

CMA CONSULTS ON NEW DIRECT CONSUMER ENFORCEMENT GUIDANCE

The Digital Markets, Competition and Consumers Act 2024 (DMCC Act) introduces a new enforcement model for consumer protection. The CMA will have the power to issue infringement decisions for UK consumer law breaches and impose direct fines of up to 10% of a company’s global turnover - in effect, bringing the consumer protection regime more closely in line with the CMA’s existing competition law enforcement powers.

On 31 July 2024, the UK Competition and Markets Authority (CMA) published [draft guidance](#) for the exercise of its new direct enforcement powers (Draft Guidance), as part of its consultation process.

In this briefing, we discuss the key points of interest arising from the Draft Guidance - including, in particular, the CMA’s new process for handling direct enforcement cases and its proposed approach to penalties and settlement. An overview of the package of consumer protection policy reforms in the DMCC Act, and pointers on how companies can prepare for their introduction, can be found in our previous [client briefing](#).

Key points of interest

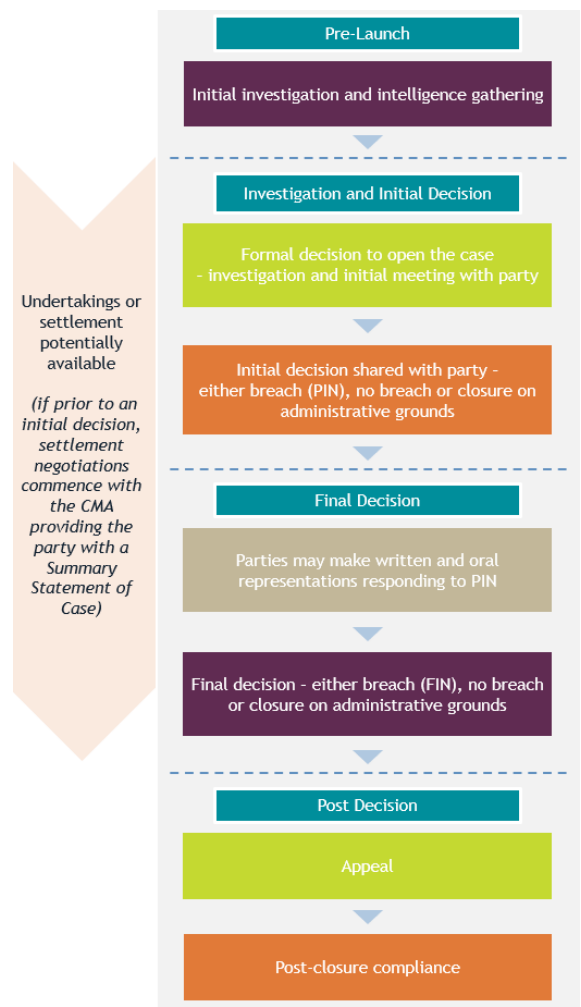
Investigative process for direct enforcement model

The Draft Guidance sets out in detail the process that the CMA will follow when pursuing cases under its new direct enforcement powers. An overview of this process is provided in the flowchart to the right.

Investigation and initial decision

As with the current court-based enforcement regime, the CMA’s formal investigation phase will follow a pre-launch intelligence gathering phase. As the Draft Guidance notes, the DMCC Act strengthens the force of the CMA’s information gathering powers during investigations - in particular, by enabling the CMA to impose fines directly on companies which supply false or misleading information or that fail to comply properly with information notices. Such fines may be up to £30,000 or 1% of global annual turnover (whichever is higher) in the case of the supply of false or misleading information, and/or include daily penalties of up to the higher of 5% of daily turnover and £15,000 for non-compliance with information notices.

Following its investigation, the CMA may issue a provisional infringement notice (PIN) to a party under investigation if it has reasonable grounds to believe that party has engaged, is engaging, or is likely to engage, in an infringing practice. If a PIN is issued, the CMA will invite the party to make representations (typically within one to one-and-a-half months). The party under investigation will also have the opportunity to attend an oral hearing.



Final decision

Unless the CMA accepts an undertaking or a settlement is reached, the CMA will then make a final decision. It will either: (a) conclude there has been no breach; (b) issue a final infringement notice (**FIN**) to the party (i.e. where it finds there has been a breach); or (c) close the investigation on administrative grounds. If a FIN is issued, it may require the party to comply with directions, including directions to take enhanced consumer measures (**ECMs**) and/or to pay a fine.

Post-decision

Following receipt of a FIN, the addressee can appeal the notice to the High Court within 28 days. Directions to pay a fine will be paused during any appeal process; however, other directions (e.g. ECMs) will continue to apply during any appeal process.

Undertakings

Where the CMA identifies conduct that it believes constitutes an infringement of relevant consumer protection laws, it can accept an undertaking from a party in place of issuing a FIN (or an online interface notice (**OIN**)¹). Undertakings are voluntary commitments intended to resolve the CMA's concerns without requiring an admission by the party that there has been an infringement (or the payment of a fine).

Standard for acceptance of undertakings

Under the new DMCC Act, the test that the CMA must apply when deciding whether to accept undertakings has been updated.² The Draft Guidance indicates that the CMA will not accept undertakings where it considers that compliance with, and the effectiveness of, an undertaking would be difficult to monitor and/or not progressing to the final decision stage would undermine deterrence. Deterrence appears to be one of the CMA's key underlying policy objectives in enforcing consumer law and is also a relevant factor in the Draft Guidance's section on penalties.

Procedure for agreeing undertakings

Undertakings may be proposed by either the CMA or a party under investigation. Where undertakings are accepted, the CMA may still issue a FIN (or OIN) in limited circumstances, including where the FIN relates to matters not covered by the undertaking or the CMA has reasonable grounds to suspect non-compliance with the undertaking.

The CMA will also be able to impose directly penalties for breach of undertakings (up to 5% of a company's annual global turnover, with additional daily penalties for continued non-compliance) - this is aligned with its other direct enforcement fining powers under the DMCC Act. This contrasts with the current court-based enforcement model, under which the CMA must apply to the courts to enforce non-compliance with undertakings.

The CMA's approach to penalties

The Draft Guidance outlines the CMA's planned approach to calculating penalties for breaches of consumer law. To calculate the starting point of any fine, the CMA will first determine the seriousness of the infringement and the relevant infringement category, by reference to the harm (or the risk of harm) caused by the infringement and the culpability of the party. Together, the level of harm (graded from Category 1 to Category 4) and the level of culpability (graded from High to Low) will determine the starting point for a fine:

STARTING POINTS (PERCENTAGES REFER TO UK TURNOVER)	
Starting Point A	£225,000 or 22.5% (whichever is higher) up to £300,000 or 30% (whichever is higher)
Starting Point B	£150,000 or 15% (whichever is higher) up to £225,000 or 22.5% (whichever is higher)
Starting Point C	£75,000 or 7.5% (whichever is higher) up to £150,000 or 15% (whichever is higher)

¹ An OIN is a specific form of infringement notice which applies to online interfaces (which is defined as "any software including websites, applications, and other digital content, which is operated for, or in connection with, giving access to or promoting goods, services, or digital content").

² Currently, the CMA may accept undertakings where it considers them to be "satisfactory and likely to be honoured".

Starting Point D	Up to £75,000 or 7.5% (whichever is higher)
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The starting point will then be adjusted via a similar process as applied in the case of Competition Act infringements - for example, making adjustments for deterrence; any aggravating or mitigating factors; and to ensure the total fine does not exceed the 10% worldwide turnover cap. Finally, any agreed settlement discount will be applied (see further below).

Settlement

The Draft Guidance also sets out the proposed settlement process under the CMA’s new direct enforcement model. Similar to the process for Competition Act cases, the key benefit to settlement is that the CMA will reduce the level of penalty for a settling party. In exchange, a settling party must admit to the facts, conduct and breach of the consumer law(s) in question, commit to stop or mitigate the relevant infringement within a specified time period and agree not to appeal the CMA’s decision. If settlement discussions are terminated - which the CMA may do if it considers they are not proceeding with sufficient pace or are unlikely to succeed (or in the event the party withdraws from discussions) - the case will proceed through the standard administrative process. While the CMA may not use any admissions from settlement discussions in any PIN or FIN, the Draft Guidance envisages that the CMA could still use evidence collected during the settlement process in these circumstances (as is the case in Competition Act investigations).

Penalty discount levels

The maximum settlement discount available to a settling party will depend on the stage of the investigation at which settlement discussions take place. If a settlement is reached prior to the issue of a PIN, the maximum settlement discount will be 40%; if a settlement is reached after the issue of a PIN, the maximum discount reduces to 20%.

The actual discount will ultimately be determined by reference to the resource savings achieved by the CMA in settling the case at that particular stage of the investigation.

The maximum penalty discounts anticipated by the Draft Guidance align with the increased discount levels proposed by the CMA for non-cartel conduct Competition Act infringements (which the CMA is currently consulting on in parallel). In relation to cartel conduct, the maximum penalty discount will remain at the current level of 20% for a successful settlement prior to any Statement of Objections being issued and 10% for settlements that take place after this.

Comment and next steps

The CMA’s consultation on the Draft Guidance closes on 11 September 2024, after which there will be a period for the CMA to consider any responses and adjust the Draft Guidance if it considers it appropriate to do so.

The Draft Guidance provides further clarity on a number of procedural points as to how the CMA will conduct consumer law investigations, determine infringements and issue penalties. These processes may already be familiar to consumer-facing businesses which have been subject to Competition Act investigation by the CMA; however, there are areas of divergence which will likely come to the fore when the CMA opens its first consumer law investigations under the new direct enforcement model.

The CMA has stated that it is working on separate guidance relating to the substantive consumer law changes introduced by the DMCC Act, with a view to publishing this for consultation later this year. The CMA’s new powers under the DMCC Act are expected to come into force in around Spring 2025, with the precise timing still to be determined. Whilst the CMA’s new powers will not have retroactive effect (i.e. UK consumer law breaches that have concluded before commencement of the DMCC Act must be examined under the previous regime), it will be open to the CMA to use its new direct enforcement powers in respect of any new or continuing infringement occurring after the DMCC Act fully comes into force.

The DMCC Act also introduces sweeping reforms to UK competition law and creates a new ex-ante regulatory regime aimed at increasing competition in digital markets. For a general overview of the DMCC Act, see our [Competition & Regulatory Newsletter](#).

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