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More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

Breakout session 2 - Requests for Information: Limits and Effectiveness

- Contribution from the United Kingdom –

1. An overview of the CMA's framework for and approach to requests for information

1. The CMA requires a wide range of information to discharge its functions. The availability and receipt of complete and accurate information is crucial to enable it to make evidence-based decisions and generally for the quality and effectiveness of its work. Requests for information are therefore a key tool for the CMA to collect the information it needs to carry out its investigations and market studies.

2. The CMA has formal information gathering powers in respect of all/many of its key functions but it often also relies on the voluntary cooperation of parties to obtain as full a picture as possible and discharge its functions effectively.[1] The CMA can request for information from a range of sources such as the business/es under investigation and/or affected by a market study or investigation as the case may be, their competitors and customers, complainants, and suppliers. A wide range of information can be requested, including market information, internal business reports, internal data and copies of emails; in other words, any information that the CMA considers may be of relevance for the investigation/project concerned.

3. The CMA's formal gathering powers are governed by different legal instruments depending on the specific function (e.g. Section 26 of the Competition Act 1998 (CA98) for antitrust investigations; Sections 109 and 174 of the Enterprise Act 2002 (EA02) for mergers and market studies/market investigations respectively[2]) but they all similarly provide the CMA with powers to require the production of documents and information by a specified time and in a specified form and include the power to require explanation of certain documents and to produce information that is not already written down.

4. The information request will tell the recipient in what context the information is being requested (i.e. CA98 or consumer investigation, a merger case, a market study or a market investigation), specify or describe the documents and/or information that the CMA requires, give details of where and when they must be produced, and set out the offences and/or sanctions that may apply if the recipient does not comply.

5. As indicated earlier, the CMA can use both formal and informal requests for information across its tools and the practice may be more or less varied depending on the specific tool and the circumstances of the case. However, at a general level, it can be observed that the CMA tends to use its formal powers in all its functions to a greater extent.

[1] See footnote 1 above.

[2] See relevant tool specific guidance for more details in the specific areas of work, all available on the CMA page on www.gov.uk.

Also, in some instances the CMA receives requests to do so by recipients of the requests themselves as an alternative to providing information voluntarily, possibly in order to avoid breaching a confidentiality obligation (on the basis that they were compelled to provide such information).

6. By way of indication, in CA98 investigations the CMA is more likely to use formal information requests (so-called section 26 CA98 notices), including to take into account the Competition Appeal Tribunal (CAT)'s case law regarding the quality of evidence and whether it is appropriate to rely on it.[3] Similarly, in its consultation in March 2018 on a draft "*Guidance on requests for internal documents in merger investigations*", the CMA has indicated that its formal s109 powers (as opposed to its voluntary powers) are likely to be used as standard in future merger investigations in both Phase 1 and Phase 2 where internal documents are requested from main parties. That said, the CMA will typically request information from third parties informally in the first instance. S109 notices will be used where third parties fail to respond to informal requests and the evidence requested is material to the CMA's investigation.[4]

7. The CMA adopts the same approach to using these information gathering powers across its functions. This is set out in published guidance.[5] In short, since the CMA recognises that when making RFIs, these will have an impact on others (whether they are businesses involved in its cases and/or third-parties, consumers or organisations), when formulating its RFIs the CMA endeavours to focus them on the information which the CMA needs for its purposes, thus avoiding, as far as possible, imposing unnecessary burdens on such persons and considering the need for the CMA to operate efficiently and effectively.[6]

8. In practice, the CMA seeks to achieve these aims by:

- Considering the information required for the CMA's purposes
- Preparing clear and focused information requests
- Addressing requests to those best placed to provide the information
- Where practicable and appropriate, giving advance notice of the request to the intended recipient/s prior to sending the request and, in certain circumstances, sharing a draft of the request in order to take into account comments on the scope of the request, the availability of the information requested, and the form in which it is held and may be provided
- Setting a realistic and reasonable deadline for responses that takes into account at the same time how soon the CMA requires the information (having regard to

[3] See for instance London Metal Exchange v OFT [2006] CAT 19, paras 131 to 142 and the CAT's Phenytoin judgment, paras 83-85.

[4] See paragraphs 15 and 16 of the draft "*Guidance on requests for internal documents in merger investigations*" consulted upon in March 2018 (https://www.gov.uk/government/consultations/draft-guidance-on-requests-for-internal-documents-in-merger-investigations).

[5] For the CMA's general approach to requests for information, see *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6, chapter 4), January 2014. See relevant tool specific guidance for more details in the specific areas of work, all available on the CMA page on www.gov.uk.

[6] Ibidem.

administrative or statutory timetable of the case and the impact of any delay in receiving the information) and the likely timescale in which the intended recipient/s will be able to provide the information, considering, among other things, the type and quantity of the information required.

9. In its experience to date, the CMA has found that these factors may be equally applicable to most, if not all, of its information requests (voluntary and/or compulsory) across its functions, whether at the outset of a case/project ow while this is ongoing. Applying these considerations has generally helped the CMA maximise the effectiveness of requests for information. In practice, it has helped in ensuring constructive engagement with intended recipients while minimising the burden on both the recipient/s in producing responses and on case team/s to having to deal with amounts of information that are too large. It has also helped reduce the amount of unnecessary or irrelevant information that case teams have to deal with, which is one of the main risks with information requests (and which can generate significant resourcing issues during the case, particularly where access to file is required). A badly drafted information request will be, at best, unhelpful and cause undue delays in the project or investigation; at worst, the information request could be found to be unenforceable and also risk the CMA taking decisions based on incomplete information. Moreover, it can result in poor cooperation as well as adversely impact on the CMA's reputation.

10. Information requests are generally sent in an electronic format but case teams should consider the most appropriate way in which these should be sent and also to whom according to circumstances of the case, including whether the company concerned has a presence in the UK.

11. Although to date the CMA has not had to deal with many instances of non-compliance with its information gathering powers, under the CA98 and the EA02, the CMA also has parallel powers to impose administrative penalties of such amount as it considers appropriate on persons who fail, without reasonable excuse, to comply with its information gathering powers.[7] As for the exercise of these information gathering powers themselves, the CMA has a consistent approach across its functions when considering and imposing administrative penalties for non-compliance with them and which is set out in published guidance.[8]

12. In brief, when considering whether and in what amount administrative penalties should be imposed, the CMA will do so on a case-by-case basis having regard to a number of factors in the round, including the nature and gravity of the failure, any adverse effects on the CMA's investigation, whether the failure was significant and/or flagrant, the reason provided by the person concerned for the failure to comply and administrative and financial resources available to the latter. In making this assessment, the CMA endeavours, on the one hand, to achieve its own policy objectives of incentivising compliance with its investigatory (and interim measures) powers and deterring future failures to comply, while not being disproportionate or excessive taking into account all the circumstances of the case.[9]

[7] Section 40Aof the CA98 in respect of competition act investigations; and sections 110 and 174A of the EA02 in relation to mergers and markets investigations.

[8] See *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4, January 2014)

[9] Ibidem (CMA4), see in particular chapter 4.

13. Certain criminal offences also operate alongside these enforcement powers when a person intentionally or recklessly alters, suppresses or destroys any document which he/she has been required to produce; or knowingly or recklessly provides false or misleading information and these can be punishable by a fine and/or imprisonment.[10] In this context, it should also be noted that although there is no obligation for a person to respond to an informal request for information, the offence under the above-mentioned acts of providing false or misleading information to the CMA would still apply to any response provided. In this context, it is worth noting also that if a person does not respond to an informal request, the CMA would consider whether it was appropriate to issue the same request under its formal powers.

14. To date, the CMA has used its fining powers for failure to comply with its requirements to produce information in a CA98 case (*Phenytoin unfair pricing case*[11] in 2016[12] - 'the Phenytoin case') and in a merger case (*Anticipated acquisition by JUST EAT plc of Hungryhouse Holdings Limited*[13] in 2017[14] – 'the Hungryhouse case'). The CMA's experiences in these cases is discussed in some detail later in this paper.

2. Requests for information: Lessons and practical take-aways to improve effectiveness and minimise limitations

15. Requests for information - issued informally or using the powers available to the CMA – are probably the tool that the CMA has used most extensively to gather the information it needs for discharging its functions. On the whole, this has proven an effective tool across functions and, as indicated earlier, the CMA has not had to deal with many significant instances of reluctance and/or failure to comply (even where informal requests have been used), or of provision of misleading or inaccurate information.

16. However, over the years and its its cases (and one would also expect for other competition authorities), the CMA has been confronted by several issues concerning requests for information (and which have proved to be similar across its functions), namely: the volume of information received in response to a request, including often irrelevant material; their use as delaying tactics by some recipients; claims that wrong information or documents had been provided or were not provided as the questions were unclear or were misunderstood; etc. The CMA has therefore had the opportunity to learn from these experiences and develop and refine its approach to deal with these so as to minimise the risk of them arising again.

17. The main learning from its cases, regardless of their nature (e.g. antitrust, merger, market, consumer), has been that, while the appropriate scope and nature of a request for

[10] Sections 43 and 44 CA98 and sections 110(5) and 117 of EA02 (mergers) and section 174A (4) EA02 (markets)

[11] Case CE/9742-13 see here https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products#penalty-notice.

[12] See here https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products#penalty-notice.

[13] Case ME/6659-16 https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry

[14] Hungryhouse penalty notice see here https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry#penalty-notice

information will be determined in light of the circumstances of each case in order to ensure that the request is appropriate and proportionate, a request for information needs to be focused and well-prepared to ensure it will be effective in obtaining the information and documents which case teams need. This in turn also helps to minimise the burden on the intended recipient (particularly where, in many cases, third party recipients are unlikely to have legal advisers assisting them in preparing a response) and is likely to make it easier for case teams to process the response. In this respect, it is therefore crucial to always keep the purpose of the information request in mind and draft the questions accordingly, bearing in mind the objectives of the investigation or project, any evidence gaps and how the information sought would help build/support the case and/or contribute to the project. The key is therefore to ensure the request is formulated based on the need to know as opposed to the interesting to know.

18. Being clear (and maintaining clear records) on how an information request contributes to a case is also important to show, including in court if needed, how the information/evidence received in response to a certain request does not have value only on its own but also as part of an overall evidence gathering strategy and narrative, to which it contributes to add evidentiary strength/value. In this regard, the CMA always treats information obtained with care, in particular but not only when using its formal information gathering powers, and will look for corroboration with other evidence wherever possible, before deciding on the weight to place on responses in terms of reliability and probative value.

19. In addition to the purpose of the request, and with a view to ensuring that a request for information is acted upon and understood correctly and hence minimise the risk of obtaining a response that is insufficient or irrelevant, it is important that case teams formulate questions so that they are easy to understand and interpret, avoiding language that is too legalistic, and questions that are too lengthy or convoluted. Questions that are too wide and/or too narrow should also be avoided: the former so to reduce the risk of information overload and placing too onerous a burden on the intended recipient/s; the latter because they may lead to the respondent omitting documents from an important period and/or certain correspondence or agreements which may be of relevance. A badly drafted information request will be, at best, unhelpful and cause undue delays in the project or investigation as the case may be; at worst, it can result in poor cooperation as well as adversely impact on the CMA's reputation.

20. In its experience, the CMA has also learnt the importance of having at least some knowledge of the market/industry concerned as well as of the companies to which requests will be addressed and the way in which they conduct their commercial operations and/or take decisions. This will assist drafting appropriate and realistic/sensible questions which are less likely to be misunderstood or ignored, and/or seeking documents which are more likely to be available or, if not already available, can easily/reasonably be produced. For example, when dealing with online companies in some of its recent cases, the CMA has learnt that such companies, especially if young and more technology-based, may not always have in place clear processes for taking formal decisions and/or keep extensive records in structured databases. So, where appropriate, the CMA may for instance require the production of chats on instant messaging systems.

21. Similarly, it is important to consider the size of the businesses to which requests for information are sent. If within the same case/project there is a mixture of large and small companies, it may be worth considering whether separate questionnaires should be sent, taking into account the likely different level of sophistication, resources, availability of

legal representation, etc. The CMA adopted this diversified approach in its Care Homes market study[15] in the context of which it sent out voluntary requests for information to the sector but sent smaller companies a slimmed down version of the questionnaire sent to the bigger companies, with a view to ensuring that smaller businesses would not find the task too burdensome or difficult and hence would decide against replying. Although the response rate from the smaller businesses was still lower than that from the big companies, the CMA found that sending the two different questionnaires had been the appropriate and most helpful approach to take as it nonetheless ensured a reasonable initial response. To address the issue of the lower response rate from smaller businesses, the CMA organised roundtables through the main trade associations and found that the questionnaires previously sent – even if unanswered – helped to facilitate the discussions and understanding of the issues concerned at the roundtables.

22. In relation to the importance of knowing the market/sector concerned to ensure formulating effective requests for information, the CMA has noted that in many of its cases and projects, wherever practicable and appropriate, organising a call or a meeting to discuss the request with the intended recipient/s prior to sending the request or just after has proven helpful. This is particularly so to get an understanding of the availability of the information requested and the form in which it is held and may be provided as well as to discuss realistic timescales for a response. It has also helped in minimising the risk of misunderstanding as to the interpretation of questions as the meeting/call has provided the opportunity for intended recipients to ask clarifications and get answers straightaway. In this context, the CMA notes its general practice to share a draft version of the request with the intended recipient/s (whenever there is no risk of prejudice to the investigation) so to ensure the request was formulated appropriately and understood correctly and also to help the recipient to organise its resources so to be able to respond on time. When this occurred, it was well received by those involved and facilitated a smooth and timely response.

23. One of the most recurring issues to deal with in connection with information requests is that respondents frequently request extensions of time. In order to try to manage this risk, as indicated earlier, the CMA tends to discuss the request, including the issue of timing with the intended recipient/s in advance so to ensure that a realistic timescale for a response is agreed. However, in its experience, the CMA has found that this may not always be enough or be possible. In some cases, especially when the request is extensive (and there is no risk of concealment of information/evidence), the CMA tends to give advance notice that a request is about to be issued so that intended recipients can plan their resources accordingly. Another option that the CMA has sometimes offered is to set different deadlines for different questions/parts of the request, taking into account the type, availability and quantity of information required and also, where appropriate, the size of the respondent (and hence likely resources available to them). When these options have been given, unless a good reason is provided, case teams may be less likely to agree to an extension, particularly in mergers and markets cases where the CMA is subject to statutory deadlines.

24. While the 'techniques' described so far have generally proved effective in the CMA's experience to manage and mitigate some of the drawbacks and risks inherent in using information requests, the CMA has also found it useful that it has been given formal powers to sanction non-compliance with its information gathering powers and the provision

[15] See https://www.gov.uk/cma-cases/care-homes-market-study

of false or misleading information or document destruction.[16] An overview of these is provided earlier in the paper. In the last couple of years, the CMA has used its formal powers to impose administrative penalties for non-compliance with its information requests in two cases: the CA98 Phenytoin case and the Hungryhouse merger case. A brief summary of these cases is set out below.

3. The CMA's penalty notices in the CA98 Phenytoin case and Hungryhouse merger case

3.1. Penalty notice under section 40A CA98 in the CA98 Phenytoin case

25. Under section 40A CA98, the CMA has powers to impose financial penalties on persons who fail without reasonable excuse, to comply with requirements imposed on them under its investigatory powers (i.e. sections 26, 26A, 27, 28 or 28A CA98). These include failures to answer questions asked by the CMA, failures to produce documents required by the CMA or to comply with the CMA's powers to enter premises (either with or without warrant). They also include failure to provide adequate or accurate information in response to a request.

26. Under section 40A CA98, the CMA may impose such administrative penalty as it considers appropriate, subject to the statutory maxima specified by order of the Secretary of State. The current maxima specified by the Competition and Markets Authority (Order) 2014 are as follows: £30,000 fixed amount; £15,000 (daily rate) and £30,000 and £15,000 (fixed amount and daily rate together). When reaching decisions regarding enforcement action for failure to comply with its investigatory powers, the CMA must have regard to the "*Administrative penalties: Statement of Policy on the CMA's approach*" (CMA4, the 'Administrative Penalties Guidance').[17]

27. Following careful consideration of all relevant circumstances of the case and having had regard to the Administrative Penalties Guidance, in April 2016 the CMA published a notice of a penalty imposed on Pfizer under section 40A CA98 for a failure to comply, without reasonable excuse, with a s26 CA98 request for information in the context of the then ongoing CMA investigation under Chapter II CA98 and Article 102 TFEU into the (alleged) conduct of Flynn Pharma and Pfizer for unfair pricing for phenytoin sodium capsules in the UK.[18] The CMA imposed a penalty of £10,000 on Pfizer. This was the first time that the CMA used its statutory powers to impose a fine for non-compliance with a formal information request.

28. The full reasoning is set out in the published notice. However the key issue was that this was a flagrant breach by Pfizer, without any justification for why its statutory deadline was not complied with in relation to the response to one particular question in the s26 CA98 notice. The specific question concerned asked for further information in support of a pre-prepared statement made by Pfizer at the oral hearing.

29. Based on the evidence available to the CMA it was clear that Pfizer should reasonably have been able to respond at any point prior to the deadline, given in particular that the question asked for further information of a statement and data already provided by

[16] See earlier footonote 14 and paragraphs 17-19.

[17] See paragraph 17 and 18 in the paper and footnote 15.

[18] CMA Case CE/9742-13

Pfizer at the oral hearing; but had failed to do so. Pfizer was clear about what it was required to do. The CMA's question was simple and well understood as demonstrated, inter alia, by the fact that Pfizer didn't ask for any clarification.

30. Pfizer did raise an unsubstantiated reason for not responding around 30 minutes before the deadline expired. This reason was that 'it needed more time to verify the data'. The CMA considered that this statement was not sufficient to explain why Pfizer was unable to provide a response by the deadline of 26 February.

31. Pfizer subsequently explained that the representation made during the oral hearing on 21st January was based on an internal estimate and 'there is no additional internal data'. In the CMA's view this response could have been provided at any time prior to the deadline.

32. In light of all of the above, the CMA considered that it was important to use its powers and impose an administrative penalty with a view to highlighting the importance of complying with the CMA's information gathering powers and the seriousness of breaches for non-compliance as well as the CMA's readiness to use such powers as and when appropriate.

33. The penalty was set at the lower end of the statutory maximum of £30,000. This penalty took account of a number of factors including that Pfizer's failure to comply - while still of some prejudice to the investigation - was, in itself, unlikely to have a significant adverse impact of the overall investigation.

3.2. Penalty notice under section 110 EA02 in the Hungryhouse merger case[19]

34. Under section 110(1) EA02 the CMA may impose a penalty of such amount as it considers appropriate (in accordance with section 111 EA02) on a person who has, without reasonable excuse, failed to comply with any requirement of a notice under section 109 EA02. These include failures to attend interviews or meetings with the CMA, failures to provide evidence, or failures to produce documents required by the CMA. Penalties may also be imposed on persons who intentionally obstruct or delay another person in copying documents produced to that other person.[20]

35. The CMA may impose such administrative penalty as it considers appropriate, subject to the statutory maxima specified by order of the Secretary of State. The current maxima specified by the Competition and Markets Authority (Order) 2014 are as follows: £30,000 fixed amount; £15,000 (daily rate) and £30,000 and £15,000 (fixed amount and daily rate together). When reaching decisions regarding enforcement action for failure to comply with its investigatory powers, the CMA must have regard to the "*Administrative penalties: Statement of Policy on the CMA's approach*" (CMA4, the 'Administrative Penalties Guidance').[21]

36. On 22 November 2017, the CMA imposed a fixed penalty of £20,000 on Hungryhouse for failure to comply with a requirement imposed on it under section 109

[19] CMA merger case ME/6659-16

[20] Sections 110(1) and (3) EA02 (mergers) and 174A(1) and (3) EA02 (markets).

[21] See also paragraphs 17 and 18 in this paper and footnote 15.

EA02, without reasonable excuse[22] in the context of the Just Eat/Hungryhouse merger inquiry. It was the first such fine in a CMA merger case.

37. More specifically, Hungryhouse failed to provide 49 unique documents responsive to a first s109 EA02 notice dated 31st May 2017 and had no reasonable excuse for its failure to do so. The CMA considered that it was important to use its powers as Hungryhouse did not have a reasonable excuse for its failure to comply with the s109 EA02 notice while compliance with its information gathering powers is crucial for the CMA to be able to discharge its functions effectively and in an informed manner.

38. The CMA considered that Hungryhouse had no reasonable excuse for its failure to comply for the following reasons:

- The information gathering process it followed was not robust enough and failed to identify responsive documents. Hungryhouse should have been aware that this was a substantial risk.
- Hungryhouse made no attempt to discuss the process, the response or concerns it may have has as per scope or practicality to respond with the CMA despite having been provided with a draft.
- Key emails between senior employees/board were omitted. Hungryhouse should have been aware that the search processes had resulted in the omission of these documents. Also, it is reasonable for the CMA to expect main parties to merger investigations to prioritise the assessment, and production, of responsive email communications from senior management in response to information requests.
- Hungryhouse should have allocated sufficient resources to comply with the notice.
- The fact that Hungryhouse provided documents in response to later information requests does not excuse the failure to provide them in response to the first notice.

39. The CMA considered that a penalty of £20,000 was appropriate and proportionate in this case because:

- The failure to comply had an adverse impact on the enquiry in terms of cost and unnecessary duplication of work;
- Contributed to the extension to enquiry timetable;
- The failure to comply was significant and gave rise to the risk that a decision could have been taken without key evidence
- The imposition of an administrative penalty under s110(1) EA02 was critical to achieve deterrence specifically in this case and more widely
- The financial resources available to Hungryhouse are such that a penalty of £20,000 (which was below the statutory maximum of £30,000 for a fixed amount) was not disproportionate and was appropriate.

40. The penalty on Hungryhouse (as with the one of Pfizer) has emphasised the need and duty for parties to respond comprehensively and on time to CMA's information requests and the need for parties to raise any concerns regarding the scope of an information request, the timescale for responding or the processes involved for identifying responsive

[22] Hungryhouse penalty notice see here https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry#penalty-notice.

documents in advance of the deadline. The penalty notice raised a lot of interest among law firms and the press reported extensively on it.

41. Since these two penalties have been imposed, the CMA has observed that recipients of information requests across its functions are more mindful of complying with deadlines and of ensuring that they have understood correctly what is requested of them and are in a position to provide it and, if not, take adequate steps to discuss any difficulty with the CMA in a timely manner and well in advance of the deadline.