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RESPONSE TO THE CMA TRANSITION TEAM'S CONSULTATION ON DRAFT CMA GUIDANCE - DOCUMENTS CMA8CON (GUIDANCE AND RULES OF PROCEDURE FOR INVESTIGATION PROCEDURES UNDER THE COMPETITION ACT 1998) AND CMA9CON (CARTEL OFFENCE PROSECUTION GUIDANCE)

A. Introduction

1. Dickson Minto W.S. welcomes the opportunity to respond to the CMA Transition Team's ("**Transition Team**") consultation on the following draft CMA guidance documents which were published on 17 September 2013:

   - Guidance document CMA8con: Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998 (the "**Competition Act Consultation Document**"), including Annex B (the "**Draft Rules**") and Annex C (the "**Draft Guidance**"); and

   - Guidance document CMA9con: Cartel Offence Prosecution Guidance (the "**Cartel Offence Consultation Document**"), including Annex C (the "**Draft Cartel Offence Guidance**").

   We make no comments on the other consultation documents which were part of the "second tranche" published on 17 September 2013.

2. In this response we refer to the following legislation:

   - the Competition Act 1998 (the "**Competition Act**"); and

   - the Enterprise Act 2002 as amended by the Enterprise and Regulatory Reform Act 2013 (the "**Enterprise Act**").

3. The views expressed in this response are solely ours and should not be attributed to any of our clients.

B. The Competition Act Consultation Document and annexes

Separation of investigation and decision-making

4. The Competition Act Consultation Document sets out the details of the CMA's decision-making procedures. For example, at paragraph 3.22 it is stated that "*the SRO will consult two senior officials at key stages during the investigation up until the decision to issue a Statement of Objections*". Although it is helpful to understand how the CMA envisages reaching its decisions, we believe that more transparency surrounding the procedure would be warranted. Transparency is particularly important given that separation of the various stages in the decision-making process forms a key part of the reform package. One suggestion to enhance transparency is to include in the decision a confirmation to the parties that the relevant procedures have been followed (which could include a brief description of the key steps and dates).

5. At paragraph 11.30 of the Draft Guidance, we suggest adding a sentence stating that the CMA will avoid having in the CDG individuals who were involved at the pre-Statement of Objections stage of the investigation.

6. According to paragraph 11.31 of the Draft Guidance, the SRO will remain in place for the second phase of the investigation under the direction of the CDG. We consider that it would make sense for the SRO to withdraw from the investigation for the second phase in order to ensure a clear separation between the two phases (particularly since continued involvement of the SRO may well have a practical impact on the direction of the inquiry at the second stage).

7. In relation to oral representations, paragraph 12.22 of the Draft Guidance states that "*the CMA will objectively consider all written and oral representations to appraise the case as set out in the Statement of Objections and to assess whether the provisional findings in the Statement of Objections continue to be supported by the evidence and the facts*". We would suggest replacing "*continue to be*" with "are"; as currently drafted this statement suggests that there is a presumption that the Statement of Objections is fully supported by the evidence and facts. In our view there must not be any such presumption as this would undermine the very reason for the separation of the two phases (i.e. the investigation phase led by the SRO and the decision-making phase led by the CDG).

<u>The Procedural Officer</u>

8. We welcome the proposal to create a permanent role of Procedural Officer. We note that paragraph 3.26 of the Competition Act Consultation Document states that "*the CMA Procedural Officer will be independent of the investigation, the case team and the Case Decision Group*". It will be crucial that the CMA ensures this independence in practice. Ideally, the CMA should model the institution of the Procedural Officer on the European Commission's Hearing Officer. As the Hearing Officer is not in fact a DG Competition official, he is able to be an independent arbiter who is independent in the exercise of his functions. The Hearing Officer's independence from DG Competition ensures that procedural complaints are effectively reported to the European Commission rather than to DG Competition. We consider that this system would provide a good example for the CMA's Procedural Officer role.

9. Paragraph 6(5) of the Draft Rules states that "*The oral hearing is to be chaired by a relevant person who may be a Procedural Officer*". It is unclear who else might chair an oral hearing as this seems to clearly fall within the remit of the Procedural Officer's role. Has this paragraph been included simply to enable the Procedural Officer to appoint someone to chair the oral hearing on his/her behalf? If this is the case, we would suggest amending paragraph 6(5) as follows: "*The oral hearing is to be chaired by the Procedural Officer or someone appointed by the Procedural Officer ~~a relevant person who may be a Procedural Officer~~*".

10. In the Draft Rules, paragraph 8(1) states that "*The Procedural Officer is to consider a significant complaint…"*. We would query whether it is necessary to include a "significance" threshold? In our view there is no need for such a threshold and it is sufficient for the Procedural Officer to have regard to the list of matters in paragraph 15.4 of the Draft Guidance when assessing his competence.

11. In paragraph 8(2) of the Draft Rules it is suggested that, with the exception of dealing with significant procedural complaints, the Procedural Officer must not be otherwise involved in an investigation. However, paragraph 6(5) of the Draft Rules permits the Procedural Officer to chair an oral hearing, which could be seen as being "*involved in the investigation in question*". We would suggest clarifying this.

12. Paragraph 15.6 of the Draft Guidance states that the Procedural Officer does not have jurisdiction to review decisions on the scope of requests for information. However, we would ask the CMA to reconsider this limitation to the Procedural Officer's remit on the basis that often the scope of an information request is inextricably linked to the timing of the information request (and we note that complaints in relation to timing are complaints that may be raised with the Procedural Officer).

Short-form Opinion process

13. In paragraph 4.4 of the Competition Act Consultation Document it is stated that: "*the Transition Team has [therefore] proposed that the CMA Board should adopt the OFT's Short-form Opinion process on a trial basis, subject to certain modifications designed to extend the use of the tool and clarify the process*". It further states that "*there is no proposed end date for the SfO trial*". It is not clear to us why the Transition Team is recommending that the SfO process be implemented *on a trial basis* given that the SfO process has now been available for over three years and the OFT has had ample time to identify shortcomings in the current process. Indeed, the Transition Team has already identified a number of improvements that it will recommend to the CMA Board. We would suggest that the CMA Board consider adopting this process on a permanent basis, taking account of the recommended improvements.

14. We strongly welcome the CMA's proposal to extend the scope of the SfO process to cover vertical agreements (see paragraph 4.5 of the Competition Act Consultation Document).

15. At paragraph 4.6 of the Competition Act Consultation Document, the Transition Team proposes that the CMA Board adopts "*revised procedures*" to provide businesses and their advisers with greater clarity regarding the SfO process. We would ask the CMA to run a separate consultation on any "*procedural enhancements*" that it proposes, before implementing them. In particular, we would suggest that such a consultation cover the following questions:

    a) Would it be possible to make the SfO process more business-friendly by introducing the option for the CMA to redact the names of the applicants from the published decision?

    b) Could the CMA provide clarity as to how it may use information received in the context of SfO enquiries or requests? In particular, will the CMA be able to use such information in other Competition Act cases, or in the exercise of its other functions? We consider that use of the information for purposes other than responding to a request for an SfO would be undesirable and the current uncertainty on this point may discourage businesses from seeking SfOs.

Commitments on future conduct

16. At paragraph 10.18 of the Draft Guidance, the CMA explains that a business under investigation can offer commitments at any time during the investigation prior to an infringement decision, but that "*the CMA is unlikely to consider it appropriate to accept commitments at a very late stage in an investigation, such as after the CMA has considered representations on the Statement of Objections*". We believe that it is entirely reasonable for a business to ask to see all the evidence before it decides whether to offer commitments. It is not clear why the CMA considers it unlikely to be appropriate for a business to offer commitments after it has considered representations on the Statement of Objections. It is interesting to note that the European Commission is more willing to consider commitments in the later stages of an investigation; the Commission's guidance on Best Practices states that "*if a Statement of Objections has already been sent to the parties, commitments may nevertheless still be accepted, in appropriate cases*".

17. Paragraph 10.19 of the Draft Guidance sets out the process for the initiation of discussions regarding commitments: "*if a business would like to discuss offering commitments, they should contact the Team Leader in the first instance*". The Draft Guidance does not state that such opening discussions may be carried out on a "without prejudice" basis i.e. the mere discussions will not constitute an acknowledgement of unlawfulness on the part of the business. We suggest that the CMA considers including an express statement to this effect.

Access to the file

18. Footnote 155 of the Draft Guidance states that where the CMA makes an internal note of a meeting, telephone call or conversation with any party to an investigation, such notes will reflect the CMA's own interpretation of that meeting or conversation and will be considered "internal documents". By virtue of draft Rule 6(2)(b), the CMA may withhold internal documents from parties wishing to access the file. However, this approach may be too rigid. First, there may be instances where it is reasonable for the parties to be given an opportunity to propose corrections to notes, particularly where there is a risk of a misinterpretation or an incorrect record of a statement affecting the CMA's assessment. Second, if the notes contain material information on which the CMA proposes to rely in its assessment, the parties should also be given access. We would ask that this is clarified in footnote 155.

Settlement

19. We welcome the proposed change in terminology from "early resolution" to "settlement" (see paragraph 14.1 of the Draft Guidance).

20. The Draft Guidance is not entirely clear as to the relationship between the settlement procedure and applications for leniency. Paragraph 14.3 states that it is possible for a leniency applicant to benefit from both leniency and settlement discounts in the same case. However, in footnote 198, the CMA states "*we would not normally invite an immunity applicant to explore the possibility of settlement*", which suggests that it is not generally possible to combine settlement with an application for leniency.

21. Paragraph 14.7 of the Draft Guidance states that parties wishing to settle must make a submission of liability (and not merely an admission of the facts alone). Will the CMA accept this submission of liability either in writing or in verbal form? We note that the European Commission will accept submissions in either form.

22. In our view, the Draft Guidance may not provide sufficient incentives to parties considering settlement. In particular, the proposed settlement procedure appears to entail a number of "sticks" and we believe that the proposed discount of a maximum of 20% may not constitute sufficient "carrots". For example:

- Paragraph 14.8 (first bullet) lists the aspects of the investigation process that will not be available to parties in the case of settlement, in order to make the process more streamlined e.g. no written representations on the statement of objections (apart from in relation to manifest factual inaccuracies), no oral hearing etc. These are important parts of the process as they are designed to protect the parties' rights of defence. We note that, by contrast, EU procedure does not preclude parties from giving their views on the Statement of Objections in a settlement case; the Commission Notice on conduct of settlement procedures states "*For the parties' rights of defence to be exercised effectively, the Commission should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate*".

- The fifth bullet of paragraph 14.8 sets out a number of quite onerous requirements that the CMA may impose on parties as part of the settlement procedure e.g. making employees available for interview, providing additional witness statements etc. In particular, the CMA can require the settling business to confirm that employees would be prepared to appear as witnesses in any future appeals. We suggest that the CMA changes this to an obligation on the company to "use its best efforts to procure" that employees will act as witnesses (rather than give an outright confirmation) as the company cannot in all circumstances be expected to guarantee the future conduct of its employees.

- Paragraph 14.15 lists additional aspects of the standard investigation process that businesses will have to forgo if they wish to use the settlement procedure, for example the opportunity to enter into negotiations or plea bargaining with the CMA.

- We would encourage the CMA to consider whether it is possible to offer additional incentives to businesses considering settlement, in order to address the imbalance between "sticks" and "carrots". For example, the CMA could take the approach that it will not pursue a competition disqualification order against a director of a settling business unless there are exceptional reasons for doing so (see paragraph 14.30 of the Draft Guidance).

23. In paragraph 14.10 of the Draft Guidance, we understand the statement "*the CMA will not make any assumptions about a business' liability from the fact that it is interested in engaging in or engages in settlement discussions*" to mean that the CMA will treat any settlement discussions on a "without prejudice" basis. Assuming our understanding is correct, we suggest that paragraph 14.10 be amended to make this point expressly.

24. We would suggest moving footnote 201 of the Draft Guidance into the body of the document. Information on the Summary Statement of Facts will be of key importance to businesses considering settlement as they will need to be aware of the substance of the CMA's provisional views in order to weigh up their options (and indeed, it would be helpful if the CMA could provide a clearer indication as to what information or analysis the Summary Statement of Facts needs to contain in any event).

25. Paragraph 14.16 of the Draft Guidance requires a business which is willing to settle following settlement discussions with the CMA to confirm its acceptance of the requirements in a letter (which will also contain its admission). It is not clear at what stage this letter must be issued by the business and what the remainder of the process consists of once the CMA has received this letter (or whether the letter in fact is the final stage of the settlement process).

26. Under paragraph 14.20 of the Draft Guidance, a party which has entered into settlement discussions must not disclose the content of the discussions nor the fact that such discussions have taken place. Although we understand that the existence of on-going settlement discussions may be sensitive, there are circumstances in which businesses have sound reasons for wanting to disclose the fact that it entered into settlement discussions with the CMA. For example, the shareholders of a company that is later fined for a competition law infringement may, at a general meeting, question the officers of that company as to whether they considered the option of settlement (in which case the officers should normally be free to explain that they entered into settlement discussions with the CMA). We note that paragraph 14.31 states that a party may disclose the fact that settlement discussions took place where the CMA provides prior written authorisation. However, this may not be practicable or feasible in each situation such as in the scenario described above.

27. Footnote 208 explains that if settlement discussions take place post-Statement of Objections, the CDG will need to be informed that such discussions are taking place because the timetable will

be paused as a result of the discussions. We would be grateful if the CMA could confirm that the CDG will simply be told that one or more businesses are considering settlement, rather than being told the identity of the businesses in question.

28. While we understand the policy reasons why parties who settle pre-Statement of Objections should be afforded a greater level of discount than those who settle at a later stage in the investigation, in practice a key factor affecting the timing of a business' decision to enter into settlement discussions will be the level of detail contained in the Summary Statement of Fact. This will depend entirely on the CMA and will be outside the control of the parties. If the CMA's Summary Statement of Fact is not sufficiently detailed, a business may not have a thorough understanding of the evidence, which in turn complicates the ability to make a fully-informed decision whether to enter into settlement discussions.

29. The Draft Guidance provides no information about how the CMA will decide the appropriate level of discount beyond stating that the CMA will have regard to "the circumstances of the case". It would be helpful if the CMA could provide more colour as to how it will decide the level of discount.

Comments specific to Annex B (the Draft Rules)

30. We have found a number of instances where there may be scope for improving the clarity of the rules, as currently drafted. For example:

a) Draft Rule 2 states that the rules "*apply when the CMA takes investigation or enforcement action under the [Competition] Act*". While we note that "*investigation*" is defined in section 59 of the Competition Act, it is not clear how "*enforcement action*" should be interpreted (and indeed there is no statutory definition of "investigation **action**"). We would be grateful if the CMA could clarify this.

b) We consider that in some instances the drafting of Draft Rule 3 is unnecessarily vague. For example:

- In paragraph (1), instead of referring to "*a relevant person who oversees the investigation under the Act*", would it be possible to simply refer to "a Senior Responsible Officer"? Alternatively, if the CMA wishes to keep the current wording, it would be helpful if the following bracketed wording were added for the avoidance of doubt "(also referred to as the "Senior Responsible Officer")". This would benefit accessibility of the Rules.

- Similar to the point above, in paragraph (2) would it be possible to replace "*a separate relevant person from the relevant person referred to in paragraph (1)*" with "a Case Decision Group" (or at least add in bracketed wording similar to that proposed above to explain that this separate relevant person is also referred to as a "Case Decision Group")?

- Paragraph (3) states that the Case Decision Group must consist of "*at least two persons*". Although we understand that "persons" in this context means natural persons, this is not very clear (particularly given that the definition of "persons" in section 59 of the Competition Act includes undertakings, cf. Rule 1(3)). We would suggest replacing "*persons*" with "natural persons" or "individuals" for clarity.

c) Draft Rule 4 contains several provisions that may be considered unduly subjective. For example:

- Draft Rules 4(1)(b) and 4(3)(b) grant unlimited discretion to the officer who imposes conditions on an occupier of premises or an individual to be interviewed (respectively). We would suggest qualifying this by adding a reasonableness requirement. The paragraphs could be amended as follows: "*is satisfied that such conditions as* *are reasonable in the circumstances* ~~*he considers it appropriate to impose*~~*…*".

- Similar to the point above, we consider that paragraph 4(3)(4) could be made less subjective by amending the wording as follows: "*a "reasonable time" means such period of time as* ~~*the officer considers*~~ *is reasonable in the circumstances*".

31. Draft Rule 6(1) provides that a notice relating to a Statement of Objections must state the period within which a relevant party may make written representations to the CMA (both in relation to identification of confidential information and substantive comments). However, the Draft Rules do not specify a minimum period and therefore the length of the period is entirely within the CMA's discretion. In the interests of fairness, we consider that the CMA should indicate the minimum length of time that it will allow parties to prepare their representations.

32. Under Draft Rule 10(1)(b), following an infringement decision the CMA must, without delay, publish the infringement decision. Presumably this means that the CMA will only publish notice of the outcome of the decision, rather than the full text of the decision? Our main concern relates to redaction of commercially sensitive information; it is important that the CMA allows sufficient time for discussion with the parties in relation to confidentiality redactions, before publishing the full decision.

Comments specific to Annex C (the Draft Guidance)

33. At paragraph 3.23, the CMA states that the anonymity of a complainant cannot be guaranteed as "*the CMA may have to reveal to [the business under investigation] the identity of the complainant as well as the information supplied by them where the business under investigation cannot properly respond to the allegations in the absence of such disclosure*". Ideally, we consider that the CMA should give a commitment to ensuring anonymity as far as possible. However, if the CMA is unwilling to afford blanket anonymity to complainants, there should be an option for the complainant to withdraw their complaint retrospectively.

34. For the avoidance of doubt, please could the CMA confirm whether the process and timelines described in chapter 4 of the Draft Guidance also apply to cartel investigations? Paragraph 4.13 suggests that this is indeed the case but the reference to the exception in paragraph 4.1 may raise doubts, so it would be helpful if this could be clarified.

35. In paragraph 5.8, we would suggest inserting "(or EU equivalents)" after "*investigated under the Chapter I and/or II prohibitions*" for clarity.

36. The way that paragraph 5.9 is currently drafted does not make it easy to understand the CMA's policy towards publishing the names of parties. Is the CMA's general rule that it will not publish the names of the parties other than in appropriate circumstances (see the second sentence of paragraph 5.9) or that it will include the parties' names but only at a later stage of the investigation (see the last sentence)? It would be helpful if this paragraph could be redrafted so that it clearly states (a) what the general rule is; and (b) when exceptions are likely to apply.

37. Similar to paragraph 36 above, in paragraph 6.8 of the Draft Guidance we suggest that the CMA expressly states what its general rule will be in relation to the form of information requests, with

a clear explanation of when exceptions are likely to apply. For example, it would be clearer if this paragraph read as follows: "~~*Where it is practical and appropriate to do so, the CMA will*~~ *The CMA's usual approach* ~~*will be*~~*is to send the information request in draft, unless it is not practical and appropriate to do so*". This revised drafting is in line with the wording used by the CMA in paragraph 6.10 (i.e. "*This is the CMA's usual approach*").

38. At paragraph 6.28, it is stated that "*Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests*". We consider that the use of the word "request" is unfortunate because it does not provide any assurance that the CMA will permit this legal adviser to actually attend the meeting (i.e. the request could by refused by the CMA). We suggest deleting the words "*request to*" so that it reads "*Any person being formally questioned or interviewed by the CMA may have a legal adviser present to represent their interests*".

39. Also in paragraph 6.28, the CMA states that it will allow a legal adviser who is also acting for the undertaking to be present at the interview only if the CMA is satisfied that this will not risk prejudicing the investigation. We consider that the formulation of this statement is unnecessarily negative and subjective; an individual who is interviewed as part of a CMA investigation should have free choice of legal adviser unless there are extraordinary circumstances which reasonably justify a different approach. A more neutral formulation of this paragraph could read as follows "The CMA will permit a legal adviser also acting for the undertaking to be present at the interview unless the CMA reasonably believes that doing so will risk prejudicing the investigation.".

40. In relation to the presence of a legal adviser at an on-site inspection, paragraph 6.44 states that if there is no in-house lawyer present when the CMA arrives, the CMA officers may wait a reasonable time for legal advisers to arrive. This statement seems to imply that, where an in-house lawyer *is* present, the CMA will commence the inspection straight away. However, there may be circumstances where the presence of an in-house lawyer may not be sufficient, for example where this individual is new to the company, where he/she is relatively junior or where he/she is employed on a temporary basis. We consider that the company is best-placed to decide whether it needs to bring in additional legal advisers and, if the company does call for additional legal advisers, the CMA should generally respect this view and delay the start of the inspection.

41. Paragraph 7.3 states that, in the event of a dispute during an inspection as to whether information or documents are privileged, a CMA officer may request that the communications are placed in a sealed envelope or package. However the Draft Guidance contains few details on this procedure. We would be grateful if the CMA could provide more information on this.

42. There appears to be a discrepancy between paragraphs 12.32 and 12.36 on the subject of oral hearings regarding draft penalty statements. Paragraph 12.32 implies that it is the CMA who will offer parties the opportunity to attend an oral hearing, whereas paragraph 12.36 suggests that it is the parties who must request an oral hearing. It is not clear whether the wording "*If a party requests an oral hearing*" in paragraph 12.36 introduces a separate opportunity for the parties or whether this indeed refers to the opportunity described in the first sentence of paragraph 12.32. If it is the latter case, perhaps a cross-reference could be inserted in order to ensure clarity?

43. Paragraph 13.5 states that where the CDG does not find sufficient evidence of an infringement, it will close the case and "*may decide to publish a reasoned no grounds for action decision*". It is not clear why the CMA will not publish such a decision as a matter of course. In the interest of transparency such decisions should be published as a matter of course.

44. Paragraphs 15.10 and 15.14 are drafted in a different style to the rest of the Draft Guidance, in particular as they contain references to "You" and "Your" whereas the rest of the document tends to refer to "the Parties" or "businesses".

C. The Cartel Offence Consultation Document and annexes

45. We consider that the provisions of the Draft Cartel Offence Guidance are not sufficiently clear as regards what exactly is required in order to satisfy the notification exclusion. In particular, paragraph 4.13 states that "*the exclusion will not be satisfied if the arrangement merely provides that customers would be provided with a broad general disclaimer that its agreements may contain price fixing/market sharing provisions*". This raises the question of what is positively required from a business; for example, would the notification exclusion be satisfied if the business provided a disclaimer which contained a reference to the relevant information?

46. As regards the publication exclusion, paragraph 4.15 of the Draft Cartel Offence Guidance states that the offence will not be committed where the relevant information about the arrangement is published in the London Gazette, the Edinburgh Gazette or the Belfast Gazette. This imposes an impractical requirement on businesses as they will need to check all three sources in order to be sure that they do not miss the publication of information that is relevant to their businesses. It would be more straightforward if there was one single register that businesses could check quickly and easily. In addition, it is crucial that whichever register is used for publication of relevant information is searchable, preferably including an automatic electronic alert function.

47. We note that under paragraph 4.24 of the Draft Cartel Offence Guidance the CMA will consider both external and in-house legal advisers as "professional legal advisers" for the purposes of section 188B of the Enterprise Act. However, the paragraph states that *"[the term "professional legal advisers"] could apply to legal advisers qualified in foreign jurisdictions with an equivalent legal qualification*" (emphasis added). It is unclear why the Draft Cartel Offence Guidance is not definitive on this point; what type of situation does the CMA envisage in which it would not treat a foreign-qualified lawyer as a "professional legal adviser"?

48. We would be grateful if the CMA could confirm for the avoidance of doubt (for example in paragraph 4.24 of the Draft Cartel Offence Guidance) that the legal advice defence set out in section 188B(3) of the Enterprise Act will not affect the privileged status of communications between a client and its legal advisers.

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We would of course be happy to clarify or discuss any of the above if it would assist the Transition Team. If so, please contact Ajal Notowicz (t: +44 (0)20 7649 6838, e: ajal.notowicz@dmws.com) or Ruth Osborne (t: +44 (0) 20 7649 6896, e: ruth.osborne@dmws.com).

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London/Edinburgh, 8 November 2013