Direct Consumer Enforcement Rules and Guidance (CMA200 and 201)

Summary of Responses to the Consultation

14 March 2025

CMA
Competition & Markets Authority

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1. Introduction

1.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer enforcement body. It helps people and the UK economy by promoting competitive markets and tackling unfair behaviour.[1]

1.2 Part 3 of the Digital Markets, Competition and Consumers Act 2024 (DMCC Act) provides new powers to the CMA to determine when consumer law has been broken. These new powers enable the CMA to investigate, determine and take enforcement action to address: (a) infringements of certain consumer protection laws, (b) breaches of undertakings given to the CMA, (c) breaches of CMA direct enforcement directions, (d) providing false or misleading information in connection with the CMA's exercise of a direct enforcement function, and (e) non-compliance with statutory information notices. Previously only a court could determine whether consumer law had been broken and take action to stop or rectify them.

1.3 The CMA published Direct Consumer Enforcement Guidance (the Guidance)[2] on 14 March 2025 to fulfil its obligations under section 212 of the DMCC Act which requires it to prepare and publish guidance about its general approach to the carrying out of its direct consumer enforcement functions. The Guidance sets out the CMA's procedures and explains how the CMA will generally conduct direct consumer enforcement investigations. The DMCC Act provides that the CMA must keep the guidance under review and may alter it from time to time. Before issuing the Guidance, the CMA consulted the Secretary of State for Business and Trade and other appropriate persons and secured the approval of the Secretary of State as required for the first guidance by the DMCC Act.

1.4 The CMA also made procedural rules (the CMA Consumer Rules)[3] as permitted by section 210 of the DMCC Act. The statutory instrument approving the CMA Consumer Rules was laid in Parliament as SI 2025/267 on 7 March 2025. Upon commencement, they will become legally binding secondary legislation applicable in cases where the CMA exercises its direct consumer enforcement functions in relation to a relevant infringement of consumer law.

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[1] More information about the CMA and its powers can be found here: About us - Competition and Markets Authority - GOV.UK (www.gov.uk).

[2] Direct consumer enforcement guidance

[3] See The Digital Markets, Competition and Consumers Act 2024 (CMA Consumer Enforcement Rules) Regulations 2025.

1.5 The CMA ran a consultation from 31 July 2024 to 18 September 2024 (the Consultation) on drafts of the CMA Consumer Rules and Guidance.[4] The CMA received 19 responses to the Consultation from stakeholders, including law firms, businesses and enforcers. As part of the Consultation, the CMA published a consultation document which explained the direct enforcement powers and the draft CMA Consumer Rules and Guidance (the Consultation Document).[5]

1.6 This response should be read in conjunction with the Consultation Document, which contains further background on the intentions behind the CMA Consumer Rules and Guidance.

1.7 The Consultation Document set out the following questions on which respondents' views were sought:

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

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

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

(d) 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?

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

(f) 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?

(g) 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?

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[4] Direct consumer enforcement guidance and rules consultation | Connect: Competition and Markets Authority
[5] Consultation document

(h) 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?

(i) 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?

(j) 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?

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

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

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

Purpose of this document

1.8 The CMA would like to thank all those who responded to the Consultation. The CMA carefully considered the representations made and has made amendments to the CMA Consumer Rules and Guidance following these.

1.9 The document summarises the comments received in response to the Consultation and explains the key changes that the CMA has made to the CMA Consumer Rules and Guidance as a result.

1.10 This document is not intended to be a comprehensive record of all views expressed in response to the Consultation, nor to be a comprehensive response to all individual views, however it does set out the general views received and the most significant. Non-confidential versions of all responses to the Consultation are available on the consultation webpage.

1.11 The CMA published the final version of the Guidance on 14 March 2025 and it takes effect on 6 April 2025, and this document should be read in conjunction with it.

1.12 The changes made in view of the responses to the Consultation are discussed below.

2. Overarching comments

Overview of responses

2.1 Alongside the specific comments on particular topics which are summarised in Chapter 3 onwards of this document, respondents to the consultation made a number of general comments about the draft of the CMA Consumer Rules and Guidance as a whole. This chapter summarises and responds to those comments.

2.2 Overall, respondents were broadly positive about the CMA's approach to enforcement. However, respondents also requested that the CMA provide further detail to enhance the predictability in the regime or strengthen the rights of the parties within the process. In particular, respondents made comments about the time allowed for making representations, the approach to calculating penalties, voluntary resolution (settlement and undertakings) and decision-making. More detailed summaries of comments can be seen in the next section of this response document.

Engagement with government

2.3 Pursuant to its obligations under the DMCC Act, the CMA consulted with the Secretary of State for Business and Trade while developing the Guidance. The CMA has also consulted the Secretary of State in the development of the CMA Consumer Rules. Technical changes have been made to the rules in accordance with legislative drafting practice, given the rules are to be approved by regulations.

The CMA's general approach, including the '4 Ps' framework

2.4 In considering the responses to the Consultation and finalising the Guidance, the CMA has had regard to its commitment to ensuring that its direct engagement with business is characterised by the principles of pace, predictability, proportionality and process,[6] which the CMA considers are key for business confidence, investment and growth.[7]

[6] The fact that we have had regard to these factors is explicitly referenced at paragraph 1.6 of the Guidance.
[7] For more information on the '4 Ps' framework, see New CMA proposals to drive growth, investment and business confidence – Competition and Markets Authority

Competition Act alignment

2.5 A number of stakeholders made points concerning the consistency of the CMA's proposed approach to the CMA Consumer Rules and Guidance with the existing CMA direct enforcement regime for the Competition Act 1998 (CA98).[8] This covered a number of topics, including decision-making, timing, settlement and penalties. There are many similarities between the two regimes, though they are not identical. The CMA has used the existing CA98 model as a basis for the new consumer direct enforcement regime, aligning them where appropriate but with some differences where it considered there was good reason for this. Chapter 3 below sets this out in more detail.

[8] Details of the Competition Act enforcement regime can be found in CMA8, which was recently updated following changes made by the DMCC Act: CMA investigation procedures in Competition Act 1998 cases: CMA8 - GOV.UK

3. Issues raised by the consultation and our response

3.1 The CMA has reviewed the Consultation responses alongside its preparations for implementing the new process to reflect on what revisions can helpfully be made to the draft Guidance. The representations received and the CMA's views on these including revisions are explained below.

Interactions with parties

Publicity/naming at or before the issue of a PIN or FIN

3.2 Five respondents made submissions asserting that naming parties before the issue of a Provisional Infringement Notice (PIN) or Final Infringement Notice (FIN) is inappropriate and damaging to a business's reputation.

3.3 One respondent expressed its support for the CMA to continue its present practice of announcing investigations and naming parties under investigation, unless there are exceptional circumstances not to do so and argued that the issuing of a PIN amounts to a 'significant milestone and therefore should be made public'.

Time limits for written representations are too short

3.4 10 respondents made submissions stating that the time limit to respond to written representations is too short.

3.5 Seven respondents compared the 12-week period afforded to parties in CA98 cases and called for the CMA to replicate the same time frame.[9] One respondent argued that given the scope for fines under the consumer direct enforcement regime are equivalent to fines for CA98 infringements, parties should be given an equivalent opportunity to exercise their rights of defence (up to 12 weeks).

[9] Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8): see para 12.3: 'The deadline for an Addressee to submit written representations will be no more than 12 weeks from the issue of the Statement of Objections and any Draft Penalty Statement. Any requests for an extension to the deadline should be communicated to the CMA as soon as possible, and in any event within five working days, following the receipt of the Statement of Objections and any Draft Penalty Statement, and must specify the reasons why an extension is required. In order not to delay investigations, extensions to the time for submitting written representations on the Statement of Objections and Draft Penalty Statement will be given only where there are particularly compelling reasons for doing so, and should not be regarded as normal practice.'

3.6 On the other hand, one respondent considered the 20 to 30 day period appropriate, and that an even shorter deadline would sometimes be required.

Oral hearings

3.7 One respondent welcomed the opportunity to make written follow up representations after an oral hearing but noted that this should be within a deadline that is appropriate in the circumstances of the case (as provided for in CMA8) and not 'promptly after the hearing' (as per paragraph 2.49 in the draft Guidance).

3.8 Six respondents stated that there should be more than one oral hearing, especially after a supplementary PIN. Contrastingly, two respondents stated that the current approach is appropriate with parties offered the opportunity to attend a single oral hearing and that generally, the representations process is clear.

3.9 Six respondents stated that oral hearing attendance should be extended to third parties including economists, professional advisers and others, as provided for in CMA8 for the CA98 cases.

3.10 One respondent noted that oral hearings should not be compulsory and another that there should be an option for these to be held outside London.

Further guidance on valid confidentiality claims

3.11 Three respondents called for clearer criteria and examples of what would constitute a valid claim for confidentiality.

3.12 Two respondents suggested that companies be given more than 10 working days to prepare a non-confidential version, especially in complex cases where significant redaction may be required.

Interaction with foreign businesses

3.13 One respondent recommended that the CMA engage further with industry stakeholders to develop guidelines that reflect the realities of multinational operations, ensuring that enforcement actions are consistent, predictable and respectful of international comity principles.

3.14 Two respondents stated that online interface providers that carry on their business entirely outside the UK and do not direct the activities of a UK subsidiary or branch, should be recognised as outside the jurisdictional scope of the CMA's powers to impose third party Online Interface Notices (OINs), even if some UK consumers use their services.

The CMA's views

Publicity/naming at or before the issue of a PIN or FIN

3.15 The CMA's practice is that it will normally publish the names of the parties under investigation in a case opening announcement, other than in exceptional circumstances, such as where doing so could, in the CMA's view prejudice a CMA investigation. The CMA's practice in this regard is well established, the CMA having moved to a policy of naming parties in CA98 and consumer cases in 2020, following a public consultation on the approach. The CMA remains of the view that the public interest in the transparency of its work means that the CMA should normally publish the names of parties under investigation in case opening announcements. Including the names of the parties under investigation in CMA case opening announcements also means that third parties, including individual consumers, who have information that may be relevant to the investigation are alerted to the investigation in a way that enables them to come forward with that information.

3.16 Moreover, the CMA considers this approach appropriate, as parties in a sector that are not under investigation should also be protected from unwarranted public speculation that they might be under investigation.

Time limits for written representations are too short

3.17 The CMA notes the responses suggesting that in complex cases more time may be needed for businesses to make representations following a PIN. The CMA has, therefore, amended the 'typical period' in the Guidance from 20-30 to 20-40 days.[10] This balances the public interest in swift intervention to protect consumers, particularly in cases involving serious or imminent harm, with the need to ensure that the parties' rights of defence are properly safeguarded. The CMA has also amended the Guidance to provide that in appropriate circumstances the deadline may be longer.[11] In all cases, the CMA will take account of the circumstances of the individual case.

Oral hearings

3.18 The CMA agrees that, in addition to relevant staff from the business under investigation, third party advisers should also be allowed to attend the hearing

[10] See Paragraph 2.37 of the Guidance

[11] See Paragraph 2.37 of the Guidance

where the business would find this useful. The CMA has amended the Guidance accordingly.[12]

3.19 Where the CMA issues a supplementary PIN, the CMA has clarified in the Guidance that the opportunity to make representations will include the opportunity to attend a further oral hearing.[13] The CMA has clarified that, save in exceptional circumstances, it would otherwise expect a single oral hearing.[14] This approach protects the parties' rights of defence while ensuring that the investigation may progress as expeditiously as possible.

3.20 In response to submissions regarding the opportunity to make written follow up representations after an oral hearing, the Guidance has been amended to reflect that the CMA will set a reasonable deadline for providing these, taking into account the circumstances of the case.[15]

3.21 The CMA also confirms that oral hearings are a right offered to parties, but there is no obligation on parties to attend an oral hearing and they may decline and submit written representations if they so wish. Parties will be informed as to where the oral hearing will take place but the CMA does not consider it necessary to include this level of detail in the Guidance. Logistics can be discussed on a case-by-case basis. For example, where parties wish to make oral representations but do not wish to travel, we would consider using technology to facilitate an effective oral hearing.

Further guidance on valid confidentiality claims

3.22 In response to calls for further guidance on confidentiality claims, the CMA does not feel it would be appropriate to provide more detail on confidentiality in the Guidance given the breadth of possible situations that may be relevant. Parties who need more information about confidentiality claims can seek their own legal advice. The CMA will set appropriate deadlines in cases.

3.23 In response to suggestions that parties be given more time to prepare non-confidential versions of representations, the CMA considers 10 working days to be appropriate, especially given parties can seek to agree an extension on a case-by-case basis.

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[12] See paragraph 2.44 of the Guidance.
[13] See paragraph 2.64 of the Guidance.
[14] See paragraph 2.42 of the Guidance
[15] See paragraph 2.49 of the Guidance

Interaction with foreign businesses

3.24 In response to concerns raised regarding the potential extra-territorial implications for businesses with multilateral operations, the CMA will be happy to discuss these on a case-by-case basis with affected stakeholders to build a better understanding of any such implications. In response to the jurisdictional scope of the CMA's powers to impose OINs on businesses who have not been found to engage, or to be likely to engage, in a relevant infringement, such providers would only be outside the CMA's jurisdiction if they did not meet the criteria in section 184(3) of the DMCC Act.[16]

Interconnected Bodies Corporate (IBCs)

Just, reasonable and proportionate test

3.25 One respondent stated that the Guidance should expand on what the CMA considers to be just, reasonable and proportionate in this context and provide examples.

3.26 Another respondent suggested that, in the context of new group members following a FIN, for example as a result of a company subject to the FIN being acquired, the Guidance/CMA Consumer Rules should explicitly say that the CMA will not generally consider it just, reasonable or proportionate to extend remedies to entities in the group of the acquirer. The respondent submitted that this would result in 'vicarious liability' for monetary penalties which, in their submission, should never be extended to other group entities as it would be inconsistent with the presumption of innocence under the Human Rights Act 1998.

Imposing all/some requirements to all/some group members

3.27 Three respondents submitted that the Guidance should clarify that the CMA can opt not to impose any requirements at all on some group members, notwithstanding the reference to 'all group members' in section 200(3) of the DMCC Act. Another respondent stated that the Guidance should also clarify that any requirements that are imposed on other group members need not be the same for all such other group members.

[16] Digital Markets, Competition and Consumers Act 2024

Methods of serving a FIN

3.28 Two respondents made submissions on the methods that the CMA uses to serve a FIN, with both arguing that notification on the CMA's webpage is an insufficient method of serving a FIN and calling for the Guidance/CMA Consumer Rules to be amended so that this method is used in addition to direct notification to the relevant party rather than as an alternative.

3.29 One respondent noted that at paragraph 2.67 of the Guidance, the CMA should mention the potential role of external legal advisers in representing interconnected bodies corporate.

New IBCs post-FIN requirement will not be imposed automatically

3.30 Three respondents said that the statute is unclear as to whether a failure by the CMA to serve notice renders the requirements non-binding, and that this should be clarified in the Guidance/CMA Consumer Rules.

The CMA's views

3.31 Where the CMA wishes to bind IBCs, it will need to include provision in the FIN for it to be binding upon all other members of the group. The CMA may only do so where the CMA considers it just, reasonable and proportionate. Where such a provision is included in the FIN, the CMA must then give the notice to any other member in relation to which the requirements are to be binding. As such, the CMA understands:

(a) The decision at FIN is whether to include a provision for the requirements also to be binding on all group members. As such, the CMA does not consider it can decide in the FIN only to bind certain companies;

(b) In order for the notice to be binding on a group member, however, the CMA is required to give the notice to that group member. As such, it is open to the CMA only to notify certain members of the group. The legislation does not however appear to envisage that the CMA may impose different requirements on group members, only that it can bind some and not others.

3.32 It may be appropriate for future IBCs to be bound. The legislation explicitly envisages this and the CMA considers it would be inappropriate to fetter its discretion by indicating in Guidance that it would not generally seek to extend these remedies to future IBCs.

3.33 With respect to notifying parties of the FIN, the guidance is silent on how this will be done but there are rules of service within the DMCC Act, which the

CMA will be required to follow. The CMA Consumer Rules only allow for the CMA to publish a notice on its website where the CMA has taken all reasonable and proportionate steps to notify a person as required but considers the FIN was not received (Rule 10(1)). The language at paragraph 2.67 of the Guidance has been clarified to reflect the latter point.

3.34 The CMA considers that what will be just, reasonable and proportionate will be case specific. The CMA will consider updating its Guidance to include examples of what might be just, reasonable and proportionate once it has concrete decisional practice in this area under the new legislation.

3.35 The CMA has made amendments to note that:

(a) the address of a party's legal representatives may be an appropriate address for service;[17]

(b) the CMA may invite representations from new IBCs after the PIN is given if the facts of an individual case justify it;[18]

(c) the CMA will invite representations from new IBCs after a FIN before giving a notice as to whether they are a member of the group, and it would be reasonable to send the notice to them;[19] and

(d) make clear that a notice to IBCs may only be given at a time when the requirements imposed by the FIN remain in force.[20]

3.36 We do not consider that further explanations or changes in relation to IBCs are required in the Guidance.

Resolution and remedies including undertakings and settlement

3.37 This section covers Chapters 4 and 5 of the Guidance and contains details of respondents' submissions on accepting, varying or releasing undertakings; the proposed minimum conditions and the process for engaging in settlement discussions and accepting settlement; and the proposed approach to the selection of remedies for substantive infringements.

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[17] See Paragraph 2.72 of the Guidance
[18] See paragraph 2.72 of the Guidance
[19] See Paragraph 2.85 of the Guidance
[20] See paragraph 2.85 of the Guidance

Summary of responses

Criteria for accepting, varying and releasing undertakings

3.38 Three respondents requested greater clarity on the criteria for accepting undertakings, suggesting that more examples should be included in the Guidance. Another respondent suggested further detail on what the notion of a 'short period of time' means as a criterion for the CMA to be more likely to accept undertakings.

3.39 One respondent highlighted concern around requiring undertakings to pay redress to consumers. 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.

3.40 One respondent queried whether the CMA would consider reviewing existing undertakings after a set period of time as this would lighten the compliance burden on in-house legal teams significantly.

3.41 One respondent noted that it was unclear if undertakings agreed with one business are expected to have wider significance for other businesses and suggested the CMA clarify its position in this regard.

Settlement

3.42 Four respondents made general comments on settlement: asking if other factors could be included in determining which cases are suitable for settlement, requesting the CMA to avoid encouraging businesses to settle that cannot dedicate the resources to the full procedure, questioning the interaction between undertakings and settlement and the meaning of 'streamlined administrative procedure' in the context of settlement.

3.43 Six respondents argued that the settlement conditions are unattractive for parties and suggested amendments to these provisions as described below:

(a) Offering a discount for early settlement even after a FIN is issued and indicating as early as possible whether a case is suitable for a settlement offer;

(b) Not discouraging 'extensive submissions' and terminating settlement discussions sparingly to give parties the ability to correct CMA misunderstandings and allow robust decisions;

(c) If a party moves to settlement after making representations, they should not have to withdraw all representations as those regarding manifest factual inaccuracies should still be made;

(d) Allowing for reasonable and proportionate requests for documents that may be relevant to the decision on whether to engage in the settlement process, without having a negative impact on procedural efficiencies;

(e) Request to notify a party if the CMA will terminate settlement discussions so that submissions can be revised if desired; and

(f) Consider consumer benefits, particularly when the settlement goes beyond mere redress and offers advantages to all users.

3.44 One respondent said they agreed with the provision requiring the trader to admit a breach before settlement can be accepted, even though they consider it may make it less likely that traders will agree to settlement.

3.45 One respondent was concerned parties would be required to admit to the infringement after seeing the Summary Statement of Case only as opposed to the PIN. The respondent considered parties should be able 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. Further, all communications prior to the letter of acceptance should be protected as without prejudice communications aimed at resolving a contentious investigation.

Settlement uncertainty

3.46 Two respondents suggested that settlement uncertainty could be reduced by indicating that without prejudice discussions are possible. One of the respondents also suggested that the CMA provisionally set out the category of harm/culpability to enable businesses to have a clearer understanding of the likely level of penalty and ensure that settlement discount conditions are clear and easy to comply with.

Settlement press releases

3.47 Two respondents made submissions on settlement press releases. One respondent argued that parties should have a say in what press releases the CMA makes on the basis of settlement discussions. Another respondent requested that paragraph 4.75 of the Guidance (which states that the CMA

will ‘generally not’ make a public announcement about the settlement discussions) mirror the equivalent wording in CMA8.[21]

Settlement discount conditions should be more flexible, concerns about withdrawal

3.48 Two respondents made submissions on settlement discount conditions. One respondent argued that the CMA should consider other discount limits depending on the circumstances of the case, rather than a fixed maximum. One respondent requested greater flexibility and potentially greater settlement discounts for cooperation and compliance efforts.

3.49 Three respondents made submissions on the withdrawal of settlement. Two suggested including the possibility for parties to provide representations before the CMA withdraws the settlement discount and allowing parties to rectify minor breaches. Another respondent raised concerns about the CMA’s one-sided ability to revoke the settlement discount while still relying on any admissions of liability made by the settling party if it breaches the settlement discount conditions (SDCs).

The CMA’s views

Undertakings

3.50 The CMA has made some clarificatory changes to the text on undertakings but believes that it is important to allow flexibility. By way of example, providing specific additional detail on timing for implementation is not possible given the wide range of potential situations covered by consumer law breaches which may, for example, require urgency to prevent serious harm to consumers or, at the other end of the spectrum, may require extensive changes to a business’s systems. The CMA has highlighted in the Guidance that what constitutes an acceptable period of time for implementation will depend on the circumstances of the case.

3.51 On the acceptance of undertakings and the inclusion of redress, it is important to note that the CMA cannot impose undertakings – they can only be offered by the respondent and accepted by the CMA. In some cases, redress may be an important part of resolving concerns. As such, the CMA considers it

[21] Guidance on the CMA’s investigation procedures in Competition Act 1998 cases (CMA8): see paragraph 14.34 of: ‘The CMA’s 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’.

desirable to retain flexibility to accept undertakings which cover redress and not fetter its discretion in this regard.

3.52 On the automatic review of undertakings, whilst the CMA can consider variation of existing undertakings on a case-by-case basis it does not believe it would be appropriate to stipulate a specific time period for the automatic review of all undertakings given the range of situations that may be covered.

3.53 In relation to third parties and undertakings, it is worth clarifying that undertakings are not directly binding on other parties, but may be helpful in understanding expectations and promoting compliance. To that end, the CMA will publish undertakings and where appropriate refer to these in future guidance.

Settlement

3.54 In light of the responses received above, the CMA has added text to clarify the operation of the settlement element of the direct enforcement regime, including those outlined below, namely by:

(a) Including an introductory sentence to the start of Chapter 4 (Undertakings and Settlement) summarising the key differences between undertakings and settlement;

(b) Adding a cross reference at paragraph 4.33 to paragraph 2.25 which provides an example of what the CMA means by streamlined administrative procedure;

(c) Including drafting at paragraph 4.36 to address concerns about encouraging parties to engage in settlement where they may not have sufficient resources to dedicate to it.

3.55 With regard to concerns raised around access to file during settlement at PIN, the CMA believes the current proposals offer the right balance between flexibility, certainty and speed. However, the CMA has clarified that access to specific documents can be requested although the extent of the request will influence the CMA's assessment of the procedural efficiencies and resource savings that can be achieved from settlement.[22] Prior to that the CMA considers that the Summary Statement of Case should provide sufficient information for the parties to decide whether to engage in the settlement process.

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[22] See paragraph 4.49 of the Guidance

3.56 The CMA acknowledges the concerns raised on settlement uncertainty. The CMA envisages that the settlement process will allow for the settlement discount conditions to be clear and easy to comply with. Additionally, if the scope of the case or settlement changes this would be reflected in the final settlement agreement. The CMA confirms that, as set out in the Guidance, the letter of acceptance is the point at which parties formally agree to the settlement.

3.57 The CMA considers that the settlement discounts have been set at an appropriate level that maintains the right balance between enabling the CMA to achieve procedural efficiencies and ensuring that penalties remain a sufficient deterrence for non-compliance. The level of maximum discounts has been designed to take into account incentives for businesses under investigation but also the likely savings to the CMA and the taxpayer if cases can be resolved swiftly. Delaying discounts until after representations would remove significant savings from the CMA's costs and would also prolong the case. On giving parties an opportunity to provide representations before the CMA withdraws the settlement discount, the CMA has not included additional steps or representations, given that the trigger for withdrawing a settlement discount could include clearcut breaches of the settlement agreement, such as where a party appeals the penalty. The CMA also does not consider that it is appropriate for settlement to be available after a finding of infringement as there would be very limited administrative savings and the amount of the penalty will already have been set.

3.58 It is important to emphasise that there is no 'right' to settlement – resolution will only be reached where both the respondent and the CMA are happy with the outcome. The CMA therefore reserves the right to terminate settlement discussions at any point. Where settlement fails, the CMA has included drafting in the text to clarify that representations relating to manifest factual inaccuracies should still be made and thus not withdrawn.[23] Additionally, the CMA has added text at paragraph 4.48 to clarify that where settlement fails, admissions will not be relied on in any PIN or FIN to address concerns raised about the unattractiveness of settlement conditions.[24] The CMA does not consider it appropriate to indicate that all discussions are 'without prejudice' given that this has a specific meaning in the context of litigation and the Guidance already provides that admissions will not be relied on in the PIN and FIN where settlement fails.

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[23] Paragraph 4.62 of the Guidance

[24] Paragraph 4.48 of the Guidance

3.59 As regards settlement press releases, the CMA will treat settlement discussions with an appropriate level of confidentiality. More information can be found in the CMA's guidance on transparency (CMA6) which sets out our approach to disclosure and publicity. The CMA has amended the Guidance to note it is standard practice not to publicise that settlement discussions are taking place or have broken down. The CMA believes the confidentiality of the settlement discussions is assured and there are appropriate procedural protections for parties.

3.60 The CMA does not, therefore, consider that any further changes to the CMA's settlement policy as set out in Chapter 4 (Undertakings and Settlement) are required. While the CMA is not at this stage making any changes to its settlement process, it intends to keep the settlement process under review. Moreover, as outlined in paragraph 3.54, it intends to apply the settlement policy in appropriate cases in a way that achieves efficiency through a streamlined administrative procedure such as streamlined approach to disclosure.

Penalties

3.61 Overall, 13 respondents made submissions or comments relating to the CMA's imposition of substantive or administrative penalties and the step-by-step approach to calculating these, as well as on factors that the CMA proposes to consider when determining whether a reasonable excuse for certain breaches exists. These are further described below.

Penalties for breaches of consumer law

Summary of responses

3.62 Five respondents made submissions on the determination of harm, calling for definitions and examples of what constitutes major, significant and moderate harm. Stakeholders also asked for further guidance on how the category of harm is determined. Further, one respondent requested detailed definitions and examples of non-economic losses and what 'large' economic loss entails.

3.63 Three respondents argued that redress should directly reduce the amount of the penalty, and that the CMA should prioritise redress over the imposition of penalties. One respondent questioned whether a penalty would be appropriate at all if a business provides redress.

3.64 Two respondents asserted that low culpability should not require a penalty and noted that level 1B culpability is assumed to be high if guidance has been issued that the practice is unlikely to comply with the law or industry

standards. The respondents argued that given the lack of independent oversight in the direct enforcement regime, the CMA should reconsider this approach. One respondent argued that CMA should do more to take account of staff training when assessing culpability.

3.65 Two respondents argued that adjusting a penalty for deterrence is inappropriate and that if the CMA were to uplift, a transparent process and framework should be in place. One respondent's view was that there should be a cap on the maximum uplift of a penalty and evidence for the scope of the uplift. On the other hand, one respondent welcomed adjusting a penalty for deterrence.

3.66 Three respondents requested greater clarity on the definition of UK turnover and asked for further guidance on how UK and worldwide turnover would be calculated.

3.67 Another three respondents noted the exhaustive nature of the list of aggravating factors in comparison to the list of mitigating factors.

The CMA's views

3.68 The CMA has made a number of changes concerning penalties in response to concerns and queries raised by stakeholders. In particular, the CMA has:

(a) Added Annex E providing illustrative (and non-exhaustive) examples of how penalties might be calculated in a number of scenarios to help stakeholders understand our approach to the categories of harm that are used to determine the starting point. These include an example of non-economic loss.

(b) Clarified the calculation of penalties, for example further explaining economic and non-economic harm and on calculating turnover for the purposes of the relevant statutory caps for penalties and the starting point. Further detail can be found in paragraphs 7.16 to 7.18 and Annex D, which also summarises and explains The Digital Markets, Competition and Consumers Act 2024 and Consumer Rights Act 2015 (Turnover and Control) Regulations 2024.

(c) Made a number of changes around the scope of harm and have streamlined the list of aggravating factors.

3.69 In response to concerns on redress, the CMA notes that redress and penalties serve two different purposes. Redress offers compensation or other redress to affected consumers whereas a penalty sanctions the conduct and deters businesses from breaching consumer law. The CMA does not

therefore consider it appropriate for there never to be a penalty in a case where an infringing business pays redress. Nevertheless, where consumers have or will received redress, this must be taken into account when considering any adjustment for deterrence (Step 2), as a mitigating factor, or when adjusting to ensure the penalty is proportionate (Step 4). In the case of Step 2, this was already provided for in the draft Guidance. As regards mitigation, the CMA has added further detail to the Guidance. In the case of Step 4, the CMA has added a reference to the party paying or being required to pay redress to consumers.

3.70 In addition, the CMA believes that it has taken the appropriate approach to culpability in penalty calculation, which has been informed by having regard to criminal sentencing guidelines and other good practice. The penalty starting point has been structured to take both harm and culpability into account, and ruling out fines for low culpability would ultimately give more weight to one criterion (culpability) over the other (harm) and could result in no fines despite major financial harm to consumers. The CMA considers the approach to culpability already allows the CMA to take sufficient account of staff training, as training staff in ways which amount to an infringement or failing to train staff to comply with the law is explicitly mentioned in the examples of high and medium culpability, respectively.

3.71 Furthermore, in respect of adjusting a penalty for deterrence, the CMA believes that deterrence is appropriate to ensure that businesses are incentivised to maintain a consumer protection compliance culture. Giving a precise figure on deterrence uplift would involve taking a ‘one size fits all’ approach. The CMA believes that a case-by-case assessment of what is appropriate in the particular circumstances of each case is required.

Administrative penalties

Summary of responses

3.72 Two respondents expressed concerns on the imposition of administrative penalties. Respondents note that the list in paragraph 7.54 which describes more serious instances of administrative breaches is too wide and separately, suggest a warning system before applying daily penalties. More generally, respondents also asked for more detail on the administrative penalty provisions.

3.73 Seven respondents raised concerns on the reasonable excuse provisions. Some respondents submitted that the definition of reasonable excuse needs further specificity and should allow more flexibility for unforeseen events.

Other respondents stated that examples such as illness and reliance on mistaken advice should not count as a reasonable excuse.

The CMA's views

3.74 The CMA believes that administrative penalties are important to the fair and swift operation of the new enforcement regime – for example that parties are not able to gain a competitive advantage by unreasonably resisting information notices. As these are relatively new powers, the CMA considers that it is important to allow practice to develop before stipulating more details.

3.75 At paragraph 7.57 of the Guidance the CMA has added more examples of circumstances that are unlikely to constitute a reasonable excuse. The CMA believes that these and existing examples on reasonable excuse are appropriate. The list of factors is illustrative and non-exhaustive. A case-by-case assessment will be needed in each instance and respondents will have an opportunity to raise any matters which they consider relevant to that assessment.

Decision Making

Summary of responses

3.76 The government consulted on potential proposals to change competition and consumer law in July 2021, including questions on giving the CMA direct enforcement powers for the CMA for consumer protection law. Further background, including on decision-making, can be found in the government's response following the consultation.[25] The government's approach to decision-making, on both competition and consumer enforcement, is also set out in some detail in the response.

3.77 Eleven stakeholders raised specific concerns about the proposed CMA approach to decision-making in the new consumer enforcement regime. In particular, some argued that the Senior Responsible Officer (SRO) should not be involved in the final decision group (FDG) for reasons of potential confirmation bias. Stakeholders pointed out that this was inconsistent with the CMA's current approach to CA98 enforcement and the existing rules on CA98. Some concerns were also raised around appropriate legal expertise in the decision-making group.

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[25] Reforming competition and consumer policy: government response - GOV.UK Chapter 3 of the responses looks at consumer enforcement

The CMA's views

3.78 The CMA has considered these points carefully but has decided to retain the approach whereby the SRO, where appropriate, may be one of the final decision makers in the FDG. The Guidance makes clear that the CMA will assess this on a case-by-case basis. There are also a number of safeguards in place to ensure that the process is robust and that respondents' procedural rights are observed:

(a) There will be three final decision makers (other than in the case of settlement, where the SRO may issue a FIN if appropriate), at least two of whom will not have been involved in the investigation since it was opened. In addition, where the SRO is a member of the FDG, the other members will be of equivalent or greater seniority. The SRO (if a member of the FDG) can be overruled by the other two decision makers;[26]

(b) There is also the right to appeal to the High Court in England and Wales or Northern Ireland, and the Court of Session in Scotland against any penalty or directions;

(c) The parties can make written representations and, if they desire, have an oral hearing which all decision makers will attend;

(d) The parties will have access to the material on the CMA's file that is relevant to matters in the PIN;

(e) Procedural matters can be referred to an independent Procedural Complaints Adjudicator.

3.79 In the light of these safeguards, the CMA considers that the Guidance provides for appropriate and sufficient separation between the investigation and final decision.

3.80 The CMA does not consider it is necessary to specify in detail what expertise decision makers will hold. Decision makers will receive specialist legal and, where appropriate, economic advice, for which the CMA's General Counsel and Chief Economic Adviser respectively will be responsible.[27] Further, the

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[26] See paragraphs 8.1 and 8.19 of the Guidance, namely: 'The final decision makers in respect of an investigation will be a group of three "relevant persons" (FDG), one of whom may be the SRO in the case' and 'with the exception of the SRO, the persons in the FDG will not have been involved in the investigation since it was opened'.

[27] Paragraph 8.9 of the Guidance.

CMA considers it important to retain flexibility in appointing decision makers in order to progress decisions swiftly in line with its duty of expedition.

Procedural complaints

Summary of responses

3.81 Eight respondents made comments or asked for changes to the CMA's approach to handling Procedural Complaints – for example asking for alignment with the CA98 process around the singular identity of the procedural complaints adjudicator (PCA); in CA98 cases this is the procedural officer. There were also some specific points requesting more time to bring a complaint, further clarity on the effect of PCA rulings and comment that the remit of the PCA is too narrow and should extend to all decisions regarding disclosure.

The CMA's views

3.82 The CMA has made some changes to help clarify the process of referring complaints to the PCA. We believe that reliance on a single individual to act as PCA across all cases may risk slowing down casework. We believe that appointing appropriate individuals from a pool is more likely to lead to swift and effective handling of concerns raised by parties. This is particularly relevant given the shorter deadline of 15 working days for the PCA to make a decision under the CMA Consumer Rules, as opposed to 20 working days under the CMA's Competition Act 1998 Rules. In that context, the CMA does not think it appropriate to allow parties more than five working days to raise a complaint with the procedural adjudicator, especially given the complaint will already have been raised with the SRO or FDG (as appropriate).

3.83 With regard to the implications of the PCA's decisions, the CMA has included the following wording to make clear that it will take appropriate steps in the light of the PCA's decision: 'The CMA will then take any steps it considers appropriate based on the nature of the PCA's decision'.[28] The Guidance further clarifies that if the decision from the PCA denying or rejecting the complaint comes back before the end of the deadline for complying with a CMA request, the complaint will not in and of itself constitute a reasonable excuse if the deadline is not then met.[29] If a complaint about a deadline which the CMA has imposed for responding to a request is not upheld by the PCA

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[28] Paragraph 9.10 of the Guidance.

[29] Paragraph 7.57(g) of the Guidance.

and the deadline has already past, the CMA would expect the party to respond to the information notice or PIN promptly after the PCA's decision is notified to them. It would not be appropriate to extend the timeframe to respond where the PCA upholds the deadline the CMA sets for complying with the request given (i) delays in cases could harm competitors who are compliant with consumer law as well as consumers themselves and (ii) this would incentivise PCA applications and undermine CMA decisions which are upheld.

3.84 The CMA has made further amendments to clarify that complaints should be made in the first instance to the SRO, or where appropriate the FDG, before being made to the PCA.[30]

3.85 In terms of the scope, the rules make clear that any significant procedural issue arising from a procedural decision may be brought to the PCA. The CMA has amended the Guidance to make clear that, save where a complaint is vexatious, the same process can be followed for procedural complaints during an administrative enforcement investigation as during an investigation into an alleged substantive breach.[31] Substantive decisions, on the other hand, are not covered by the PCA procedural complaints process but may be appealed to the courts.

3.86 The CMA believes it has adequately addressed the concerns raised by stakeholders whilst ensuring that PCA challenges do not threaten the CMA's duty of expedition in progressing cases. The CMA is aiming to strike the right balance between the safeguards for respondents and the need to progress cases in the public interest. The CMA will always endeavour to act reasonably and to consider any requests on their merits.

Other comments

Summary of responses

Comments on areas covered in separate guidance

3.87 Several respondents made submissions stating that there is an overlap regarding enforcement responsibilities. The majority of respondents requested further clarity on the interaction between the CMA's process with the roles of other sector-specific regulations. Some of these respondents highlighted the importance of ensuring mechanisms are put in place to refer cases to the

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[30] Paragraphs 9.2 and 9.3 of the Guidance.
[31] Paragraph 9.11 of the Guidance.

CMA and that the necessary supporting arrangements between enforcers to ensure accountability within the system are made. One respondent also asked about the interaction between redress and private actions.

3.88 One respondent stated that the Guidance is too detailed for small businesses and suggested the CMA prepare a shorter Guide setting out the key steps, stages and timelines.

3.89 One respondent asked the CMA to provide more information on when on-site inspections / dawn raids would be proportionate.

Interaction with parties

3.90 We received a submission requesting more clarity on early interactions with parties and one around whether we would issue a draft PIN.

Duty of expedition

3.91 Five respondents suggested that the duty of expedition (section 237 of the DMCC Act) should only impact the CMA's actions.

The CMA's views

Comments on areas covered in separate guidance

3.92 This Guidance is designed to set out the CMA's approach to the exercise of its direct enforcement powers and statements of policy with respect to the exercise of its powers to impose monetary penalties. As such, the CMA does not consider it necessary to include further information on landscape interactions within this Guidance. It will however consider whether further information on the interaction of the CMA's process and sector-specific regulations should be included in the CMA's Consumer protection enforcement guidance: CMA58).

3.93 As on-site inspections / dawn raids are a power the CMA has across tools, the CMA considers further information on this would also sit better within CMA58.

3.94 The CMA will consider whether to publish a short guide aimed at assisting businesses in understanding the key steps in any enforcement case and their rights within it.

3.95 The CMA considers that it has included sufficient detail on the interaction between redress and private actions in paragraph 5.21 of the Guidance.

Interaction with parties

3.96 The CMA acknowledges the importance of engaging with businesses productively and efficiently throughout the investigation. As such, it has included additional language indicating it would typically offer an initial meeting at case opening with the party to explain the process and timeline.[32] In addition, while the CMA does not consider it appropriate either to send a draft PIN where the PIN provides an opportunity for the party to send in representations or to commit to sending a draft information notice, it will offer a call either before or after issuing an information notice where it considers this would assist in ensuring the CMA receives an appropriate and targeted response to its information notice.[33]

Duty of expedition

3.97 The CMA notes that the duty of expedition is a general duty on the CMA in respect of its competition, consumer and digital markets functions under which the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable. The duty of expedition may be relevant therefore to the timing of deadlines set by the CMA (for example for responses to information notices). It is clear that this duty does not override the CMA's administrative law duties, including the duty to act reasonably and fairly. It is also potentially relevant that any ongoing conduct breaching consumer law may continue to have a negative impact on consumers as well as businesses that are complying with the law. The CMA will consider how best to balance these considerations whilst ensuring it sets reasonable deadlines on a case-by-case basis.

Other amendments

3.98 The CMA considered the number of representations suggesting alignment with CA98 and CMA8. With that in mind, the CMA considered it would be a helpful addition to include language around self-incrimination. The CMA has therefore set out what it considers it may or may not require a party under investigation to produce, and that should a party consider a response to be self-incriminatory, it should indicate this as early as possible together with a detailed justification.

3.99 In addition, the CMA has included some clarifications on decision making for substantiation, which would be confirmed by the FDG.

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[32] See paragraph 2.8 of the Guidance.

[33] See paragraph 3.11 of the Guidance

The CMA Consumer Rules

3.100 A limited number of respondents made comments on the CMA Consumer Rules. These are described below.

Summary of responses

3.101 In regards to Rule 5, one respondent submitted that if the CMA deemed any of the criteria in Rule 5(1)(a)-(g) to be met, redaction of the information in question would be the appropriate measure for the CMA to take rather than withholding the material from inspection in its entirety.

3.102 One respondent stated that they were satisfied with the procedure suggested in the draft CMA Consumer Rules in regard to procedural complaints (Rule 6) and considered it to be fair. However, they noted that it was not clear what the impact of a procedural irregularity would be, and in particular whether the process could start again with a different decision maker if a mistake had been made.

3.103 Another respondent noted that the list of matters included in the draft CMA Consumer Rules was expressed to be non-exhaustive and questioned why the rules could not cover certain matters that are included in the CA98 rules but which were not included in the draft CMA Consumer Rules and the DMCC Act, such as:

(a) Rules for formalising the role of the FDG (and the requirement that the FDG does not include the SRO);

(b) Businesses' rights to legal representation during investigations and inspections;

(c) In regard to Rule 6, extending the remit of the PCA to all decisions regarding disclosure, not just those relating to confidentiality; and

(d) Including a new rule requiring the FDG to comprise individuals that were not involved in the issue of a PIN.

3.104 In regards to Rule 9, the same respondent argued that the CMA Consumer Rules should include a specific provision that, if the CMA intends to extend directions or liabilities for penalties to entities that become part of the group after the CMA has issued a PIN, it must notify them that it intends to do so, and invite written representations on whether it is just, reasonable and proportionate to do so, as well as whether the entity meets the interconnection criteria (i.e. the same requirements as set out in Rule 9(1) in respect of the period prior to the issue of a FIN).

3.105 Another respondent made comments on Rule 9, encouraging 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. The respondent also noted that it is inappropriate for the CMA to discharge its obligations under Rule 9(2) by relying on the assurance of the respondent that it has agreed to notify and seek representations from interconnected bodies corporate (IBCs). In their view, this obligation should only be discharged by the CMA where the CMA has been directly notified and sought representations directly from any such IBC.

The CMA's views

3.106 The CMA has not made any specific changes to the CMA Consumer Rules to address these comments though some of these points have been covered in the Guidance instead, namely:

(a) The CMA will take into account any decision made by the procedural complaints adjudicator in progressing the case. How this translates in practice will be very case specific and we do not consider it is appropriate to try to envisage each scenario which could arise in the Guidance.

(b) The approach to representations and the notification of members who become part of a group of IBCs after a FIN is now covered in the Guidance.[34]

3.107 The CMA does not consider it necessary to set out in the CMA Consumer Rules who can make decisions when this is set out in authorisations and the expected practice is extensively covered in the Guidance. Similarly, the approach to legal representation during inspections will be covered in CMA58. With respect to Rule 6, we have addressed the representations on scope at paragraph 3.85 above. The CMA considers the level of detail in the CMA Consumer Rules relating to inspection of the file is appropriate for the CMA Consumer Rules and is supplemented by the Guidance. The CMA considers that when it will be appropriate to redact rather than withhold a document in its entirety will need to be assessed on a case-by-case basis.

3.108 Finally, with respect to Rule 9, the CMA considers it will in any event be required to provide a reasonable amount of time for submitting representations in line with general public law considerations and therefore it is not necessary to specify this in the CMA Consumer Rules. Given the

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[34] See Paragraph 2.67 of the Guidance

resulting procedural efficiencies, the CMA considers it will be appropriate for a respondent to seek representations from its IBCs in instances where the respondent has agreed to this.

4. List of respondents

4.1 ABTA

4.2 Ashurst LLP

4.3 British Retail Consortium

4.4 City of London Law Society Competition Law Committee

4.5 Clifford Chance LLP

4.6 CMS Cameron McKenna Nabarro Olswang LLP

4.7 Federation of Small Businesses

4.8 Freshfield Bruckhaus Deringer LLP

4.9 Herbert Smith Freehills LLP

4.10 Knights

4.11 Linklaters LLP

4.12 News Media Association

4.13 Paul, Weiss, Rifkind, Wharton & Garrison LLP

4.14 Society of Motor Manufacturers and Traders

4.15 techUK

4.16 TLT LLP

4.17 Trading Standards Scotland

4.18 Which?

4.19 Yoti