Paul | Weiss

CMA consultation on direct consumer enforcement
Response of Paul, Weiss, Rifkind, Wharton & Garrison LLP

1. Overview

1.1 Paul, Weiss welcomes the opportunity to comment on the CMA's consultation (the "**Consultation**") on its draft direct consumer enforcement guidance (the "**Draft Guidance**") and rules.

1.2 As a general matter, Paul, Weiss welcomes the move to a model of direct enforcement for consumer law that draws on the successful and well-functioning aspects of that model as already applied to Competition Act 1998 procedures. We set out below some observations that we hope will assist the CMA in fine-tuning the new regime to this end.

2. Expedition must be balanced with procedural fairness

2.1 The Draft Guidance briefly touches on the CMA's duty of expedition at paragraphs 1.11 and 1.12. At the conference hosted by the CMA on 9 September 2024, the CMA emphasised the importance of its new duty of expedition, and a view was expressed by CMA staff in attendance that it may be the case that consumer law investigations are particularly apt for expeditious resolution given they can often be more factually simple than Competition Act 1998 investigations (e.g. relating only to a particular contractual term).

2.2 We would contest this characterisation based on our experience of consumer law investigations under the existing regime, and would urge the CMA to take care in applying its duty of expedition to ensure that Parties have adequate time to make representations and more generally benefit from a fair procedure. For example, if alleged consumer law breaches relate to a contractual term, there may still be a task of determining the terms that were actually applicable at the point in time when potentially affected consumers entered into the relevant contracts and whether these included the offending provision; this type of analysis can quickly become factually complex when carried out across thousands of consumers and long time periods. Allowing sufficient time throughout the process for the CMA to assess the evidence presented, and for parties to make representations, will ensure procedural fairness and lead to higher quality decisions by the CMA.

2.3 In a context where the CMA may be seeking expeditiously to conclude investigations in an area of law that is, given the significant number of cases resolved via undertakings, somewhat underdeveloped, we would also encourage the CMA to take care in how it communicates publicly about consumer law investigations. In our experience, public commentary on consumer law investigations can be extremely damaging to clients, and we would urge the CMA to limit the frequency and content of public comments on

investigations – especially in the early stages – to what is truly necessary and proportionate.[1]

3. More substantive guidance is required

3.1 We believe that updated and accessible guidance on the substantive assessment of consumer law breaches would be very valuable from a compliance standpoint, a view expressed by other stakeholders at the conference hosted by the CMA on 9 September 2024. For the reasons given above, there is substantially less precedent and decisional practice available to legal advisers and companies on consumer law, making it more challenging to give targeted and precise advice on compliance. Our experience is that the guidance that exists is generally limited, is not consolidated in a clear format and appears somewhat outdated. Given the substantial powers and discretion now granted to the CMA, consolidated and clear guidance on the CMA's views on the substance of consumer law would be welcome and will improve compliance.[2]

4. Penalties should take account of legal certainty

4.1 The changes to the UK's consumer law regime give the CMA the power to impose very significant penalties. Whilst we acknowledge the rationale for this shift, we would encourage the CMA to take a measured approach for possible breaches in areas where consumer law remains underdeveloped. As noted, we think this gap can be rectified by clear and accessible guidance on consumer law issues, but new guidance will naturally take some time to "bed in" in the adviser and business communities. Whilst the regime is in the early stages of implementation, penalty-setting should take account of this.

4.2 We further note the following:

a. In the context of Rule 9, where the CMA intends to make a penalty or the directions in a final infringement notice also binding on other interconnected group members, we would encourage the CMA to ensure that any time periods for submitting representations in accordance with Rule 9.2(a) should be reasonable, given the complexities of many modern corporate structures.

b. Given that being treated as an interconnected body corporate for the purposes of section 200(3) of the Act and Rule 9 has potentially material repercussions,

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[1] For example, the CMA's announcement of its review of veterinary services in September 2023 led to high volatility in the share prices of affected listed companies, including in particular a 36% drop in the share price of CVS (https://www.cityam.com/pets-at-home-and-cvs-shares-plunge-after-cma-vows-to-investigate-veterinary-fees/). We would draw the CMA's attention in this context to the assessment of the House of Lords Financial Services Regulation Committee of the Financial Conduct Authority's proposal to make public ongoing investigations (in some circumstances) in its letter of 18 April 2024, which noted that such announcements "*[risk] having a disproportionate effect on firms named … This also risks the overall integrity of the market, including through possible unwarranted impacts on share prices* .."

[2] We note that the CMA's guidance on the Green Claims Code is a good example of clear and accessible guidance that supports compliance (https://www.gov.uk/government/publications/complying-with-consumer-law-when-making-environmental-claims-in-the-fashion-retail-sector/complying-with-consumer-law-when-making-environmental-claims-in-the-fashion-retail-sector).

we do not think it is appropriate for the CMA to discharge its obligations under Rule 9(1) by relying on the assurances of the respondent that it has agreed to notify and seek representations from interconnected corporate bodies. Such an obligation should only be discharged by the CMA where the CMA has directly notified and sought representations directly from any such interconnected corporate bodies.

5. More clarity on prioritisation would be welcome

5.1 We note that, whilst a court-based enforcement route remains open to the CMA, the Draft Guidance merely notes that it will "*choose the enforcement route it considers most appropriate*." Greater clarity on how cases are prioritised in this way would be helpful. More generally, given the CMA now has a broad range of powers to address consumer law issues including direct enforcement powers, court-based enforcement powers and market study/investigation powers (with, as we understand, a more unified internal structure within the CMA), general guidance on how the CMA will prioritise consumer law cases and choose the appropriate legal tool will improve legal certainty

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