



Bar Council response to the Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998 consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Business, Innovation and Skills consultation paper entitled Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board

Overview

4. This consultation sets out, in the words of the covering email from the Department for Business, Innovation and Skills (BIS) how the Competition and Markets Authority (CMA) will work in practice and how it will interact with businesses and individuals across the range of its powers and responsibilities.
5. As such, the Bar Council will restrict its comments in response to this consultation, given that it focuses on policy rather than law reform. However, there are certain issues, in particular in relation to access to legal advice, which are of concern to the Bar Council.

¹ Business, Innovation and Skills (2013) Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998

6. We have considered and made comments on the follow documents:

- (i) Guidance on the CMA's investigation procedures in Competition Act 1998 cases and Competition and Markets Authority Competition Act 1998 Rules;
- (ii) Guidance on the CMA's approach to use of its consumer powers;
- (iii) Prosecution guidance on the criminal cartel offence;
- (iv) Proposed approach to the treatment of existing OFT and Competition Commission guidance.

Guidance on the CMA's investigation procedures in Competition Act 1998 cases and Competition and Markets Authority Competition Act 1998 Rules

Question 1: Do you agree with the list in Annexe A of the Draft CMA CA98 Guidance of existing CA98-related OFT guidance documents that the Transition Team proposes to put to the CMA Board for adoption?

7. Yes.

Question 2: Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate? Please give reasons for your views.

8. The Bar Council has the following concerns with the Draft Rules.

Rule 3 provides as follows: *"An officer must grant a request of an individual required under section 26A to answer questions to allow a reasonable time for a legal adviser to arrive before starting the interview, if the officer (a) considers it reasonable in the circumstances to do so; and (b) is satisfied that such conditions as he considers it appropriate to impose in granting the individual's requests are, or will be, complied with."* The Bar Council has grave concerns about this circumscribed right to a lawyer during investigations which may lead to criminal charges being brought against the individual in question.

Rule 6(2)(a) provides as follows: *"The CMA must give a relevant party a reasonable opportunity to inspect the documents in the CMA's file that relate to the matters referred to in a notice given to that relevant party, except that the CMA may withhold any document to the extent that it contains confidential information ..."*. The Bar Council is concerned about the potential restriction on access to relevant information held by the CMA. No consideration appears to have been paid to the possible use of confidentiality rings for example which allow for access to files whilst protecting confidentiality.

Question 3: Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?

9. No. In paragraph 3.9 of the consultation paper, the following statement is made:

"The Transition Team recognises that compulsory interview powers are a significant new investigatory tool and will have personal and procedural implications for the individuals and

undertakings concerned. The Transition Team proposes to adopt the approach outlined in paragraphs 6.18-6.28 of the Draft CMA CA98 Guidance when applying this new interview power."

10. The key paragraph in that draft guidance with which the Bar Council has concerns is 6.28 which provides as follows:

"Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation. However, the CMA will only permit a legal adviser also acting for the undertaking to be present at the interview if it is satisfied that doing so will not risk prejudicing the investigation – in particular, the CMA will need to be satisfied that the presence of lawyers acting for the undertaking at the interview will not increase any of the following risks: (i) the destruction, falsification or concealment of evidence; (ii) the contamination of witness evidence, or (iii) the reduction of incentives for individuals being questioned to be open and honest in their accounts. In cases where the CMA wishes to question a person having entered into premises as described in paragraph 6.44 below, the questioning may be delayed for a reasonable time to allow a legal adviser to attend. During this time, the CMA may make this subject to certain conditions for the purpose of reducing risk of contamination of witness evidence."

11. The Bar Council has very grave concerns about this restriction on the lawful right to a lawyer, which right has recently been endorsed by the European Union.² Not only are the restrictions unlawful as a matter of domestic, EU and ECHR law, they are also offensive to the extent that they link the presence of a lawyer to unlawful conduct such as the destruction, falsification or concealment of evidence. Lawyers acting on behalf of relevant individuals will be bound by their Codes of Conduct which clearly outlaw any and all of the behaviour referred to above.

Question 4: Do you agree with the proposed approach to use of 'confidentiality rings' and 'data rooms'?

12. The Bar Council supports the principle of the use of "confidentiality rings" and "data rooms" but has concerns that their use only appears in the draft guidance and not in the Draft Rules, which seek to exclude access, as noted above, to confidential documents. Clarification in particular is required insofar as concerns the "read-across" from the draft guidance to the Draft Rules in this regard.

Question 5: Is the proposed settlement procedure clear, and do you have any views on it?

13. Yes, the proposed settlement procedure is clear. No the Bar Council does not have views on it.

² On 10 September, the European Parliament adopted the European Commission's proposal on access to a lawyer for persons facing criminal proceedings.

Question 6: Do you agree that settlement discussions should include the proposed maximum penalty the settling business should pay or would it be sufficient if the CMA only set out the settlement discount on an undisclosed penalty?

14. The former, to give greater clarity and legal certainty to the process.

Question 7: Do you agree that the proposed caps for settlement discounts at up to 20% for pre-SO settlement and up to 10% for post-SO settlement are appropriate?

15. Yes.

Question 8: Do you have any comments on any of the other amendments proposed for the Draft CMA CA98 Guidance?

16. No.

Question 9: Do you agree with the proposed transitional arrangements, as set out in paragraphs 3.41 to 3.43 above?

17. Yes.

Question 10: Do you agree with the Transition Team's proposal to extend the availability of SfOs to prospective vertical agreements in addition to prospective horizontal agreements? Please give reasons for your view

18. Yes.

Guidance on the CMA's approach to use of its consumer powers

Question 1: Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to working in partnership?

19. No.

Question 2: Are there other factors which you feel should be taken into account when considering the CMA's approach to the use of its consumer enforcement powers?

20. It is difficult to answer this question without considering the prioritization principles which the Financial Conduct Authority will apply, which have yet to be published. It may be, for example, that matters which we consider to be relevant, such as the technical complexity of a case and resource implications, will form part of those principles. In criminal cases cost implications can be significant for local authorities, in particular in cases where confiscation proceedings are taken following a conviction. In such cases, the defendant's resources are more likely to be deployed to meet a confiscation order than to pay the prosecution costs.

Question 3: Are there other activities which you feel should be included when considering the CMA's approach to the lead authority for UTCCRs?

21. No.

Question 4: Are there other activities which you feel should be included when considering the CMA's approach to carrying out its international functions?

22. No.

Question 5: Do you consider that the Draft Guidance covers the main changes that are introduced by the ERR13 to the CMA's consumer powers?

23. Yes.

Question 6: Do you consider that the Draft Guidance will facilitate your understanding of the consumer protection regime when read in conjunction with the existing guidance documents?

24. We agree that the draft guidance is a useful statement of the FCA's intentions.

Question 7: Do you agree with the list in Annexe B of the Draft Guidance of existing consumer-related OFT guidance documents proposed to be put to the CMA Board for adoption by the CMA?

25. Yes.

Question 8: Do you consider that the Draft Guidance is user friendly in terms of its content and language?

26. Yes.

Question 9: Do you have any other comments on the Draft Guidance?

27. We have two comments, one a matter of detail and the other a matter of policy:

28. Firstly, at para 7.19, third bullet point, the draft guidance states that prosecutions may be brought against "officers of corporate bodies who have consented or connived in the commission of the offence". Regulation 15 of the CPRs is cited in the footnote to this sentence. That provision allows the prosecution of an officer of a body corporate in the manner set out (reg.15(1)(a)), but also where the commission of the offence by the relevant corporate body is proved to be attributable to the officer's neglect (re.15(1)(b)). Unless the intention is that the FCA will confine itself to only prosecuting in the former case, we would suggest that this bullet point is amended to include reference to prosecution in cases of neglect.

29. Secondly, there is no reference in the draft guidance to the role of the Primary Authority. Many large businesses have a Primary Authority relationship, and in the case of enforcement action taken or proposed by a local authority there is an obligation to notify the Primary Authority. In many cases there would be dialogue between the enforcer and the Primary Authority before any action is taken to establish, for example, whether advice has been given in relation to the matter which is the subject of the proposed action. If this has not already been considered, we suggest that the FCA should consider whether there should be some form of recognition of this in the draft guidance and, if so, whether it would be appropriate to set out how the FCA will proceed in a case where there is such a relationship.

Prosecution guidance on the criminal cartel offence

30. The Bar Council notes the following by way of preliminary comments. First, the draft guidance states at paragraphs 2.5 and 2.6 as follows:

“2.5 Prosecution guidance is inherently different to other guidance documents that the CMA may at any time publish. Principally this is because it is issued in the context of the criminal justice process rather than the civil competition enforcement regime, which is administrative in nature. The CMA’s role as a prosecutor is to take a decision on the institution of proceedings for the cartel offence under the legislation and the draft prosecution guidance explains the factors that the CMA will consider in making that decision.

2.6 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. This is in contrast to the CMA’s role when enforcing civil competition law in which the CMA is also the decision maker. Nor would it be appropriate for prosecution guidance to set out a list of examples or cases where the CMA would not prosecute, creating immunities that are not envisaged in the legislation.

31. Secondly, it is noted that the Transition Team is not seeking views on the changes to the cartel offence, which have already been the subject of a public consultation – see paragraph 3.2.

Question 1: Does the Draft Guidance fulfil its statutory purposes, 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?

32. Yes.

Question 2: Is the evidential stage of the test of the decision making process explained clearly enough?

33. Yes.

Question 3: Do you have any comments on the factors that the CMA will take into account in considering the public interest in instituting a prosecution?

34. No.

Question 4: Do you have any further comments on the Draft Guidance?

35. No.

Proposed approach to the treatment of existing OFT and Competition Commission guidance

Question 1: Do you agree with the proposed approach to the treatment of existing OFT and CC guidance and other publications?

36. Yes.

Question 2: Do you consider that and of the existing OFT and CC guidance proposed for adoption (as set out in Annexe B, and subject to the limitations referred to therein) is, in any respect, no longer appropriate?

37. The Bar Council notes that OFT 953, dealing with prioritisation principles, will not be adopted by the CMA. That is understandable given new priorities of the CMA. However, the Bar Council would expect that another guidance would be published setting out those new prioritisation principles.

Question 3: Do you consider that the Transition Team's proposals set out at Annexe B provide sufficient information on the treatment of existing OFT and CC guidance after their functions are transferred to the CMA?

38. Yes.

Question 4: Do you consider that the CMA should prioritise updating any guidance document or producing new guidance on any topic after 1 April 2014?

39. A new guidance on prioritisation principles.

**Bar Council³
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³ Prepared for the Bar Council by the Law Reform Committee

*For further information please contact
Jan Bye, Head of Professional Affairs
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7242 0082
Email: JBye@BarCouncil.org.uk*