THE CMA'S CONSULTATION ON DRAFT GUIDANCE AND DRAFT RULES ON THE DIRECT CONSUMER ENFORCEMENT REGIME SET OUT IN THE DIGITAL MARKETS, COMPETITION AND CONSUMERS ACT 2024 (DRAFTS CMA200CON AND CMA201CON)

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

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1. INTRODUCTION

1.1. Freshfields Bruckhaus Deringer LLP (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation on the draft guidance (in CMA200con) (***Draft Consumer Guidance***) and draft rules (in CMA201con) (***Draft Consumer Rules***) concerning the direct consumer enforcement regime set out in the Digital Markets, Competition and Consumers Act 2024 (the ***DMCCA***).

1.2. This response is based on our significant experience and expertise in advising clients on a wide range of CMA proceedings under both the current consumer and competition law frameworks, and in relation to similar proceedings conducted by consumer and competition authorities in other jurisdictions.

1.3. We have confined our comments to those areas which we feel are most significant to ensuring the effective operation of the direct consumer enforcement regime and providing clarity and certainty for companies that might be subject to such proceedings. This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

1.4. References to 'paragraphs' below refer to the paragraph numbers of the Draft Consumer Guidance, unless otherwise stated. References to 'Rule' or 'Rules' below refer to the numbered rule of the Draft Consumer Rules.

1.5. We also refer to this Firm's response to the CMA's consultations on other draft guidance in respect of the DMCCA to the extent there are overlaps with the Draft Consumer Guidance and Draft Consumer Rules, notably our responses to:

(a) the draft updated CMA6 on Transparency and Disclosure (June 2024);

(b) the draft Digital Markets Competition Regime Guidance (July 2024); and

(c) the draft updated CMA4 on Administrative Penalties (August 2024).

2. GENERAL OBSERVATIONS

2.1. We provide detailed comments in the remainder of this response. However, our overarching views can be summarised under the following headings:

(a) Alignment with the Competition Act 1998 and CMA8 Guidance: There is, in general, less information provided in the Draft Consumer Guidance than there is in the equivalent guidance regarding the CMA's conduct of investigations under the Competition Act 1998 (***CMA8***). In our view there should be further alignment between the two frameworks, which would also help ensure that the operation of the direct consumer enforcement regime reflects the administrative best practices and procedural safeguards from

decades of experience of Competition Act 1998 (***CA98***) investigations (and related case law). This is important with respect to:

i. Procedural safeguards: there appear to be fewer procedural safeguards envisaged for direct consumer enforcement procedures than those that exist for CA98 investigations, notwithstanding the severity of the financial, commercial and reputational consequences that may follow from consumer enforcement. The Draft Consumer Guidance should seek to introduce equivalent safeguards.

ii. The use of the Procedural Officer in oral hearings and for procedural disputes: having the Procedural Officer present at oral hearings provides parties that are subject to a CA98 investigation with reassurance that the hearing will be chaired by someone who is genuinely impartial, and that any disputes arising in relation to the conduct of the hearing will be adjudicated by someone with the requisite experience. The Draft Consumer Guidance instead introduces the concept of a 'Procedural Complaints Adjudicator' (***PCA***) to whom procedural complaints in respect of direct consumer enforcement cases will be referred. As currently envisaged, we have serious concerns that complaints handled by a PCA will not be subject to the same level of impartial assessment as those handled by the Procedural Officer.

iii. Approach to information gathering: certain important features of the CA98 regime in respect of the CMA's information-gathering powers are omitted from the direct consumer enforcement regime under the draft Consumer Guidance. For example, whereas CMA8 provides explicitly for the possibility that a CMA case team will share draft requests for information with parties before issuing them (which we consider often represents an overall time **saving** on cases), the Draft Consumer Guidance is silent on this.

(b) Duty of expedition: There are references throughout the Draft Consumer Guidance to the CMA's duty of expedition,[1] which will now be extended across other areas of the CMA's work, including in relation to consumer law. For the reasons articulated in the Firm's previous submissions,[2] we reiterate that it is critical that the CMA interprets this duty appropriately and in line with its public law duties, and does not apply the duty in any way which may override or limit parties' rights to due process. We encourage the CMA to state expressly in the Draft Consumer Guidance that it will do so. We also urge the CMA again to provide fuller guidance on how the duty of expedition will be interpreted and applied in practice, including in relation to its consumer enforcement work.

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[1] See Draft Consumer Guidance, paragraphs 1.11-1.12, 2.34, 2.37-2.38, 2.55, 2.58, 3.1, 3.11, 4.43, 5.3, 6.5, 6.10 and 7.9.

[2] The Firm's responses set out in paragraph 1.5 of this document.

(c) Fair and impartial decision-making: In addition to our observations in relation to the procedural safeguards available in CA98 cases which are not currently envisaged in the Draft Consumer Guidance (as noted above), we consider that the measures intended to guarantee fair and impartial decision-making in respect of direct consumer enforcement cases (which impact on parties' due process rights) require improvement, not least as they fall short of what is provided for in CA98 cases. For example, in order to guarantee a degree of separation between a case team and ultimate decision-makers, the senior responsible officer (***SRO***) in CA98 cases is expressly prohibited from participating on a case decision group (***CDG***). However, there is no such restriction in respect of the SRO and potential participation in a final decision group (***FDG***).

(d) Calculating monetary penalties: As detailed further below in response to Question 9, we welcome the proposed 'step-by-step' approach to calculating monetary penalties under the direct consumer enforcement regime, but are concerned in particular about the lack of clarity about the basis for determining the level of harm in each case; the current list of aggravating and mitigating factors set out in the Draft Consumer Guidance (which is currently heavily weighted towards aggravation); and the use of entire UK turnover (as opposed to relevant turnover) as the starting point.

(e) Monetary penalties for administrative breaches: We have similar concerns in relation to the calculation of monetary penalties for administrative breaches (see our response to Question 9, below).

2.2. We would be grateful for the CMA's careful consideration of these points, as articulated in more detail below.

3. RESPONSES TO QUESTIONS

Question 1

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

3.1. The Draft Consumer Guidance would benefit from clarification in respect of certain important points, in particular in relation to the overall process the CMA intends to adopt in respect of issuing provisional and final infringement notices (PINs and FINs respectively). Our response to this question therefore makes a number of points in relation to the CMA's proposed process leading up to the submission of written representations on infringement / enforcement notices, as well as the process of making those submissions themselves.

3.2. As an overarching point, while we of course recognise that the direct consumer enforcement regime is based on a different legal framework to CA98 investigations, we would suggest that the CMA looks more closely at the tried-and-tested approach it has developed for CA98 cases with a view to ensuring due process rights are adequately protected, and in order to see what other

points of practice and good administration it might be able to replicate in consumer cases.

3.3. There is, in general, less information provided in the Draft Consumer Guidance in relation to the way in which the CMA proposes to conduct direct consumer enforcement cases than there is in CMA8, the equivalent guidance regarding its conduct of CA98 cases.[3] More importantly, there also appear to be fewer procedural safeguards envisaged for direct consumer enforcement procedures than those that exist for CA98 investigations. For example:

(a) As is set out in paragraphs 9.8 to 9.13 of CMA8, in CA98 investigations the CMA generally commits to sharing its "*early thinking*" in its investigations and providing parties with "*regular updates*". It does this through regular communications between the case team and the party under investigation, and/or offering the party under investigation regular opportunities to speak to case team representatives, including if needed the SRO (see paragraph 9.9 of CMA8). More broadly, frequent communication between a case team and a party under investigation tends to help to avoid procedural issues developing into disputes, as potential problems can be discussed and resolved between the CMA and the parties at an early stage. Such interactions in our view also support the possibility of undertakings and/or timely settlements being agreed, which will ultimately be in the interests of consumers, the CMA and investigated parties. While it may be that the CMA intends that case teams for direct consumer enforcement investigations will work with parties in a similar way (and indeed paragraph 2.12 of the Draft Consumer Guidance hints at this possibility), it would be helpful if the Draft Consumer Guidance made this clear.

(b) In CA98 investigations, the CMA also organises 'state of play' meetings with the parties under investigation, where parties are provided with further information "*on the nature and scope of the investigation*", as well as the "*next stages of the investigation and the timing of these*". At state of play meetings, the CMA "*may also share the case team's provisional thinking on a case*" (see paragraphs 9.9 and 9.10 of CMA8). State of play meetings may take place more than once in the course of an CA98 investigation. In our experience, state of play meetings are particularly helpful to parties in order to better understand the CMA's provisional thinking in a case, and put parties in a better position to make a decision as to whether or not to offer undertakings or to seek to settle the case. In circumstances where the CMA is not restricted by the DMCCA legal framework from holding state of play meetings with parties under investigation in direct consumer enforcement cases, we would urge the CMA to consider introducing this feature of CA98 investigations into the Draft Consumer Guidance.

3.4. The Draft Consumer Guidance would also benefit from further clarification in other regards:

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[3] We note that an updated version of CMA8 is currently also the subject of consultation. References in this document to CMA8 are to the version of that guidance currently in force.

(a) In the context of multi-party investigations, it would be helpful for the CMA to clarify the extent to which parties will have an opportunity (if any) to make confidentiality representations in respect of any of their internal documents which are likely to feature in a PIN. There is an equivalent process in CA98 investigations whereby parties can assure themselves that other parties to the investigation will not receive commercially sensitive information or have access to the party's business secrets. However, it is unclear from this Draft Consumer Guidance whether the CMA envisages giving parties the same rights in direct consumer enforcement cases.

(b) It would also be helpful for the CMA to clarify how it proposes to handle scenarios in which it is necessary for parties to have access to documents which implicate and/or are relevant to them, but which belong to other parties. This is acknowledged in paragraph 11.2 of CMA8, but is not addressed in the Draft Consumer Guidance.

(c) In CA98 cases, the CMA offers third parties (e.g., complainants or parties directly affected by the conduct in question and who might be able to materially add to the CMA's investigation) the opportunity to comment and/or make representations on a non-confidential version of any Statement of Objections (see paragraph 12.7 of CMA8). It would be helpful for the CMA to clarify whether it envisages a similar approach for consumer cases.

(d) Paragraph 2.41 explains that representations made by parties will not "*generally*" be cross disclosed to other parties in an investigation. The same applies to CA98 cases, but for those cases the CMA mentions cross-disclosure could occur in "*exceptional circumstances*" (examples of which are set out at FN139 of CMA8). The CMA should clarify whether the exceptional circumstances position in CA98 investigations also applies here. If it does not, the CMA should be more explicit that it will not cross-disclose.

(e) Paragraph 11.8 of CMA8 refers to the format in which a Statement of Objections will be sent, and paragraph 11.9 of CMA8 discusses how a Statement of Objections is notified where the matter is market sensitive, whereas the Draft Consumer Guidance does not provide the same level of detail in respect of PINs.

3.5. As to the deadline for written representations on the PIN, while we acknowledge the importance of the CMA's duty of expedition (and see our comments at paragraph 3.47 below on that duty), we are concerned that the timeframe of 20-30 working days referred to at paragraph 2.37 (or shorter) is unlikely to be sufficient in some cases, and this could risk compromising parties' rights of defence. For example, a party may need time to obtain expert evidence on key issues such as the impact on consumers of any alleged conduct and/or the materiality of such an impact, and the CMA's analysis of such issues, which may not be possible in such a short timeframe. We note in contrast CMA8 states that addressees of a Statement of Objections in CA98 cases will have up to 12 weeks to respond, and at this stage it is not clear to us how or why much shorter deadlines would necessarily be appropriate in consumer

cases, given the wide similarities between the consumer enforcement and CA98 enforcement regimes and in their potential outcomes (including levels of fine).

3.6. In addition, in relation to the factors listed at paragraph 2.37, relevant to setting the deadline for written representations, we suggest that the CMA makes the following proposed amendments:

(a) Paragraph 2.37(c): "*the amount and type of evidence referred to in the PIN, including the need (if any) for the respondent to obtain responsive evidence, consistent with its rights of defence.*"

(b) Paragraph 2.37(e): "*the particular situation of the party (such as their size and resources, and the availability of key personnel with knowledge of the matters under investigation)*."

Question 2

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

3.7. In our experience of CA98 investigations, oral hearings provide a useful opportunity for parties to discuss with the CMA any key issues arising out of the CMA's Statement of Objections and a party's representations in response to the provisional case against it. Being able to make representations orally in the presence of the CDG (as well as representatives of the CMA's case team) gives parties the ability to express and explain any particular concerns they might have in relation to the CMA's provisional case and the CMA's broad 'direction of travel' towards a final decision. The CMA's proposal in the Draft Consumer Guidance to give parties a right to request an oral hearing following the service of a PIN or administrative enforcement notice, in addition to the submission of written representations, is therefore welcome.

3.8. However, there are certain features of oral hearings in CA98 investigations which do not appear to be included in the CMA's proposed process for oral hearings in direct consumer enforcement cases:

(a) One important distinction is that, in CA98 cases, oral hearings are chaired by the Procedural Officer who then prepares a report of the hearing (see CMA Rules,[4] Rules 6(6) and (7)). That report must: (i) contain an assessment of the fairness of the procedure followed in holding the oral hearing; and (ii) identify any other concerns about the fairness of the procedure followed in the investigation (see CMA Rules, Rule 6(7)). No such requirement appears to feature in the Draft Consumer Guidance, which instead stipulates that the oral hearing may be chaired by "*a CMA member of staff*" provided that person has not been involved as a decision maker or in the day-to-day running of the investigation (paragraph 2.45). In CA98 cases, the Procedural Officer also has the power to adjudicate over any disputes ahead of the oral hearing relating to, for example, the agenda for the hearing (see paragraph 12.17 of CMA8). In keeping with certain points

[4] Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458.

made in more detail in our response to Question 12 below, it is unclear why the CMA intends to 'water down' these requirements for the purposes of direct consumer enforcement cases. In CA98 cases, the presence of the Procedural Officer in oral hearings provides parties subject to an investigation with reassurance that the hearing will be chaired by someone who is genuinely impartial, and that any disputes arising in relation to the conduct of the hearing will be adjudicated by someone with the requisite experience. We would urge the CMA to reconsider this point.

(b) We note the CMA's explanation at paragraph 2.42 that the CMA will offer parties the opportunity to attend a "***single*** *oral hearing*" (emphasis added) at which they may make oral representations. While CMA8 makes the same stipulation in respect of CA98 cases, we note that there may be circumstances in which it would be appropriate for the CMA to offer parties a further opportunity to make oral representations if necessary for the fair disposition of the matter.[5] We consider that the CMA should leave open the possibility of further oral hearings being offered to parties (at the CMA's discretion) if deemed necessary for the preservation of parties' rights of defence.

(c) Paragraph 2.44 notes that while legal advisers will be permitted to attend oral hearings (subject to "*any reasonable limits that the CMA may set*"), third parties (including, implicitly, a party's expert advisers) will "*generally not be permitted to attend*". This differs from the approach taken for CA98 investigations, where paragraph 12.14 of CMA8 expressly envisages the party's "*legal or other advisers*" being permitted to attend the oral hearing "*to assist in presenting* [the party's] *oral representations*". There are various foreseeable circumstances in direct consumer enforcement cases in which it would be appropriate for a party to be able to rely on assistance not only from its legal advisers but also, for example, expert economists, experts in consumer behaviour or polling experts. To ensure that parties can make effective representations, we would suggest that the CMA amends the Draft Consumer Guidance so that it aligns with CMA8 in this regard and or/clarify in the Draft Consumer Guidance in what circumstances third parties (and especially expert advisers) may be permitted to attend the party's oral hearing.

Question 3

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

3.9. It would be helpful for the CMA to expand on paragraph 4.14 to clarify how third-party involvement would work. For example, would the CMA publish draft undertakings for consultation (as is the case for commitments in CA98

[5] For example, where new evidence comes to light following an oral hearing (paragraphs 2.57-2.60 of the Draft Consumer Guidance), or where a letter of facts or a supplementary PIN is issued (paragraphs 2.61-2.64 of the Draft Consumer Guidance).

cases) or would the CMA only target interested / relevant third parties and complainants?

3.10. Paragraph 4.16 refers to admissions regarding a party's conduct made for the purposes of exploring the possibility of resolving the case by way of undertaking. We consider that the Draft Consumer Guidance should also confirm that the CMA will not rely on any such admissions in the context of any future appeal of a FIN or other measure that the respondent may undertake.

3.11. Additionally, to avoid discouraging parties from negotiating undertakings or any other settlement, paragraph 4.16 should include express recognition that such admissions and other correspondence in relation to undertakings or settlement may in addition be protected as 'without prejudice' for the purposes of civil proceedings and/or fall within one or more exceptions to disclosure under the Freedom of Information Act regime.

Question 4

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?

3.12. The process for settlement in the Draft Consumer Guidance is broadly similar to the process for CA98 cases, as set out in CMA8. However, certain points in the Draft Consumer Guidance require further clarification:

(a) The CMA should clarify (at paragraph 4.45) whether the summary statement will refer to any documents when setting out details of the infringements.

(b) Paragraph 4.46(c) appears to require parties to "*acknowledge and agree*" to the conditions of settlement that will apply, "*including those set out in Rule 7 of the CMA Consumer Rules*". In practice, this would require parties to admit an infringement after seeing the summary statement of case alone, without having sight of the PIN. In our view, parties should be allowed to provisionally agree to the terms of the settlement discussions, with the 'letter of acceptance' being the point at which settlement terms (and admission of guilt) are formally in place, with all communications to that point being protected as without prejudice communications aimed at resolving a contentious investigation.

(c) In paragraph 4.48, the Draft Consumer Guidance indicates that one scenario in which the CMA may terminate settlement discussions is where the party's submissions "*are extensive*". The Draft Consumer Guidance should clarify what the CMA is likely to consider to be "*extensive*" – recognising that, in direct enforcement cases whose outcome may have a significant reputational, financial and/or operational impact on the trader under investigation, it is important that the trader be permitted to defend its conduct robustly and to respond fully to the CMA's case (which may itself be extensive). The Draft Consumer Guidance could also usefully indicate whether the CMA intends to provide advanced notification to the party

before terminating discussions on this ground (so as to allow the party to amend their submissions) – we think this should be the case.

(d) Paragraph 4.75 states that the CMA will "*generally not*" make a public announcement about the fact that settlement discussions are underway or where they fail. This wording differs slightly from the equivalent wording in CMA8 where the CMA says that its "*standard practice is not to make a public announcement that settlement discussions are taking place, or, where discussions break down, that they have broken down*" (paragraph 14.34 of CMA8). In our view, the possibility of having confidential settlement discussions "leaked" is likely to be a significant deterrent to parties which would otherwise be willing to seek to resolve the matter. While it may well be that the CMA intends to take exactly the same approach in direct consumer enforcement cases as it does for CA98 cases, it would be helpful if the CMA could align the wording used in the Draft Consumer Guidance with that in CMA8.

(e) In addition, the CMA sets out guidance in paragraph 14.35 of CMA8 covering the types of disclosure it may be required to make in multi-party cases where settlement discussions are taking place. It is not clear why similar guidance cannot be provided in respect of direct consumer enforcement cases, where similar circumstances may well arise.

Question 5

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

3.13. We welcome the CMA's provision of specific examples of when it will consider that the "*reasonable excuse*" test has or has not been met. However, we note that the examples provided at paragraphs 7.48-7.49 are more extensive than those provided at paragraphs 2.5-2.8 of the CMA's draft Statement of Policy on Administrative Penalties (***CMA4***), which addresses the substantively identical "*reasonable excuse*" test in respect of non-compliance with requirements issued by the CMA under the Competition Act 1998 and Enterprise Act 2002. As set out in the Firm's response to the recent consultation on the CMA's draft CMA4 (at paragraph 4 of that response), the interpretation set out in draft CMA4 is overly narrow and restrictive, and those comments apply equally in relation to the Draft Consumer Guidance. The CMA should also ensure that the same standard for both tests will be adopted and that the guidance on what will constitute a "*reasonable excuse*" is consistent across both documents.

3.14. Footnote 183 of paragraph 7.48(c) states that "*[i]n relation to provision of false or misleading information, the CMA can only impose a penalty if the information given is materially false or misleading. Accordingly, the CMA will not impose a penalty where the falsity is not material.*" The CMA should clarify what is meant by "*materially*" false or misleading information in this regard, with reference to specific examples (for example, if such information would

only be considered "*materially*" false or misleading if it were to have a substantive impact on the CMA's findings).

3.15. The Draft Consumer Guidance would benefit from additional, more nuanced examples than those provided on circumstances in which a party may be considered to have a "*reasonable excuse*". A number of these points were also raised in our response to the Administrative Penalties Guidance, but, for completeness, they are repeated below:

(a) In our experience, it is often the case that information notices issued by the CMA are challenging for parties to comply with – for example because the requested information does not currently exist, is not in the required format, will require very intensive data processing to produce, or is being produced to deadlines that do not allow reasonable (or indeed any) time to clarify and correct errors. Businesses may also need to take steps internally and vis-à-vis employees or customers in order to comply with data protection legislation and ensure that the data processing activities are necessary, prior to providing certain data to the CMA in response to an information notice, which may result in a reasonable delay to that company's compliance with a request. In those circumstances, notwithstanding a genuine desire to be as helpful as possible to the authority (and contrary to the CMA's indication that it will not accept as a "*reasonable excuse*" any claim that compliance would constitute a breach of a non-disclosure agreement or duty under the Data Protection Act 2018[6]), respondents may struggle to meet information notices in full, or to do so within the tight deadlines set out in requests. In our view, it would be inappropriate to impose a penalty on a company that is making efforts to comply with its legal or contractual obligations.

(b) It would be helpful for the CMA to acknowledge expressly that companies' compliance with data protection legislation may be relevant to any delays in meeting deadlines, and that it will take this into account, including through coordination with the Information Commissioner's Office if necessary. The need to comply with the law (on data protection or otherwise) should, on any assessment, amount to a reasonable excuse.

(c) The CMA's position on when the risk of foreign law breaches will meet the threshold for "*reasonable excuse*" is similarly too narrow: the only example provided of where such breaches will meet the threshold is where there is an "*express legislative barrier*" and there are "*no steps the party could feasibly take to facilitate compliance*" (paragraph 7.50). While paragraph 7.51 recognises that a "*reasonable excuse*" may exist in the case of other foreign law restrictions that fall short of this standard, it would be beneficial for the CMA to set out where it considers the line should be drawn. Even where foreign laws may not expressly prohibit a party from complying with an information notice, foreign laws (including blocking statutes and data protection laws) may prevent a party from complying with such a request in practice and/or within the timeframe that the CMA may seek to impose. The

[6] Draft Consumer Guidance, paragraph 7.49(a).

Draft Consumer Guidance should also recognise that barriers to compliance may be executive rather than legislative. Companies otherwise risk being penalised by foreign authorities, through no fault of their own, if they are made to meet a CMA requirement in breach of contradictory foreign law requirements.

Question 6

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?

Deterring infringements and incentivising compliance with both consumer law and remedies, whether agreed or imposed, in order to protect consumers (paragraph 7.9(a))

3.16. When considering the need for deterrence (paragraphs 7.8 – 7.10), it is also important (and consistent with the prevailing case law[7]) that the CMA does not merely look at turnover information but at **all** appropriate indicators of a company's financial position and size that can be derived from the information available to the CMA. This assessment should include the company's profitability after tax, net assets and dividends.

Reflecting the seriousness of infringements and breaches that the CMA finds to have occurred (paragraph 7.9(b))

3.17. Before imposing a penalty, the CMA should also have regard to the need to give businesses a reasonable period of time to resolve any non-compliant situations of which they may not previously have been aware. The legislation appears to leave open to the CMA the power to impose a penalty after a fixed notice period, giving businesses the opportunity to resolve any ongoing breaches before a penalty is formally applied. Accordingly, where the CMA has determined that it is appropriate to impose a daily penalty, in particular, the CMA should also consider whether it is appropriate under the circumstances to provide that the penalty will only enter into force if the undertaking does not resolve the breach within a specified time period.

Encouraging parties to co-operate fully with CMA investigations, so that the CMA is able to take timely decisions based on accurate and complete information (paragraph 7.9(c))

3.18. While we support this objective in principle, it is important that the CMA's expectations are tempered with a realistic acknowledgement of the difficulty and cost associated with responding to complex or extensive information notices (or complying with orders imposed by the CMA), particularly where businesses' information gathering and reporting systems do not align with the information being requested. Such an acknowledgement from the CMA is particularly important in circumstances where it has powers to fine

[7] See, for example, *Eden Brown and Hays v Office of Fair Trading OFT* [2011] CAT 8.

undertakings at any stage of a proceeding for failing to respond to requests in a manner that the CMA considers adequate.

Interconnected bodies corporate

3.19. In our view the CMA should take "*reasonable and proportionate steps*" to notify interconnected group companies that they will face a monetary penalty or have directions imposed upon them (in contrast to only the "*steps that [the CMA] considers reasonable and proportionate*" as found in Rule 9(1)).

3.20. Further, the Rules should cater for the laws of the place where the respondent is located as a factor to be considered in determining whether the steps taken to notify interconnected group companies are "*reasonable and proportionate*". Some countries have their own legal requirements regarding interactions between domestic companies and foreign regulators, such that the proper method for the CMA to serve notice on one of those companies would be via a local regulator and using mutual assistance procedures.

3.21. In addition, we suggest that when the CMA invites representations from group companies interconnected with the respondent, it sets a (reasonable) time period for providing representations (Rule 9(2)(a)).

3.22. As a public authority, the CMA has a public law duty to take all relevant considerations into account when making a decision. If a representation goes beyond the scope of the representations invited by the CMA, for example because it is made by interconnected bodies corporate, that does not mean it could not be relevant to the CMA's wider decision-making in the case. Consequently, Rule 9(3) regarding the CMA's power to disregard such representations is inconsistent with its public law duties and should be reconsidered by the CMA.

Other comments

3.23. In light of section 202(d) DMCCA and the CMA's duty to act reasonably, we consider that further clarity could be added to paragraph 2.75 through the inclusion of the underlined text: "*A FIN may require the party to comply with such directions as the CMA considers appropriate, which may include directions to take ECMs, and to pay a monetary penalty <u>provided that, in each case, these are just, reasonable and proportionate</u>*".

3.24. In our view, further clarity could be added to paragraph 2.91 to explain that "*compensation*" in this context means any obligation to make a monetary payment or other financial redress to consumers, including refunds.

Question 7

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?

Step-by-step approach

3.25. At paragraph 7.11 of the Draft Consumer Guidance the CMA appears to pre-suppose that the default starting point for determining a party's turnover – following the publication of relevant regulations by the Secretary of State – will be that a party's turnover in the UK. This is in contrast to the "*relevant turnover*" test applied in CA98 cases. Using whole-of-UK turnover with no regard to the relevance of that turnover risks disproportionately inflating fines at the outset of any penalty calculation process. For some companies (for example large conglomerates with multiple business lines within the UK), basing a penalty calculation off whole-of-UK turnover would risk resulting in disproportionate fines for conduct limited to a single part of that company's broader business. The CMA should give further thought as to whether the "*relevant turnover*" qualification would also be appropriate for direct consumer enforcement cases, as is the case for CA98 cases.

3.26. We note the broad approach to determining what category the level of harm caused by the infringement falls into through the consideration of key factors. paragraph 7.24 specifies such key factors as being: the duration of the conduct; the total likely economic loss to consumers (if any); the overall level of non-economic harm; and the impacts on consumers' decision-making. However, there is a lack of clarity regarding the different gradations of harm that these factors represent. For example, it is not clear what the difference would be between a "*major*" and "*significant*" harm to consumers, whether economic or not. The CMA should clarify this point because of the impact these factors could have in determining the tariff of any monetary penalty that is imposed.

3.27. In determining the level of culpability, paragraph 7.26 explains the CMA will consider the evidence before it to decide whether the act(s) of the party in question were caused by deliberate action or genuine mistake. In this regard, we note that non-compliance with assured advice from a business's Primary Authority is included in the table as a factor evidencing high culpability.

3.28. Given businesses' need for legal certainty, and for consistency across the UK regulatory regime, there is a strong case for providing that positive compliance with local authority assured advice should be framed as a factor which is sufficient to avoid any liability at all, other perhaps than in exceptional circumstances. That would reflect current advice to businesses from the Department for Business and Trade (via the Office for Product Safety and Standards, which sits within it):[8]

"*Your primary authority can provide your business with reliable regulatory advice that's tailored to your business circumstances.* ***Enforcing authorities should respect this advice when regulating your business****.*

Primary Authority Advice can help your business understand:

[8] "Primary Authority: a guide for businesses", OPSS, published 1 October 2017 and last updated 11 May 2018, available at: https://www.gov.uk/guidance/primary-authority-a-guide-for-businesses (accessed 6 September 2024).

- *how legal requirements apply to you*
- *how you can achieve compliance*
- *whether the controls you have in place are acceptable*

Primary Authority Advice is assured, which means that ***provided that you abide by the advice you are given, you won't need to follow conflicting advice from other sources. Your business should be protected against the risk of enforcement action from enforcing authorities that have different views*** *on what you should be doing to achieve compliance*" (emphasis added).

3.29. As a minimum, we would strongly suggest that the CMA includes positive compliance with local authority assured advice as a factor evidencing low culpability for these purposes.

Aggravating and mitigating factors

3.30. We welcome the addition of guidance concerning potential aggravating and mitigating factors in paragraph 7.34 (in relation to substantive breaches) and paragraph 7.65 (in relation to administrative breaches). In our view the CMA should consider the following additional points:

(a) First, the list of aggravating factors is disproportionately longer than the list of mitigating factors. Additional mitigating factors should be included based on the opposite scenarios of the aggravating factors listed in the Draft Consumer Guidance. For example, paragraph 7.65 provides that an aggravating factor will exist where there has been a previous breach of any direction, undertaking, or information notice requirement. As such there should conversely be a mitigating factor for where the breach is the first of its kind committed by the company.

(b) Second, paragraph 7.65 should clarify precisely what is meant by the "*involvement of senior management, either actively or in failing to prevent the breach*".

(c) Paragraphs 7.34 and 7.65 should expressly state that the CMA will consider potential aggravating and mitigating factors on a case-by-case basis.

3.31. Certain aggravating factors seem overly strict. For example, "*continuing the infringement after being notified of the opening of the CMA's investigation*" (paragraph 7.34). We do not think that this is an appropriate aggravating factor. Where a trader has a good faith belief that its conduct is lawful and therefore intends to engage robustly with the CMA to defend that conduct, as is its right, this should not of itself lead to a higher fine being imposed. Doing so would place improper pressure on businesses to waive their defence rights.

3.32. Regarding the mitigating factors set out at paragraph 7.34:

(a) We suggest amending "*full redress having been paid to affected customers…*" to refer to "*appropriate*" redress. There may be circumstances where "*full redress*" is not appropriate; we note, for example, that for the purposes of consumer redress under section 233 of the DMCCA, it is

envisaged that regulations may be published which will e.g. specify what an appropriate discount may be (section 233(2)(b) DMCCA). It is possible that these may replicate the current discount regime set out in regulation 27I of the Consumer Protection from Unfair Trading Regulations 2008, which envisages the consumer reducing future payments by 25%, 50%, 75% or 100% in particular circumstances.

(b) We suggest considering adding further mitigating factors, such as:

i. evidence of a genuine belief that conduct was lawful;

ii. a previous history of treating customers fairly and/or compliance with consumer law;

iii. that the conduct in question complies with the law of the respondent's place of domicile, where they are based outside the UK;

iv. halting the infringement having been warned that the relevant conduct may be unlawful by an enforcer;

v. compliance with undertakings and/or directions given in respect of any infringement;

vi. evidence of senior management having attempted to prevent the breach;

vii. evidence of appropriate systems and controls being in place at the time of the breach to ensure compliance with consumer law (recognising that infringements may occur even in the best run organisations); and

viii. taking appropriate action to improve relevant systems and processes, and/or training staff to seek to prevent further breaches.

Question 8

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?

3.33. Paragraphs 7.61 and 7.62 confer wide discretion on the CMA to impose penalties on a fixed rate or daily basis (or a combination of the two), including in circumstances where the failure to comply has already been remedied (paragraph 7.62(c)). In our view, penalties should generally not be imposed (including on a fixed rate basis) in circumstances where the failure to comply is the result of an honest error made in good faith, particularly where that error has been promptly corrected upon the party becoming aware of the breach. Imposing a fine in such circumstances would not achieve a deterrent effect as the undertaking in question is in fact using its best efforts to comply.

3.34. Conversely, recognition in the Draft Consumer Guidance that the prompt correction of breaches will not usually attract an administrative penalty would encourage companies proactively to investigate and correct inadvertent mistakes, thus supporting the CMA's objective of taking "*timely decisions based on accurate and complete information*" (paragraph 7.9(c)).

Question 9

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?

Step-by-step approach

3.35. We welcome the CMA's use of a 'step-by-step' approach to calculating monetary penalties for administrative breaches, while also recognising that the overall penalty imposed (whether fixed, daily or combination) should not be disproportionate in the circumstances, when looked at in the round (paragraph 7.66). We note, however, that the 'stepped' approach set out in the Draft Consumer Guidance to calculating administrative penalties for **consumer** breaches is clearer and more nuanced than the parallel approach to calculating administrative penalties for **competition** breaches, as set out in the draft updated CMA4. The CMA should adopt a consistent methodology for calculating administrative penalties for both competition and consumer breaches, which should be reflected across both documents.

Aggravating and mitigating factors

3.36. We repeat our comments on the aggravating and mitigating factors listed at paragraph 7.34 set out in our response to Question 7 above and in addition in relation to the factors listed at paragraph 7.65:

(a) Aggravating factors: failing to request an extension of time within a short time frame for an information notice (paragraph 7.65). We refer to our comments above with regard to the CMA's overarching duty of expedition in this context. We do not think that this is an appropriate aggravating factor and would suggest it is removed.

(b) Mitigating factors: we similarly suggest the CMA considers adding further mitigating factors, such as the following, and those referred to in this Firm's response to the consultation on draft CMA4 (at paragraph 5.5 of that response) where relevant:

i. halting the relevant conduct having been warned about it by an enforcer;

ii. evidence of senior management having attempted to comply with the law and prevent any breach;

iii. evidence of appropriate systems and controls being in place at the time of the breach to ensure compliance (recognising that breaches may occur even in the best run organisations); and

iv. taking appropriate action to improve relevant systems and processes, and/or training staff to seek to prevent further breaches.

Question 10

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?

3.37. We have no comments on this section of the Draft Consumer Guidance.

Question 11

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

3.38. When it comes to decision-making, particularly in circumstances where the CMA is now able to impose monetary penalties in respect of infringements of consumer law it has investigated itself, it is of fundamental importance that decisions are made on a fair and objective basis, with no possibility of pre-judgment. The CMA must therefore make every effort to ensure that decision-makers in respect of FINs issued in its direct consumer enforcement cases are independent from those within the CMA who have been investigating the conduct subject to the FIN.

3.39. While imperfect, in CA98 cases the formation of a CDG has two important qualifications which are not present in the proposed FDG structure set out in the Draft Consumer Guidance:

(a) at least one member of the CDG has to be legally qualified (paragraph 11.35 of CMA8); and

(b) the SRO **cannot** be a member of the CDG, in order "*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*(s)" (paragraph 11.36 of CMA8).

3.40. There does not appear to be any attempt by the CMA to separate the SRO from the FDG for consumer enforcement cases: indeed, at paragraph 8.19 it is explicitly acknowledged that the SRO can be a member of the FDG. It is not clear why this should be acceptable for consumer enforcement cases but not CA98 cases. We would therefore urge the CMA to reconsider this point and provide in the final guidance that an SRO should **not** participate in the FDG.

3.41. There are also relatively few constraints on who can be in the FDG. CDGs generally comprise very senior staff of the CMA and will always contain at least one person who is legally qualified: there is no such restriction for FDGs. Ensuring that one member of the CDG in CA98 cases has legal qualifications is a means of ensuring that the CDG as a group can fully understand the legal framework within which they are making a decision and the legal requirements they need to meet. We consider that such a qualification should be required in respect of FDGs as well.

3.42. As a final point, we note that under the Draft Consumer Guidance the SRO's powers are also extremely broad: they are essentially able to make all relevant decisions themselves except for in relation to issuing FINs, which must be made by the FDG (of which they could be a part). The requirement that an SRO "*will consult two other senior officials as appropriate at key stages of the investigation*" adds very little by way of reassurance. The CMA should clarify whether the need to consult two other senior officials is indeed a hard-and-fast

requirement (for example, where the CMA says this should be done "*as appropriate*" does this mean that there will be circumstances in which they will not need to consult?). Clarification is also required in relation to the points in the investigation at which this requirement bites (i.e., what is a "*key stage*"?).

Question 12

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

3.43. Where parties are unable to resolve concerns or disputes in relation to certain procedural issues in CA98, market- or merger-related cases with relevant CMA case teams, it is open to those parties to raise those issues with the CMA's Procedural Officer. While the Procedural Officer is employed by the CMA, they are independent from CMA investigations, cases teams and decision makers.

3.44. The Draft Consumer Guidance creates an alternative mechanism for procedural complaints in relation to consumer direct enforcement cases whereby disputes can be referred to a PCA. While it appears to be intended that the PCA will exercise a role in respect of consumer cases broadly similar to that of the Procedural Officer's role in respect of CA98, merger and markets cases, a key difference is that under the Draft Consumer Guidance and the Draft Consumer Rules, the PCA role can be carried out by any "*relevant person*" (including any member of CMA staff) provided that person has not "*been involved in the day to day running of the investigation or as decision maker overseeing the investigation*." This does not guarantee that the PCA will be 'independent' in the way that the Procedural Officer's independence is protected. While the PCA may not have involvement in the day to day running of the investigation, the fact that the PCA role can be occupied by any member of the CMA staff means that the PCA may have knowledge of the case via other means (through attending team meetings within the CMA, via internal communications regarding case updates made to all staff or through routine conversations with colleagues).

3.45. It is not clear why procedural issues in direct consumer enforcement cases should be subject to a different standard than is used for procedural issues in respect of other CMA tools, or indeed why the Procedural Officer's existing remit cannot be extended to cover direct consumer enforcement cases. To the extent that the CMA intends to press ahead with implementing the PCA system, it should consider the extent to which further assurances can be given to parties regarding the independence of the PCA, which is an important safeguard.

3.46. In terms of the PCA's remit, we refer to points raised previously by this Firm in its response to the CMA's consultation on its updated Transparency and Disclosure statement (CMA6) (at paragraphs 3.25 and 3.26 of that response). While made in respect of the remit of the Procedural Officer, those points apply equally to the proposed role and remit of the PCA (namely, that there would be considerable merit in expanding this remit in order to ensure the PCA is able to address various issues which can arise in a number of contexts not captured

by the scope of review envisaged by the Draft Consumer Guidance and the Draft Consumer Rules).

Question 13

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

Additional comments on the Draft Consumer Guidance

3.47. Duty of expedition: Further to our observations above on the newly extended duty of expedition,[9] the following examples illustrate instances where further guidance and clarification may be helpful:

(a) At paragraph 1.12, the Draft Consumer Guidance states that the CMA will "*take account of this duty when engaging with parties, setting deadlines, and considering requests for extensions to deadlines*". The CMA should also take account of its public law duties, including the need to act reasonably in all the relevant circumstances, and parties' rights of due process. In the context of setting deadlines for responses to information requests and written representations, this means that the CMA must set reasonable deadlines, and take into account parties' representations on any extension requests. As explained at paragraphs 3.5-3.6 above in relation to written representations on PINs, we are concerned that the Draft Consumer Guidance does not adequately reflect these considerations.

(b) At paragraph 4.43, the Draft Consumer Guidance refers to the duty in relation to the timetable for settlement discussions and states that the CMA may terminate settlement discussions if they are not proceeding with "*sufficient pace*". It would be helpful for the CMA to indicate both in the Draft Consumer Guidance and to parties engaged in settlement discussions what the CMA's expectations are around the timeframes for settlement discussions and parties' engagement with those discussions, to ensure parties that genuinely wish to conclude a settlement are aware of the CMA's expectations and what they need to do to meet them.

3.48. We consider that the CMA should clarify the basis on which it considers that undertakings given under the Part 8 EA2002 regime can properly be taken into account when deciding whether to give a FIN (see paragraph 2.74). Section 182(3) DMCCA refers specifically (and solely) to undertakings given under Chapters 3 and 4 of the DMCCA as factors to which the CMA should have regard when deciding whether to give a FIN. However, the more general scheme of the DMCCA is such that other elements of the CMA's new powers are not applicable to decisions made under the 'old law' (see paragraphs 1.14 to 1.15). It would be improper and inconsistent with the general scheme of the DMCCA for decisions which a trader made to bring an end to investigations

[9] Referred to throughout the Draft Consumer Guidance: see paragraphs 1.11-1.12, 2.34, 2.37-2.38, 2.55, 2.58, 3.1, 3.11, 4.43, 5.3, 6.5, 6.10 and 7.9.

under the old regime (in light of its understanding of that regime) to be taken into account when determining penalties under the new regime.

3.49. Transparency: Paragraph 2.5 states that "*unless there are exceptional circumstances*", the CMA will publish a notice at the time of opening a direct consumer enforcement investigation (paragraph 2.5). We consider that the Guidance should provide examples of the circumstances which would, exceptionally, lead to an opening notice not being published (consistent with CMA6 at paragraph 3.5).

3.50. Paragraph 2.8 indicates that the CMA will "*usually*" write to a party under investigation when an investigation is launched. Our expectation is that in practice the norm should be for the CMA to provide parties due to be investigated with such a notification. This is an important step in order for the company to exercise its rights of defence (e.g. to take steps to gather and preserve potentially exculpatory material). Moreover, there may be material commercial considerations given, for example, any share price impact the investigation could cause, if the CMA publishes a notice at the time of opening without having informed the relevant party in advance.[10] We repeat the comments in our response to the consultation on draft CMA6 (at paragraphs 3.7-3.18 of that response) and encourage the CMA to provide further detail in the Draft Consumer Guidance, consistent with CMA6 where relevant, in relation to such notifications, including the factors the CMA will consider when deciding whether to do so. In order to provide reassurance to businesses which may find themselves the subject of investigation, the Draft Consumer Guidance could usefully refer to any regulatory codes or principles of better regulation that the CMA, as a public authority, considers applicable to its decision-making at these key stages of the direct enforcement process. In particular, it should clarify whether, in reaching decisions under the DMCCA, and especially when issuing a FIN that includes monetary penalties (see paragraph 2.72):

(a) the CMA considers itself subject to / bound by the Regulators' Code[11]; and

(b) the CMA will take into account considerations similar to those which a prosecutor would be required to take into account under the Code for Crown Prosecutions (as under CMA9 in relation to cartel prosecutions).

3.51. Paragraph 3.2 refers to the CMA's ability to obtain information by "*enter[ing] premises without a warrant (sometimes without notice), and enter[ing] premises with a warrant.*" There does not appear to be any further information in the Draft Consumer Guidance as to how the CMA proposes to approach any such unannounced inspection. The CMA has developed long-standing practices in how it exercises its powers to conduct unannounced inspections in CA98 cases, and Chapter 6 of CMA8 provides detailed guidance on the steps the CMA is expected to take before and during it exercising these powers. It

[10] That said, we recognise as above that there may be exceptional circumstances where the CMA neither informs a party nor publishes a notice when opening an investigation.

[11] See: https://www.gov.uk/government/publications/regulators-code (accessed 6 September 2024).

would be helpful if the CMA could clarify in the Draft Consumer Guidance whether it envisages that it will carry out any such inspections in the same way and, if that is the case, either to set out in the Draft Consumer Guidance further explanation as is available in CMA8, or to cross-refer to CMA8 so that parties have appropriate guidance available to them. To the extent the CMA envisages unannounced inspections in direct consumer enforcement cases being conducted in a way that differs from the CA98 process, it should explain how it proposes to do this.

3.52. Footnote 73 of paragraph 3.9 states that that the CMA may make requests for substantiation, but it does not identify the limitations upon the CMA's ability to do so set out in the DMCCA. We note that requests for substantiation can only be made at the time that a PIN is issued and where the respondent makes representations (see section 195(1) DMCCA).

3.53. Paragraph 6.7 of CMA8 provides that "*the CMA will seek to give recipients of large information requests advance notice so that they can manage their resources accordingly*". However, it is unclear from paragraphs 3.4-3.10 whether the CMA intends to keep open the possibility of using draft information requests in direct consumer enforcement cases. We consider that it is important and beneficial to all parties that the CMA continue with the approach of using draft information requests as in our experience this allows parties respond to requests more efficiently (which we would suggest is particularly pertinent under the new legislation given the CMA's duty of expedition). We therefore recommend that the CMA confirm that they will continue to make use of draft information requests in consumer investigations.

Additional comments on the Rules

3.54. In our view, if the CMA deems any of the criteria in Rule 5(1)(a)-(g) are to be met, redaction of the information in question would be an appropriate measure to take rather than the CMA withholding the material from inspection in its entirety.

CONCLUSION

3.55. We welcome the guidance provided in the Draft Consumer Guidance and Draft Consumer Rules in light of the new direct enforcement powers bestowed on the CMA by the DMCCA.

3.56. However, the Draft Consumer Guidance would benefit from further clarification in a number of places (as outlined in our response above) if it is to support the CMA in achieving its objectives of effective and timely management of investigatory proceedings. We remain available for further dialogue with the CMA and other stakeholders on the Draft Consumer Guidance and Draft Consumer Rules.

Freshfields Bruckhaus Deringer LLP

18 September 2024