Ensuring finality in settlement cases – Proposed amendments to the Guidance on the CMA's investigations procedure in Competition Act 1998 cases – Summary of Responses

Introduction

1. On 31 August 2021, the CMA published a consultation inviting views on proposed changes to the Settlement chapter of CMA8, the CMA's Guidance on the CMA's investigation procedure in Competition Act 1998 (CA98) cases (the Consultation).[1]
2. The proposed changes set out that the CMA will only agree to settlement if the party agrees that it will not subsequently appeal against the decision, including any financial penalty imposed. The purpose of these changes is to increase the prospects of any settlement yielding procedural efficiencies and resource savings (which is the principal benefit of settlement), by ensuring finality of the settlement process.
3. The CMA received two responses to the Consultation, which closed on 28 September 2021.[2] This document summarises the key issues raised by the responses and the CMA's views on these issues.

Summary of responses

4. Neither of the respondents supported the proposed change to the conditions of settlement. Both considered that there were already strong disincentives acting to discourage appeals, including the possibility of higher fines and the costs of appealing. One respondent pointed out that appeals following settlement decisions are exceptional, with only one case in the last decade.
5. One respondent stated that it was important to preserve the right to appeal given the quasi-criminal nature of the CMA's decisions and noted that there was a risk, given the bilateral nature of settlement, that in multi-party cases an individual party does not have the full picture of the case against them.
6. Both respondents raised questions as to whether an agreement by settling parties not to appeal would 'overcome' any statutory right of appeal or the CAT's ability to hear such an appeal. One respondent considered that a more substantively relevant legal authority than those quoted in the Consultation Document was the *Case of Natshvlishvili and Togonidze v. Georgia*. In this case, the respondent noted that the European Court of Human Rights (ECtHR)

[1] Consultation on draft CA98 procedures guidance - GOV.UK (www.gov.uk).

[2] Responses were received from Baker McKenzie and Competition Law Committee of the City of London Law Society, and non-confidential versions of these are available on the consultation page.

found 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*".[3]

7. One respondent noted that the settlement process needs the right incentives for both sides and invited the CMA to review its own procedures rather than asking parties to agree not to appeal. The respondent suggested enhancements to the CMA's process in order to increase procedural efficiency and fairness in order to incentivise early engagement with settlement, including:

    - the CMA providing a more detailed Summary Statement of Fact including a penalty assessment to allow businesses to engage with the detail of the case against them prior to the Statement of Objections; and
    - considering how to provide greater transparency to parties in multi-party cases to assure them there are no inconsistencies and inequality in how penalties are calculated, for example by cross-disclosing the proposed maximum penalties.

The CMA's views

8. While the CMA welcomes the comments received on the proposed changes, the CMA remains of the view that having settling parties agree, as part of the conditions of settlement, that they will not subsequently appeal against the decision is appropriate in order ensure such cases achieve finality. The CMA agrees that the Roland case[4] provides a clear example of the potential consequences for a settling party if it chooses to appeal against a penalty in a settlement case. However, this is not material for these purposes. The possibility of an appeal and of it succeeding, by definition, undermines the principle of finality of settlement. Such lack of finality operates against the public interest, by requiring the CMA to deploy resources on dealing with appeals in cases that should have been closed, and at the expense of other enforcement activity to protect consumers. This is contrary to the very purpose of settlement.

9. Settling parties do not settle in the abstract: they are provided with the evidence on which the CMA is relying, including the nature, scope and duration of the infringement, whether in a Summary Statement of Facts, a draft Statement of Objections or the Statement of Objections itself. In pre-Statement of Objections cases, settling parties will also be provided with a draft penalty calculation and the opportunity to provide representations on penalty.[5] Accordingly, before agreeing to any settlement, settling parties see the full facts and legal characterisation of their alleged conduct, as well as that of the other parties. In respect of the draft penalty calculation, as in contested cases, these are generally cross-disclosed in multi-party cases.[6] The CMA therefore considers

[3] ECHR, *Case of Natshvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014, paragraph 88 and 89.
[4] Case 1365/1/12/20, *Roland (U.K.) Limited and Another v Competition and Markets Authority*.
[5] CMA8, paragraphs 14.9 and 14.15 to 14.17.
[6] CMA8, paragraph 11.17.

that under its settlement procedure, which is an entirely voluntary process, settling parties are properly informed of the case against them and are therefore able to agree not to appeal. The CMA disagrees with the respondents and considers that a settling party is in a position to agree not to appeal (by forgoing its right to appeal under section 46 of the CA98) in circumstances where it is (i) entering a voluntary process, (ii) being informed of the case against it and any other parties involved, and (iii) has time to consider the implications of settlement, with the opportunity to seek legal advice where it chooses to.

10. Established case law provides that an agreement to waive the right to a fair and public hearing can be valid when it is voluntary, informed and unequivocal.[7] Therefore, the CMA does not consider that the possibility of an agreement being challenged in the courts is a reason not to change the guidance and allow for the proposed voluntary, informed and unequivocal agreements. .

11. As noted above, one respondent highlighted the *Case of Natshvlishvili and Togonidze v. Georgia*, where the ECtHR examined a wavier made in the context of a plea bargain in a criminal matter. The ECtHR observed that where the plea bargain led to an abridged form of judicial examination the waiver of that right had to be established "*in an unequivocal manner and be attended by minimum safeguards commensurate with its importance"*.[8] In the case at hand, the ECtHR was assessing the lawfulness of the process for a plea bargain under Georgian criminal law, which included review by the courts, and concluded that there had been no violation of Article 6 on the basis that the individual's waiver of rights to ordinary appellate review was a conscious and voluntary decision.

12. The CMA does not consider that this judgment of the ECtHR, highlighted by one of the respondents, affects its position regarding the proposed changes to its guidance. The CMA's view is that its proposal to require settling parties to agree not to appeal against the settlement decision is consistent with established case law and that its settlement process provides sufficient safeguards in order that any agreement not to appeal is fully informed.

13. In respect of possible enhancements to the CMA's settlement process to increase procedural efficiency, as indicated above in paragraph 9, the current process already provides for both suggestions made in response to the consultation. In addition, the CMA notes that the government's recent consultation on proposed options and changes to the settlement process outlines options for further procedural efficiency via legislative changes.[9]

Next steps

14. On 10 December 2021, the CMA published the changes to Chapters 14 and 15 of CMA8. These changes apply to cases from 10 December 2021.

[7] See: *McGowan v B* [2011] UKSC 54, paragraphs 15-54 and David Cameron Millar v Procurator Fiscal (Scotland) [2001] UKPC D4, paragraph 33.
[8] Case of *Natshvlishvili and Togonidze v. Georgia*, paragraph 88.
[9] See Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers, July 2021, paragraph 1.178 onwards.