Law Society of Scotland

Consultation Response

Draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases

August 2018

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Competition Law sub-committee welcomes the opportunity to consider and respond to the Competition and Markets Authority's consultation: *Draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases*[1]. The sub-committee has the following comments to put forward for consideration.

Consultation questions

Question 1: Do you agree with the proposed changes to the Current Guidance on complaint handling (described in Chapter 3)? Please give reasons for your views.

Overall, we welcome the proposed changes to the current guidance.

The clarification at paragraph 3.14 of the ways in which to make an anonymous complaint is helpful for potential complainants.

However, at paragraph 3.17 we note that the CMA will no longer 'endeavour' to give an initial view as to whether it would be likely to investigate a matter further if an in-depth complaint were to be made, but instead 'may' do so where it is presented with an outline of the issue. We are concerned that a potential SME complainant could be put off proceeding with a viable case where the CMA decides not to give its initial view as the risk seems too great in comparison to the resources which would need to be invested to pursue that complaint.

It would be preferable for the Guidance to adopt a more balanced approach that would ensure that the CMA retains a duty to 'endeavour' to respond as to the likelihood of an investigation, at least in cases

[1] https://www.gov.uk/government/consultations/ca98-procedures-guidance-consultation

where it can be illustrated that a SME complainant is seriously considering bringing a complaint which will be at a generally significant expense.

Furthermore, the definition of 'significant expense' could be further defined in the Guidance in order to protect the CMA from an obligation to act on all initial inquiries. This would limit the duty to respond to those cases which will genuinely require significant investment from the complainant based on, for example, annual turnover.

Question 2: Do you agree with the proposed changes to the Current Guidance on information handling (described in Chapter 4)? Please give reasons for your views.

We welcome the proposed changes to the Current Guidance on information handling. Removing the 'Formal Complainant' status should be helpful to streamlining the procedure.

It may be relevant to add a footnote on the Cartel Hotline at paragraph 4.2.

Question 3: Do you agree with the proposed changes to the Current Guidance on interim measures (described in Chapter 5)? Please give reasons for your views.

We also welcome the proposed changes to the Current Guidance on interim measures. As noted above, removing 'Formal Complainant' status should be helpful to streamlining the procedure.

We would welcome further information on the procedure the CMA will follow where it publishes parties' names pursuant to paragraph 5.7. This should include how it will inform the parties, the parties' rights to object, and likely timescales.

Question 4: Do you agree with the proposed changes to the Current Guidance on engagement with the parties (described in Chapter 6)? Please give reasons for your views.

Generally we agree with the proposed changes to the Current Guidance on engagement with the parties.

At paragraph 6.10 we note that the text stating that 'where the CMA does not give advance notice of large information requests, it will explain why' has been removed. We consider this to be negative from both a procedural and transparency perspective. Since paragraph 6.7 retains the 'advance notice' procedure, it would be preferable to ensure that the CMA is still required to provide an explanation where advance notice is not given for large information requests (unless this means that it will be given in all cases, and accordingly the word 'seek' should be removed from paragraph 6.7 instead).

Paragraphs 6.16 and 6.17 amend the way in which the CMA can require any individual who has 'a connection with' a business to answer questions after giving formal written notice. In order to uphold the principles of transparency, and to protect the undertaking's rights of defence, the undertaking should be notified at the same time as the relevant individual about the interview and the relevant questions they will be asked. While this appears to be reflected in paragraph 6.18 for current connections, the position should also be clarified for former connections – for which an undertaking should also be notified in all cases.

Paragraph 6.22, footnote 82 acknowledges that the CMA will send a copy of the transcript of an interview to any undertaking with which the interviewer has a 'current' connection, to make confidentiality representations. However, when this applies to former connections, the CMA will only send a copy of the transcript 'if appropriate'. The basis for this distinction is not clear, and again in order to uphold the principles of transparency and rights of defence, it would seem reasonable for interview transcript of both current and former connections to be shared with the undertakings. At the very least, the general rule should be for the CMA to provide the transcripts to the undertaking; only in exceptional circumstances should it be withheld by the CMA and an appropriate appeals process to deal with this situation should be set out in the Guidance.

We also recommend the inclusion of further information as to the CMA's powers of searching and retaining electronic equipment at paragraph 6.35. This is particularly important given the powers and abilities of regulators carrying out electronic searches in modern dawn raids, which no longer rely so heavily on paper files.

Question 5: Do you agree with the proposed changes to the Current Guidance on commitments (described in Chapter 7)? Please give reasons for your views.

Generally, we welcome changes to the Current Guidance on commitments.

We note that the text in paragraph 7.9 to the effect that the deadline for submitting non-confidential versions should be made no later than four weeks from the date of submitting the original response, has been deleted. However, the text that has been substituted at paragraph 7.8 does not clearly indicate that the deadline will be set following the submission of the original response. Therefore, while this amendment may provide the CMA and parties with added flexibility on the timing of non-confidential versions, it should be clarified that the deadline will fall after the submission of the original response.

Paragraph 7.8 also provides that any extension to a deadline must be discussed well in advance of the deadline with the case team. While it is understandable that the CMA wishes to avoid last minute extension requests, from a practical perspective these are sometimes simply unavoidable – for example due to problems within an undertaking's team including a family death, illness or injury, theft, or where there are delays with access to physical files. The CMA should undertake to reasonably consider each case on its own merit, and avoid ruling out all late requests merely as a matter of principle in the Guidance.

Non-confidential versions of documents can be extremely time-consuming for undertakings to prepare. While we agree that the CMA should not accept blanket or unsubstantiated confidentiality claims at paragraph 7.9, it would be helpful for the CMA to indicate more clearly the level of detail that is necessary for the confidentiality claims to be deemed acceptable.

We also note that it can be very time-consuming and expensive if a regulator accepts one version of a set of confidentiality claims and then the decision is reversed and a new set need to be prepared over again. As such, in terms of efficiencies for compliance, a clear CMA policy on confidentiality claims should be established and duly upheld in a consistent manner for all cases.

Question 6: Do you agree with the other proposed changes to the Current Guidance. Please give reasons for your views.

Generally speaking, the now deleted short summary at the start of each chapter was helpful; we would welcome the reinstatement of these summaries (amended to reflect the updated Guidance).

Question 7: Are there other aspects of our CA98 investigation procedures where you think further changes could be made to enhance the efficiency of our investigations or improve certainty for businesses? Please explain which aspects and why.

Chapter 8 provides significant detail on interim measures. We observe that paragraph 8.6 requires a non-confidential version of the information and evidence for interim measures to be provided at the same time as the interim measures application is made. However, from a practical perspective, this added requirement could have the overall effect of delaying the interim measures application – and thereby potentially resulting in further harm being caused. Although the non-confidential version of the file is needed to allow the CMA to provide it to the relevant parties in order to enable the application to be considered expeditiously, in terms of timing it is clear that the CMA itself will first have to consider the application directly. In practical terms there must therefore usually be a minimum of one or two working days before the non-confidential file is distributed. The applicant could therefore prepare and submit the non-confidential version of the file shortly after the initial application – for example within 48 hours; it seems unnecessary to demand that the original and non-confidential version of interim measures must be submitted together.

Chapter 9 provides information on process. We welcome the fact that the CMA is open to organising state of play meetings by phone or video conference to keep costs and inconvenience to a minimum for parties.

Chapter 12 deals with the right to reply. Paragraph 12.2 states that any requests for an extension to the deadline should be communicated to the CMA at the time the deadline is set. As referred to above, while it is understandable that the CMA wishes to avoid last minute extension requests, from a practical perspective these are sometimes unavoidable. We consider that the CMA should undertake to consider

each case on its own merit. Moreover it is highly impractical from a process perspective to only allow parties to ask for an extension when the initial deadline is set as delays and the consequent need to extend are likely to stem from unforeseen circumstances.

We have also identified a number of issues regarding the guidance in relation to hearings set out from paragraph 12.11 onwards. Firstly, it is not clear how the CMA intends to accommodate requests for confidential hearings where more than one party will be in attendance. Secondly, paragraph 12.16 states that, as a general rule, any points raised should be limited to those already submitted to the CMA in writing. However, we consider that this should not prevent one undertaking responding to points made by another undertaking at the hearing where more than one party will be in attendance. Finally, paragraph 12.18 addresses responses to questions after the hearing – which should also set out that any such responses will be shared with the other parties in attendance, where the hearing involves multiple parties.

Chapter 13 looks at the final decision. Paragraphs 13.5 and 13.6 examine the date by which a penalty must be paid. However, it is not clear what would happen following an appeal where the penalty is upheld. Further clarification would be welcome as to any new date by which parties must pay before the CMA will commence proceedings to recover the required amount as a civil debt.

Also pursuant to chapter 13, it is noted that the summary of the decision (previously paragraph 13.12) has been deleted in its entirety. We would welcome reinstatement of this paragraph to ensure that the summary of the infringement decisions is retained, especially in view of the complexity and length of some cases; the summary is very helpful in navigating the key milestones of the investigation.

Chapter 14 addresses settlements. We note that paragraph 14.6 lists the relevant factors, which the CMA will examine in determining whether a case is suitable for a settlement, but deletes a significant number of previous factors including: the stage of the proceedings; whether settlement will result in a shortening of the case timetable; the number of businesses involved in the investigation and a potential settlement; and the number of alleged infringements. We would welcome further clarification as to whether the factors formerly referred to are no longer relevant to the assessment process. If they remain relevant, this should be duly reflected and retained in the Guidance as knowledge of the relevant factors is helpful for applicants considering settlements.

Question 8: Are there other aspects of the Current Guidance which you consider could be streamlined or simplified? Please explain which aspects and why.

We have no further comments.

For further information, please contact:

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