RESPONSE TO THE CMA CONSULTATIONS ON

Competition Act 1998:
CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998

Regulated Industries: Guidance on concurrent application of competition law to regulated industries

Cartel Offence Prosecution Guidance

11 November 2013

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COMMENTS ON THE SECOND TRANCHE OF DRAFT CMA GUIDANCE

The Simmons & Simmons LLP EU, Competition & Regulatory, Antitrust Litigation, and Crime Groups welcome the opportunity to respond to the CMA's second tranche of draft CMA Guidance. We have chosen to focus our comments on three of the consultation papers:

- CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998
- Regulated Industries: Guidance on concurrent application of competition law to regulated industries
- Cartel Offence Prosecution Guidance

In each case, where we have not explicitly responded to a question, we either agree with the approach proposed, or have no comments in response to it.

1. CMA draft Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998

Our key comments relate, first, to the clarity of some of the drafting of the Rules, and second, in the draft Guidance, to the procedures for interviewing witnesses, and to confidentiality rooms and data rooms.

1.1 Draft Rules

(A) Question 2: Clarity of the draft amended Rules

Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate?

We have some reservations about the clarity of drafting of certain of the rules – in particular in:

- Rule 3 (delegation of functions) and Rule 9(3) (settlement), a plain English approach would avoid the infelicity of having to define a person as comprising at least two persons. A relevant person is defined in Rule 1. Rule 3 could therefore read:

  3(1) A relevant person must oversee the investigation under the Act and decide whether notice of a proposed infringement decision under Rule 5 is to be given (or has been given, depending on the intention - the current drafting is ambiguous)

  3(2) Subject to Rule 9(4) two other relevant persons (separate from the relevant person referred to in paragraph (1)) must decide […]

- Rule 9(3) could be dispensed with through redrafting 9 (2) to read: [..] pursuant to paragraph (1) if at least two other relevant persons approve that decision.

- Rule 4(3)(b) (Legal advice). Insert (a) the word "reasonable" before the word "conditions" – in our view, an unfettered discretion to impose conditions would be inappropriate and (b) the word "being" after "are".

- Rule 8(1) (procedural complaints). What constitutes a "significant" complaint is unclear. Are all complaints that have not been resolved to the satisfaction of the

complainant by the relevant person overseeing the investigation to be regarded as significant? If not, how and by whom is significance to be established?

1.2 **Draft Guidance on investigation procedures in competition cases**

(A) **Question 3: Approach to interviewing witnesses**

Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?

Paragraph 6.21 relegates the list of individuals that might be determined to have "a connection with" a company to footnote 81. In our view, proper examples of individuals that could have a connection belong in the text of the Guidance, and the definition of what constitutes a connection should then be restricted to those examples properly included. In our view, the category of "professional advisers", appears significantly to exceed the parameters set in section 26A(6) CA 98 for an individual to be regarded as having a connection[1] and should be excluded from the list.

We note that under section 26A(1), an interview could be carried out immediately on receipt of the notice and that paragraph 6.26 gives as an example of where this might be the case, " *where the CMA considers that an individual may have information that would enable the CMA to take steps to prevent damage to a business or consumers*". We are not entirely clear how the taking of such steps relates to the CMA's enforcement function and would welcome clarification.

Paragraph 6.27 states that ordinarily interviews will be recorded, but that "in circumstances where this is unnecessary or impracticable a contemporaneous note will be taken of the questions and the interviewee's response." We can see that there may possibly be times when a recording might be impracticable – although given the formal nature of such interviews, in our view, all possible steps should be taken to ensure that recording the interview is in fact feasible – but we fail to understand how a recording might be unnecessary. If the CMA is exercising formal powers of interview, a formal recording should in all cases be necessary.

Paragraph 6.28 together with footnote 88 suggests in essence that the presence of a lawyer acting for the company brings with it an increased risk of evidence being tampered with, witness evidence being contaminated, or individuals being more reluctant to be open and honest in their accounts. With respect, the ability for the CMA to exclude a lawyer subject to professional conduct rules and acting for the company from an interview on the basis of an unsubstantiated risk of this description is not, in our view, an appropriate power for the CMA to assume for itself.

Indeed we believe it is important that the undertaking with whom the individual has a connection has the right to be represented through its legal function or external legal advisers. First, in practice, this is likely to mean the individual in question is more forthcoming, as the company representative will explain that the undertaking is cooperating with the investigation.

Secondly, the situation should not be seen as analogous to questioning in the criminal context where individual criminal liability is at issue – this power exists to facilitate investigation and enforcement of the civil Competition Act prohibitions, which apply only to

[1] (6)For the purposes of this section— .
(a) an individual has a connection with an undertaking if he or she is or was— .
(i) concerned in the management or control of the undertaking, or .
(ii) employed by, or otherwise working for, the undertaking, and .
(b) an individual has a current connection with an undertaking if, at the time in question, he or she is so concerned, is so employed or is so otherwise working. .

undertakings, not individuals. The rights of the defence in these cases are those of the undertakings which may ultimately receive a Statement of Objections. Having a company legal representative present is the only practical way of ensuring protection of those rights of defence, including the undertaking's so-called "privilege against self-incrimination" (Case C-374/47 *Orkem* [1989] ECR 3283), i.e. that the CMA must not ask the individual a question the answer to which would constitute an admission of infringement by the undertaking (see paragraphs 7.4 and 7.5 where we believe that the CMA clearly acknowledges this position).

We believe that if these protections are not made clear, this power to ask questions of individuals will lead to litigation in the context of its exercise which will hold up the effective use of this power, potentially for many years. These concerns will be multiplied where the power is exercised without notice in the context of a dawn raid. The CMA should think carefully about the procedural problems which would be likely to occur in that particular context.

(B) Question 4: Confidentiality rooms and data rooms

Do you agree with the proposed approach to use of 'confidentiality rings' and 'data rooms'?

The proposals in paragraphs 11.24-11.26 will need to be reviewed in light of the judgment in *BMI Healthcare Limited v Competition Commission (No. 1)* [2013] CAT 24 by the Competition Appeal Tribunal, the forthcoming judgment of the CAT in *Groupe Eurotunnel S.A. v Competition Commission* and further judgments in cases brought before the CAT separately by BMI Healthcare Limited (No.2), Lafarge Tarmac Holdings Limited, and Hanson Quarry Products Limited against the Competition Commission.

Use by administrative bodies of confidentiality rings in this way may, rightly, be the subject of litigation to establish the correct approach in principle to this issue.

(C) Questions 5, 6 and 7: Settlement

We agree both with the proposal to include a proposed maximum penalty in the settlement discussions, and with the proposed caps for settlement discounts.

(D) Question 8: Additional comments

We note that there is no specific question relating to the issuing of a notice of investigation. (paragraphs 5.7-5.10). We have one comment. Paragraph 5.9 states that the CMA "*will usually only include parties' names in the notice of investigation at a later stage of an investigation, typically if a Statement of Objections is issued*". We have serious reservations about the release of parties' names at any time before an infringement decision is issued. Suspicions and allegations have a significant impact on the share value and reputation of a company, and in our view, the CMA should be fully conscious of the consequences for the company of releasing names, and should make use of this power with great caution and only in exceptional circumstances.

2. Regulated Industries: Guidance on concurrent application of competition law to regulated industries

2.1 General comments

We address two of the questions posed: that relating to the regulators' use of competition powers versus sectoral powers (question 1), and an issue relating to the timing of information sharing under question 4.

2.2 Question 1: Competition powers versus sectoral powers

Do you consider that the Transition Team's proposed approach to dealing with the revised requirement that Regulators exercise competition powers in favour of sectoral powers is clear and appropriate? Please give reasons for your view.

We have assumed that the question targets the requirement for the Regulators to apply the appropriateness test before making a final (enforcement) order, giving a notification of contravention, imposing a discretionary requirement, accepting an enforcement undertaking, confirming a provisional (enforcement) order, or imposing a penalty, depending on the regulated sector.

The statutory obligation under schedule 14 ERRA 2013 to apply the appropriateness test, and to proceed only under Competition Act powers rather than regulatory powers where a regulator considers this to be more appropriate, is imposed at the point of decision-making. In theory, this would permit the regulators to investigate conduct in parallel under regulatory and competition law powers, and to apply a relevant order or impose a penalty under the more relevant power as appropriate.

Paragraph 4.4 of the Draft Guidance suggests instead that a Regulator will apply the appropriateness test early, at the point at which it commences its investigation into a particular case "*in order to ensure the efficient and effective allocation of resources*", but will keep that decision under review during the course of an investigation. This appears to suggest that in relation to a particular piece of conduct the investigatory route is at any time under either regulatory or competition law powers, but that the decision can be reversed at any time if the alternative route subsequently appears more appropriate. We note that the draft Guidance makes no comment on the procedure for switching to using sector-specific powers after commencing under competition law powers, and perhaps some wording to address that could be explicitly incorporated.

The Transition Team may perhaps wish to consider whether the process proposed will also work in relation to the Financial Conduct Authority and Payment Services Regulator, if, as the government proposes, they each obtain concurrent competition powers under the Competition Act through the Financial Services (Banking Reform) Bill.

2.3 Question 4: Information sharing

Do you consider that the Transition Team's proposed approach to information sharing between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.

We have one comment on the information sharing provisions. The wording of Regulation 9 of the Competition Act (Concurrency) Regulations places a wide responsibility on the regulators and the CMA to share details of any infringement "*that may have taken place*". According to the draft Guidance, the various Memoranda of Understanding contain a similar requirement. This is an obligation that begins early, therefore. The draft Guidance (footnote 93), however, indicates that the obligation to notify applies only once the threshold for a Competition Act investigation is met, and footnote 94, that it will not apply to a complaint or preliminary investigation in which the investigating competent person concludes that there were in fact no reasonable grounds for suspecting an infringement. In our experience, Regulators regularly threaten to invoke their Competition Act powers at an early stage in a potential regulatory dispute for the purposes of achieving a regulatory outcome. This seems to us to be an inappropriate use of those powers which would continue to fall outside the scrutiny of the competition authority and would not be caught by the CMA's annual reporting obligation. In our view, the notification requirement should be triggered at an earlier stage – essentially whenever the prospect of a Competition Act investigation is raised by a regulator. This would comply with the wording of Regulation 9, and at the same time, would offer parties some reassurance that the Regulators were applying their competition law powers in a co-ordinated and consistent way.

3. Cartel Offence Prosecution Guidance

3.1 Question A1: Scope of the guidance

Does the Draft Guidance fulfil its statutory purpose, namely to set out the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be instituted against an individual?

The Guidance is subject – and subordinate to - the principles set out in the Code for Crown Prosecutors (the "Code"), and it is therefore appropriate that the CMA has drawn heavily from the Code when preparing the Guidance. However, we believe that the scope of the guidance may have been drawn too narrowly to be of as much assistance as it could be, both to the CMA in terms of determining whether proceedings should be instituted, and to the individuals involved and their advisers.

We note the comment at Paragraph 2.6 of the introduction to the Guidance and in particular the view expressed that "*it is not appropriate in prosecution guidance for the CMA to attempt to provide further interpretation of the legislation such as the availability or operation of defences to the offence. That is the role of the criminal courts*". Given that there is very little or no criminal case law to guide parties and the court on interpreting the elements of the cartel offence, and particularly the new exclusions and defences, it is not unreasonable to expect that the Guidance should go a little beyond the limited remit that it purports to set for itself.

The credibility of the evidence on which a defence is based, for instance, is to be taken into account in considering whether there is sufficient evidence for a realistic prospect of conviction. The CMA will need to assess the credibility of a defence both in terms of whether it is available to the defendant and how it will operate. We therefore consider that transparency on the operation and availability of the defences will be crucial to enabling the CMA to exercise its discretion to prosecute, as well as to the parties involved.

Precedence for a more illustrative approach to providing guidance in a criminal context is provided in the Bribery Act, which in section 9 provides that the *Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).* It is to be regretted that Parliament did not take a similar approach in ERRA 2013. However, we do not believe that this omission from ERRA 2013 necessarily prevents the CMA from offering greater transparency on how it will implement the legislation.

We note the assistance provided in the Guidance in interpreting the section 188(1) offence at paragraph 4.9. This clarification appears at odds with the view expressed at paragraph 2.6 of the introduction. The inclusion of examples of "unilateral restrictions" indicating to practitioners that arrangements without reciprocity will not be criminalised appears to be interpretative of the legislation (although we have a comment arising from the joint venture example, as we set out below). In principle, therefore, we see no reason why a similar approach should not be taken in addressing other aspects of the legislation which have not been tested in the criminal courts.

This fundamental perspective informs our comments below.

Specific comments and suggestions for amendment

3.2 **Question A.2: the evidential stage**

Is the evidential stage of the test of the decision making process explained clearly enough?

(A) **Evidence**

We note the omission of a number of issues relevant to establishing whether there is sufficient evidence to provide a realistic prospect of conviction. For example, one crucial issue is to consider the source of the evidence. The CMA will have to weigh the value of evidence provided by immunity or leniency applicants carefully when considering the quality of the evidence before it. Given the horizontal nature of the offence, the entities providing evidence will in all likelihood be competitors and the credibility of their evidence consequently has the potential to be undermined at trial. Successful immunity or leniency applicants will by definition be implicated in the alleged wrongdoing and individual employees and/or agents may very well be so too, as well as having an incentive to overstate the evidence against the defendant and play down their own role in the arrangement. Evidence and testimony provided by a leniency or immunity applicant (and its employees) may very well be of diminished evidential value as a result.

A further example that may also need to be taken into account at this stage relates to third party confidential evidence and/or evidence purported to be privileged. This is especially important in relation to potential leniency or immunity applicants or entities located in jurisdictions without formalised evidence sharing provisions. We note that the OFT's current policy of not requiring waivers of legal professional privilege as a condition of leniency in either civil or criminal investigations, and its new procedure for using an independent counsel to give an opinion on whether or not evidence is covered by legal professional privilege, have yet to be tested in the context of a the criminal courts.

It is important that examples and guidance be given that assist in distinguishing between conduct which is considered hardcore cartel activity, and conduct that is not.

(B) **Unilateral restrictions (paragraph 4.9)**

We are particularly concerned that paragraph 4.9 includes a non-reciprocal non-compete in a joint venture as an example of a restriction that will not trigger the offence. This is an unfortunate choice. The implication may be seen to be that reciprocal non-compete restrictions entered into by the parents to a JV would be caught – yet a provision of this type is generally regarded as ancillary (ie directly related and necessary) to the implementation of the JV provided that it is limited to the scope of activities and the lifetime of the JV. It would therefore be cleared in a European Commission or UK merger filing and would not fall within the prohibition against restrictive agreements under either EU or UK competition law. This is therefore not a good example to use on the narrow unilateral restriction point: it appears to suggest that an ordinary commercial practice could be caught by the cartel offence. If this is the case, it would be an entirely inappropriate consequence of the removal of the dishonesty element from the offence. Businesses would benefit from reassurances that this is not, in fact, the case.

(C) **Exclusions (paragraphs 4.11 – 4.17)**

We believe that greater clarity on what constitutes "relevant information" and in particular what level of detail would qualify as a "sufficient" description of the arrangement to demonstrate why the offence might be triggered is necessary from the perspective of the CMA, not simply (although clearly also) from the perspective of the parties. An entity will be reluctant to disclose confidential information, for example, in attempting to fulfil this criterion.

We suggest that the test for sufficiency should be an objective one, viewed from the perspective of either one of a customer or consumer in the market to which the arrangement relates.

(D) **Defences (paragraphs 4.18 – 4.24)**

Confirmation in paragraph 4.24 that in section 188B(3) the term "professional legal adviser" is intended to cover both external and in house legal counsel is welcome. A further key point on which clarity would assist both the CMA and prospective parties is in relation to the "reasonable steps" that must be taken under section 188B(3) to disclose the nature of the arrangements to a professional legal adviser for the purpose of obtaining advice. Some illustration of what steps the CMA will regard as reasonable would be of assistance, as well as reassurance that the test will take account of the nature of the organisation in question. Many small and medium sized enterprises will not have a legal function or a dedicated in-house lawyer. The CMA should therefore be able to consider what "reasonable" steps would be appropriate in a given organisation in considering whether to prosecute or whether the defence is met, and the Guidance should address the point, especially as this reasonableness requirement is a gloss not found in the legislation.

The corollary of this defence may mean that privilege is waived over correspondence (potentially email chains or phone calls) where advice was sought and obtained. We suggest that an explicit recognition of this waiver is made in the Guidance and of how waiver will be dealt with and who is in a position to give consent to such disclosure.

3.3 Question A.3: the public interest stage

Do you have any comments on the factors that the CMA will take into account in considering the public interest in instituting a prosecution?

By way of context, there is a presumption in law that a *mens rea* is required for a criminal offence and particularly one where the offence is "truly criminal" in nature (Lord Scarman in Gammon (HK Ltd) v AG of Hong Kong [1985] AC 1 PC). The presumption is displaced in cases of social concern e.g. public safety or to encourage greater vigilance to prevent the commission of the prohibited act. It is by no means clear that the cartel offence is such an offence, this being essentially a commercial offence.

With the removal of the "dishonesty" element, the revised cartel offence appears to be effectively a strict liability offence. The cartel offence was originally devised to address the worst kinds of cartel activity – ie restrictions by object, and the amendment to the offence should not now open up the offence to restrictions by effect. Yet arrangements may now fall within the reformed offence where individuals did not intentionally set out to offend and where any restriction operates by effect. Examples could include agreements that fall within a block exemption or could be subject to assessment under the civil rules. In the context of a criminal offence, we do not believe it practicable for the CMA entirely to disregard state of mind when considering whether to prosecute, notwithstanding the deletion of the word "dishonestly" from section 188 EA02. At the least, in assessing the public interest, the CMA should consider whether a party's original intention when entering into the agreement (as evidenced at the time) runs counter to any alleged effect of the agreement. If so, this should be considered a factor against prosecution, and in our view, the Guidance should explicitly address the point.

The relevant industry and market in which the entity operates should also be considered at this stage, as the context may diminish the culpability of the suspect. Specific market conditions for example, could have given rise to a similar outcome notwithstanding the alleged cartel arrangement.

Consideration should also be given as to whether a criminal prosecution is appropriate in light of other sanctions available to the CMA (for example, director disqualification proceedings) or parallel proceedings in other jurisdictions such as the United States.

We hope that the above comments are a helpful contribution towards developing a body of guidance in relation to the changes brought about by the Enterprise and Regulatory Reform Act 2013. Please do not hesitate to contact us if we can be of further assistance.

Simmons & Simmons LLP
EU, Competition & Regulatory Group
Antitrust Litigation Group
Crime Group **11 November 2013**

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