

## Linklaters Response: Draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases

### 1 Introduction

These comments are submitted by Linklaters LLP in response to the consultation document issued by the Competition and Markets Authority ("CMA") on 5 August 2020 entitled Draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases.

We welcome the opportunity to comment on the proposed revisions to the CMA's current guidance. We have several comments on specific aspects of the documents which we outline below in Section 2.

### 2 Responses to consultation

#### 2.1 Opening Formal Investigation – Increased transparency at case opening

The CMA's Draft Revised Guidance proposes that its case-opening announcements will now name the parties to an investigation under the CA98; other than in exceptional circumstances, such as where doing so might prejudice a CMA investigation or an investigation by another body.<sup>1</sup>

We recognise that there may be benefits in terms of increased transparency from naming the parties under investigation at the case-opening stage. For example, it may be appropriate to do so in the following instances:

- (i) situations where the parties' involvement in the CMA's investigation is already in the public domain or subject to significant public speculation (so it is appropriate to publish details of the parties);
- (ii) where a party requests that the CMA name them in the notice of investigation (and the CMA considers doing so to be appropriate); or
- (iii) where the CMA considers that the level of potential harm to the named party in relation to their customers or suppliers is not material or can be appropriately managed via caveats around the initial nature of the investigation, and the finding of an infringement not having been made or indeed harm other businesses active in the sector who are not involved in the investigation from parties remaining unidentified, justifies disclosure.

However, parties to an investigation should not be named as a matter of course without consideration of the reputational harm that being named in an investigation can attract. Considering the presumption of innocence, it may not be appropriate for parties to be named at such an early stage of an investigation,<sup>2</sup> as this is before the CMA has been able to determine whether there is a case to answer.

If the CMA does name the parties under investigation, it is important that it is precise in relation to the nature of the infringements alleged (i.e. to avoid repeating the lack of clarity around what was alleged against individual parties and how many infringements they were

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<sup>1</sup> Draft Revised Guidance, para. 5.7

<sup>2</sup> The EU Commission typically names the parties to an investigation once a formal decision has been taken to initiate proceedings, unless such publication may harm the investigation.

alleged to be a party to which. This formed the basis for the defamation action brought by Morrisons in 2008, in the context of the Office of Fair Trading's dairy cartel investigation).<sup>3</sup>

More generally, as well as the basic details of the case, it will be essential for the reasons given above that the CMA is clear that an investigation is a fact-finding exercise and, prior to any Statement of Objections, no provisional decision has been taken regarding infringement or liability.

## 2.2 Information Handling – Expedited access to files and confidentiality representations

The CMA proposes that it 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*”<sup>4</sup> and it envisages two possible approaches: (i) disclosing to the Addressee(s), the documents directly referred to in the Statement of Objections (and any Draft Penalty Statement issued to the Addressee) together with a schedule containing a detailed list of the documents on the CMA's case file (including those not referred to in the Statement of Objections i.e. “non-key” documents) (“**Option 1**”); and (ii) the use of a confidentiality ring to facilitate the disclosure of “non-key” documents (“**Option 2**”).<sup>5</sup> In both scenarios, the parties will have the opportunity to make reasoned requests for additional disclosure.

We consider that there is a delicate balancing act to be had in this regard: resource savings and improvements to efficiency cannot come at the cost of a defendant undertakings' rights of defence.

It is worth reiterating that access to the CMA's case file is “*one of the procedural guarantees intended to protect the right of defence and to, ensure, in particular, that the right to be heard [...] can be exercised effectively.*”<sup>6</sup> Indeed, in a context where “*the jurisdiction of competition authorities is treated as quasi-criminal because it can lead to the imposition of potentially vast fines*”,<sup>7</sup> it is “*of overriding importance that the parties should be able to exercise their rights of defence without having possibly relevant material held back or inaccessible.*”<sup>8</sup> More generally, this supports the common law principle that “[a] party has a right to know the case against him and the evidence on which it is based [and] the other side may not advance contentions or adduce evidence of which he is kept in ignorance”.<sup>9</sup>

The CMA, as the investigating authority, has access to the *entire* case file, including all confidential material, and it is ultimately for the CMA to ensure adequate disclosure is made in discharge of its administrative law duties of candour. This is supported by the CMA's existing guidance which requires it to “*have particular regard to the need for disclosure to achieve due process*”.<sup>10</sup> In addition, in considering the extent of disclosure required to

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<sup>3</sup> A 2008 OFT press release incorrectly suggested that Morrisons was subject to a provisional finding of infringement and that it previously had been warned for anticompetitive behaviour by the OFT.

<sup>4</sup> Draft Revised Guidance, para. 11.24.

<sup>5</sup> The Consultation Document explains that the CMA considers that, “*given the large volume of documents that are often on the CMA's file, the use of these approaches gives rise to identifiable benefits in terms of resource savings and administrative efficiencies, both for businesses and the CMA.*” Consultation Document, para. 1.30.

<sup>6</sup> Joined cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR v Commission* [1992] paragraph 38.

<sup>7</sup> *Competition and Markets Authority v Flynn Pharma Ltd & Ors* [2020] EWCA Civ 339, paragraph 115; *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [Case No. 1001/1/1/0], paragraphs 99 -100

<sup>8</sup> *Umbro Holdings Ltd v OFT* [2003] CAT 26, paragraph 33.

<sup>9</sup> *Al Rawi v Security Services* [2011] UKSC 34, paragraph 12.

<sup>10</sup> CMA6, paragraph 4.24.

achieve such due process, the Competition Appeal Tribunal (“CAT”) recognised that “*competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed*”.<sup>11</sup> In our view, the CMA’s proposed approach (i.e. Option 1 and Option 2) involves a significant reversal of the CMA’s obligations. Defendant undertakings should not be placed in a disadvantaged position vis-à-vis the CMA, but must be afforded the same possibility to prepare their defence as that afforded to the CMA to prepare its findings.<sup>12</sup> In our experience, it is often information available in non-key documents which is the most relevant to the defence.

We disagree with the notion that defendant undertakings, via their external advisors, should be required to provide requests to inspect non-key documents. However, as a practical matter, it is often difficult to determine from the index, whether a document will be relevant. For example, in the case of email correspondence, the “description” provided in the index can simply be the subject line of an email. In the majority of cases, this does not provide sufficient detail to determine whether or not the email is relevant.<sup>13</sup> It can also be difficult to determine, based on the index alone how particular documents relate to others on the case file or the context in which a particular document has been provided.<sup>14</sup> Consequently, defendant undertakings often make broader requests for additional disclosure (with significant time and cost implications) to ensure access to all necessary information. Based on our experience, it is often only upon receipt of this request that the CMA will revert to the relevant “information owner” to obtain confidentiality representations and/or comments on the CMA’s proposed disclosure which often results in further delays. If efficiency is the overarching objective, confidentiality representations should be sought at the outset.

Equally, it is important that parties to an investigation have more than one opportunity to make confidentiality representations, as a document that was not initially considered confidential may become so during lengthy investigations. Further, should the scope of the disclosure change during an investigation (e.g. because the CMA subsequently decides to make disclosures in the context of a director disqualification investigation) the parties should be afforded the opportunity to make further redaction requests.

While we support the use of confidentiality rings in principle in appropriate circumstances, we disagree with their use in the manner described in the Consultation Document and Draft Revised Guidance. We consider it likely that some form of data room/confidentiality ring will be required in most cases, as any allegations of anticompetitive conduct, by their very nature, may often be informed by other parties’ confidential documents. Allowing parties and their advisers access to such documents is crucial to parties being able to understand the case against them and to defend themselves. The CMA’s proposal in Option 2 seems to be that the CMA will simply disclose all non-key documents in a confidentiality ring to enable the parties’ external advisers to carry out an assessment of these materials, enabling those advisers to make targeted requests for the disclosure of these materials. A confidentiality

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<sup>11</sup> *BMI Healthcare Limited v. Competition and Markets Authority (No. 1)*, [2013] CAT 24, paragraph 39(7).

<sup>12</sup> This is generally known as the principle of “equality of arms”. This involves several material rights, including: (i) that it is the CMA’s responsibility to ensure that adequate disclosure has been made; and (ii) that the fullest possible access to the CMA’s file is a necessary corollary of the rights of defence.

<sup>13</sup> For example, recently in one of the CMA’s ongoing investigations, there were several emails listed in the index provided. The description given was limited to the name of an entirely different product, entirely outside of the scope of the CMA’s investigation. It is not possible to know whether such documents could be relevant to the investigation without seeing the underlying document.

<sup>14</sup> For example, it is useful to understand whether a document forms one of several materials provided in response to a section 26 Notice, on the basis that the other materials will likely provide useful context when analysing the document in question.

ring should be used to safeguard information which is truly sensitive and should not be a substitute for obtaining confidentiality representations at the outset. This approach shifts the burden of identifying relevant documents to the parties' external advisers and consequently has significant time and cost implications.

We request the CMA to reconsider its approach in this regard. Disclosure of the full case file at the outset, with a sufficiently detailed index and confidentiality representations already obtained by the CMA before the Statement of Objections is issued, should occur as a matter of course. This is to ensure that the defendant undertakings can fully address the provisional conclusions the CMA has reached.<sup>15</sup> In our view, this is the most effective way in which efficiency can be enhanced. However, if the CMA were to follow the proposed approach it should ensure that: (i) the information provided on the schedule is sufficient to enable the recipient to assess its relevance; (ii) confidentiality representations on all documents provided to the CMA for inclusion on its case file are obtained at the outset; and (iii) its deadlines adequately take account of this process and do not compromise rights of defence. As is provided for in the current guidance, it is important that discussions regarding the process envisaged for giving access to the CMA's file are had well before the Statement of Objections is issued.<sup>16</sup>

### **2.3 Issuing CMA preliminary findings – Sending the Draft Penalty Statement with the Statement of Objections**

The Draft Revised Guidance proposes that, where the CMA provisionally considers that an undertaking has infringed either of the CA98 prohibitions and that a financial penalty should be imposed, the Draft Penalty Statement will be sent at the same time as the Statement of Objections.<sup>17</sup>

We recognise that the Statement of Objections and Draft Penalty Statement are closely related. In particular, the question of whether an infringement is committed intentionally or negligently is difficult to separate from an analysis of the infringement. We therefore see that bringing these two procedural steps together may bring efficiency savings for both the CMA and the Parties.

However, it is critical this does not come at the expense of the parties' rights to fully defend themselves on both the alleged infringement and the proposed penalty.

To this end, we consider it vital that:

- (i) the content of the documents is streamlined such that each issue need only be responded to once;
- (ii) the content of the DPS remains confidential to the party to the DPS and is not included in any CMA press communications at the time of its issue (and that proposed fines are not made public);
- (iii) the time for responding be extended to reflect the additional workload for the parties, to a minimum of 16 weeks; and

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<sup>15</sup> The Draft Revised Guidance recognises that the Statement of Objections represents the CMA's provisional view and proposed next steps. It allows the businesses being accused of breaching competition law an opportunity to know the full case against them and, if they choose to do so, to respond formally in writing and orally. Para 11.16

<sup>16</sup> CMA8, 18 January 2019, para 11.18.

<sup>17</sup> Draft Revised Guidance, paras 11.15 to 11.19.

- (i) the time allocated for an oral hearing is also extended to reflect that this will now cover both documents.

We also note that there may be inevitable inefficiencies for both the CMA in publishing and the parties in responding to, a Draft Penalty Statement in those cases where no infringement is ultimately found. With that in mind, we would be concerned if combining the Statement of Objection and Draft Penalty Statement were to in any way compromise the CMA carrying out an objective assessment of defendants' representations on a Statement of Objections.

## **2.4 Right to Reply – Clarification of the process relating to disclosure of directors' representations on a Statement of Objections**

The CMA is considering clarifying when it discloses representations on a Statement of Objections, by directors who are subject to CMA director disqualification proceedings. On a case by case basis, the CMA will enable third parties who are current or former directors of an Addressee of the Statement of Objections and being investigated under the Company Directors Disqualification Act 1986, to submit written representations on a non-confidential version of the Statement of Objections. However, the CMA is proposing not to disclose the representations of these directors to the Addressees of the Statement of Objections for confidentiality reasons, "*other than in exceptional circumstances*" such as "*where the CMA considers it necessary for the rights of defence of an Addressee*".<sup>18</sup>

We welcome the ability for such directors to make representations on a non-confidential version of a Statement of Objections. We understand that this will enable them to be fairly and meaningfully heard on any allegations in the Statement of Objections and help to prevent future claims of procedural errors against the CMA for not allowing them to make such representations.<sup>19</sup>

Nonetheless, in most cases visibility of these representations will be necessary to uphold Addressees' rights of defence. In particular, given that such directors are under investigation for direct involvement in the alleged conduct, and given that they represent (or represented) the directing mind and will of the undertaking responsible for the alleged conduct, it is difficult to envisage a situation in which the representations of these directors would not be necessary for the rights of defence of the Addressees. Additionally, it is typical for CA98 cases to relate to historic conduct, where the undertaking directly responsible for the alleged conduct may no longer be owned by the Addressees and/or the directors are no longer readily accessible to the Addressees. In such circumstances, the Addressees' access to any representations made by these directors plays an even greater role in upholding their rights of defence.

As a result, we request the CMA to recognise that it is vital for the rights of defence of the parties to an investigation to have full visibility of all representations made to the CMA by current or former directors. This includes confidential representations made on the Statement of Objections, as these may materially impact the CMA's findings on liability.

The rights of defence of the Addressees should not be overlooked or deprioritised in the interests of procedural efficiency. The CAT has made it clear that the rights of defence should take precedence over such procedural concerns: "*in the event of a conflict between the rights*

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<sup>18</sup> Draft Revised Guidance, para. 12.11.

<sup>19</sup> As put forward by the Appellant in the Notice of Appeal for *Amit Patel v Competition and Markets Authority* (Case No: 1348/2/12/20).

*of the defence and other claims to confidentiality, there must, in our judgment, be a presumption that the rights of the defence prevail.”<sup>20</sup>*

## 2.5 Settlement – Clarification of the CMA’s practices

The CMA proposes that, where a party offers to settle after a Statement of Objections has been issued, the business will be required to formally withdraw any representations it has made on the Statement of Objections save to the extent that they deal with manifest factual inaccuracies.<sup>21</sup> The consultation document indicates “this is because such representations may otherwise tend to undermine the clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement, which is a requirement for settlement.”

As a preliminary comment, it is unclear from the consultation document at what stage in the settlement process the requirement to withdraw representations on the Statement of Objections would arise. If the intention is that this would be a requirement *prior to* a settlement in fact being finalised, this would be contrary to the principle that settlement discussions are undertaken on a without prejudice basis. In our experience, settlement discussions occurring on a without prejudice basis is critical to parties under investigation being willing to open settlement discussions.

Regardless of the stage at which the requirement to withdraw representations arises, we submit that it is not appropriate to require the parties to an investigation to withdraw their representations on the Statement of Objections. While entering a settlement does require an admission of liability, it is acknowledged that such admission is given in return for a discount on penalty and swift resolution of the proceedings. Many parties will enter settlement for a range of reasons, including commercial factors such as the cost of continuing to challenge the CMA’s case. In these circumstances, an admission of liability in the terms set out in the Statement of Objections is not necessarily inconsistent with representations that may be made in response to the Statement of Objections.

Equally, the change appears unnecessary in view of the CMA’s current practice. Our experience is that the CMA will require settling parties to agree, in principle, to the standard Terms of Settlement at the time of entering settlement negotiations, and to execute such Terms of Settlement as part of any actual settlement. The Terms of Settlement include the admission of liability on the terms set out in the Statement of Objections (apart from factual inaccuracies), and it is therefore unclear on what “additional” clarity would be achieved by the withdrawal of settling parties’ Statement of Objections response. Overall, we consider this an unnecessary change that risks undermining parties’ willingness to engage in the settlement procedure.

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**September 2020**

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<sup>20</sup> *Umbro Holdings Ltd v OFT* [2003] CAT 26, paragraph 33.

<sup>21</sup> Draft Revised Guidance, para. 14.21.