HERBERT SMITH FREEHILLS

Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998 (CMA8con)

Response of Herbert Smith Freehills LLP

INTRODUCTION AND OVERVIEW

1.1 Herbert Smith Freehills LLP is grateful for the opportunity to respond to the consultation CMA8con *Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998*[1] ("**Consultation Document**").

1.2 We welcome the initiative to revise the current documents and publish *Draft Rules of Procedure: Competition and Markets Authority Competition Act 1998 Rules* ("**Draft Rules**") and *CMA draft guidance: Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* ("**Draft Guidance**"), to reflect the changes made by the Enterprise and Regulatory Reform Act 2013 ("**ERRA13**"), and to set out the procedures and policies of the Competition and Markets Authority ("**CMA**") in respect of settlements.

1.3 We do, however, have a number of concerns about some aspects of the CMA's proposed procedures, in particular in relation to the new interview power under Section 26A Competition Act 1998 ("**CA98**") (including its use during the course of inspections), settlements, and interim measures. These are highlighted below, together with other comments on the Draft Guidance and Draft Rules.

1.4 This response is made in addition to and should be read in conjunction with our response of 19 June 2012 to the previous consultation by the Office of Fair Trading ("**OFT**") *Review of the OFT's investigation procedures in competition cases - a consultation paper* (OFT1263con2 of March 2012).[2]

1.5 Consistent with our comments within that response, we note that only the application of the CA98 investigation procedures by the CMA in practice will highlight to what extent the procedures are effective in ensuring an appropriate balance between objectives such as increasing the timeliness of investigations and public accountability, increasing the robustness of CA98 investigations and decision making, whilst always respecting the rights of defence of the parties to the investigation and ensuring procedural fairness of CA98 investigations.

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1 CMA8con, September 2013.

2 Available here: http://www.oft.gov.uk/shared_oft/consultations/CA98-IP-responses/HerbertSmith.pdf.

1.6 We therefore believe it is essential that, once adopted, the Draft Guidance is kept under regular review, and that the necessary steps are taken by the CMA to amend procedures to address any shortcomings in a timely manner.

1.7 The comments contained in this response are those of Herbert Smith Freehills and do not represent the views of our individual clients.

QUESTIONS

1. QUESTION 1: DO YOU AGREE WITH THE LIST IN ANNEXE A OF THE DRAFT CMA CA98 GUIDANCE OF EXISTING CA98-RELATED OFT GUIDANCE DOCUMENTS THAT THE TRANSITION TEAM PROPOSES TO PUT TO THE CMA BOARD FOR ADOPTION?

1.1 In general, we agree with the proposed list of existing OFT guidance documents set out in Annexe A which will be put to the CMA Board for adoption by the CMA.[3]

1.2 However, we note that Annexe A does not list comprehensively all guidance documents published by the OFT[4] which are relevant to CA98 (for example OFT397 *A brief guide to the role of the OFT in the bus industry*). Whilst some of these documents may be regarded as out of date or as not meriting adoption, these should be included within Annexe A and categorised accordingly, so the status of such documents is clear. This is in particular the case for the section of Annexe A covering cartel investigations under the Enterprise Act 2002 ("**EA02**") which includes some OFT guidance documents relating to cartels, leniency and no-action, but not others (for example OFT1495b *Quick Guide to Cartels and Leniency for Businesses* and OFT 1495i *Quick Guide to Cartels and Leniency for individuals*[5]).

1.3 We also suggest that the guidance documents included in Annexe B of CMA9con *Cartel Offence Prosecution Guidance* which are stated to have been replaced (for example

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3 We would query, however, whether OFT1227 *Drivers of compliance and non-compliance with competition law* constitutes "guidance" which requires adoption.

4 For example at the following pages of the OFT's website: http://www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/publications (which we note in some instances does not appear to include the most recent version of the relevant guidance, or which includes guidance which has been superseded, which is clearly not satisfactory); http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/confess; and http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/guidance-for-directors/.

5 We also note the categorisation of the important guidance document OFT515 *Powers for investigating criminal cartels* as replaced/obsolete, although the no draft revised guidance has been published to date; this requires clarification.

OFT738 *Covert surveillance in cartel investigations* and OFT739 *Covert human intelligence in cartel investigations*) are also included in Annexe A and their status clarified.

1.4 We note that the original text of the adopted guidance will be retained unamended and will not reflect the changes implemented by the ERRA13, and that this will not reflect the Draft Guidance or Draft Rules, but that instead must be "read in light" of these. This is not satisfactory for anything other than a very short transitional period, in particular in relation to those guidance documents which are aimed at businesses, who may not be aware of the changes. We consider that the CMA should endeavour to produce, as soon as possible, an updated version of those guidance documents which, as a minimum, reflect the substantive legal changes implemented by the ERRA13 and the replacement of the OFT with the CMA.[6]

1.5 For example OFT404 *Powers of Investigation* requires amendment as a matter of urgency to reflect the new powers granted to the CMA by the ERRA13, as well as the ability of the Competition Appeal Tribunal ("**CAT**") to issue warrants to enter premises (as discussed within the Draft Guidance).

1.6 Similarly, OFT407 *Enforcement* and OFT 451 *Involving third parties in Competition Act investigations* require amendment to reflect the revisions made by the ERRA13 to the test for the imposition of interim measures, and OFT423 *Guidance on the appropriate amount of a penalty* and OFT407 *Enforcement* require amendment to reflect the new guidance on settlements set out within the Draft Guidance.

1.7 In the interim period we would suggest that it is made clear on the relevant section(s) of the CMA's website (and ideally within the documents themselves, such as a watermark or comment "stamped" within the header) that these are subject to the changes made by the ERRA13 and the Draft Guidance.[7]

1.8 Finally, in relation to the proposed adoption of *Short-Form Opinions – the OFT's approach*, we assume that in light of the comments within in section 4 of the Consultation Document this will shortly be replaced, in order in particular to reflect the fact that the Short-Form Opinion approach will now be available in respect of prospective vertical agreements.

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6 The same comment applies equally in relation to the guidance in respect of areas other than CA98, as set out in CMA12con *Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance* (to which we have not responded separately).

7 The same comment applies equally in relation to the guidance in respect of areas other than CA98, as set out in CMA12con *Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance* (to which we have not responded separately).

2. **QUESTION 2: DO YOU CONSIDER THAT THE PROPOSED AMENDMENTS TO THE DRAFT CMA CA98 RULES ARE CLEAR AND APPROPRIATE? PLEASE GIVE REASONS FOR YOUR VIEWS**

2.1 We consider that Rule 3(2) (and paragraphs 11.27-11.31 of the Draft Guidance) should specify that the "separate relevant person" who will take these decisions (i.e. the Case Decision Group ("**CDG**")) should not be otherwise involved in the investigation, nor in any other investigation which raises similar issues.

2.2 Similarly, Rule 6(6) on the chair of the oral hearing and Rule 8(2) on the Procedural Officer (and the relevant sections of the Draft Guidance) should in our view also specify that these individuals should not be involved in any other investigation which raises similar issues.

2.3 We believe that the CMA should consider amending Rule 6 to reflect paragraph 12.13 of the Draft Guidance and specify that the Rule 3(2) decision maker (i.e. the CDG) should be in attendance at the oral hearing, and to reflect paragraph 12.12 of the Draft Guidance and specify that oral hearing is take to place at a time following the submission of written representations on the Statement of Objections (in accordance with the time period specified in Rule 6(c)) and a reasonable time period within which the CMA has reviewed these submissions.

3. **QUESTION 3: DO YOU CONSIDER THAT THE PROPOSED APPROACH TO INTERVIEWING WITNESSES IS CLEAR AND APPROPRIATE?**

Scope of obligation – information

3.1 Paragraph 6.19 of the Draft Guidance implies that individuals will be expected to locate and provide documents and other written information. This does not appear to be what is envisaged by new Section 26A CA98, given in particular the already wide power to require documents and information under Section 26 CA98, which is the proper route for the CMA to obtain documents and other written information. Individuals cannot be expected to carry out searches for documents in response to questions under Section 26A CA98, in particular given the resources that this involves.

3.2 We assume that this paragraph is actually intended to make it clear that the individual will need to answer questions notwithstanding the fact that information relating to the subject matter of the CMA's questions may already have been included in documents provided by or obtained from the undertaking under investigation.

3.3 We therefore consider that this should be made clearer within the Draft Guidance.

Scope of obligation – individuals

3.4 We note with concern the reference within footnote 81 of the Draft Guidance on the CMA's interpretation of the meaning of an individual having a "connection with" an undertaking under investigation for the purposes of Section 26A CA98 to the CMA's view that this includes "*professional advisers or any other person who has advised the business*".

3.5 In our view the meaning of "connection with" as set out within Section 26A(6) CA98 cannot be taken to have been intended to extend to the professional advisers of the undertaking concerned, such as legal advisers and economic consultants. There was no suggestion during the legislative passage of the ERRA13[8] of such a wide interpretation.

3.6 Moreover, we believe that if the CMA were to utilise its compulsory interview power to question the undertaking's professional advisers, in particular legal advisers (notwithstanding the protection of privileged communications under Section 30 CA98), this would unfairly limit the undertaking's ability to obtain professional advice. In addition, this may lead to a conflict with the professional obligations of the undertaking's advisors.

Notice requiring an individual to answer questions

3.7 In relation to paragraph 6.22 of the Draft Guidance, the formal notice should also make it clear that a legal advisor may be present, consistent with the position set out in paragraph 6.28 of the Draft Guidance. We believe that the notice should also refer to the relevant provisions of Section 30A CA98. Such a notice should also give details of the persons with whom queries can be raised.

3.8 We consider that the Draft Guidance should make clear the position as to the privilege against self-incrimination in this context[9], and that the formal notice should reflect this.

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8 Nor within Government in *Growth, competition and the competition regime: Government response to consultation* (March 2012).

9 Reflecting the OFT's position as outlined by the Government in *Growth, competition and the competition regime: Government response to consultation* (March 2012): "*…the OFT recognises, as reflected in its current guidance on powers of investigation, that such a power could not be used to compel answers to questions where that might amount to an admission of an infringement of competition law by an undertaking…As the OFT has recognised, it would need to take great care when asking oral questions to ensure that the privilege against self-incrimination is fully respected, just as it does when drafting section 26 notices*". We note that paragraph 7.4 Draft Guidance refers to requests to/answers from businesses, and therefore it is not clear that this paragraph is intended to extend to exercise of the new Section 26A CA98 power.

3.9 Although Section 26A CA98 requires that a copy of the formal notice is provided to the undertaking under investigation where the relevant individual has a "current connection" with the undertaking, we consider that the CMA should also provide such notice where the connection is not current (unless to do would risk prejudicing the investigation). The rationale and reasons for it being important that notice is provided to the undertaking in the case of current connections apply equally in the case of non-current connections, for example: the undertaking may be willing to provide funding for legal assistance for the individual; it is important for the undertaking to be able to make confidentiality submissions in respect of information provided by the individual (see below); and this is important to enable the undertaking to understand the investigation and exercise its rights of defence. Moreover, in particular in relation to non-employees such as consultants and contractors, it may not always be straightforward to determine clearly whether a connection is current or not.

Conduct of interviews – inspections

3.10 Paragraphs 6.25-6.26 of the Draft Guidance appear to imply that the CMA envisages utilising its Section 26A CA98 powers during inspections of premises.

3.11 This is in contrast to the OFT's current approach in relation to its powers to question individuals under the EA2002, in relation to which it has stated[10] that "*officers will not generally conduct interviews under caution or using the compulsory powers of investigation in the Enterprise Act during the course of a search under warrant*".

3.12 We consider that a similar approach should be adopted in civil cases, in particular given the stated intention underlying the introduction of the Section 26A CA98 power was to mirror the criminal provisions under the EA2002.[11] As in criminal cases, utilising these powers routinely during inspections would undermine the protections available to the individual and the undertaking under investigation, for example given that during an inspection: it may be more difficult for the individual and the undertaking to access legal advice; there may be greater difficulties in ensuring that the interview is properly recorded and transcribed; this may undermine the undertaking's rights of defence, for example where the individual concerned is important to the supervision of the inspection; and the

10 OFT407 *Enforcement.*

11 See *Growth, competition and the competition regime: Government response to consultation* (March 2012). This consultation response also stated that: "*…the power proposed is simply to allow the CMA to obtain evidence from individuals in antitrust cases orally rather than in writing*". It does not appear to have been intended that this power would be utilised routinely in the course of inspections.

circumstances of the inspection may be such that the interview is conducted under unfair pressure.

Conduct of interviews – legal advisers

3.13 We are very concerned by the current wording of paragraph 6.28 of the Draft Guidance and the implication that the default position will be that the undertaking's legal advisor should not be present at the interview (i.e. that the CMA will only permit the legal adviser to be present if it is satisfied that doing so will not risk prejudicing the investigation).

3.14 We consider that the presumption should be that the undertaking's legal advisor can be present, unless the CMA has proper reason to believe that his/her presence will prejudice the investigation.[12]

3.15 As undertakings can only act through their employees/officers, the CMA's current position would interfere with the undertaking's rights of defence if this were not the case.[13] We note that Section 30A CA98 provides that a Section 26A CA98 statement cannot be used in evidence against an undertaking; however, this only appears to apply in relation to "*a prosecution for an offence*", and therefore not to either the imposition of penalties under Section 40A CA98 or indeed to the finding of an infringement under Section 30 CA98 or the imposition of penalties under Section 36 CA98. In addition, Section 30A CA98 provides that statements of the individual can be used for the purposes of the prosecution of an offence against the undertaking under investigation under Section 44 CA98.

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[12] In this context we note with surprise and concern the reference within footnote 88 of the Draft Guidance to the potential for the presence of lawyers acting for the undertaking at an interview to increase the risk of the destruction, falsification or concealment of evidence. We do not consider that this risk would ever arise in practice; legal advisors will in fact be advising the undertaking on its obligations not to destroy, falsify or conceal evidence. We similarly do not believe that there should be concerns about contamination of witness evidence or the reduction of incentives for individual to be open and honest in their accounts as a result of the undertaking's legal advisers being present. However, if there were ever real risks in this regard, then more proportionate methods of dealing with such risks could be put in place, for example the obtaining of assurances from the undertaking and/or its legal advisers.

[13] We note in this regard the statements of the Government in *Growth, competition and the competition regime: Government response to consultation* (March 2012): "*Where…employees or former employees of undertakings under investigation…are being interviewed either they could only be interviewed in the presence of a legal representative of the relevant undertaking or the use to which any self-incriminating replies given at a compulsory interview could be put would be restricted.*" The Government clearly did not regard there to be concerns as a result of the attendance of the legal adviser of the undertaking.

3.16 These concerns are even more acute where the questioning is carried out in the context of an inspection. We note in this respect the usual practice of the European Commission to allow the undertaking's legal advisers to be present when questions are asked during the course of inspections. This is also the usual approach of other domestic regulators, whether during the course of inspections or when such compulsory interview powers are exercised more generally.

Conduct of interviews – records

3.17 In relation to confidential information, we note the CMA will ask the individual to make confidentiality claims. However, the confidentiality of the relevant information will normally be that of the undertaking under investigation. The undertaking should therefore be able to make confidentiality representations in all cases, including where the individual has a non-current connection with the undertaking. No such information should be provided during access to the file, for example, before the undertaking in question has had opportunity to make confidentiality representations and have these taken into account.

4. QUESTION 4: DO YOU AGREE WITH THE PROPOSED APPROACH TO USE OF 'CONFIDENTIALITY RINGS' AND 'DATA ROOMS'?

4.1 As set out in our response of 11 September 2013 to the consultation by the Department of Business, Innovation and Skills on *Streamlining Regulatory and Competition Appeals*[14], earlier and improved disclosure to the parties throughout the administrative process is likely to improve decision making. If the CMA were to better articulate its case and the evidence relied upon at an earlier stage – for example pre-Statement of Objections – this is likely lead to improved engagement with the undertaking(s) under investigation. It is also likely to allow the undertaking(s) under investigation to better respond with relevant factual or expert evidence (reducing the need for such evidence to be produced for the first time on appeal).

4.2 The use of confidentiality rings – and other mechanisms such as data rooms - is one method which can assist in increasing such transparency and engagement (although the Draft Guidance appears to consider the use of such mechanisms at the post-Statement of Objections stage, we would encourage the CMA to also consider their use pre-Statement of Objections in appropriate cases[15]).

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[14] Available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252840/regulatory-and-competition-appeals-consultation-responses-a-h.pdf.

[15] This may also facilitate settlements and/or commitments.

4.3 We note that this will only be effective in doing so if the disclosure within the confidentiality ring / through the data room is meaningful and allows the parties or their advisers to properly assess and respond to the material in question. We refer in this regard to the recent judgment of the CAT in *BMI Healthcare Limited, HCA International Limited and Spire Healthcare Group v Competition Commission* ([2013] CAT 24).

4.4 We also note that the use of such mechanisms should be used to facilitate further disclosure (and/or disclosure at an earlier stage), not as a substitute for access to the file by the undertaking(s) concerned (unless they agree to this), in relation to both potential culpatory and exculpatory documents. In this context, in relation the second bullet within paragraph 11.24 of the Draft Guidance, we believe that if such a procedure is adopted, with the agreement of the undertaking under investigation, non-confidential versions of all documents referred to in the Statement of Objections and any other key documents within the CMA's file should be provided to the undertaking(s) under investigation at the outset, rather than awaiting review by those within the confidentiality ring and access to a "shortlist" of redacted documents being sought.

4.5 We note that the CMA envisages that in some cases even where agreement cannot be reached with the relevant parties as to the disclosure of sensitive data within the proposed confidentiality ring / data room it will nevertheless adopt this procedure. Given the sensitivity of information which can be involved in such proceedings, the relevant decision makers will of course need to have great regard to the importance of the protection for business secrets and other confidential information, as well as to the rights of defence.

4.6 We note that the CMA appears to envisage that confidentiality ring or data room procedures would be limited to external advisers such as lawyers and economists. We agree that generally this will be appropriate. However, in some cases this might constrain the ability of the undertakings, who may be best placed to assess the relevant information, to sufficiently understand the case against them in order to make informed decisions. In some instances a potential solution may be to extend the confidentiality ring to include specified decision-makers within the undertaking, who would be ring-fenced from others who could benefit commercially from access to the relevant information.[16] The CAT has been prepared in some cases to agree to confidentiality rings of this nature.

[16] This would also ensure that undertakings who have not instructed external advisers are not prejudiced.

5. **QUESTION 5: IS THE PROPOSED SETTLEMENT PROCEDURE CLEAR, AND DO YOU HAVE ANY VIEWS ON IT?**

5.1 We welcome the CMA's initiative to now publish guidance on its settlement policy and procedures, providing information which will assist undertakings when deciding whether to engage in settlement discussions.

5.2 We do, however, believe that the Draft Guidance/proposed settlement procedure requires revision in some respects.

'Summary' box

5.3 We note the reference within the final bullet of the 'Summary' box that the financial penalty on a settling business "may" include a settlement discount. Clearly if there is not or may not be a settlement discount there would be no incentive on an undertaking under investigation to enter into a settlement or settlement discussions. We therefore consider that this should be amended accordingly to provide that if a settlement is agreed and the settlement requirements are met, a settlement discount will be granted (see below for our comments on its level).

Procedure

5.4 Generally, we believe that this section of the Draft Guidance would benefit from further clarity and detail.

5.5 Firstly, we note the statement that the CMA will consider settlement for any case in which it considers the evidential standard for the issue of a Statement of Objections to be met. It would be useful to understand whether the CMA envisages informing (and if so when) the undertaking(s) under investigation when it considers this threshold has been met prior to the issue a Statement of Objections, in order that the undertaking(s) can consider whether it wishes to initiate settlement discussions (in particular given the proposed significant difference in the level of discount available if settlement occurs post-Statement of Objections). In addition, more detail on when the CMA may be prepared to consider a case as suitable for settlement would be beneficial. Otherwise, undertakings may be reluctant to initiate settlement discussions, in particular prior to the Statement of Objections being issued. This should also make it clear whether and when the CMA may be willing to consider "hybrid" settlements where some but not all of the undertakings under investigation are potentially interested in pursuing settlement (which appears implicit within the Draft Guidance, but is not explicit).

5.6 Secondly, there would in our view be merit in revising paragraphs 14.7 to 14.23 of the Draft Guidance to divide this more clearly into: (i) what is settlement; (ii) what internal procedures

must the CMA follow in order to explore settlement; (iii) what must undertakings wishing to explore settlement commit to at the outset; (iv) what the process will be following commencement of a settlement process, including more detail on the process that will be followed by the CMA (for example in terms of the structure and number of discussions, and what the process would be in the case of any "hybrid" settlements); and (v) what must undertakings agree to in order to actually settle a case. As part of this, we believe that the settlement requirements on the undertaking, which entitle the CMA to withdraw from the settlement procedure under paragraph 14.28[17], need to be made very clear.

5.7 We note the reference within paragraph 14.5 of the Draft Guidance to the CMA's discretion whether to continue or withdraw from settlement discussions. If the CMA has an unlimited discretion to do so at any point prior to settlement being finally agreed, including after the undertaking has confirmed its acceptance of the settlement requirements, this may undermine incentives on undertakings to enter into and pursue settlement discussions. We therefore believe that, at least after a certain point has passed, the CMA should only be entitled to withdraw in specified circumstances. Generally we believe that the Draft Guidance would merit greater clarity on when both the CMA and the undertaking(s) concerned can withdraw and when.

5.8 In relation to the statement in paragraph 14.15 of the Draft Guidance that the CMA will not enter into "*negotiation or plea-bargaining*" during settlement discussions, we consider that this should not prevent, for example, discussions as to whether the CMA has sufficient evidence that an practice lasted for a particular duration, or extended to a particular class of products, and whether the CMA would be willing to accept this and therefore shorten the duration, or limit the scope of the infringement. Discussions should also be possible as to the CMA's view as to the key elements of a penalty, such as the value of sales, mitigating/aggravating factors, and the undertaking's view of these points, as under the Commission settlement process.

5.9 We welcome the CMA's acceptance in paragraph 4.18 of the Draft Guidance that it will consider requests from the settling undertaking for the acceptance of the settlement requirements, including its admission, to be made orally (but note it would be useful if paragraph 14.16 contained a cross-reference to this).

5.10 In order to ensure that settlement incentives are not undermined, we consider that the CMA should also commit to resist requests for disclosure of materials provided or produced

[17] In relation to withdrawal, we note that we consider that the settling business should have the right to refer the matter to the Procedural Officer should the CMA withdraw on the basis that it considers the business is not following the requirements for settlement.

in connection with settlement discussions, and of the fact that settlement has or is being explored, where such requests are made in connection with private civil proceedings whether in the UK or overseas (consistent with the OFT's approach to leniency materials as set out within OFT1495 *Applications for leniency and no-action in cartel cases*, and with the proposals of the European Commission within its June 2013 *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*).[18]

5.11 As is the case for leniency materials within OFT1495 *Applications for leniency and no-action in cartel cases*, we believe that the Draft Guidance should also set out clearly the CMA's approach to the disclosure of material to support a criminal prosecution.

5.12 We note the statement within paragraph 14.23 of the Draft Guidance that "*the decision may include findings of effect if appropriate to the case*". In some cases this will of course be necessary, but in other cases it will not, and the extent to which the CMA intends to make findings of effect may influence the incentives of the undertaking(s) to agree a settlement. It is therefore important that discussion of this point forms part of the settlement discussions. In relation to paragraph 14.23 and the infringement decision more generally, we assume that the form of decision for any settling parties and for an immunity applicant who has not been invited to settle will be the same.

5.13 We note the CMA's reference to the ability of the settling undertaking to respond to the Statement of Objections in respect of "*manifest factual inaccuracies*"; in previous cases the OFT has allowed comments on "material" factual inaccuracies. If the change is intended to mark a departure from the current approach and to limit the type of comments which can be made, we do not consider this to be necessary or justified.

5.14 Finally, Rule 9(4) and paragraph 14.22 of the Draft Guidance appear imply that even in relation to undertakings who do not proceed to settlement it is the Senior Responsible Officer ("**SRO**") who decides whether to make an infringement decision (subject to the approval of the Case and Policy Committee). Whilst we agree that there is merit in this process in respect of the undertakings who are settling, in relation to those who are not settling (for example in a "hybrid" case), any infringement decision should be taken by the CDG as in any other case (which, as noted below, should not have any knowledge of the settlement discussions). The Draft Rules and Draft Guidance should be amended to make this clear.

[18] COM(2013) 404.

Obligations of settling undertaking

5.15 We note the requirement set out in paragraph 14.7 for the settling undertaking to cease the infringing behaviour, which makes sense, but also to "*refrain from engaging again in the same or similar behaviour*". We believe this latter requirement goes too far. Aside from for example hard-core cartel behaviour, the same or similar behaviour in another context, market or point in time may not infringe. We do not therefore consider this requirement to be justified.

5.16 In relation to the requirement to agree to streamlined access to the file set out in the first bullet of paragraph 14.8 of the Draft Guidance, we believe that this should be subject the CMA providing a list of the documents on the file and the ability of the undertaking to request specific documents.

5.17 In relation to the comment within the third bullet of paragraph 14.8 of the Draft Guidance, whether this is the case or not is a question of law.

5.18 We consider that the obligation set out within the fifth bullet of paragraph 14.8 of the Draft Guidance in respect of employees or officers should be limited to the undertaking using its reasonable endeavours to secure the cooperation of its employees and officers.

Confidentiality

5.19 In relation to paragraph 14.20 of the Draft Guidance on the confidentiality of settlement discussions, we welcome the CMA's recognition that disclosures may be made with the prior written authorisation of the CMA, given that in some cases legal or regulatory requirements may require disclosure of at least the fact of settlement discussions. The parties should also be free to disclose this once the fact of settlement has been made public.

5.20 We are of the view that the CDG should not be informed that one or more businesses are exploring settlement, in particular given the potential for settlement discussions to break down. If the CMA maintains that this is necessary, then the identity of such parties should not be revealed. In the event of settlement discussions breaking down, we consider that it is very important that any documents pertaining to the settlement discussions are kept strictly ring-fenced from the CDG.

5.21 In relation to the CMA keeping the fact of settlement discussions confidential, we note that paragraph 14.31 of the Draft Guidance states merely that it is its "*standard practice*" not to make a public announcement to this effect. We consider that the CMA should not make such announcements without the consent of the relevant party(ies) and this should be reflected in the Draft Guidance.

5.22 In relation to the CMA issuing a press release that a business has settled (paragraph 14.33 of the Draft Guidance), the parties should be given advance sight of this at least in the case of non-market sensitive announcements, as per the position in respect of the issuance of a Statement of Objections and of a final infringement decision (as set out in Chapters 11 and 13 of the Draft Guidance).

6. **QUESTION 6: DO YOU AGREE THAT SETTLEMENT DISCUSSIONS SHOULD INCLUDE THE PROPOSED MAXIMUM PENALTY THE SETTLING BUSINESS SHOULD PAY OR WOULD IT BE SUFFICIENT IF THE CMA ONLY SET OUT THE SETTLEMENT DISCOUNT ON AN UNDISCLOSED PENALTY?**

6.1 We agree that the settlement discussions should include the maximum penalty the settling business should pay. Otherwise, it would be difficult for the relevant undertaking to properly assess whether there are sufficient settlement incentives to compensate it for the limitations on the rights of defence (including the inherent limitations on the ability to appeal) that this involves.

6.2 We consider that in the settlement discussions the CMA should also make clear the level of settlement discount involved, which leads to the proposed maximum penalty, as well as to the other steps in the CMA's proposed calculation of the basic penalty.

6.3 At least the level of settlement discount envisaged should be made clear by the CMA from the outset, in particular in novel cases, in order that undertakings can assess properly the question of whether settlement is suitable.

6.4 We note that the Draft Guidance (and/or revisions to OFT423 *The OFT's guidance as to the appropriate amount of a penalty*) should make clear how settlement and leniency discounts interact, for example whether first the leniency discount is applied and then the settlement discount is applied to the resulting sum (which we believe should be the case). This could be made clear within paragraph 14.25 of the Draft Guidance, which should make reference to the leniency discount in relevant cases.

7. **QUESTION 7: DO YOU AGREE THAT THE PROPOSED CAPS FOR SETTLEMENT DISCOUNTS AT UP TO 20% FOR PRE-SO SETTLEMENT AND UP TO 10% FOR POST-SO SETTLEMENT ARE APPROPRIATE?**

7.1 Whilst in some cases a 20% or 10% settlement discount may be appropriate, and therefore these could serve as a starting point for the level of discount that the CMA would generally be prepared to grant, we do not consider that utilising these thresholds as fixed caps is appropriate. Moreover we consider that a discount below the level of 10% would not

provide any incentive for parties to settle, and therefore that 10% should be a minimum discount/"floor" in all cases, rather than "up to 10%".

7.2 We consider that there should be greater flexibility in terms of the discount awarded, enabling the CMA to assess what figure reflects the advantages in terms of procedural economies of early settlement, and what figure will provide sufficient incentives to settle, as well as the strengths of the CMA's case, in a particular investigation. We note in this context that the OFT has previously entered into early resolution agreements with one or more parties on the basis of discounts at a higher level, such as in the *Dairy* case. We also note that such rigidity may prevent the grant of additional discounts in respect of innovative solutions which benefit those who may have suffered as a result of the alleged anti-competitive behaviour as part of a settlement (such as that in the *Independent Schools* case).

7.3 Similarly, although in some cases it would be appropriate to offer a higher discount for settlement pre-Statement of Objections, in other cases such a discount may also be justified post-Statement of Objections. The incentives for the parties to agree to early settlement and the "watering down" of their procedural rights will depend in many cases on the extent to which the CMA's case against them is disclosed.[19] In particular where the CMA's theory of harm is novel, it may only be possible to understand and assess the strength of the CMA's case following the issuance of a Statement of Objections.

8. QUESTION 8: DO YOU HAVE ANY COMMENTS ON ANY OF THE OTHER AMENDMENTS PROPOSED FOR THE DRAFT CMA CA98 GUIDANCE?

Paragraphs 5.7-5.9 Draft Guidance: notice of investigation

8.1 Whilst we recognise that transparency is one important objective, we believe that the Draft Guidance does not sufficiently recognise the potential harm to the parties under investigation that can result from publication of such a notice, and does not sufficiently take into account the need to respect the rights of the parties under investigation (and the individuals involved) and ensure that legitimate commercial and personal interests are not damaged.

8.2 Publishing a notice can cause unwelcome and potentially damaging media enquiries and speculation which may be inappropriate at such an early stage of the CMA's investigation. We are concerned that the full range of potential outcomes of a CA98 investigation is not

[19] In this respect we note that in pre-Statement of Objections cases, the content of the Summary Statement of Facts and the level of detail this includes will of course be very important in terms of the ability of the undertaking(s) to assess whether to proceed with settlement.

well understood by the press or public at large, and therefore that publicising the start of an investigation could cause the parties under investigation prejudice or damage by creating the impression that the CMA believes that the parties have acted anti-competitively. Non-infringement or case closure announcements are far less likely to attract media attention and in any case by that stage the damage caused by the initial announcement is unlikely to be repaired.

8.3 In addition, publication of such a notice could prompt potential claimants to commence "early" private damages actions in relation to the subject matter of the investigation, in particular if the provisions of the draft Consumer Rights Bill on opt-out collective actions are implemented (as the CMA will be aware in the US private damages actions are routinely brought as soon as any information about an investigation is made public).

8.4 These concerns are, of course, particularly significant where the parties are named. Even if the parties are not named, the parties may be identifiable (or at least subject to speculation as to their identity), in particular in abuse of dominance cases, and/or where the relevant sector is particularly specialised or small.

8.5 We consider that the CMA should take into account these factors when deciding whether to publish a notice of investigation, and when considering the contents of such notification (including in particular whether to include the names of the parties under investigation), and that the Draft Guidance should explicitly recognise this. The Draft Guidance currently does not recognise the potential harm to the undertakings (and/or individuals) concerned at all.

Paragraphs 6.3-6.17 Draft Guidance: information requests; Paragraphs 7.6-7.17 Draft Guidance: handling confidential information

8.6 As set out in our response to CMA6con: *Transparency and disclosure: Statement of the CMA's policy and approach* ("**Draft Statement**") we welcome the acknowledgement in the Draft Statement of the need for information requests to be formulated with precision, so as to avoid imposing an unnecessary burden on the parties and to avoid the CMA receiving large volumes of irrelevant material, and the process of early consultation with the parties in order to shape the information request outlined in the Draft Statement.

8.7 We consider that it would be useful if paragraphs 6.8-6.9 of the Draft Guidance in relation to draft information requests reflected these factors and set out the process in more detail. Early discussion as to the scope of the information request makes the process of responding more efficient and improves the quality of the evidence the CMA ultimately receives.

8.8 In relation to commercially sensitive information, confidentiality claims, and the production of non-confidential versions of responses to information requests, in accordance with our comments on the Draft Statement, we believe that the Draft Guidance should set out the approach the CMA will take when responses involve very large volumes of material being provided by the parties.

8.9 Identifying and redacting confidential documents, and providing individual justifications for such, where there are very large volumes of material, is both time consuming and costly. If the CMA ultimately decides not to pursue that investigation, and therefore no Statement of Objections is issued and there is no access to the file, this time and cost will ultimately be wasted. It may also be the case that material which the parties view as confidential at the time the documents are submitted ceases to be confidential by the time access to the file is given.

8.10 In our experience, some case officers have been willing in such circumstance to accept large volumes of documents on the basis that submissions as to confidentiality will be invited at a later stage, should the investigation proceed. In our view this approach can be a pragmatic solution in appropriate circumstances which avoids unnecessary costs.

8.11 We would encourage the CMA to indicate in the Draft Guidance its willingness to consider adopting this approach in appropriate cases.

8.12 In relation to footnote 110 of the Draft Guidance, we believe that the two year threshold beyond which the CMA is unlikely to consider financial information/certain other data as confidential is too short. As a standard threshold, we believe that the period referred to should be 5 years, as per the approach within equivalent guidance of the European Commission.[20]

Paragraph 6.40 (and footnote 104) Draft Guidance: separation of documents

8.13 We consider it would be useful if this paragraph cross-referred to the relevant sections of the Criminal Justice and Police Act 2001 which allow the CMA to obtain non-relevant documents where it is not reasonably practicable to separate these from relevant documents on the premises, to the factors to be taken into account when considering this question, and to the obligations of the CMA in respect of the return of non-relevant documents as soon as reasonably practicable.

[20] http://ec.europa.eu/competition/antitrust/business_secrets_en.pdf

Paragraphs 8.1-8.25 Draft Guidance: interim measures

8.14 In light of the lowering of the threshold for the imposition of interim measures under revised Section 35 CA98, and the intrusive nature of this power and its potential to significantly harm the interests of the undertaking(s) under investigation (and equally the potential for significant harm to the interests of third parties if interim measures are not granted), we consider that it is particularly important that clear guidance is provided by the CMA as to both the process it will follow and the manner in which it will exercise its discretion under Section 35 CA98.

8.15 In addition, we note that although this case related to the current version of Section 35 CA98, the comments of the CAT in *London Metal Exchange v the Office of Fair Trading* [2006] CAT 19 as to the OFT's obligations when considering whether to impose interim measures under Section 35 CA98 and the type and strength of evidence which would justify the imposition of interim measures are equally relevant to the exercise of the CMA's powers under revised Section 35 CA98.

8.16 We are therefore surprised that the Draft Guidance does not contain any reference to the process which the CMA will follow when determining whether to adopt a decision to impose interim measures, including the information gathering process it will carry out, nor as to the evidence which the CMA may rely on and how it would assess whether "*the information it is relying upon is of such a quality that it is appropriate to rely upon it in all the circumstances*" (per the CAT). We consider that the Draft Guidance should be revised accordingly.

8.17 We are also surprised that there is no reference within paragraph 8.12 of the Draft Guidance when discussing the balancing exercise the CMA will carry out as to the damage, if any, which would be suffered by the addressee of the interim measures should interim measures be granted. We consider that it is essential this is taken into account by the CMA in particular when considering whether interim measures would be proportionate (in particular in circumstances where the CMA does not, unlike the High Court, have the power to require cross-undertakings in damages), and that the Draft Guidance should reflect this.

8.18 Although under revised Section 35 CA98 the potential damage to a particular person/category of person no longer needs to be irreparable, such factors as the potential duration of any damage and the extent to which the relevant person or persons will be hindered from competing on the market are surely relevant to the question of whether any damage is "*significant*" and to the question of proportionality. We therefore consider that the Draft Guidance should reflect this. In addition we believe that when considering

whether potential damage can be said to be significant the CMA should assess whether the potential loss would be recoverable as damages in ordinary civil proceedings.

8.19 We would also expect there to be more consideration within the Draft Guidance of the question of urgency, and the factors the CMA will take into account when assessing whether action is urgently required (including consideration, for example, of any delay on the part of an applicant for interim measures).

8.20 Finally, we note the position set out in paragraph 8.11 that it will be the SRO who takes the decision whether to grant interim measures or not. Given that this will be a contested decision (and in particular given the lowering of the threshold for the grant of interim measures) we believe that involvement of senior CMA officials in the decision, rather than just consultation, is important. We would suggest that a specific interim measures CDG is appointed for this purpose (separate to the CDG for the investigation more generally). At the very least, the SRO should be obliged to consult with the Case and Policy Committee and obtain its approval prior to making an interim measures decision.

Paragraphs 9.13-9.21 Draft Guidance: sharing the CMA's early thinking and giving regular updates

8.21 We believe that in appropriate cases there would be merit in holding the first state of play meeting prior to an investigation being formally opened. In addition to assisting the CMA in scoping cases, this may provide the party being investigated with an opportunity to demonstrate that there is no need to open a case on the merits. It would also assist parties in deciding whether to submit a leniency application or to consider the settlement procedure.

Paragraphs 12.11-12.21 Draft Guidance: oral hearings

8.22 We note the focus within the Draft Guidance on the CMA asking questions of the undertaking under investigation. We consider that the undertaking under investigation should also be able to raise questions of the case team during oral hearings, in order to properly understand the CMA's case and exercise its rights of defence.

8.23 As part of the agreement of the agenda, in addition to the undertaking providing an indication in advance to the CMA of the matters it proposes to focus on, the CMA should provide to the undertaking in advance an indication of the key outstanding areas of concern and possible questions on the written submissions.

8.24 We believe that the report prepared by the Procedural Officer should be made available to the undertaking as well as to the CDG.

Paragraphs 12.28-12.30 Draft Guidance: supplementary Statement of Objections

8.25 Although this is not entirely clear from the Draft Rules and the Draft Guidance, we assume that if a Supplementary Statement of Objections is issued the original CDG will continue with the case rather than a new CDG being appointed. If so we note that it is important that the CDG members avoid becoming too involved in directing the consequent additional investigatory steps, in order to avoid the CDG indirectly becoming part of the investigation team.

Paragraph 13.9 Draft Guidance: Issue of infringement decision

8.26 We consider that this paragraph should make it clear that the CMA will take into account the representations of the relevant undertaking(s) which supplied the information prior to disclosing this to the other parties, and will consider using methods such as confidentiality rings if necessary. This should be reflected within the Draft Guidance

9. **QUESTION 9: DO YOU AGREE WITH THE PROPOSED TRANSITIONAL ARRANGEMENTS, AS SET OUT IN PARAGRAPHS 3.41 TO 3.43 ABOVE?**

9.1 We note that paragraph 3.41 of the Consultation Document states that the approach in the Draft Guidance will take effect on date on which the final guidance is published. In contrast, paragraph 1.9 of the Draft Guidance states that it will take effect from 1 April 2014. If this is ultimately the same date, then this should not cause issues, but if this will not or may not be the case then this inconsistency needs to be resolved.

10. **QUESTION 10: DO YOU AGREE WITH THE TRANSITION TEAM'S PROPOSAL TO EXTEND THE AVAILABILITY OF SFOS TO PROSPECTIVE VERTICAL AGREEMENTS IN ADDITION TO PROSPECTIVE HORIZONTAL AGREEMENTS? PLEASE GIVE REASONS FOR YOUR VIEW.**

10.1 We support the proposals to extend the availability of Short-Form Opinions to vertical agreements, as the application of Article 101 TFEU/Chapter I CA98 to distribution and supply/purchase agreements is not always clear. Businesses would therefore benefit from the potential ability to obtain a Short-Form Opinion from the CMA in relation to such agreements, and if such Short-Form Opinions are published this will offer useful guidance as to the CMA's approach to the relevant issues (in particular given the paucity of published decisions in relation to such agreements).

10.2 However, we note that the OFT's Short-Form Opinion process has not been widely utilised to date, and believe that the CMA should consider whether further adjustments to the procedure should be made to make this more attractive to businesses.

10.3 For example, the CMA should consider whether the process could extent to agreements that have already been entered into, and consider reducing the amount of information which must be published as part of the process (including potentially the identity of the parties).

Herbert Smith Freehills LLP

11 November 2013