

**RESPONSE OF CLIFFORD CHANCE LLP TO THE CMA CONSULTATION ON
DRAFT DIRECT CONSUMER ENFORCEMENT GUIDANCE AND RULES**

Clifford Chance welcomes the opportunity to respond to the consultation of the Competition and Markets Authority (CMA) on the proposed Direct Consumer Enforcement Guidance (the **Draft Guidance**) and Direct Consumer Enforcement Rules (the **Draft Rules**).

Our observations below are based on the experience of lawyers in our antitrust practice of advising on CMA investigations under the UK consumer protection regime and the similar procedures under the Competition Act 1998 (CA98). However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Our overall comments are that the Draft Guidance does a good job of reflecting the legislation and that we agree with the adopted approach of largely following CMA procedures in CA98 cases, which will help to ensure familiarity with the new regime.

We set out below our observations on specific parts of the Draft Guidance and Rules.

1. THE DRAFT GUIDANCE

Section 2: enforcement process

- 1.1 Paragraph 2.14 of the Draft Guidance should make it clear that an interim enforcement order can also be discharged by a court, on application by the CMA or the business in question.
- 1.2 Paragraph 2.22 should cross refer to paragraph 2.37 where the Draft Guidance explains the expected deadlines for written representation (given that period for access to file will generally be the same).
- 1.3 Paragraph 2.54 of the Draft Guidance explains that the CMA can ask that a business substantiates claims that it has made as part of its commercial practice, and that if the business fails to do so by the specified deadline, the CMA may determine that the claim is inaccurate. The Guidance should clarify the consequences of such a determination. For example, if such a determination is decisive in a finding that the party under investigation has engaged in a misleading action for the purposes of s.226 DMCCA, we doubt that a court would accept that the CMA could simply ignore substantiation of a claim that is provided shortly after the deadline expires, if the CMA still has plenty of time in the investigative process to consider the substantiation.

Interconnected bodies corporate

- 1.4 As regards the extension of obligations to interconnected companies, s.200(3) DMCCA allows the CMA to impose "*the requirements (or any particular requirements) [...] upon all other members of the group (in addition to the respondent), as if each of them were the respondent*" (emphasis added). The guidance should clarify that the reference to "any particular requirements" means that the CMA can opt not to impose any requirements at all on some group members, notwithstanding the reference to "all group

members" in the wording of s.200(3). It should also clarify that any requirements that are imposed on other group members need not be the same for all such other group members. This is important, because remedies that are tailored to the business model of the company that has committed an infringement may not be appropriate for different business models of other group entities.

- 1.5 The guidance should also clarify how this will work in respect of entities that become part of the group after the final notice (as defined in s.200(8)) is issued, e.g., because the group is acquired by another group of entities or acquires another group of entities. The assessment at the time of the final notice of whether it is "just, reasonable and proportionate" to impose requirement on all group members will not have considered these future group members. In our view, the CMA should clarify that:
 - 1.5.1 it will not, in the final notice, make requirements binding on all future group members automatically. If the final notice does include a provision allowing particular requirements to be imposed on entities that become part of the group post-final notice, such requirements will not become binding unless and until the CMA has given such entities notice under s200(7) (the statute is unclear on whether a failure by the CMA to serve notice renders the requirements non-binding);
 - 1.5.2 before extending any requirements to entities that become part of the group, post-final notice, it will carry out an assessment of whether it is just, reasonable and proportionate to do so and will give the relevant entities the opportunity to make representations on this assessment. Rule 9 of the Draft Direct Consumer Enforcement Rules should be amended to reflect this, as well as point (i) above;
 - 1.5.3 to the extent that the relevant requirements are not appropriate for the business model of entities that become part of the group post-final notice, the CMA may use its powers under s.196 DMCCA to vary the relevant directions, so that they are just, reasonable and proportionate for the new group entities. Again, new group entities should have the opportunity to make representations in respect of any proposed variation;
 - 1.5.4 where the infringing business is acquired post-final notice by another business, the CMA will not generally consider it just, reasonable or proportionate to extend remedies to entities in the group of the acquirer, given that they will have had no involvement in the infringement and no oversight of the infringing company at the time of the infringement. In particular, liability for monetary penalties should never be extended to other group entities in these circumstances. In our view, imposing vicarious liability in such circumstances would be inconsistent with the presumption of innocence that is required by the Human Rights Act 1998; and
 - 1.5.5 it should be possible for potential acquirers to consult with the CMA prior to making an acquisition of a business that is subject to a final notice, to obtain comfort that the CMA will not extend directions or liability for monetary penalties to entities within the acquirer's group.

- 1.6 The CMA should also commit that if a group entity (that was not itself the infringing entity) ceases to be part of the group, the CMA will revoke any requirements imposed on that entity.

Information Notices (Chapter 3)

- 1.7 This section explains that the CMA's duty of expedition under s.327 of the DMCC Act will be reflected in the deadlines that it sets for information notices. We submit that the guidance should clarify that the CMA's duty of expedition also implies the need for information notices to be appropriately proportionate and focused, in the interests both of progressing the investigation expeditiously and of not imposing excessive burdens on businesses.

Section 5: Remedies

- 1.8 In paragraph 5.5 of the Draft Guidance it would be useful for the guidance to include some illustrative examples, drawn from the CMA's decisional practice, of the types of remedies that it has sought (or undertakings accepted) for the most common types of infringement.
- 1.9 Paragraph 5.20 should explain how the CMA interprets the distinction between the cost of remedy measures and the administrative costs of taking the measure, when assessing their proportionality. In particular, it will be important for businesses to understand whether the cost of the measures includes losses of profit incurred as a result of changing a business model in the way required by the measures.
- 1.10 Paragraph 5.26 of the Draft Guidance is unclear as to whether an Online Interface Notice (OIN) can be addressed to a third-party online interface that is not established in the UK, has no subsidiary in the UK and carries out its business entirely outside the UK (e.g. where UK customers access digital content hosted on servers that are located outside the UK). In particular, it is unclear whether the wording "directs activities in the course of carrying on a business to consumers in the UK" requires only that the relevant consumers are located in the UK, or also that the relevant business is carried on in the UK. Our view is that the wording is intended to capture circumstances such as those that arose in *Akzo Nobel v. Competition Commission*,¹ where a foreign parent was considered to be carrying on business in the UK as a result of its oversight of strategic and operational decisions of a UK subsidiary. Online interface providers that carry on their business entirely outside the UK and do not direct the activities of a UK subsidiary or branch, should therefore be recognised as outside the jurisdictional scope of the CMA's powers to impose third party OINs, even if some UK consumers use their services. That would be consistent with the presumption that statutes should not be interpreted as having extra-territorial effect in the absence of clear indications that Parliament intended them to have such effect.²

¹ [2014] EWCA Civ 482.

² See the Supreme Court judgment in *R (KBR Inc) v. Director of the Serious Fraud Office* [2021] UKSC 2 at [21]

Section 7: Penalties

- 1.11 Paragraph 7.11 of the Draft Guidance states that "the CMA will generally determine a starting point of up to 30% of the party's UK turnover". Unlike CA98 infringements, this is not limited to turnover in markets affected by the infringement. Moreover, the guidance is unclear as to whether it will take a party's group turnover for the purposes of applying the starting point in the same way as for the statutory cap: it refers only to a "party's" turnover, which is defined in the Glossary as "any natural or legal person that is subject to" an investigation or enforcement action.
- 1.12 If group turnover is intended to be captured for the starting point, this could have disproportionate results for groups of companies that operate multiple different businesses in the UK, of which only one is found to have committed an infringement – particularly if the infringing business represents only a small portion of the group's UK turnover. We therefore submit that the starting point should be based on the UK turnover of the group entities that were involved in the infringement, or the turnover relating to products or services to which the infringement relates. If the CMA is not minded to do that, it should at least take into account the fact that turnover relating to products or services involved in the infringement accounts for a small percentage of a party's group UK turnover when assessing proportionality under Step 4 (paragraphs 7.35-7.40 of the Draft Guidance).

Section 8: Decision-making

- 1.13 Paragraph 8.19 states that the Final Decision Group (**FDG**) may include the SRO, contrary to the practice under CA98 procedures, in which the SRO is never included in the FDG. In our view, this defeats the point of having a separate FDG, as the presence of the SRO – who will have decided on matters such as the issue of a provisional infringement notice – will mean that the likelihood or appearance of confirmation bias is not excluded. We therefore submit that the CMA should follow its approach in CA98 cases, and specify in the guidance and in the rules that the FDG will be comprised of individuals that have not been involved in the decision to issue a provisional infringement notice (i.e. equivalent to Rule 3(2) of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (the **CA98 Rules**)).

Section 9: procedural complaints

- 1.14 Unlike the CMA's CA98 guidance, the Draft Rules do not provide for the remit of the procedural complaints adjudicator (**PCA**) to extend to all decisions regarding the disclosure or non-disclosure of certain documents on the CMA's case file. It covers only decisions regarding the disclosure of information over which claims of confidentiality have been made. However, the CMA can also withhold disclosure on the basis that it is in the "public interest". Consequently, the PCA's remit should extend to all decisions regarding disclosure, not just those relating to confidentiality.

Annex A: Legislation in scope of the direct enforcement model

- 1.15 This Annex could be usefully supplemented with a list of cases that the CMA has brought under each of the relevant statutory provisions.

2. THE DRAFT RULES

- 2.1 We recognise that the list of matters that may be included in the rules (as specified in s.210 DMCCA) is not the same as the list of matters specified for the purposes of the CA98 Rules. However, the list is expressed to be non-exhaustive, so there is no reason why the rules could not also cover certain matters that are included in the CA98 rules, but which are not in the Draft Rules and are not otherwise covered by the provisions of the DMCCA, such as:
- 2.1.1 rules formalising the role of the FDG (and the requirement that the FDG does not include the SRO – see our comments at 1.12 above).
 - 2.1.2 businesses' rights to legal representation during investigations and inspections; and
 - 2.1.3 access to file.
- 2.2 These are important procedural issues and therefore merit being set out in the Rules. This would also have the benefit of maintaining as much consistency as possible with CA98 procedures.
- 2.3 As regards Rule 6, see comments above regarding the remit of the PCA. See also our comments at 1.13 regarding the inclusion of a new rule requiring the FDG to comprise individuals that were not involved in the issue of a provisional infringement notice.
- 2.4 Finally, in line with our comments at 1.5 above, Rule 9 should include a specific provision that, if the CMA intends to extend directions or liabilities for penalties to entities that become part of the group after the date the CMA issues the PIN, it must notify them that it intends to do so, and invite written representations on whether it is just reasonable and proportionate to do so, as well as whether the entity meets the interconnection criteria (i.e. the same requirements as set out in Rule 9(1) in respect of the period prior to the issue of a FIN).

Clifford Chance LLP
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