Competition and Markets Authority Consultation

Draft guidance on the direct consumer enforcement regime set out in the DMCC Act 2024

Response of Herbert Smith Freehills LLP

Introduction

Herbert Smith Freehills LLP welcomes the opportunity to provide comments in response to the CMA consultation document of 31 July 2024 *Draft guidance on the direct consumer enforcement regime set out in the Digital Markets, Competition and Consumers Act 2024 (CMA200con)*. The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of any of our individual clients.

We welcome the draft guidance which sets out the CMA's general approach to the exercise of its direct consumer enforcement powers under the DMCC Act 2024 to enforce certain consumer laws. This is a new enforcement regime and although it is based on the CMA's existing Competition Act 1998 (CA98) regime and its procedural guidance, it is important for businesses to have as much clarity as possible around the CMA's processes when enforcing this new regime.

Our comments set out below largely follow the questions set out in the CMA's consultation document and where appropriate we have also made some additional points.

1. **Question 1. Do you have any comments on the proposed process for submitting written representations on provisional infringement and/or administrative enforcement notices?**

1.1 The draft guidance around the proposed process for submitting written representations on provisional infringement notices is similar to the guidance for making written representations to a statement of objections under the CA98 but with one notable difference. The timetable for submitting responses under the direct consumer enforcement guidance is less than half that for responding to a statement of objections under the CA98: 20 to 30 working days versus 12 weeks.

1.2 Whereas we understand the need for expedition in order to bring matters to a swift conclusion to protect consumers from ongoing practices, the level of potential penalties that can be imposed for breach of the relevant consumer protection legislation is the same as that imposed for breach of the competition rules. On that basis the rights of defence of the parties involved should mirror those of the parties in CA98 cases, and we recommend extending the timetable under the direct enforcement guidance to 12 weeks.

1.3 We would also welcome greater clarity around the granting of extensions to the time for permitting written representations. The draft guidance currently provides that extensions will only be granted exceptionally and where there are compelling reasons for doing so, but there is no further guidance as to what would qualify as exceptional and as compelling reasons.

2. **Question 2. Do you have any comments on the proposed process for conducting oral hearings on provisional infringement and/or administrative enforcement notices?**

2.1 The draft guidance on the proposed process for conducting oral hearings on provisional infringement and/or administrative enforcement notices mirrors that of the CA98 guidance on oral hearings. We welcome the addition of the option for the oral hearing to take place as a hybrid hearing or online.

2.2 The draft guidance provides that a party can bring legal advisers to the oral hearing to assist in presenting its oral representations at the hearing, subject to any reasonable limits that CMA may set in terms of the number of persons that may attend on the party's behalf. In our view this should be extended to economists and other advisers, as is the case under the CA98 procedural guidance.

2.3 The draft guidance, at paragraph 2.42, provides that parties will be offered the opportunity to attend a single oral hearing to make their representations about the giving of a provisional infringement notice (PIN). We believe there should be greater flexibility around this and the draft guidance should provide a further oral hearing opportunity where a supplementary PIN has been issued. This is not currently provided for in paragraph 2.64.

3. **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?**

3.1 We would welcome further clarity from the CMA on the relationship between offering undertakings and settlement. The draft guidance describes some of the factors which the CMA will consider when assessing whether undertakings or settlement would be appropriate in their own right, but does not describe the CMA's view of the relationship between the two processes. Further clarity will assist those involved in consumer enforcement investigations and their advisers with understanding whether and when to approach the CMA regarding undertakings and settlement.

3.2 We note that paragraph 4.7 of the draft guidance highlights that the CMA is more likely to accept undertakings where these include an element of paying redress to affected consumers. In our view, the CMA should act cautiously before requiring that undertakings include the payment of compensation to potentially affected consumers, as opposed to

undertakings which require altering the potentially problematic conduct. Such a requirement might have the unintended effect of dissuading relevant persons from offering undertakings to the CMA because redress may be practically unmanageable or too costly to implement. This is consistent with the CMA's own draft guidance on enhanced consumer measures which states that it may not be possible to identify affected consumers, or it may be disproportionately costly to do so (see paragraph 5.12).

3.3 Furthermore, any requirement that consumer redress is offered may be inconsistent with (i) the CMA's desire to ensure that undertakings should be able to be implemented effectively within a short period of time, and (ii) the fact that offering undertakings does not require any admission of liability. This may mean that cases which otherwise might be suitable for undertakings continue under the usual administrative procedure, resulting in wasted time and costs for both the CMA and parties under investigation.

3.4 Paragraph 4.14 states that the CMA may seek third party views before deciding on whether to accept proposed undertakings. To ensure suitable transparency and engagement from interested third parties, we would welcome a firmer commitment from the CMA to consult on undertakings in all cases, save where there are exceptional circumstances which mean that this was not appropriate.

3.5 It is welcomed that paragraph 4.16 states that any admissions made by a party under investigation in the context of discussions with the CMA regarding possible undertakings will not be placed on the CMA's file, noting an admission of liability is not a requirement to the offering of undertakings. However, we note that the CMA is proposing to include any further material obtained during discussions on undertakings on the CMA's file. We consider that this approach might have the effect of dissuading the offering of undertakings due to a concern that the CMA may rely on unhelpful information should the CMA decide to recommence its usual administrative procedure and/or a concern that any unhelpful material voluntarily provided to the CMA may eventually be accessed by potential Claimants seeking to bring follow-on damages claims.

4. **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?**

4.1 We have reservations about the approach set out in paragraph 4.33(d) of the draft guidance which requires that, in order to enter into a settlement with the CMA, the relevant party must waive its rights to appeal any matter set out in the FIN. Our expectation is that appeals of FINs following a settlement with the CMA are likely to be extremely rare, given settlement is entered into voluntarily. We would expect a party to appeal a FIN only in circumstances where there is some material change of circumstances (e.g. a significant

failure of the CMA's process). In a context where appeals of settlement decisions are likely to be extremely rare, it seems inappropriate for the CMA to require a party to waive a fundamental right of access to justice as part of the settlement process. We would therefore suggest that paragraph 4.33(d) is deleted from the draft guidance.

4.2 In addition, paragraph 4.38 states that the CMA will have regard to a number of factors before determining whether a case of suitable for settlement. However, only two factors are expressly cited by the CMA in the draft guidance, namely anticipated procedural efficiencies and resource savings. It is, therefore, unclear what other factors the CMA proposes to consider when assessing whether settlement is appropriate. We would welcome the CMA expanding its guidance to include other factors which the CMA is likely to consider when assessing whether a case is appropriate for settlement. This could include, for example, some of the factors listed by the European Commission in its Settlement Notice.[1]

4.3 We would welcome further clarity on the relationship between paragraph 4.40 and paragraphs 4.39 and 4.63. On the one hand, paragraph 4.40 states that the CMA may still rely on admissions made if the settling party seeks to withdraw from the settlement process. However, paragraphs 4.39 and 4.63 separately suggest that withdrawal is only possible prior to the acceptance of settlement.

4.4 Finally, we note that the CMA may seek to withdraw the benefit of settlement in circumstances where a settling party's submissions on the Summary Statement of Case or the PIN are "extensive" (paragraphs 4.48 and 4.55). While we appreciate that the settlement process seeks to achieve efficiencies, we consider that the CMA should exercise its discretion to terminate the settlement process based on submissions made by the settling party only sparingly. It is crucial that the settling party has a reasonable opportunity to set out its views of the potential problematic conduct, for example to correct any misunderstandings that the CMA may have. The opportunity to respond to the CMA's findings will ensure that the CMA decision-making is robust and accurate; this, in turn, is likely to incentivise parties to enter into settlement discussions with the CMA.

---

[1] See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2008/C 167/01, paragraph 5 ("*The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including the scale of burden involved in providing access to non-confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent might apply*. […].")

5. **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?**

5.1 We generally welcome the inclusion in the draft guidance of non-exhaustive factors the CMA will take into account when determining whether a reasonable excuse exists for certain breaches.

5.2 However, we would encourage the CMA in its final guidance to:

5.2.1 provide further clarification as to what it would consider to constitute a "*staff error*", and at what point the CMA can be deemed to have "*relied*" on information provided as a result of this (see paragraph 7.48(d)). As drafted, this example is too vague in our view to provide effective guidance, and we have concerns that the high degree of latitude granted to the CMA could lead to arbitrary distinctions;

5.2.2 explain, in relation to circumstances where a party communicates to the CMA that it has concerns regarding its ability to comply with e.g. an information notice, how the timing of such communication will factor into the CMA's assessment. For example, it is not clear from the guidance whether a reasonable excuse would cease to be considered reasonable by the CMA if brought to its attention "too late", or otherwise how this may affect the CMA's decision-making. We would urge the CMA to provide additional, and consistent, clarification on how this is expected to fit into the CMA's thinking;

5.2.3 extend the availability of the reasonable excuse of "*death or incapacity of a key official*" (see paragraph 7.48(b)) to all businesses irrespective of their size. In the case of, for example, the late submission of a response to an information notice, it would appear manifestly unfair not to grant leeway to a larger business following the death or incapacitation of a key individual involved in the response. We do not agree that it is appropriate to limit this consideration to small businesses.

5.2.4 include an express qualification that unplanned absences of personnel (see paragraph 7.49(d)) may in themselves be as a result of a "*significant and genuinely unforeseeable and unusual event*", for which a reasonable excuse may be available.

5.3 We also note that there are a number of differences in both the level of detail and the framing of the relevant factors in the draft guidance when compared to the draft guidance / policy statement documents relating to Administrative Penalties and Digital Markets.

5.4 For example, we note that the draft guidance:

5.4.1 refers to "*the sorts of factors the CMA will consider*" (underlining added) as part of its objective test (see paragraph 7.47). The draft Digital Markets guidance and draft Statement of Policy on Administrative Penalties use more definitive language when describing the test (i.e. "*In doing so, the CMA will consider whether […]*");

5.4.2 states that it is "*unlikely*" the CMA will accept adherence to obligations under a non-disclosure agreement as a reasonable excuse for non-compliance (see paragraph 7.49(e)). The draft Administrative Penalties guidance goes further in stating that the CMA "*will not accept*" this as a reasonable excuse, while the draft Digital Markets guidance uses broader references to ("*non-compliance […] required under an agreement, contract […]*");

5.4.3 states that adherence with duties under the Data Protection Act 2018 is unlikely to constitute a reasonable excuse for non-compliance (see paragraph 7.49(e)). The draft Digital Markets guidance is framed more broadly to refer to non-compliance required under "*data protection laws*". The draft Administrative Penalties guidance provides an additional clarification in a footnote that "*[t]he DPA18 allows processing of personal data for the purposes of a legal obligation: para. 3, Schedule 9 of the DPA18*"; and

5.4.4 contains a number of specific examples not present in the other documents, of circumstances which may amount to a reasonable excuse (e.g. the death or incapacity of a key official in the case of small businesses; typographical errors; staff error) and those which are unlikely to (e.g. failure to obtain senior approval in good time; absences of officials or advisers for planned reasons; and unplanned absences of specific personnel in larger companies).

5.5 To ensure clarity for businesses, and to avoid arbitrariness in decision-making, the CMA should in our view embed the same approach across the respective guidance documents for each regime and harmonise the references accordingly.

6. **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?**

6.1 We have no further comments around the CMA's overarching objectives in imposing penalties, which are to deter infringements and incentivise compliance, reflect the seriousness of the infringements and to encourage parties to cooperate fully with CMA investigations. We do however have comments on the guidance where it expands on how the CMA proposes to implement some of these objectives, which are set out below.

7. **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?**

7.1 We are supportive of the stepped method for calculating penalties, given that this provides in principle a more objective methodology than an "in the round" approach. However we have some concerns that, in seeking to set out a framework for the CMA's stepped approach in calculating penalties for substantive breaches, the draft guidance is insufficiently clear in several places:

7.1.1 In determining the level of harm (step 1A), the draft guidance provides that the CMA will apply specified principles set out in its table – Category 1 being the most serious and Category 4 being the least serious. This categorisation however provides insufficient certainty on the one hand, and overly broad discretion for the CMA on the other, to discharge the CMA's requirement to set out a statement of its policy on penalties:

- For example, it is not clear how infringements which have had the overall effect of causing "major" harm to consumers (category 1 harms) differ from infringements which have had the overall effect of causing "significant" harm (category 2 harms).
- It is also not clear how infringements will merely create a "risk" of a category being met, as opposed to falling directly under a category, while the category 4 factor of "any other infringements" is too vague to provide any meaningful guidance.
- Further, the CMA's "Escalating Factors" also lack specificity, and potentially would extend to large numbers of infringements, particularly given the requirement to only have caused an individual consumer (singular) to suffer large economic or non-economic losses. Indeed, footnote 172 provides that an infringement may be subject to Escalating Factors where, even though the overall infringement is modest, individual consumers have suffered large losses.
- In sum, these factors would give rise to a framework that is vague, uncertain and provides undue latitude to categorise large numbers of infringements as involving high levels of harm. The CMA should reconsider this framework to ensure greater objectivity, and more meaningful and specific guidance to businesses and persons.

7.1.2 In determining the level of culpability of an infringing party (step 1B), the draft guidance sets out relative levels of culpability based on three categories (high, medium and low). However this framework is again vague, non-objective and overly broad:

- The guidance provides that, to the extent a party exhibits behaviour which matches factors in more than one category, the party will be designated to the higher of the categories. This clearly runs counter to the CMA's stated commitment to impose penalties in a proportionate way (see paragraph 7.10). Where a party is designated should be based on the circumstances of an individual case. Instead, the CMA's stated approach will allow it to place cases in the category of high culpability where the facts may not support this. This is particularly significant in light of the generally vague and non-objective nature of these categories (see further below).
- The CMA's categories are one-sided in that they are expansive in terms of factors pointing to high culpability, and restrictive on factors pointing to low culpability. For example, footnote 174 makes it clear that the CMA will not view "generic compliance training" as being sufficient to indicate low culpability where this is not specific to the practice in question. For procedural fairness balance, it therefore follows that the CMA should only treat as a high culpability factor the party training staff to act in ways which amount to infringements in respect of the practice in question (rather than more generally). Further, the CMA gives as a high culpability factor the party operating with a deliberate strategy to carry out the relevant practices. It therefore follows that a party not operating with such a strategy should be recognised as a low culpability factor (but the draft guidance does not currently address this).

8. **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?**

8.1 We have no further comments on the factors the CMA proposes to consider in order to decide between a fixed or daily penalty for administrative breaches.

9. **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?**

9.1 As described in our response to Question 7 above, in principle we are supportive of a stepped approach for calculating penalties. However, we consider that the CMA's proposed

framework is insufficiently certain, and would provide the CMA with very broad discretion in calculating monetary penalties for administrative breaches:

9.2 The draft guidance sets out examples of factors to which the CMA will have regard when assessing the seriousness of a breach (step 1A). However, its examples of "more serious breaches" could cover substantially all, or a very high number of, administrative breaches. For example, the CMA could credibly argue that breaches of information notices generally could either risk having a material impact on its ability to understand and assess evidence, or risk impacting the CMA's ability to progress a case and/or meet internal deadlines. This therefore could result in an unduly high number of breaches being considered to be serious in nature. We would encourage the CMA to delineate more precisely the categories of breaches that it considers would be serious (particularly in relation to information notice breaches).

9.2.1 The draft guidance indicates that the CMA will apply a categorisation in relation to seriousness of a breach, ranging from category 1 (most serious) to category 4 (least serious). However, as with the categorisation for substantive breaches, the CMA's draft framework is not sufficiently clear to discharge its obligation to publish a statement of policy on its approach to penalties. In particular:

- It is not clear in what circumstances "major breaches of [a] requirement" (category 1 breaches) would differ from "significant breaches of [a] requirement" (category 2 breaches).
- The category 4 description of "any other breaches" is too vague to provide any meaningful guidance.
- The CMA's "Escalating Factors" also lack specificity, and would potentially extend to large numbers of infringements, for example "breaches which have caused any economic or non-economic harm to individual consumers" and (in relation to information notice requirements) breaches which had an "impact" on the CMA's investigation.

9.2.2 In determining the level of culpability of a party (step 1B), the draft guidance sets out relative levels of culpability based on three categories (high, medium and low). However this framework is insufficiently clear, and is (in places) disproportionate. In particular:

- The guidance provides that, to the extent a party exhibits behaviour which matches factors in more than one category, the party will be designated to the higher of the categories. This is inappropriate, and runs counter to the CMA's stated commitment to impose penalties in a proportionate way (see

paragraph 7.10). Where a party is designated should be based on the circumstances of an individual case.

- The draft guidance indicates that factors indicating high culpability for information notice breaches include "where a party has failed to engage with the CMA at all, or only engaged minimally, following receipt of an information notice". This is vague, i.e. in terms of what is entailed by "engagement" for these purposes, and would leave too much discretion for the CMA. We would suggest greater specificity regarding categories of conduct that could reasonably indicate higher culpability.
- Medium culpability factors for information notice breaches are stated to include "where the CMA considers a party may have failed to expend or allocate necessary resources to respond to the information notice promptly and properly" and "where the party has failed to take reasonable steps to verify the accuracy of the information provided". This would risk leading to unclear and arbitrary assessments, and not appropriately accounting for extenuating circumstances (e.g. if a party unavoidably does not have the necessary resources to respond within an information notice deadline, and the CMA has turned down requests for an extension).

9.2.3 The framework for adjustment for aggravating/mitigating factors is again unclear and disproportionate in places:

- The draft guidance provides that "previous breach of any direction, undertaking, or information notice requirement whether or not as part of a CMA investigation" may be an aggravating factor. This is disproportionately broad and vague. Breach of (undefined) undertakings or notices generally should not be considered an aggravating factor for the purposes of the CMA's direct consumer enforcement powers.
- "Lack of cooperation" and "lack of engagement" is again very vague, and does not properly define scenarios in which a party's conduct in an investigation may give rise to an aggravating factor.
- "Failure to provide information following an extension granted by the CMA" should not of itself be a factor capable of being an aggravating factor. This could otherwise create a perverse incentive for parties not to request appropriate extensions.

- Neither is it appropriate for "failure to discipline" a staff member to be considered an aggravating factor, given that this will be an internal disciplinary/contractual matter for a party.

10. **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?**

10.1 We have no further comments on the guidance around the recovery of unpaid monetary penalties.

11. **Question 11. Do you have any comments on the proposed internal CMA decision-making arrangements for direct consumer enforcement cases?**

11.1 Whilst there are similarities with the decision-making arrangements set out in the CA98 guidance, there are certain differences in the decision-making arrangements for direct consumer enforcement cases. This is to be expected considering the differences in enforcement procedures between the two regimes. However, there are notable differences to the CA98 guidance in the draft guidance, some of which raise concerns.

11.2 We have concerns that the SRO's involvement in all stages of the decision-making arrangements risks prejudging the CMA's decision to issue a FIN:

11.2.1 The draft guidance states that the SRO will make decisions during the course of an investigation, including the decision to issue a PIN (paragraph 8.14). This approach reflects the CA98 guidance, where the SRO is similarly responsible for the decision to issue a Statement of Objections ("**SO**") and any Draft Penalty Statement. However, under the CA98 guidance, the SRO will not be a member of the Case Decision Group responsible for issuing a final infringement decision and appropriate penalty. This is to ensure that the final decision is taken by officials not involved in the issuing of the preceding SO. This restriction in the CA98 regime also ensures that any infringement decision is made without prejudice to any related dissolved settlement discussions between the CMA and relevant party(ies), which the SRO would have led.

11.2.2 In contrast, the draft guidance provides that the SRO may be a member of the Final Decision Group ("**FDG**") responsible for issuing a FIN (paragraph 8.19) – meaning that the final decision can be taken by officials previously involved in the issuing of the PIN. Further, save that where an FDG has already been appointed to issue a FIN following settlement, the SRO alone can make the decision to issue a FIN following settlement. The draft guidance explains that the SRO can make a decision to issue a FIN following settlement because an investigation

"*may only be resolved through the acceptance of undertakings or settlement with the consent of both the relevant party and the CMA*" (paragraph 8.15). However, even where the FDG has already been appointed to issue a FIN following settlement, the SRO may still be one of the three 'relevant persons' within the FDG. It is no different under the CA98 regime that settlement requires the consent of both the relevant party and the CMA. In light of this, we consider that the draft guidance does not adequately clarify why this factor justifies the involvement of the SRO in the decision to issue a FIN.

11.2.3 We are concerned by these proposed deviations from the CA98 guidance to allow the SRO to be involved in the decision to issue a FIN. The draft guidance does not indicate how the SRO will not prejudge a decision to issue a FIN, following their involvement in the decision to issue a PIN, or indeed any failed preceding settlement discussions. We consider that the CMA should provide guidance to articulate how it will avoid such prejudice.

11.3 It is also our view that the CMA should reconsider a requirement that at least one member of the FDG is legally qualified:

11.3.1 It is already a requirement under the CA98 guidance that at least one member of the Case Decision Group is legally qualified. This requirement ensures that the officials responsible for issuing the final decision hold sufficient knowledge of the underlying legal regime.

11.3.2 We expect that the introduction of the new consumer enforcement regime will present new challenges for the CMA in its decision making. We consider it is appropriate that at least one of the officials responsible for issuing a FIN is legally qualified to help navigate these expected challenges.

12. **Question 12. Do you have any comments on the proposed scope and process for referring and deciding procedural complaints?**

12.1 We have no further comments on the scope and process for referring and deciding procedural complaints.

13. **Question 13. Do you have any other comments on topics not covered by the specific questions above?**

We have set out below our comments a range of other topics not covered by the previous questions.

13.1 **Choice of enforcement regime**

Paragraph 1 of Annex B notes that the CMA "*may choose to pursue enforcement action via criminal law enforcement, the civil court-based enforcement regime or the direct enforcement regime depending on what it deems more appropriate in any given case.*"

We would invite the CMA to provide detail in the draft guidance as to when it may consider it appropriate to (a) make use of the civil court-based enforcement regime; and (b) pursue actions via criminal law enforcement in the context of its direct consumer enforcement powers, and the factors it is likely to take into account when determining which route it will follow.

13.2 **Naming of parties allegedly involved in an infringement at case-opening**

We do not consider it reasonable or proportionate that the CMA's "*normal*" practice should be to identify parties under investigation in its case-opening announcements (see paragraph 39).

The CMA's threshold for launching an investigation is low: it must simply have "*reasonable grounds to suspect*" a past, ongoing, or likely future infringement. While we appreciate that there can be public interest benefits in sharing certain information in consumer cases, making public allegations against named individuals can cause very serious reputational damage to the party under investigation in question at a time when the CMA is unlikely to have amassed sufficient evidence, and when the party has not yet had the opportunity to start making its case. It is our view that the probability and risk of serious reputational damage occurring, and the likely difficulties in publicly refuting allegations, and any other potential unintended consequences will need to be considered very carefully in each specific case, such that adopting a default approach of public identification is inappropriate.

It is also our view that the aims listed in paragraph 42 of the draft guidance (i.e. encouraging information to be brought forward; enhancing understanding of when the CMA considers enforcement action appropriate; keeping the public informed; and developing public confidence in consumer markets and the consumer protection regime) could be achieved in a far more proportionate manner by referring to the relevant sector.

Related to this, the CMA's stated aim of "*mak[ing] clear when businesses in a sector are not under investigation*" seems to prioritise the potential (and far less likely) reputational concerns of un-named businesses – who would in any event have the ability to state publicly that they are not under investigation – over those of named parties against whom no infringement has been found.

This is all the more pertinent given the CMA may decide to close an investigation on administrative priority grounds prior to issuing a PIN or a FIN, without reaching a conclusion as to whether consumer law has been infringed. Under the proposed approach

in the draft guidance, a party alleged to have infringed consumer law would have been named at the outset of a case but not formally cleared at its closure. This may cause serious ongoing reputational issues.

13.3 **Interconnected bodies corporate**

Under the DMCC Act 2024 the CMA has the power to extend the scope of an order or final notice to all other members of the group if the CMA considers it just, reasonable and proportionate to do so. The CMA will bring this to the attention of members of the party's group and invite written representations on whether they are interconnected with the party and on whether it is just, reasonable and proportionate for the requirements to be imposed on them. In our view the draft guidance should expand on what the CMA considers to be just, reasonable and proportionate in this context and provide examples. The Act's Explanatory Notes provide examples of what the CMA may take into account:

- To what extent any other group members have been the "brains" behind the infringement or have benefitted from it;
- Whether the infringing body corporate has sufficient funds to pay the penalty; and
- Whether to ensure the penalty is paid it is necessary to make the requirement to do so binding on one or more members of the same corporate group

The Explanatory Notes also clarify that the underlying policy intent is to prevent the infringing body corporate from engaging in corporate restructuring to minimise or avoid liabilities. Such additional guidance and examples should also be included in the draft guidance.

13.4 **Retrospectivity of fining powers**

Finally, we welcome the CMA's guidance as to when the "old law" and "new law" will apply in the direct consumer enforcement context, including as regards the enforceability of breaches of undertakings given to the CMA under the "old law". We note however that similar guidance is not given in relation to any retrospective aspect of the CMA's new fining powers in the draft policy statement on Administrative Penalties, which raises concerns of uncertainty.

For example, it is not clear whether, following the date of commencement of the relevant parts of the DMCC Act 2024, the CMA would in practice issue fines using its new powers (e.g. for amounts exceeding those available under its previous powers) for breaches committed after commencement of enforcement orders issued or undertakings given prior to commencement (e.g. in the market investigation context).

In our view, clarification on these points should be introduced in the relevant documents to provide businesses with a necessary degree of certainty.

Herbert Smith Freehills LLP

6 September 2024