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18 November 2013

The CMA Transition Team on behalf of the CMA
FAO: Easha Lam
Department for Business Innovation, and Skills
3rd Floor, Orchard 2
1 Victoria Street
London
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Dear Sirs,

Response to the Consultation Document entitled Competition Act 1998: Competition and Markets Authority ("CMA") Guidance and Rules of Procedure for Investigation Procedures under the Competition Act 1998

We set out below Brown Rudnick LLP's response to the Consultation Document entitled Competition Act 1998: CMA Guidance and Rules of Procedure for Investigation Procedures under the Competition Act 1998. Our response is restricted to Question 3 of the Consultation Document which reads, as follows:

> "Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?"

Background

From 1 April 2014, the CCG[1] of the CMA will be tasked with investigating undertakings in order to determine whether they are in breach of the Chapter I and II prohibitions in the Competition Act 1998 and/or the equivalent EU prohibitions in the Treaty on the Functioning of the European Union. The CCG will also be tasked with prosecuting individuals who are alleged to have committed the cartel offence contrary to section 188 of the Enterprise Act 2002.

The New Statutory Power

Section 39 of the Enterprise and Regulatory Reform Act 2013, which will come into force on 1 April 2014, introduces a new section 26A of the Competition Act 1998 which provides the CMA with the power to require individuals who have a "*connection with the relevant undertaking*" to answer questions with respect to any matter relevant to the investigation.

The power to require individuals to answer questions which will be granted to the CMA by section 26A is not unique. Indeed, under section 193(1) of the Enterprise Act 2002, the OFT already has

[1] Formerly called the Cartels and Criminal Enforcement Group (CCEG) at the OFT.

the power, by notice in writing, to require the person under investigation, or any other person who it has reason to believe has relevant information, to answer questions or otherwise provide information with respect to any matter relevant to the investigation.

There are also similar powers available to other regulatory and law enforcement agencies. Under section 171(1), 172(2) and 173(2) of the Financial Services and Markets Act 2000, the Financial Conduct Authority has the power to require a range of persons to attend "*at a specified time and place and answer questions*". Under section 2(2) of the Criminal Justice Act 1987, the Director of the Serious Fraud Office has the power to require the person whose affairs are to be investigated or any other person whom he has reason to believe has relevant information to "*answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith*".

Our Response to Question 3 - Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?

For present purposes, we do not seek to take issue with the fact that the legislature has seen fit to equip the CMA with the power to require individuals to answer questions and nor do we seek to address the appropriateness of the grant of this power in the context of the investigation of infringements of competition law.

We are, however, concerned at the proposed approach as to how the CMA will use the new power. Compulsory powers interfere with fundamental human rights and must be exercised in accordance with the provisions of the Human Right Act 1998 whereby an appropriate balance is struck between the public interest in investigating infringements of competition law and private rights. We are concerned that the draft CMA Competition Act 1998 Rules and Guidance do not adequately preclude the highly undesirable outcome that all manner of employees of undertakings may be subjected to compulsory interview on receipt of a notice under section 26A(1) during inspections or the execution of search warrants, without any forewarning, without independent legal advice and in circumstances where it is difficult to envisage any real need for such urgency. In addition, we are extremely concerned that the draft CMA Competition Act 1998 Rules and Guidance contain no provisions in relation to compulsory interviews of employees with potential criminal liability under section 188 of the Enterprise Act 2002. Our view is that, as a matter of principle, where there are reasonable grounds to suspect an individual of involvement in the criminal cartel offence, that individual should not be subject to compulsory interview under s.26(A). Accordingly, we consider that the draft CMA Competition Act 1998 Rules and Guidance should be amended in light of these broad comments and as set out below.

Rule 4(3) of the CMA Competition Act 1998 Rules begins by stating that "*An officer must grant a request of an individual required under section 26A to answer questions to allow a reasonable time for a legal adviser to arrive before starting the interview*". However, it then provides that the obligation to allow a reasonable time for a legal adviser to arrive before starting the interview is subject to the two requirements at sub-paragraphs (a) and (b). In the present draft, the two requirements are dependent upon what the officer considers to be reasonable / appropriate and, as such, are entirely subjective. We do not consider that the subjective views of an officer should be determinative of whether there is an obligation to allow a reasonable time for a legal adviser to arrive before starting the interview. On the contrary, there must be objectively justifiable reasons to deny an interviewee access to legal advice and, in the context of an investigation of an infringement of competition law, it would be extremely rare for such action to be justified, if at all. Where a legal adviser cannot attend an interview on the day of the inspection/execution of the warrant, we submit that it would be both inappropriate and unlawful for the CMA to insist upon conducting the interview that day, against the wishes of the interviewee, unless it could be

demonstrated that there were reasonable grounds to believe that there was a real risk that postponement would seriously prejudice the investigation.

We note that paragraph 1.8 of the draft CMA Competition Act 1998 Guidance states that "*the CMA may adopt a different approach in circumstances where, at the same time as conducting an investigation into a suspected competition law breach by a business, in parallel the CMA is also looking at whether an individual has committed a criminal cartel offence.*" We consider that the draft CMA Competition Act 1998 Rules and Guidance should be amended so that they address, in detail, the use of compulsory interviews where interviewees may have potential criminal liability under section 188 of the Enterprise Act 2002. As detailed above, our view is that, as a matter of principle, where there are reasonable grounds to suspect an individual of involvement in the criminal cartel offence, that individual should not be subject to compulsory interview under section 26(A).

Paragraph 6.26 of the draft CMA Competition Act 1998 Guidance indicates that, generally, compulsory interviews on receipt of notice will occur during the course of an inspection (or, presumably, during the execution of a search warrant) where "*the CMA considers that an individual may have information that would enable the CMA to take steps to prevent damage to a business or consumers, or where the effective conduct of the investigation means that the CMA considers it necessary to ask an individual questions about facts or documents immediately after having given a notice.*" In reality, in the context of an infringement of competition law, it is very difficult to envisage why there would be any justification for compulsory interviews of employees during the course of an inspection or the execution of a warrant in the usual course of events, especially given the fact that sections 27(5)(b)(i), 27(5)(b)(ii), 27(5)(c), 28(2)(e) and 28A(2)(e) and are already available to facilitate those processes. Accordingly, further thought should be given to attempting to define the circumstances in which there will be a genuine need to interview without notice. Our view is that any attempt to over-use section 26(A) in order to ambush individuals, without very good reason for doing so, would be entirely inappropriate. In circumstances where the threat of administrative penalties and criminal offences exist, it is imperative that individuals are granted adequate time to take legal advice and prepare for interview. Any attempt to deny interviewees the right to adequately consider, in advance of and in the course of compulsory interviews, important issues which routinely arise (for example, admissibility against the interviewee, admissibility against a co-defendant, disclosure to third parties, privilege against self-incrimination, legal professional privilege, human rights law and judicial review) would be unduly prejudicial and inappropriate.

At paragraph 4.20, the Financial Conduct Authority's Enforcement Guide states that "*Where the FCA interviews a person, it will allow the person to be accompanied by a legal adviser, if they wish.*" Similarly, under 'Interviews', the Serious Fraud Office's Operational Handbook states that "*It is SFO policy to permit the attendance of defence legal advisers at s2 interviews...*" We consider that words to the same effect should be inserted at the beginning of the section entitled 'Can a legal adviser be present?' in the draft CMA Competition Act 1998 Guidance.

Paragraph 6.28 of the draft CMA Competition Act 1998 Guidance states that in cases where the CMA wishes to question a person having entered premises during an inspection or the execution of a search warrant, "*the questioning may be delayed for a reasonable time to allow a legal adviser to attend.*" We consider that this paragraph should be amended in order to confirm that the questioning <u>will</u> be delayed for a reasonable time to allow a legal adviser to attend. Once again, where a legal adviser cannot attend an interview on the day of the inspection/execution of the warrant, we submit that it would be both inappropriate and unlawful for the CMA to insist upon conducting the interview that day, against the wishes of the interviewee, unless it could be demonstrated that there was a real objective risk that postponement would seriously prejudice the investigation.

Finally, we wish to point out that paragraph 3.10 of the Consultation Document appears to contain an error in stating that "*In limited circumstances, however (for example, in certain 'dawn raid scenarios', where there is a time-critical element to an interview and a delay in conducting the interview may compromise the investigation), it may not be possible or appropriate to provide a notice prior to conducting the interview.*" For the avoidance of doubt, section 26A(1)(b) and paragraph 6.25 of the draft CMA Competition Act 1998 Guidance confirm that the provision of a notice prior to any interview is obligatory, albeit the interview may take place "*on receipt of the notice*" (ie immediately afterwards).

For the reasons set out above, we do not consider that the proposed approach to interviewing witnesses is appropriate.

We confirm that we are happy for our response to be made available on the CMA's website.

Yours faithfully

BROWN RUDNICK LLP