

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

Whilst understanding that the CMA has a duty under the DMCC to expedite cases, clearly it is also important in the context of direct enforcement that parties to the enforcement are able to fully understand the process and the arguments raised against them. With this in mind, the guidance is silent on whether the parties will have the option to clarify certain points or arguments put forward in the PIN or the EAN with the CMA prior to the submission of written representations. Clearly this will not be necessary in every case, however in the initial teething phase it would be useful to know whether this will be an available option, and, if so, how to go about raising questions with the CMA at this stage.

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

The guidance is clear that the CMA may vary administrative timelines depending on the individual facts of each case, including but not limited to the volume of documents within the CMA case file. Whilst maintaining this flexibility, the guidance sets out basic parameters for what would be considered a standard timeline for submission of written representations, which is particularly helpful when managing client expectations at the start of an investigation. However, the guidance does not provide this illustrative timeline for other time periods that can be fixed by the CMA at other stages in the investigation (for example in relation to written representations after the hearing, for providing additional evidence after the hearing, for submissions by interconnected bodies corporate, and for a letter of facts etc.) It would be helpful if the CMA would provide similar guidance in relation to these time periods, in order to help manage expectations.

The guidance sets out that oral representations may be given in person or remotely via video conferencing. Whilst understanding that the CMA's Canary Wharf offices are the primary place these hearings would take place and would be the most convenient option for many businesses, for clients based outside of London the option to present oral submissions in person in one of the CMA's other offices (e.g. Manchester, Edinburgh etc) would be invaluable. Although the option to present remotely creates the option for parties to present submissions from anywhere in the world, it does not facilitate the same level of discussion as an in-person oral hearing. If this is an option that the CMA would consider, it would be helpful if this could be clarified as an option in the guidance alongside guidance on how to request this option with the case team.

The guidance sets out that parties will have the opportunity to request one oral hearing with the CMA during the investigation. Whilst understanding that the CMA has a duty of expedition, where a case is more complex (for example, where a number of infringements of consumer law are alleged, or where the facts are particularly complex) will there be the option to request a longer 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?

The guidance lists previous non-compliance with undertakings as a factor the CMA may take into consideration when deciding whether to accept undertakings from a party under investigation. Whilst understanding that previous behaviour can be an indicator of future behaviour, and that the CMA needs to take a risk-informed approach when deciding whether to accept undertakings, under the current guidance the CMA would have the ability to refuse an undertaking based on previous failure to comply with an undertaking, with no time limit on when an instance of failing to comply with an undertaking would cease to be relevant to the CMA's consideration. Certain clients may have failed to comply with an undertaking in excess of, by way of example, ten years ago, and have had an entire overhaul of management and compliance teams in the interim period yet could still be denied undertakings on the basis of the behaviour of individuals no longer in the organisation. Would the CMA consider including within the guidance a statute of limitations for previous instances of non-compliance?

In relation to the review of undertakings, would the CMA consider reviewing existing undertakings after a set time period? Certain undertakings accepted by the CMA in relation to breaches of competition Law have been in force for a number of years, with organisations complying and submitting compliance reports for in excess of ten years, and hesitant to make submissions to the CMA (or not aware that this is an option to them). If the CMA would commit to automatically reviewing undertakings after, by way of example only, a five year period, this would lighten the compliance burden on in-house legal teams significantly.

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?

N/A

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?

N/A

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?

N/A

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?

The list of mitigating factors for calculating monetary fines would suggest that even where a practice is compliant with consumer guidance issued by the CMA it could be an infringement. This has, understandably, created a significant sense of uncertainty as guidance has long been seen as a source of best practice guidance. If the guidance is not reliable as a guide as to how the law may be interpreted by the regulators, then this increases compliance risk significantly for organisations. Understanding that this may only be the case in very limited circumstances, it would be incredibly useful if the CMA could give examples as to how this may be the case in practice.

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?

N/A

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?

Where parties make the CMA aware that they are unable to meet a deadline set by the CMA in relation to information notices, PINs, to attend an oral hearing and/or to meet any other time sensitive requirements, even where this delay is not within the scope of “reasonable excuse”, and the CMA has refused to extend the deadline which is then missed, would this be considered as a mitigating factor?

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?

N/A

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

N/A

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

The proposed scope for procedural complaints to the CMA includes complaints on deadlines set by the CMA in relation to information notices, PINs, and/or to attend an oral hearing. Where a complaint is made by a party subject to investigation in relation to the CMA, the guidance is not clear on whether the deadline will be extended to allow time for review of the complaint, or whether the parties must observe the deadline in any event. It would be useful if this position were clarified in the guidance.

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

The DMCC introduces the concept of interconnected bodies corporate in the context of consumer law. Whilst understanding that the term is defined in the DMCC, additional guidance on what may be considered an Interconnected Body Corporate would be helpful, particularly in the context of a franchisor/franchisee relationship.