

# **Competition and Markets Authority (CMA)**

## **Consumer Protection: Guidance on the CMA's approach to use of its consumer powers**

**Consultation document**

September 2013

CMA7con

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This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma)

## **Scope of this consultation**

### **Topic of this consultation**

This consultation seeks the views of interested parties on the attached draft supplemental guidance (the Draft Guidance) which the CMA Transition Team (the Transition Team) (on behalf of the Competition and Markets Authority (CMA) and in consultation with the Office of Fair Trading (OFT) and Competition Commission (CC)) proposes to issue in order to explain the changes that are introduced by the Enterprise and Regulatory Reform Act 2013 to the consumer protection regime and the use of its consumer powers.

This consultation and the accompanying Draft Guidance have been drafted by the Transition Team which has been appointed by the CMA Chair Designate and Chief Executive Designate, and consists of individuals from the OFT, the CC and elsewhere.<sup>1</sup>

### **Geographical scope**

The geographical dimension to this consultation is primarily the UK.

### **Impact assessment**

Not applicable for this consultation.

### **Basic information**

This consultation is aimed at all those who have an interest in consumer protection and the CMA's proposed approach to use of its consumer powers. In particular, it may be of interest to businesses and their legal and other advisors, and to organisations representing consumers' interests.

### **How to respond**

We would welcome your comments on any aspect of the Draft Guidance contained in this document. Annexe A contains the specific questions on which your feedback is sought. Please respond to as many questions as you are able and provide supporting evidence for your views where appropriate.

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<sup>1</sup> Pending formal creation of the CMA on 1 October 2013, the OFT and CC act on behalf of the CMA through the Transition Team.

You can respond to this consultation:

By email to: [cmaconsultation@bis.gsi.gov.uk](mailto:cmaconsultation@bis.gsi.gov.uk)

By post to:

The CMA Transition Team on behalf of the CMA  
(c/o Easha Lam)  
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London SW1H 0ET

When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Please also indicate whether you are happy for your response to be made available on the CMA's website. Further information regarding our use of data received during this consultation is provided below.

### **Enquiries**

If you have any queries regarding the content of the consultation please contact Easha Lam on the email address above or by telephone on 020 7215 2044.

### **Closing date**

Responses should be received by 5pm on Monday 11 November 2013.

### **Next steps**

The Transition Team will consider the responses to this consultation document and make amendments to the Draft Guidance where appropriate. The CMA Board (once established) will make the decisions on the matters being consulted on and the content of the final guidance, to be published in advance of 1 April 2014.

### **Compliance with the Cabinet Office Consultation Principles**

This consultation complies with the Cabinet Office Consultation Principles. A list of the key criteria, along with a link to the full document, can be found at Annexe B.

## **Consultation period**

The deadline for responses to this consultation is eight weeks. While this represents an expedited consultation period, we note that the in-depth Government consultation exercise which led to the decision to create the CMA asked a number of questions and yielded a number of valuable responses on issues related to this consultation, which have informed the contents of the Draft Guidance. Furthermore, the timetable for the formation of the CMA requires that consultation exercises on numerous proposed guidance documents need to be carried out within a very short period of time. We feel that, given these considerations, the eight week consultation period is an appropriate one to obtain responses from interested parties.

## **Feedback about this consultation**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mr John Conway  
Consultation Coordinator  
1 Victoria Street  
London SW1H 0ET

Telephone John on 020 7215 6402 or email to: [john.conway@bis.gsi.gov.uk](mailto:john.conway@bis.gsi.gov.uk)

## **Data use statement for responses**

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to publish or refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for

information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

**CMA7con**

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# 1 INTRODUCTION

## Background

1.1 The CMA will be established under the Enterprise and Regulatory Reform Act 2013 (ERRA13)<sup>2</sup> as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and many of the functions of the Office of Fair Trading (OFT) will be transferred to the CMA and these bodies abolished. The CMA's primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.

1.2 The CMA will have a range of statutory powers to address problems in markets:

- under the Enterprise Act 2002 (EA02), the CMA will be able to investigate mergers which could potentially give rise to a substantial lessening of competition and specify measures which the merging parties must take to protect competition between them while the investigation takes place
- the EA02 will also enable the CMA to conduct market studies and market investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
- the CMA will have powers to enforce a range of consumer protection legislation (either directly or through Part 8 of the EA02) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
- the CMA will also take on the CC's powers and duties in relation to the conduct of appeals regarding regulatory determinations such as under section 193 of the Communications Act 2003
- the CMA will also be able to bring criminal proceedings against individuals who commit the cartel offence under section 188 of the EA02, and

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<sup>2</sup> See Annexe C for a glossary of terms used within this consultation document.



- finally, under the Competition Act 1998 (CA98) the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 1.3 The ERRA13 implements a number of enhancements to these statutory powers (compared to the powers available to the CC and OFT), in order to improve the robustness of decision-making, increase the speed and predictability of the CMA's activities, and strengthen the UK's competition regime as a whole.<sup>3</sup> The Transition Team has produced a series of draft guidance documents to assist the business and legal communities and other interested parties in their interactions with the CMA, and is consulting publicly on them.

## **Purpose of this consultation**

- 1.4 The purpose of this document is to consult on draft Guidance on the CMA's approach to the use of its consumer powers (Draft Guidance) (see Annex E) which explains the CMA's core consumer functions as a result of the changes brought about by the ERRA13, its proposed approach to promoting business compliance with consumer protection law, the use of its civil and criminal enforcement powers, and how it will work in partnership with co-enforcers to build an effective consumer enforcement regime.
- 1.5 It is intended that the Draft Guidance will supplement OFT existing guidance on the consumer protection regime, which includes: 'Guidance on Part 8 of the Enterprise Act 2002' (OFT512) and 'Consumer protection from unfair trading' (OFT 1008). The Transition Team is consulting separately on its proposal to put existing OFT and CC guidance documents to the CMA Board (once established) for adoption.<sup>4</sup> Those adopted guidance documents will however be kept under review once the CMA is in operation, in the light of its developing practice and case experience. Annex E of the Draft Guidance

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<sup>3</sup> An overview of the changes is contained in CMA1: Towards the CMA, published on 15 July 2013 and available at [www.gov.uk/cma](http://www.gov.uk/cma)

<sup>4</sup> See CMA12con. As those pre-existing documents were published prior to the amendments to the EA02 made by the ERRA13, they will (if and when adopted) need to be read subject to the Draft Guidance and to certain other 'global' changes resulting from the coming into force of the ERRA13 (for example, reading references to the OFT as referring in each case to the CMA). See Annex E of the Draft Guidance.

lists the existing consumer protection-related OFT and CC documents that it is currently proposed will be put to the CMA Board for adoption.<sup>5</sup>

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<sup>5</sup> For completeness, it is noted that Annexe B has been drafted (in common with the remainder of the Draft Guidance) as assuming that the CMA has been established and that the existing OFT and CC documents listed have been adopted by the CMA Board. Notwithstanding this drafting, the list represents only the Transition Team's current proposal as to which documents will be put to the CMA Board for adoption. It (and any other references in the Draft Guidance to OFT/CC documents having been adopted by the CMA) is therefore provisional and subject to change.

## 2 SUMMARY OF CHANGES TO THE CURRENT POSITION

### Introduction

- 2.1 The Government has undertaken a major reform of the consumer protection regime to offer improved value for money and make it fit for the challenges of the future.
- 2.2 This was a response in particular to the National Audit Office's 2011 report, 'Protecting Consumers',<sup>6</sup> which reviewed consumer protection in the UK and found that consumer detriment occurred at national and regional level but the incentives were weighted towards tackling local issues. This, it argued, contributed to an 'enforcement gap' where large regional and some national cases might not be addressed. The Government proposed various reforms in its consultation 'Empowering and Protecting Consumers'<sup>7</sup> and in response many stakeholders agreed that the existing consumer landscape, comprising an array of public, private and voluntary bodies with overlapping responsibilities, was too complex and caused considerable consumer confusion.
- 2.3 The Government response to the consultation 'Empowering and Protecting Consumers'<sup>8</sup> set out how it aimed to increase consumer empowerment by:
- reducing the complexity of the consumer landscape and streamlining the publicly funded institutions that exist to help consumers
  - strengthening the effectiveness of enforcement of consumer rights, and
  - ensuring that activities that help consumers to be empowered are delivered more cost-effectively and in a way that links national and local intelligence about the problems consumers face.
- 2.4 With the OFT increasingly focusing on cases which could have market wide impact and local authority Trading Standards Services (TSS) primarily concerned with local issues, it was felt that cross boundary and regional

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<sup>6</sup> [www.nao.org.uk/report/protecting-consumers-the-system-for-enforcing-consumer-law/](http://www.nao.org.uk/report/protecting-consumers-the-system-for-enforcing-consumer-law/)

<sup>7</sup> Empowering and protecting consumers: Consultation on institutional changes for provision of consumer information, advocacy, education, advice and enforcement, June 2011 see [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes)

<sup>8</sup> For the Governments response to the consultation see [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf)

cases were a significant source of consumer detriment and were not being addressed.

- 2.5 The Government was therefore keen to simplify the landscape by reducing the number of bodies and also re-directing resource on enforcement towards TSS while increasing their national leadership capacity.
- 2.6 Collectively the Government's reforms to the competition and consumer landscape have therefore been designed to support growth by improving consumer protection and further empowering consumers by giving them greater clarity on where to turn to for help and advice.

## **Changes to the consumer landscape**

- 2.7 The changes to the consumer landscape began in advance of the formation of the CMA. Key changes were made in April 2013 (see below) and the remainder will happen in April 2014 when various functions and powers of the OFT are transferred to the CMA and others move to TSS.
- 2.8 The changes to the consumer landscape from 1 April 2013 are summarised below:

### **Functions transferred fully out of OFT as at 1 April 2013**

- Responsibility for the provision of consumer education, advice and guidance has transferred to the Citizens Advice Service.
- The OFT's Consumer Code Approval Scheme (CCAS) has closed and has been replaced by a self funded successor scheme operated by the Trading Standards Institute (TSI).
- Responsibility for the operation of various databases has been transferred to TSS including the National Intelligence Management Database (covering England, Wales and Scotland), the Consumer Regulation Website and Central Register of Convictions.

### **Functions partially transferred out of OFT as of 1 April 2013**

- As of 1 April 2013 enforcement of consumer law at national level largely became the responsibility of TSS. The new National Trading Standards Board (NTSB) will provide leadership and support to ensure that national and cross-local authority boundary enforcement is prioritised by TSS. The equivalent functions for Scotland will be performed by the

Convention of Scottish Local Authorities (CoSLA) and by the Department of Enterprise, Trade and Investment (DETI) for Northern Ireland. The OFT retained its full range of powers to enforce consumer law in order to tackle practices and market conditions that make it difficult for consumers to exercise choice. However, it no longer has a duty to enforce any piece of legislation.

- The OFT retains its leadership role for the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) with primary expertise to tackle issues such as misleading statements, hidden fees, drip pricing and hidden surcharges. However, the OFT no longer has a duty to enforce the UTCCRs and instead shares a power to enforce with TSS. This reflects the fact that the OFT and TSS have equal responsibility for enforcement. The OFT retains primary responsibility for providing business guidance on the UTCCRs.
- Leadership on business education has passed from the OFT to the TSI but the OFT retains primary responsibility for business education on the UTCCRs and may also issue specific guidance for businesses where it has conducted a market study or other in-depth analysis of business practices in a particular sector.

### **Functions which remained with the OFT but are not transferring to the CMA at 1 April 2014**

- Operation of the Consumer Credit Licensing system will transfer to the Financial Conduct Authority,
- Estate Agency supervision and negative licensing, redress schemes and AML will transfer to the TSS.

2.9 However, the CMA will inherit the range of consumer enforcement powers from the OFT as part of its toolkit and will play a vital role in ensuring that competition and markets work well for consumers.

### **Legal framework for reform**

2.10 The reforms to the consumer landscape outline above have been implemented by various pieces of legislation, as summarised below:

## **The Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function of Modification of Enforcement functions) Order 2013 (the PBA Order)**

- transferred the OFT's statutory consumer advice scheme function to Citizens Advice and Citizens Advice Scotland (Citizens Advice services) and made consequential amendments to the payment of the levies on the gas, electricity and postal services industries to ensure that industry levies to fund Consumer Direct were transferred from the OFT to Citizens Advice services
- amended various secondary legislation<sup>9</sup> to ensure that whilst the TSS retains various duties to enforce consumer legislation, the OFT's duties are changed to powers
- amended section 214 of the EA02, to provide that enforcers will no longer need to consult with the OFT before they apply for an enforcement order. Instead enforcers are required to notify the OFT.

### **ERRA13**

2.11 The ERRA13 makes a number of provisions in relation to the CMA's consumer enforcement functions. In summary it:

- enables the CMA to have an international consumer advocacy role
- transfers the OFT's super-complaint function to the CMA
- deletes section 8 of the EA02, under which the OFT operated CCAS
- provides a specific power for consumer functions to be modified or transferred to the CMA in section 99(1) and (3) of the ERRA13.

### **Other legislative changes**

2.12 A second Public Bodies Act order will be laid in draft next year and will amongst other things, make provision for the transfer of OFT's estate agency

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<sup>9</sup> The Unfair Terms in Consumer Contracts Regulations 1999 (SI1999/2083); the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334); the Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276) and the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

functions to TSS and the transfer of Consumer Focus functions to Citizens Advice services.

### 3 CMA'S CONSUMER ROLE AND POLICY OBJECTIVES

#### Introduction

3.1 The CMA will have a range of roles and consumer enforcement powers, in addition to its competition powers, to tackle practices and market conditions that make it difficult for consumers to exercise choice or to seek out the best deal, including:

- sharing powers with other partners, to enforce a range of consumer protection legislation, with primary expertise and lead enforcement responsibility in relation to the application of the unfair contract terms legislation (the UTCCRs)<sup>10</sup>
- providing guidance material to businesses and consumers in relation to the application of the UTCCRs and use of the CMA's powers as well as in respect of matters relating to its functions
- acting as the UK's Single Liaison Office, ensuring compliance under the EU Consumer Protection Co-operation Regulation (the CPC Regulation),<sup>11</sup> and coordinating the UK's interaction with EU and international enforcers
- investigating markets that do not appear to be meeting the needs of consumers, responding to super-complaints, and conducting in-depth analyses of such markets with the aim of identifying and addressing market failures, and
- working with enforcement partners in the UK and internationally, to deliver on its objectives and to promote a joined-up approach to consumer protection.

3.2 The CMA's consumer role will complement and reinforce the effect of competition action taken to improve markets and to support economic growth through addressing problems where competition enforcement alone does not, or cannot, make a market work well for consumers. The CMA will, in general, therefore focus on cases with market-wide implication.

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<sup>10</sup> Unfair Terms in Consumer Contract Regulations 1999, implementing the European Unfair Contract Terms Directive (Directive 93/13 EEC).

<sup>11</sup> See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R2006:EN:NOT>



## Working in partnership

- 3.3 As discussed in paragraph 2.2 above the Government reforms to the UK consumer protection regime were, in part, a response to concerns that the previous consumer landscape comprised an array of public, private and voluntary bodies with overlapping responsibilities which was overly complex and caused considerable consumer confusion. As such, effective working in partnership is not only a key element of the CMA's consumer strategy but also of the new UK consumer regime.
- 3.4 As set out in the guidance, the CMA will work to build seamless partnerships with co-enforcers such as TSS and the sectoral regulators by participating fully in the new co-ordinating groups such as the Consumer Protection Partnership (CPP) to deliver high impact outcomes. The CMA will work with CPP partners to assess and provide coordinated responses to economic threats to consumers. The CMA will work with others to share best practice, build enforcement capability, and help identify strategic priorities for enforcement.
- 3.5 The CMA will also act as a conduit between the sectoral regulators, which sit on the Consumer Concurrency Group,<sup>12</sup> and the CPP to ensure issues from the regulated sectors are reflected in discussions regarding threats (and appropriate responses) to UK consumers.
- 3.6 Internationally, the CMA will retain the OFT's role as the Single Liaison Office under the CPC to coordinate the application of the regulation in the UK. In carrying out this role, the CMA will work with other competent authorities and enforcement bodies to respond to threats to UK consumers or requests for mutual assistance from EU partners.

### Question 1

Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to working in partnership?

Please give reasons for your views.

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<sup>12</sup> The membership of the Consumer Concurrency Group, as at the date of publication of this condoc, is: TSS, FCA, OFCOM, OFGEM, OFWAT, ORR, ASA, ICO and Which?

## **The enforcement of general consumer protection legislation**

- 3.7 The CMA will, in general, seek to target consumer enforcement action where it can secure wide ranging changes across a whole market and tackle significant consumer detriment, particularly with regard to emerging threats. The CMA will place its interventions in the context of broader market analysis with cases informed by clear theories of harm which take account of dynamic economic analysis where necessary. This helps ensure that interventions are proportionate to need and do not impose unnecessary burdens on business but, on the contrary, help create a framework in which competitive businesses can thrive.
- 3.8 The CMA's consumer enforcement role is somewhat different to the one taken by the OFT over recent years, but no less important. In general, the CMA will take mostly market wide cases, often multi-party cases or single party cases which can have an impact across a whole market, e.g. by setting a precedent or providing clarity on the application of the law to a new business model. The CMA is likely to take fewer consumer enforcement cases than the OFT traditionally did because of the new national enforcement role taken on by the TSS. A case against a single national company is unlikely to be taken by the CMA purely because it is a large company and the case requires significant resource. Such cases are generally part of the new TSS remit. There would often need to be an additional factor to demonstrate why the case is justified in wider market terms. However where cases relate to breaches of the UTCCRs, it is possible that the CMA, as lead authority, would take cases because it is necessary to uphold the effectiveness of the unfair terms regime.
- 3.9 The CMA will use its consumer enforcement tools to encourage open and competitive markets and to promote consumer welfare. It will aim to drive market change to help consumers to have more choice, more confidence and better value for money.
- 3.10 The CMA is likely to take account of the following factors when deciding to use its consumer enforcement powers:
- whether there are systemic problems with the structure of a market, including whether there are powerful incumbents or barriers to new entry, or whether there are widespread endemic practices across many firms
  - whether there is inadequate competition on revenue streams, quality, range or service

- where consumers make poorly informed choices through businesses exploitation of consumer's behavioural biases so that they do not access, assess or act on relevant information.

3.11 The CMA will use its prioritisation principles<sup>13</sup> in deciding which cases to pursue, but it is likely to give added weight to an issue where it:

- also involves unfair terms enforcement
- has an international dimension, and/or
- builds capability in the UK enforcement regime (e.g. by establishing a precedent, or by creating a framework for other enforcers to follow up).

3.12 TSS shares many of the same consumer enforcement powers as the CMA but tackle different types of consumer detriment. The national role of TSS has now been increased significantly by the additional funding being awarded for national cases under the control of the NTSB. TSS will take an increased number of national cases, including those that would have previously been taken by the OFT prior to the landscape reforms. The size of a case and resource needed to run it will not in themselves, subject to any TSS prioritisation criteria, be relevant factors for not taking a case. TSS will also continue to address local and regional detriment caused by rogue traders, including doorstep crime and scams, using effective partnerships with local agencies and in-depth knowledge of local markets and businesses.

### **Question 2**

Are there other factors which you feel should be taken into account when considering the CMA's approach to the use of its consumer enforcement powers?

Please give reasons for your views.

### **UTCCRs**

3.13 The UTCCRs obliged the OFT to consider complaints about the fairness of any contract term drawn up for general use and if it was appropriate to do so, seek an injunction to prevent the continued use of that term. The UTCCRs also allowed named qualified bodies (such as TSS and some regulatory bodies) to seek injunctions against the use of terms considered to be unfair.

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<sup>13</sup> The CMA prioritisation principles have not yet been finalised but will be published in due course.

3.14 As set out above, the PBA Order introduced a number of changes to the consumer enforcement role and functions of the OFT which took effect in April 2013. These changes included amendments to secondary legislation to ensure that whilst TSS retained a duty to enforce certain consumer legislation, the OFT's duty to enforce was changed to a power. In relation to UTCCRs the OFT, TSS and other sectoral enforcers<sup>14</sup> all share a power to enforce. However, the CMA will inherit the OFT's leadership role for the UTCCRs.

3.15 In fulfilling the role of lead authority the CMA is expecting to continue much of the work of the OFT in this area, specifically:

- **Taking enforcement action designed to impact across markets.** As set out in paragraph 3.8 the CMA will take mostly market wide cases, however where cases relate to breaches of the UTCCRs, it is possible that the CMA, as lead authority, would take cases without a wider market justification to uphold the effectiveness of the regime.
- **Working in partnership** with TSS, the Citizens Advice service and others via fora such as the CPP, with sectoral regulators via the Consumer Concurrency Group, and European partners in the CPC network.
- **Maximising business compliance and wider awareness** for business, consumers and wider audience for example through development of the Unfair Terms Hub.
- **Influencing Policy – at a national and European level,** for example through engaging with consultation on reform of unfair terms law, and the CPC Common Activity on Unfair Terms.

**Question 3**

Are there other activities which you feel should be included when considering the CMA's approach to the lead authority for UTCCRs?

Please give reasons for your views.

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<sup>14</sup> As at the date of publication of this condoc, the sectoral regulators who can enforce UTCCRs are: FCA, OFCOM, OFGEM, OFWAT, ORR and ICO. Which? are also able to take enforcement action under the UTCCRs.

## **Advice, information and education**

- 3.16 The CMA retains a role in providing advice to business in relation to UTCCRs or where it has conducted a market study (or other in-depth analysis of business practices in a particular sector) and may issue specific guidance for businesses in the sector concerned.
- 3.17 However, the PBA Order transferred the OFT's consumer advice scheme function (Consumer Direct) to Citizens Advice and Citizens Advice Scotland (Citizens Advice services).<sup>15</sup> In addition, the relevant energy and postal legislation was amended to ensure that industry levies to fund Consumer Direct were transferred from the OFT to Citizens Advice services.<sup>16</sup>
- 3.18 As set out in the Draft Guidance, the CMA will work with CPP partners to identify where there is a need for business guidance and help to develop an appropriate response.

## **International enforcement, coordination and liaison functions**

- 3.19 Schedule 4 of the ERRA13 provides a power for the CMA to promote good practice outside the UK in the carrying on of activities which may affect the economic interests of consumers in the UK.
- 3.20 As set out in Chapter 5 of the Draft Guidance the CMA retains the OFT's role as the UK's Single Liaison Office and a Competent Authority under the CPC. The CMA will also continue the OFT role of representing the UK in appropriate fora such as International Consumer Protection and Enforcement Network (ICPEN)<sup>17</sup> and the Organisation for Economic Cooperation and Development (OECD).<sup>18</sup>
- 3.21 Reflecting the new roles for TSS and Citizens Advice services in the landscape the CMA will work closely with its CPP and sectoral partners in carrying out its international functions. Where international agenda relate to the activities of other UK bodies the CMA will seek to facilitate their engagement in debates as the most appropriate UK representative.

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<sup>15</sup> Article 2 PBA Order.

<sup>16</sup> Articles 5 and 6 PBA Order.

<sup>17</sup> See <https://icpen.org/>

<sup>18</sup> See [www.oecd.org/](http://www.oecd.org/)

**Question 4**

Are there other activities which you feel should be included when considering the CMA's approach to carrying out its international functions?

Please give reasons for your views.

## 4 STRUCTURE OF THE DRAFT GUIDANCE

- 4.1 The Draft Guidance is designed to provide business and other parties with an overview of the CMA's role in the new consumer landscape, as well as of the main powers provided by Government in order to carry out its functions. It is not designed to provide guidance on the applicability of the law. For details of further guidance on consumer protection law see Annexe A of the Draft Guidance.
- 4.2 The Draft Guidance sets out the legal framework from which the CMA derives its functions and powers related to the interests of UK consumers, followed by an overview of the Government's policy objectives in establishing the CMA's consumer role.
- 4.3 Chapter 4 sets out the CMA's approach to using its consumer functions to promote competition for the benefits of consumers. In short, consumers are best served by competitive markets where businesses compete fairly for custom in compliance with the law. The CMA believes that most businesses aim to treat their customers fairly and comply with the consumer protection legislation that the CMA enforces. However when it is necessary to use enforcement action to achieve compliance, the CMA aims to ensure that such interventions deliver high impact results, for example, by changing market behaviour, clarifying laws or providing the necessary level of deterrence to those who would deliberately flout their legal obligations.
- 4.4 The CMA is committed to the principles of good regulation in relation to its enforcement action as set out in statute<sup>19</sup> and aims when carrying such activity that its action is:
- proportionate and consistent
  - targeted
  - clear, and
  - accountable

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<sup>19</sup> See section 21 of the Legislative and Regulatory Reform Act 2006 and in the Regulator's Compliance Code 2007 – currently being revised.

- 4.5 Chapters 5 and 6 set out the powers available to the CMA to protect UK consumers. The Consumer Rights Bill<sup>20</sup> proposes amendments to the powers in chapter 5 and this chapter will be updated following its enactment.
- 4.6 Chapter 7 sets out the CMA's approach to working in partnership nationally and internationally to protect UK consumers.
- 4.7 Chapter 8 sets out the transitional arrangements which will apply to OFT investigations which are ongoing and undertakings given by businesses following previous investigations which are in place, in each case at 1 April 2014.

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<sup>20</sup> See [www.gov.uk/government/publications/draft-consumer-rights-bill](http://www.gov.uk/government/publications/draft-consumer-rights-bill)



## **5 TRANSITIONAL ARRANGEMENTS**

- 5.1 The CMA was established by the ERA13 (and relevant statutory instruments) which transferred many of the previous functions of the OFT and CC to the CMA, and abolished those bodies. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.
- 5.2 CMA will continue with any relevant OFT consumer enforcement action ongoing as at 1 April as if it is the OFT.
- 5.3 CMA and TSS will be able to take follow up action to enforce any undertakings given to OFT or Orders obtained by the OFT, when it is appropriate to do so.

# ANNEXES

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## A. CONSULTATION QUESTIONS

A.1 The purpose of this consultation is to obtain feedback on:

- how the Draft Guidance is presented
- how clear the content, and
- any other issues which the CMA should consider when carrying out its functions.

A.2 To this end, the consultation questions are as follows:

1. Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to working in partnership?
2. Are there other factors which you feel should be taken into account when considering the CMA's approach to the use of its consumer enforcement powers?
3. Are there other activities which you feel should be included when considering the CMA's approach to the lead authority for UTCCRs?
4. Are there other activities which you feel should be included when considering the CMA's approach to carrying out its international functions?
5. Do you consider that the Draft Guidance covers the main changes that are introduced by the ERR13 to the CMA's consumer powers? If not, what aspects do you think are missing?
6. Do you consider that the Draft Guidance will facilitate your understanding of the consumer protection regime when read in conjunction with the existing guidance documents?
7. Do you agree with the list in Annexe B of the Draft Guidance of existing consumer-related OFT guidance documents proposed to be put to the CMA Board for adoption by the CMA?
8. Do you consider that the Draft Guidance is user friendly in terms of its content and language?
9. Do you have any other comments on the Draft Guidance?

A.3 The format of the final guidance may be different from that of the Draft Guidance. For example, footnotes that appear at the bottom of pages in this document may be placed in the side margins, and headings and sub-headings may appear in a different colour. If you have any formatting suggestions that will improve how the guidance is presented, please provide them in your response to this consultation.

## B. CONSULTATION CRITERIA

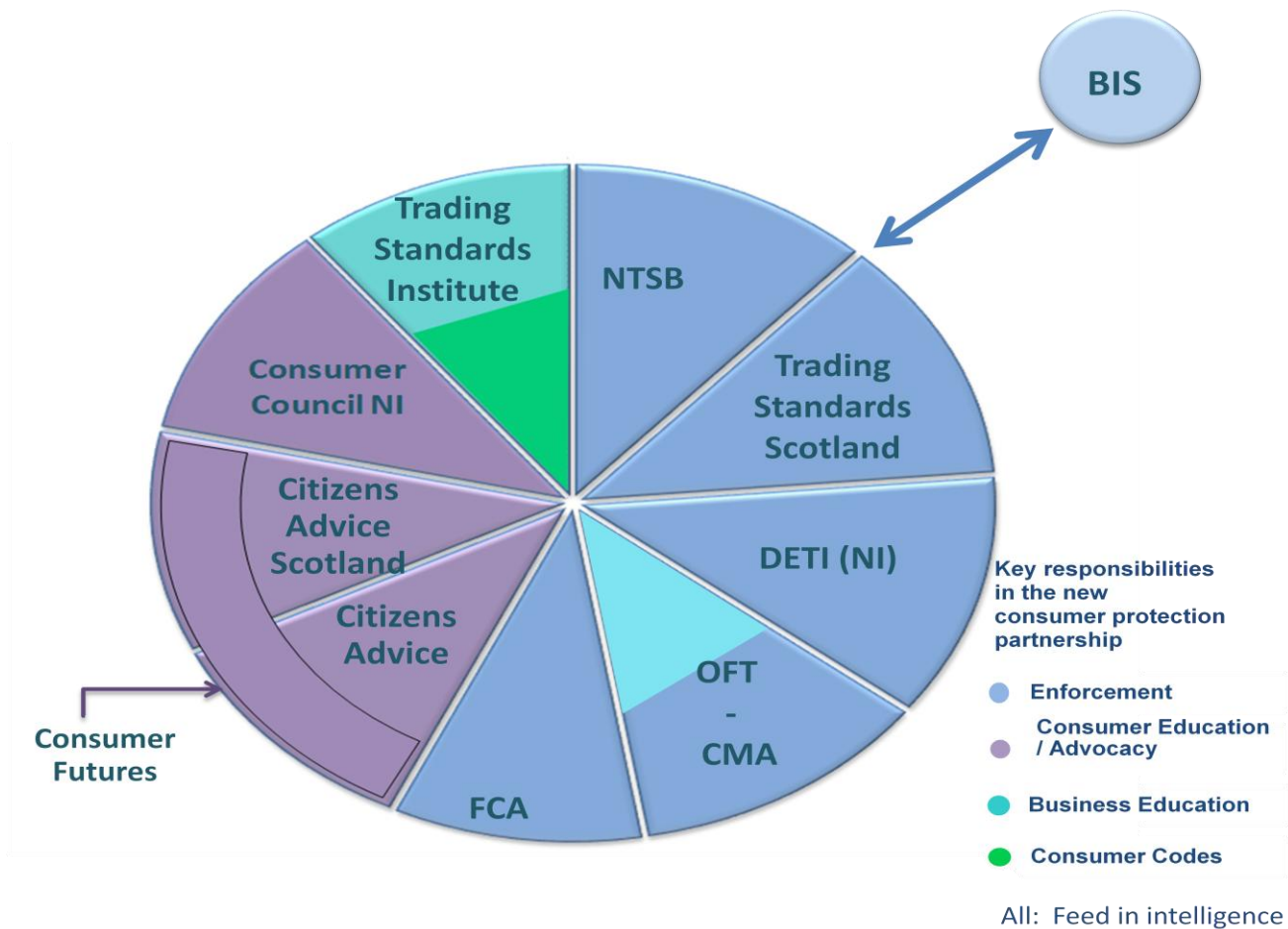
- B.1 [The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.
- B.2 As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focusing on real engagement with key groups rather than following a set process.
- B.3 The key Consultation Principles are:
- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before
  - departments will need to give more thought to how they engage with and consult with those who are affected
  - consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy, and
  - the principles of the Compact between Government and the voluntary and community sector will continue to be respected.
- B.4 The full Cabinet Office Consultation Principles can be found on the Cabinet Office website at: [www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance](http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance)
- B.5 This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

## C. GLOSSARY

BIS	Department for Business, Innovation and Skills
BPRs	Business Protection from Misleading Marketing Regulations 2008
CA98	Competition Act 1998
CAS	Citizens Advice Scotland
CCAS	Consumer Code Approval Scheme
CC	Competition Commission
CMA	The Competition and Markets Authority
CoSLA	Council of Scottish Local Authorities
CPC	EU Consumer Protection Co-operation Regulation
CPP	Consumer Protection Partnership
CPRs	Consumer Protection from Unfair Trading Regulations
DETI	Department of Enterprise, Trade and Investment in Northern Ireland
DSRs	Consumer Protection (Distance Selling) Regulations 2000
EA02	Enterprise Act 2002
ERRA13	Enterprise and Regulatory Reform Act 2013
ICPEN	International Consumer Protection and Enforcement Network
OFT	Office of Fair Trading

NTG	National Tasking Group
NTSB	National Trading Standards Board
OECD	Organisation for Economic Co-operation and Development
PBA Order	The Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013
RIU	Regulated Industries Unit
SLOs	Single Liaison Offices
TSI	The Trading Standards Institute
TSS	Trading Standards Services
TSScot	Trading Standards Scotland
UTCCRs	Unfair Terms in Consumer Contracts Regulations

## D. CONSUMER PROTECTION PARTNERSHIP





## **E. DRAFT GUIDANCE**

# **Competition and Markets Authority (CMA)**

## **Consumer protection**

**Guidance on the CMA's approach to the use of  
its consumer powers**

[2014]

CMA7con

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This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma)

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# 1 INTRODUCTION

- 1.1 This guidance covers the Competition and Markets Authority's (CMA's) approach to the use of its consumer powers. It does not provide guidance on the substance of the infringements created under relevant consumer protection law that the CMA enforces. Annexe B indicates which existing consumer-related guidance documents have been adopted by the CMA Board. To the extent that any conflict arises between the content of such existing guidance and this guidance, the content of this guidance will prevail.
- 1.2 The Enterprise and Regulatory Reform Act 2013<sup>1</sup> (ERRA13) established the CMA as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.3 On 1 April 2014, the functions of the Competition Commission (CC) and many of the functions of the Office of Fair Trading (OFT) were transferred to the CMA and those bodies abolished. The OFT's consumer role had already changed in the period prior to abolition as part of the rationalisation and simplification of the consumer landscape. The OFT's functions of running the Consumer Code Approval Scheme, the Consumer Direct advice service, and the national leadership role on consumer education had been transferred to the Citizens Advice Service and Citizens Advice Scotland (Citizens Advice services) and the Trading Standards Institute (TSI). Local authority Trading Standards Services (TSS) took on a new role as the primary national enforcer of consumer protection law with the OFT's national enforcement role focusing more on systemic problems in markets.
- 1.4 The CMA inherits most of the functions and powers which the OFT had retained as at 1 April 2013 as part of the initial package of reforms and together these constitute a reduced but significant role in the consumer landscape from that traditionally held by the OFT. The CMA will use its full range of consumer powers to tackle market wide consumer problems or issues which affect consumers' ability to make choices. While the CMA is a consumer minded organisation, it is not involved in providing direct frontline support to consumers. The OFT stopped running the Consumer Direct advice line on 31 March 2012. Consumers should now contact the Citizens Advice

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<sup>1</sup> See [www.legislation.gov.uk/ukpga/2013/24/contents/enacted](http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted).

consumer service<sup>2</sup> which provides free, confidential and impartial advice on consumer issues.

- 1.5 The CMA has a range of tools which may be used to address problems in markets. For example:
- the CMA has powers to enforce consumer protection law such as the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs) and under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) can take criminal prosecutions against appropriate breaches
  - the Enterprise Act 2002 (EA02) also enables the CMA to conduct market studies and investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
  - under the EA02, the CMA can investigate mergers which could potentially give rise to a substantial lessening of competition, and specify measures which the merging parties must take to protect competition between them while the investigation takes place
  - the CMA may also bring criminal proceedings against individuals that commit the cartel offence under section 188 of the EA02
  - finally, under the Competition Act 1998 (CA98) the CMA may investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 1.6 The CMA will act strategically, being selective about which cases it chooses to take on. The CMA will apply its prioritisation principles<sup>3</sup> and aim to maximise the impact of its work by taking an enforcement lead that others can follow and/or seeking delivery partners for targeting messages for business or consumers as appropriate.
- 1.7 Working in partnership is a key element of the CMA's consumer strategy. The CMA will work to build seamless partnerships with co-enforcers such as the TSS and the sectoral regulators<sup>4</sup> by developing Memoranda of Understanding and participating fully in the new co-ordinating groups such as Consumer

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<sup>2</sup> See [www.adviceguide.org.uk](http://www.adviceguide.org.uk) or call 08454 04 05 06.

<sup>3</sup> To be published.

<sup>4</sup> Ofcom, Ofgem, Ofwat, FCA, ICO, ORR.

Protection Partnership (CPP) to deliver high impact outcomes. In particular, the CMA will work with others to share best practice, build enforcement capability, and help identify strategic priorities for enforcement.

- 1.8 The CMA understands and respects the aims of the Government's consumer landscape reforms. Recognising the Government's desire to give TSS and CPP a central role in the new landscape, and to ensure the space is created for them to take the initiative, the CMA will adopt a supportive and facilitative partnership role in areas of potential overlap, rather than one of leadership as the OFT would have done, prior to the legislative changes.
- 1.9 The ERR13 implements a number of enhancements to these statutory powers (compared to the powers available to the CC and OFT), in order to improve the robustness of decision-making, increase the speed and predictability of the CMA's activities and strengthen the UK's competition regime as a whole.<sup>5</sup>
- 1.10 This guidance reflects the views of the CMA as at 1 April 2014 and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This guidance may in due course be supplemented, revised or replaced. The CMA's web site will always display the latest version of the guidance.
- 1.11 Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this guidance makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the relevant Acts, Regulations or Orders. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice.
- 1.12 The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when dealing with potential breaches of consumer protection law but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.
- 1.13 This guidance takes effect from 1 April 2014. The new approach will apply to all ongoing and future cases from that date.<sup>6</sup>

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<sup>5</sup> An overview of the changes is contained in 'Towards the CMA' (CMA1). The publication is available at; [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>6</sup> CMA will continue with any OFT consumer enforcement action ongoing as at 1 April as if it is the OFT. CMA and TSS will be able to take follow up action to enforce any undertakings given to OFT or Orders obtained by the OFT, when it is appropriate to do so.

1.14 The CMA will monitor the operation of the new arrangements in the consumer landscape and discuss with partners whether any improvements are necessary in the light of experience. The criteria for assessing the regime would be likely to include ensuring a lack of duplication between partners, improved speed of delivery, more effective outcomes, and the absence of an enforcement gap when tackling the most significant consumer detriment affecting consumers.

DRAFT



## 2 THE LEGAL FRAMEWORK

### Background

- 2.1 The Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013<sup>7</sup> (the PBA Order) introduced a number of changes to the consumer enforcement role and functions of the OFT before it was abolished on 1 April 2014.
- 2.2 Firstly, the PBA Order transferred the OFT's consumer advice scheme function (Consumer Direct) to Citizens Advice services.<sup>8</sup> In addition, the relevant energy and postal legislation was amended to ensure that industry levies to fund Consumer Direct were transferred from the OFT to Citizens Advice services.<sup>9</sup>
- 2.3 Secondly, responsibility for administering a consumer facing code approval scheme was given to the TSI and as such the OFT's Consumer Codes Approval Scheme closed on 31 March 2013<sup>10</sup>.
- 2.4 In order to signal clearly the new national enforcement role for the TSS, and to ensure the CMA is not obligated to step in and duplicate that role, amendments were made to secondary legislation. TSS retained a duty to enforce certain consumer legislation but the OFT's duty to enforce such legislation was changed to a power.<sup>11</sup> In relation to the UTCCRs the OFT, TSS and some sectoral enforcers<sup>12</sup> all share a power to enforce. The CMA inherited the OFT's leadership role for the UTCCRs.

### Consumer functions transferred to the CMA

- 2.5 The consumer functions transferred to the CMA at 1 April 2014 include:

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<sup>7</sup> See <http://www.legislation.gov.uk/ukxi/2013/783/contents/made>.

<sup>8</sup> Article 2 PBA Order.

<sup>9</sup> Articles 5 and 6 PBA Order.

<sup>10</sup> It is expected that a second Public Bodies Act order will be laid in draft next year and will amongst other things, make provision for the transfer of OFT's estate agency functions, and the transfer of Consumer Focus functions.

<sup>11</sup> Articles 10 to 13 PBA Order, amending the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs), the Consumer Protection (Distance Selling) Regulations 2000 (DSRs), the Business Protection from Misleading Marketing Regulations 2008 (BPRs) and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

<sup>12</sup> As at 1 April 2014 the sectoral regulators who can enforce UTCCRs are: FCA, OFCOM, OFGEM, OFWAT, ORR and ICO. Which? are also able to take enforcement action under the UTCCRs.

- using consumer enforcement powers to tackle market wide practices including the UTCCRs (for which the CMA has the lead but shares the power to enforce with TSS), CPRs and the Consumer Protection (Distance Selling) Regulations 2000 (DSRs) either directly or under Part 8 EA02
- carrying out business facing education in relation to the application of the UTCCRs or where a need for business education has been identified resulting from a market study, UTCCRs cases UTCCRs, or similar in which the CMA has built significant expertise
- under section 214 of the EA02, enforcers are required to notify the CMA before they apply for an enforcement order
- acting as the UK's Single Liaison Office and ensuring compliance under the EU Regulation on Consumer Protection Cooperation (CPC),<sup>13</sup> and
- having an international role on consumer law and policy liaison<sup>14</sup>, for example representing the UK in the International Consumer Enforcement Protection Network (ICPEN) and the Organisation for Economic Co-operation and Development (OECD) Committee on Consumer Policy.

2.6 Relevant consumer legislation applicable to the CMA and its enforcement work is listed at Annexe A.

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<sup>13</sup> Regulation (EC) No 2006/ 2004.

<sup>14</sup> Schedule 4 to the ERA13 makes specific provision for this role.

### 3 POLICY OBJECTIVES

- 3.1 As a result of the reviews in 2010 and 2011 of the competition and consumer landscape Government undertook a series of reforms to simplify the regime for consumers and plug any perceived gaps in enforcement.
- 3.2 These reforms responded to the National Audit Office's 2011 report, 'Protecting Consumers',<sup>15</sup> which reviewed consumer protection in the UK and found that although much consumer detriment occurred at national and regional level the incentives are weighted towards tackling local priorities. This, it argued, contributed to an 'enforcement gap' where large regional and some national cases might not be addressed. The Government consulted on various reforms<sup>16</sup> and in responses to the Government's consultation many stakeholders agreed that the existing consumer landscape comprising an array of public, private and voluntary bodies with overlapping responsibilities was too complex and caused considerable consumer confusion.
- 3.3 In its response to the consultation on 'Empowering and Protecting Consumers'<sup>17</sup>, Government set out its aim to increase consumer empowerment by:
- reducing the complexity of the consumer landscape – the publicly funded institutions that exist to help consumers
  - strengthening the effectiveness of enforcement of consumer rights, and
  - ensuring that activities that help consumers to be empowered are delivered more cost-effectively and in a way that links national and local intelligence about the problems consumers face.
- 3.4 Following the changes to the legislative and enforcement landscape described in chapter 2 above, Citizens Advice services are now the home of information, advice, education and advocacy on all general consumer matters. Further, the Government expects the majority of national consumer enforcement action to be taken on by TSS with the CMA focusing on tackling systemic problems in markets involving widespread practices carried out by many firms.

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<sup>15</sup> [www.nao.org.uk/report/protecting-consumers-the-system-for-enforcing-consumer-law/](http://www.nao.org.uk/report/protecting-consumers-the-system-for-enforcing-consumer-law/).

<sup>16</sup> Empowering and protecting consumers: Consultation on institutional changes for provision of consumer information, advocacy, education, advice and enforcement, June 2011, see [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes).

<sup>17</sup> For the Governments response to the consultation see [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf).

The TSI is now responsible for administering an approval scheme for consumer facing codes of practice and providing guidance to business on consumer protection legislation. The reforms also created the National Trading Standards Board (NTSB), which is responsible for prioritising national and cross-local authority boundary enforcement in England and Wales against clearly unfair or unlawful practices. The Convention of Scottish Local Authorities (CoSLA) has created Trading Standards Scotland to perform the same role in Scotland and the Department for Enterprise, Trade and Investment (DETI) will undertake it in Northern Ireland.

- 3.5 The structural reform of the consumer landscape is being followed by major changes to the consumer law framework through the Consumer Rights Bill<sup>18</sup> which will impact significantly on the consumer powers of the CMA.

### **The role of consumer powers in the CMA**

- 3.6 Experience strongly suggests that competition and consumer policy are linked. Good consumer outcomes rely on competitive markets to provide choice and value, while vibrant competition relies on consumers confidently shopping around. Competition problems can often manifest themselves in businesses failing to properly comply with consumer protection laws, which in turn can prevent consumers driving effective competition and lower prices through the exercise of informed choice.
- 3.7 An understanding of consumer policy can help competition analysis through a better understanding of consumer detriment and how consumers interact with businesses. Lessons from consumer behaviour can inform how remedies are likely to work in practice and whether they will be effective. Useful alternative or additional remedies to competition problems can sometimes be found in the consumer toolkit. For example, activating consumer choice by increasing suppliers' obligations to disclose information in combination with increased consumer awareness can kick-start markets where there is a lack of competition.
- 3.8 The CMA will seek to target consumer enforcement action where it can secure wide-ranging changes to markets and tackle significant consumer detriment, particularly emerging trends. The CMA will place its interventions in the context of broader market analysis with cases informed by clear theories of harm which take account of dynamic economic analysis where necessary. This helps ensure that interventions are proportionate to need and do not

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<sup>18</sup> See [www.gov.uk/government/publications/draft-consumer-rights-bill](http://www.gov.uk/government/publications/draft-consumer-rights-bill).

impose unnecessary burdens on business but, on the contrary, help create a framework in which competitive business can thrive.

- 3.9 In general, the CMA will take mostly market wide cases, often multi-party cases or single party cases which can have an impact across a whole market, e.g. by setting a precedent or providing clarity on the application of the law to a new business model. A case against a single national company is unlikely to be taken by the CMA purely because it is a large company and the case requires significant resource. There would often need to be an additional factor to demonstrate why the case is justified in wider market terms. However where cases relate to breaches of the UTCCRs, it is possible that the CMA, as lead authority, would take cases without a wider market justification to uphold the effectiveness of the regime.
- 3.10 The CMA will work with partners through the CPP to assess and provide coordinated responses to economic threats to consumers. It will work with trade bodies and firms to develop market-wide solutions and, where necessary, pursue multiparty enforcement and litigation, generally in the higher courts. The CMA will take largely civil cases, often relying on legislation such as the UTCCRs which can only be used in the civil courts. It acts mainly in the High Court and above, supported by the specialist advisory and litigation resources that are needed for such cases.
- 3.11 TSS shares many of the same consumer enforcement powers as the CMA but they tackle different sorts of consumer detriment. The national role of TSS has now been increased significantly by the landscape reforms with additional funding being awarded for national cases under the control of a new national leadership structure led by the National Trading Standards Board (NTSB). TSS will take an increased number of national cases, including those that would have previously been taken by the OFT prior to the landscape reforms. The size of a case and resource needed to run it will not in themselves, subject to any TSS prioritisation criteria, be relevant factors for not taking a case.
- 3.12 TSS will also continue to address local and regional detriment caused by rogue traders, including doorstep crime and scams, using effective partnerships with local agencies and in-depth knowledge of local markets and businesses.

## **4 WORKING IN PARTNERSHIP**

- 4.1 The CMA believes that it can have a greater impact on markets by working together with partner organisations to identify and address issues that create market problems and consumer detriment.
- 4.2 The reforms to the consumer protection regime in the UK following the BIS consultation on the consumer landscape 'Empowering and Protecting Consumers'<sup>19</sup> introduced a number of changes to the roles and responsibilities of UK consumer protection bodies. These changes are in addition to the creation of the CMA via the ERA13.
- 4.3 The reforms have also created a number of new fora for UK consumer protection bodies to share intelligence, priorities and identification of risks, to ensure that consumer issues are handled by the appropriate body and do not fall between consumer bodies. The CMA will participate fully in the new co-ordinating groups such as the CPP and work to avoid duplication of effort and the emergence of enforcement gaps. The CMA will use such groups to share intelligence, best practice, and help to build enforcement capability.

### **Consumer Protection Partnership (CPP)**

- 4.4 The CPP was set up to ensure coherent and strategic delivery of enforcement, information provision and education across the consumer landscape. The group works together to share intelligence, identify current or future issues that are likely to adversely affect consumers and agree priorities for work to resolve or mitigate such problems. In essence the role of the CPP is to ensure that that partners work together effectively and important issues are tackled and do not fall between partners in the consumer landscape due to differing accountabilities.
- 4.5 The membership of CPP, as at 1 April 2014, is:

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<sup>19</sup> See [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf).

Body/Group	Primary responsibilities in consumer landscape
Department for Business, Innovation and Skills (BIS)	Government lead for consumer policy in the UK
Trading Standards in England and Wales, represented by the National Trading Standards Board (NTSB)	Enforcement and threat assessment - regional and national in England and Wales
Trading Standards Scotland, overseen by the Convention of Scottish Local Authorities (CoSLA) and with co-ordination and action via Trading Standards Scotland (TSScot)	Enforcement - regional and national enforcement in Scotland
Trading Standards in Northern Ireland – Department of Enterprise, Trade and Investment (DETI)	Enforcement – local, regional and national enforcement in Northern Ireland
Trading Standards Institute (TSI)	Business education and Consumer Codes Approval Scheme
CMA	UTCCRs enforcement leadership and enforcement related to business practices that distort competition or impact on consumer choice
Citizens advice (England and Wales) and	Consumer advocacy, education and provision of consumer advice via the Citizens Advice consumer helpline
Citizens Advice Scotland	Consumer advocacy, education and advice
Consumer Council for Northern Ireland	Consumer advocacy, education and advice

## TSS

- 4.6 TSS are the CMA’s key partners in implementing the consumer law regime (which lies at the heart of UK economic policy). The CMA shares enforcement powers and works closely with them to provide an efficient and effective service for both consumers and businesses.
- 4.7 TSS are funded by and accountable to local authorities. They are required to work to national priorities set by government departments and agencies, as well as local priorities set by elected councillors which focus on the particular needs of the local community. They also enforce a far broader range of legislation than the CMA and often have responsibility for animal health, food safety and underage sales of tobacco, alcohol, knives and fireworks.

4.8 Following the BIS consultation on the consumer landscape and the Government's response 'Empowering and Protecting Consumers'<sup>20</sup>, in April 2012, TSS were given greater responsibility for consumer law enforcement, including national and cross-local authority boundary enforcement. As a result, both TSS and the CMA take cases of national scope so partnership working between the CMA and TSS is important to ensure that the collective work of both complement each other in the protection of UK consumers via enforcement activity.

### **England and Wales**

4.9 The CMA will work closely with TSS, and in particular the NTSB, which provides leadership, influence and support to ensure that regional and national cases in England and Wales are taken by TSS. The National Tasking Group (NTG), a sub-group of the NTSB with its own decision making ability, brings together TSS representatives from across English regions and Welsh TSS along with representatives from the CMA. The purpose of the group is to consider, prioritise, task cases where harm is being caused to consumers nationally. It is the forum through which TSS and the CMA will decide who is best placed to take particular cases. The CMA will play an active role on the NTG to help ensure that the division of responsibility for priority cases is agreed on the basis of the new roles for TSS and the CMA as set out by the Government.

4.10 In most cases TSS are likely to be best placed to lead. However, in borderline cases where action from CMA is considered, the NTG/CMA will look at factors such as the prevalence of issues of consumer choice, relevance of unfair contract term issues and the systemic nature of a problem across a market in deciding who is best placed to act.

### **Scotland and Northern Ireland**

4.11 CoSLA provides political oversight and leadership to the trading standards service in Scotland. CoSLA is responsible for allocation of the funding provided by BIS for national and regional enforcement by TSScot. For Northern Ireland, all trading standards activity takes place within the DETI, rather than as part of a local authority's remit.

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<sup>20</sup> [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf).



- 4.12 The CMA will work with CoSLA, TSScot and DETI to identify priority cases of consumer detriment in Scotland and Northern Ireland and decide whether any of these may be appropriate for the CMA.

## **The Trading Standards Institute**

- 4.13 Following the reforms to the consumer landscape, the TSI were given responsibility for producing the majority of education and guidance aimed at businesses in relation to their responsibilities under consumer protection legislation.

### **CMA business guidance**

- 4.14 In some circumstances it will be appropriate for the CMA to issue its own guidance to business particularly, for instance, where this relates to the UTCCRs, or is based on detailed knowledge gained from a market study, precedent setting case or similar in which the CMA has built significant expertise. The CMA will:
- consult appropriately with TSI and other partners across the consumer landscape prior to publishing such guidance in final form, and
  - encourage dissemination of its guidance via the TSI along with the TSI's own portfolio of guidance to businesses.

### **Concurrent consumer enforcers**

- 4.15 As well as the consumer enforcement powers shared with TSS, the CMA shares most of its consumer powers with a number of other agencies, many of which have enforcement responsibilities for particular economic sectors. The CMA views working closely with these concurrent enforcers as important in order to avoid duplication in effort and instead to maximise the impact of interventions for consumers.
- 4.16 Through the Consumer Concurrencies Group, the CMA and other agencies aim to improve clarity and share best practice on overlapping areas of responsibility especially in relation to enforcement.
- 4.17 The CMA chairs the Consumer Concurrence Group, which as at 1 April 2014 is made up of:

Body	Sector
Civil Aviation Authority (CAA)	Aviation
Ofcom	Communications
TSS	Cross-economy
CMA	Cross-economy
Ofgem	Energy
Financial Conduct Authority (FCA)	Finance
Office of the Rail Regulator	Railways
Ofwat	Water
Which?21	Cross-economy (limited consumer enforcement powers in relation to Part 8 EA02)
Advertising Standards Authority (ASA) <sup>22</sup>	Advertising

## Consumer Protection Cooperation Enforcement forum

4.18 The CMA, through its role as the UK's Single Liaison Office, coordinates work at a national level under the CPC Regulation.<sup>23</sup> This is primarily done through an Enforcement Forum which comprises all UK designated CPC authorities and BIS. The Forum meets shortly before each CPC Committee meeting to allow UK CPC authorities to exchange experiences, keep abreast of European and domestic developments and feed in views for the forthcoming Committee meetings. Between meetings UK authorities are updated on CPC developments and consulted for input e.g. by questionnaires, involvement in projects and common activities.

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<sup>21</sup> Which? is a private consumer body, rather than a traditional enforcer and as such its enforcement powers are more limited than the CMA or the sectoral regulators listed above.

<sup>22</sup> The ASA has specific individual self-regulatory powers, but rely on TSS as the default statutory backstop following the 2013 landscape regime changes.

<sup>23</sup> In 2004 the EU adopted the CPC Regulation which set up an EU-wide network of national enforcement authorities with similar investigation and enforcement powers known as 'competent authorities'. From April 2014 the CMA has been designated as the Single Liaison Office and a competent authority for CPC purposes.

## **Citizens Advice and other consumer bodies**

- 4.19 The CMA will make use of a variety of sources in considering where it will be appropriate to act, both in terms of enforcement action and in conducting market studies. Important to this is information gained by consumer bodies and in particular Citizens Advice services who run the national consumer advice services in England, Scotland and Wales. Citizens Advice services provide first tier advice to consumers on how to resolve their consumer complaints with traders and where appropriate refer issues/complaints to enforcers for enforcement consideration. The information obtained will be an important source of intelligence on types of consumer complaints and markets in which consumers are dissatisfied.
- 4.20 Consumer advocacy has transferred from Consumer Focus to the new Regulated Industries Unit (RIU) which is designed to represent the interests of consumers across markets subject to economic regulation (in particular energy and postal services) and, in Scotland, water. In 2014 the RIU will become a part of Citizens Advice services.
- 4.21 In addition to working collaboratively with Citizens Advice services, the CMA will maintain working relations with other consumer bodies with differing geographical scope e.g. the Consumer Council for Northern Ireland and those consumer bodies with a focus on special interest groups e.g. charities with a focus on issues such as age, disability etc.

## **Self-regulation, established means and compliance partnerships**

- 4.22 Alongside the partnership working with co-enforcers of consumer protection legislation the CMA will consider where appropriate working with self-regulation, established means and compliance partnerships.

### **Self-regulation**

- 4.23 The CMA is committed to working with self-regulatory solutions where they add value to its consumer protection work, both as a potential alternative to enforcement action or as a potential remedy to address market problems identified in its market study investigations.

### **Established means/compliance partnerships in relation to the CPRs and BPRs**

- 4.24 Bodies with alternative, and sometimes non-legislative powers, may also be regarded as established means or compliance partners for the purposes of

ensuring consumer protection. Such bodies may have other methods of gaining legal compliance from businesses.

- 4.25 Under the CPRs the CMA is required to: 'have regard to the desirability of encouraging control of unfair commercial practices by such established means as it considers appropriate having regard to all the circumstances of the particular case.'<sup>24</sup> The Business Protection from Misleading Marketing Regulations 2008 (BPRs) contains similar provisions.
- 4.26 The CMA understands that these regulations are intended to encourage the control of unfair commercial practices/misleading marketing activities through the use of alternative sets of arrangements where it is appropriate to do so. The primary concern is to gain compliance. If an alternative process is well placed to achieve this in place of the CMA, then this expands the reach of compliance processes in the UK.
- 4.27 The CMA will want to produce its own policy in relation to established means/compliance partnerships. In the meantime partners should refer to the CMA's website for information on its policy in relation to working in partnership.

### **International partnerships – partnership working across the European Union**

- 4.28 As set out in chapter 5 the CMA is part of a pan European network of public consumer protection bodies introduced with the CPC. The CPC was formally adopted by the European Parliament and Council in October 2004 and aims to improve and formalise and facilitate co-operation between public authorities responsible for the enforcement of consumer protection laws on behalf of Member States on cross-border infringements of EU consumer law. It ensures the quality and consistency of enforcement of consumer protection laws and the monitoring of the protection of consumers' economic interests by enabling national authorities to exchange information and cooperate with counterparts in other Member States as easily and seamlessly as with other authorities in their own country.
- 4.29 The CPC requires the creation of a network of public enforcement bodies ('competent authorities', see paragraph 4.30 below for a definition) across the EU. These bodies are responsible for the enforcement of consumer protection legislation in Member States. A member of the network can call upon a

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<sup>24</sup> Regulation 19.4.

member in another Member State to supply information about, or to take action against, a trader in their jurisdiction whose acts and or omissions may be causing detriment to the consumers in another Member State in breach of specified EU consumer protection laws (an 'intra-Community infringement'). This is described in the CPC as 'mutual assistance'. Competent authorities receiving such a request (referred to in the CPC as 'requested authorities') effectively have to address and act upon the alleged breaches in the same way they would if they were dealing with a purely domestic case. Accordingly, the CPC creates a series of duties on the enforcement bodies in the network in order to deliver an effective EU wide enforcement system.

### **Single Liaison Office and Competent Authorities**

4.30 The operation of the network involves the setting up and designation of various enforcement bodies, as below.

- Single Liaison Offices (SLOs): This is the public authority in each Member State which has ultimate responsibility for coordinating the application of the CPC in their country. The CMA is the SLO for the UK.
- 'Competent Authorities': These are the public authorities (whether at national, regional or local level) which have specific responsibilities to enforce the laws which protect consumers' interests and which have rights and duties under the mutual assistance provisions of the CPC. There is no limit on the number of competent authorities in each Member State. In the UK, competent authorities currently include the CMA, the Civil Aviation Authority, Office of Communications, the Financial Conduct Authority, the Medicines and Healthcare Regulatory Authority and the Information Commissioner's Office.
- 'Article 8(3)' bodies: The CPC permits Member States to designate other public authorities or private enforcement bodies which have a legitimate interest in the cessation or prohibition of consumer law breaches in their jurisdiction, in order to help carry out Member States' obligations under the CPC. Under Article 8(3) competent authorities can effectively sub-contract the enforcement of cross-border cases to such a body (subject to conditions), though ultimate responsibility for ensuring the case is dealt with remains with the competent authority which has received the mutual assistance request. In the UK, the following have been designated as Article 8(3) bodies:
  - Every local weights and measures authority in Great Britain (TSS)

- PhonepayPlus.

## **International – wider international working**

### **ICPEN**

- 4.31 The CMA<sup>25</sup> is a member of the International Consumer Protection and Enforcement Network (ICPEN).<sup>26</sup>
- 4.32 ICPEN was set up in 1992 to help governmental consumer law enforcers in different countries join forces in tackling cross border problems. The CMA actively supports the aims of ICPEN, which are to:
- protect consumers' economic interests around the world
  - share information about cross-border commercial activities that may affect consumer welfare
  - encourage global co-operation among law enforcement agencies (including co-ordinating an annual worldwide internet sweep searching for sites that make false or deceptive promises).

### **OECD**

- 4.33 The Organisation for Economic Co-operation and Development (OECD) was set up in 1961 to assist countries in fostering good governance and reforming and improving their economic policies to generate greater economic growth. It provides a forum in which governments can work together to share experiences and seek solutions to common problems.

### **London Action Plan**

- 4.34 The London Action Plan was agreed by 19 bodies from 15 countries to communicate and cooperate on enforcement action to tackle economic threats to consumers online and malware.
- 4.35 The plan aims to develop international links to address spam and spam-related problems. Participating government bodies have made commitments to actions including:

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<sup>25</sup> The CMA took the place of the OFT in ICPEN from April 2014.

<sup>26</sup> <https://icpen.org/>.

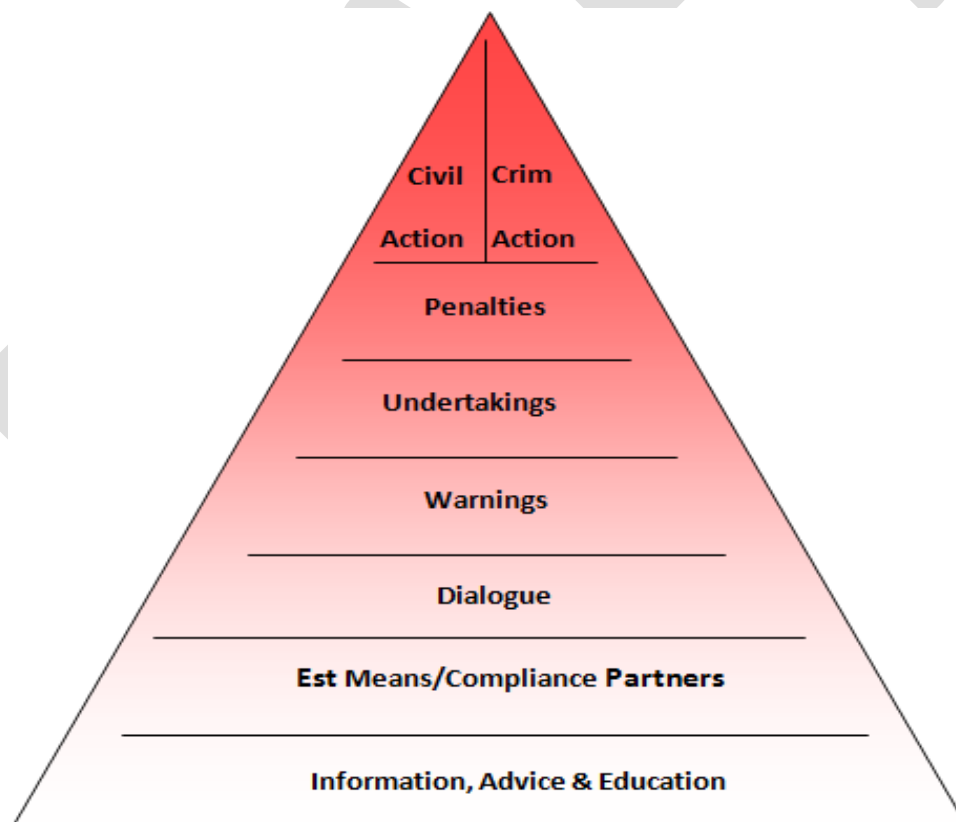
- encouraging communication and coordination between agencies to achieve efficient and effective enforcement
- regular conference calls to discuss: cases, legislative developments, investigative techniques, ways to address obstacles to enforcement, consumer and business education projects
- encouraging dialogue between government agencies and private sector representatives to promote ways to support government agencies in bringing spam cases and pursue their own initiatives to fight spam.

4.36 The action plan is open for other interested government agencies and for appropriate private sector representatives to join in order to expand the network of bodies working together to combat economic threats to consumers online.

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## 5 THE CMA'S APPROACH TO COMPLIANCE AND ENFORCEMENT OF CONSUMER PROTECTION LAW

- 5.1 Consumers are best served by competitive markets where businesses compete fairly for custom in compliance with the law. The CMA believes that most businesses aim to treat their customers fairly and comply with the consumer protection law that the CMA enforces.<sup>27</sup>
- 5.2 The law sets minimum standards for behaviour in markets and the CMA has a range of enforcement options to ensure compliance with them.
- 5.3 The diagram<sup>28</sup> below illustrates the range of enforcement and compliance options available to the CMA. It shows enforcement options including civil and criminal powers but also the flexibility of the CMA approach in using clear, targeted and timely information, advice and education to secure compliance. Further detail on the CMA's approach to compliance and enforcement is set out below.



<sup>27</sup> See Annexe A for a list of consumer protection legislation enforced by CMA.

<sup>28</sup> The diagram does not replicate the order in which options are considered.



## The CMA's Approach to Compliance

- 5.4 The CMA encourages higher standards using tools other than enforcement either itself or through working with compliance partners.<sup>29</sup>
- 5.5 For example, the CMA supports the provision of clear, targeted and timely information and guidance to businesses, to educate, enable and encourage their compliance with consumer protection legislation, and to consumers, to educate and empower them and so reduce the need for enforcement action.
- 5.6 The CMA may issue specific guidance to businesses in a sector where, for example, it has published a market study, or to businesses in relation to the application of the UTCCRs.
- 5.7 The CMA relies, where appropriate, on its compliance partners to educate consumers,<sup>30</sup> to encourage compliance and also to deal with consumer complaints.<sup>31</sup>
- 5.8 Further detail on the CMA's relationship and division of work as between compliance partners, is set out in chapter 4.

## The CMA's Approach to Enforcement

- 5.9 When it is necessary to use enforcement action to achieve compliance, the CMA aims to ensure that such interventions deliver high impact results, for example, by changing market behaviour, clarifying laws or providing the necessary level of deterrence to those who would deliberately flout their legal obligations. The CMA takes a risk-based approach, prioritising its actions to ensure resources are used to maximum effect and to avoid burdening business with the costs of unnecessary interventions. The CMA aims to be as robust as necessary to gain compliance while allowing maximum freedom for effective competition within the law.

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<sup>29</sup> Compliance Partners are established means - bodies able to act in place of the CMA in encouraging compliance with the CPRs. The CMA has developed principles to apply when working with its partners to enforce both the CPRs and the BPRs. See paragraph 4.24 for further information.

<sup>30</sup> In relation to consumer guidance on consumer law, the role in educating consumers is provided by Citizens Advice services.

<sup>31</sup> While the CMA has powers under the CPRs to take enforcement action in response to a complaint concerning misleading advertising, in practice the CMA will give existing organisations, in this case the Advertising Standards Authority (a self-regulatory body which as a compliance partner acts as 'established means' for this purpose) the opportunity to deal with complaints in the first instance.

5.10 The CMA is committed to the principles of good regulation in relation to its enforcement action as set out in statute<sup>32</sup> and aims to ensure when carrying such activity that its action is:

- proportionate and consistent
- targeted
- clear, and
- accountable.

5.11 The way the CMA applies these principles is set out below.

### **Proportionate**

5.12 The CMA decides its enforcement approach to any particular case in light of all the facts before it, its current overall priorities, its appropriate resources and the appropriate legal considerations such as whether there is a power to act.

5.13 The CMA generally prioritises its work according to its prioritisation principles<sup>33</sup> however where appropriate the CMA may also take account of other relevant factors.

5.14 The CMA fully recognises the need to ensure that its interventions are proportionate. In considering the proportionality of interventions the CMA takes into account issues such as:

- the likely direct effect of enforcement on consumer welfare in the market or sector where the intervention takes place
- the indirect effects of any action, particularly on the working of relevant markets, including deterrence; for example where the practice is new and likely to be repeated or copied, the deterrent effect of enforcement action is likely to be higher

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<sup>32</sup> See section 21 of the Legislative and Regulatory Reform Act 2006 and in the Regulator's Compliance Code 2007 – currently being revised.

<sup>33</sup> CMA Prioritisation Principles – to be published.

- the likelihood of a successful outcome and the risks of not taking action bearing in mind the seriousness of any breach of the law and any impact on the effectiveness of the consumer protection regime
- the available options, from advice on compliance, compliance partners' intervention, warning letters, undertakings, interim measures, injunctive action or enforcement orders through to criminal prosecution
- the extent of any administrative burdens likely to be imposed by these various interventions, particularly taking account of the size of the business or businesses involved
- the type of action to which the particular business will best respond
- intelligence, including knowledge of the business's intent and past behaviour
- whether the resource requirements of the action are proportionate to achieving the desired results.

### **Consistent and targeted**

- 5.15 It is the CMA's intention to avoid a situation whereby businesses receive multiple approaches on similar or linked issues, or approaches reflecting different interpretations of the law, so they can deal effectively with a single body and expect a consistent approach.
- 5.16 Where powers are shared between separate authorities, the CMA works on the principle that action should always be taken by the body that is best placed, following appropriate consultation with other compliance partners, particularly where consultation is required, and taking account of both statutory and non-statutory mechanisms. The CMA will also work with compliance partners to assist a consistent interpretation of consumer protection laws. Further detail on the CMA's work with other partners is set out in chapter 4.
- 5.17 In carrying out its functions, the CMA endeavours to act fairly and applies its procedures to achieve consistent outcomes in the market. This does not mean that the CMA will always take the same steps to enforce the law in the same way on apparently comparable cases or use the same legislative option – rather the CMA aims to tailor the action to the individual circumstances. The CMA, across all its consumer enforcement activities, assesses each case on

its own merits, taking account of risk and of the need for proportionality, deterrence and achieving high levels of compliance.

- 5.18 The CMA will carry out projects that estimate and evaluate the impact of its work which seek to ensure its actions are cost-effective, well targeted and any burdens imposed on legitimate businesses are proportionate to benefits obtained for consumers. The CMA will consider the impact of its work in various ways, including, for example, analysis of complaints, soliciting views of trade bodies and businesses affected and independently commissioned research.

### **Transparency in the CMA's consumer enforcement work**

- 5.19 The CMA is committed to the principle of transparency in its consumer enforcement work. Detail on the CMA's overall commitment to transparency and its approach to disclosure can be found in CMAcon6 Transparency and disclosure: Statement of the CMA's policy and approach.<sup>34</sup>
- 5.20 In general, the CMA aims to be as transparent as it can about its enforcement activities to aid consumer and business understanding of how it seeks to ensure markets work well. The CMA seeks to provide full, clear and timely information and guidance on legal requirements. In addition, the CMA:
- deals with enquiries about its enforcement activities in line with the requirements of the Freedom of Information Act 2000 (FOIA), while also having regard to legal protections enjoyed by information subjects
  - publishes information that is in the public interest to disclose, in particular via an approved Information Scheme under FOIA, and
  - where possible and appropriate, shares or exchanges information with other regulators (as far as permitted by legal disclosure restrictions), to facilitate the exercise of its functions and/or the exercise of the functions of the regulators concerned.
- 5.21 In making disclosures to the public the CMA takes into account the need to comply with any statutory constraints on the disclosure of information that protect businesses and individuals under Part 9 of the EA02 and under the Data Protection Act 1998 (DPA98), and has full regard to the importance of the duty of confidentiality.

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<sup>34</sup> Currently under consultation, see [www.gov.uk/cma](http://www.gov.uk/cma)

- 5.22 When the CMA takes enforcement action it will inform the parties directly involved of the decision to open a case. This may be done in the course of contact with the parties or a case initiation letter.
- 5.23 Although the level of detail may vary depending on the circumstances of the case, the CMA aims to tell the businesses concerned:
- the business activity or practice causing concern
  - the law(s) allegedly breached and/or the law to be enforced, including the CMA's enforcement role
  - an explanation of the next steps including timescales and the possible consequences of failure to respond
  - the risks the CMA has identified which we believe make enforcement necessary, and
  - the contact details for the main CMA contacts for the case.
- 5.24 However, it may not be appropriate to inform the parties directly involved when doing so may prejudice an investigation. For example, in a criminal investigation, there will be circumstances where the CMA will move without notice towards the exercise of criminal powers without any consultation with the parties or business subject to the investigation.
- 5.25 The CMA will place a case opening announcement on its website to announce its decision to formally begin a case, unless to do so would prejudice the case or would otherwise be inappropriate.
- 5.26 On completing a case in relation to which a formal case opening announcement has been made, the CMA will publicise the outcome of court or administrative proceedings, the successful negotiations of undertakings, requirements, determinations, interim measures and orders, unless it would be inappropriate to do so. The CMA will also, where appropriate, publish case closure decisions on prioritisation grounds on its website,<sup>35</sup> taking account of the need to:
- deter others from engaging in similar kinds of conduct

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<sup>35</sup> Sections 215(1), 219(2) and 220(2) and (3) of the EA02 and other relevant consumer protection legislation.

- warn consumers about practices that are detrimental to their interests
- increase consumers' awareness of their rights
- facilitate complaints about further breaches, and educate other businesses in the market
- create an open public record of the CMA's consumer enforcement work.

## **Accountability**

- 5.27 The CMA is committed to providing a high quality, accessible and responsive service to individuals and businesses being professional, courteous and helpful in all contacts and enquiries.
- 5.28 The CMA is accountable to the public through Parliamentary scrutiny in Westminster and the devolved administrations, for example through inquiries by select committees.
- 5.29 A member of the public may complain to the Parliamentary and Health Service Ombudsman via a Member of Parliament about the CMA's administrative actions, after seeking to resolve the complaint with the CMA. The CMA will have regard to the Ombudsman's Principles of Good Administration, which are:
- getting it right
  - being customer-focused
  - being open and accountable
  - acting fairly and proportionately
  - putting things right, and
  - seeking continuous improvement.
- 5.30 The CMA will set out its consumer objectives, as part of its Annual Plan which is laid before Parliament. The CMA is accountable to Parliament for the delivery of these objectives via the presentation of its Performance Report., which will also provide information on its ongoing consumer work in the public domain.

5.31 Further detail on the CMA's commitment to accountability and its complaints procedure is set out in 'Transparency and disclosure: Statement of the CMA's policy and approach'.<sup>36</sup>

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<sup>36</sup> See document CMAcon6 on [www.gov.uk/cma](http://www.gov.uk/cma).

## 6 THE USE OF CIVIL CONSUMER ENFORCEMENT POWERS BY THE CMA

- 6.1 Part 8 of the EA02 deals with provisions for the enforcement of consumer protection legislation. It gives the CMA, along with other enforcers,<sup>37</sup> powers to apply to the courts for an enforcement order to stop a business from breaching certain legislation, where the breach harms the collective interests of consumers. Such breaches are known as either domestic infringements or Community infringements.
- 6.2 Domestic infringements are breaches of a wide range of specified UK laws. Community infringements are acts or omissions that breach UK legislation implementing a number of listed EU consumer protection directives or regulations and which harm the collective interests of consumers.<sup>38</sup> In each case the breach must affect, or have the potential to affect, consumers generally or a group of consumers. This must be established by the evidence gathered by the CMA or other enforcer.
- 6.3 For the CMA, enforcement action may be appropriate where it has determined that breaches of law point to systemic failures in a market, where changing the behaviour of one business would set a precedent or have other market-wide implications, where there is an opportunity to set an important legal precedent or where there is a strong need for deterrence or to secure compensation for consumers. The CMA will make strategic choices about the cases it takes and apply its prioritisation principles.
- 6.4 This chapter describes the consumer enforcement powers conferred on the CMA under Part 8 of the EA02, as well as the procedures that apply and the limits to those powers. More detailed guidance on Part 8 of the EA02 is available in the OFT guidance 'Enforcement of consumer protection legislation' (OFT512).<sup>39</sup>

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<sup>38</sup> The list of EU legislation was amended by the Enterprise Act 2002 (Amendment) Regulations 2006 (see [www.legislation.gov.uk/ukxi/2006/3363/pdfs/ukxi\\_20063363\\_en.pdf](http://www.legislation.gov.uk/ukxi/2006/3363/pdfs/ukxi_20063363_en.pdf)) so that it includes all the EU consumer protection laws covered by the CPC (see section 210(7A) of and Schedule 13 EA02).

<sup>39</sup> Enforcement of consumer protection legislation (OFT512) available to download at: [www.gov.uk/cma](http://www.gov.uk/cma).



6.5 The proposals in the Government's Consumer Rights Bill<sup>40</sup> will impact on the civil consumer enforcement regime and this document will be updated to reflect those changes once the new legislation is in place.

## **Power of investigation**

### **Access to information**

6.6 The CMA has the power to require any person to answer questions in writing, or provide information, and to produce specified documents relevant to an investigation. This power must be exercised by serving a written notice.<sup>41</sup> If a person fails to comply with the notice then it is possible for the CMA to make an application to the court<sup>42</sup> for an order to be granted requiring the person to provide the information.

### **On-site inspection powers**

6.7 The CMA also has the power:

- to gain access to premises without a warrant<sup>43</sup>
- to require persons to produce goods or documents (including information recorded in any form), and to require persons to give an explanation about such goods or documents, during inspections with and without a warrant<sup>44</sup>
- to seize goods or documents for certain purposes during inspections with and without a warrant<sup>45</sup>
- to enter and search premises under a warrant.<sup>46</sup>

6.8 These powers can be used in respect of premises including vehicles but not in respect of premises which are used only as a dwelling.<sup>47</sup>

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<sup>40</sup> For further details the draft Bill can be seen at [www.gov.uk/government/publications/draft-consumer-rights-bill](http://www.gov.uk/government/publications/draft-consumer-rights-bill).

<sup>41</sup> Under section 224 or 225 of EA02 or the equivalent provisions of other legislation.

<sup>42</sup> Under section 227.

<sup>43</sup> Section 227A.

<sup>44</sup> Section 227B.

<sup>45</sup> Section 227B.

<sup>46</sup> Section 227C.

<sup>47</sup> Section 227A(9).

## **Power to gain access to premises without a warrant**

### **When the power can be used**

- 6.9 The CMA can exercise its on-site inspection powers if there is a 'reasonable suspicion' that a Community infringement has been committed in order to investigate whether one has occurred (or, in the case of a reasonable suspicion that one is likely to be committed, to investigate whether it is likely to occur).
- 6.10 The CMA can also exercise this power, again with reasonable suspicion, to investigate whether a person has complied with or is complying with an enforcement order or an interim enforcement order which has already been made on its application, or an undertaking already given by the business to it or to the Court relating to Community infringements. This will enable the CMA to police its enforcement orders, interim enforcement orders, or undertakings which are already in place.

### **The scope of the power**

- 6.11 For the purposes set out above, any officer of the CMA authorised in writing (referred to in the text below as 'an authorised officer') can enter premises in order to:
- observe the carrying on of a business on the premises
  - inspect goods or documents on the premises
  - require any person on the premises to produce goods or documents within such period as the officer considers to be reasonable. Where a document contains illegible information, a legible copy of the information can be required
  - seize goods or documents in order to carry out tests on them on the premises or seize, remove and retain them to carry out tests on them elsewhere, or
  - seize, remove and retain goods or documents which he reasonably suspects may be required as evidence of a Community infringement or a breach of a relevant enforcement measure.

6.12 An authorised officer entering premises without a warrant may in addition require:

- any person who is required to produce any goods or documents by virtue of the exercise of the power
  - to state to the best of his knowledge and belief, where the goods or documents are
  - to provide an explanation of the goods and documents produced, and
  - to secure that any goods or documents produced are authenticated or verified in such a manner as the authorised officer considers appropriate

6.13 An authorised officer may take copies of, or extracts from, any documents to which he has access by virtue of exercising his powers, subject to rules relating to legal privilege communications (see further below).

### **The procedure**

6.14 An authorised officer may enter any premises in connection with an investigation if the occupier of the premises has been given at least two working days' written notice of the intended entry by delivering the notice or leaving it at the premises or by sending it by post. 'Working day' means a day which is not Saturday or Sunday or Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971<sup>48</sup> in the part of the UK in which the premises are situated.

6.15 An authorised officer may enter premises without a warrant and without notice if the officer has taken all reasonably practicable steps to give notice but has been unable to do so.

6.16 In all cases, the authorised officer entering the premises must produce to any occupier evidence of his identity and authorisation if asked to do so.

6.17 If the authorised officer is carrying out an inspection of premises without a warrant the written notice of the intended entry must state:

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<sup>48</sup> See [www.legislation.gov.uk/ukpga/1971/80/contents](http://www.legislation.gov.uk/ukpga/1971/80/contents).

- why the entry is necessary, and
- the nature of the offence that may be committed if a person obstructs or fails to co-operate with an authorised officer when the powers of inspection are exercised.

6.18 If the authorised officer is entering the premises without a warrant and without written notice, he must produce to any occupier that he finds on the premises a document containing the following information:

- the reasons why the entry is necessary
- the nature of the offence that may be committed if a person obstructs or fails to co-operate with an authorised officer when the powers of inspection are exercised (described below).

6.19 An authorised officer may only enter premises at a reasonable time and will normally arrive at the premises during office hours. On entering the premises, an officer will produce evidence of his identity and will also hand over a separate document which sets out the powers of the authorised officer. Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the authorised officer during the inspection. At the end of the inspection, the authorised officer will provide, unless it is not practicable to do so, a list of goods and documents that have been seized, a list of extracts from documents of which copies have been taken and copies of documents that have been seized. In circumstances where it is not practicable to do so at the end of the inspection, a list will be provided as soon as possible afterwards.

6.20 If the premises are unoccupied or the occupier is temporarily absent, the authorised officer will take reasonable steps to ensure that when he leaves the premises they are as secure as they were before he entered.

### **Access to legal advice**

6.21 The CMA is required to give at least two working days' notice of an intended entry for an inspection. A business is entitled to seek legal advice but as it has received prior notice of intended entry, the authorised officer will commence the inspection immediately on arrival at the premises.

## **Power to enter premises under a warrant**

6.22 An application can be made to a justice of the peace (or to a sheriff in Scotland, and in Northern Ireland to a lay magistrate) for a warrant for an authorised officer to enter and search any premises including vehicles but does not include any premises used only as a dwelling.

### **When the power can be used**

6.23 A warrant may be issued where the CMA can show that there are reasonable grounds for believing that there are goods or documents on the premises to which they would be entitled to have access<sup>49</sup> and that any of the conditions detailed below are met.

6.24 These conditions are:

- that an authorised officer has been, or would be likely to be, refused admission to the premises or access to the goods or documents
- that the goods or documents would be likely to be concealed or interfered with if an appropriate notice were given
- that there is likely to be nobody at the premises capable of granting admission.

### **The scope of the power**

6.25 The warrant will authorise an authorised officer to:

- enter the premises specified in the warrant (using reasonable force if necessary)
- do anything on the premises that an authorised officer would be able to do if he had entered the premises without a warrant
- search for goods or documents which they have required a person on the premises to produce where that person has failed to comply with such a requirement

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<sup>49</sup> Under sections 227A, 227B and 227C(2).

- take any other steps which he considers to be reasonably necessary for preserving such goods or documents or preventing interference with them
- to the extent that it is reasonably necessary to do so, require any person who is responsible for discharging any of the functions of the business carried on at the premises to break open a container and, if that person does not comply with the requirement or if such person cannot, despite all reasonably practicable steps taken, be identified, to do so himself.

## **Additional powers**

- 6.26 For inspections both with and without a warrant, the authorised officer can take persons they consider necessary to assist in the search. Such persons may be needed to provide expertise which is not available within the CMA but is necessary to exploit fully the terms of the warrant. For example, an IT expert who would assist the CMA officers to retrieve information from computers located on premises for which the warrant was issued. Or, such persons may be contracted from investigation agencies who accompany authorised officers to allow the search to proceed quickly and efficiently. These are illustrative examples and should not be read as limiting the exercise of this power.
- 6.27 An authorised officer may also take with him such equipment as he deems necessary. For inspections conducted under warrant this will include equipment that can be used to enter the premises using reasonable force if necessary (for example, equipment that can be used to break locks) as well as equipment that can be used to facilitate the search (for example, computer equipment).
- 6.28 In addition, for inspections conducted under warrant, an authorised officer will also have the power to remove material where it is not reasonably practicable to determine on the premises the extent to which it may be seized, if at all, but where there are reasonable grounds to believe that it may be or contain something authorised to be seized.<sup>50</sup> The power also applies in relation to property which clearly can be seized but which is contained in something that cannot, and it is not reasonably practicable for the property to be separated

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<sup>50</sup> Under section 50(1) of the Criminal Justice and Police Act 2001 (CJPA) which can be located at [www.legislation.gov.uk/ukpga/2001/16/contents](http://www.legislation.gov.uk/ukpga/2001/16/contents).

out.<sup>51</sup> This may be the case, for example, where there is a large bulk of material or where special technical equipment is needed to separate out material the authorised officer would be entitled to take from material which he is not (for example, material held on a computer).

6.29 The factors that the authorised officer will take into account in deciding whether to exercise these seize and sift powers include:

- how long the determination or separation of material would take if carried out on the premises, and
- in the case of separation, whether carrying out the separation on the premises would prejudice the use of the material to be taken.

6.30 The exercise of seize and sift powers is subject to strict safeguards, which include a requirement by the authorised officer to provide a written notice to the occupier of the premises or the person from whom the material has been seized specifying:

- what has been seized
- the grounds for the exercise of the seize and sift powers
- the grounds for a person with a relevant interest in the seized property to apply to a judicial authority for the return of seized material
- the duty of officers to secure property in certain circumstances when such an application is made
- the name and address of the person to whom notice of such an application must be given, and
- to whom an application may be made to allow the attendance at the initial examination of the property to determine which of the property may be retained and which must be returned.

6.31 The power to obtain information does not extend to legally privileged material (see below). If it appears that legally privileged material has been seized, the CMA has a duty to return this material as soon as reasonably practicable.

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<sup>51</sup> Under section 50(2) of the CJPA.

## **The procedure**

6.32 Application for a warrant must be made to a Justice of the Peace (in Scotland, a Sheriff and in Northern Ireland to a lay magistrate), supported by information on oath (in Scotland, evidence on oath) given by an officer of the CMA.

6.33 The warrant ceases to have effect at the end of the period of one month beginning with the day of issue.

6.34 The warrant will indicate:

- the premises to which it applies
- the date of issue and the date of expiry
- the reasons why the entry is necessary
- the nature of the offences that may be committed if a person obstructs or fails to co-operate with an authorised officer when the powers of inspection are exercised (described below).

6.35 The authorised officer will normally arrive at the premises during office hours. On entering the premises, the authorised officer will produce evidence of his identity to any occupier of the premises. If requested they must produce the warrant to the occupier of the premises for inspection. He will also hand over a separate document which sets out the powers of the authorised officer. Where possible, the occupier of the premises should designate an appropriate person to be a point of contact for the authorised officer during the search. At the end of the inspection, the authorised officer will provide, unless it is not practicable to do so, a list of goods and documents that have been seized, a list of extracts from documents of which copies have been taken and copies of documents that have been seized. In circumstances where it is not practicable to do so at the end of the inspection, a list will be provided as soon as possible afterwards.

6.36 If the premises are unoccupied or the occupier is temporarily absent, the authorised officer will take reasonable steps to ensure that when he leaves the premises they are as secure as they were before he entered.

## **Access to legal advice during searches**

6.37 When carrying out a search, the authorised officer is not required to wait for an individual's or a business's legal advisers to arrive before commencing the



search. That said, generally, the authorised officer will wait for legal advisers where to do so does not unreasonably delay the commencement of the search. If the authorised officer considers it reasonable in the circumstances to do so, and if that officer is satisfied that individual or business is complying with, or will comply with, such conditions as he considers it appropriate to impose,<sup>52</sup> the authorised officer will grant a request to allow a reasonable time for a legal adviser to arrive at the premises before the inspection continues. For these purposes, a 'reasonable period' is such period of time as the authorised officer considers is reasonable in the circumstances.

- 6.38 If the search does commence prior to the arrival of a legal adviser, the authorised officer would, as far as practicable, avoid removing any material from the premises until the legal adviser has had the opportunity to make representations.
- 6.39 If the individual or business decides to seek legal advice it should do so promptly and this must not unduly delay or impede the inspection. Any delay must be kept to a strict minimum.
- 6.40 If the individual or business has an in-house legal adviser on the premises, or if it has received prior notice of the inspection, the authorised officer and other persons will not wait for an external legal adviser to arrive.
- 6.41 The authorised officer will not generally administer a caution during the course of a search under warrant. A caution may be administered during the course of a search under warrant if a person voluntarily decides to provide information to the authorised officer. In this case the officer may consider it appropriate to give a caution and advise the person that he is free to seek legal advice. A person is not required to be cautioned prior to being asked questions that are necessary solely for the purpose of furthering the proper and effective conduct of a search, such as to obtain computer passwords or safe combinations.

## **Limitations on the use of the powers of investigation**

### **Legally privileged communications**

- 6.42 The power of the CMA to obtain documents under the EA02, whether by a written notice, or pursuant to the power to access premises or during the execution of a search warrant, does not extend to communications covered by

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<sup>52</sup> Typical conditions would be designed to ensure that documents were not subject to tampering.

legal professional privilege. A person is not required to produce or disclose any information or document which he would be entitled to refuse to produce or disclose on grounds of legal professional privilege in proceedings in the High Court or in the Scottish Court of Session on grounds of confidentiality of communications. This is generally defined to mean a confidential communication:

- between a professional legal adviser and his or her client for the dominant purpose of obtaining or giving legal advice, or
- made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings.

- 6.43 If the occupier of premises entered with or without a warrant considers that a document or information is subject to privilege, he should provide the authorised officer or accompanying persons with a sufficient explanation such as to demonstrate to his satisfaction that the document or information, or parts of it, for which privilege is claimed, fulfil the conditions for it being privileged.
- 6.44 If no agreement is reached during the inspection as to whether or not the conditions for privilege have been made out in relation to particular documents or information, the authorised officer will suggest to the occupier that the authorised officer makes a copy of the documents or information and places this in a sealed envelope or package in the presence of the occupier. The authorised officer will then discuss with the occupier the appropriate arrangements for the safe-keeping of the documents or information by the CMA pending resolution of the issue of privilege. The authorised officer may, if it is agreed that the disputed material will be retained by the occupier's legal adviser, require the occupier's legal adviser to give (or if no legal adviser is present, that the occupier give) a written undertaking that the disputed material will be retained safely and that its contents will not be concealed, removed, tampered with or destroyed until the issue of privilege is resolved.
- 6.45 In addition, where entry is made under warrant, and the authorised officer exercises the powers of seize and sift described above, any legally privileged items which have been seized will be returned as soon as reasonably practicable.

## **Privilege against self-incrimination<sup>53</sup>**

- 6.46 The CMA may compel an individual or business to provide certain information or documents in the exercise of its powers. However, if it is exercising its powers in relation to a suspected breach of criminal provisions it cannot require the business or individual to provide information or documents (other than pre-existing documents) that might involve an admission on its or his part of the existence of a breach of consumer law, which it is incumbent upon the CMA to prove.<sup>54</sup> The CMA may, however, require information relating to facts and the production of pre-existing documents.
- 6.47 Documents produced by a person in response to a requirement imposed by the authorised officer in the exercise of their powers may, at the discretion of a judge, be admissible in evidence against the person in civil proceedings or on prosecution for an offence. However whilst statements made by a person in response to such a requirement may be used in civil proceedings (subject to the discretion of the judge), the CMA will not use such a statement on prosecution for an offence unless evidence relating to the statement is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person. This limitation to the use of statements in criminal proceedings does not apply to proceedings for an offence relating to obstruction or failure to co-operate with powers of entry.<sup>55</sup>

## **Disclosure of confidential information**

- 6.48 The EA02<sup>56</sup> imposes a general restriction on the disclosure of ‘specified information’, defined as information relating to the affairs of an individual or the business of an undertaking which has come to the CMA in connection with the exercise of its functions, unless such disclosure is permitted under one of the ‘information gateways’ in Part 9 EA02 which are set out below. Such information must not be disclosed during the lifetime of that individual or while the undertaking continues in existence.<sup>57</sup>

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<sup>53</sup> Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is given effect in the UK by the Human Rights Act 1998.

<sup>54</sup> Where the CMA has not established the true nature of breaches being investigated a business or individual would not be asked to provide information or documents (other than pre-existing documents) that might involve an admission on its or his part of the existence of a breach of consumer law in order to comply with self incrimination rules in criminal prosecutions.

<sup>55</sup> A section 227E offence.

<sup>56</sup> Part 9 of the EA02.

<sup>57</sup> Section 237 of the EA02.

6.49 Further information on the CMA's approach to the treatment and disclosure of information, including to identifying confidential information, is available in the guideline CMA6 Transparency and Disclosure.<sup>58</sup>

### **Retention of documents and goods**

6.50 Documents seized on the premises, under the powers described above, may be retained for no more than three months. The same time limit applies to goods seized under those powers unless the goods are reasonably required in connection with the exercise of any function of the CMA under Part 8 of the EA02. In such a case the goods may be retained for as long as they are so required.

### **Complaints procedure**

6.51 Anyone who has a complaint about the conduct of the CMA in carrying out an on-site inspection can find details of the complaint procedure at [www.gov.uk/cma](http://www.gov.uk/cma).

## **Offences relating to the Powers of Investigation**

### **Offences created by Part 8 of the EA02**

6.52 A criminal offence is committed where a person, without reasonable excuse, intentionally obstructs or fails to co-operate with an authorised officer who is exercising or seeking to exercise a power of inspection (outlined above).<sup>59</sup>

6.53 A person guilty of such an offence is liable on summary conviction, to a fine not exceeding level 5 on the standard scale.<sup>60</sup>

### **Powers to require defendants to make payments into the public purse**

6.54 In relation to Community infringements, the CMA has the power itself (or more likely by applying to the courts) to require the losing defendant to make payments into the public purse in the event of failure to comply with the

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<sup>58</sup> See CMA 6 Transparency and Disclosure [currently in draft] (available at [www.gov.uk/cma](http://www.gov.uk/cma)).

<sup>59</sup> Section 227E of the EA02.

<sup>60</sup> £5,000 as at 1 April 2014.

decision.<sup>61</sup> In the UK, courts can impose fines for contempt of court consisting of disobedience of court orders to cease Community infringements.

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<sup>61</sup> Article 4(6)(g) of the CPC Regulation.

## 7 THE USE OF CRIMINAL CONSUMER ENFORCEMENT POWERS BY THE CMA

- 7.1 While the CMA's main enforcement instrument is Part 8 of the EA02, giving the CMA, and other designated enforcers, the power to apply to a court for an enforcement order to stop breaches of a range of consumer law the CMA also has criminal prosecution powers (along with various other enforcers)<sup>62</sup> under the CPRs and the BPRs.<sup>63</sup>
- 7.2 Detailed guidance on the CPRs is available in the OFT guidance 'Guidance on the Consumer Protection from Unfair Trading Regulations 2008' (OFT1008). In summary the CPRs contain a general prohibition of unfair trading, prohibitions of misleading and aggressive trading practices and specific prohibitions of particular practices considered to be inherently unfair. The CPRs cover business to consumer practices<sup>64</sup> and apply to conduct by traders which is directly connected to the promotion, sale or supply of a product (including goods, services and intangibles) to or from consumers.
- 7.3 If a trader misleads, behaves aggressively or otherwise acts unfairly towards consumers, then the trader is likely to be in breach of the CPRs and may face action by enforcement authorities. The TSS are the lead enforcers of the CPRs with a duty to enforce them, and responsibility for coordinating their application in the UK. The CMA has a power and not a duty to enforce them. However, the CMA and TSS have complementary powers and will work in partnership (see chapter 4), to ensure that action is taken by the most appropriate enforcement body.
- 7.4 For the CMA, action may be appropriate where it has determined that breaches of law point to systemic failures in a market, where changing the behaviour of one business would set a precedent or have other market-wide implications, where there is an opportunity to set an important legal precedent or where there is a strong need for deterrence or to secure compensation for

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<sup>62</sup> As at 1 April 2014, the enforcers with criminal prosecution powers in addition to the CMA are Weights and Measures authorities (the TSS), the Department of Enterprise, Trade and Investment in Northern Ireland, and the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate in Scotland, may also conduct prosecutions under the CPRs. A number of other enforcers have the power to take civil injunctive action under Part 8 EA02, such as the sectoral regulators.

<sup>63</sup> See [www.legislation.gov.uk/ukksi/2008/1277/contents/made](http://www.legislation.gov.uk/ukksi/2008/1277/contents/made) and [www.legislation.gov.uk/ukksi/2008/1276/contents/made](http://www.legislation.gov.uk/ukksi/2008/1276/contents/made)

<sup>64</sup> See <http://www.legislation.gov.uk/ukdsi/2008/9780110811475/contents> - Misleading business to business practices and comparative advertising are covered by the Business Protection from Misleading Marketing CPRs 2008.

consumers. The CMA will make strategic choices about the cases it takes and apply its prioritisation principles.

- 7.5 The CMA will consider whether to enforce the CPRs either by using the civil injunctive powers in Part 8 of the EA02 or by carrying out a criminal investigation with a view to prosecuting those responsible. Although the CMA is more likely to take civil cases it will, where appropriate, use its criminal powers robustly, acting decisively to stop offenders where this is likely to have an effect across the market or wider economy.
- 7.6 The remainder of this chapter provides guidance on the circumstances in which, having determined that enforcement action under the CPRs is appropriate, and that the CMA is the appropriate authority to enforce, the CMA is likely to take criminal enforcement action. It should be recognised, however, that each case must be considered on its merits and particular circumstances, and in some circumstances an approach different from that suggested by this guidance may be required.

### **Considerations in deciding whether to commence a criminal investigation**

- 7.7 Where the CMA determines that enforcement action is required it will generally use its criminal powers when:
- civil enforcement is unlikely to be effective in achieving a change in behaviour, and/or
  - the breach is sufficiently serious that the conviction and punishment of offenders ought to be pursued, for example to protect the public and to provide wider deterrence.
- 7.8 See below under 'Prosecution' the test which the CMA must have regard to when it is considering prosecution.
- 7.9 Particular circumstances in which the CMA is therefore likely to consider commencing a criminal investigation include:
- where traders deliberately or recklessly use deceptive, misleading or fraudulent practices
  - where traders deliberately or recklessly use aggressive, intimidating or coercive practices

- where flagrant and/or persistent offending by a trader or group of associated traders has occurred or is occurring
- where a particular unlawful practice is widespread, or there is a risk of it becoming widespread, to the serious detriment of consumers and criminal enforcement will send a strong deterrent message
- where a particular unlawful practice is novel or unusual and it is determined that criminal enforcement is likely to be the most effective means by which to set a precedent for future action
- where false statements are made or false documents provided in the course of dealings with the CMA or another enforcement body or where an investigation is otherwise obstructed.

7.10 Where cases do not have any of those features, or any combination of those features, the CMA will generally consider alternative means of encouraging compliance such as civil enforcement, other compliance activities or no enforcement, depending on the potential desired outcomes. The CMA will work with other enforcers to ensure action is taken by the most appropriate body.

7.11 As the CMA has both civil and criminal enforcement powers, if it becomes apparent during the course of an investigation that a breach of the CPRs has occurred, but for any reason criminal enforcement is no longer appropriate, the CMA may stop the criminal investigation and deal with the breach by alternative means, such as civil enforcement.

## **Carrying out investigations**

7.12 The CPRs grant certain powers to authorised officers of the CMA conducting investigations under the CPRs.<sup>65</sup> These include powers:

- to make test purchases in order to determine whether the CPRs are being complied with<sup>66</sup>
- to enter premises and inspect goods in order to determine whether a breach of the CPRs has been committed<sup>67</sup>

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<sup>65</sup> Note that these differ from the investigation powers set out in Part 8 of the EA02.

<sup>66</sup> Regulation 20 of the CPRs.



- where there is reasonable cause to suspect a breach of the CPRs has been committed, to:
  - require the production of business documents, and take copies
  - seize goods and documents to determine whether a breach of the CPRs has been committed, or as evidence.<sup>68</sup>

7.13 The CMA is also able, in certain circumstances,<sup>69</sup> to apply to a magistrates court for a warrant to enter premises, for the purpose of exercising the powers of production and seizure outlined above.<sup>70</sup>

7.14 The CMA will only exercise its powers under the CPRs when it considers it is necessary and proportionate to do so. The CMA will only seize goods or require documents to be produced that it believes to be necessary in order to carry out an investigation effectively.

7.15 CMA officers carrying out criminal investigations will have regard to the provisions of the Police and Criminal Evidence Act 1984 and the associated Codes of Practice and will respect the rights and freedoms guaranteed by the European Convention on Human Rights and the Human Rights Act 1998.<sup>71</sup>

## Prosecution

7.16 A decision by the CMA to prosecute a case criminally will be taken in accordance with the two stage test set out in the 'Code for Crown Prosecutors', that is, the 'evidential sufficiency test' and the 'public interest' test.<sup>72</sup>

7.17 Evidential sufficiency – the CMA will only commence a criminal prosecution when satisfied that there is sufficient evidence to provide a 'realistic prospect of conviction'. If the case does not pass the evidential test, it will not go ahead,

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<sup>67</sup> Regulation 21(1)(a) of the CPRs.

<sup>68</sup> Regulation 21(1)(b)-(d).

<sup>69</sup> Where the CMA believes there are goods or documents on the premises which are likely to disclose evidence of a breach of the CPRs, or a breach of the CPRs has been, is being, or is about to be committed on any premises and either admission to the premises has been or is likely to be refused and a notice of intention to apply for a warrant has been given; or applying for admission or giving a notice of intention to apply for a warrant would defeat the object of the entry; or the premises are unoccupied; or the occupier is absent and it might defeat the object of the entry to await his return.

<sup>70</sup> Regulation 22.

<sup>71</sup> Codes A-H issued by the Secretary of State pursuant to Section 66 PACE. See [www.gov.uk/police-and-criminal-evidence-act-1984-pace-codes-of-practice](http://www.gov.uk/police-and-criminal-evidence-act-1984-pace-codes-of-practice)].

<sup>72</sup> [www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/).

no matter how important or serious the allegation may be. The CMA may decide to look at the case under its other powers, or refer to another body if this is deemed appropriate.

7.18 Public interest - when deciding whether to prosecute, the CMA will consider the public interest factors set out in the Code for Crown Prosecutors, including whether, in light of all the evidence, the case might more appropriately be dealt with in another way.

7.19 Prosecutions may be brought against:

- individuals responsible for the offences
- corporate bodies, or
- officers of corporate bodies who have consented or connived in the commission of the offence.<sup>73</sup>

7.20 The CMA will decide who should face prosecution on a case-by-case basis, having regard to the evidence, and the best means of achieving the CMA's enforcement aims. In general, the CMA will seek to act against those who are genuinely responsible for the offence(s).

7.21 The CMA will determine the most appropriate charge or charges in each case on the evidence and with a view to ensuring that a court on conviction will have sufficient powers to impose sentences that properly reflect the seriousness of the offence. Charges may include offences under the CPRs and any other statutory or common law offences that are disclosed by the evidence.

7.22 The offences under the CPRs are:

- contravention of requirements of the 'general prohibition'<sup>74</sup>
- misleading actions<sup>75</sup>

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<sup>73</sup> Regulation 15.

<sup>74</sup> Regulation 3 - For a person to be convicted of a contravention of the general prohibition, which is a 'mens rea' offence, it must also be shown that he had a specified state of mind and his actions distort (or are likely to distort) the economic behaviour of the average consumer. The specified state of mind will be knowingly or recklessly engaging in a commercial practice which fails to comply with the requirement of professional diligence.

<sup>75</sup> Regulation 5 (except 5(3)(b) – code commitments).

- misleading omissions (including the omission of specified information in invitations to purchase)<sup>76</sup>
- aggressive practices<sup>77</sup>
- specific unfair commercial practices.<sup>78</sup>

7.23 The offences above are all strict liability offences, apart from contravention of the general prohibition (as explained in footnote 74), which requires proof of 'mens rea'.<sup>79</sup> For strict liability offences it need only be shown that there has been a prohibited act or omission.

7.24 Breach of most of the prohibitions contained in the CPRs means that an offence may have been committed, unless a defence can be shown. The defences available for the strict liability offences are those of due diligence<sup>80</sup> and innocent publication.<sup>81</sup> These defences are not available for the general prohibition.

7.25 In qualifying cases the CMA will usually ask the sentencing court to proceed with a view to making a confiscation order under the Proceeds of Crime Act 2002 unless it would be unjust to do so.

## Penalties

7.26 The general penalties are:

- on summary conviction, a fine not exceeding the statutory maximum<sup>82</sup>
- on conviction on indictment, an unlimited fine or imprisonment not exceeding two years or both.

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<sup>76</sup> Regulation 6.

<sup>77</sup> Regulation 7.

<sup>78</sup> Schedule 1 – apart from numbers 11 and 28.

<sup>79</sup> This is a legal term implying a mental element in the offence, for example knowledge or recklessness

<sup>80</sup> To be able to rely on the defence of due diligence, the person accused must prove that the commission of the offence was due to a mistake, reliance on information given by another person, the act or default of another, an accident, or another cause beyond his control, and, in addition, that he took all reasonable precautions and exercised all due diligence to avoid committing the offence or to avoid someone under his control committing it.

<sup>81</sup> The person accused who wishes to rely on this defence must prove that he is a person whose business is to publish or arrange publication of advertisements, he received the advertisement in the ordinary course of business, and that he did not know and had no reason to suspect that the publication would amount to an offence.

<sup>82</sup> This is as at 1 April 2014.

# ANNEXES

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## A. CONSUMER LEGISLATION UNDER WHICH THE CMA HAS ENFORCEMENT POWERS

A.1 The majority of consumer powers previously held by the OFT are transferred to the CMA, as of 1 April 2014, under ERA13.

A.2 The table below summarises the principal areas of consumer legislation under which the CMA has enforcement powers from 1 April 2014:

Legislation	Description
The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)	<p>These regulations protect consumers against unfair standard terms in contracts they make with traders. Under the UTCCRs, the CMA and other qualifying bodies have the power to pursue legal action to prevent the use of unfair standard terms in consumer contracts. If the CMA believes that a term is unfair, the CMA has powers to ask a court for an injunction to prevent it being used or recommended for use (civil enforcement).</p> <p>Legislation available at:  <a href="http://www.legislation.gov.uk/uksi/1999/2083/contents/made">www.legislation.gov.uk/uksi/1999/2083/contents/made</a></p>
The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)	<p>The CPRs implement the Unfair Commercial Practices Directive (UCPD)<sup>1</sup> in the UK.</p> <p>The Regulations include a general duty not to trade unfairly and seek to ensure that traders act honestly and fairly towards their customers. They apply primarily to business to consumer practices (but elements of business to business practices are also covered where they affect, or are likely to affect, consumers).</p> <p>In addition to civil enforcement powers, the CPRs provide the CMA with a criminal enforcement power under these</p>

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<sup>1</sup> As part of this implementation, the Business Protection from Misleading Marketing Regulations 2008 (BPMRs) were created. These regulations prohibit advertising which misleads traders, regulate business-to-business marketing and set out the conditions under which comparative advertising is permitted. The CMA also has both civil and criminal enforcement powers under this business protection legislation.

	<p>regulations.</p> <p>Legislation available at:  <a href="http://www.legislation.gov.uk/uksi/2008/1277/contents/made">www.legislation.gov.uk/uksi/2008/1277/contents/made</a></p>
<p>The Consumer Protection (Distance Selling) Regulations 1999 (DSRs)</p>	<p>The DSRs are designed to protect consumers who purchase goods and services without face to face contact with the supplier. The DSRs give extra protection to consumers who shop using methods such as the internet, mail order, telephone or cable television.</p> <p>The CMA has civil enforcement action powers in respect of the DSRs.</p> <p>Legislation available at:  <a href="http://www.legislation.gov.uk/uksi/2000/2334/contents/made">www.legislation.gov.uk/uksi/2000/2334/contents/made</a></p>
<p>Part 8 of the Enterprise Act 2002 (Part 8 of the EA02)</p>	<p>Under Part 8 of the EA02, bodies responsible for consumer law enforcement, including the CMA, have powers to seek court orders against businesses who breach a range of specific consumer protection laws.</p> <p>Civil enforcement action under Part 8 of the EA02 can be taken by the CMA against:</p> <ul style="list-style-type: none"> <li>• Community infringements - a breach of laws by a business which harms or is likely to harm the collective interests of consumers under the UK laws which transpose certain EU Directives/Regulations. These UK laws cover activities such as unfair terms in consumer contracts, unfair commercial practices, sale of goods, distance selling, doorstep selling and e-commerce.</li> <li>• Domestic infringements - a breach of UK laws by a business that harms the collective interests of UK consumers. These cover a wide range of trading activities, including sale of goods and supply of service laws.</li> </ul> <p>Under part 8 of the EA02 a single enforcement action may cover breaches of multiple pieces of consumer protection</p>

	<p>legislation.</p> <p>Legislation available at:  <a href="http://www.legislation.gov.uk/ukpga/2002/40/part/8">www.legislation.gov.uk/ukpga/2002/40/part/8</a></p>
<p>The Regulation on Consumer Protection Cooperation (CPC),<sup>2</sup></p>	<p>The European Council adopted the CPC Regulation on 7 October 2004, providing for wider and formalised co-operation between Member States on cross border infringements of EU consumer laws.</p> <p>Under the CPC the CMA acts as the UK's single liaison body facilitating this co-operation.</p>

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<sup>2</sup> Regulation (EC) No 2006/ 2004.

## B. STATUS OF OFT CONSUMER GUIDANCE DOCUMENTS AND PUBLICATIONS

B.1 The table below indicates the status of OFT guidance documents and publications relevant to enforcement of and compliance with consumer legislation that had been published and were in effect prior to the transfer of the various consumer functions to the CMA on 1 April 2014. Certain of those documents have been adopted by the CMA Board in order to facilitate transition to the new regime, and to minimise disruption to parties and the CMA.

OFT CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>1</sup>	Adopted by the CMA Board <sup>2</sup>
OFT1221	Statement of consumer protection enforcement principles	✓	-
OFT311	Unfair contract terms guidance	-	✓
OFT911	A quick guide to competition and consumer protection laws that affect your business	-	✓
OFT512	Enforcement of consumer protection legislation – guidance on Part 8 Enterprise Act 2002	-	✓
OFT1292	The OFT's approach to promoting business compliance with consumer protection law	✓	-
OFT143	Unfair standard terms	-	✓
OFT734	Guidance on unfair terms in holiday caravan agreements	-	✓
OFT737	Guidance on unfair terms in home improvement contracts	-	✓
OFT668	Guidance on unfair terms in package holiday contracts	-	✓
OFT667	Guidance on unfair terms in consumer entertainment contracts	-	✓
OFT635	Guidance on unfair terms in care home contracts	-	✓
OFT373	Guidance on unfair terms in health and fitness club agreements	-	✓
OFT356	Guidance on unfair terms in tenancy agreements	-	✓

<sup>1</sup> OFT publications listed in this column have, at the date of publication of this guidance, been replaced, or rendered obsolete, by CMA guidance or publications.

<sup>2</sup> OFT publications listed in this column have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future).



OFT CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>1</sup>	Adopted by the CMA Board <sup>2</sup>
OFT1008	Consumer protection from unfair trading	-	✓
OFT979	The Consumer Protection from Unfair Trading Regulations: a basic guide for business	-	✓
OFT1273	Criminal enforcement of the Consumer Protection from Unfair Trading Regulations	✓	-
OFT1494	Key issues in ongoing contracts: a practical guide	-	✓

B.2 Parties should refer to those documents listed above as having been adopted by the CMA board (the adopted guidance) for further details on the substance and procedure around the CMA's powers and duties in relation to enforcement and compliance. This is subject, in particular, to the following general limitations:

- all references in the adopted guidance listed above must be read in the light of this CMA consumer guidance 'CMAcon7 Consumer protection: Guidance on the CMA's approach to use of its consumer powers' [currently in draft and being consulted on].
- in the cases of conflict between this guidance document and the adopted guidance, this guidance document prevails
- the original text of the adopted guidance has been retained unamended: as such, that text does not reflect or take account of developments in case law, legislation or practice since its original publication, and
- all the adopted guidance should be read subject to the following cross-cutting amendments:
- references to the 'OFT' (except where referring to specific past OFT practice or case law), should be read as referring to the CMA
- references to articles of the EC Treaty should be read as referring to the equivalent articles of the Treaty on the Functioning of the European Union (TFEU)

- certain OFT departments, teams or individual roles may not be replicated in the CMA, or may have been renamed; a copy of the CMA's organisational chart is available on the CMA's website, and
- parties should check any contact details against those listed on the CMA's website, which will be the most up to date.

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