

February 2015

Memorandum of Understanding between the Competition and Markets Authority and Ofcom on the use of concurrent powers under consumer protection legislation

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Introduction

This Memorandum of Understanding (“MoU”) sets out working arrangements between the Competition and Markets Authority (“CMA”) and Ofcom in relation to their concurrent powers under specific consumer protection legislation as regards the sectors for which Ofcom is responsible.

The purpose of this MoU is to establish an understanding between the CMA and Ofcom as to how these working arrangements will work in practice. It draws on the legislation that sets out the formal framework for how concurrency in this area will operate. It records our commitment to the sharing of expertise, information, ideas and experience, and to doing this efficiently and with a mutual regard for each other’s statutory position and strategic objectives.

We believe that this MoU offers a valuable basis for co-operation in the interests of the CMA, Ofcom, and consumers.

This MoU and the practices which it provides for will be reviewed from time to time by the CMA and Ofcom as the need arises or at the request of the CMA, Ofcom or members of the UK Consumer Concurrency Group. This MoU may be revised by agreement between the CMA and Ofcom.

This MoU is not legally binding.

Signed

Roland Green
Senior Director
Policy Precedent and Procedure
CMA

Graham Howell
Secretary to the Corporation
Ofcom

Date: 19 February 2015

Purpose of this MoU

1. This Memorandum of Understanding (“MoU”) sets out working arrangements between the Competition and Markets Authority (“CMA”) and Ofcom in relation to their concurrent powers to enforce (in the communications sector):
 - a) certain consumer laws under Part 8 of the Enterprise Act 2002 (EA02);
 - b) The Unfair Terms in Consumer Contracts Regulations 1999; and
 - c) Regulation (EC) No 2006/2004 on consumer protection cooperation.

Background

2. The CMA inherited most of the functions and powers which the Office of Fair Trading (OFT) had retained as at 1 April 2013, and together these constitute a different but significant role in the consumer landscape from that previously held by the OFT. The CMA will use its full range of consumer powers to address 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.

Role of the CMA

3. The CMA is a non-ministerial department, established under the Enterprise and Regulatory Reform Act 2013 whose aim is to promote competition, both within and outside the United Kingdom, for the benefit of consumers, to make markets work well for consumers, businesses and the economy.
4. In exercising its statutory responsibilities, the CMA will co-operate with sectoral regulators and encourage sectoral regulators to use their powers to apply relevant consumer legislation, in the interests of consumers.

Role of Ofcom

5. Ofcom is the independent national regulatory authority for the UK’s communications industries, with responsibilities across broadcasting (television and radio), telecommunications, spectrum and postal services. Ofcom is also a national competition authority with concurrent powers with the CMA to enforce competition law in the sectors which it regulates.
6. Ofcom’s principal duties, set out in the Communications Act 2003, are to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.
7. In relation to postal services, Ofcom’s primary duty is to carry out its functions in a way that it considers will secure the provision of a universal postal service. Where it appears to Ofcom that, in relation to the carrying out of any of their functions in relation to postal

services, that any of the general duties (including the principal duties set out above) conflict with their duty under section 29(1) of the Postal Services Act 2011 to secure the provision of a universal postal service, Ofcom must give priority to that latter duty.

8. Ofcom has functions relating to consumer policy and consumer protection in the telecommunications and postal services sectors in particular (though they may also be relevant in other areas, such as in relation to the electromagnetic spectrum). These functions include making and enforcing sectoral rules for protecting the interests of consumers of relevant services. They also include enforcing general consumer protection legislation in the sectors Ofcom regulates. Ofcom is required to fulfil the duties described above in carrying out these functions.

General co-operation

9. The CMA and Ofcom will work together with the aim of ensuring that a consistent and co-ordinated approach is generally taken in relation to issues covered by concurrent enforcement powers and to discuss which body is best placed to lead in each case.
10. The CMA and Ofcom are committed to the following general principles and practices for co-operation between themselves in respect of the sectors for which Ofcom has responsibility.
11. Officials of the CMA and Ofcom will meet and communicate regularly, at appropriate levels of seniority, to discuss matters of mutual interest, including through the Consumer Concurrency Group and bilaterally.
12. The CMA and Ofcom will always consult each other before exercising their powers on a case where it appears that they have concurrent powers, even if the CMA and Ofcom do not go on to exercise their concurrent powers.
13. Where either the CMA or Ofcom exercises their concurrent powers, the CMA and Ofcom will, to the extent permitted by law, engage with each other in open dialogue and by sharing relevant information as appropriate.
14. The CMA and Ofcom will consult each other at an early stage on any issues that might have significant implications for the other.
15. The CMA and Ofcom agree that in deciding upon any enforcement action in respect of a potential breach of consumer protection legislation, causing potential consumer harm, they will have regard to the principles that regulatory activities should be carried out in a way which is proportionate, consistent, transparent, accountable and targeted. The CMA will enforce consumer protection legislation with regard to published statements of enforcement and prioritisation principles.¹ Ofcom will take action having regard to its

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243711/4-guidance-on-cma-approach-to-use-of-its-consumer-powers-consultation.pdf

Enforcement Guidelines and administrative prioritisation framework.² The aim of these arrangements is to avoid, as far as is reasonably practicable, duplication of enforcement or other action

Notifications

16. Ofcom will comply with its legislative obligations to notify the CMA of its intention to take certain enforcement action, and of the outcome of the action by entering the required information on the Trading Standards Sanctions Database.
17. Where the CMA has an obligation to publish the information it will do so by publishing it on www.gov.uk/cma

Liaison between CMA and Ofcom

18. Where CMA identifies a consumer law issue relating to communications matters falling within Ofcom's remit which it considers merits regulatory attention the CMA will, prior to taking any action, contact Ofcom. It will do so in the first instance to discuss whether the matters raise issues which Ofcom agrees is appropriate for it to consider under its consumer law and/or sectoral regulatory powers, having regard to matters such as its sectoral expertise and its administrative prioritisation framework.
19. Where Ofcom identifies potential breaches of consumer protection legislation which may lead to enforcement action, and opens an investigation in accordance with its enforcement guidelines, it will contact the CMA as well as providing notification by placing details of the investigation on the Trading Standards Sanctions Database.³

Sharing information – legal aspects

20. CMA and Ofcom will, in accordance with Part 9 EA02 (governing the disclosure of specified information⁴) and, in Ofcom's case, in accordance with s.393 of the Communications Act 2003, s.111 of the Wireless Telegraphy Act 2006, and s.56 of the Postal Services Act 2011, promptly share such information as is permitted and necessary to enable efficient and effective handling of consumer law issues. Where appropriate, this includes sharing complaint data, together with relevant correspondence regarding those complaints.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274462/CMA16c_on_Prioritisation_Principles_consultation_document.pdf

² http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/annexes/Enforcement_guidelines.pdf

³ www.nafn.gov.uk

⁴ See s. 238(1) of the EA2002 for definition of specified information

21. Under Part 9, information that comes to the CMA in connection with the exercise of its functions (as defined), and in appropriate cases information that comes to Ofcom, is “specified information” (see section 238(1) of the EA02). Where specified information relates to the affairs of an individual or any business of an undertaking (see section 237(1) of the EA02) the CMA and Ofcom can only disclose it, during the lifetime of the individual or while the undertaking continues in existence, under permitted gateways (see section 237 (2) of the EA02). Disclosure outside those gateways is a criminal offence.
22. Unless the information is already properly and lawfully in the public domain (see section 237(3) of the EA02), or a power or duty to disclose it exists outside Part 9 of the EA02 (see section 237(6) of the EA02), the CMA and Ofcom, as the case may be, may only disclose it where one of the following gateways exists:
 - a) where the CMA or Ofcom obtains consent from both those providing the information and those to whom it relates (section 239 of the EA02);
 - b) disclosure is required to meet an obligation under EC law (section 240 of the EA02);
 - c) disclosure facilitates the exercise of the CMA’s or Ofcom’s statutory functions;
 - d) disclosure facilitates the exercise of any function another body has under certain specified statutes (section 241 of the EA02);
 - e) disclosure is for the purposes of, or in connection with, prescribed civil proceedings or prospective proceedings in the UK or elsewhere, or for the purposes of taking legal advice in relation to them, or for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings;
 - f) the disclosure is for certain purposes connected with criminal investigations and proceedings in the UK (section 242 of the EA02); or
 - g) the disclosure is to facilitate the performance of an overseas public authority's functions, in certain circumstances (section 243 of the EA02).
23. Even where a gateway exists, the CMA or Ofcom, as the case may be, is also required to consider excluding from disclosure (so far as practicable):
 - a) information whose disclosure the CMA or Ofcom, as the case may be, thinks is against the public interest (see section 244(2) of the EA02);
 - b) information relating to the private affairs of an individual, or any commercial information relating to a business, whose disclosure might, in the CMA’s or, as the case may be, Ofcom’s, opinion, significantly harm the individual’s interests or the legitimate business interests of the undertaking to which it relates (see section 244(3) of the EA02); and
 - c) The CMA or Ofcom, as the case may be, must also consider the extent to which any disclosure under (b) above is necessary to fulfil the purpose for which it is made (see section 244(4) of the EA02).

Transfer of personal data

24. In receiving any “personal data” through the gateways set out above or otherwise the CMA and the Ofcom will comply at all times with the Data Protection Act 1998.

Process for sharing information

25. The CMA and Ofcom will each designate in its organisation a relationship manager at official level to take responsibility for relations between the two authorities. In each authority, the relationship manager's responsibilities will include (but not be limited to):
 - (a) maintaining an overview of joint projects between the two authorities and matters of mutual interest;
 - (b) maintaining an overview of the authority's contacts from all areas of joint working and mutual interest; and
 - (c) holding meetings with the relationship manager in the other authority from time to time to identify potential new issues with a view to circulating information to appropriate individuals within each organisation.

26. The existence of relationship managers does not in any way preclude direct communication between other staff at the CMA and Ofcom.