TLT For what comes next

TLT responses to CMA consultation on draft guidance on the direct consumer enforcement regime set out in the Digital Markets, Competition and Consumers Act 2024

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

We note that the deadline for submitting written representations to PINs are expected to be between **20 and 30 working days** from the date the PIN was given to the party, and that in some circumstances the deadline "may be shorter than this".

While we recognise that the CMA must have regard to its duty of expedition, we would urge the CMA to reconsider this starting point and adopt a more realistic approach to deadlines. For example, CMA8 specifies that addressees will have up to **12 weeks** from the issue of the Statement of Objections (the equivalent of a PIN in CA98 investigations) and we suggest that a similar time frame would most likely be required to respond substantively to a PIN.

This will be particularly relevant for enforcement cases relating to unfair commercial practices that are not listed in Schedule 20 of the DMCC Act. Given that those cases may hinge on the subjective interpretation of how practice impacts the purchasing behaviour of the 'average consumer' (and potentially also the concept of 'professional diligence') the respondent will need an opportunity to fully scrutinise and, if necessary, rebut the CMA's evidence. This may require the input of behavioural economists on both sides. In our view 20-30 working days is an insufficient timeframe for this exercise.

We would therefore propose that the CMA increases the upper end of the deadline range to bring it in line with the CMA8 guidelines. At a minimum, the CMA should expressly acknowledge that the deadline may be longer in more complex cases, not just shorter for more straightforward cases. This could be achieved via the following amendments:

> *"In appropriate circumstances, the deadline for submitting written representations may be shorter or longer than this depending on the facts of the case."*

We also strongly recommend that, as with CA98 investigations (where draft SOs are the norm), the CMA issues draft PINs, thereby enabling the parties to tackle any complex evidential issues before the PIN is issued.

As a final point, we note that one of the factors the CMA will take into account when determining the length of the deadline is the "size and resources" of the party. We would caution against the assumption that larger corporates will always be in a position to provide substantive responses more

quickly than smaller businesses. This is because any additional resources available to large corporates will typically be offset by other factors. For example they are likely to be in possession of higher volumes of customer data that takes longer to sift through and will also often have more complex internal policies and corporate governance processes, with more stakeholders required to provide input into the written submissions.

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

As a general point, we agree that (as with CA98 oral hearings), the agenda for oral hearings should be agreed by consent between the CMA and the party under investigation to ensure that it is focussed on the key issues that are disputed. However, we stress that as a starting point the right to reply means that it should be primarily up to the party under investigation to set out the points it wishes to covey to the CMA during the hearing on its own terms. As noted in the draft guidance, the CMA representatives will always have an opportunity to formulate and ask their own questions during the oral hearing. It is important that the respondent is given time to correct any serious misunderstandings in the PIN (where applicable) without being unduly constrained by the CMA's own view on the hearing agenda.

With regards to hearing attendees, we accept that the CMA may impose reasonable limits on the number of attendees on behalf of the respondent, although we note that attendance by third parties should not necessarily be limited to legal advisors. In some cases, parties may instruct independent consultants such as economists to provide evidence on consumer behaviour. Other industry experts may provide evidence on what constitutes 'professional diligence' for the industry in question. Such third parties may need to either attend or speak at the oral hearing.

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

We support the CMA's position that it would be open in principle to considering undertakings any time until a FIN has been issued.

However, we note that the CMA's position is that it would be unlikely to accept undertakings at a very late stage in an investigation, such as after the CMA has considered representations on a PIN.

We acknowledge that the suitability of undertakings would, ideally, be explored early on in a case, but consider that there may be circumstances where this may present a more suitable outcome for the case at a later stage. For example, if the party under investigation raises very strong and pursuasive arguments against the PIN, the CMA may determine that agreeing undertakings at this stage would be a more appropriate means of resolving the case than proceeding to a FIN that is vulnerable to appeal in the High Court.

In addition, if the Final Decision Group (**FDG**) is to adequately hold the case team to account before the FIN is issued, the possibility of underakings should remain on the table if the FDG identifies weaknesses in the case. In this regard we note that the decisions available to the FDG under 8.23(c)

appear to present a somewhat stark choice between either issuing a FIN, or closing the case without issuing a FIN. In some cases, entering into discussions regarding undertakings may offer a more appropriate 'middle-ground' between the two – particularly if the party in question has indicated a willingness to do so.

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?

One of the biggest incentives for any business considering settlement during a CMA investigation is the increased certainty that comes with settling the case. It follows that the best way to make settlement as attractive as possible for parties under investigation is to **reduce uncertainty** as far as possible.

With this in mind, we make the following observations:

- It is vital that parties entering into settlement have a clear understanding not just of what the level of discount will be, but what the likely level of penalty will be. If a party agrees to enter into settlement at an early stage, we would therefore encourage the CMA to provisionally set out its views on how any alleged infringement may be categorised in terms of level of consumer harm and culpability under section 7 of the draft guidance, thereby enabling businesses to have a clear understanding of the level of penalty (pre-discount). We understand that the CMA would not expect a party to agree to settlement 'blind' to the penalty, but think this could be made clearer in the guidance.

- We have serious concerns regarding the CMA's one-sided ability to revoke the settlement discount while still relying on any admissions of liability made by the settling party if it breaches the Settlement Discount Conditions (**SDCs**). If the settlement agreement breaks down, the default position should be that the parties revert to their pre-settlement positions (as with the CMA8 guidance for competition law enforcement). Given the consequences for the settling party, it is also vital that there are no 'hair triggers' within the SDCs – which should focus solely on the core requirements of the settlement process – i.e. continued acceptance of liability and co-operating with the CMA in bringing the case to a conclusion. It is essential that settling parties are still able to hold the CMA to account in terms of procedural fairness (post-settlement) without any adverse inference from the CMA.

- Finally, as a general point, we encourage the CMA to confirm that it is amenable to frank and open (without prejudice) discussions with companies regarding all potential case outcomes to help reduce levels of uncertainty in the settlement process as far as possible. This includes matters such as the CMA's press release following settlement and closure of the case. In this regard, it would be beneficial if the parties could agree certain parameters in terms of the content of future CMA press releases as part of the settlement process (without detracting from the CMA's need to issue a clear deterrent message). This is particularly relevant if the SDCs

may prevent the party in question from challenging any damaging subjective commentary added by the CMA in its press release.

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 note that the CMA sets the bar very high for what constitutes a 'reasonable excuse' for a failure to comply with an information request by the required deadline.

CMA requests for information (**RFIs**) are invariably huge projects that place significant human and business resource pressure on the company in question. In our experience, businesses typically take such requests extremely seriously and are prepared to divert resources to meet the CMA's statutory deadlines – the only question is whether the CMA's deadline gives the party in question enough time to collate and present the RFI responses in a logical and digestible format.

While the CMA's assurance that it will approach each case on its merits is welcome, we consider that the current approach relies too much on the CMA's discretion. For example, the draft guidance states that relevant factors such as unplanned absences or annual leave will not be considered a reasonable excuse, while "death or incapacity" will only be accepted for sole traders or small businesses (which seems to suggest even this would not be considered a reasonable excuse for a large company).

We accept that firms will often need to dedicate additional resources to responding to RFIs, but urge the CMA to take into account the impact that responding to information requests has on individual staff members. For example, in some cases, a disproportionate burden will fall on a single or small number of employees with specialist knowledge. Similarly, even large businesses may be going through a restructuring or consolidation process that may have an impact on its ability to respond promptly. The draft guidelines should make it clear that the CMA will endeavour to provide deadline extensions in cases where they are genuinely needed.

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?

We consider that the CMA should keep an open mind as to the most appropriate means of resolving a case, whether that be via undertakings or imposing a penalty.

Our main observation on the CMA's general policy objectives regarding penalties is that they seem to be weighted more towards the wider impact of the penalty on the market, rather than the actual conduct of the party concerned. Companies that have clearly evidenced a genuine commitment to consumer law compliance should not be singled-out for enforcement action just because they are likely to send the strongest message to the market.

In particular, we consider that a penalty is unlikely to be justified according to the CMA's policy objectives if the business in question reasonably acted in accordance with **assured Primary Authority advice**. Even if issuing a penalty may issue a strong detterance message to the market in such cases, the

conduct of the party in question cannot be considered sufficiently serious to merit a monetary penalty if they have taken and acted upon advice from their Primary Authority.

In this respect we note that reliance on assured Primary Authority advice is highlighted in the draft guidance as a 'mitigating feature' that may only reduce the level of penalty. This seems to be at odds with the CMA's wider policy objectives. Indeed, at paragraph 5.14(e) of the draft guidance, the CMA states that it may direct a company to sign-up to Primary Authority scheme, which it described as a "… *form a statutory partnership with a Trading Standards to provide it with consistent, tailored, assured advice,* ***which other enforcers must take into account when addressing non-compliance***." It would seem counterintuivite for the CMA to subsequently impose a penalty on a business that has relied on such assured advice in good faith.

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?

We support the logical framework for determining the starting point of any potential penalty at Step 1 and note the similarities with the court's sentencing guidelines for corporate bodies.

However, we do have some concerns, which are set out below:

- When considering the overall level of **harm** (Step 1A), it is not immediately clear how the CMA would go about distinguishing between 'major', 'significant' or 'moderate' harm. For example, is this determined by the severity of the harm to individual consumers affected by the relevant commercial practice, the overall scale of the harm (i.e. how many consumers were affected in total), or a mixture of both? Without this clarification it is unclear how the CMA would approach Step 1A in the abstract.

- We note that the level of **culpability** (Step 1B) is automatically assumed to be high if the CMA has issued guidance that the practice in question is unlikely to comply with the law or applicable industry standards. Given the lack of independent oversight in the CMA's direct enforcement regime (see Q.11 below), we would urge the CMA to reconsider this approach. In particular:

    - CMA consumer law guidance is often either generic/ principle-based, or very detailed and targeted at specific sectors. This can make it hard to clearly identify the CMA's position on compliance. For example, the CMA has issued consumer law guidance addressed at car rental intermediaries, online travel agencies and, most recently, online mattress sellers. It is concerning that the the CMA often expressly reserves the right to refer to that sector-specific guidance in investigations into commercial practices in other sectors, which may be subject to very different trading conditions.

    - A prime example is promotional pricing practices, where businesses have to unpick a wide range of regulatory guidance issued by the ASA, CTSI and the CMA. The CMA has issued general guidance and sector-specific guidance targeted at online mattress sellers following the Simba Sleep investigation. We query whether the CMA's detailed

guidance on the pricing of mattresses would be applicable to more general FMCG retailers, particularly the CMA's guidance in relation to the "volume principle". We also observe that the CTSI consulted widely with industry stakeholders before issuing its pricing guidance, wheras the CMA did not.

- A more proportionate approach would be to reserve high culpability for cases where the CMA has previously published a FIN in relation to the relevant commercial practice and/or there is established case law on the subject in the High Court. Failure to comply with non-binding guidance should be downgraded to medium culpability, at most. If the guidance relates to another sector, culpability may often be low.

- We also consider that there is too much emphasis on self-regulatory bodies (e.g. the ASA) and regulators such as Trading Standards which tend to have a much narrower focus than the CMA. Adverse ASA Rulings should only amount to medium to high culpability if they were addressed directly at the party in question and concern the exact the same commercial practice as the infringing conduct – but even then the business may have legimate reasons for questioning the ASA's approach. It is important to bear in mind that the ASA is not a statutory regulator and its Rulings will often be handed down without robust legal analysis. The CAP Code may reflect the principles of the DMCC Act, but in our experience the ASA Council will often apply a broad-brush approach to complex legal issues such as the impact of the marketing practice on the average consumer.

- More detail is required in relation to the role that staff training plays in assessing culpability. It is not immediately clear what "failure to control" staff means in practice, and the requirement to train staff "to comply with the law" also seems too vague. These issues are more directly relevant to whether or not there has been a breach of consumer law in the first place – particularly cases that hinge on the professional diligence test. Staff training should only have an adverse impact on culpability in the case of serious omissions. We support the positive approach for assessing low culpability in cases where companies have taken active steps to implement a consumer law compliance program. We would also strongly encourage the CMA to issue clear, practical guidance on its expectations with regards to consumer compliance policies.

Finally, we are concerned that the lack of a guiding framework at Step 2 could undermine the Step 1 process by leaving the door open to the CMA to impose substantial deterrent uplifts on the basis of value judgments.

This could result in disproportionate penalties for large companies (particularly global companies), where the scale of their international operations might result in penalties that are excessively punitive relative to the actual harm or breach.

To address these issues, we suggest that the CMA publishes a more transparent framework for how it would approach any penalty uplift at Step 2. This should include:

- further clarity on how the CMA intends to determine a company's worldwide turnover;
- a requirement for the CMA to clearly evidence the need for any deterrent uplift rather than simply pointing to the scale of the company's global turnover;
- a requirement for the CMA to set out a transparent decision-making process for how it arrives at any eventual uplift at Step 2; and
- a commitment to avoid any "double-counting" at Steps 1 and 2 of the penalty calculation process. Specifically, large companies with high numbers of UK customers are already likely to be heavily penalised at Step 1 due to their high UK turnover and, potentially, due to the high number of customers affected by their commercial practices (which is relevant to the 'level of harm' categorisation at Step 1A). This means that a significant uplift at Step 2 may be unnecessary in many cases.

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 have any comments at this stage.

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?

We do not have any comments at this stage.

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 have any comments at this stage.

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

Internal oversight and scrutiny throughout the investigation process is vital in terms of demonstrating a commitment to procedural fairness, given the CMA's ability to issue 'first tier' regulatory penalties under the direct enforcement regime.

It is therefore concerning that, as shown in Section 8.25 of the draft guidelines, the overview of almost all key decisions throughout the investigation rests with the Senior Responsible Officer (**SRO**), save for the scrutiny of the CMA's own General Counsel. The FDG only become involved at the very end of an investigation before a FIN is issued. This raises concerns in relation to confirmation bias given the close relationship that the SRO has with the case team. Introducing independent oversight at such a

late stage has the potential to seriously undermine the credibility of the CMA's decision-making process.

Furthermore, while we welcome the commitment to ensure that other members of the FDG will be of equivalent or greater seniority to the SRO, it is not clear why the SRO needs to be a member of the three-person FDG at all. The FDG should exclusively comprise senior CMA colleagues who have no direct involvement in the case.

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

We do not have any comments at this stage.

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

n/a