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

QUESTIONS FOR CONSULTATION

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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 No comment.

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 Our comments regarding the Draft CMA CA98 Rules are included in our responses to Questions 3 to 10 below.

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

3.1 Clause 39 of the Enterprise and Regulatory Reform Act 2013 introduces a new section 26A to the Competition Act 1998 ("**CA 98**") which gives the CMA the power to require individuals to answer questions. Paragraphs 6.20 and 6.22 of the Draft CMA CA98 Guidance state that, where the CMA wishes to question an individual under formal powers, the CMA will provide the relevant individual with a formal written notice which will explain what the CMA's investigation is about and provide details about where and when the interview will take place. The CMA will also give notice to any undertaking with which the relevant individual has a "current connection" before carrying out the interview.

3.2 Paragraphs 6.25, 6.26 and 6.28 of the Draft CMA CA98 Guidance state that the CMA may, in certain circumstances (which are not specified), interview relevant individuals during dawn raids immediately after giving them formal notice. The Draft CMA CA98 Guidance also states that the CMA can object to the undertaking's lawyers being present during the interview with the relevant individual. Although 6.28 of the Draft CMA CA98 Guidance states that the interview may be delayed for a reasonable time to allow a legal adviser to attend, the CMA is not obliged to delay the interview.

3.3 We have substantive concerns about these developments, as well as concerns about the drafting of the relevant legislation and guidance.

3.4 Our substantive concerns are the following:

(a) As external lawyers may not be present when the dawn raid takes place, there is a serious risk of the interview proceeding before the individual has had any legal advice, in particular in relation to the privilege against self-incrimination.

(b) Individuals being interviewed at a dawn raid without having had access to the undertaking's lawyer or an external lawyer may not be aware of the privilege against self-incrimination. We therefore believe that the formal notice provided to an individual by the CMA before the interview is conducted should contain a paragraph clearly and prominently explaining the right to remain silent and the protection against self-incrimination.

(c) The CMA will tell the individual's present employer if the interview relates to that employer, but not, for example, his or her previous employer even if the interview relates to events during his or her previous employment with that employer. We believe that there should be an obligation on the

CMA to inform not only the undertaking with which the relevant individual has a "current connection", but also the undertaking(s) which employed the relevant individual during the period(s) that the relevant individual is being questioned about.

3.5 We have the following concerns about the drafting of the relevant legislation and guidance:

(a) The Draft CMA CA98 Rules do not refer to the CMA using its interview powers during a dawn raid. It is only apparent from the Draft CMA CA98 Guidance and Chapter 3 of the CMA's consultation document (which summarises the procedural changes in the Draft CMA CA98 Guidance) that the CMA intends to use its interview powers during dawn raids.

(b) The Draft CMA CA98 Guidance does not provide any guidance in relation to the circumstances in which the information obtained during an interview could be used against the individual, his/her colleagues and/or his/her employer. This is particularly important if an individual is interviewed during a dawn raid, without having had access to the undertaking's lawyer or an external lawyer. It is not clear why the Draft CMA CA98 Guidance does not contain this guidance, given that the amended sections 30A(2) and 30A(3) CA98 (also introduced by Section 39 of the Enterprise and Regulatory Reform Act 2013) provide that a statement by an individual in response to a requirement imposed by virtue of section 26A (a "**section 26A statement**") may only be used in evidence against the individual on a prosecution for an offence under section 44[1] or on a prosecution for some other offence in a case where, while giving evidence, the individual makes a statement inconsistent with the section 26A statement and evidence relating to the section 26A statement is adduced, or a question relating to it is asked, by or on behalf of the individual. The amended section 30A(4) of the Competition Act 1998 states that a section 26A statement may not be used in evidence against an undertaking with which the individual who gave the statement has a connection on a prosecution for an offence unless the prosecution is for an offence under section 44.

3.6 It is unfortunate that the CMA has not provided clearer information and guidance regarding the CMA's new power to require individuals to answer questions, given that this is an important change to the competition regime. At a minimum, the Draft CMA CA98 Guidance should refer to the relevant statutory provisions and include clear guidance on the circumstances in which the information obtained during an interview conducted by the CMA can be used against the individual, his/her colleagues and his/her employer.

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

4.1 Paragraph 11.24 of the Draft CMA CA98 Guidance states that the CMA "*may organise a 'data room' procedure where the disclosure of a limited category of confidential information or data on an 'external adviser only' basis would enable a party's legal, economic or other professional advisers to further their understanding or prepare confidential submissions on behalf of their client regarding the CMA's analysis*". This suggests that in-house lawyers will not have access to data rooms. We consider that the CMA CA98 Guidance should clarify whether in-house legal advisers can be included in confidentiality rings and/or have access to data rooms.

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[1] Providing false or misleading information

4.2 In our view there should be no presumption or rule against including in-house legal advisers in confidentiality rings or giving them access to data rooms. At a minimum, this issue should be considered on a case by case basis.

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

5.1 We support the introduction of the formal settlement procedure and CMA's efforts to achieve efficiencies through the adoption of a streamlined administrative procedure, resulting in earlier adoption of any infringement decision and resource savings for itself and the infringing parties (referred to in paragraph 14.8 of the Draft CMA CA98 Guidance).

5.2 We consider that the provision of a Summary Statement of Facts and draft penalty calculation to businesses considering settlement will provide clarity and certainty and enable businesses to reach an informed decision regarding settlement.

5.3 However, it would be helpful to have more detailed guidance in relation to certain aspects of the settlement procedure. For example, paragraph 14.23 of the Draft CMA CA98 Guidance states that the infringement decision will "*substantially reflect the admission made by the settling business… [it] will also include findings of fact and law, the amount, and an explanation of, the penalty imposed on the settling business as well as a description of the key requirements of the settlement procedure*". It is not clear from the guidance whether the infringement decision in settlement cases will be sufficiently different from the infringement decision in cases where there is no settlement. We consider that a streamlined decision would be one of the key incentives for businesses to settle, given that an infringement decision may be relied on by third parties that bring follow-on actions. It would be helpful to have confirmation that the infringement decision in settlement cases will contain more limited information than infringement decisions in cases where there is no settlement.

5.4 In addition, we consider that the requirement for businesses to confirm that its employees or officers would be prepared to appear as witnesses on behalf of the CMA's case, should another addressee of the eventual infringement decision appeal the decision (referred to in paragraph 14.8 of the Draft CMA CA98 Guidance), is unreasonable. Infringing parties should not be expected to incur further management time and costs after an investigation has finished, where they themselves have not appealed a decision.

5.5 Rather than this being a requirement of any settlement, the willingness of a business to agree that specified employees or officers would be willing to appear as a witness in such circumstances could be a factor in the terms of the settlement – i.e. a larger discount could be available for parties willing to give such a commitment. There could, however, be a significant gap between the date of the settlement and the date of an appeal, by which time one or more relevant potential witnesses may have left the employment or office with the relevant company, so that it would no longer be in a position to direct the relevant person(s) to give evidence. Would the CMA expect to claw back some of the settlement from the relevant company in such circumstances?

5.6 If employees or officers are to agree to give evidence on an appeal, the CMA should consider giving them some incentive to do so, such as immunity from criminal proceedings and/or disqualification proceedings.

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 consider that settlement discussions should include the proposed maximum penalty that the settling business will have to pay. As suggested in paragraph 3.35 of the consultation document, one of the advantages of settlement for a business is that the business can obtain increased certainty regarding its financial exposure. A discount on an undisclosed penalty does not provide sufficient certainty.

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 Paragraph 14.28 of the Draft CMA CA98 Guidance states the following: "*the discount available for settlement pre-Statement of Objections will be up to 20% and … the available for settlement post-Statement of Objections will be up to 10%*" (emphasis added). The Draft CMA CA98 Guidance further states that, "*the discount may be less than 20% for pre-Statement of Objections and less than 10% for post-Statement of Objections. The CMA will determine the appropriate level of the discount having regard to the circumstances*". We agree in principle that larger discounts should be available for parties that settle before the Statement of Objections is issued than for parties that settle after the Statement of Objections is issued. However, we believe that uncertainty regarding the settlement discount will significantly reduce the incentive of businesses to settle. As part of the settlement process, parties will have to make admissions of liability. In an environment in which it will be easier for third parties to succeed in follow-on actions[2], parties are likely to require greater certainty about the level of discount they can expect to receive. For example, a party may be willing to settle if it is granted a discount (at the pre-Statement of Objections stage) of 20%, but may not be willing to settle if it does not know whether it will receive a discount of 20% or (for example) 5%.

7.2 We consider that the CMA should grant a minimum settlement discount of 10%. We would also prefer to see discounts of more than 20% available given the benefits to the CMA of settlement and the risks of third party claims against parties admitting liability. If up to 50% is available for leniency, then there should be room to give larger discounts for settlement without risking discount levels being close to immunity once Type C leniency and settlement discounts are combined.

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

8.1 We have the following additional comments:

(a) Paragraph 4.10 of the Draft CMA CA98 Guidance states that the CMA will have two groups to carry out competition investigations, one of which will be referred to as the "Anti-Trust Group". We believe that this use of US terminology is inappropriate. "Anti-competitive Investigations Group" or "Competition Investigations Group" would be more appropriate terminology.

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[2] As a result of the changes to be made by (among other things) the Consumer Rights Bill

(b) Paragraph 6.48 of the Draft CMA CA98 Guidance says the CMA may return information it has gathered during the course of an investigation where it is duplicate information or is outside the nature and scope of the investigation. There is no obligation on the CMA to return this information within any period after having established that it is duplicate information or is outside the nature and scope of the investigation. There should be an obligation on the CMA to return it within a reasonable time of establishing that it is duplicate or outside the nature and scope of the investigation.

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

9.1 No comment.

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 agree in principle with extending the availability of SfOs to prospective vertical agreements as well as prospective horizontal agreements, as such guidance may be helpful to the parties and as a precedent. However, our understanding is that to date there have been few SfOs requested or given in any event.