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Consultation Response

Which? response to the CMA consultation on the draft guidance and rules for the direct consumer enforcement regime set out in the Digital Markets, Competition and Consumers Act 2024

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Summary

Which? welcomes the opportunity to comment on this consultation and is very supportive of the new powers of the CMA to enforce consumer law and this guidance and rules on how the new regime will operate.

The option of a direct consumer enforcement regime for the CMA has been a longstanding Which? ask[1], and we believe this is a major step forward for consumer protection as the previous inadequacies of the CMA's powers (and those of other regulators) have been evident and well recognised for quite some time. It is crucial that robust civil penalties are in place as part of this regime to further protect consumers. For example, it took nearly six years, and the threat of legal action, for Viagogo, a well-known secondary ticket selling company, to finally change its practices and follow CMA guidance on the information it gives consumers. In contrast, in other countries where these powers were available, like in Canada, secondary ticketing sites Ticketmaster and Stubhub faced immediate fines for not complying with a previous warning. Which? believe that this will provide an effective deterrent against non-compliance with consumer law and will enable the CMA to intervene more effectively where there are breaches including the ability to fine businesses that do not comply with information requests or undertakings.

We are broadly supportive of the CMA's guidance and consider that it sets out a clear and fair process for how the CMA will use these new powers appropriately, including how it will determine penalties - and in line with its duty of expedition under the Digital Markets, Competition and Consumers Act 2024 (DMCC Act). This obliges the CMA to have regard to the need to make a decision or take action as soon as reasonably practicable.

[1] See, for example, our response to the Government's consultation on 'Reforming Competition and Consumer Policy' in 2021.

We have made some minor suggestions for where we think additional clarity could be provided.

Where appropriate we would suggest that relevant third parties such as ourselves with a sufficient interest in ensuring effective enforcement should be enabled to contribute to the process. For Which?, although we are a private designated enforcer in our own right, we have considerably more limited enforcement powers under the new DMCC Act than other (non-CMA) regulators. In particular, we do not have access to enhanced consumer measures options, or to apply to a court for monetary penalties or online interface orders. For this reason, the option of formal involvement in CMA processes where relevant would be welcome.

CONSUMER ENFORCEMENT QUESTIONS

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

The approach set out in the guidance for submitting written representations on provisional infringement and/ or administrative enforcement notices is appropriate. We have the following suggestions for how it can be further improved.

In the first instance we fully support that the CMA, as indicated in para. 2.5 of the draft guidance, aims to continue its present practice of announcing investigations and naming parties under investigation, unless there are exceptional circumstances not to do so. We also believe that it would be useful for the CMA to say in the guidance that it will frequently also issue a general call for views on the investigation, as it has done for some such investigations in recent years, for example in relation to online console gaming.

We would also suggest that the issuing of a PIN amounts to a 'significant milestone' in the case in accordance with CMA6 (transparency and disclosure guidance, see para. 2.5) and therefore should be made public. It would be helpful if the guidance could state that relevant third party written representations could be sought at that stage too (including for supplementary notices), especially from parties who have a particular interest or perhaps made the original complaint.

In para. 2.37, we consider that the timeline for representations of 20 to 30 working days is appropriate, and are mindful of the CMA's duty of expedition. We do consider that some cases will be urgent and require a shorter deadline as appropriate to the circumstances. We agree with the factors set out in the guidance that are relevant for determining when this may be necessary, i.e.: the importance of bringing matters to a swift conclusion to protect consumers from ongoing practices; the extent to which the party has already had time to engage with the CMA's investigation since investigation opening; the amount and type of evidence referred to; the scope of the potential infringements and relevant facts; and the particular situation of the party (such as their size and resources).

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

We think that the approach is appropriate with parties offered the opportunity to attend a single oral hearing with the party asked to give an indication in advance of the matters it proposes to focus on in its oral representations at the hearing. We think that the aim of agreeing an agenda at least three working days in advance of the hearing is reasonable, subject to a decision by the Hearing Chair in the event and agenda and associated timings cannot be agreed.

Following on from the answer to question 1, if appropriate and if there is a sufficient interest the CMA should allow third parties to make representations at oral hearings, and appears to leave open that possibility more in merger / competition matters. We note, for example, that there is a formal right to be heard in some EU merger cases, through which consumer organisations have been able to provide important evidence[2].

Particularly where parties are accompanied by their legal representatives, it might be appropriate to provide that a CMA panel should include at least one of its senior internal lawyers.

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

[2] BEUC, the European Consumer Organisation, provided relevant input for example in the merger case involving Google and Fitbit.

We agree with the criteria set out for when the CMA is likely or unlikely to accept undertakings (4.7 and 4.8) - and where it will not accept undertakings (4.10).

Regarding the factors the CMA proposes to consider when deciding whether to accept, vary or release undertakings, under para. 4.8 in relation to circumstances where CMA will not accept undertakings, we believe interim Enhanced Consumer Measures (ECMs) should be established for the protection of consumers where applicable.

We consider the procedure for proposal and consideration of undertakings to be appropriate.

We welcome the reference at para. 4.14 regarding the consultation of third parties where appropriate before deciding whether or not to accept undertakings.

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

Regarding the discretionary nature of settlement, para. 4.38 states that in determining whether a case is suitable for settlement, and whether to engage in settlement discussions, the CMA will have regard to a number of factors. These include the likely procedural efficiencies and resource savings that can be achieved. We believe it is important to have a robust and consistent approach by explicitly extending the reference to the consultation with other organisations, as per Table 1 in para. 1.13 of CMA199 dated 31 July 2024.

Also, similarly under 5.3, whilst third parties will not generally have a right to comment on any remedies the CMA is looking to impose, we think that there is scope for relevant consumer law enforcers in the above Table to be added where the CMA considers that it would be of material assistance in a particular case.

In relation to para. 4.33 c), there should be more clarity around what is meant by a ‘streamlined administrative procedure’ in relation to the remainder of the investigation.

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

In section 7 it would be helpful if the CMA could state that illness of individuals would not generally be regarded as a reasonable excuse, even if

unexpected, especially in larger companies. In addition, reliance on mistaken advice from third parties should also be specified not to be a reasonable excuse.

We welcome para. 4.5 regarding a failure to comply with one or more of the terms of an undertaking without reasonable excuse that may result in the imposition of a monetary penalty and para. 4.7 where the CMA is more likely to accept undertakings in cases where the CMA is satisfied that they adequately address the CMA's concerns in relation to the issues covered by the undertakings, including taking appropriate steps to address the position of affected consumers and paying redress to affected consumers, and the undertakings can be implemented effectively and within a short period of time.

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

In general, we agree with the policy to provide for penalties which act as a meaningful deterrent for businesses by reflecting the seriousness of infringements. When backed up with directions and information notices by the CMA we expect them to create strong incentives for parties to comply with undertakings they have been given. Also, we believe it is important to consider whether the failure to comply has been remedied and impose a penalty to reflect the nature and gravity of the failure and/or to achieve deterrence, including adjustment for aggravating/mitigating factors and taking into account the size of the businesses in question.

In para. 7.24, it would be useful to have further guidance on, or indicative examples of, 'major', 'significant' and 'moderate' damage.

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

We broadly agree with the step by step approach ie.
Step 1 – calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover.
Step 2 – adjustment for deterrence and to take account of the size of the party.
Step 3 – adjustment for aggravating or mitigating factors.
Step 4 – adjustment to ensure the penalty is proportionate and the maximum cap of 10% of world-wide turnover is not exceeded.

Step 5 – application of a settlement discount where applicable.

We agree with the escalating factors in 7.25 but suggest that (b) which refers to essential products also recognises that some transactions may not be essential as such but require a substantial emotional investment or commitment by the consumers, such as a wedding or other personal event or a holiday that may have been saved for.

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

We largely agree with the guidance set out for the penalties for administrative breaches, however as set out in para. 7.44(c), provision of false or misleading information should carry a similar penalty to a breach of an undertaking or direction if done on purpose.

As with the answer to question 6 above, in relation to the table at para. 7.55 it would be useful to have further guidance on, or indicative examples of, 'major', 'significant' and 'moderate' damage.

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

Which? agrees with the approach set out in the guidance. The CMA must have a simplified process for investigations including enhanced information gathering powers to enable the CMA to intervene more effectively where there are breaches including the ability to levy monetary penalty in case of non-compliant businesses with information requests. As part of this, giving the CMA the ability to direct businesses to stop unlawful practices and issue fines without going through the courts, will make the system faster and thus become a more effective deterrent.

Regarding reasonable excuses for administrative penalties, we agree with the part of the guidance regarding foreign law, under 7.50 where it is stated that a party might claim that it has a reasonable excuse for not complying with their obligations because doing so could put the party in breach of a foreign law. The CMA recognises that there may be circumstances in which this will be the case. In order to effectively protect UK consumers and businesses from harmful practices deriving from abroad, we believe it is crucial to include in the factors the notions of international private law and the 'direct activities principle' in order to assess whether this is still a reasonable excuse to be

used by the company. If the activities ultimately affect UK consumers, businesses should take steps to provide adequate protection in order to guarantee compliance to UK consumer law.

Also, under para. 3.10 on page 31 the CMA may send an information notice to a person outside the UK where the CMA considers that the person is a potential enforcement subject, or where that person has a UK connection. We believe it is crucial to put in place formal mechanisms for cooperation and sharing of intelligence with international partners, including the EU's Consumer Protection Cooperation (CPC) network and the International Consumer Enforcement and Protection Network (ICPEN) in order to facilitate these approaches.

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

We agree with the guidance and welcome para. 6.32 which states the CMA may prioritise the enforcement of directions requiring affected consumers to receive redress ahead of the recovery of unpaid monetary penalties.

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

We are satisfied that the CMA will scrutinise the way it handles the investigation into a suspected relevant infringement and assesses the evidence before it, to ensure that its actions and decisions are well-founded, fair and robust through the use of relevant skilled individuals.

We would like to emphasise that the CMA, in the exercise of its direct consumer enforcement functions, should take care to identify both those members of the CMA Board/Panel/staff with relevant expertise on the consumer law breach and consequence of the infringement to consumers, and relevant independent experts to quantify the damage to consumers. The CMA should also make use of redress under ECMs rules (section 221 DMCC Act) and refer to other enforcers, if permitted by the time constraints, i.e. the CMA's duty of expedition.

In para. 8.3, it would be better to have decisions made by at least a panel of three people, which could make such decisions less likely to be challenged successfully on appeal.

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

We are generally satisfied with the procedure suggested in the draft rules and consider it to be fair. However, it is not clear what would be the impact of a procedural irregularity, and in particular whether the process could start again with a different decision-maker if a mistake has been made by the CMA.

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

With regard to Online Interface Orders (OIOs) and Notices (OINs), we welcome the inclusion of the guidance on these, and would urge the CMA to make use of them as effectively as possible. There may be many circumstances in relation to online platforms where other methods of enforcement are not appropriate or feasible and the criteria for the use of OIOs / OINs can reasonably apply.

Which? is also pleased to see the explanations of the continuing conduct provisions in paras 1.16 to 1.18 of the guidance, and would urge the CMA to make full use of them, as they could be significant in practice to ensure that the full impact of infringements over time is properly addressed.

It would also be important for the CMA to keep the lists of enactments in Schedules 15 and 16 to the DMCC Act carefully under review, albeit that only Schedule 16 enactments are subject to the new direct enforcement powers and any changes to the Schedules are of course a matter for the government. However, in our view any new consumer protection rights should be added to the Schedules as speedily as possible. Equally, if an enactment that is in Schedule 15 but for good reason should now also be added to Schedule 16, this too should be done.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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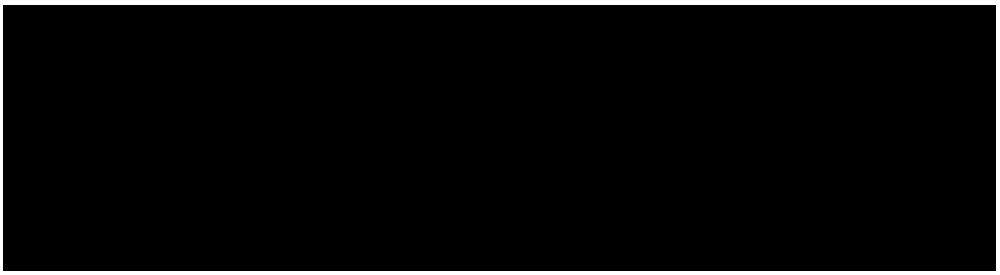

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