SQUIRE PATTON BOGGS

An Update to the Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases

EMEA – November 2020

On 4 November 2020, the UK's Competition and Markets Authority (CMA) published updated Guidance on its investigation procedures in Competition Act 1998 cases (CMA8)[1] (Guidance). This is the third version of the Guidance since the inception of the CMA in 2014, and it makes some important changes from the previous version. Businesses that the CMA suspects have infringed the competition rules, or complainants, should be aware of these developments, and plan for them accordingly.

We set out below some of the key changes to the CMA's investigation procedures Guidance.

Opening a Formal Investigation – Increased Transparency at Case Opening

Announcement of the Parties Under Investigation

Under the updated Guidance, the CMA will normally name parties under investigation in case-opening announcements, other than in exceptional circumstances (such as where doing so might prejudice a CMA investigation). This is a significant step away from the approach taken to date, under which the CMA normally named parties under investigation only upon issue of any Statement of Objections (SO) (i.e. where the CMA believes it has a compelling case against the addressees). The CMA will not, at this early stage, mention whether any parties are leniency applicants.

Impact on Businesses of Such an Announcement by the CMA

While the CMA will make it clear that the opening of a formal investigation against a business does not imply that there has been an infringement of competition law, businesses will have to consider quickly how to deal with their internal and, in particular, external communications in order to manage reactions from customers, suppliers and non-implicated competitors. Public companies will also have to consider the reaction of the market to an announcement by the CMA. Businesses should consider updating their internal dawn raid guidelines to include communications strategy.

Potential Impact on Civil Litigation

The other major impact this amendment to the Guidance is likely to create relates to issues of limitation in future private damages claims. Regulation 19 of the Competition Damages Regulations 2017[2] confirms that a claimant's "day of knowledge" is "the day on which the claimant first knows or could reasonably be expected to know (a) of the infringer's behaviour; (b) that the behaviour constitutes an infringement of competition law; (c) that the claimant has suffered loss or damage arising from that infringement; and (d) the identity of the infringer".

Information Handling

Access to File

The Guidance states that the CMA would disclose to the addressee(s) of an SO the documents directly referred to in the SO (and any Draft Penalty Statement (DPS) – see below) together with a schedule containing a detailed list of the rest of the documents on the CMA's file, which the SO addressees can request access to. In some cases, the CMA could use a confidentiality ring (whereby documents are disclosed only to, say, the addressee's external legal advisors). The purpose of this is to reduce the burden on the parties, while maintaining their rights of defence. In practice, this is the approach that has been adopted by the CMA in recent cases, even before publication of the Guidance. One apparent omission in the Guidance, however, is the lack of explanation as to the process that the CMA will follow in order to decide which of the documents it obtains during its investigation should form part of its investigation "file". This process is not transparent to parties under investigation and risks depriving them of access to potentially relevant (including possibly exculpatory) documents.

Confidentiality Representations

Parties will be entitled to make confidentiality representations on their documents (prior to disclosure to the other addressee(s) of the SO), although the Guidance explains that, in the event that those representations are not received by the deadline set by the CMA, the CMA will assume that no confidentiality is being claimed over any of that information/ those documents.

Issuing the CMA's Provisional Findings

The Guidance confirms that the CMA will issue DPSs to each of the addressees of an SO at the same time as the SO itself is issued, rather than after the SO response and oral hearing (as was the CMA's practice). This is in line with the practices of the European Commission. There will be no public reference to the amount of the proposed penalties, other than in respect of SOs issued to parties that have agreed to settle with the CMA. Parties will have up to 12 weeks to respond to the SO and the DPS.

1 https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

2 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017

To ensure impartiality in decision-making and due process, the Case Decision Group (CDG) will have had no involvement in the decisions to issue the SO and DPS and is independent of the Senior Responsible Officer (SRO), who is the CMA staff member responsible for taking those decisions. The CDG makes the decisions as to whether the relevant Competition Act 1998 prohibitions have been infringed, whether to impose a penalty and, if so, the amount of the penalty (which can be different from the Proposed Penalties in the DPSs).

Right to Reply – Cross-disclosure of Written/ Oral Representations on an SO

The CMA considers that "genuinely new evidence" (as opposed to arguments of fact or law, or evidence that has already been disclosed to the addressees) in an addressee's written (or oral) representations on an SO may need to be cross-disclosed to the other addressees of an SO. The "exceptional circumstances" in which the CMA may decide to cross-disclose representations on an SO include where the CMA considers it necessary for rights of defence to do so.

Whilst this does not materially change the position set out in the previous guidance, reference to "genuinely new evidence" is explicitly set out as an example of when cross disclosure might be made for rights of defence purposes.

The CMA will determine what constitutes "genuinely new evidence". However, in practice, the test is likely to be difficult to apply, particularly where an addressee of an SO relies on a different characterisation of events or specific elements of evidence from another addressee – does this constitute genuinely new evidence? While the CMA should probably over-disclose as opposed to under-disclose in order to ensure the rights of defence, it is likely that the application of this test in practice might prove contentious.

If, on appeal, an addressee of an infringement decision is made aware of information (such as characterisation of events or specific elements of evidence from another addressee) of which it had previously been unaware, it is probable that this will cause additional grounds of dispute as to whether that information should have been disclosed.

Right to Reply – Disclosure of Directors' Representations on an SO

Primarily for confidentiality reasons, representations of current or former directors of an addressee of an SO should not to be disclosed as a matter of course to the addressees of an SO (or to those parties' legal advisers), when those statements are made in the context of a CMA investigation into whether to make an application for a Competition Disqualification Order. However, the Guidance allows for representations by a director be disclosed to the addressees of the SO only in exceptional circumstances, such as where the CMA considers it necessary to do so for rights of defence of an addressee of the SO.

Settlement

Where an addressee of an SO offers to settle after an SO has been issued, the CMA will require the business formally to withdraw any representations it has made on the SO, save to the extent that they deal with "manifest factual inaccuracies" (examples of which have not been provided). In the CMA's view, such representations may undermine the clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement, which is a requirement for settlement.

A settling party will be able to make limited representations on the DPS calculations within a specified time frame as part of the settlement discussions, so long as these are not inconsistent with its admission of liability.

It is unclear what the process would be in the event that the CMA had previously decided that an addressee's representations on an SO contained "genuinely new evidence" and was cross-disclosed to the other addressees (or if a director's representations were cross-disclosed), with that party subsequently settling with the CMA. It is also unclear whether the necessary withdrawal of an addressee's representations on settlement may leave directors or employees at personal risk and, possibly further down the line, may hamper defences in subsequent competition damages claims.

Complaints About the CMA's Investigation Handling, Right of Appeal and Reviewing the CMA's Processes

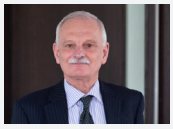
The Guidance clarifies the remit of the Procedural Officer, whose role is to ensure that procedural issues can be addressed quickly, efficiently and cost effectively when a company under investigation has not been able to resolve those issues with the CMA case team or the SRO responsible for the investigation.

The Guidance appears to narrow the role of the Procedural Officer to consider "significant procedural complaints" (which is a new addition to the previous guidance) and introduces a further threshold for the consideration of procedural complaints.

Conclusion

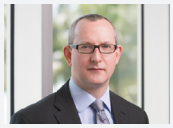
The CMA's new Guidance is likely to have an impact on the way that businesses should prepare themselves for dawn raids and subsequent investigations and complaints, as well as for how any investigations are run. If you have any questions regarding the above, or wish to discuss the implications of the new Guidance on your business, please do get in touch with any member of the team below.

Contacts



Martin Rees
Partner
T +44 20 7655 1137
E martin.rees@squirepb.com

Francesco Liberatore
Partner
T +44 207 655 1505
E francesco.liberatore@squirepb.com



Diarmuid Ryan
Partner
T +44 20 7655 1310
E diarmuid.ryan@squirepb.com

Sam Hare
Senior Associate
T +44 207 655 1154
E sam.hare@squirepb.com

39982/11/20