CMA Consultation: Direct consumer enforcement guidance and rules

ABTA Submission

Wednesday, 11 September 2024

Introduction

ABTA is the UK's trade association for travel agents, tour operators (including coach tour operators) and the wider travel industry, with over 4000 travel brands in membership and a combined annual UK turnover of more than £40 billion. ABTA works closely with its members to help raise and maintain standards, enable a more sustainable travel industry, and provide travellers with advice, guidance and support.

ABTA welcomes the opportunity to submit to this inquiry. ABTA's submission will focus on the need for fairness and transparency in the Competition and Markets Authority's (CMA) enforcement processes, including the acceptance of undertakings, the settlement process, and the calculation of penalties. It will also urge for clarity on how CMA actions affect private legal proceedings and interactions with other enforcers.

Consultation questions

Q1. Do you have any comments on the proposed process for submitting written representations on provisional infringement and/or administrative enforcement notices?

See Q2

Q2. Do you have any comments on the proposed process for conducting oral hearings on provisional infringement and/or administrative enforcement notices?

ABTA believes that it is problematic that publicity has already been given to the investigation at this stage. We note that the matter and the parties will be published when CMA opens an investigation. We believe that businesses should be able to go through the investigation and respond to any PIN in private. It is detrimental to a business for any investigation to be in public, especially when at this stage the CMA only has grounds to suspect an infringement, not grounds to believe, or indeed be satisfied that the business has infringed the law.

In terms of specific comments on the process, ABTA believes that the time limit for written representations on provisional administrative enforcement notices is too short. Businesses must have a reasonable time to respond but are only given ten working days, and three working days to request an extension to the deadline.

Q3. Do you have any comments on the factors that the CMA proposes to consider when deciding whether to accept, vary or release undertakings?

Where the CMA has reasonable grounds to suspect that a business is engaged in a commercial practice that constitutes an infringement of the relevant legislation, ABTA believes that there should be a strong

presumption that the CMA should accept an undertaking offered by the business unless it has reasonable grounds to believe that the undertaking will not be honoured or that accepting it would harm consumers.

In particular, ABTA strongly believes that businesses should have the opportunity to correct any issues, such as removing an unfair contract term, without having to go through formal enforcement processes, including hearings, procedures, or facing fines. This would encourage businesses to address concerns more efficiently and cooperatively, reducing the burden on both the CMA and the business involved.

At this stage in any investigation and enforcement process, it seems unnecessary for any publicity to be attached to the giving of an undertaking. The agreement of a business to rectify any inappropriate commercial practice is a valid result in itself without subjecting the business to further harmful publicity.

In considering whether to accept an undertaking from a business, previous breaches of undertakings by that business should rightly be considered. However, it should also be recognised that a business's management and ownership can change over time. New management or owners should not necessarily be held accountable for previous breaches. ABTA's members have suggested that a fair approach would be to implement a three-year time limit for considering past breaches.

Q4. Do you have any comments on the factors the CMA proposes to consider, the proposed minimum conditions and process for engaging in settlement discussions and accepting a settlement?

ABTA is concerned that the proposed settlement process is predicated on the relevant business admitting to a breach of consumer law. On that basis, the term 'settlement' itself appears inappropriate.

Whilst the benefits to the CMA can be readily appreciated, the outcome for the business seems disproportionately burdensome - the admission of guilt in exchange for financial incentives, the waiving of rights to any future appeal, and the acceptance as fact of the infringement stated by the CMA.

Such an outcome would only seem to be appropriate where the CMA is *satisfied* with an infringement. Therefore, ABTA would propose that the process should be amended to include:

- Offering a discount for early settlement even after a FIN is issued.
- Indicating as early as possible whether a case is suitable for a settlement offer, rather than using the settlement process as leverage in negotiations.

Q5. Do you have any comments on the factors that the CMA proposes to consider when determining whether a reasonable excuse for certain breaches exists?

Q6. Do you have any comments on the objectives and considerations that the CMA proposes to apply in imposing monetary penalties for substantive and/or administrative breaches?

ABTA's members have observed that regulators often impose significant financial penalties based on an entity's perceived ability to pay rather than the actual harm caused. For example, in the travel industry, statutory bonding costs for package travel organisers are calculated on a per-passenger basis, rather than considering the risk of insolvency or commercial viability. This method does not accurately reflect the risk to consumers and fails to address fraudulent or reckless trading by smaller or unethical operators.

As such, ABTA would suggest that the imposition and amount of monetary penalties should be directly related to the type and scale of harm inflicted on consumers, rather than the financial resources of the company involved. This ensures that penalties are proportionate to the actual damage caused and serve as an effective deterrent. Further, it is crucial that the CMA applies penalties in a manner that reflects the real impact on consumers, promoting fairness and justice in regulatory enforcement.

Q7. Do you have any comments on the step-by-step approach and/or on any particular steps that the CMA proposes to apply in calculating monetary penalties for substantive breaches?

Q8. Do you have any comments on the factors that the CMA proposes to consider when deciding whether to impose a fixed or daily penalty for administrative breaches?

Q9. Do you have any comments on the step-by-step approach and/or on any particular steps that the CMA proposes to apply in calculating monetary penalties for administrative breaches?

It is important for the CMA to clarify whether the imposition of fines could affect the ability of individuals or class-action groups to bring separate private legal proceedings against the company. It is ABTA's opinion that the CMA's approach should balance fairness and effectiveness, reflecting the true impact on consumers rather than just the company's financial resources. The CMA must be mindful of its approach of deciding and setting penalties while businesses must prove their case. This method can be flawed and may lead to significant damage if the CMA's decisions are incorrect. Past cases, such as HMRC TOMS (Tour Operators Margin Scheme), show that regulatory errors can have serious consequences. Therefore, the CMA's decision-making process must be refined to ensure fairness, accuracy, and to prevent unjust outcomes for businesses.

Q10. Do you have any comments on the factors that the CMA proposes to consider when deciding whether to start proceedings for recovery of unpaid monetary penalties?

Q11. Do you have any comments on the proposed internal CMA decision-making arrangements for direct consumer enforcement cases?

ABTA notes that the CMA will scrutinise its decision making, including seeking advice from specialist advisers. The General Counsel is responsible for ensuring there has been a thorough review before a PIN or FIN is given and will attend an oral hearing following a PIN. Decisions before that point will be made by the Senior Responsible Officer (SRO). This includes important decisions such as whether to open an investigation, with the accompanying publicity about the business; whether there are sufficient grounds for a PIN and whether to accept an undertaking.

The draft guidance doesn't elaborate on who will be an SRO, and what experience they have. It is simply stated that it will be a member of CMA staff, Board Member or Panel Member. ABTA would like to stress that the SRO must have relevant qualifications, experience, training, etc, to make the decisions on infringements. There should also be a requirement that specialist advice is sought and considered before any decision is made. This was a theme in the original consultation in 2021/22 on whether the CMA should have a direct enforcement model. Respondents raised concerns about the expertise to make decisions in place of judges. In its response, the Government agreed that the challenges raised were important and stated that it wanted to see that the CMA acted where it had relevant experience.

Q12. Do you have any comments on the proposed scope and process for referring and deciding procedural complaints?

Q13. Do you have any other comments on topics not covered by the specific questions above?

ABTA would welcome clarity on how the CMA will interact with other enforcement bodies under the new system. Specifically, it is important to understand how the CMA's process aligns with the roles of Trading Standards and other sector-specific regulators. This interaction should be transparent to avoid any overlap or confusion regarding enforcement responsibilities.

ABTA would also welcome clarity on whether the CMA will continue to use more informal methods of resolution. For example, the current prioritisation principles include that CMA considers whether it is best placed to act, including "we take into account the full range of our toolkit, including our formal powers and more informal interventions (for example advocacy, informal engagement, and information campaigns), or a combination of these." These can be more proportionate and achieve a result without unnecessary cost and time pressures on a business.

ABTA believes the CMA should also clarify how it will handle cases where an investigation does not conclusively prove an infringement. The mere fact of an investigation can damage a company's or sector's reputation. The CMA should issue a public statement in such cases to mitigate potential reputational damage. Additionally, ABTA would appreciate clarification on the CMA's approach to coordinating with the ASA on issues related to the CAP and BCAP Codes, which have historically been managed by the ASA except for significant or repeated breaches.