

EVERSHEDS SUTHERLAND

The UK's CMA consults on its draft direct enforcement guidance and rules

Digital Markets, Competition and Consumers Act

August 28, 2024

The Digital Markets, Competition and Consumers Act 2024 (“DMCC”) gives the Competition and Markets Authority (the “CMA”) new direct enforcement powers for consumer law breaches.

This is a significant change to the existing enforcement regime, where previously only the courts could determine whether consumer protection laws had been infringed.

The CMA has now published a consultation inviting comments on its draft copies of the statutory guidance and rules that will underpin the way that the CMA will exercise its new enforcement powers. The closing date for responses is 11 September 2024.

What are the CMA’s new enforcement powers?

Chapter 4 of the DMCC sets out the new direct enforcement regime for the CMA. These apply in relation to the consumer protection laws that are listed in Schedule 16 of the DMCC. The new powers include the ability to:

- launch and conduct investigations into potential consumer law infringements;
- impose provisional infringement notices (“PINs”), and thereafter final infringement notices (“FINs”), as well as the ability to issue interim and final online interface notices. The DMCC also provides for a penalty regime for failure to comply with these, and an ability to apply court enforcement;
- agree undertakings with an infringer and to enforce them (including issuing penalties if they are breached);
- impose financial penalties for infringements (up to a statutory cap of 10% of global turnover), but subject to a settlement regime where a discount may be agreed for a person who admits to the alleged infringement.

The CMA is required by the DMCC to issue these guidance documents, and once finalised, they will be legally binding on the CMA, unless a deviation from them is appropriate in specific cases.

A separate court-based enforcement regime for certain other consumer law infringements also exists in parallel, which businesses will also need to be aware of.

Eve England, partner in the consumer law team comments: *"This represents a watershed moment for UK consumers, as, for the first time, the DMCC promises swift and effective recourse outside of the current courts system."*

What is the CMA consulting on?

The CMA is consulting on a number of aspects of the draft guidance and rules, particularly around how the processes applying to the different enforcement powers will work in practice. The questions set out in section 3 of the consultation ask respondents to provide comments on a number of areas including:

- **Provisional Infringement Notices** – The guidance provides detailed procedures around the issuing of PINs, stating that recipients will typically have 20-30 days to respond and to attend an optional oral hearing. It also sets out how new evidence may be submitted, how extensions may be requested, as well as how confidentiality is treated.
- **Acceptance of undertakings** – The general aim of the CMA's powers is to promptly address any issues identified by the CMA. On this basis, undertakings will more likely if they can be implemented effectively and quickly. The CMA has suggested that repeat offenders will find it more difficult to agree undertakings. The CMA has also set out a number of factors that it would consider when deciding whether to accept, vary or release undertakings.
- **Settlements** – The settlement regime could lead to a reduction of between 25-40% of any monetary penalty imposed on a person who admits consumer law infringement.
- **Reasonable excuse for non-compliance** – The drafts provide an overview of the factors that would be considered in these cases. These situations would mean that a person would not be subject to a monetary penalty.
- **Monetary penalties** – CMA proposes that its starting point for a monetary penalty could be up to 30% of UK turnover for the most serious breaches, but subject to the statutory cap of 10% of global turnover. The guidance provides a stepped calculation process: first determining the level of harm (from Category 1 "major" harm, down to Category 4) and by considering so called "Escalating Factors" (including where there has been any impact on vulnerable customers or where infringement involves products of an essential nature such as day to day necessities). The CMA will then consider deterrent effect, mitigating/aggravating factors and any adjustment to ensure the penalty is proportionate. Finally any settlement discount will be applied..

Louise Howarth, partner in our regulatory disputes team comments:

“The CMA’s new powers are a step change in consumer enforcement. We expect to see the CMA taking early and decisive action under the new regime to demonstrate its commitment to protecting consumers from harm and tackling unfair behaviours.”

Matthew Gough, head of the ES consumer practice comments:

“The stronger enforcement powers including CMA fines of up to 10% of global turnover represent a step change in UK consumer law enforcement. This brings the UK in line with much of Europe where regulators have strong powers to enforce consumer protection laws. We are receiving a lot of interest from clients who are keen to understand where they might have potential exposure under the new regime. This is one area where prevention is much preferable to cure!”

What do businesses need to do?

The CMA’s consultation is available for comment until 11 September 2024. Please get in touch if there are any aspects you would like to discuss.