Competition & Markets Authority

Competition and Markets Authority guidance: part 2 consultation

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Consultation response from the ESRC Centre for Competition Policy

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The response to each question in this consultation response has been drafted by a named academic member of the Centre, who retains responsibility for that section. The document has been edited by Andreas Stephan following discussions held in the Centre and it has the broad agreement of the group of contributors.

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Question 2: Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate?

(Andreas Stephan) The introduction of a formal settlement procedure under new paragraph 13C of Schedule 9 of the CA98 is a welcome development. In the US around 90 per cent of antitrust cases are concluded through a mechanism of direct settlement. Settlements thus have the potential to free up significant resources for the competition authority to increase the throughput of cases and in return reduce the period of uncertainty for the undertakings. Increased transparency in the use of settlements is also important. Certainty as to how firms will be treated is a cornerstone of effective antitrust enforcement. The informal use of 'Early Resolution Agreements' by the Office of Fair Trading was open to criticism, as it was impossible to effectively scrutinise their application.

Question 5: Is the proposed settlement procedure clear, and do you have any views on it?

(Andreas Stephan) Given that the settlement discount on offer is quite generous, the guidelines could go further in ensuring that the settling undertakings accept wrongdoing. Both in the UK and Australia, there have instances of firms making technical admissions of guilt to reduce their liability at settlement, while publically denying any wrongdoing.[1] This outcome is hugely damaging to antitrust enforcement. It allows the infringing firms to deflect stigma and reduce reputational damage. It also risks portraying the competition authority as an overzealous regulator using the settlement procedure to extort money from business. As a condition of settlement, firms should agree to make public admissions of guilt, possibly including newspaper adverts that would help enhance the deterrent effect of the settlement. This would not need to extend to an admission of *harm*. Firms would be able to maintain that the infringement did not actually have an effect on prices, so as not to increase their exposure to private actions for damages and therefore discourage settlements.

[1] A Stephan, 'OFT Dairy Price-fixing Case Leaves Sour Taste for Cooperating Parties in Settlements' (2010) ECLR 30(11) pp.14-16; K Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing 2004) p145

Question 6: Do you agree that settlement discussions should include the proposed maximum penalty the settling business should pay or would it be sufficient if the CMA only set out the settlement discount on an undisclosed penalty?

(Andreas Stephan) In order for the settlement procedure to be successful in making antitrust cases less resource intensive, it is very important that discussions include the proposed maximum penalty the settling business should pay. Unlike US plea bargains, settlements in UK and EU Competition Law cannot include the defendant waiving their right to appeal. Appeals to the Competition Appeals Tribunal are routine in antitrust cases and frequently result in significant fine reductions. It can be costly to defend cases at appeal. While it is hoped that settlement procedures will free up resources at the investigation stage *and* reduce the number of costly appeals, this will not necessarily be realised.

The reason for this is that appeals to not generally contest whether an infringement occurred, but rather the way in which the final penalty and leniency discount were calculated.[2] Paragraph 14.26 of the proposed guidance states,

> *The settlement discount set out in the infringement decision will no longer apply if a settling business appeals the infringement decision to the Competition Appeal Tribunal. The Competition Appeal Tribunal has full jurisdiction to review the appropriate level of penalty*

As the way in which settlement is applied forms part of the exercise of power subject to judicial review, this rescinding of the discount is only likely to be possible where the firm contests the infringement decision itself, rather than the level of penalty. Thus even allowing the firm to agree a maximum fine at settlement will not prevent the firm from later contesting how the final fine was calculated within that maximum. The more specific the agreement on the level of penalty, the more scope there is for reducing appeals. Allowing the competition authority and firms to agree the exact penalty would be undesirable. As well as putting undertakings with weak legal representation at a significant disadvantage, there are other problems associated with haggling over an exact number, as is alleged to occur in US plea bargains.[3] However, appeals could be reduced by requiring firms to agree a minimum as well as a maximum penalty; a range therefore that broadly reflects their liability.

[2] A. Stephan, 'The Direct Settlement of EC Cartel Cases' (July 2009) ICLQ 58(3) pp.627-654
[3] Ibid.

Question 7: Do you agree that the proposed caps for settlement discounts at up to 20% for pre-SO settlement and up to 10% for post-SO settlement are appropriate?

(Andreas Stephan) The gains from pre-SO settlement are significant enough to justify a 20% discount. It is also right that the settlement amount not be fixed in the way it is by the European Commission. Different firms will have a different willingness to settle depending on how risk averse they are and how active their role was within the infringement. However, the CMA must be wary of three potential costs associated with this system:

1. 20% amounts to a significant drop in the level of sanctions and so, assuming the uptake of settlements is high, the policy may reduce the deterrent effect of enforcement. However, fines are already unlikely to outweigh the illegal gains from an infringement (given even conservative estimates about probability of detection and cartel profits[4]) and so a 20% discount may not make a discernible difference. Moreover, some believe the rate of detection is more important than the size of the fine. Therefore so long as resource savings result in more successful cases, the net effect may still be deterrence enhancing.
2. The guidance talks of discounts "up to 20%". This suggests the exact level of discount needs to be agreed with the firm. This will involve some negotiation, the outcome of which may reflect the abilities of the individual negotiators rather than the parties' true willingness to settle or the procedural savings enjoyed by the competition authority.
3. A 20% discount increases the cost to firms wishing to challenge the competition authority's investigation and protest their innocence. There is a small danger here that firms will accept a fine at settlement that exceeds their actual liability out of corporate pragmatism or concerns about capital markets.[5] It is therefore important that there be some independent oversight of settlement procedures.

[4] E.g. E Combe and C Monnier, Fines against hard core cartels in Europe: The myth of overenforcement' (Summer 2011) *The Antitrust Bulletin* Vol 56 No2

[5] n2 above.

Regulated Industries: Guidance on concurrent application of competition law to regulated industries

Question 1: Do you consider that the Transition Team's proposed approach to dealing with the revised requirement that Regulators' exercise competition powers in favour of sectoral powers is clear and appropriate?

(Catherine Waddams) In general the principle of building on the CC and OFT guidance and practice and developing procedures on this basis seems an excellent way of benefiting from the considerable experience of the two organisations. Developing effective case work and changing processes from this base in response to the requirements of ERRA13 and emerging issues is an effective way of building on the established and well recognised strengths of the old, without having to start from scratch to 'reinvent the wheel'.

There may be a potential conflict within the CMA's primary duty 'to promote competition …for the benefit of consumers' in circumstances where competition may not benefit consumers. An obvious example arises in the regulated industries where competition within natural monopoly sectors would be wasteful and not in the interests of consumers.

Under section 2.4 there are potential conflicts for regulators who have been working to nurture competition within their sectors, and who may not welcome a third party inquiry into how effective they have been in this endeavour. While the possibilities of intervention by the CMA seem on balance positive, a broadly supportive rather than interventionist process is likely to lead to better outcomes for consumers.

The change in ERRA13 to the duties of the regulators to consider the use of their CA98 powers ahead of their license amendment powers is in interesting contrast to the change made to the energy regulator's duties in the Energy Act 2010 which requires them to consider whether competition is necessarily the best way of protecting consumers. Some discussion around these two changes and their apparent contradiction might be useful to clarify priorities, at present hotly debated, within these sectors.

So the answer to question 1 is yes, but there are some inherent tensions in terms of emphasis to be resolved.

Question 2: Do you consider that the Transition Team's proposed approach to allocation of cases between the CMA and Regulators, or between Regulators, is clear and appropriate?

(Catherine Waddams) The approach is not entirely clear, but insofar as it is, it seems appropriate.

Question 3: Do you consider that the Transition Team's proposed approach to secondments and cooperative working between the CMA and Regulators is clear and appropriate?

(Catherine Waddams) Such secondments seem to be both clear and appropriate. It is important to share understandings both of issues and procedures between the organisations which hold concurrent powers for regulated sectors. The issue of developing competition in previously monopolised areas is particularly fraught, and the political sensitivity of some sectors makes it very difficult to separate legitimate accountability to and responsibility by Parliament from political intervention which is likely to exacerbate difficulties and/or raise the cost of capital and prices. For example social responsibilities act as a tax on consumers, and require companies to co-operate over aspects of their business which bring them uncomfortably close to each other if they are to engage in active rivalry. The CMA has a potentially important role in analysing the competition consequences of interventions, because unlike the sector regulators it does not hold social or environmental responsibilities.

Question 4: Do you consider that the Transition Team's proposed approach to information sharing between the CMA and Regulators, or between Regulators, is clear and appropriate?

(Catherine Waddams) Information sharing between authorities should be maximised, even where the authorities are considering different issues, or the same issues from different perspectives, to ensure that all have as much information as is relevant to their decision making and to minimise the probability of unintended consequences.

Consumer Protection: Guidance on the CMA's approach to use of its consumer powers

Question 1: Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to working in partnership?

(Catherine Waddams) Working with concurrent powers and in partnership with so many other potential enforcers, there is a danger of either duplication or gaps in enforcement. The establishment of co-ordinating groups is a welcome approach to maximise the effectiveness of the disparate resources.

In stating that the CMA would not pursue a case against a single national company (3.9 of draft guidance), there may be a danger of effectively introducing impunity for such behaviour, unless it is clear that another body would take action.

Question 2: Are there other factors which you feel should be taken into account when considering the CMA's approach to the use of its consumer enforcement powers?

(Catherine Waddams) Para 3.9 of the consultation states that the CMA will drive 'more consumer choice'. This may contradict the current approach of one of its partners, Ofgem, who is restricting choice by constraining the number of tariffs which companies may offer. Some refinement of this concept might be helpful – more ***realistic*** choice perhaps.

Wherever possible the relevant authorities should enforce existing rules, rather than supplement them by specific additions to meet particular abuses. There is a danger that such additions make the consumer landscape over complex, to the detriment of companies, consumers and enforcers. Using more general laws also ensures consistency of principles and enforcement. While occasionally specific codes of practice or guidance may be appropriate, these should be the exception rather than the rule.

Question 4: Do you have any further comments on the Draft Guidance?

(Andreas Stephan) The draft guidance does fulfil its statutory purpose of setting out the principles to be applied in determining whether proceedings for the cartel offence should be instituted against an individual. The evidential stage of the test and factors taken into account in considering the public interest are also clear enough. However, there are two additional issues which should be considered:

Case Selection – There continues to be a fair amount of opposition to the cartel offence within the business community. Their specific fears relate to the types of arrangements that will attract criminal prosecution and the danger of prosecuting individuals who inadvertently breach the cartel offence. In previous consultation responses, they have warned the offence may have a dampening effect on legitimate agreements. The carve outs and defences included in the new cartel offence go a long way to alleviate these fears, but early case selection will determine whether the business community is won over in the long run. In particular, it is important that the CMA bring cases against clear hard-core cartel conspiracies, and avoid cases on the fringes. The prioritisation of bid-rigging cases may be an effective way of achieving this because the deceptive nature of the conduct is harder to dispute.

118B(3) Disclosure to professional legal advisers defence – The purpose of this consultation is not to question the wisdom the defences introduced by the Enterprise and Regulatory Reform Act 2013. Cartelists familiar with the new law need only take reasonable steps to ensure that the nature of the arrangements be disclosed to professional legal advisors for the purpose of obtaining advice, prior to making the agreement. The legal advisor can be in-house and does not even have to be a UK lawyer (Paragraph 4.24). It is unclear why the defence needs to be so generous in this last respect. Legal advisors outside the UK may not subscribe to the same ethical standards or be subject to effective regulation. It may therefore be difficult to protect against abuse of this defence by unscrupulous legal advisors based overseas.

In order to avoid this defence amounting to a fatal flaw in the new cartel offence, the proposed guidance could go further in setting out how the CMA envisages the defence applying in practice. In particular, it should be made clear that 'reasonable steps' should not include scenarios where cartelists have reported their arrangements to legal professionals, under the protection of privilege, for no

other purpose than to later benefit from this defence at trial. Apart from making a mockery of the criminal justice system, this would be inconsistent with the nature and purpose of the exclusions and remaining two defences. It is clear from debates in Parliament that the purpose of these defences is to exclude defendants who openly entered into 'legitimate behaviour' and not to protect behaviour that is 'clandestine to a high degree'.[6] By implication, 'reasonable steps' must include some effort to engage with the advice obtained.

[6] Lord Viscount Younger of Leckie, Hansard HL vol 743 col 1057 (26 February 2013). Discussed in A Stephan, 'The UK's New Cartel Offence: It Could Be Alright on the Day' (9 July 2013) Competition Policy Blog. Available: http://competitionpolicy.wordpress.com/2013/07/09/the-uks-new-cartel-offence-it-could-be-alright-on-the-day/