Baker McKenzie.

Response to CMA Consultation: Ensuring finality in settlement cases – Proposed amendments to the Guidance on the CMA's investigations procedure in Competition Act 1998 cases

Baker McKenzie welcomes the opportunity to comment on the CMA's consultation on its proposed amendments to the Guidance on the CMA's investigations procedure in Competition Act 1998 (CA98) cases (CMA8, or the "Guidance"). Our response is based on our experience advising on CA98 investigations and appeals.

1. Introduction

1.1 We believe that the UK competition regime is enhanced by a robust appeal mechanism through which parties have the opportunity to contest infringement decisions made against them. Appropriate judicial scrutiny contributes to better decision making, justice for parties involved and overall business confidence, as well as ensuring that competitive markets can function properly to the benefit of consumers. We also believe that a clear and fair settlement procedure has important benefits (to the relevant party, the CMA and society).

1.2 In most instances, settling parties are unlikely to want to utilise their appeal rights. This is for obvious rational reasons, in that it is rarely in a party's interests to seek to unwind an agreement it has entered into willingly and on an informed basis. Moreover, the structure of the current settlement regime deliberately discourages appeals whilst still preserving a party's right to appeal. In our view, it would be a step too far to remove this right and we are therefore not in favour of the proposed amendments to the CMA's guidance.

1.3 We detail further below why we consider that the CMA's guidance should not be amended to require a settling party to waive their appeal rights as a condition of settlement.

2. The nature of CA98 decisions and the settlement process justify maintaining a right to appeal

2.1 Sanctions for CA98 infringements are particularly serious, often described as being quasi-criminal. This has important implications for parties in terms of reputation, future CA98 investigations, fine levels and follow-on claims. The ability to appeal has therefore been an important safeguard to a party's rights of defence, particularly given the CMA's administrative structure. These considerations continue to apply where parties agree to settle. There is also a risk that the necessarily curtailed and bilateral nature of the settlement process means a settling party will not have access to the full details of the CMA's reasoning at the time of settlement. By way of elaboration:

(a) **Nature of CA98 infringement decisions**: despite its administrative structure, the CMA's jurisdiction is treated as quasi-criminal because it can impose substantial fines. This has led to many calls over the years to move towards a prosecutorial model. These calls have been resisted, partly on the basis that an administrative model with full appeal rights was sufficient to protect rights of defence.[1] These points remain valid when the CMA's settlement procedure is used and a party should not be expected to waive its right to appeal. A settlement decision has all the characteristics of a contested infringement decision in terms of substantial penalties, implications for reputation and follow-on liability. However, settlement obviously

[1] See, for example, the Government's 2012 response to its consultation on 'Growth, Competition and the Competition Regime'

reduces the likelihood of appeals, given that the settling business is informed of the maximum penalty in advance and benefits from reduced fines.

(b) **Settlement process**: the bilateral nature of the settlement process creates a risk that a business does not have the full picture of the case against it, particularly where more than one party is involved in the infringement. In these horizontal infringement scenarios, a party may not see how other infringing entities have been treated in respect of the same conduct until after it has settled. It is impossible to foresee all the ways that this could be problematic and therefore justify the maintenance of appeal rights, but - by way of example - a party may discover post-settlement that it was treated differently to another entity in respect of the same infringement, or that key evidence on the CMA's file was not shared with it.[2] A party should have the opportunity to remedy such unfairness through appeal, notwithstanding how unlikely the CMA considers this sort of unfairness to have been.

2.2 Notwithstanding the above, we appreciate that the settlement process is intended to drive efficiencies, reducing the amount of time and resources the CMA must devote to a case in order to achieve results. Similar motivations apply to parties entering into a settlement - they are attracted by relatively faster time to reach a conclusion, greater transparency in the draft decision and the prospect of a reduced fine. We discuss further below why effectively removing appeal rights goes too far in seeking to resolve cases more efficiently.

3. The existing guidance significantly discourages appeals

3.1 We consider that the existing conditions for settlement discourage appeals. These disincentives against appeal include the following:

(a) **Exposure to higher fines**: in addition to losing its settlement discount[3], the appealing party risks having its fine reviewed by the CAT which may lead to a higher fine. For example, the CAT may substantively disagree with the CMA on how it calculated a fine in a particular case such that the fine could be *increased* (e.g., where the gravity or seriousness of the infringement justified a higher starting amount). This means a losing appellant is effectively fined what it would have paid following a full investigation (through the lost discount), and possibly more. On any view, an increase in fine is an important factor for a party considering an appeal, which already operates to deter settling parties from appealing a settlement decision.

(b) **Costs and time of appeal**: appeals require a commitment of resources, time and cost on the part of the appellant (as well as the CMA). It is not a free option for a settling party, but something it is required to consider against the competing demands of its business. A settling party is particularly unlikely to want to divert resources away from its other activities, absent special reasons for doing so.

(c) **Adverse costs exposure**: in addition to covering its own costs on appeal, a losing party is exposed to an order for adverse costs. It will therefore need to contribute to the CMA's costs of defending the settlement. This operates to further disincentivise appeals.

3.2 These disincentives also appear to us to address much of the CMA's concerns regarding efficiencies. Indeed, the CMA considers that part of the resource savings it views as inherent within the settlement procedure come from not having to defend an appeal. Clearly, appeals are demanding of CMA

[2] By way of analogy, see the EU Court of Justice's discussion of the principle of equal treatment in Printeos' appeal of the European Commission's cartel settlement decision in the envelopes cartel (Case T-95/15 - *Printeos SA v European Commission* at [55])
[3] CMA8, paragraph 14.8, 4th bullet point.

resources, which could be deployed elsewhere. However, where the CMA successfully defends its decision, it will usually be awarded its costs (albeit we recognise that costs awards rarely cover a party's true expenditure in full). We also understand that, in recent years, the CMA has offset CA98 income against its in-year litigation costs, such that the removal of a settlement discount on appeal means greater CA98 income which can be applied to cover litigation costs (as opposed to that income going to the central Consolidated Fund administered by HM Treasury).[4] In any event, we see the risks of removing appeal rights as greater than the risk of procedural inefficiencies, particularly given that there are already considerable disincentives for settling parties to re-open settlement on appeal.

4. Amending CMA guidance may not achieve the CMA's objectives

4.1 Rights to appeal are set out in s. 46 CA98, in addition to the general right to judicial review of public authority decisions. The CMA does not propose to make any legislative amendments so those rights are not directly affected. There is therefore some doubt as to whether the CMA can properly achieve its objective of preventing settlements being contested through amendments to the Guidance alone - such Guidance clearly does not operate to amend primary legislation. While an agreement to waive settlement rights would operate as a strong deterrent to appeal (in addition to the existing deterrents), we see a risk of wasteful satellite litigation where parties' rights to bring an appeal are themselves contested, leading to further protracted disputes. This is exactly the opposite of what the CMA is hoping to achieve.

4.2 The CMA cites two cases as authority for the principle that a party can waive a right when the agreement is voluntary, informed and unequivocal.[5] However, these cases relate to waiving rights to legal advice and/or a fair trial under Article 6 of the European Convention of Human Rights (as opposed to a statutory procedure, such as that embodied by s. 46 CA98). While a settlement is a voluntary arrangement, and there is no obligation to settle, we can see the validity of a waiver of appeal rights being a ripe area for legal argument in the event of an attempted appeal. Even if it were possible to waive s. 46 CA98 rights, appellants may argue that they were not sufficiently "informed" for their waiver to be valid. Accordingly, we are concerned that the proposed amendments to the Guidance may lead to more resources being wasted rather than less.

5. Conclusion

5.1 For the reasons set out in this response, we consider that the amendments proposed to the Guidance in the consultation should not be made.

Baker McKenzie

September 2021

[4] See, for example, the Trust Statement at page 11 of the CMA's Annual Report and Accounts 2020 to 2021
[5] *McGowan v B* [2011] UKSC 54 at [15]-[54] and *David Cameron Millar v Procurator Fiscal (Scotland)* [2001] UKPC D4 at [33]