Summary: CMA roundtable on the use of confidentiality rings and disclosure rooms

7 November 2016

Introduction

1. This note summarises the discussion among participants at the roundtable hosted by the Competition and Markets Authority (CMA) on the use of confidentiality rings (CRs) and disclosure rooms (DRs) in market investigation references and other CMA functions, namely mergers and Competition Act 1998 (CA98) investigations.

2. The roundtable provided a forum for the CMA to discuss its use of CRs and DRs with experienced practitioners from within the competition community (including legal and economic advisers, in-house counsel and regulators). The discussion provided relevant and useful feedback for the CMA to consider further enhancement of its approach to the use of CRs and DRs in its work.

3. The discussion focused separately on:

   (a) the CMA's recent use of CRs and DRs in its market investigations, in particular those into the energy and retail banking markets, and potential areas for further enhancement; and

   (b) the use and purpose of – and the CMA's approach to – such methods of disclosure in its mergers and CA98 investigations.

4. Opening remarks were provided by Charles Hollander QC of Brick Court Chambers. A panel of representatives[1] from the CMA and the adviser community provided their individual views to introduce the topic, followed by further discussion among all audience members.

5. Key aspects of those discussions are summarised in this note. The note does not set out the CMA's views or policies or those of speakers' organisations. While the note does not include all comments made, the CMA will carefully

[1] Andrea Gomes da Silva (CMA), Nigel Parr (Ashurst LLP), Rachel Webster (Frontier Economics) and Tom Smith (CMA).

consider all the views and comments expressed at the roundtable as part of its ongoing consideration and evolution of both its approach to CRs and DRs and its wider policies and procedures.

6. The CMA is grateful to the speakers, panellists and all participants who engaged in and contributed to an open and informative discussion.

Part 1: The use of confidentiality rings and disclosure rooms in market investigations

The CMA's current practice

7. Participants recognised the need for the CMA in all its work to seek to find the appropriate balance between its duty to protect the confidentiality of the information it receives and its duty to preserve the right of fair process and rights of defence. Participants also acknowledged the time and resources challenges that the CMA faces, especially in the markets context, where there is a statutory timetable and often large number of parties involved.

8. In light of the above, there was broad agreement that – while scope for further improvement remained – the CMA's most recent use of CRs and DRs in its market investigations demonstrated the way in which it had sought to improve and evolve its market investigation disclosure process in recent years.

Key considerations for parties

9. The discussion identified several considerations in relation to CRs and DRs that were considered of importance to parties to CMA market investigations and their advisers.

10. These included the quality of the data disclosed, the nature, extent and timeliness of that disclosure, and the importance of ensuring that parties were able to instruct their advisers effectively in relation to the information disclosed.

11. The importance placed on having a clear understanding of the CR or DR process and, more broadly, the CMA seeking to ensure that there are 'no surprises' for parties throughout the investigation process, were similarly identified as of particular relevance. It was felt that CMA guidelines and templates may assist further in increasing advisers' and parties' understanding of how CRs and DRs (or particular rules governing them) work.

12. Equally, however, the potential benefits of retaining some flexibility of approach to reflect the specific case at hand were also noted by participants. For example, it was generally agreed that in particular cases, it may be appropriate and beneficial to allow – in addition to external legal and economic advisers – parties' in-house counsel or personnel, and (in very exceptional circumstances) third parties, access to a CR or DR (see further below). Similarly, it was noted that more might be done in market investigations – and in disclosure processes in particular – to account for the challenge of such processes for small parties and their advisers given their more limited resources, and to ensure they were as able as large, better-resourced parties to influence the direction of an inquiry.

Choosing the right disclosure mechanism: disclosure rooms or confidentiality rings?

13. Participants highlighted that using CRs (including enhanced forms thereof, known as 'confidentiality rings plus' (CR Plus))[2] was generally preferable to using DRs, insofar as they allow for fewer limitations on access and timing and thus for greater flexibility for advisers in how/where they review documents, and quicker information exchange. CRs also involved a lower resource and logistical burden for both the CMA and parties. The fact that given advisers are bound by the undertakings and are subject to professional rules of conduct also meant that CRs should generally provide sufficient protection from unauthorised disclosure. Moreover, it was highlighted that the fact that the breach of the undertakings constitutes a criminal offence provides a benefit for the CMA in terms of deterrence. DRs were therefore generally felt to be necessary only in specific limited circumstances, for example where information was of an extremely sensitive nature (for example, personal data).

14. In this regard, the view was also expressed that parties to investigations were typically comfortable with their data being disclosed through a CR, provided adequate security controls or other mechanisms to ensure confidentiality were in place, and that the information was appropriately redacted before being included in the CR. Participants supported future use of CRs Plus (particularly to the extent this avoided the need to use a DR), with some commenting positively on the CMA's use of a CR Plus in its energy market investigation.

---

[2] The term 'CR Plus' is used to refer to CRs on which additional protections and controls are imposed. The CMA may consider using a CR Plus where it is concerned that an 'ordinary' CR would not offer sufficient protections or controls. In its energy market investigation, the CMA provided parties' advisers with a hard drive (one hard-drive per party) containing the disclosed information, which could be downloaded onto only a limited number of stand-alone computers in the advisers' offices. In that case, such additional restrictions enabled the CMA to avoid use of a DR to disclose the information in question.

Further improvements

15. Participants put forward a number of potential improvements to the current disclosure regime. These focused in particular on the four areas set out below.

(a) Timing of disclosure

16. Earlier disclosure (specifically before publication of provisional findings) was argued for by some participants. It was noted that the potential benefits of early disclosure needed to be balanced against potential risks and inefficiencies that could result from the CMA disclosing information or engaging with parties on particular matters before it had had adequate opportunity to consider the facts and the nature and extent of its further investigation and/or potential concerns.

17. Regardless of the specific point at which information was disclosed, overall earlier planning and engagement with parties was reported as a key aspect for an improved overall disclosure process. This could for instance take the form of discussions or 'roundtables' with parties and advisers, including early on in an investigation to discuss, for example, the data that the CMA proposes to request and/or how it would analyse this. It was felt that this would allow parties and their advisers better to understand and engage in the process and help identify potential issues and challenges early on, which could in turn facilitate and streamline later disclosure processes (including use of CRs or DRs).

18. Allowing for a longer period between the closure of a DR and the parties' submissions was also raised by some participants as a possibility to improve the effective participation and timely engagement of involved parties. In more general terms, some felt that better scoping of the need for CRs or DRs, and of the data included in them, could assist in avoiding duplication and reducing burdens for the CMA and parties.

(b) Efficient use of disclosed material

19. Participants representing the adviser community favoured advisers being able to remove intermediary DR reports or remove DR reports more than once during the duration of a DR. It was felt that this would better allow clients to discuss important issues with their advisers and give appropriate instructions, as well as giving advisers the ability to draft and prepare submissions or to quality assure the CMA's economic analysis outside the confines of the DR.

20. Separately, participants noted that disclosure exercises could also be facilitated by the CMA more generally focusing carefully on the information it requests from parties in the first instance. Ensuring that the information was the 'right' information, and seeking to avoid gathering less relevant information, would help to limit the information held by the CMA, and may thus reduce the volume of information that might need to be subsequently disclosed. This was felt to be relevant not just in market investigations, but across the CMA's functions (in particular CA98 enforcement cases).

(c) Access to the disclosure room

21. The discussion also focused on the challenges of allowing those other than external legal and economic advisers to access DRs, in particular in-house counsel and third parties.

22. According to some participants, in-house counsel and potentially even business people should be allowed access to DRs, on a case-by-case basis, if this would offer clear benefits for the business' ability to make submissions, which access only by external advisers did not allow. However, some participants noted the risk of in-house counsel being conflicted from advising in future cases if they have been given full access to a DR. Where there were good reasons to deny in-house counsel and business people access, then it was suggested that, as an alternative, they might be permitted to see the unredacted version of the DR report.

23. Other safeguards were discussed that could enable access for in-house counsel/business people while ensuring that the confidentiality of information would be preserved, including classifying information into different levels of confidentiality, with a wider range of people having access to less confidential information or, if feasible, obtaining undertakings from business people not to be involved in future deals involving the companies they get information about.

24. Participants were generally cautious about allowing third parties access to a DR, due to the increased concerns on commercial confidentiality and data protection. It was felt that such third party access should be seriously considered only in exceptional, case-specific circumstances.

25. Other challenges discussed in the roundtable involved the question of the number of advisers that should have access to DRs. It was accepted that the specific number would typically depend on the particular investigation at hand. Many participants favoured granting access to a larger number than the CMA

had typically done to date, although the CMA's need to consider, among other things, information security and logistical issues was acknowledged.

(d) Other improvements

26. Some attendees also discussed the benefits of implementing 'virtual networks' or other IT-led solutions, to maintain security while allowing for quicker disclosure and reducing logistical difficulties associated with providing a large number of people access to a single physical room at the same time. However, it was recognised that there were also financial and resource costs to procuring and using such IT-driven systems.

Part 2: The use of confidentiality rings and disclosure rooms in other CMA functions

27. The discussion continued on the use of CRs and DRs in other CMA functions – particularly mergers and CA98 cases, the potential specific challenges or considerations for use of CRs and DRs in these contexts, and the extent to which these might require or suggest a different approach to that use.

28. The consensus was that the challenges in terms of the timing and quality of disclosure identified in relation to market investigations were equally relevant to other CMA's functions, notwithstanding that specific dynamics of an investigation and the incentives of those involved were different in CA98 and mergers.

29. The discussion focused in particular on the three areas set out below.

(a) Use of confidentiality rings and disclosure rooms as a disclosure mechanism in CMA merger investigations

30. In general, it was noted that in merger investigations, DRs were typically less effective than CRs, as CRs helped to facilitate parties' involvement and cooperation in the review process. While merger investigations were not fundamentally different from market investigations, the different, tighter time limits in merger investigations were liable to impact the scope to use a CR or DR. Some felt that shorter time limits indicated that earlier disclosure would be appropriate, although it was noted that those tighter timetables equally increased challenges for the CMA in undertaking such disclosure alongside carrying out its substantive assessment of the evidence it has received.

(b) Use of confidentiality rings and disclosure rooms in CMA CA98 investigations

31. There was consensus that in CA98 cases, the dynamics of CRs and DRs were likely to be different, given the more adversarial nature of the procedure, which, among other things, impacts both the nature of the engagement between the authority and parties and the nature, purpose and extent of the information that the authority is required to disclose. Most participants considered CRs to be preferable to DRs in the CA98 context, as they were in mergers and market investigations.

32. The discussion also touched upon alternative uses of CRs in CA98 cases: namely to streamline the 'access to file' process by using a CR to enable advisers to identify non-key documents from the CMA's file for disclosure in redacted form to parties. A number of participants recognised the potential benefits of such use in appropriate cases in helping to expedite CA98 investigations.

(c) Potential areas of convergence across tools

33. It was noted that the European Commission ('Commission') uses an 'access to file'-type process as a disclosure mechanism in phase 2 merger investigations as well as antitrust cases. It was suggested by some participants that thought might be given to the CMA adopting a similar approach to that of the Commission, although underlying differences in the process, nature and delivery between the two authorities' investigations (including the 'fresh pair of eyes' in CMA phase 2 cases) were also noted.

34. Also in relation to the Commission, it was mentioned that the Commission's Hearing Officer function provided an effective complaint mechanism on disclosure issues. Some suggested that the CMA might seek to replicate this also in the markets and merger context, possibly by extending the existing scope of the role of the CMA Procedural Officer in those areas.