Linklaters

Linklaters LLP response to the CMA's consultation on the draft direct consumer enforcement guidance and rules

1 Introduction

1.1 We welcome the opportunity to respond to the CMA's consultation on the draft direct consumer enforcement guidance CMA200CON (**Draft Guidance**) and rules (**Consultation**). The Digital Markets, Competition and Consumers Act (**DMCCA**) will transform the consumer protection enforcement landscape in the UK, and so it is important that the CMA sets out clear guidance for business as the new administrative model of enforcement enters into force.

1.2 We understand that further guidance from the CMA will be forthcoming on the substantive interpretation of the law in this area. In our view this will be critical given that the obligations are very broad and that, in comparison to the competition law landscape, there is relatively little by way of case law or decisional practice to guide businesses on when conduct will be considered to infringe the law.

1.3 This paper raises specific points on the application of the DMCCA to continuing conduct, and Online Interface Notices (**OINs**), and responds to questions 1-2, 4, 7 and 11 of the Consultation.

2 Application of the DMCCA to continuing conduct

2.1 Section 339 DMCCA provides that the DMCCA (save for specified provisions) does not come into force until such day as set by the Secretary of State. This is echoed in paragraph 1.13 of the Draft Guidance and further expanded in paragraph 1.17 noting that the CMA can only impose a monetary penalty where infringing conduct takes place after the commencement date.

2.2 However, the Draft Guidance provides that the CMA may have regard to pre-commencement conduct when determining any matter under the new law, such as when setting directions, enhanced consumer measures (**ECMs**) and in factors relevant to any monetary penalty for post-commencement conduct (paragraph 1.18).

2.3 In our view, having regard to pre-commencement conduct when setting financial penalties or ECMs operates as a *de facto* penalty for pre-commencement conduct and therefore implies that the CMA's new powers are being given retroactive effect. Such a position would be contrary to long-established principles on retroactive effect and legal certainty.

2.4 In relation to penalties, under the old law, there was no power to impose monetary penalties (as recognised in 1.17). Taking into account pre-commencement conduct may affect the seriousness of the infringement and the relevant turnover when the CMA has regard to the duration of the conduct (7.24), and may be relevant in determining the existence of any aggravating factor (7.34). In all cases, the pre-commencement conduct may affect the decision of the CMA to impose a penalty at all and/or the amount of that penalty. If pre-commencement conduct results in a decision to impose a fine or an increase to a fine that would have been imposed in relation to post-commencement conduct, this effectively penalises that pre-commencement conduct, which is retroactive effect.

2.5 If the CMA maintains its current position that pre-commencement conduct can be taken into account in determining the level of the fine, we would request that the CMA provides further clarity on when and how this may happen. The CMA will have regard to conduct pre- *or* post-

commencement (emphasis added) in determining the existence of aggravating factors (7.34). That same language does not appear in respect of other steps. As currently drafted, 7.24 and 7.34 risk double-counting the impact of pre-commencement conduct (which in any case, in our view should not be subject to explicit, or de facto penalties) to the extent that duration is considered in both Step 1 and Step 3 of the penalty determination process.

2.6 In relation to ECMs, the position is slightly different because a court (although not the CMA) could have imposed ECMs on a party prior to commencement of the DMCCA. Nevertheless, redress measures imposed by the CMA effectively amount to a retroactive order for compensation, which the CMA would not have been able to impose absent the new enforcement powers conferred under the DMCCA. Section 183 DMCCA (Final infringement notice: directions to take ECMs) does not envisage the retroactive application of ECMs by the CMA and we therefore consider that, in the setting of ECMs, the CMA should not take into account pre-commencement conduct when imposing ECMs. The CMA would clearly have the ability to ask a court to direct ECMs in relation to such pre-commencement conduct and we would suggest that this is the only way that enforcement of pre-commencement conduct can be considered compatible with the principles of good administration and the presumption against retroactivity.

3 Online Interface Notices

3.1 OINs are being introduced as a potential enforcement tool available to the CMA where a Final Infringement Notice (**FIN**), by itself, may not suffice. The scope for using OINs has been narrowly defined and can only be used by the CMA where: (i) there is no other available means of bringing about the cessation of the conduct; and (ii) it is necessary to avoid the risk of serious harm to the collective interests of consumers (5.23).

3.2 As OINs could only previously be imposed by a court and not directly by the CMA, it would be helpful for the CMA to outline the circumstances in which the CMA considers they would be the only means of bringing about the cessation of the conduct and necessary to avoid serious harm to consumers. In our experience, hypothetical examples are particularly helpful to businesses to understand how the CMA might apply its powers.

3.3 We have made submissions specifically in relation to the procedural elements of issuing an OIN in response to Consultation Question 1 below. As a general remark, we would note that the CMA should maintain a consistent approach with regard to its procedure for the issuance of Provisional Infringement Notices (**PIN**), FINs and OINs to satisfy the CMA's duties of good administration, and to safeguard respondents' rights of defence.

4 Responses to Consultation Questions 1-2, 4, 7 and 11

Consultation Q1: Do you have any comments on the proposed process for submitting written representations on provisional infringement and/or administrative enforcement notices?

4.1 The Draft Guidance provides that the CMA will typically allow 20-30 working days from the date of the PIN for parties to respond with their written representations (2.37). This appears to be a very short timeframe, especially when contrasted with the CMA's guidance on procedure in Competition Act 1998 investigations (**CMA8**), which gives parties 'no more than

12 weeks' (i.e. 60 working days) to respond to the statement of objections and draft penalty statement.[1]

4.2 Setting such a short timeframe for parties does not in our view provide sufficient time for parties to review a case file and meaningfully engage with a PIN both in terms of the potential legal and factual complexities of the CMA's provisional findings as well as the proposed remedies. In this respect, we do not consider that there are any reasons which would justify the distinction between the timeframe set out in CMA8 and in the Draft Guidance, especially given that the penalties that can be imposed are equivalent. We further note that the proposed timeframe may put small and medium sized enterprises at a particular disadvantage as they may not have access to the necessary resources to address the CMA's requests in such short order. For these reasons, and to ensure that parties' rights of defence are not inhibited, we consider that, while this timeframe may be adequate in some cases, it is too short to be adopted as standard. We would instead suggest that the Draft Guidance be amended to reflect the timings as set out in CMA8.

4.3 In addition, we note that extensions to this timeframe 'will only be granted exceptionally and where there are compelling reasons for doing so' (2.38). We would welcome the CMA clarifying the exceptional circumstances envisaged, for example these could include where the timeframe falls during a holiday period or where the party is subject to other regulatory investigations. As an alternative, we would propose alignment with the wording adopted in other CMA guidance, which instead only requires 'particularly compelling reasons'[2] for any timeframe extensions. Given that a short response time is proposed by the CMA, we note that the ability to understand in which circumstances an extension may be granted becomes even more critical.

Provisional findings

4.4 The Draft Guidance provides (following the statutory wording of section 181 DMCCA) that the CMA may give a respondent a PIN where it has reasonable grounds to believe that the respondent has engaged or is engaging in infringing behaviour or is an accessory to that behaviour (2.15).

4.5 We would welcome confirmation that, insofar as the CMA intends to impose an OIN on a party (especially where the party may not be the infringing party but rather a third party online interface), that party will receive a PIN detailing the proposed OIN remedy and will be given an appropriate opportunity to comment (which appears consistent with Footnote 23 of the Draft Guidance, which provides that a 'respondent', for the purposes of PINs may include a party to whom an OIN is issued).

Consultation Q2: Do you have any comments on the proposed process for conducting oral hearings on provisional infringement and/or administrative enforcement notices?

4.6 We note a general trend to align the Draft Guidance with procedural provisions under CMA8, which we consider to be an efficient and effective approach from the CMA. However, we note that the Draft Guidance is not consistent with CMA8 as regards the timing of written responses following a hearing (2.49). We would propose that the Draft Guidance is amended to explicitly align with the CMA8 and include language such that where a party indicates that it will respond to questions in writing post-hearing, the case team will set out these questions

[1] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 12.3.

[2] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 12.3.

in writing and provide a deadline for response which is 'appropriate in the circumstances of the case',[3] instead of 'promptly after the hearing' (2.49).

4.7 Similarly, the Draft Guidance does not include a requirement that the Procedural Officer will report to the final decision group (**FDG**) on the fairness of the procedure followed in the investigation following the oral hearing, which is provided for under CMA8.[4] We would consider this an important procedural check and balance which we would propose is included in the Draft Guidance in terms similar to those included in CMA8.

Consultation Q4: Do you have any comments on the factors the CMA proposes to consider, the proposed minimum conditions and process for engaging in settlement discussions and accepting a settlement?

4.8 During settlement discussions in Competition Act 1998 investigations, CMA8 provides that a business' admissions will not be disclosed to the Case Decision Group or be used in evidence against any of the parties to the investigation where the CMA no longer intends to substantially reflect a settling business' admission in its statement of objections or infringement decision (e.g. where new evidence comes to light).[5] This same exception does not appear to be set out in the Draft Guidance. This position is an important one, as settlement (which saves the CMA considerable time and resources) is less attractive if any admissions – should settlement discussions become redundant – are relied upon. We would suggest that the Draft Guidance is amended to include this provision provided for in CMA8.

4.9 There are also a number of procedural misalignments with CMA8 which we would propose the CMA addresses in the final version of the Draft Guidance.

4.10 Firstly, we note that the deadline for responding to a PIN is not generally expected to exceed 10 working days (4.53). For the reasons explained in response to Question 1 above, we would consider this a particularly short timeframe, in particular when no such timeline is set out in relation to representations on the Summary Statement of Facts in CMA8[6] and when it is possible a party receives access to a significant volume of documents to review and understand before being able to decide whether to proceed with a settlement.

4.11 Secondly, we note that there is no express need for approval from the Case and Policy Committee (**CPC**) to proceed with settlement discussions or to settle (as set out in CMA8).[7] Whilst the Draft Guidance provides that the Senior Responsible Officer (**SRO**) will seek such approval 'where appropriate' (8.16), we would suggest aligning this wording with the obligations in CMA8, or that the CMA explains the circumstances in which this is unlikely to be appropriate. We consider engagement with the CPC to be an important procedural safeguard which is appropriate in all settlement cases.

4.12 Finally, we note that where a party has made representations on the PIN before settling, they will be required to withdraw those representations (4.62). We would suggest this is explicitly caveated so as to exclude those representations that deal with manifest inaccuracies, as set out in CMA8.[8]

[3] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 12.20.

[4] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 12.22.

[5] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 14.32.

[6] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 14.14.

[7] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 14.11 and 14.18.

[8] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 14.21.

Consultation Q7: Do you have any comments on the step-by-step approach and/or on any particular steps that the CMA proposes to apply in calculating monetary penalties for substantive breaches?

4.13 Paragraph 7.11 of the Draft Guidance indicates that the starting point for penalties is 30% of the party's UK turnover. Contrary to the position for CA98 infringements, this is not restricted to the party's turnover in the relevant markets, neither is it clear from the Draft Guidance whether a "party's" turnover refers to the entity under investigation.

4.14 We consider that it would be proportionate and in line with the CMA's approach under CA98, to limit the starting point of penalties to activities in the UK which relate to the infringement. On this basis, we would propose that the CMA elect a starting point based on either (i) turnover of UK entities found to have engaged in the infringement, or (ii) turnover generated in the UK as a result of the infringement. We consider that Step 2 offers sufficient scope to increase penalties to provide a deterrent effect without having to depart from the established and proportionate position taken for CA98 infringements.

4.15 Separately, we note that the penalty applies to the "party's" turnover. This implies that the CMA will only consider the turnover of the entity under investigation, but it is not entirely clear from the wording used. Given that any other position would have a significant impact on a penalty calculation, we request that the CMA clarify its intended approach in the Draft Guidance.

Consultation Q11. Do you have any comments on the proposed internal CMA decision-making arrangements for direct consumer enforcement cases?

4.16 The Draft Guidance provides that the SRO can be part of the FDG in direct consumer enforcement cases (8.19). It is not in our view appropriate for the SRO to be part of the FDG, as the independence of the decision group should be preserved in the case of consumer enforcement cases, as it is in Competition Act 1998 investigations,[9] consistent with principles of fairness and good administration.

[9] CMA8, CMA guidance on procedure in Competition Act 1998 investigations, paragraph 11.36.