EDWARDS WILDMAN

CONSULTATION ON COMPETITION AND MARKETS AUTHORITY (CMA) GUIDANCE – PART 2

Response of Edwards Wildman Palmer LLP

Guidance on concurrent application of competition law to regulated industries

Introduction

- This response has been prepared by Edwards Wildman Palmer LLP (**Edwards Wildman**), an international law firm with offices in London and 15 other locations across the United States, Europe and Asia. The views set out in the response reflect our lawyers' experience representing clients before the EU and UK competition authorities and are provided in the interests of assisting the Government and the CMA Transition Team. We have not consulted with our clients as part of the preparation of this response and, as a result, the response does not necessarily represent their views. We are happy for this response to be published on the CMA website.

- This response relates to the consultation document '*Regulated Industries: Guidance on Concurrent application of competition law to regulated industries'* (**Consultation Document**), including Annex B to the Consultation Document, setting out the draft *Guidance on concurrent application of competition law to regulated industries* (**Draft Guidance**). To the extent that terms have been defined in the Consultation Document and/or Draft Guidance, this response adopts the same terms.

Questions

1. **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.**

1.1. We agree that it is desirable, as a matter of principle, that all Regulators are under a similar duty to consider whether it may be "more appropriate" to exercise their general competition law powers to remedy an issue of concern, before exercising their sector-specific enforcement powers. It is important to note that this duty gives each Regulator a broad discretion on which powers to apply and, presumably to maintain operational flexibility, there is no statutory presumption as to which power will be more appropriate in specific circumstances. There is, in fact, no requirement to exercise competition powers "*in favour of*" sectoral powers. Rather, there is simply a uniform statutory requirement to consider whether competition powers should be used instead of sector specific powers, with no presumption either way. While this is perfectly understandable, it should be recognised that the heavy burden of competition law enforcement, compared with the possibility of often rapid and streamlined action offered by sector specific regulation, will tend in practice to favour the latter.

1.2. This suggests that situations may arise where a Regulator has decided to exercise its sector specific powers, in circumstances where the CMA may consider that the exercise of general competition powers may have been more appropriate. In other words, the CMA may have the opportunity to 'second guess' the Regulator's exercise of its discretion not to exercise its competition powers. Such a situation is potentially more complex than one in which a Regulator has decided not to take any enforcement action at all and more likely to arise than a situation in which a sectoral regulator *has* commenced enforcement action under its general competition powers but the CMA subsequently decides to take the case away from the Regulator. Given this context, it is surprising that there is not more discussion in the Consultation Document or Draft Guidance as to how such a situation would be managed.

1.3. Paragraph 4.3 of the Draft Guidance suggests that a Regulator may consider it more appropriate to exercise competition powers rather than sectoral powers when doing so would "*be more effective or provide greater deterrent and precedent effect*". This is a very general statement and it would be helpful if the guidance provided additional detail on the factors that Regulators may consider in their assessment of which powers to use.

1.4. There does not appear to be any requirement that, if a Regulator considers the application of sectoral powers and competition powers, and chooses the former, the Regulator should inform the UKCN (or at least the CMA) of this assessment and decision. Even if the Regulator commences an investigation using its sectoral powers, the CMA may then nevertheless commence an investigation based on the same facts under the CA98. While the draft Competition Act 1998 (Concurrency) Regulations 2014 (**Draft Regulations**) contain provisions against double jeopardy preventing two Regulators from exercising their *Part 1 functions* in respect of the same case, they do not prevent a different form of double jeopardy whereby a Regulator investigates using its sectoral powers and the CMA investigates using its CA98 powers.

1.5. In the interests of efficiency and procedural fairness, it appears to us that, where a Regulator is weighing up the appropriateness of exercising its sectoral powers or competition powers, it should consult with the CMA so that, should the CMA consider that the exercise of competition powers are on the facts appropriate, it has an opportunity to express this view to the Regulator and thereby potentially prevent a duplicative investigation or a potentially more disruptive dispute between the authorities further down the line.

1.6. A similar concern arises regarding market studies. We appreciate that the revisions to the legislation do not provide for the same level of cooperation and consultation in relation to market studies as they do in relation to CA98 investigations. However, it seems that the same risk arises whereby a Regulator may initiate a market study and the CMA may open a CA98 investigation to consider the same set of facts. It appears to us to be appropriate, and open to the CMA and Regulators, to agree to a greater level of cooperation in order to seek to prevent such circumstances. While we acknowledge that there is scope for such interaction to be covered in individual Memoranda of Understanding, the general lack of clarity over the interaction between the CA98 and market study/investigation regimes may make it difficult to provide meaningful guidance in individual cases.

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

2.1. We agree with the general principle that the "better or best placed" authority should be responsible for a case. We consider that the factors to be taken into account in making this assessment, as listed in paragraph 3.21 of the Draft Guidance, are on the whole sensible and appropriate.

2.2. Of these factors, the one in the second to last bullet point ("*whether the CMA considers it necessary to exercise Part 1 functions in relation to a case*") is of particular importance, given the CMA's ability to decide the ultimate outcome of case allocation, if there is a dispute. Given this, we have some doubt over the utility of the stated factors that the CMA will apply under this heading, given their ambiguity. Specifically, it is not clear how the CMA will assess that taking action itself will better "*develop UK competition policy*", given that most decisions, by their very nature, have this effect. It is also unclear when action by the CMA would "*provide a greater deterrent and precedent effect for the benefit of competition and consumers*", given that the deterrent effect of a decision is generally created by the level of the fines issued, which may be just as high in a decision taken by a Regulator. It is also hard to see why the precedent value of a decision by a Regulator would necessarily be lower than that by the CMA.

2.3. We support the position that the CMA cannot exercise its jurisdiction where a case is already being investigated by a Regulator and a Statement of Objections has been issued (paragraph 3.26 of the Draft Guidance). However, the circumstances in which the CMA can exercise its jurisdiction are somewhat imprecise. Paragraph 3.25 of the Draft Guidance states that the CMA may claim jurisdiction if "*it is satisfied that doing so would further the promotion of competition within any market or markets in the UK for the benefit of consumers, **for example** to develop competition policy or ensure effective competition enforcement*" (emphasis added). The concept of furthering the promotion of competition is very wide, and it appears that developing competition policy and ensuring effective competition are just two examples of the concept. It also suggests that Regulators exercising their Part 1 functions may not always by furthering the promotion of competition.

2.4. Conversely, it is not clear what is achieved by including the qualifier that intervention by the CMA must be "*for the benefit of consumers*". To the extent that all competition enforcement should ultimately enhance consumer welfare, this phrase adds nothing. To the extent that it limits CMA intervention only to cases where individual consumers can be shown to be directly harmed by anticompetitive conduct, we would suggest that such limitation is unhelpful, given that anticompetitive conduct often occurs higher in the supply chain. This also seems to be an unhelpful factor in differentiating cases where it is appropriate for the CMA to take action, compared with those where a Regulator should take a case, given that both bodies have a responsibility for protecting consumers. While we accept that the Draft Guidance is simply reflecting the wording of the Draft Regulations on this point, the same question of interpretation arises in that context.

2.5. It is clear that the new concurrency arrangements will mark a shift from the current situation, in which, notwithstanding the formal legal position, the reality is that sectoral Regulators are largely left to enforce competition law in their respective sectors as they

see fit. The new obligations on Regulators to work more closely with the CMA, and to share more information with the CMA and each other, are welcome. We consider that the greater powers of the CMA to intervene in cases are likely to have at least some impact on how sectoral regulators use their competition powers. It would nevertheless be helpful to have more clarity on the extent to which the CMA anticipates becoming directly involved in competition enforcement in regulated sectors. While we note at paragraph 3.27 of the Draft Guidance that the "*CMA expects that the circumstances in which it would take over a case under Regulation 8 are likely to be rare*", we also note that the CMA has already indicated that action in regulated sectors will be a priority[1].

2.6. Given these ambiguities, it may be preferable for the circumstances in which the CMA may claim jurisdiction to be more precisely defined, for example to cover situations where the responsible Regulator is no longer the appropriate authority to investigate, for example if the investigation covers conduct arising in more than one sector. We believe such a clarification is appropriate to provide greater certainty for regulators, potential complainants and companies which may face investigation.

2.7. It would also be helpful if the Draft Guidance could provide at least some information on the circumstances in which the Secretary of State might exercise his power under s.52 ERRA to remove a Regulator's concurrent jurisdiction entirely. While we appreciate that a minister's exercise of his discretion is ultimately not a matter for the CMA, it would nevertheless be desirable to have some explanation of the circumstances in which a sectoral regulator order could be made, given the significant impact any such order would have. In the absence of any other guidance, this document would appear the natural place to set this out.

2.8. On a further point of detail, we have concerns that the period of two months provided for in paragraph 3.23 for agreement to be reached as to which authority will deal with a complaint is too long. While we appreciate that a complaint may raise complex issues, and that any complaint that covers conduct in a regulated sector will need to be carefully considered by both the CMA and the responsible sectoral regulator, it is important to bear in mind that nothing can happen on a case until the investigating authority is determined. During this period, the complainant and other interested parties are in a limbo and must simply wait until the case is allocated. The impact of this is even greater in cases where urgent interim measures are sought. Based on the wording of paragraph 3.39, it appears that such cases will also be subject to a two month wait while the case is allocated. We would suggest that wording should be added to make it clear that, in appropriate cases, allocation will be decided in a much shorter period.

[1] See page 17 of the vision, values and strategy for the CMA document. Although we acknowledge the CMA's stated objective to take action "*in collaboration with […] sectoral regulators*", it may be assumed that action by the CMA in these areas would remain a priority even when, or perhaps *especially* when, such collaboration is not forthcoming.

3. **Do you consider that the Transition Team's proposed approach to secondments and cooperative working between the CMA and Regulators is clear and appropriate? Please give reasons for your view**

3.1. We welcome the creation of the UKCN and the steps proposed to improve cooperation between the CMA and Regulators, and the proposed approach to secondments. There are some areas of cooperation, however, that may benefit from additional clarification.

3.2. We assume that the Financial Conduct Authority (**FCA**) will be listed as a Regulator in paragraph 2.1 of the Draft Guidance, given the recent decision to grant concurrent competition powers to that body, and that the principles set out in the Draft Guidance will apply equally to the FCA, once the guidance comes into force.

3.3. We agree that, as a matter of principle, it is desirable to facilitate the exchange of staff between authorities with competition powers. In particular, such exchanges help spread best practice and should ensure that the right expertise is in the right place, irrespective of which authority takes a decision. We were surprised, however, to see that such exchanges could apparently involve members of the CMA Board or CMA Panel members (see paragraph 3.13 of the Draft Guidance) and that seconded staff may "*make a decision in relation to a case*". While we accept that a case may require many decisions to be made and that most of these will be made at a case team level, we have concerns that the involvement of seconded staff in significant case decisions, or the secondment of senior decision makers such as board or panel members, could blur lines of accountability in a potentially unhelpful way, including in the event of any appeal. It must always be clear which authority took a decision, which is intimately connected to the identity of the decision maker. We would therefore suggest that secondment will usually be reserved for case handlers or subject specialists, rather than senior decision makers, and that, in any event, great care should be taken to maintain clarity as to which body is ultimately the decision maker on a case. Further clarification on this would be welcome.

3.4. Paragraph 3.33 of the Draft Guidance also notes that the "*CMA **may** … agree to the use by a Regulator of the CMA's procedural complaints process*" (emphasis added), including giving *a Regulator* access to the Procedural Officer. Further clarity on the circumstances in which this means of redress may be available to *parties* would be appreciated, bearing in mind the potentially significant implications of this step. Given the success of the Procedural Adjudicator under the current CA98 regime, we would welcome a clearer role for the Procedural Officer as the central venue for dealing with all procedural complaints relating to CA98 investigations, with the option of access for both Regulators and companies under investigation.

3.5. We assume that some of this additional clarification may be provided in the Memoranda of Understanding entered into or to be entered into by the CMA and the Regulators. We hope that the detail included in the Memoranda will go beyond what is currently listed in paragraph 3.6 of the Draft Guidance, however, in order to provide meaningful and substantive information regarding the specific manner in which the CMA will cooperate with each Regulator.

3.6. As regards the Memoranda of Understandings specifically, we note that there are numerous references to further details being included in the Memoranda. The nature of

the references suggests that the Memoranda are already in place. However, it does not appear to be the case (based on the OFT's website) that there are currently relevant Memoranda with all Regulators, and where there are bilateral agreements in place there is considerable disparity in the details. The Memorandum of Understanding with the FCA[2], for example, contains some details regarding information sharing between the two authorities, whereas the concordat with the CAA[3] and protocol with the ORR[4] contain no or few details, and in any event relate solely to consumer protection matters. Neither the Consultation Document nor the Draft Guidance give any indication of the proposed approach to amending existing Memoranda and entering into new Memoranda, and importantly whether such Memoranda will be open to consultation. We recommend that the Transition Team provide clarity on the process for agreeing the Memoranda of Understanding, and as a practical matter it would be helpful for ease of reference if the Memoranda were attached as annexes to the guidance.

4. **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.**

4.1. While we consider that the approach is generally clear and appropriate, the Draft Guidance leaves some areas of uncertainty. In particular, it is unclear how the significant additional burden on regulators to share information with the CMA, and potentially other regulators, will operate in practice. According to paragraph 3.44, each authority will be obliged to share details of "*any information* in their possession" that indicates that an infringement may have taken place to any other competent person with concurrent jurisdiction in a timely manner and within ten days if that information gives rise to reasonable grounds of an infringement. Given the wide range of conduct that may give rise to potential concerns under the CA98, and the ease with which the 'reasonable grounds' threshold may be reached, it is not clear to use that such a stringent requirement is workable in practice.

4.2. We would also suggest that the Draft Guidance should be amended to make it clear that information exchanged between authorities may be used only for the purposes for which it was exchanged, namely application of the CA98 or Article 101/102 TFEU.

4.3. As noted above, we would welcome clarity as to the extent to which existing Memoranda of Understanding will be amended and new Memoranda entered into, the anticipated timing for this and whether stakeholders will be given an opportunity to comment on the details therein relating to information sharing.

[2] Memorandum of Understanding between the Office of Fair Trading and the Financial Conduct Authority dated 2 April 2013.
[3] The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Enterprise Act 2002 (EA02): A Concordat between the Office of Fair Trading (OFT) and the Civil Aviation Authority (CAA)
[4] Protocol between the Office of Rail Regulation and Office of Fair Trading for handling consumer law issues relating to the railways.

5. **Do you consider that the CMA and the Regulators should share additional categories of information, or share information of the type outlined in the Draft CMA Concurrency Guidance at different times? Please give reasons for your view**

5.1. We do not consider that additional categories of information should be shared. It appears to us that the timing for sharing information will be driven by the category of information being shared and that some types of information are more important than others. For example, a proposed decision to commence an investigation or an infringement decision will necessarily be more important that information relating to more routine issues.

6. **Do you consider that the Transition Team's proposed approach to the annual concurrency report is clear and appropriate? Please give reasons for your view**

6.1. We consider that the approach is generally clear and appropriate.

7. **Do you consider that the annual concurrency report should contain categories of information that is not envisaged in the Draft CMA Concurrency Guidance? Please give reasons for your view**

7.1. We do not believe any additional categories of information should be contained in the annual concurrency report.

8. **Do you agree with the Transition Team's proposed approach to transitional arrangements to account for the changes to competition concurrency introduced by Chapter 5 of Part 4 of the ERRA13? Please give reasons for your view**

8.1. We agree that the powers and/or procedures coming into force on 1 April 2014 should apply prospectively. However, paragraph 3.18 of the Consultation does not make entirely clear how ongoing matters will be handled. For example, if a complaint relating to a sector covered by a Regulator is received by the OFT before 1 April 2014 but the OFT has not decided whether to commence an investigation, will the CMA then determine the exercise of Part 1 functions in accordance with Regulation 4 of the Concurrency Regulations? Further clarity on the manner in which ongoing investigations will be handled would be very helpful to stakeholders.

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