Response to BIS CMA Transition Team

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

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CMA8con: COMPETITION ACT 1998: CMA GUIDANCE AND RULES OF PROCEDURE FOR INVESTIGATION PROCEDURES UNDER THE COMPETITION ACT 1998

This response represents the views of law firm Allen & Overy LLP on the Competition and Markets Authority (**CMA**) consultation document *CMA8con: Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998* (the **Consultation Document**) and, in particular, the draft *Rules of Procedure: Competition and Markets Authority Competition Act 1998 Rules* (the **Draft CMA CA98 Rules**) and the CMA draft guidance *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (the **Draft CMA CA98 Guidance**). We have also responded separately to the following consultations:

- Competition Regime: Draft secondary legislation – part two
- CMA9con: Cartel Offence Prosecution Guidance
- CMA10con: Regulated Industries: Guidance on concurrent application of competition law to regulated industries
- CMA11con: Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders
- CMA12con: Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance
- CMA13con: Vision, values and strategy for the CMA

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

The Consultation Document, Draft CMA CA98 Rules and Draft CMA CA98 Guidance are well structured and clear. We welcome the CMA's approach to retain much of the existing OFT Competition Act 1998 (**CA98**) rules (**OFT Rules**) and the OFT's guidance on how it conducts investigations under the CA98 (**OFT Guidance**) and only to propose revisions to reflect: (i) amendments introduced by the Enterprise and Regulatory Reform Act 2013 (**ERRA13**); or (ii) incremental improvements to policies and procedures made by the Office of Fair Trading (**OFT**) or intended to capture the benefits of the CMA's unitary nature.

We address any concerns in response to the specific questions raised in the consultation.

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 Yes. In particular we agree with the CMA's approach of replacing (rather than supplementing) the OFT Rules and the OFT Guidance, but retaining the OFT guidance on substantive assessment. Given that the key changes to the CA98 regime introduced by the ERRA13 relate to procedure, and are in many cases significant reforms, we consider it is extremely important to have a single comprehensive set of rules of procedure and a single guidance document to take parties through the process.

1.2 We note that three documents listed in Annexe A (*OFT436: Leniency in cartel cases*; *OFT515: Powers for investigating criminal cartels* and *OFT546: Memorandum of understanding between the OFT and the NCD, Crown Office, Scotland*) are marked as "(✓)" in the "replaced/obsolete" column. Please could you clarify why the parenthesis has been used? We understand from other consultation

documents that there are separate workstreams to consider updates to OFT 515 and OFT546. OFT436 is presumably out of date following the publication of the new leniency guidance (OFT1495) in July 2013.

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 the Draft CMA CA98 Rules generally reflect well the impending changes to the antitrust regime.

2.2 Rule 3 (Delegation of functions) sets out a clear basis for the new decision making process although Rule 3(2) refers to any "supplementary notice" under Rule 5, a term which is otherwise not used or defined in the Draft CMA CA98 Rules.

2.3 Rule 4(3) (Legal advice during investigations and inspections) sufficiently extends an individual's right to legal advice to interviews conducted under the CMA's new section 26A power.

2.4 Rule 6 (Notices, access to file and representations) clearly articulates the CMA's obligation to offer an addressee of a notice the opportunity to attend an oral hearing and the identity, role and duties of the chairperson of the oral hearing.

2.5 Rule 8 (Procedural complaints) sets out the processing of complaints by the Procedural Officer, and in particular the timeline for determination of complaints. Rule 8(3) should be clarified by stating when the Procedural Officer's 20 working days to give notice of its decision actually starts to run, presumably from receipt of the complaint. The use of the undefined term "significant procedural complaint" in Rule 8(1) introduces some uncertainty as to which complaints the Procedural Officer will be compelled to consider. Similarly, the undefined term "special reasons" in Rule 8(4) creates, perhaps in this case an unavoidable, ambiguity as to the circumstances when the Procedural Officer could extend the 20 working day period.

2.6 Rule 9 (Settlement) provides a clear procedure for settlement-specific decision making. However, we query whether Rule 9(4) should clarify that the single relevant person taking the decision to follow a settlement procedure may also take a decision to issue a statement of objections, as well as to make an infringement decision.

2.7 Rule 10 (Notice of decision) sets out the procedure for giving notice of a no grounds for action decision. We note that the CMA's obligation to issue a notice has been narrowed – the notice must be provided to those who have been issued with a Rule 5 (Statement of objections) notice, whereas Rule 7(2) of the OFT Rules refers to persons in respect of which the OFT or an officer has exercised any of the CA98 powers of investigation.

2.8 Rule 11 (Notice of proposed penalty) is a welcome new rule that clearly sets out the CMA's obligation to provide any undertaking that it proposes to fine with a draft penalty notice.

2.9 We note that a requirement to register summaries of notices published under Rule 19(2)(a) has been removed from Rule 20 (Public register). This is despite the fact that Rule 19(2)(a) still requires the CMA to publish such summary notices in the register in certain circumstances, including in the newly-articulated situation where the CMA is enforcing a competition law breach against one or more – but not all – parties to an agreement (Rule 19(1)(c)). The omission should be re-inserted.

2.10 See also 1.1 above.

3. Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?

3.1 Paragraphs 6.18 to 6.28 of the Draft CMA CA98 Guidance cover the CMA's power to require individuals to answer questions. The guidance is a little repetitive. It does add, however, some useful detail to the statutory power as set out in section 26A CA98, for example on individuals who could be considered to have a "connection with" a relevant undertaking (footnote 81), when an individual may be interviewed immediately on receipt of the formal notice (paragraph 6.26), and the process for recording of interviews and making confidentiality claims (paragraph 6.27).

3.2 Paragraph 6.23 highlights the degree of flexibility afforded to the CMA by the wording of section 26A(2) to (4) CA98. Although the CMA "must" provide relevant undertakings with a copy of notices provided to their currently connected individuals, there is some discretion as to *when* the CMA can provide the notice. Footnote 84 notes that the CMA may not provide the copy before conducting an interview if the resulting delay may compromise the investigation or otherwise undermine the CMA's ability to exercise its functions under the CA98.

3.3 It would be useful to have some guidance as to how long the CMA will normally give individuals to make representations on confidentiality in relation to the interview transcript (paragraph 6.27 simply states that the CMA will normally ask for representations by a "specified date"). It is sensible that the CMA provides for relevant undertakings to have also an opportunity to comment on the confidentiality of transcripts or notes prepared subsequent to an interview (footnote 86).

3.4 Paragraph 6.28 sets out an individual's right to have a legal adviser present at the interview. The Draft CMA CA98 Guidance notes that the CMA may delay, for a reasonable time, questioning in the context of an inspection, but possibly only subject to certain conditions to reduce risk of contamination of witness evidence. It would be helpful if the Draft CMA CA98 Guidance included examples of such conditions.

4. Do you agree with the proposed approach to use of 'confidentiality rings' and 'data rooms'?

4.1 Given that 'confidentiality rings' and 'data rooms' are increasingly being used (especially in settlement cases), we consider the guidance on the situations when such access to file methods might be appropriate in paragraph 11.24 extremely helpful.

4.2 Whilst we broadly agree with the CMA's approach as set out in the Draft CMA CA98 Guidance, we expect the CMA to review its procedures, and in particular the detail of its data room rules, in the light of the Competition Appeal Tribunal's 2 October judgment in *BMI Healthcare v Competition Commission*.

5. Is the proposed settlement procedure clear, and do you have any views on it?

5.1 Chapter 14 of the Draft CMA CA98 Guidance provides very welcome new guidance on settlement, in particular on the requirements for settlement and the settlement process. On the whole, and in light of the discretionary and case-specific nature of settlement, the guidance is clear and comprehensive. However, we do have a few comments in addition to our responses to questions 6 and 7.

5.2 In terms of the discretionary nature of settlement, paragraph 14.6 states that the CMA will have regard to "a number of factors" in determining whether a case is suitable for settlement. Might these factors go further than the evidential standard and resource-savings example factors expressly mentioned? Is the CMA prepared to give guidance on the likelihood of it following a settlement procedure where one or more businesses involved in the investigation is clearly not interested in taking the settlement path?

5.3 Paragraphs 14.7 and 14.8 clearly set out the requirements for settlement. In particular, in relation to appeals we note that if the settling business appeals the decision (presumably including the level of

penalty), it will no longer benefit from the settlement discount. We note too that a decision will remain final and binding as against a settling party if it does not successfully appeal the infringement decision, even if another addressee of the infringement decision successfully appeals it. Of course this bullet point will need to remain squared with the final outcome of Gallaher and Somerfield's applications for permission to appeal the OFT's 2010 tobacco retail pricing decision.

5.4 We note that the CMA will prepare a Summary Statement of Facts where it pursues settlement pre-Statement of Objections. Footnote 201 explains the content and purpose of this document but fails to mention that the CMA will only use it in pre-Statement of Objections cases (and not post-Statement of Objections settlement cases). This should be clarified.

5.5 Paragraphs 14.20 and 14.31 remind parties that they should not disclose the content or fact of settlement discussions or documents to any third parties without the CMA's prior written authorisation. We suggest that the CMA clarifies the consequences of failing to meet this requirement.

5.6 The final sentence of paragraph 14.22 (which relates to cases where settlement discussions are unsuccessful) states that the Case and Policy Committee will formally adopt a final infringement decision. However, according to chapter 13 of the Draft CMA CA98 Guidance the Case Decision Group will just give the Case and Policy Committee an opportunity to provide its views in non-settlement cases.

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 Paragraph 14.14 states that the CMA will present each business considering settlement with a draft penalty calculation. We consider that this calculation, and settlement discussions generally, should set out the maximum level of penalty the CMA will impose (factoring in a specified settlement discount).

6.2 There is a significant range in the penalty discount that businesses might win, in particular in relation to the pre-Statement of Objections 20% cap. This will result in a degree of uncertainty for businesses, especially early in the application of the CMA's settlement regime before the publication of case-specific facts and reductions. Whether a 5% cap, for example, is attractive to a business will depend hugely on what the total penalty is going to be. We therefore consider that the CMA should brief businesses fully on their maximum penalty and settlement discount prior to the businesses being required to make an admission of infringement.

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 We welcome the fact that settlement is available in principle both pre- and post-Statement of Objections. We consider that significant procedural efficiencies and resource savings can be made at both stages of an investigation to justify a settlement discount.

7.2 Clearly, however, these savings are likely to be greater pre-SO and the higher 20% settlement discount cap reflects this.

8. Do you have any comments on any of the other amendments proposed for the Draft CMA CA98 Guidance?

8.1 Paragraph 5.9 of the Draft CMA CA98 Guidance states that "the CMA will not generally expect to publish the names of parties under investigation other than in appropriate circumstances". Paragraph

3.14 of the Consultation Document maintains that naming parties only in *appropriate* circumstances is a continuation of the OFT's current practice. We note, however, that the OFT Guidance refers to, more limited, *exceptional* circumstances.

8.2 A new footnote (71) is added to paragraph 6.8, but we notice that the text of the footnote is not included in the Draft CMA98 Guidance.

8.3 Paragraph 6.8 deals with the return of information gathered during the course of an investigation, for example if it is duplicative or outside the scope. It states that *"[a]ny such information that is returned will no longer form part of the CMA's investigation file*". We agree with this approach. However, the Draft CMA CA98 Guidance does not make it clear whether the CMA is able to (and if so, is likely to) use the knowledge gained from any such information to launch a new, separate, investigation, e.g. by conducting a raid or using its other information gathering powers.

8.4 In relation to the handling by the CMA of confidential information, footnote 110 states that the CMA is unlikely to consider financial information or certain other data relating to a business that is more than two years old to be confidential. We suggest that the CMA keeps this approach under review in light of the Advocate General's Opinion of 3 October 2013 in *European Commission v EnBW Energie Baden-Württemberg*, in which the Advocate General concluded that the General Court was mistaken in "*declining – simply because of the age of the documents – even to consider the possibility that there might be a commercial interest worthy of protection*". If the ECJ chooses to follow the Advocate General on this point, the CMA should consider whether this section of the guidance should be revised.

8.5 We welcome the additional guidance on interim measures in chapter 8 and, in particular, on when the CMA is likely to consider damage is significant under the new threshold. However, the Draft CMA98 Guidance does not address the point of whether interim measures will be available where significant damage has been caused, but where that harm could be adequately compensated by damages. Would the CMA nevertheless consider that interim measures were appropriate, or would it simply be a factor to weigh up alongside the others listed?

8.6 Paragraph 12.13 states that the oral hearing will be chaired by the Procedural Officer. According to the Draft CMA CA98 Rules the oral hearing will be chaired by a "relevant person who may be a Procedural Officer" (Rule 6(5)), thus giving a little more flexibility on the identity of chairperson. Is the CMA interpreting the Rules in a way that oral hearings will always be chaired by the Procedural Officer? If there is a possibility that a person other than the Procedural Officer will chair the oral hearing, this should be reflected in the Draft CMA CA98 Guidance.

8.7 Paragraph 13.9 and footnote 193 cross refer to Rule 19 of the CA98 Rules, stating "where an undertaking is a party to an agreement that is the subject of a CMA decision but is not an addressee of the Statement of Objections, the CMA will fulfil its obligation to notify such parties by issuing a press release that the decision has been issued, and taking steps to publish a notice of that decision on the register of decision". In fact, Rule 19(2) of the Draft CMA CA98 Rules refers to publishing a summary of the notice in the CMA's register and a reference to the summary in certain newspapers and journals.

8.8 Chapter 15 deals with complaints to the Procedural Officer. Paragraphs 15.9 and 15.10 note that the Procedural Officer is able to extend the 20 working day deadline for him/her to make a decision in accordance with Rule 8 of the Draft CMA CA98 Rules, but does not provide any guidance on the special reasons that might trigger an extension. In comparison, paragraph 3.27 of the Consultation Document does provide examples of the circumstances where the extension period is likely to be used. These would be usefully included in the Draft CMA CA98 Guidance.

9. Do you agree with the proposed transitional arrangements, as set out in paragraphs 3.41 to 3.43 above?

9.1 We consider the proposed transitional arrangements to be a sensible way of dealing with ongoing cases.

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 consider that there is a strong case for the CMA to maintain the short-form opinion (SfO) process as part of its package of guidance and advocacy work. We welcome the Transition Team's proposed extension of the SfO trial to prospective vertical agreements. In our experience, such agreements are as much, if not more, likely to raise knotty, novel or unresolved questions, the clarification of which would benefit a wider audience, as horizontal agreements.

10.2 We look forward to the publication of guidance on the procedure that the CMA will follow.