CMA Consultation on Guidance on Direct Consumer Enforcement

Response from the BRC

September 2024

About the BRC

As the go-to trade association for UK retail businesses, our mission is to make a positive difference to retail, its customers and the community, today and in the future, by influencing change and delivering member value through our communities and networks.

We tell the story of retail, work with our members to drive positive change and use our expertise and influence to create an economic and policy environment that enables retail businesses to thrive and consumers to benefit. We do this in a way that delivers value back to our members, justifying their investment in the BRC.

This membership comprises over 200 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of niche retail Trade Associations that are themselves members of BRC.

Retail is an exciting, dynamic and diverse industry. It is a driving force in our economy, a hotbed of innovation and the UK's largest private sector employer. Retailers touch the lives of millions of people every day, supporting the vibrancy of the communities they operate in. However, the industry is going through a period of profound change, with technology transforming how people shop, costs increasing, and growth in consumer spending slowing.

Retailing will continue to evolve and advance. Online retail will continue to grow as retailers invest in new emerging technologies; there will be fewer stores and those stores remaining will offer new experiences; there will be fewer, but better jobs and a career in retail in the future will be very different to today.

We are committed to ensuring the industry thrives through this period of transformation.

Preliminary

Given the nature of the retail sector and its exceptionally close interaction with consumers – its raison d'etre - this consultation has special relevance to retail. With hundreds of thousands of shops there is always room for mistakes and misinterpretations of the rules both by individual employees and indeed even at a corporate level. It is important that any regulator distinguishes between deliberate non-compliance and unintended non-compliance and treats the two appropriately, differently and proportionately, recognising that the easiest and most resource efficient way to secure compliance from a business that values its reputation, is co-operative and seeks to comply is through discussion at an early stage.

The Proposed Guidance

The key test of any Guidance on enforcement is whether it enables a business to understand the procedures and the risks of non-compliance and whether any business that is affected can understand the process that will be followed.

This Guidance is comprehensive, generally clear and, unless experience once in effect shows otherwise, covers the main aspects of the approach and the details of how the CMA will undertake an investigation. Anyone coming into contact with the CMA - particularly from a larger business - should be able to understand the CMA's expectations on their enforcement approach from this Guidance. We have suggested some areas where it could be expanded to assist businesses further but it generally passes the key test.

It will need others in the ASA and Trading Standards to indicate their approach and also the Guidance on the substance of the changes to have a fully comprehensive approach to enforcement overall.

Nature of our comments

Our comments are, therefore, made in that context – that the Guidance as it stands even if unaltered substantially meets the test of how the CMA will approach its work and the steps businesses need to take and can expect the CMA to take. Rather our comments are designed to be constructive suggestions that, in our view, would improve the overall approach of the CMA to its new enforcement powers – and in some cases question some specifics.

In our view a statement of the overall approach should be included in the Guidance but if it is deemed inappropriate for inclusion it should nevertheless form the basis of a statement from the CMA to accompany the Guidance when issued.

- ***Thus generally our concerns are less lack of clarity or comprehensiveness in respect of the CMA intentions but more whether the underlying approach is always the right approach***. Based on our view of that, we question some of the specifics. Some relate to specific questions posed in the consultation but some are not covered by specific questions. This in itself leads us to believe that the CMA may not regard the underlying approach as significant – or at least significant for Guidance. It should.

Our response will cover

- Overall comment on the Guidance
- Concerns on the overall approach
- Specific comments on some proposals

Where possible we have tried to indicate where our comments refer to specific questions, albeit in a general way.

Overall comment on extent of detail

For some, the level of detail overcomplicates the issue. For others, it is a necessary level of detail should the CMA start an investigation into one or more businesses.

Essentially the division comes down to whether the business is large with a number of expert lawyers or small or medium with access only to external advice. It also reflects whether the Guidance is being used once an investigation has started or as a means of providing informed advice to a CEO or Board or Owner on what would happen if ever there were an investigation - and thus the risks for a business of going too far in undertaking activities that may test the margins of what is allowed.

For example, green claims give rise to considerable uncertainty for some businesses and those in marketing or the business of making claims to promote the greenness of a product are not necessarily lawyers. In the absence of in-house legal advice, the risks of making a misleading claim and what constitutes a misleading claim in any specific case may not be fully understood – and it is here that useful Guidance can demonstrate the risks involved and that something less detailed can be of most use.

- ***In short, the level of detail is appropriate for a legal team to advise a business on the enforcement process and for a legal team to understand the process once an investigation is underway. However, while it is very comprehensive, for smaller businesses that do not have dedicated legal teams and for the provision of general risk advice to a Board or CEO etc, in reality there are insufficient resources to read and fully comprehend 130 pages of detailed guidance. For these purposes a shorter Guide setting out the key steps, stages and timelines (which we recognise would not be a substitute for but a complement to the actual Guidance) would be helpful. It would be better for this to be prepared by the CMA than a whole series of legal firms or trade associations.***

CMA approach to securing compliance

The Guidance should set out the context within which the CMA will act – its overall approach to the task of securing compliance.

We note that this Guidance involves a relatively old fashioned approach to enforcement of regulation. In our view, the aim of an enforcer should be to secure compliance with the law – preferably by co-operation where that is possible. This is also a sensible approach when

resources of enforcers and law firms active in the area are limited and formal enforcement should focus on those who have no intention of complying with the law.

- However, in this Guidance, there is insufficient recognition of the value of a co-operative approach to secure compliance or change at least from those who can generally be trusted to comply but may on occasion make a mistake or fall short.

To some extent the pre-PIN stage which is not covered in as much detail as it might be, may cover this but words such as 'punishment', 'setting an example', 'deterrence', 'penalty' predominate. It is not even totally clear that an offer of, or agreement on, providing redress will generally lead to a reduction in the penalty – and the penalty starting point seems not to be zero but 30% of turnover. Indeed it is also clearly stated that a business could be culpable even for an accidental one off breach or even if it is following Primary Authority advice – which is only a mitigation.

In principle, we would like to see a clear recognition that where a reputable business is in the frame and is willing to co-operate often more can be achieved through discussion and co-operation than a heavy handed punitive approach, leaving the formal approach to situations where it is clear that is not going to work. For many businesses, reputation is more important than the threat of a penalty.

- Thus consistent with such an approach, there should be a greater emphasis on the initial conversation before the PIN stage; greater recognition of the value of redress as opposed to a penalty; and less of a desire to name and shame even before a PIN has been issued, recognising that such naming and shaming can have an effect on the reputation and indeed investment in a business against whom a case may not materialise and which may be caught out by trying to innovate, an approach that the new Government is trying to encourage.

- In this vein, the Guidance should include a fuller explanation of the CMA's process for accepting undertakings and willingness to reach swift resolutions through agreeing undertakings with businesses.

- The Guidance should also include additional mitigation factors and ways to broaden the existing mitigation factors. For example: demonstrating a history of compliance; whether the breach was remedied prior to receiving a provisional notice; taking steps beyond legal requirements; and engaging in industry best-practice.

<u>Co-operation and consistency among enforcers</u>

The lack of resources for Trading Standards – and for that matter the CMA Consumer side – remains and is likely to remain an ongoing issue. This has resulted in gaps in enforcement activity thereby undermining a level playing field, not just in face to face trading but also online. While reputable businesses try to comply with ever more information requirements etc and online rules, others simply ignore them.

The DMCCA did not deal with the Consumer Enforcement landscape but against this background we believe that ***the Guidance should set out how the CMA will work with other Enforcers including Trading Standards and the ASA to avoid overlap and ensure consistency.***

The lack of acceptance of Trading Standards Primary Authority assured advice - up to the point of it not being revoked - as evidence of compliance rather than as mitigation does not indicate the level of respect for other enforcers one we would expect to see. There are concerns of the emergence of a two tier system – CMA looking at larger businesses and Trading Standards at local ones – with some falling between the two stools and a divergence of enforcement and compliance expectations.

With differences of view over the role of PA Assured advice; different guidance from different agencies including the ASA; potential for an Open letter, undertakings and perhaps settlements having broader significance – it is becoming increasingly difficult to advise a business on what to do to ensure compliance that is acceptable to all enforcers. The sector needs to be judged by single visible requirements. In developing the substantive advice it would be helpful if it were to address some of these issues and secure Trading Standards and ideally ASA commitment to avoid a two or three tier system.

- The Guidance should be clear on how cases will be prioritised in the first place. Will it be a matter of a referral from Which? Desk research? Consumer complaints? TS notification?
- In particular, the Guidance should indicate the sort of cases the CMA expects to take and those it would leave to Trading Standards – and that in general the CMA cannot be a backstop for Trading Standards. We are told the CMA will focus on cases with a national market significance (and this does not necessarily mean just large businesses) as it has in the past and there is no intention to take on cases of purely isolated significance. That should be clear in the Guidance so that a business knows that a Trading Standards case will not suddenly be taken over simply to apply an easier route to a penalty or to avoid the need to go to court.
- The CMA has said that it will be willing to take a case against a business as an example to or to deter the rest. If that is the intention, this should be clearly stated, as should the considerations that would go into deciding to act in that way. We oppose such an approach as unfair to that business with potential for an impact on its competitive position vis a vis its competitors to the extent of damaging the reputation of the one business and damaging the enthusiasm of the investment community for it.

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Status of decisions, undertakings and settlements (Q3 and Q4)

Further clarification of the significance and status of decisions, settlements and undertakings would be useful.

As this is civil enforcement not criminal, there is an issue over the extent to which CMA decisions create a precedent – unless appealed.

- The fact that a business chooses not to appeal should not in itself indicate the CMA decision is correct and can stand as a precedent. Will, however, the CMA regard it as a precedent and expect others to automatically take it into account? This is important for businesses and Trading Standards. Are they to accept the CMA interpretation is a precedent in their work and are TS to suggest to businesses that it is and that they will be taken to court if they do not agree.

This carries over to Undertakings - and even Settlements - which have a new role in the new order given they are to be checked for compliance and can be enforced by a penalty. The Guidance should indicate their status.

- The relevance of undertakings to those not actually involved in giving the undertaking needs to be clearer. The suggestion seems to be that other businesses should take note of undertakings and apply their requirements to their own business. This is even less satisfactory in this regime than currently in light of the CMA's new powers. The point here is that other businesses will not have been privy to the discussions leading to the undertaking or indeed settlement – and whether or not the business giving the undertaking merely wanted to end the argument.

- Even more to the point other businesses will not have had the opportunity to make representations on the requirements and whether they should be generic rather than specific to the business in question. This leaves the CMA in a somewhat dictatorial position – with businesses potentially having to make costly adjustments without having the capacity to influence those adjustments or knowing whether they are legally necessary.

- ***The application to other businesses should be assessed separately from the undertaking itself and the CMA view should be made explicit as to whether the undertaking has implications for the competitors of the specific business involved and indeed more widely.*** For example the Simba sleep case could just relate to the online sale of mattresses – but it could also have read across to other types of promotions altogether.

- Thus where there is wider significance there should be an opportunity for stakeholders to discuss the proposal rather than be expected to sign up.

- Likewise an **Open Letter** on topics such as urgency claims and price reductions is an attempt to establish new rules without full consultation and without consideration of how far they go beyond the strict law. While there may be objections to that in any event, they are stronger when the issuer of the letter is also enforcer and finer – it needs to be clear how far the requirements are actionable.

- Moreover, where an Open Letter, or indeed any decision, undertaking or settlement, is not in line with CTSI Guidance the divergence needs to be rectified not least to avoid a two tier enforcement system. With its new powers, the CMA needs to adopt a more comprehensive approach to communicating its views.

Appeals

We are told that the appeals process has taken into account Sentencing Guidelines for criminal cases because it is thought the courts would understand these better than something novel. We would hope that courts could understand new ways of thinking – but even putting that to one side one of the alleged advantages of the new system is that it is indeed a new system not based on criminal law but civil law and penalties.

- We question the appropriateness of designing an appeals system based on criminal law when it is civil law that applies – unless it can be clearly shown that the requirements are the same (rather than that judges will find it easier to reject the appeal because they will understand the parameters better).
- The appeals system should be designed to fully appropriate to Direct Consumer Enforcement cases and tested against that requirement rather than be lifted from another system – unless it can be shown that is entirely appropriate.

Further points of more detailed specifics

Timetable for response to request for information

The reference to 20 – 30 days to respond to an initial request for information needs further explanation. Does it apply to the pre-PIN stage or the PIN stage or both? Does it apply to general information requests or only to information requests linked to a potential specific case. Does it represent the time for an initial acknowledgement of the request or is it the time to respond in a substantive way to the request? ***For most of these it is short as a hard and fast timescale***.

We understand that some interpret the 20-30 day period as the start of a negotiation on the actual timescale with businesses able to make an early request for an extension once they have assessed the requirements of the request – but this and the grounds for making such a request should be clear in the Guidance. ***The fact that some interpret this as the upper threshold and some interpret it as the timescale for initial acknowledgement of the request itself suggests the requirement and expectation are not clear.***

We also understand the CMA has a duty of expedition (as it constantly emphasises) but we believe that given the fines that can be imposed for non-compliance with the timescale and

provision of an inaccurate response - this period may well be too short particularly for complicated cases. ***We would suggest a better approach would be to require acknowledgement of the request for information within a set period of days followed by a negotiation of no more than a further set period of days on the actual timelines for the information required.***

Trading Standards usually give 28 days for the initial response – and it is likely the CMA requests will involve more substantial work. Gathering information can take people resources and time, depending of course on the nature of the request – especially if the information is not held in the format requested.

Indeed, the proposed typical timings, and even the possibility of shorter deadlines, are potentially problematic. The CMA may not get the depth of information it requires to be able to properly assess its concerns and (if required) ensure that there is an opportunity to voluntarily put appropriate remedies in place after discussion. There is also a significant burden imposed on businesses which may not be afforded an adequate opportunity to present detailed submissions within the timings set. If the timings are not extended by agreement, the proposed deadlines are likely to be too short for businesses to provide accurate, detailed representations on complicated issues.

- In the event of a complaint about the timeline, to make the review and complaint process meaningful and practical for businesses, the timeline for responding to a PIN should be paused while a complaint about a denied deadline extension is being considered by the CMA and no penalty should be imposed by the CMA for a failure to comply with a deadline which is subject to the complaint/review process while it is in progress. Ideally short extensions should be provided automatically during this complaint/review process where the complaint is clearly not capricious.

- Businesses would also appreciate more clarity on timelines for the stages beyond the issue of a PIN – both in terms of timescales for further information and representation and for decisions to be made.
- The deadline for written representations should not be shortened unless there is a clear and significant risk of harm to consumers that provides a compelling reason to require quicker resolution that outweighs the risk to the fundamental principles of ensuring procedural fairness.
- The Guidance should also include clear timelines for CMA responses.

<u>Transparency on the nature of the request</u>

The Guidance should also make clear that the CMA must advise whether the information request is because it suspects a breach may have occurred or because it is necessary for a wider examination of what is happening in the market. In the past we have found not all businesses understand that a request may be part of an investigation for a breach and act accordingly rather than a more generic request for information. This should be made very clear using plain language whenever an information request is made.

Publicity

The Guidance is clear that the initial request for information may not always result in a formal PIN. Against that background, we believe it is inappropriate for there to be publicity at this stage. Publicity will have damaging implications potentially affecting the business's reputation and inward investment into a business even if that business is subsequently not proceeded against. Publicity should await the PIN stage at the earliest.

Levels of culpability (Q6)

We question the levels of culpability. If the CMA resources are not extensive and if, as we are told, the CMA is to focus on issues of national market significance, the Low Culpability tier is misplaced.

Low culpability includes a one off breach due to a staff member action contrary to the business rules; accidental breach; or even where the business has actually made provisions to ensure the breach would not occur - none of which would seem to require either investigation or a penalty of any sort even on the basis of the CMA approach to enforcement.

These must be the sort of matters that can be dealt with by conversation and agreement. If indeed they do require a penalty for whatever reason we would suggest that they ought to have been in the medium culpability tier anyway.

This also applies to the level of harm criteria – major, significant, moderate. It is important these terms are defined and the difference between them made totally clear.(Q7)

Primary Authority advice as mitigation - Respecting and working with other enforcers (Q7)

We do not believe the CMA shows sufficient respect for another enforcer when it refuses to accept Primary Authority Assured Advice other than as mitigation. It undermines the PA system at a time of very limited enforcement resources.

Given Primary Authority Advice is obtained by businesses which want to be compliant to ensure they are doing the right thing, it would be best for the CMA not to undermine the approach.

While we have not succeeded in imposing a requirement on the CMA to accept such advice up until the time it is revoked for any reason, we do not accept that the CMA should only regard such advice as mitigation rather than evidence of a full intention to comply if it is

followed. Such an approach can only lead to unnecessary appeals incurring further cost for a business and the CMA.

- We would strongly suggest that the CMA accepts following PA Assured advice is not just mitigation but evidence of full intention to comply – and that if the CMA thinks the advice is wrong it should seek to have it withdrawn without retrospective effect, not impose a penalty and give the business time to adapt to the changed advice. The CMA should become a more active Supporting Regulator and indicate that a business and Trading Standards Service seeking assured advice at least on issues within scope of the CMA direct enforcement powers can be checked by the CMA prior to it being issued.

Deterrence (Q7)

While deterrence may be a factor in considering whether to initiate a case, the CMA has said that it will make an adjustment to a fine for deterrence purposes. We think this is inappropriate and even more so where the practice may not be confined to one business but a case has been pursued against one business as an example to the rest.

- Businesses will be well aware of the level of fines the CMA can impose – and that in itself should have a deterrent effect. A fine should reflect the non-compliance by the business in question, tempered by any redress provision, not what impact the fine may have on its competitors. Indeed such an approach to a fine could be regarded as skewing the competitive position of the business in question against those very competitors.

Assessment of penalties (Q7)

There should be a clear framework for businesses to understand potential penalties and for the CMA to justify its decisions.

- The CMA should provide a detailed rationale/explanation when applying an "uplift"

- The basis for calculating any uplift to financial penalties would benefit from further explanation. There is some concern that in taking into account global turnover the penalty may not fairly reflect the impact on UK consumers. One option could be a cap on the maximum "uplift" of the penalty compared to the UK turnover and UK consumer impact in relation to the relevant UK infringement.

- The Guidance should include further definition and examples of non-economic losses and, in particular, what "large" non-economic loss entails.

- The list of aggravating factors at 7.65 seems too open ended. It should be an exhaustive list of factors or at least require additional explanation where any other factor unique to a case is to be taken into account. It could also indicate the importance that would be attached to each factor based on its impact. For example

the CMA could take into account: efforts made to comply upon notification; whether any concealment was deliberate; and whether failing to prevent a breach was through wilful neglect.

Redress v penalty (Q7)

The Guidance should be clear as to the extent to which the provision of redress will be taken into account in determining a fine.

- If a business provides full redress – especially voluntarily or in the event of a low culpability event – is a penalty appropriate at all? Essentially redress should be preferred to a fine because it puts consumers back in the position they would have been had the breach not occurred. There is a balance to be struck. Double jeopardy should be avoided or businesses will be reluctant to provide redress.