

Consumer protection: Draft guidance on the CMA's consumer powers

Summary of responses to consultation

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1. Introduction and summary

- 1.1 Following a consultation on 26 May 2016, the Competition and Markets Authority (CMA) published draft guidance on the CMA's consumer protection powers (the 'new' guidance).
- 1.2 The guidance:
- (a) Sets out how the CMA uses its consumer powers to address problems in markets, including its approach to compliance and enforcement of consumer law. It replaces the [Guidance on the CMA's approach to use of its consumer powers](#) (CMA7) issued on 12 March 2014.
 - (b) Explains the consumer protection provisions in Part 8 of the Enterprise Act 2002 (EA02) and indicates how these provisions operate. It replaces [Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act](#) (OFT512) which was originally published by the (Office of Fair Trading) OFT and adopted by the CMA.
 - (c) Explains certain investigatory powers provisions in Schedule 5 to the Consumer Rights Act 2015 (CRA), and indicates how these provisions operate.

Purpose of this document

- 1.3 The purpose of this document is to provide an overview of the responses to the consultation on the draft guidance and the CMA's view on the issues raised.
- 1.4 The CMA is a non-ministerial department formed on 1 April 2014. It is a primary competition and consumer authority which took over a number of functions formerly performed by the OFT and those of the Competition Commission.
- 1.5 The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.
- 1.6 The CMA is required under statute to prepare and publish advice and information to explain the provisions of Part 8 of the EA02 to persons who are likely to be affected by them and to indicate how the CMA expects such provisions to operate. Part 8 of the EA02 gives the CMA and other bodies powers to enforce certain consumer protection laws. The statutory requirement has to date been fulfilled by OFT512. The guidance replaces OFT512 and brings the guidance up to date.

- 1.7 The CMA has a new statutory requirement under the CRA to explain certain provisions of Schedule 5 to the CRA so far as they relate to investigatory powers to persons who are likely to be affected by them, and to indicate how the CMA expects such provisions to operate. Schedule 5 to the CRA contains a generic set of investigatory powers which consolidate and modernise the enforcement powers of a range of enforcers, including the CMA. The guidance fulfils that statutory requirement.
- 1.8 The CMA issued guidance on its approach to the use of its consumer powers in March 2014 at the time of changes to the consumer landscape and the refocusing of consumer powers by several bodies. Now that these changes have become more established, it is opportune to update this guidance and to consolidate it into single guidance which incorporates guidance on Part 8 and Schedule 5 investigatory powers.

Responses to the consultation

- 1.9 The consultation document that accompanied the draft guidance set out a series of questions on which respondents' views were sought. This document sets out a summary of the responses received to each of those questions and the CMA's view, where applicable, on those responses.

Consultation questions

- 1.10 The table below sets out the questions on which the consultation document sought views.

Questions for consideration	
1.	Is it helpful to have a single set of guidance which consolidates previous guidance and serves the three purposes identified above?
2.	Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them?
3.	Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?

4.	Is the level of detail helpful? Are there any parts of the draft guidance which you feel would be improved by being either more, or less, detailed?
5.	Do you have any other comments about the draft guidance?

2. Issue raised in the responses to the consultation

- 2.1 We received eight responses to the consultation. This included public bodies, businesses, and an academic. A full list of respondents can be found in Annex A.
- 2.2 Overall respondents welcomed a single set of guidance on the CMA's consumer powers, and considered that its content, format and presentation was clear, sufficiently comprehensive and had an appropriate and sufficient level of detail. Responses to the questions and the CMA's view on particular issues raised are summarised below.

Questions and responses

Question 1: Is it helpful to have a single set of guidance which consolidates previous guidance and serves the three purposes identified above?

Summary of responses

- 2.3 Respondents agreed with this approach and that the guidance served the three purposes subject to the following comments.
- 2.4 One respondent noted that the title referred purely to the CMA's consumer powers whereas the content covered the use of powers by other enforcers under Part 8 of the EA02 and the CRA. Another respondent commented that, where the text was intended to apply to other enforcers, clearer reference to this should be made throughout. If parts of the document applied to other enforcers, the contents page should also be updated to reflect this.
- 2.5 Another respondent commented that, in its treatment of the powers of investigation in Schedule 5 to the CRA, CMA7 appeared to operate more as an overview, whereas guidance produced by BEIS¹ (cited in footnote 3 of the draft guidance) provided the detail. This respondent considered that the BEIS guidance should be referenced more clearly in the CMA document, especially in Section 6.

The CMA's views

- 2.6 The CMA accepts that the guidance could be clearer in this regard and has revised the contents page and made a number of other revisions to the body

¹ In July 2016, the Department for Business, Innovation and Skills and the Department of Energy and Climate Change merged to form the Department for Business, Energy and Industrial Strategy (BEIS).

of the guidance. The CMA has also revised the title to 'Consumer protection: enforcement guidance' to indicate that the guidance may relate to the enforcement of consumer protection legislation other than by the CMA.

- 2.7 The CMA has also revised Section 6 so that the BEIS guidance is more prominently referenced in the text.

Question 2: Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them?

Summary of responses

- 2.8 Respondents agreed that the content, format and presentation of the guidance was clear.
- 2.9 No respondents identified parts of the guidance requiring greater clarity save that one respondent suggested that paragraph 2.10 should be revised to show that, where consumers wish to report a breach of consumer protection law, they should do so to Citizens Advice whose role goes beyond advocacy, education and advice as outlined in the draft guidance (at paragraph 2.10).
- 2.10 One respondent suggested that there should be more use of mini case studies, possibly in boxes in the main text or in annexes, as was done in the CMA's unfair contract terms guidance (CMA37) which contained an annex with examples of fair and unfair contract practices. Another respondent made the point that where case studies were referenced within the footnotes (eg 9 and 10) that they could be more usefully drawn into the main text or in a box.

The CMA's views

- 2.11 The CMA has revised paragraph 2.10 as suggested to reflect that consumers are also encouraged to report potential breaches of consumer protection legislation to the Citizens Advice Consumer Service.
- 2.12 The CMA is not convinced that CMA37 is a useful model to follow in this respect. CMA37 is a guide to the substantive law which is supported by an annex containing a historic list of examples of terms, as used by businesses at that time, which the OFT challenged as potentially unfair, and which were either deleted or amended in response to the OFT's action. While CMA7 contains some elements of the CMA's interpretation of its legal powers (most notably in Section 6), it is, for the most part, guidance on how it may use

those powers, rather than the powers themselves. The BEIS guidance already provides guidance on the investigatory powers of consumer law enforcers.

Question 3: Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?

Summary of responses

- 2.13 Respondents generally agreed that the guidance was sufficiently comprehensive and did not identify significant omissions.
- 2.14 One respondent suggested that the wider international working sections would need to be reviewed post Brexit (Annex D and elsewhere in the document) and also could benefit from some case studies illustrating areas of cooperation.
- 2.15 One respondent suggested that it would be helpful if, in addition to the guidance, the CMA could provide a clear route/contact for members of the Chartered Trading Standards Institute (CTSI) to raise enforcement queries.

The CMA's views

- 2.16 The CMA will keep the guidance under review to reflect material changes in the legislation it covers.
- 2.17 The CMA notes the proposal that the CMA offers a clear route/contact for CTSI members to raise enforcement queries and will continue to work with its compliance and enforcement partners to improve efficiencies.

Question 4: Is the level of detail helpful? Are there any parts of the draft guidance which you feel would be improved by being either more, or less, detailed?

Summary of responses

- 2.18 All respondents who replied to this question found the level of detail helpful subject to the following comments:
 - (a) One respondent considered that the section on the use of criminal enforcement powers was short and could be extended.
 - (b) One respondent considered it would be helpful to identify where a case would not be referred to established means, and further guidance on

which entities other than Advertising Standards Authority and PhonepayPlus were regarded as established means.

- (c) The same respondent considered it would be helpful to note in paragraph 3.12 that civil action and prosecution are not mutually exclusive: prosecution and the use of Part 8 (particularly now that enhanced consumer measures are available) have different objectives in many cases and it is important to remember that they can be used in conjunction with one another.
- (d) The same respondent also thought that the circumstances listed in paragraph 5.6, as particular circumstances in which the CMA was likely to consider commencing a criminal investigation, seemed more relevant to a decision to prosecute than a decision to commence an investigation, and also the guidance may imply that mens rea is likely to be a prerequisite to investigation.
- (e) One respondent thought that, whilst the document was clear on the roles and responsibilities of the CMA, it did not go into detail on how these roles/responsibilities were going to be fulfilled with diminished staffing levels. As such, it might be helpful to have the priorities and portfolios of different staff or departments clearly identified in a secure part of the website to facilitate easier communication with the relevant department when an enforcement partner has a query.

The CMA's views

2.19 The CMA makes the following responses to the points raised:

- (a) The section on the use of criminal enforcement powers cross-refers in particular to the Code for Crown Prosecutors which sets out the two stage test which governs CMA decision-making in this area. The respondent did not identify particular improvements which could be made to this section's shortcomings. The approach taken in the guidance is generally to avoid repetition of material that is readily available (for example through a hyperlink).
- (b) The CMA has a statutory duty to have regard to the desirability of encouraging control of unfair commercial practices by such 'established means' as it considers appropriate on the fact of the case. In general this is likely to involve referral to an appropriate compliance partner such as the Advertising Standards Authority and PhonepayPlus. However, there is no definition of 'established means' in the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) or Business Protection from

Misleading Marketing Regulations 2008 and the CMA interprets the statutory duty more broadly to refer to systems and mechanisms provided by relevant bodies which have the effect of controlling unfair commercial practices. The circumstances in which it is most likely that the CMA may take action without reference to a compliance partner are set out in paragraph 3.11, but each case will hinge on its own facts.

- (c) The CMA has revised the text in paragraph 3.12 to make clear that civil action and prosecution are not mutually exclusive.
- (d) The factors listed in paragraph 5.6 may be relevant to a decision to prosecute, but they are also relevant to a decision to open a criminal investigation. While these are particular circumstances in which the CMA is likely to consider commencing a criminal investigation, they should not be interpreted as precluding a criminal investigation in other circumstances where the facts justify it. The CMA has revised the text in paragraph 5.6 to make this clearer.
- (e) The CMA notes the suggestion for a secure part of the CMA website for the purposes suggested. While it does not consider that the guidance needs to be revised to reflect this level of detail of working relationships, it will continue to work with partners to increase the efficiency of its partnerships.

Question 5: Do you have any other comments about the draft guidance?

Summary of responses

- 2.20 One respondent commented that it is sometimes challenging to obtain up to date information from the CMA and the website often does not have all the information required to resolve a query. In order to facilitate this situation, it would be helpful if the CMA could have a secure part of their website available to Trading Standards Officers, where updates of ongoing investigations, and contact details for officers could be accessed.
- 2.21 One respondent did not comment specifically on the questions raised but responded in the form of a case study intended to illustrate a disparity between the content of the draft guidance and enforcement practice in relation to copycat packaging. In summary, this respondent submitted that the CMA's use of consumer powers to support competition (as described in paragraph 2.2) had not been applied in the following respects:

- (a) There were no 'established means' to address this practice. The practice could only be addressed through enforcement by the CMA or Trading Standards Services.
- (b) There was no evidence that the aim of 'providing the necessary level of deterrence to those who might otherwise flout their legal obligations' was being met in the case of copycat packaging.
- (c) The absence of enforcement action since 2008 had resulted in the practice becoming more widespread now than when the CPRs had been introduced in 2008.

The CMA's views

- 2.22 The CMA notes the suggestion to create a secure part of its website to provide contact details and to update ongoing investigations. As with the suggestion from the same respondent for the CMA to offer a clear route/contact for CTSI members to raise enforcement queries, the CMA will continue to work with its compliance and enforcement partners to improve efficiencies but it is not, in our view, a matter which requires revision of the guidance.
- 2.23 The CMA similarly does not propose to revise the guidance in the light of the alleged disparity between enforcement policy and practice. The CMA's broad position as to enforcement by the CMA of practices in this area was set out in the published response of the outcome to the consultation [*Review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging*](#). Essentially, this was that a complaint must be supported by evidence of collective consumer harm in order to justify action under the CPRs, and that the CMA has not to date been presented with evidence which is sufficiently compelling to justify enforcement action. Insofar as the CMA fails without proper justification to follow its own guidance or otherwise acts unreasonably or below an acceptable standard, avenues are available for parties which are adversely affected to challenge the CMA's action (or lack of action).

Annex A: List of respondents

1. Written consultation responses were received from the following:
 - British Brands Group
 - Consumer Council for Northern Ireland
 - Chartered Trading Standards Institute
 - Devon and Somerset Trading Standards Service
 - EDF Energy
 - Norfolk County Council, Community and Environmental Services
 - Professor Peter Cartwright, University of Nottingham
 - Society of Chief Officers of Trading Standards in Scotland