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BY EMAIL
The BIS CMA Transition Team on behalf of the CMA (c/o Easha Lam)
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11 November 2013

Dear Sirs

CONSULTATION ON DRAFT CMA GUIDANCE - INVESTIGATIONS

I am writing briefly on the subject of the treatment, in the CMA's draft guidance on investigations, of the privilege against self-incrimination in the context of compulsory interviews of individuals under section 26A CA 1998. This letter follows up on the specific comment that I made at the CMA launch event on 1 October.

The comments made in this letter should not be seen as reflecting the views of any of Bird & Bird's clients.

Current OFT guidance, OFT 1263rev, explains, at para 7.4, that "When we request information or explanations we cannot force a business to provide answers that would require an admission that they have infringed the law." That reflects the requirements of the Human Rights Act, case-law of the European Court of Human Rights and case-law of the European Court of Justice in cases such as *Orkem*.

The draft CMA guidance retains this wording, with minor amendments. However, it also provides guidance, at paras 6.18-6.28, on the exercise of its new power under section 26A CA 1998, the power to require certain individuals to answer questions.

As a preliminary comment, it would be useful to see, at paras 6.18-28, guidance in relation to the exceptions provided in section 30A(2)-(5) CA 1998.

However, while section 30A(4) expressly prohibits use of a section 26A statement in a prosecution of a connected undertaking (with limited exceptions), it does not address the use of a section 26A statement in CA 1998 infringement proceedings against an undertaking with which the individual has a connection. In this respect, it adopts a similar approach to section 26, which is silent on the subject of the privilege against self-incrimination as applied to undertakings, and leaves the issue to be addressed in OFT/CMA guidance.

There is no doubt that the privilege should apply to such situations. It is accepted, and recognised in para 7.4 of the OFT and CMA guidance, that an undertaking is entitled to the protection of the privilege against self-incrimination. However, an undertaking can answer

questions only through the agency of individuals – whether orally or in writing. The rights of the undertaking must not be capable of being circumvented merely by the device of compelling an individual to answer questions in a section 26A interview, rather than posing them in writing in the form of a section 26 notice. Consider the following simple example:

CMA: "did Widget plc agree to fix prices at the meeting with its competitors on 5 November?"

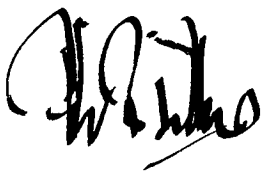
If the question were asked of Widget plc in a section 26 notice, the company would be entitled to refuse to answer. However, if the same question were put to the CEO in the course of a section 26A interview, the guidance fails to make it clear that he would be entitled to refuse to answer. Use of the statement in a criminal prosecution of the company (for provision of incorrect or misleading information) would be limited by virtue of section 30A(4). However, as the guidance currently stands, it could be used in CA 1998 proceedings against the company. This is a clear breach of a fundamental right of the business.

The CMA guidance should therefore make it clear at least that the use of section 26A statements as evidence in CA 1998 civil infringement proceedings against a connected company will be limited in the same way as in criminal proceedings. In fact full compliance with EU and ECHR case-law in this area require that the individual should be entitled to refuse to answer such questions entirely, but I recognise that the formula of a mandatory interview, with limits on the use that may be made of the answers, is established in similar UK legislation.

Support for this view can be found in "Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues"[1] by Bo Vesterdorf, at the time President of the Court of First Instance. Judge Vesterdorf specifically considered (on page 1213) the application of the privilege to questions asked of individuals under Article 20(2)(e) of Regulation 1/2003. He differentiated between interviewees who are authorised to speak on behalf of the undertaking (who, he believed, should not be required to incriminate the undertaking) and those who are not. Section 26A draws a similar distinction by its reference to "connection with an undertaking".

Please do not hesitate to contact me if you would like to discuss this further.

Yours faithfully



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[1] Fordham International Law Journal, Vol 28, Issue 4, 2004, Article 11:
http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1984&context=ilj