



Competition and Markets Authority Consultation

Draft revised CMA guidance on the investigation procedures in Competition Act 1998 cases

Response of Herbert Smith Freehills LLP

1. **INTRODUCTION**

1.1 Herbert Smith Freehills LLP welcomes the opportunity to provide comments in response to the CMA consultation document of 5 August 2020 *Draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8) (Consultation Document)* and associated draft revised guidance (**Draft Revised Guidance**). The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of any of our individual clients.

1.2 We support the CMA's initiative to update the current guidance on its investigation procedures in Competition Act 1998 (**CA98**) cases (CMA8, 18 January 2019) (**Current Guidance**) to reflect developments since January 2019 and to increase clarity and transparency. However, we are concerned that some of the proposed amendments do not strike the right balance between facilitating procedural efficiencies and maintaining the CMA's commitment to due process and robust decision-making.¹ In particular, we disagree with the proposal to name the parties allegedly involved in an infringement at the case-opening stage, and the proposal to send the draft penalty statement with the Statement of Objections (**SO**).

1.3 Our comments on the amendments proposed in the Draft Revised Guidance are set out below, largely following the structure of the Consultation Document. We confirm that this response does not contain any sensitive information.

2. **NAMING THE PARTIES ALLEGEDLY INVOLVED IN AN INFRINGEMENT AT THE CASE-OPENING STAGE**

2.1 We do not agree that it is appropriate to amend the Current Guidance to provide that the CMA will normally name parties under investigation in case-opening announcements. This would be a significant departure from the CMA's current policy of only naming the parties in exceptional circumstances, and would fail to strike the appropriate balance between

¹ The Consultation Document identifies this as one of the key aims which the proposed amendments are intended to achieve (paragraphs 1.4 and 1.9).



transparency of enforcement policy and protecting businesses from the serious reputational damage which may result from allegations of infringement.

- 2.2 We note in this context that the threshold which must be met for the CMA to launch a formal investigation – “reasonable grounds for suspecting” an infringement of competition law – is a very low bar compared to the “balance of probabilities” civil standard of proof which must be met at the SO and infringement decision stage. Naming the parties at a stage when the evidence supporting the allegations against them may be relatively limited and/or largely based on a complaint by a third party which the CMA has decided merits further investigation is disproportionate, given the serious reputational damage which may result.
- 2.3 It is also important to remember that the CMA may decide to close its investigation on administrative priority grounds prior to issuing an SO, without reaching a conclusion on whether or not competition law has been infringed. Under the CMA’s proposed approach, in such cases the parties alleged to have been involved would have been named at the case-opening stage, but not formally cleared of any suspicion of wrongdoing: the spectre of an alleged infringement would continue to loom over them, in circumstances where it may be difficult to publicly refute the allegations in the absence of an SO setting out exactly how the parties are alleged to have breached competition law.
- 2.4 We note the various justifications put forward by the CMA in support of this amendment in paragraphs 1.22-1.26 of the Consultation Document. However, we do not consider that any of these reasons are sufficiently strong to support shifting the balance in the way proposed by the CMA.
- 2.5 The need to help consumers, businesses and members of the public more generally who are concerned about a particular business’s practices to be confident that the CMA is investigating the practices and addressing their concerns² is already sufficiently addressed by the CMA providing details in the case-opening notice of the industry sector concerned and a brief description of the case. If a company or individual wishes to make sure that the conduct of a particular company active in the sector in question is being looked at as part of the CMA’s investigation, they have the option of contacting the CMA to provide details.
- 2.6 Similarly, we disagree that not naming parties under investigation in the case-opening notice means that interested stakeholders cannot inform the CMA if an undertaking whose conduct would also merit investigation is not being investigated.³ It remains open to interested parties to contact the CMA about potentially anti-competitive conduct which

² Para 1.22 and 1.23 of the Consultation Document.

³ Para 1.25 of the Consultation Document.



would fall within the description of the case and the affected industry already included in the case-opening announcement under the Current Guidance. We do not consider that the CMA's current approach deters potential complainants from contacting the CMA in response to the publication of a case-opening notice (for example, on the basis that they assume that a particular business is already under investigation), and we do not believe that the proposed change in approach would make a significant difference to the likelihood of interested stakeholders contacting the CMA.

- 2.7 For the same reasons, we also reject the suggestion that interested stakeholders are not able to approach the CMA with evidence which may assist the investigation if the parties alleged to be involved are not named in the case-opening statement.⁴ If stakeholders know the industry sector and brief details of the case, that should be sufficient for them to consider approaching the CMA if they have potentially relevant evidence. We note in this regard that the CMA also has statutory powers to actively approach businesses to request information, should it wish to do so.
- 2.8 The CMA states in the Consultation Document that there have been instances where it has been contacted by a member of the public following a unilateral announcement by an undertaking that they are under investigation, and been unable to confirm or comment on the subject matter of the investigation, which in turn has led to incorrect speculation or rumours as to the subject matter.⁵ We agree that such an outcome is undesirable. However, it seems that this scenario would only rarely arise in practice, as the scope for confusion would seem to be limited to situations where the CMA has two or more different ongoing investigations in the same sector, or where the undertaking in question is active in more than one industry sector and has not confirmed in its announcement which sector the investigation relates to. Routinely naming the parties allegedly involved in a competition law infringement in the case-opening notice would not be a proportionate way of addressing this concern.
- 2.9 Where this particular issue does arise, we would suggest that a more appropriate solution would be for the CMA to issue an updated notice of investigation under section 25A CA98,⁶ naming the party which has issued the unilateral announcement (i.e. if a company chooses to make such a unilateral announcement referring to being under investigation, then it is deemed to have impliedly consented to being named by the CMA). This would be a more

⁴ Para 1.25 of the Consultation Document.

⁵ Para 1.26 of the Consultation Document.

⁶ Rather than a separate press release, so as to ensure that the CMA continued to benefit from absolute privilege from defamation in respect of information in section 25A notice.



appropriate and targeted amendment than moving to a situation where the CMA routinely names the parties at the case-opening stage.

- 2.10 If the CMA nonetheless decides to proceed with its proposal to name the parties allegedly involved in an infringement at the case-opening stage, we would strongly urge the CMA to ensure that sufficient notice is given to a party of the CMA's intended announcement. Where the CMA ultimately decides not to issue an infringement decision – whether because it concludes that there is no infringement or because it decides to close its investigation on administrative grounds – the CMA should issue an announcement which makes expressly clear that there has been no infringement finding and that the parties are no longer under investigation.

3. **ACCESS TO FILE PROCEDURE**

- 3.1 We welcome clarification of the CMA's access to file procedures for parties who have received an SO, and we generally support the proposed amendments to the Current Guidance.
- 3.2 However, it would be helpful to include further detail in the final version of the updated guidance about how access to file procedures operate in practice. In particular, we would welcome further clarification of the level of detail which will usually be included in a schedule listing documents on the CMA's file which are not referred to in the SO and any draft penalty statement, and more guidance on how the CMA will assess requests for further disclosure of documents.
- 3.3 In relation to the use of confidentiality rings, we agree that such an approach may be helpful to enable external advisors to make targeted requests for disclosure to the parties of documents on the CMA's file which are not referred to in the SO and any draft penalty statement. However, it is important to be aware of the difficulties that can arise in practice under such an approach, where the documents in question include confidential and potentially competitively sensitive information. Whilst the external advisors will have signed strict undertakings limiting disclosure of such information to their clients, in practice this may then make it very difficult for them to receive instructions and provide advice in practice (and the same difficulties can of course also arise in relation to documents which are referred to in the SO and draft penalty statement). We would encourage the CMA to engage with all parties and adopt a case-by-case approach to resolving such difficulties.
- 3.4 With regard to access to file procedures in interim measures cases, we agree that it is usually likely to be appropriate to limit disclosure to documents on the CMA's file that relate to the proposed interim measures directions (rather than the suspected infringement of the



Chapter I or Chapter II prohibitions). However, we would welcome similar clarifications to those set out above in the context of interim measures cases i.e. clarification of the level of detail included in the schedule of additional documents referred to in paragraph 8.9 of the Draft Revised Guidance, and more guidance on the criteria which must be met for a business to satisfy the CMA that additional disclosure is necessary for it to respond to the CMA's provisional decision (bearing in mind the difficulty of assessing the potential relevance of a particular document based on information set out in a schedule).

4. **SENDING THE DRAFT PENALTY STATEMENT WITH THE SO**

- 4.1 We do not agree with the CMA's proposal to send the draft penalty statement at the same time as the SO, without first receiving and considering representations on the SO from the addressee.⁷ Whilst we can see how such an approach could lead to efficiencies where any ultimate infringement decision maps squarely onto the SO, we do not consider that it would do so in all – or even the majority of – cases.
- 4.2 Moreover, the CMA's proposed approach would significantly undermine the fundamental principle that an SO does not pre-judge any ultimate infringement finding. As recognised in the consultation document,⁸ whilst a number of other European competition authorities include an explanation or assessment of the factors likely to be relevant to penalty-setting at the SO stage, they do not include an actual calculation of the proposed penalty in the event that all of the details of the SO are ultimately made out. There is a good reason for this, namely not pre-judging the ultimate outcome of the case.
- 4.3 We recognise that the CMA makes clear in paragraph 1.37 of the Consultation Document that *"the mere fact that the SO and draft penalty statement have been issued at the same time does not mean that any assumptions should be made that there will be a finding of infringement"*.⁹ However, calculating a penalty figure – even in draft form – before the SO addressee(s) has had an opportunity to make representations on the SO undermines the presumption of innocence in a way that we do not consider to be justified by the possibility of efficiencies in certain cases where the ultimate infringement decision maps squarely on to the SO.
- 4.4 Moreover, the approach proposed by the CMA seems likely to lead to inefficiencies for the CMA in many cases – precisely the opposite outcome to that which is intended.
- 4.5 In most cases, representations on an SO will include arguments as to key matters such as the duration and/or scope of an alleged infringement, and representations on any

⁷ Para 1.34 of the Consultation Document.

⁸ Para 1.36 of the Consultation Document.

⁹ Para 1.37 of the Consultation Document.



aggravating/mitigating factors (such as the extent to which a particular party was a ringleader). This may have a significant effect on any subsequent penalty calculation. Preparing a draft penalty statement before the CMA's view on the scope and duration of the infringement has been finalised would be inefficient in any case where that view changes between the SO stage and the decision stage. In such cases, the CMA would have to revisit the work done on assessment of appropriate penalty, having effectively wasted work on drafting a penalty statement based on an alleged infringement which has not in fact been made out. In circumstances where key aspects of the alleged infringement differ in the ultimate infringement decision compared to the SO, the parties' rights of defence would arguably also necessitate the preparation of a supplementary draft penalty statement – resulting in additional work and delays, rather than procedural efficiencies.

- 4.6 The risk of inefficiencies is heightened by the fact that, as recognised in the Consultation Document, the final decision on the question of whether there has been an infringement will be a matter for the Case Decision Group, whose membership is separate from the CMA officials involved in the decision to send the Statement of Objections and Draft Penalty Statement. The idea that “considerable efficiencies” would result from moving to an approach where CMA officials who will not take the final decision on infringement are responsible for issuing a draft penalty statement before the Case Decision Group has considered the case, and before any representations on the SO have been made, seems to be a “red herring” for any case other than one where the SO maps squarely on to the infringement decision.
- 4.7 The CMA's proposed approach would also be inefficient for the addressee(s) of the SO, and could potentially cause unnecessary difficulties when responding to the SO and draft penalty statement simultaneously: an SO addressee would effectively be asked to comment on a draft penalty statement based on an infringement which they may well be arguing did not exist in the first place. Putting an SO addressee in a position where they are required to argue in the first instance that there is no infringement, but in the event that they lose on that point, to argue how the penalty should be calculated, risks complicating matters and requiring implied admissions of liability at a time before any infringement decision has been finalised.
- 4.8 It is notable that in the mergers context, as part of the 2014 reforms the CMA moved away from the OFT's previous approach of requiring merging parties to propose undertakings in lieu of reference before the CMA's Phase I decision was known, precisely because of the



difficulties this sort of “consolidated” approach leads to. It would be inadvisable for the CMA to re-introduce these issues in the CA98 context.

- 4.9 Finally, in addition to being inefficient, the approach set out in the Draft Revised Guidance would also risk creating a significant disincentive for the CMA to adjust its position in light of representations on the SO and an increased risk of confirmation bias.

5. **RIGHT TO REPLY**

- 5.1 We agree that a situation where genuinely new evidence is included in an addressee’s written or oral representations is one where it may be necessary to disclose those representations to the other SO addresses.
- 5.2 With regard to disclosure of directors’ representations on the SO, we do not object to the CMA’s proposed approach as a general starting point. However, in light of the CMA’s justification for not normally disclosing such representations (i.e. because the fact that the CMA is carrying out an investigation in respect of a particular director will not normally be public at that stage of the CMA’s investigation), we would suggest that any such representations are disclosed to addressees of the SO if the investigation into the director becomes public prior to any infringement decision being reached. We also consider that the parties’ rights of defence would normally require the directors’ representations to be disclosed to the extent that the CMA wishes to rely on those representations in its infringement decision.

6. **SETTLEMENT**

- 6.1 We generally support the clarifications made in the Draft Revised Guidance in relation to settlement procedure. We would however encourage the CMA to provide further clarification and examples of what would constitute representations relating to “manifest factual inaccuracies”, that a party offering to settle post-SO would not be required to formally withdraw as a condition of settlement. We presume that this would include representations as to the scope or duration of the infringement set out in the SO (which would in practice be key elements to be agreed as part of the settlement process), but we would welcome further clarification in this regard.

7. **ROLE OF PROCEDURAL OFFICER**

- 7.1 We welcome the expanded guidance on the remit of the Procedural Officer in CA98 cases, and support the inclusion of an express reference to the publication of previous Procedural Officer decisions on the CMA website.



- 7.2 However, we are concerned that the amendments made to paragraph 15.4 of the Draft Revised Guidance could be read as narrowing the scope of issues which the Procedural Officer may consider, which we would not support. The final bullet point of the Current Guidance refers to the Procedural Officer being able to consider complaints relating to “*other significant procedural issues that may arise during the course of an investigation.*” This has been deleted in paragraph 15.4 of the Draft Revised Guidance, with the lead-in wording to the list of issues amended to refer to the Procedural Officer being able to consider “*significant procedural complaints, in particular, relating to:*”.
- 7.3 Whilst the use of the words “*in particular*” arguably avoids the following list being read as exhaustive, we suggest that it would be clearer to retain the final bullet point included in the Current Guidance, with the list being preceded by “*The Procedural Officer shall consider procedural complaints relating to.*”. This would also remove the risk of the proposed amendments narrowing the scope of the Procedural Officer’s remit by adding a separate requirement that the procedural complaint must reach an undefined threshold of “significant” (in addition to falling within one of the categories included in the list in paragraph 15.4) in order to be considered.¹⁰
- 7.4 Alternatively, if the CMA wishes to proceed with the deletion of the final bullet point of the Current Guidance, we would suggest amending the lead-in wording to state “*The Procedural Officer shall consider significant procedural complaints. These may include, but are not limited to, complaints relating to.*”.
8. **SECTION 26A CA98 INTERVIEWS**
- 8.1 We support the use of remote meeting technology for section 26A CA98 interviews where appropriate.
- 8.2 We also agree with the removal of the footnote references to the SRA’s Guidance on Employer’s Solicitors Attending Health and Safety Executive Interviews with Employees, given the removal of this guidance from the SRA website. However, we note that the removal of these footnotes means that paragraph 6.21 of the Draft Revised Guidance no longer makes any reference to the potential conflict of interest which may arise where a solicitor is asked to act for both the employer and the employee. Whilst the assessment of potential conflict of interest is ultimately a matter for the individual and legal adviser

¹⁰ We consider that complaints relating to matters listed in the first four bullet points of paragraph 15.4 would be “significant” by virtue of the subject matter of the complaint, but it is unclear whether the CMA’s proposed amendments are intended to impose an additional requirement to demonstrate that a complaint relating to one of those matters is “significant”.



involved, we consider that it would nonetheless be helpful to retain a reference to this issue in paragraph 6.21.

9. ATTENDANCE AT ORAL HEARINGS

9.1 We recognise the importance of the Case Decision Group being able to hear from representatives of the SO addressee's business at the oral hearing. We do not object to the inclusion of an express statement in the Draft Revised Guidance making clear that the CMA expects such representatives to attend the hearing and address the Case Decision Group.

10. PURSUIT OF DIRECTOR DISQUALIFICATION

10.1 We do not object to the clarifications in the Draft Revised Guidance regarding the CMA's discretion to decide not to pursue a competition disqualification order/undertakings against the directors of a business being investigated for breach of competition law. We agree that it is appropriate to make any such decision independently of any decision relating to settlement.

11. REMOVAL OF REFERENCES TO EU LAW

11.1 Given that the Revised Guidance will mainly apply after the anticipated end of the Brexit Transition Period, we do not object to the CMA's proposal to remove references to EU Law in the Draft Revised Guidance (whilst adding a footnote to clarify that during the Transition Period the CMA will continue to apply Articles 101 and/or 102 TFEU and existing arrangements for the discharge of the CMA's functions will remain unaffected).¹¹

11.2 However, we would question to what extent this approach gives rise to any real efficiencies given the proposal to retain Chapter 16¹² in the Draft Revised Guidance pending the outcome of the future relationship negotiations between the EU and the UK. As expressly acknowledged in the Consultation Document, the CMA will need to review its guidance again in any event after the end of the Transition Period, and it may arguably be more efficient to address all references to EU law at the same time. We do not, however, feel strongly about this point, and defer to the CMA's judgment on the most appropriate way to deal with it.

¹¹ Para 1.58 of the Consultation Document.

¹² Describing the use of the CMA's powers of investigation under CA98 for Article 101 and 102 TFEU investigations at the request of the European Commission or national competition authorities of EU Member States.



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12. **NO CHANGES TO GUIDANCE ON COMMITMENTS**

12.1 We do not object to the CMA's proposal to retain its existing guidance in relation to the acceptance of commitments under the CA98.

Herbert Smith Freehills LLP

10 September 2020