

## RESPONSE TO CMA CONSULTATION: GUIDANCE ON THE CMA'S INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES

*Baker McKenzie welcomes the opportunity to comment on CMA's consultation on Guidance on the CMA's investigation procedures in Competition Act 1998 cases ("Draft Guidance"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK competition law. We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.*

### **1. Do you agree with the proposed changes to the Current Guidance on complaint handling (described in Chapter 3)? Please give reasons for your views.**

1.1 Our experience so far has been that the process for handling complaints has not been optimal. The process is not very transparent and the levels of engagement are low. This has been the case even when our client had the status of a Formal Complainant. We believe therefore that the CMA and sectoral regulators need to improve the way that they deal with complainants in the round, whether there is a two tier system or not.

### **2. Do you agree with the proposed changes to the Current Guidance on information handling (described in Chapter 4)? Please give reasons for your views.**

2.1 We broadly agree with the CMA's approach on a streamlined access to file according to which the CMA provides to the parties copies of the documents that are directly referred to in the Statement of Objections and a schedule containing a detailed list of all the documents on the CMA's file. The CMA notes in para 4.6 of the Consultation Document that it will provide full access to all key and non-key documents if requested by the parties. We agree with that. The parties should have an automatic right to inspect the full file (or any parts of it-not just key documents) if they wish to do so and the CMA should not be able to refuse such requests. However we are troubled by the fact that the CMA has not included such a commitment in its Draft Guidance. We are further troubled by the fact that the CMA is saying in para 11.21 of the Draft Guidance that '*Businesses will have a reasonable opportunity to inspect additional documents listed in the schedule upon a request indicating why the document(s) are being requested*'. Why does the CMA want the parties to provide such reasons? If the CMA envisages that there might be instances where such requests are denied, then we would strongly oppose that as such an approach would encroach on the parties' rights of defence. If, on the other hand, the CMA intends to give access to these documents in all instances (as it should) then why do the parties need to provide reasons for such requests? This serves no purpose. It simply creates unnecessary burdens for businesses. For these reasons we propose that it should be made clear in the Draft Guidance that the parties will always be granted access to any document included in the file if they wish to. The CMA should also drop the requirement for the parties to provide reasons as to why they want to inspect additional documents.

2.2 We welcome the fact that the CMA has modified the Draft Guidance to remove the requirement to provide non-confidential versions at the same time as the original information and documents are provided.

2.3 We suggest that the CMA should retain the current deadline available to the parties for providing a non-confidential version of their response to the SO which is currently four weeks from the date of submitting the original response. The CMA in its Draft Guidance, in para 12.4, proposes to reduce this to two weeks. We disagree with that. It usually takes the CMA

months to prepare the SO and the parties often have limited amount to respond, which means that they will focus on their substantive representations before they start preparing a non-confidential version of their response. Given how work is sequenced in practice and based on our experience, we consider that a deadline of two weeks will be too short and will impose undue burdens on the parties without providing any meaningful reductions to the CMA's timeline.

- 2.4 We suggest that the CMA retains the current deadline available to the parties for making representations on the confidentiality of information contained in the final decision. In its current guidance the CMA says that the deadline for such representations will normally be four weeks from the date of the issue of the decision. The Draft Guidance, in para 13.13, simply notes that these representations will be gathered either shortly before or after the infringement decision is issued to the addressee. We disagree with this approach as it affords too much discretion to the CMA and can impose excessive burdens on the parties. We would like to note that after the decision is issued the parties must concentrate their efforts on going through the decision and deciding whether to appeal and on what grounds. Excessively short deadlines in respect of making representations on the confidentiality of information contained in the final decision may impair their ability to do that effectively.

**3. Do you agree with the proposed changes to the Current Guidance on interim measures (described in Chapter 5)? Please give reasons for your views.**

- 3.1 We have no comments.

**4. Do you agree with the proposed changes to the Current Guidance on engagement with the parties (described in Chapter 6)? Please give reasons for your views.**

- 4.1 The CMA should retain the minimum time that is granted to the parties for responding to an SO. The current guidance explains that the deadline for providing written representations on a SO will usually be at least 40 working days and not more than 12 weeks. The Draft Guidance, in para 12.2, retains the maximum of 12 weeks but removes the minimum of 40 days. We disagree with such an approach as it affords the CMA too much discretion and may result in deadlines that impose an excessive amount of burden to the parties. The SO is usually a lengthy complex document and when one takes into account the access to file process, we would strongly advocate that 40 working days as a minimum is not excessively long and should be retained.

- 4.2 In para 12.2 of the Draft Guidance the CMA notes that any requests for an extension to the deadline should be communicated to the CMA at the time the deadline is set and must specify the reasons why an extension is required. This is unreasonable. The CMA surely appreciates that it is not always possible to foresee at the outset circumstances which might justifiably necessitate a request for an extension. This part of the guidance should be dropped.

**5. Do you agree with the proposed changes to the Current Guidance on commitments (described in Chapter 7)? Please give reasons for your views.**

- 5.1 We have no comments.

**6. Do you agree with the other proposed changes to the Current Guidance. Please give reasons for your views.**

- 6.1 We agree.

**7. Are there other aspects of our CA98 investigation procedures where you think further changes could be made to enhance the efficiency of our investigations or improve certainty for businesses? Please explain which aspects and why.**

7.1 We have no comments.

**8. Are there other aspects of the Current Guidance which you consider could be streamlined or simplified? Please explain which aspects and why.**

8.1 We have no comments.