BRISTOWS

CMA CONSULTATION: GUIDANCE ON THE CMA'S INVESTIGATION PROCEDURES IN CA98 CASES

Response of Bristows LLP

This is the response of Bristows LLP to the CMA's consultation on proposed revisions to its published guidance on procedures for running Competition Act 1998 (CA98) cases. We have restricted our response to the four questions below.

Question 1: Do you agree with the proposed changes to the Current Guidance on complaint handling (described in Chapter 3)? Please give reasons for your views.

We agree that removal of the 'two-tier' complainant system would simplify matters and bring the CMA's procedures more in line with those of other competition authorities. However, in order for an investigation to be managed efficiently, it will be important to identify those complainants that are directly and materially affected by the outcome of the investigation for the purpose of being provided with a copy of a non-confidential Statement of Objections ("**NCSO**") or an opportunity to comment on a draft case closure letter. Inviting too many complainants to comment on a draft case closure letter could unduly lengthen the time a company remains under investigation (even if the CMA intends to close the investigation swiftly).

Question 2: Do you agree with the proposed changes to the Current Guidance on information handling (described in Chapter 4)? Please give reasons for your views.

Access to the file

We appreciate that a streamlined process to access to the CMA's file can achieve efficiencies for the CMA and any party under investigation. However, during the discussions around access to the file, the party under investigation will be at an information disadvantage, and particularly in investigations involving a number of parties, will not have a full understanding of the contents. Given the information asymmetry between the CMA and a party under investigation, the streamlined procedure could affect the ability of a party under investigation to defend itself fully.

In particular, we do not understand why parties should have to submit reasons as to why they are requesting documents from the file that have not been provided under the proposed streamlined approach. This implies that the CMA can refuse to share documents on the file. Indeed, given the CMA notes that its experience have been that requests for additional documents have been limited to date, it does not appear necessary to adopt any limitation even on efficiency grounds.

Setting a deadline for further requests is also unwarranted in our view, at least as a general matter. Requests for access to documents relevant to a company's right to defence should not

be refused on the basis of arbitrary deadlines. To ensure that the right of parties to request access is not limited, these two provisions should be removed.

Confidential information

We agree that the Current Guidance should be amended to remove the pre-Statement of Objections requirement to provide non-confidential versions at the same time as original information and documents. The proposed approach has already been used in practice, and this targeted approach to confidentiality has limited the need to spend time making representations at an early stage in relation to information which may later be of no relevance to an investigation. For SMEs, we believe it is particularly important to remove any unnecessary burdens, as it is likely their resources will already be stretched by any involvement in an investigation.

We agree with the proposal that respondents to a Statement of Objections be permitted to focus on preparing their substantive representations before preparing a non-confidential version of the response. However, we have doubts about the proposed two-week maximum for confidentiality representations, as the time needed to determine confidentiality may vary from case to case based on a number of factors, such as the length of the substantive response, or the type of industry. By setting too short a deadline, we see a risk of overly broad representations being made to preserve a position (in particular where third party information is involved). This may ultimately serve to lengthen the time before final non-confidential responses are available. We would therefore suggest that the CMA does not impose a maximum period in the Guidance, but determines appropriate deadlines on a case-by-case basis (as appears to be suggested for Post-Decision representations).

Question 4: Do you agree with the proposed changes to the Current Guidance on engagement with the parties (described in Chapter 6)? Please give reasons for your views.

Deadlines for responding

Whilst we understand that the CMA is trying to set deadlines on a case-by-case basis, we do not agree with the proposal to remove the minimum period of 40 days to respond to a Statement of Objections. This minimum period provides companies with some degree of certainty at what is a crucial stage of the investigation, and the removal of this certainty does not seem justified. The removal of the minimum period is also particularly concerning when the CMA is proposing to require companies to make any extension requests at the time the deadline is set.

Indeed, it is our view that this minimum period is already extremely short, in circumstances where substantial access to file processes run in parallel with the preparation of a response to the Statement of Objections.

State of play meetings

Increasingly, communications with the CMA are by way of telephone or video conference. This can be convenient for those located outside London and may reduce the CMA's need for meeting or conference rooms. However, to maintain the integrity pf the CMAs procedures and to protect the rights of the defendant it is important that guidelines are in place to ensure that such calls are as clear and effective as face to face meetings. During state of play meetings held by telephone or video conference, it needs to be clear who is speaking, acronyms should be avoided (particularly if in-house company representatives who have little knowledge of competition law are in attendance), and there should be checks to ensure that everyone on the call fully understands what has been said.

Where a state of play meeting is held over the phone, and a prepared statement about the scope of the investigation is relayed to the party under investigation, it would be helpful if a copy of that statement could be provided shortly after the call. These statements are crucial to a party's understanding of the case against it, and it is important that they are made clearly. Providing the written statement should not impose any additional burden on the CMA, but would be of great assistance to a party under investigation, particularly where a participant to a call is unfamiliar with competition law and/or the CMA's procedures. Similarly, if the CMA makes use of a PowerPoint presentation during the state of play meeting, it would be helpful if a copy of the slides could be provided shortly after the meeting. We would recommend that the CMA includes the provision of a written statement as standard in its procedures. We would also recommend that description of the infringement under investigation is as concrete as possible, in particular at a first state of play meeting where no previous information has been provided about the nature of the infringement under investigation.

Finally, it would be helpful if the CMA could, in advance of a state of play meeting, provide the party under investigation with an indication of what issues are going to be covered in the meeting, so that the party and its advisors can prepare effectively and ensure that the meeting is as productive as possible.

Question 7: Are there other aspects of our CA98 investigation procedures where you think further changes could be made to enhance the efficiency of our investigations or improve certainty for businesses? Please explain which aspects and why.

Relevance requirement for s.26 Notices

It would be helpful if the Revised Guidance included more clarity on the CMA's powers to ask questions of undertakings. The draft revised CMA guidance (very similarly to the current guidance) allows the CMA to send formal information requests to obtain information "*that it considers relates to any matter relevant to [an] investigation*" (paragraph 6.2 of the Revised Guidance). It is understandable that the CMA wishes to have broad powers to seek information. However, it is also desirable that parties under investigation and third parties should have a clear understanding of the limits to the CMA's discretion in this regard, not least

given the time and cost burden involved in responding to s.26 Notices. It would be desirable in cases of substantive disagreement over relevance for a procedure to be put in place to allow challenge to a request (perhaps involving the procedural officer, or perhaps involving a process akin to that used by the European Commission in relation to disputes over privilege).

Review of documents

During a dawn raid, a company will often want to review documents alongside the CMA case officers to confirm that they are within the scope of the investigation. In relation to documents seized during a dawn raid that are taken away for review (such as e-mail inboxes, mobile phone contents), such shadowing may not be practical or may be unduly expensive for an SME under investigation. It would be helpful to include in the Revised Guidance an explanation of how the seize and sift process works (including how personal information is removed, and the different teams involved), and the scope for reviewing the documents identified by the CMA's initial review to confirm they are within scope / not privileged. Our experience has been that reviewing the set of documents assembled after the CMA has completed its initial review (or, at the option of the company under investigation, a sample), is an efficient way of confirming that the documents are within scope / not privileged.

Return of information

The Revised Guidance refers to the return of information that falls outside the scope of the investigation, and it would be helpful if additional guidance was given on when in an investigation the CMA would expect to return such irrelevant information.

Settlement – Possibility of greater fining discounts for companies which cooperate in non-cartel cases

We note that the CMA is not proposing to make substantial changes to the 'Settlement' chapter of the Guidance. In light of (i) the anticipated increase in the CMA's competition law enforcement caseload as a result of the UK's exit from the EU and (ii) the CMA's aim of reducing the time taken to conclude CA98 investigations[1], there may be scope for the CMA to amend its existing procedural practice so as to give companies greater incentives to reach settlements with the CMA in non-cartel cases. Specifically, the CMA may wish to consider broadening its practice of rewarding cooperation in non-cartel cases such that companies could receive a fining discount of more than 20% if they cooperate with the CMA by:

(a) acknowledging infringement of the competition rules;

(b) waiving certain procedural rights and accepting that a streamlined administrative process will apply to the investigation; and

[1] Cf. paragraphs 1.14 to 1.16 of the CMA's Consultation document.

(c) providing additional evidence which represents significant added value in relation to the evidence already in the CMA's possession, and which by its nature and level of detail would strengthen the CMA's ability to establish the infringement.

Under the CMA's current settlement procedure, companies can be rewarded if they acknowledge infringement and accept a streamlined administrative process, but the settlement discount is capped at 20%. Under the CMA's leniency procedure, companies that provide significant added value to the CMA's investigation can benefit from significant reductions in fines, but this is only a possibility in cartel cases.[2] The new cooperation procedure that we have in mind for non-cartel cases can be seen as a 'hybrid' procedure, in the sense that it is inspired by both the settlement and leniency procedures.

The European Commission has made recent use of this kind of 'hybrid' cooperation procedure in its non-cartel investigations into Asus, Denon & Marantz, Philips and Pioneer. In announcing its decisions to fine the four consumer electronics manufacturers for engaging in resale price maintenance on 24 July 2018[3], the Commission noted that the fines were reduced in all four cases as a result of the companies' cooperation with the Commission. The Commission's press release states that "*[a]ll four companies cooperated with the Commission by providing evidence with significant added value and by expressly acknowledging the facts and the infringements of EU competition rules*". The Commission granted fining discounts depending on the extent of the cooperation, ranging from 40 % (for Asus, Denon & Marantz and Philips) to 50 % (for Pioneer). The press release notes that cooperation of the kind provided by Asus, Denon & Marantz, Philips and Pioneer "*allows the Commission to increase the relevance and impact of decisions by speeding up its investigations and companies can benefit from significant reductions of the fines depending on the level of cooperation*". We consider that if the CMA were to introduce a 'hybrid' cooperation procedure and offer the possibility of settlement discounts of up to 50% in non-cartel cases, companies' incentives to settle in some types of case would be significantly increased, bringing benefits both for the CMA and the companies under investigation.

Bristows LLP
2 August 2018

---

2 Cf. chapter 3 of the CMA's guidance as to the appropriate amount of a penalty (CMA73, 18 April 2018).

3 http://europa.eu/rapid/press-release_IP-18-4601_en.htm