

CMA Consultation: Consumer protection: enforcement guidance

Consultation response from the

Centre for Competition Policy

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This consultation response has been drafted by named academic members of the Centre, who retain responsibility for its content.

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General comments on structure

1. The University of East Anglia's Centre for Competition Policy (CCP) welcomes the opportunity to respond to the CMA's consultation on its Consumer Protection Enforcement Guidance. The imperative of effective enforcement, while a key facet of effective regulation, needs to be viewed in the round (Ayre and Braithwaite, 1992; 2016; Amodu, 2008) as is alluded to at para 2.8 but not stated explicitly. Central to the task of effective enforcement is ensuring that those who are being regulated, or are participants in the regulatory process, understand what can be expected from that process. The principles of clarity, simplicity and fairness are thus the bedrock upon which any enforcement practices and guidance should be based. Put simply - the question regulators might ask themselves is whether those to whom the guidance is addressed, whatever their capacity, can understand in broad terms, how and why the regulator is exercising its powers.
2. On the question of structure and clarity, we would encourage the CMA to revisit the exposition of the legal provisions at 5 of the guidance. Whilst it is helpful to explain the prospective provisions, this does not necessarily serve the function of enforcement guidance. More could perhaps be done to separate out the legal provisions of the Digital Markets, Competition and Consumers Act (DMCCA) from guidance as to how the Authority will use its powers. This will a) go some way to satisfying the generic public law duties to which all regulators are subject and b) be a useful guide to all parties, not only those being regulated but co-regulators and consumers. It is not until c. 5.46 that we begin to understand how the CMA may begin to deploy its powers. Even then, statements of the proposed legislation are mixed with guidance in a manner that may not be particularly helpful to those subject to possible action e.g. the significant powers relevant to criminal enforcement bury the evaluative guidance – 6.4 – 6.7. Paragraphs 6.11 – 6.13 contain no real guidance at all – something which may be very relevant for those who are being regulated. The CMA appears to be more confident by Ch 7 and I would encourage some thought as to how Ch 6 could be dealt with in a similar fashion.

Detailed comments

1. Para 2.5 We would query the situation where data is derived from other credible sources, which the CMA has not necessarily undertaken. Would this inform decision-making? Would it be useful to triangulate data deriving from the CABx, Trading Standards or the Consumers' Association explicitly (which we suspect happens in practice). It would be unfortunate if the CMA were to constrain its activities by referring solely to its own data. This can be inferred from para 3.10 et seq. and Ch 4, especially Chapter 4 at para. 4.10.
2. Para 3.3 It might be preferable to use the phrase "signal appropriate behaviours" as the CMA presumably does not wish to tie itself regarding when action may be appropriate. This could invite a public law challenge to any exercise of the discretion as to when to enforce.

3. Para 3.8 (b) p. 11 The extent of the administrative burdens on who, business (are other options available to mitigate market failure), consumers (in terms of seeking information) or the CMA?? Following on from this
4. Para 3.11 Please explain what is meant by risk. Inevitably the guidance will be considered forensically (by those being regulated especially) and so it is good to try to be as explicit as possible.
5. Para 3.12 Is there something missing here? And so, this will inform its enforcement practices??
6. Para 3.15 et seq. It may be prudent to anchor practices with general public law principles – e.g. the CMA will be guided in its decision-making by the general public law duties of fairness and legitimate expectation. Thus will the CMA’s enforcement duties and strategies be informed by these? It is not apparent from what is written.

As I understand it references to the provisions in Parts 3 and 4 of Chapter 3 remain prospective i.e. they are not in force. The discussion is highly descriptive and I can only assume that the enforcement guidelines will be dovetailed to the coming into force of the relevant provisions.

Other comments

While the Better Regulation Framework (as amended in 2023) does not apply to independent regulators as such, the Framework could be seen as a material consideration and could perhaps be referred to.

Furthermore, the references to being “likely” to take action are perhaps unfortunate – this brings with it connotations of statistical evaluation which the CMA may wish to avoid. It might be preferable to use standard legalese – as in “may”. For example at para 6.4, the CMA may use its criminal enforcement powers .. Additionally, it may be simpler to deploy the template of the Criminal Procedure and Investigations Act Code of Practice, “tweaked” as appropriate, at the stage of considering *whether* to investigate. I am sure that other public prosecutors practices may be deployed here to good effect.