RESPONSE TO THE CMA'S CONSULTATION ON COMPETITION ACT 1998: CMA GUIDANCE AND RULES OF PROCEDURE FOR INVESTIGATION PROCEDURES UNDER THE COMPETITION ACT 1998 (CMA8CON, SEPTEMBER 2013)

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1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the Competition and Market Authority's (***CMA***) draft for public consultation (the ***Consultation***) of its *Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998,* of September 2013 (the ***Guidance***).

1.2 Our comments are based on our experience of representing clients in a wide range of Office of Fair Trading (***OFT***) proceedings under the Competition Act 1998 (***CA98***), together with a significant number of equivalent proceedings conducted by other competition authorities worldwide. We rely on this breadth of experience to provide these comments on the CMA's proposed approach to investigation procedures. The comments in this response are those of Freshfields Bruckhaus Deringer LLP and do not necessarily represent the views of any of our clients.

1.3 We have confined our comments to those areas which we feel are most significant in terms of the effective operation of the regime and providing clarity and certainty for companies that might be subject to such proceedings. Our comments should be read as applying both to the *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* and, where that guidance is reflected in the *Competition and Markets Authority Competition Act 1998 Rules*, those rules.

1.4 We consider that the CMA's overall approach to the Guidance is helpful. In particular, we note that the previous OFT guidance was recently updated and enhanced. We consider that "marking up" that existing guidance to reflect changes introduced by the Enterprise and Regulatory Reform Act 2013 (the ***ERRA13***) will help businesses and advisers to adapt to the new regime more quickly and at lower cost.

1.5 We also welcome:

(a) the additional transparency provided by the new chapter on settlement procedures and the additional detail on interim measures;

(b) the continuation of the Short Form Opinion procedure and extension of the procedure to vertical agreements; and

(c) the continuation of the Procedural Officer role.

1.6 However we are concerned about some aspects of the CMA's proposed operation of its powers relating to:

(a) questioning individuals;

(b) case opening notices;

(c) interim measures;

(d) access to file;

(e) settlement; and

(f) notice of decisions.

1.7 We recognise that the significant expansion of the CMA's investigatory powers under the ERRA13 was intended to strengthen the CMA's enforcement capability. However it is equally important that the CMA implements these powers in a manner that respects parties' rights of defence and legitimate interests. As set out in more detail below, we consider that in this respect there is room for improvement of the draft Guidance.

1.8 We would be very happy to discuss any aspect of this response in more detail should that be of assistance to the CMA.

2. QUESTIONING INDIVIDUALS

2.1 The introduction of a power to require individuals to answer questions in an interview is among the most significant reforms to the civil competition regime. It is therefore critical that the power is used in an appropriate and proportionate manner. We consider that the Guidance could provide further reassurance in respect of:

(a) the ability of the business's legal advisers to be present during an interview, particularly in order to prevent breaches of the business's privileges;

(b) the time allowed to obtain legal representation before the interview commences;

(c) access to recordings, transcripts or notes of the interview;

(d) the application of the privilege against self-incrimination; and

(e) which categories of individuals the CMA can require to answer questions.

Presence of business's legal advisers

2.2 The Guidance states that the CMA may prevent an individual from being questioned in the presence of the business's legal adviser, unless it is satisfied that allowing the adviser to be present will not increase any risk of the falsification or concealment of evidence, the contamination of witness evidence, or the reduction of incentives for individuals to be open and honest.[1]

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[1] Paragraph 6.28 and footnote 88 of the Guidance.

2.3 For the following reasons, we consider that the CMA should exercise caution before seeking to place restrictions on whether the business's legal adviser can be present during the interview. Any such restriction could risk interfering with the business's rights of defence (and have practical implications for the efficient conduct of a dawn raid or investigation).

2.4 We note that evidence obtained during questioning can only be used directly against the individual concerned in certain limited categories of proceedings. It may, however, have material indirect consequences for the individual. For example, if used to establish an infringement by the individual's employer, the individual may suffer financial or employment consequences, and could be at risk of being subject to a Director Disqualification Order. Moreover, the evidence obtained may be disclosed to the individual's employer or third parties, or potentially even published in an infringement decision, which could cause reputational harm to the individual. It is therefore crucial that individuals understand their rights when being interviewed, and are free to choose their legal advisers.

2.5 In addition, businesses are entitled to prevent information protected by legal advice privilege or self-incrimination privilege from being disclosed. The only way for businesses to ensure that these crucial rights of defence are protected is for their legal advisers to be present during an interview, for example to make clear that the individual is not authorised to waive the business's legal advice privilege.[2]

2.6 If the business's legal advisers were not allowed to attend an interview, this could also prevent the business from accessing the evidence provided by its employees in a timely manner and therefore create a barrier to assessing an application for leniency or settlement. This would appear to be contrary to the CMA's policy of encouraging leniency or settlement discussions in appropriate cases so as to achieve an efficient and timely outcome and minimise administrative burdens. It could also unduly prejudice particular parties as crucial evidence that might otherwise have materially supported a leniency application could be withheld or delayed causing the affected party to lose its place in the 'queue'.

2.7 Moreover, preventing the business from accessing evidence provided during questioning in a timely manner would be inconsistent with the OFT's practice in respect of written evidence taken during dawn raids, which allows the business to take copies of any such evidence so that it can assess whether an infringement may have taken place.

2.8 Requiring separate legal advice for individuals could also lead to higher costs, given that it would require the parallel instruction of additional legal advisers. These may well be unaffordable to many individuals, should the business be unable or unwilling to fund them. Moreover, if the CMA were to require separate legal advice during dawn raids, this could cause delays to the inspection in order to allow a separate team to arrive on site and receive instructions.

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[2] We note that in our experience of dawn raids where individuals have not been separately represented, the presence of the business's lawyers often helps the raid to run efficiently and effectively.

2.9 We recognise that the CMA is concerned to ensure that it can conduct its investigations effectively and efficiently, including by avoiding the risks to which footnote 88 of the Guidance refers. However in light of the above, we do not consider that preventing the business's legal adviser from being present would be appropriate in most cases, unless the individual concerned did not wish the business's legal advisers to attend.

2.10 We also question whether it would be proportionate in most cases to prevent the business's legal advisers from attending, particularly in light of the importance of access to legal advice, the availability of existing sanctions provided by statute for any person obstructing the CMA's investigation[3], and the professional duties to which legal advisers are subject[4].

2.11 In our view, the draft Guidance sets the bar for placing restrictions on the presence of the business's legal advisers too low. The CMA should not impose such restrictions unless it has objective and specific reasons for believing that the risks referred to in footnote 88 of the Guidance apply in that investigation or inspection and would be materially increased by allowing the business's legal adviser to be present during an interview, for example because the CMA has reason to believe that the business's legal advisers have been involved in obstructing the CMA's investigation or inspection. There should be no presumption that the presence of particular legal advisers will prejudice the investigation absent such specific reasons.

2.12 Given the potentially serious impact of preventing a business's legal advisers from attending an interview on the business's rights of defence, we also consider that the CMA should, at the relevant time, provide its reasons for seeking to do so to the business in writing, in order to allow the business an opportunity to consider and (where appropriate) challenge that restriction.

Waiting for legal advisers

2.13 For the reasons set out above, given the importance of legal advice we would be concerned by any suggestion that the CMA would seek to start an interview without the individual's chosen legal adviser being present simply because the CMA considered that waiting for the legal adviser would lead to an unreasonable delay.[5] Provided the individual is willing to cooperate with appropriate measures to prevent the contamination of witness evidence, we consider that the CMA should allow sufficient time for their chosen advisers to arrive on site and receive instructions (particularly if the business's lawyers are not allowed to attend), unless it is clear that the individual is using this deliberately to delay the start of the interview.

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3 In particular sections 40A, 43 and 44 CA98.

4 For example, solicitors are required to uphold the rule of law and the proper administration of justice, and to act with integrity.

5 See paragraph 6.28 of the Guidance.

Access to recordings, transcripts and notes

2.14 As noted above, in order for the business under investigation to protect its privileged information, and to obtain the evidence needed to establish whether an infringement may have taken place and whether it should apply for leniency or settlement, it is critical that the business has access to any witness evidence as soon as possible. The company may also wish to review the evidence for accuracy and correct any mistakes in the transcript or the underlying interview responses, so as to cooperate fully with the CMA's investigation (as well as, in due course, making confidentiality representations). The best way to provide this access is to allow the business's legal advisers to attend the interview, and to provide a copy of the recording or transcript to the business immediately after the interview.

2.15 However in the limited circumstances when it may not be appropriate for the business's legal adviser to be present, the CMA should in any case provide access to the recording or transcript as soon as possible thereafter. This would also apply in respect of individuals who no longer have a connection with the business, since they may have access to the business's confidential and privileged information. As noted above, this is consistent with current practice for documentary evidence taken during raids.

2.16 At present, the Guidance provides little information about when transcripts or recordings would be made available.[6] We consider that additional comfort would be helpful, both in respect of individuals with a current connection to the business, and those without.

Self-incrimination

2.17 We note that whilst minor amendments have been made to the section on self-incrimination in paragraphs 7.4 and 7.5 of the Guidance, it does not set out how the privilege against self-incrimination applies in respect of the CMA's new powers to question individuals. We assume that the CMA is not seeking to erode this fundamental right, and would therefore suggest that paragraphs 7.4 and 7.5 of the Guidance be clarified to note that individuals with a connection to an undertaking are not required to answer questions that potentially could incriminate the undertaking (with the exception of purely factual questions). This would be consistent with the OFT's position in relation to its equivalent compulsory interview powers under section 193 of the Enterprise Act 2002, which is that the OFT will not use any evidence obtained under such powers in a Competition Act investigation against any undertaking which employs the individual concerned.[7] Such a clarification is important given that this area of the law is not well-understood; small businesses and individuals in particular will be unlikely to be familiar with their rights.

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6 See footnote 86 of the Guidance.

7 See paragraph 4.3 of the OFT's *Powers for investigating criminal cartels*, OFT515.

Individuals subject to questioning

2.18 We consider that the CMA's interpretation of its powers to question individuals may be wider than the terms of the CA98 and would be undesirable from a policy perspective.

2.19 We do not think that the terms of section 26A can fairly be interpreted to encompass "*professional advisers or any other person who has advised the business*".[8] Professional and other advisers lack the requisite degree of decision-making authority that is clearly required by the statutory language. Neither are professional advisers "*employed by, or otherwise working for, the undertaking*". If employed, advisers are likely to have an employment relationship with separate businesses and only "work for" the undertaking in the sense that they supply services to it. There is no basis to believe that Parliament intended to subject employees of a company's suppliers to this power and the statutory language is not capable of sustaining that interpretation. In fact the Explanatory Notes to the ERRA13 imply that the words "working for" were included in order to capture relationships such as those with contractors and volunteers, who do not have a formal employment contract, and not professional advisers.[9]

2.20 Given that Parliament expressly limited the application of this significant new power to individuals with a current or former connection with the business, we consider that the CMA should ensure that it respects those limitations and does not seek to apply the power more widely.

2.21 Moreover, interviewing professional advisers could lead to other material legal or policy concerns, in particular concerning the advisers' duties of confidentiality towards their client – such duties often being incorporated into the advisers' regulatory frameworks as well as their terms of engagement with the client. Indeed, should the CMA seek to interview them, advisers may consider themselves legally obliged to challenge a request for disclosure of client confidential information. Any unlawful use of this power could also provide grounds for a business under investigation to appeal.

2.22 In addition, given that many professional advisers play a positive role in promoting compliance with competition and other regulation, any risks to the confidentiality of professional advice could reduce business's incentives to seek such advice and lead to negative policy implications. (If the CMA did question advisers, it would be essential for the business's legal advisers to be present at the interview or have immediate access to the recording or transcript so that they can identify the business's privileged information.)

2.23 We also note that the CMA has the power under section 26 CA98 to issue a written information request requiring any person, including professional advisers, to provide specified documents or information (provided that it is not privileged from disclosure). Given the availability of this power, we do not consider it appropriate to

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8 Footnote 81 of the Guidance.

9 Paragraph 317 of the Explanatory Notes to the ERRA13.

seek to apply a power to question professional advisers, in view of the more intrusive nature of such questioning and the additional risk that the business's privileged information may be requested or disclosed. In addition, if the CMA is concerned that professional advisers may be involved in anti-competitive behaviour themselves, the CMA could make those advisers a subject of its investigation and then apply the questioning power to them.

3. CASE OPENING NOTICES

3.1 We welcome the CMA's statement that "*[t]he CMA will usually only include parties' names in the notice of investigation at a later stage of the investigation, typically if a Statement of Objections is issued*".[10] The CMA will be aware of the substantial reputational consequences of publicity of a competition investigation, and the importance of avoiding undue damage to businesses during the early stages of investigations given the low evidential threshold required to open an investigation.

3.2 The CMA's new privilege against defamation where it publishes specified information in a case opening notice does not affect this concern. We therefore agree with the statement in the consultation document that "*the CMA will continue with the OFT's current practice of naming parties to an investigation only in appropriate circumstances*".[11]

3.3 However the Guidance indicates that the CMA may in fact have broadened the circumstances in which it would publish the names of the parties. In particular, the OFT's *A guide to the OFT's investigation procedures in competition cases* stated that it would not publish the names of the parties in a case opening notice "*other than in exceptional circumstances*".[12] In addition, the CMA Guidance has added a further basis for publication, where the identity of the parties under investigation is "*subject to significant public speculation (and the CMA considers it appropriate to publish details of the parties in the circumstances)*".[13]

3.4 We consider that the OFT's approach was reasonable and proportionate and it would be helpful for the CMA to clarify that parties would only be named in the case opening notice in exceptional circumstances. We also consider that the CMA should not use public speculation as a basis for disclosure, since to do so could encourage the media or other market participants to engage in such damaging speculation in order to "force" a disclosure.

4. INTERIM MEASURES

4.1 As noted above, we welcome the additional transparency in the Guidance concerning interim measures. We also note that interim measures will be likely to materially disrupt a business subject to them, at a stage when there has been no finding of any illegitimate behaviour by the business. Whilst we note that the

[10] Paragraph 5.9 of the Guidance.

[11] Paragraph 3.14 of the Consultation.

[12] Footnote 44 of the OFT Guidance.

[13] Paragraph 5.9 of the Guidance.

ERRA13 reduced the threshold for the application of interim measures, we therefore welcome the CMA's intention to apply them in a proportionate manner.

4.2 However, we consider that it would be helpful if the CMA were to clarify the wording of its guidance on the manner in which it will apply the statutory test for the application of interim measures so as to be clear that its assessment will be based in all cases on whether the statutory test is met on the balance of probabilities. That test requires that interim measures are "*necessary… as a matter of urgency for the purpose (a) of preventing significant damage to a particular person or category of persons…*". Accordingly, we consider that in assessing whether interim measures are necessary, the CMA should consider (among other things) whether, on the balance of probabilities, significant damage is occurring or will occur.[14] We would suggest that paragraphs 8.13 and 8.14 of the Guidance should be amended to replace the wording referring to "*the effect the conduct is having or may have*" and "*such that this may significantly damage their commercial position*" with language that reflects the CMA's obligations as set out in the statutory language.

5. ACCESS TO FILE

5.1 We note that obtaining access to the CMA's file is crucial to allow parties to understand the case against them and to exercise their rights of defence. We further recognise that determining the appropriate procedure for access to file can involve a balancing of parties' rights to maximum disclosure of all potentially exculpatory and/or inculpatory evidence in the CMA's possession with measures to protect legitimate confidentiality interests of information providers, in appropriate circumstances. However in view of the fundamental importance of undertakings' rights of defence, at a stage when they are being "charged" with serious civil infringements, in general any such balancing exercise must ultimately be resolved in favour of the party under investigation. That principle informs several specific points on the CMA's proposed approach to access to file.[15]

5.2 We consider that as a general rule, CMA internal notes of meetings with third parties should not be excluded from the file. We are concerned that the proposed distinction in the treatment of "*formal minutes, transcripts or meeting notes which are agreed with a party*", which would be included, and CMA "*internal notes*", which would be excluded, is unmerited and could lead to inappropriate incentives in relation to how records of meetings are created and maintained.[16] Indeed, such documents are not properly characterised as "internal" as they record engagement with a third party. If the CMA is concerned that its interpretation of meetings should remain confidential, it should record such interpretations in a separate document. We recognise, however, that there may be some categories of meeting notes (e.g. those relating to leniency discussions) that should remain confidential for other reasons.

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[14] We consider that paragraph 8.12 of the Guidance reflects this approach.

[15] The principle is also reflected in the European Commission's *Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004*– see paragraph 24 in particular.

[16] Footnote 155 of the Guidance.

5.3 Whilst we would accept that purely administrative documents that provide no information relevant to the defence need not be included in the file (see paragraph 11.21 of the Guidance), we would encourage the CMA to be very cautious in how it identifies such documents, particularly since it may be difficult for the CMA to anticipate which documents will be relevant. For example, emails setting up meetings may often contain information relevant to the evidence discussed at that meeting. Moreover, even the fact that a meeting with a third party has taken place could in principle be relevant to the defence. In order to allow some oversight of the documents that have been excluded, we would also suggest that the CMA provide the parties with a schedule setting out a brief description of each excluded document and the reason for excluding it from the file.

5.4 We note that the CMA suggests that it may seek to impose confidentiality rings and data rooms as a mechanism of providing access to sensitive documents. We agree that these mechanisms can be an appropriate and proportionate approach in some circumstances, however this is dependent on how they are organised and the extent of restrictions placed on parties and external advisers. These mechanisms should therefore remain voluntary, since they constitute an interference in parties' rights of defence.

5.5 We note in particular that a number of concerns can arise, including in connection with restrictions on:

(a) time to review evidence;

(b) the ability to make notes of or use evidence;

(c) disclosure to individuals in the business with knowledge of the behaviour or of the market concerned in order to seek explanations;

(d) disclosure to client decision-makers with authority to give instructions; and/or

(e) different categories of data or evidence leading to complexity in the administration and protection of confidentiality.

5.6 The CMA will be aware that some of these issues have recently been subject to appeal to the Competition Appeal Tribunal. We recognise the complexities in this area, however we would urge the CMA to work constructively and sensitively with business and their advisers to resolve these issues by agreement where possible. The approach needs to flexible as the appropriate approach is inevitably highly dependent on the individual circumstances of the case. In our experience, problems arise where the authority seeks to impose, rather than agree, the terms of access. We would hope, at least in the CA98 context, that the lack of statutory time limits for access to file should make agreement achievable.

6. SETTLEMENT

6.1 We welcome the new Chapter 14 of the Guidance, which provides additional transparency on the CMA's settlement procedures. We understand much of that chapter to be a codification of the OFT's existing practices, with some aspects that are

new to the CMA. In particular, we welcome the proposal to provide the parties with a draft penalty calculation during settlement discussions; we consider that this will facilitate the operation of the settlement process by helping parties to assess the costs and benefits of settlement.[17]

6.2 However we do not consider that at this stage it is appropriate for the Guidance to express a view on whether an infringement decision would continue to bind a settling party following a successful appeal by a third party.[18] This is a legal issue; the CMA cannot in our view override that legal position with its guidance on settlement policy. Given that this issue may be considered by the Supreme Court[19] in Spring 2014, we would suggest that this does not form part of the CMA's policy or of the Guidance until the legal position is clarified.

7. NOTICE OF DECISIONS

7.1 We welcome the CMA's clarification that in certain circumstances it may be appropriate to issue an infringement decision against only some parties to an agreement.[20]

7.2 However we note that such a decision can have consequences for the other parties to the agreement, including the invalidity of the agreement and potential reputational consequences, as well as increasing the risk of third party litigation. We would therefore encourage the CMA to provide other parties to the agreement with appropriate opportunities to exercise their rights to be heard[21] (including accessing relevant evidence and making representations to the CMA) and to receive prior warning of any public announcements that may have a commercial or reputational impact.

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17 Paragraph 14.14 of the Guidance.

18 Paragraph 14.8 of the Guidance.

19 In *Deutsche Bahn AG & Others v Morgan Crucible Company PLC & Others.*

20 Paragraph 193 of the Guidance.

21 For completeness, we note that a party to the agreement would likely have the right to appeal an infringement decision relating to the agreement. Allowing such a party to exercise their rights at the CMA stage is therefore in the best interests of the party and the CMA.