Bristows

Consultation on draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases

The following document is the response of Bristows LLP ("**Bristows**") to the CMA's consultation on its proposed revisions to the current guidance on investigation procedures in Competition Act 1998 cases (the "**Draft Guidance**"). Bristows has acted as a legal adviser on a number of CMA investigations, and therefore has a considerable interest in the CMA's investigation procedures, as well as a range of experience based on work for different clients. We understand the need for the CMA to update its guidance to reflect its recent experience in past and current investigations. However, we have concerns that a number of the CMA's proposed changes are not sufficiently clear. Further, and more significantly, some of the proposed changes are likely to result in inadequate protection of the rights of defence of the parties under investigation.

1. Main Proposal 1: Increased transparency at case opening

1.1 The CMA's proposed new wording at paragraph 5.6 of the Draft Guidance means that the companies under investigation would be named when the notice of investigation is published. We do not agree that (as a general matter) companies should be named at this early stage in the proceedings. Even if the CMA makes it clear that they are being investigated and no decision has yet been made, naming companies involves a significant cost to the business in terms:

(a) Loss of time – e.g. responding to customer and press enquiries about the investigation;

(b) Loss of customers and suppliers – e.g. due to reputational damage.

1.2 Competition infringement proceedings are very serious, being "quasi-criminal" in nature, and so it is crucial that the identities of the parties under investigation are protected until the CMA has established its case against them. In most cases, it would be disproportionate to name the companies under investigation at this stage, particularly in light of the fact that many cases do not proceed following the opening of an investigation. For example, to the best of our knowledge, at least six CMA investigations have been opened and closed without naming a company since 2014, five of which were closed on administrative priority grounds early in the procedure.[1]

1.3 The CMA states that where it has published a notice identifying a party under investigation and subsequently decides to terminate the investigation, it will publish a notice stating that the party's activities are no longer being investigated.[2] However, this is not sufficient to redress the potential harm to the parties that would occur in the period of investigation prior to the notice being published.

1.4 In the CMA's proposed Draft Guidance, it appears to seek to align its own procedure closer to that of the European Commission. However, the situation at the start of the proceedings for each of the two authorities is not comparable. Although the Commission publishes the names of the companies under investigation when it opens proceedings, it will only formally open proceedings after an extensive fact-finding investigation. This means that in cartel cases, it will often issue a Statement of Objections at the same time as opening proceedings. It will therefore generally only name the companies under investigation when it has a "*view to adopting a decision*".[3] In contrast to the CMA's procedure, Commission proceedings will not be opened if

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1 Case 50511 - Pharmaceutical sector: suspected anti-competitive agreements investigation; Case 50332 - Energy price comparison websites investigation; Case CE/9855-14 - Conduct in the pharmaceutical sector investigation; Case CE/50284 - Medical equipment sector investigation; Case 50924 - Hand sanitiser products investigation; Case 50794 - Entertainment and recreation services sector investigation.

2 Draft Guidance - Page 20, footnote 29.

3 Article 2 of Commission Regulation (EC) No 773/2004 "Implementing Regulation".

the Commission does not intend to adopt a decision; there must be a "*reasonable indication of a likely infringement*".[4]

1.5 We therefore submit that the current approach strikes the right balance between transparency and protection of the rights of the parties under investigation. However, if the CMA does wish to increase transparency, we suggest that it should limit the naming only the parties under investigation once it has a reasonable suspicion that an infringement has taken place.

2. Main Proposal 2: Clarification of the basis on which the CMA may seek to expedite its access to file procedure

2.1 The CMA's proposed additional wording at paragraph 11.24 of the Draft Guidance, "***The CMA will consider the most appropriate process for allowing parties to have access to its case file in each case, while ensuring that parties are able to exercise their rights of defence***", is very vague, and in any event, it is not for the CMA to "balance" the parties' rights of defence against the disclosure of confidential information. If the CMA wishes to maintain the approach adopted following its 2018 consultation that parties do not routinely get access to all documents in its case file, the only fair position which ensures that proper protection is afforded to the parties' rights of defence is that the CMA should be obliged, when considering the most appropriate process with regards to access to file, to allow parties to make representations on access to file and to take these representations into account. In doing so, there should be a presumption in favour of disclosure where a party raises substantive justifications for requiring access.

2.2 In order to ensure that the parties under investigation are able to exercise their rights of defence, there must be a presumption that at least the parties' advisors are entitled to unredacted copies of all documents mentioned in the SO belonging to the parties under investigation, in an "External Eyes Only" confidentiality club. In our experience, in addition to the very significant concern about proper respect for the parties' rights of defence that arises if only redacted documents are provided, it is a false economy to only provide the parties and their advisors with redacted documents, as there is generally substantial back and forth over what has been redacted if the parties' advisors are not given full access to file. The process of redaction is very time-consuming and costly, and may be somewhat reduced if advisors have access to all information referred to in the SO.

2.3 Further, in Competition Act investigations, there are fewer concerns about the documents in question containing strategically sensitive information belonging to third parties than there are in, for example, merger investigations, because the majority of documents in the case file belong to the parties under investigation. It is therefore reasonable to allow external advisors access to unredacted copies of all documents belonging to the parties under investigation.

2.4 It would also be more efficient for the CMA to ask for confidentiality representations to be provided on all documents at the same time, so that it is straightforward to identify what confidentiality conditions apply to the documents (e.g. confidentiality rings). This is likely to reduce unnecessary confidentiality claims and enhance consistency in redactions. The practice that we have seen whereby the CMA assigns a date at which the redactions are to be considered from the perspective of commercial sensitivity is helpful and provides certainty. We would suggest that this practice should be applied in most cases.

2.5 According to paragraph 7.10 of the Draft Guidance, the CMA will no longer give businesses a second opportunity to make confidentiality representations if no representations are made within the deadline. We consider that the CMA should at least share a version of what it is intending to publish, so that the parties have a final chance to review. For smaller parties where representation may be limited (if at all), this is likely to be very important.

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[4] DG Competition Antitrust Manual of Procedures, March 2012, page 104.

2.6 Paragraph 11.26 of the Draft Guidance states that the CMA may consider "*whether it is appropriate to use a confidentiality ring or data room to facilitate further disclosure*". Where commercially sensitive confidential information is involved (as in the majority of cases involving current competitors and/or recent conduct), a confidentiality ring is likely to be appropriate and should be used as the CMA's standard practice.

2.7 At paragraph 8.9 of the Draft Guidance, the CMA proposes to add wording to reflect the need for the urgent provision of documents in interim measures cases. We do not have any objections to the amended wording, but suggest adding the following wording in red for clarity: "*The CMA will not normally provide access to documents on the CMA's file ~~will~~ that relate to the suspected infringement of the Chapter I or Chapter II prohibitions at the interim measures stage.*"

3. Main Proposal 3: Sending the Draft Penalty Statement with the Statement of Objections

3.1 The CMA's current proposal to send the draft Penalty Statement to the client at the same time as sending the SO is not sufficiently detailed. In many cases, a further SO or Letter of Facts will be issued before the case concludes, causing a delay in the progress of the case, sometimes of over a year.[5] This will affect the methodology of the penalty calculation if the delay pushes the investigation into a different financial year. The CMA should therefore be clear that the bases for the draft Penalty Statement, like any conclusions reached in the Statement of Objections, are preliminary and that they will be re-assessed should any new evidence come to light and in light of the parties' responses. Given this, we question whether requiring a formal response to a Penalty Statement at this stage is an efficient use of the parties' and the CMA's time and resources.

3.2 However, if the CMA does deem it necessary to send the draft Penalty Statement with the SO, the parties under investigation will need sufficient time to respond to the draft Penalty Statement as well as the SO. The 12 week period for parties to respond to the SO is unduly abbreviated in any event, in particular given that the CMA has typically spent considerably longer than 12 weeks in preparing its case, and SOs can run to many hundreds of pages. We suggest that a period of 12-18 weeks would allow parties to fully consider the allegations made against them and the basis of the CMA's penalty calculation, and to be able to respond to the SO and draft Penalty Statement. Moreover, as Competition Act 1998 investigations are not subject to statutory time limits, and given that the CMA retains discretion over the period for parties to respond to SO, the suggestion that the CMA would grant extensions to the time limit for the response to the SO and draft Penalty Statement only in "*exceptional circumstances*" is inappropriate.[6]

4. Main Proposal 4: Clarification of the process relating to cross disclosure of parties' written (or oral) representations on a Statement of Objections

4.1 At paragraph 12.11 of the Draft Guidance, we propose the addition of the following wording in red: "*The non-confidential version of the written representations that have been submitted by a relevant Addressee, complainant or third party will **generally** be disclosed to Addressee(s) to allow them an opportunity to comment.*" This clarifies that all parties under investigation will have access to non-confidential versions of each other's representations. This is necessary for two reasons:

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5 E.g. Case 50230 - Sports equipment sector: anti-competitive practices (14 months); Case CE/9742-13 Phenytoin sodium capsules: suspected unfair pricing (16 months); Case CE/9531-11 Paroxetine investigation: anti-competitive agreements and conduct (34 months).

6 We therefore do not agree with the proposed wording in paragraph 12.3 of the draft Guidance: "***While any such request will be considered on its own merits, the CMA considers that extensions are only likely to be granted in exceptional circumstances.***"

(a) The representations of other parties may involve allegations about another party, which that other party must have a chance to respond to;

(b) Any discussion of the facts by one party should be provided to the other parties, to avoid the CMA drawing incorrect conclusions about discrepancies between the parties in their interpretation of the facts.

4.2 Further, at paragraph 12.11 the CMA states that representations of directors will not be disclosed to the Addressees other than in "*exceptional circumstances*". Firstly, it is essential that the CMA sets out a non-exhaustive list of these "*exceptional circumstances*", so that parties have an idea of whether they are likely to be granted access to these. Second, any such representations should still be disclosed to the legal advisors of the other parties, so that they can assess whether matters have been raised which are relevant to their clients' rights of defence.

5. Main Proposal 5: Clarification of the process relating to disclosure of directors' representations on a Statement of Objections

5.1 See 4.2 above.

6. Main Proposal 6: Settlement - Clarification of the CMA's practices

6.1 No comments

7. Main Proposal 7: Clarification of the scope of the Procedural Officer's role

7.1 The CMA is proposing to add the following wording at paragraph 15.4 of the Draft Guidance: "*The Procedural Officer shall consider* ***significant*** *procedural complaints, in particular […]*" (emphasis added). Limiting complaints considered by the Procedural Officer to "significant" complaints only will jeopardise procedural fairness, particularly if a complaint can be rejected by the Procedural Officer because it is not "significant" without a proper consideration of the substance of the complaint. We therefore suggest removing the word "significant" from the Draft Guidance.

8. Other aspects of the Draft Revised Guidance

8.1 We have no objection to the CMA conducting interviews via a videolink, particularly in light of the COVID-19 pandemic. However, we note that where the CMA conducts interviews via videolink, they must be transparent as to the attendees of the call and their role within both the CMA and the investigation itself. Whether conducted in person or via videolink, it is essential that interviewees are entitled to take breaks during the interview, including to consult their legal representative, and that there is a maximum time limit on interviews.

8.2 Paragraph 12.14 of the Draft Guidance states that the CMA expects to hear from the business representatives of the Addressee at the oral hearing. However, the CMA should take into account the fact that business people are generally not legal experts, and so may not be comfortable in making all representations at the oral hearing, particularly with regards to legal representations. To the extent that legal questions are raised at the oral hearing, the CMA should direct these at the legal representatives, and should not expect a response from the business representatives.

8.3 Finally, we query the purpose of the proposed amendments at paragraph 16.1 of the Draft Guidance, in light of the fact that the Transition Period is only in place for just over three more months. The CMA should clarify whether this guidance will then be subject to the specific terms of any withdrawal deal reached with the EU, and/or whether this specific paragraph will become obsolete if no deal is reached.

We hope that the CMA will take the above response into consideration when finalising its new Guidance on its investigation procedures in Competition Act 1998 cases. We are very willing to make ourselves

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available for a call with you if you would like to discuss our comments in more detail. Please contact sophie.lawrance@bristows.com, stephen.smith@bristows.com and helena.connors@bristows.com in the first instance if this is of interest.