fsb
Federation of
Small Businesses

Sent via email: consumerguidance@cma.gov.uk

11 September 2024

Dear Sir/Madam,

RE: Direct consumer enforcement guidance and rules

FSB welcomes the opportunity to provide a response to the above consultation.

FSB is a non-profit making, grassroots and non-party political business organisation that represents members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

We welcome the guidance and rules about the new powers for CMA under the DMCC Act to investigate, determine and take forward consumer enforcement investigations and action. We agree that those with the most severe breaches and damage caused should face appropriate penalties, however, we believe that small businesses that have not acted in bad faith and have not repeatedly infringed on consumer protection laws should be offered appropriate support to comply instead of penalties. This is particularly important during the initial implementation and adjustment period as these new powers come into force to allow both CMA as well as businesses themselves familiarise themselves and adjust to the new powers and rules.

Small businesses unlike larger ones, do not have dedicated compliance teams or legal representatives therefore, CMA should consider their ability to comply with any notices, requests for information and remedies, particularly if it is evident that they have not deliberately infringed or caused significant harm. Small businesses are also more likely to gold plate compliance due to fear of enforcement, which is why any guidance or notice should use clear language and provide examples of how to comply. This will not only help to ensure that small businesses are able to comply in set timeframes but, help to ensure that they do not spend significant resources on compliance when this is not necessary to achieve the desired aims. We also would like to ask that where possible appropriate safeguards are put in place to help ensure that small businesses are not disadvantaged in comparison to larger ones when they comply with notices, including written representation, as well as settlement, so they are not discouraged from following through with the process in favour of ending proceedings due to inability to dedicate appropriate resources.

We have not commented on every section in the consultation, only where we believe that we could provide a valuable view.

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

We do not oppose the proposed process. We appreciate an estimate of 20 to 30 days being provided for the deadline for written representation to manage expectations, however, we also agree that the deadline for representations should be ultimately set on a case-by-case basis with regard to the

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circumstances of each case, in particular we welcome size and resources of the party being considered, the amount and type of evidence submitted as well as, the scope of potential infringement and risk of harm to consumers. It is worth noting that small businesses unlike larger ones, have less resources and therefore may take longer to comply or, their written representation or supportive documents could be less detailed without appropriate guidance. Therefore, while it is outlined that the precise format and delivery method for representations will be detailed within the information accompanying the notices, we would appreciate that this is set out in clear and simple language with exact requirements highlighted and where necessary examples provided. Similarly, it should be considered whether a small business has infringed in genuine error through either lack of knowledge or oversight or whether they have intended to do so maliciously.

We are supportive of confidentiality of written submissions being accepted provided that they are not blanket or unsubstantiated confidentiality claims. It is worth noting that small businesses are usually more sensitive in the market, both in terms of their lack of reserves and reputationally. Therefore, careful consideration should be given to the impact of not allowing confidentiality on them, as it could have a detrimental impact not only on their relationship with consumers but also their suppliers, with losses taking much more longer to restore than those for a larger firm. We would welcome further guidance of what would be deemed as a substantiated claim in relation to confidentiality, so that small businesses are able to appropriately identify and apply for the claim.

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

It is noted that parties may make representations in writing or at oral hearing or, both. We believe that small businesses should be able to request an oral hearing if they find it to be beneficial however, if a small business does not want an oral hearing then, and unless the case is particularly complex, an oral hearing should be avoided. We appreciate that the party will be able to bring legal advisers to the oral hearing to as assist in presenting its oral representations at the hearing, however it is unlikely that a small business owner will be able to have legal representation, as they do not have in-house legal teams and legal representation usually comes at a substantial cost, which will be in addition to them taking the time to attend their hearing and pause their business operation for the purpose of gathering evidence, providing a written submission and preparing for oral representation. Therefore, where possible, and in particularly in cases that are not severe or complex, or there is little evidence that these are repeat infringements that have been done in bad faith, we do not think that an oral hearing would be necessary due to the costs involved. However, where an oral hearing is unavoidable for the party or if they wish to have one, we would ask that any instructions or guidance are as easy and clear as possible to understand, and that sufficient time is given to prepare, with consideration for business size, as smaller businesses with only a handful employees, could take longer to prepare, as preparation is likely to be the sole responsibility of the business owner. With that said, given that CMA aims to share an agenda at least 3 days before the hearing, we would ask that where possible small businesses are given longer to prepare.

Finally, while we understand that there is no obligation for parties to submit representations on the PIN, it is more likely that a small business rather than a larger one will not be able to make representations due to lack of resources, therefore, given that CMA will proceed regardless with the case, we ask that this is not something that a small business is penalised for if it is evident that a

representation has not been made due to their size or inability to comply with representation requests within a certain period.

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

It does make sense for CMA to be more likely to accept undertakings in cases where it is satisfied that they adequately address their concerns and take appropriate steps to address the position of affected consumers, that the undertaking can be implemented effectively and within a short space of time. However, it is worth noting that this should also be balanced with the businesses' ability to comply. We recognise that a short space of time is not limited to a specific number of days however, it would also be worth considering what short space of time means in relation to the specific issue and remedy at hand as some can be implemented in shorter time periods than others. Similarly, larger firms are more likely in some cases to implement remedies quicker than smaller ones on the basis of availability of resources. Therefore, we are supportive of CMA taking into consideration the reasons for parties not complying as well as being unlikely to accept the undertakings if a party if it has previously failed to comply with undertakings provided to the CMA. It would be beneficial for CMA to provide additional support for small businesses on a case-by-case basis who encounter such discussions with the CMA. It is worth noting that this process in itself should not be much more onerous than actual admission of serious infringement and/penalty in order not to have adverse consequences and disadvantage those with least resources.

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?

We do not oppose this, however as above, settlement should not be encouraged indirectly for businesses where they are not able to dedicate resources to follow through the full procedure and defend themselves appropriately and/or lack of availability of legal representation being seen as unfavourable. Consideration should be given for appropriate safeguards being in place to ensure that this is avoided. For small businesses that are able to seek legal advice, there needs to be reasonable opportunity to do so after they receive all relevant information. However, given that many small businesses will not receive legal advice at the time of entering into a settlement, the CMA must ensure there is a mechanism for subsequently challenging and unravelling an agreed settlement if it transpires the settlement was either ultra vires (outside the scope the CMA's legal powers) or based on a false factual matrix.

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?

We understand that what would constitute a reasonable excuse would need to be quite severe for example incapacity of a small business owner or a sole trader or a significant and demonstrable IT failure. We welcome that what constitutes a reasonable excuse will be assessed on a case-by-case basis by CMA to allow for flexibility.

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?

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We are particularly supportive of objectives to deter infringements and incentivise compliance and for penalties to reflect the seriousness of infringements. We would like to ask that CMA considers whether any decisions or acts were made in bad faith and whether reasonably, a small business owner was aware of the infringement and/or of its impact. We agree that penalty adjustments should be made in particular when taking into account the size of the party. This would help to ensure that penalties are reserved for the most serious and/or malicious cases, and in a way that is proportionate, and provides a meaningful deterrent.

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?

It seems sensible that the seriousness of the infringement and the relevant business turnover are taken into account and, that there are adjustments for various mitigating and aggravating factions, such as size of the party and severity of harm to consumers.

We are particularly supportive of CMA determining the level of culpability which looks at the extent to which acts of the party were the result of deliberate action or a genuine mistake, as we believe that ideally penalties should be reserved for those that have acted in bad faith. Similarly, if a small business is willing to cooperate with CMA in way that ensures that the process is efficient and, is also concluded without delay and with no further harm to consumers then these should also be considered as mitigating factors.

We are supportive of a discount of up to 40% being provided for those that settle with CMA and agree to conditions of settlement, however we would ask that appropriate safeguards are put in place to ensure that settlement is not taken as option for those that lack appropriate resources rather than genuine willingness to remedy an infringement and move forward.

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?

We do not oppose any of the factors that CMA proposes, and are supportive of the approach to consider the deterrent effect, factual circumstances and whether a remedy has been implemented. We agree that a fine should only be issued following remedy due to infringement being severe, rather than as a default for infringement regardless of resolution.

We are supportive of mitigating factors by CMA being considered where party has engaged with CMA early on and remedied the breach in full before CMA issuing any notice, as well as had engaged constructively throughout the whole process. In this regard, we would encourage an education first approach for parties willing to remedy particularly for less serious and first time infringements.

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?

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Our views are similar to those to the aforementioned points we made on the step-by-step process for substantive breaches, in particular in relation to reasonable excuses, deterrence and mitigating and aggravating factors.

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?

We do not oppose any of the factors listed. We believe it is sensible that individual factual circumstances of each case are taken into account to help decide whether to start proceedings for recovery of unpaid monetary penalties and we are particularly supportive of consideration of whether the party has proactively engaged with CMA ahead of the payment deadline with detailed explanation of why a penalty will not be paid in time. We do think it is right that where applicable CMA prioritises redress measures to consumers over recovery of unpaid monetary penalties.

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

No.

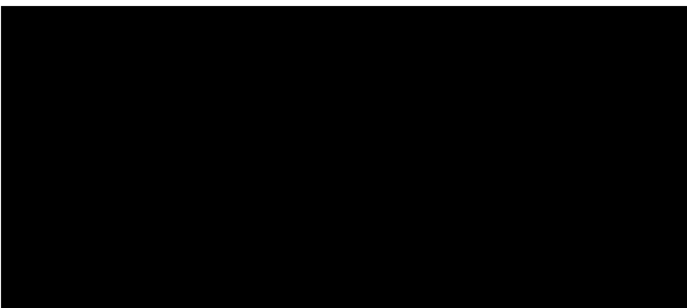
Q12. Do you have any comments on the proposed scope and process for referring and deciding procedural complaints?

No.

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

Given that the guidance will continue to be reviewed on a regular basis, we would also ask that when it is updated that relevant parties are made aware through the regulator, government website and relevant intermediaries such as FSB. Where possible, we would encourage CMA to provide examples and exercise judgement in a way that considers the ability of small businesses to comply with any requests and notices as well as does not significantly disadvantage them in comparison to larger businesses with more resources. Finally, given that these are new powers for CMA as well as new process and procedures for small businesses and consumers, we would encourage an education first approach where possible, and in particular if infringements are not severe and have not been done in bad faith.

Yours sincerely,



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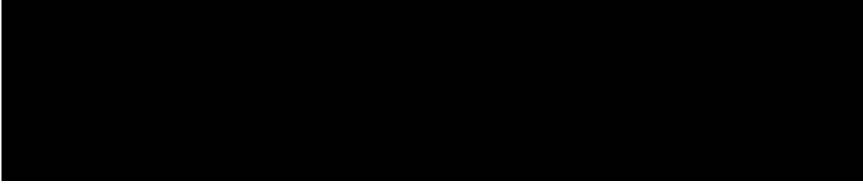

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