

Competition and Markets Authority
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Consultation Response

Which? response to the CMA's consultation on draft consumer protection enforcement guidance (CMA 58ii)

Submission date: 21st January 2025

Summary

Which? welcomes this opportunity to respond to the CMA's consultation on revised consumer protection enforcement guidance, taking into account the CMA's new direct civil enforcement powers under the Digital Markets, Competition and Consumers (DMCC) Act 2024.

We generally support the guidance and think that it is clear and well structured. However, at a time when the consumer landscape is facing a number of challenges, including increasingly strained and limited Trading Standards Services, we have suggested that some areas are expanded to explain how the CMA will operate and make effective use of its powers given this wider context, including:

- how decisions are made about when action is likely to be precedent setting;
- how coordination with other enforcers and decisions about which authority is most appropriate to act can be made in a timely way that achieves an effective outcome;
- further clarity on how the CMA will work with international partners and deal with cross-border issues;
- how CMA published guidance relates to other guidance; and
- how the CMA's other powers will be relevant, including references to its competition law powers, responding to super-complaints and the new Digital Markets Unit (DMU) regime.

Full response

1. Do you have any comments on the structure or clarity of the Draft Guidance?

The structure of the guidance is helpful and logical, setting out the CMA's role and powers in general, its approach to enforcement, how it works with other consumer protection enforcers and compliance partners and then use of civil consumer enforcement powers, criminal consumer enforcement powers and powers of investigation.

We think that it would also be helpful to have a specific section on how the CMA works with other enforcers internationally, including when dealing with cross-border issues or with businesses that are based in another jurisdiction.

2. Does the guidance offer sufficient clarity about how the CMA proposes to carry out its enforcement functions?

The guidance is generally clear. We have the following suggestions for how it can be improved or where specific aspects could be expanded upon:

Approach to guidance

The CMA's approach to guidance and compliance advice is set out on page 6 of the draft guidance. This explains that "Where appropriate, the CMA may publish advice, guidance or information based on detailed knowledge gained from work in the consumer arena through which it has obtained relevant expertise, such as a compliance review, a market study, a decision it has made under its direct enforcement powers, or a precedent-setting court case". It would be helpful to expand on how the CMA will make a decision to do this and its relative status, taking into account existing guidance that has been provided by other bodies and how they are likely to relate to each other.

Range of available powers

The guidance should also include background information about the CMA's other powers that can be relevant. This can include references to its competition law powers, responding to super-complaints and the new Digital Markets Unit (DMU) regime. This was referenced in the previous version of CMA58 (see para. 2.30).

Incentivising business change

In terms of the CMA's general approach to enforcement (page 9), we agree that it is important that enforcement interventions deliver high impact results and therefore that the CMA focuses on particular types of cases. The guidance states that enforcement action may be appropriate in particular (a) where breaches of the law point to systemic failures in the market (b) where changing the behaviour of one business would set a precedent or have other market-wide implications (c) where there is an opportunity to set an important legal precedent or (d) where there is a strong need for deterrence or to secure compensation for consumers.

We agree with all of these criteria, but think that it may be helpful to provide some further detail on how these might be applied in practice. For example, it would be helpful to explain what is considered to be systemic and how this may vary in different contexts and markets. It is also important that when putting the CMA's efforts into changing the behaviour of one business, an assessment has been made of the market dynamics and the likelihood of this driving change in order to avoid a 'scatter gun' approach that inadvertently emboldens rather than deters the businesses' competitors.

As we have also highlighted in relation to enhanced consumer measures (ECMs) below, the guidance could usefully provide some scenarios to help explain when the need to secure compensation for consumers will be an important driver.

Enforcement route selection

We generally agree with the circumstances set out for how the CMA will use its direct enforcement powers or when a civil enforcement approach through the courts or pursuing a criminal prosecution is more appropriate and agree with the CMA's prioritisation principles. It may be helpful to expand on the section 'consistent and targeted' which explains how the CMA will consult with compliance partners where powers are shared to ensure that action is taken by the body that is best placed. It is important to ensure effective coordination and action by the most appropriate enforcer, without a process that leads to unnecessary delays, either by the CMA or by another enforcer.

Compliance partners

When considering whether another enforcer is best placed to take action, it is also important to consider whether they have the ability to achieve maximum compliance in a way that is both effective and appropriate - and what this may mean in particular circumstances. Effective data sharing between enforcers will be crucial and should also be emphasised in the guidance.

Trading Standards

There will be many examples of non-compliance that are a shared responsibility between the CMA and Trading Standards Services within local authorities, as well as through National Trading Standards, as the guidance explains. Given the potential for a lot of cross-over and given the increasing limitations of Trading Standards Services because of a lack of resources and to a certain extent, expertise, it would be helpful if the guidance could expand on how decisions will be made as to where the CMA should take action rather than Trading Standards - as well as how it may support Trading Standards Services in taking action, including where a local authority may be the primary authority for a business.

International partners

As set out in response to question 1, it may be helpful to pull out the CMA's approach to international collaboration and cross-border issues in a specific section or chapter. We fully support the CMA taking on a pro-active role through the inter-governmental bodies that are specified eg. ICPEN, UNCTAD and OECD and think that the guidance could provide more detail on how it will do this, for example, where it will look to take a leadership role on a particular issue. It is also important to ensure that the CMA also has strong bilateral relationships, both informally as well as formally - and that it works closely with DBT to ensure that the government's trade strategy and approach to negotiating specific trade agreements recognises the importance of cooperation on enforcement. This includes ensuring effective cooperation with EU partners on consumer protection in a similar way to the arrangements that have been put in place for cooperation on competition enforcement matters.

Transparency

We fully support the emphasis on transparency throughout the guidance. As well as aiding consumer and business understanding of how it works, this can be a deterrent for non-compliance.

Use of undertakings (civil enforcement)

We welcome the guidance at section 5 regarding the considerations and use of undertakings. We would be grateful if further guidance could be given in regard to paragraph 5.12 and the factors that would prompt an urgent application for an enforcement order, are there any practical examples that could be given where an order would be deemed preferable to an undertaking?

Enhanced consumer measures

It would be helpful if the guidance could give more detail on when the CMA would choose to apply for ECMs. Paragraph 5.26 of the draft guidance sets out the factors that the enforcer may take into account when considering whether to implement an ECM. Further detail added to this paragraph on different scenarios and practical examples that may or may not warrant an ECM would help to clarify how the powers should be applied. It would also be useful for the guidance to expand on whether (or at all) greater weight should be given to the potential benefit of an ECM to consumers over the consideration of cost.

Online interface orders

In regard to Online Interface Orders (OIOs), it would be helpful for further clarification on a number of points regarding the intended use of OIO's, particularly in relation to the guidance set out at paragraph 5.30 of the draft guidance.

In relation to paragraph 5.30 b) of the guidance, it would be helpful to clarify the practical implications of the need for there to be no other available means of enforcement before the use of OIO's become a possibility. Would the initial use (and failure) of an enhanced consumer measure be enough to prompt the use of an OIO? Or would the CMA have to exhaust all other possibilities before using an OIO?

In relation to the guidance at paragraph 5.30 c), if the collective interests of consumers are at risk of serious harm - does this override the need to explore other means of enforcement first? It would also be useful to have clarification on how serious harm will be measured.

- 3. Do you have any other comments on topics not covered by the specific questions above? If so, the CMA requests that respondents structure their responses to separate out their views in relation to each of the Draft Guidance's chapters.**

Chapter 4 - Consumer Protection Partnership

It is important that the CMA works with DBT and other enforcers to ensure that the CPP is able to operate as a strategic and effective body. Our understanding is that it currently doesn't operate in this way which may limit the extent to which the CMA can follow through on the approach set out in this guidance.

Annex A - Consumer Protection Landscape

It would be helpful if the section on 'Citizens Advice and other consumer bodies' could also refer to the role of Which?.

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.

