28 September 2021

CLLS Response to the consultation on amendments to the Settlement chapter in the CMA's investigations procedure in Competition Act 1998 ("CA98") cases

1 Introduction

(1) These comments are submitted by the Competition Law Committee of the City of London Law Society ("**CLLS**") in response to the consultation document issued by the Competition and Markets Authority ("**CMA**") on 31 August 2021 entitled "*Ensuring finality in settlement cases – Proposed amendments to the Guidance on the CMA's investigations procedure in Competition Act 1998 cases – Consultation*".

(2) The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and government bodies in relation to competition law matters.

(3) The Competition Law Committee members responsible for the preparation of this response are:

Robert Bell, Rosenblatt Ltd (Chairman)
Nicole Kar, Linklaters LLP (Vice Chairman)
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Jenine Hulsmann (Weil, Gotshal & Manges LLP)
Isabel Taylor (Slaughter and May)
Ian Giles (Norton Rose Fulbright LLP) (Secretary)

2 Summary

(4) As we explain in further detail below, the Committee considers that the proposed amendments to the Settlement Chapter of the CMA's *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* ("**CA98 Guidance**") are neither necessary nor proportionate. The Committee doubts whether the fact that a party has waived its right to appeal (including importantly, its ability to seek judicial review of a CMA decision) will either bind the CAT or result in efficiencies saved in the exceptional case of a settling party appealing a CMA decision.

(5) There are strong existing built in disincentives for a settling party to appeal a CMA decision in the form of its admission of an infringement and the risk to its settlement discount (and the risk of increased penalty if it loses).

(6) In short, the CMA should not sacrifice a settling party's fundamental right of access to the courts under the guise of achieving marginal efficiencies in its administrative process.

3 Appeal of a CMA decision by a settling party is exceptional: only one case in the past decade

(7) There are clear benefits both to the CMA and to a party under investigation of a settlement process. Settling parties benefit from a lower penalty than may otherwise be the case, earlier dialogue with the CMA on key aspects of the case, and the opportunity to resolve the CMA's concerns earlier and without incurring further legal fees and disruption to the

business. For the CMA, a successful settlement not only means that any outstanding antitrust concerns are resolved earlier than would otherwise be the case than if it proceeded to an infringement decision (yielding substantial efficiency savings) but also that subsequent appeals are unlikely such that there is finality. Indeed, Roland is the only case that has been settled within the last ten years and subsequently appealed (out of twenty cases that settled in this period). In other words, finality is far and away the most common outcome of a decision to settle.

(8) The proposed amendments to the CA98 guidance are said by the CMA to have been informed by the (unsuccessful) appeal to the CAT by Roland against a decision of the CMA following a settlement procedure[1]. However, recent history shows that the *Roland* case is an outlier. As the CMA itself noted, Roland's decision to appeal the level of the fine which it had itself agreed to pay as part of its settlement is a "*highly unusual move*".[2]

(9) We agree: no party which settles an investigation is keen to subsequently litigate unless there is some material change of circumstance, for example, information or perceived unfairness in treatment of parties under investigation, unknown to the settling party comes to light. Reflecting the principles discussed in paragraphs (10) and (13) below, it would not be appropriate to remove the right of appeal in such circumstances.

(10) As is well established, the settlement process pursuant to CA98 requires a company to admit that it has breached competition law: a very significant admission given that this has reputational effects and increases a business' exposure to follow-on damages claims. The CAT of course remains free to have regard to the fact that an appealing party made a prior admission of infringement on appeal.[3] Finally, as the *Roland* case shows, appealing a CMA decision means not only that the settlement discount is lost but also that, if unsuccessful, the CAT can *increase* the penalty over that imposed originally by the CMA.

(11) Accordingly, the Committee considers that not only are the number of cases that are settled and then appealed likely to remain a rarity; but that where this occurs there has typically been some wider failure in the CMA's process. The *Tobacco* litigation is such an example.[4] In this case, three of the 13 parties to the OFT's Statement of Objections entered into early resolution agreements with the OFT. One of these, TMR, received an assurance from the OFT that, in the event of a successful appeal of an infringement decision by the other parties, it would receive the benefit of their appeal. However, the OFT did not offer the same assurances to the other two settling parties: Gallaher and Somerfield. Unsurprisingly, both Gallaher and Somerfield subsequently issued judicial review proceedings in relation to the OFT's decision not to repay their fines – despite the OFT having done so for TMR following the successful appeal (and quashing) of the OFT's infringement decision to the CAT by six of the parties.

(12) The settlement process – of which the CA98 Guidance is a critical part – should provide incentives for settlement in appropriate cases (given that settlement achieves resource savings on both sides and has scope to bring investigations more swiftly to an end: with wider societal savings). In our view, rather than asking parties to forgo fundamental rights of appeal, the CMA should review its own procedures around settlement to consider what

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1 Paragraph 4 Proposed Amendments to the Guidance document.

2 CMA Press Release "*CAT increases fine after musical instrument firm breaks settlement bargain*", 19 April 2021, accessed via CAT increases fine after musical instrument firm breaks settlement bargain - GOV.UK (www.gov.uk).

3 CMA "*Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8*", paragraph 14.8.

4 See *R (on the application of Gallaher Group Ltd and others) v the Competition and Markets Authority* [2018] UKSC 25 ("***Tobacco***").

further it can do to enhance certainty around the process and enhance incentives to settle.[5]

4 Suggested enhancements to the CMA's processes

(13) The maximum discount available for settlement pre-Statement of Objections is 20% which falls to 10% for settlements reached post-issuance of the Statement of Objections.[6] In practice, it is difficult for businesses to engage with the detail of the case against them without having access to the Statement of Objections (which sets out in detail the evidence the CMA proposes to rely on and the infringements it intends to find in any Infringement Decision). This lack of detailed information backed by a clear decision by the CMA to proceed with its investigation is a disincentive to engage early in the settlement process for many businesses[7]. The upshot of this is that the efficiency gains which the CMA could make are much reduced because the majority of businesses will require a Statement of Objections and detail of the penalty before considering settlement (again noting the requirement to make an admission and the increased exposure to follow-on damages claims as a result). A more detailed Summary Statement of Facts including the CMA's assessment of the maximum penalty it would seek (as the European Commission indicates)[8] if it proceeded to an infringement decision would incentivise more parties under investigation to engage with settlement earlier in the process.

(14) Secondly the CMA should consider what enhancement to its processes it could make to remove the concerns settling parties feel about unfairness vis a vis other investigated parties after the settlement has been reached. In previous investigations this has included assurances given to some but not all parties (as above), acceptance by the CMA of a novel "no contest" agreement – later reneged upon by the party in question (after other settling parties had made admissions of breach of competition law of); and inconsistencies and inequalities in how penalties have been calculated. Greater transparency or assurances to settling parties that the methodology for the calculation of fines or the principles for engagement are and will be the same for all parties could go some way to addressing the concerns that can cause settling parties to re-open their settlements. Indeed, the Committee considers that the CMA should disclose, as a matter of course, the proposed maximum penalty to other parties engaged in the settlement process for this reason.

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[5] For example, ensuring parties can engage with the CMA at an earlier date on the key elements of the penalty calculation to increase transparency and ensure the parties are better engaged with the settlement process.

[6] CMA "*Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8*", paragraph 14.31.

[7] We acknowledge the Summary Statement of Facts which is available to parties prior to an SO but the CMA's guidance suggests that this does not include an indication of the maximum penalty payable by the undertaking and in any event, occurs at a stage prior to a decision by the CMA to proceed, provisionally, to an infringement decision.

[8] The European Commission provides parties with an estimate of the range of likely fines (together with other essential elements of the Commission's case e.g. facts alleged and the evidence relied on) during settlement discussions. Once a common understanding has been reached – including with regards to the estimated range of likely fines – and the Commission is of the view that procedural efficiencies are likely to be achieved, parties will be invited to make a settlement submission which will include an indication of the maximum penalty the parties foresee being imposed by the Commission and which the parties would accept (as informed by the settlement discussions).

See Commission Notice on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation No 1/2003 in Cartel cases, OJ C167/1, 2 July 2008, paragraphs 14-21.

5 Waiver of right of appeal must itself be subject to judicial oversight and does not bind the CAT

(15) The Committee notes the cases cited by the CMA regarding an agreement to waive a right to a fair and public hearing being valid when it is voluntary, informed and unequivocal, but considers that a more substantively relevant authority is *Case of Natshvlishvili and Togonidze v. Georgia.* In this case, the European Court of Human Rights found (in relation to whether a plea bargain could be appealed) that while "*neither the letter nor the spirit of Article 6 [of the European Convention on Human Rights] prevents a person from waiving these safeguards of his or her own free will*" it remains the case that the plea bargain including that waiver "*should have been accompanied by the following conditions: (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review*".[9]

(16) Even if a settling party agrees to a waiver in its settlement agreement, this is a quasi-contractual agreement and would not affect the settling party's underlying legal right to appeal the CMA's decision to the CAT (i.e., updating the CMA's guidance would neither impact the wider law nor the CAT's jurisdiction). As such, it is unclear what effect the CMA's updated guidance would have in practice.[10]

6 Conclusion

(17) Rather than making the case for amending the guidance to require waiver of appeal rights, the *Roland* case serves as a stark reminder of the dangers to parties in seeking to challenge a settlement.

(18) In the Committee's view, it is imperative that an effective judicial remedy remains available to settling parties. The CMA is not infallible. The fundamental rights of defence must be rigorously observed so as to maintain the quality decisional practice and to provide settling parties with the means of correcting e.g unfairness in treatment which comes to light subsequent to their settlement. The CMA cannot sacrifice a settling party's fundamental procedural guarantees under the guise of achieving marginal efficiencies in relation to exceptional cases.

CLLS Competition Law Committee

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[9] ECHR, *Case of Natshvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014, paragraphs 91-92.

[10] This reflects the current situation where the settlement agreement anticipates that the settling party will lose the benefit of the settlement discount if it appeals. However, in practice, the CMA is reliant on the CAT exercising its discretion to increase the fine during the appeal (as it did in *Roland*).