

RESPONSE TO CONSULTATION

CMS welcomes the opportunity to respond to the consultation on the CMA draft guidance on the direct consumer enforcement regime set out in the Digital Markets, Competition and Consumers Act 2024 (the “**Draft Guidance**”) and the draft direct consumer enforcement procedural rules (the “**Draft Consumer Rules**”).

The Draft Guidance, published on 31 July 2024, initially requested responses by 11 September 2024, later extended to 18 September 2024. Despite this extension, the consultation period over the summer holiday is short for responding to over 140 pages of detailed content. Such compressed timelines pose significant challenges, even for larger businesses, in providing timely, comprehensive and thoughtful feedback. With this in mind, we set out below some high-level observations on some concerns related to the Draft Guidance:

- **Very short deadlines for businesses.** The Draft Guidance imposes tight deadlines on businesses throughout the enforcement process, purportedly justified by the CMA’s duty of expedition (requiring the CMA to “*have regard to the need for making a decision, or taking action, as soon as reasonably practicable*”). Whilst this statutory obligation of course must be followed, the CMA should carefully consider the deadlines it seeks to impose, in light of the relevant context. Deadlines must be appropriate for proper responses and representations to be made, that “*address all relevant matters that the party wishes the CMA to take into account*” (as expected by the CMA).
- **Misguided focus on, and expectations of, larger businesses.** The Draft Guidance considers the “*size and resources*” of businesses when setting certain deadlines, indicating that larger or better-resourced businesses could be set shorter deadlines than smaller or less-resourced businesses. It is a misconception that larger businesses can always respond more quickly - often, quite the opposite is true. Whilst it may be the case that some larger businesses have greater financial resources, larger businesses typically have more complex and diverse global group structures with relevant stakeholders in many different departments and across many different jurisdictions/time zones. Information may be held in different systems by numerous individuals, and review/approval structures can have many layers. Smaller businesses may well have more streamlined decision-making processes, but a scarcity of resource to address CMA requests. Seeking to impose deadlines based simply on the perceived size and resources of a business is misguided and, if maintained, will inevitably lead to legal challenges.
- **Imbalance in the application of the duty of expedition to the CMA.** The notable absence of timelines for the CMA’s processing or responding to requests, notices or information from businesses creates an imbalance. In practice, the CMA has historically sought to impose very short deadlines for responses from businesses - often over typical national (and international) holiday periods - then the CMA has taken months (or longer) to consider those responses, before then seeking further information from businesses within extremely short deadlines. Where the duty of expedition is used as a basis for seeking to impose deadlines on businesses, those deadlines must be proportionate to the expediency of the CMA’s own actions.

- **Reasonable excuse.** Sanctions for failure to comply with a CMA imposed obligation and/or deadline are, in a number of circumstances, subject to a qualification of “reasonable excuse”. The Draft Guidance provides some examples of what the CMA believes may or may not amount to “reasonable excuse”. However, these examples are extreme and do not provide any real practical guidance or clarity for any business. The fact that, for example, it is only the death or incapacity of a key official in a small business or sole trader that is identified as a reasonable excuse, when clearly the death or incapacity of a key official in any business is both extreme and obviously capable of amounting to a reasonable excuse, identifies the gap in the Draft Guidance in this area. We would strongly encourage proper engagement with this principle and more helpful, practical guidance focusing not just on extremes.
- **Repetition of legislation without providing guidance.** Many sections of the Draft Guidance (including the ‘transparency regarding the process of determining the final decision’ section) seem to largely repeat the Digital Markets, Competition and Consumers Act 2024 without providing additional guidance or practical explanations. More detailed information on procedural steps would ensure transparency and predictability for both the CMA and businesses. This could improve the relevance and quality of business representations by ensuring they focus on what the CMA considers to be the most important issues, speeding up the procedural enforcement process generally and ultimately providing better outcomes for consumers.

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