

RESPONSE TO OFCOM CONSULTATION ON REVISING THE ENFORCEMENT GUIDELINES AND RELATED DOCUMENTS

Baker & McKenzie LLP welcomes the opportunity to comment on Ofcom's consultation on revising the Enforcement Guidelines and related documents. Our comments are related to (i) the Draft Enforcement Guidelines for Competition Act Investigations ("the Draft Guidelines") and (ii) the Draft Advice for Complainants. Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK and EU competition law.

1. THE DRAFT GUIDELINES

- 1.1 We welcome Ofcom's proposals to introduce greater transparency into its competition enforcement procedures and to bring its processes more in line with the enforcement practice of the Competition & Markets Authority ("CMA"). However we consider that additional changes could be introduced in order to further improve the procedure.

Case Opening Announcement

- 1.2 Para. 2.30 of the Draft Guidelines state that Ofcom's case opening announcement will include the identity of the subject of the investigation and the identity of any complainant. We strongly consider that information included in case opening notices should be kept to a minimum and that any information that could reveal the identity of the parties under investigation (and the complainant, if relevant) should not be included. If Ofcom were to identify the target of the investigation, the target could suffer unnecessary reputational and financial harm (if it is later found not to have infringed competition law).

Timescales

- 1.3 We note that Ofcom is proposing to move away from its current 8 week target for completing an enquiry as to whether to open a CA98 investigation, and instead will seek to set a target on a case by case basis. We consider that 8 weeks is a sufficiently long period in which to reach a decision, and are concerned that without a set target, there is a risk that Ofcom may take significantly longer to take a decision, which would create uncertainty for parties. We consider that a fixed target of 8 weeks provides focus and discipline to the process of deciding whether or not to investigate and should therefore be retained.
- 1.4 Experience has shown that CA98 investigations can be lengthy (as noted by BIS in its consultation on *A Competition Regime for Growth: A Consultation on Options for Reform* and by the National Audit Office in its 2016 Report: *UK Competition Regime*). We consider that that Ofcom should take steps to ensure that the length of its CA98 investigations is reduced. Ofcom has stated that it will publish updates on the progress of investigations, including when it expects to reach particular milestones) (para 3.10 and 3.38 of the Draft Guidelines). We suggest that Ofcom should go further and introduce a target timescale of two years for all CA98 investigations. The benefit of this non-statutory two year target timescale would be twofold. Not only would it provide greater certainty for those parties under investigation but it would also foster greater discipline around the scope of cases brought as well as procedural rigour.

Power to require an individual to answer oral questions

- 1.5 Para. 3.21 states that interviews will usually be recorded. We recommend that Ofcom also confirms that the interviewee will be asked to read through and check any transcript of the recording or the questions and answers in the note and to confirm, in writing, that they are an accurate account of the interview. The individual should also be given the opportunity to identify any confidential information in the transcript.

Powers to enter and search premises

- 1.6 The Draft Guidelines provided limited details of Ofcom's powers to enter and search premises. We suggest that cross-references are provided to the relevant sections of the CMA's guidance on these powers. In particular, we consider it important to clarify the position in respect of communications that are protected by legal privilege and the right against self-incrimination.

Publicity

- 1.7 Para. 3.33 states that Ofcom may consider the use of confidentiality rings or data rooms. We would welcome further clarification on how these will be set up and managed. in relation to the use of confidentiality rings and data rooms. The Competition Appeal Tribunal's ("CAT") judgment in *BMI Healthcare Ltd v Competition Commission* [2013] CAT 24, provides guidance on how confidentiality rings and data rooms should be used in order to enable the parties' advisers to formulate a proper and informed response. We believe therefore that para. 3.33 of the Draft Guidelines should be reviewed to ensure compliance with the CAT's judgment.

Decision makers

- 1.8 We agree that it is appropriate that there are separate decision makers for (i) overseeing the investigation and issuing the statement of objections ("SO") and (ii) for issuing a supplementary statement of objections, draft penalty statement and infringement decision (paras. 4.4 and 4.5). However we would welcome more clarity on how the internal decision making process will work in practice, and the approach Ofcom will take to internal checks and balances. For example, before the SO or final decision is issued, will lawyers and economists from outside the case team analyse and review the relevant facts and key underlying evidence, and highlight to the case team and the relevant decision maker(s) the legal and/or economic risks associated with the proposed course of action? Such an approach is used by the CMA to ensure robust internal scrutiny. Ofcom suggests that this may be the case in the accompanying consultation document *Ofcom's approach to enforcement* (para. 2.37) but we consider that this needs to be clarified in the Draft Guidelines.

State of Play Meetings

- 1.9 We do not agree with Ofcom's proposal to hold state of play meetings only on a case by case basis. State of play meetings provide an opportunity for parties to understand the progress of an investigation and to clarify outstanding issues, as well as ensuring ongoing transparency. We consider that Ofcom should offer three state of play meetings as a matter of practice: (i) once the case has been opened; (ii) before the SO is issued; and (iii) after the SO is issued. This would be in line with current CMA practice in its CA98 investigations.

Oral Hearing

- 1.10 We consider that the decision makers should as a matter of practice attend the oral hearing. The oral hearing representations process could be developed further into a much more useful meeting for both Ofcom and the parties under investigation. We believe that the oral hearing should be a two way communication, meaning that the firm/s under investigation should be able to question the evidence and witnesses relied upon by Ofcom, including any complainants and others who have provided evidence on which Ofcom relies.

- 1.11 We note that the hearing will be transcribed. We consider that the subject of the investigations should be asked to confirm the accuracy of the transcript and to identify any confidential information. This should be made clear in the Draft Guidelines.

Settlement

- 1.12 We welcome Ofcom's guidance on settlement procedures as this improves transparency. We have a number of comments on the procedure.
- 1.13 First, we note that the party will be sent a summary statement of facts for the purpose of settlement discussions, including the provisional level of penalty. Ofcom states that it will provide a streamlined access to file process - in our view the Draft Guidelines should confirm that the party will have sight of the key documents on which Ofcom is relying.
- 1.14 We are concerned that the Draft Guidelines do not state that the subject of the investigation will be given the opportunity to give representations on the statement of facts and on the draft penalty. We urge Ofcom to clarify this and to confirm that the parties will have such an opportunity (as they do in CMA investigations).
- 1.15 We do not agree with Ofcom's approach in para. 5.20 which states that if the subject of the investigation is not prepared to agree to settle on the basis of the statement of facts, it is unlikely to be appropriate to continue the settlement process. We do not consider it is appropriate for Ofcom to have this as a default position. In our view, if a party does not agree with the statement of facts, settlement should not automatically be ruled out at that stage. The party should have the right to make representations and Ofcom should make the decision as to whether to continue with settlement on a case by case basis in light of those representations.

Interim Measures

- 1.16 We would welcome more clarity on the circumstances in which Ofcom considers it would be appropriate to impose interim measures. We note that the CMA explains the factors that it will take into account when considering whether conduct is causing or is likely to cause significant damage with regard to the facts of the case (paras. 8.13-8.20, *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*). It would be helpful for parties and their advisers if Ofcom were to include similar guidance in the Draft Guidelines.

2. Draft Advice for Complainants

- 2.1 We note that Ofcom expects complainants to try to resolve matters through commercial discussions before approaching Ofcom, and that Ofcom may not accept a complaint if the complainant has not made appropriate attempts to resolve problems directly with the subject of the complaint. We do not consider that this is appropriate - there may be valid commercial reasons for not engaging directly with the subject of the complaint and this should not be a barrier for making a complaint to Ofcom.
- 2.2 We note that Ofcom is open to listening to concerns but it will not give a view on the merits of a complaint. It would be helpful if Ofcom were to adopt a similar approach to the CMA, who will provide an initial view as to whether it would be likely to investigate the matter further if an in depth complaint were to be made. This would provide more certainty to the complainant and allow it to assess whether the complaint is worth pursuing. Ofcom also expects at this stage that the potential complainant provide as much evidence as possible. It would be helpful to clarify what kind of evidence Ofcom would expect and the level of detail.

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