

UK Cartels

Maintaining the Balance between Effective
Enforcement and Fair Procedure

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Outline

- Access to the CMA's file – new streamlined process
- Claiming legal privilege
- Sectoral regulators – cross-disclosure of evidence
- Section 50 – “seize and sift” powers
- Compulsory interviews
- CMA's future enforcement powers and rights of defence

Access to the CMA's File – New Streamlined Process

- CMA's preferred process:
 - provision of documents directly referred to in the SO; and
 - schedule containing a detailed list of documents on the CMA's file – key documents selected and redacted for confidentiality
- Who has access to the full un-redacted file?
- Status of administrative documents?
- Extension of time to respond to SO?



Claiming Legal Privilege

- Important to identify legally privileged and confidential documents
- What happens when there is a dispute?
- Independent Counsel Process -> no say on the identity of independent counsel
- Need for full factual explanation -> no sight of CMA's explanation
- Options if outcome disputed:
 - Senior Case Officer
 - Application to CAT for injunction



Sectoral Regulators – Cross-Disclosure of Evidence

FSMA



CA98

- Evidence gathered on a regulatory matter can be used in a competition investigation (and vice-versa)
- Example: FCA
 - S. 394 FSMA - CA98 materials disclosable in FSMA case including exculpatory
 - S. 348 FSMA – disclosure of confidential information with consent
 - Disclosable in accordance with FSMA 2000 (Disclosure of Confidential Information) Regulations 2001 (Gateways Regulations)
 - Use of FSMA submissions only to exercise rights of defence under CA98 proceedings
 - Reliance by FCA on FSMA materials to support CA98 findings

“Seize and Sift” Powers

Section 50 Criminal Justice and Police Act 2001



- Use of section 50 powers to supplement section 28(2)(f) powers
- Allows the seizure (or copy) of:
 - any material to determine later whether the document falls within the terms of the warrant where not reasonably practicable to determine this on the premises; and
 - material where it is not reasonable to separate the material which may be covered by the warrant from material which is not, where not practicable to determine on the premises
- Seize and sift powers do not apply to the seizure of legally privileged material

Compulsory Interviews

- Speed
- Attendance of legal advisors?
- Preparation
- Protection against self-incrimination
- Leading questions



CMA's Future Enforcement Powers and Rights of Defence



- CMA seeking powers to impose:
 - turnover-based fines on businesses for non-compliance with CMA's information requests
 - civil fines for providing false or misleading information
- New information gathering powers to respond to digitalisation
- Greater protections for whistleblowers
 - Increased financial compensation
 - Courts to consider if disclosure of whistleblower's identity outweighs the importance of anonymous whistleblowing to competition law enforcement in public interest
- Restricting CAT's review of CMA decisions

Questions?



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