RESPONSE TO CMA CONSULTATION: COMPETITION ACT 1998: GUIDANCE ON THE CMA'S INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES AND COMPETITION AND MARKETS AUTHORITY COMPETITION ACT 1998 RULES- CONSULTATION DOCUMENT

Baker & McKenzie LLP welcomes the opportunity to comment on the CMA Consultation: Cartel Offence Prosecution Guidance ("the Draft Guidance"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK and EU competition law.

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 We agree with the proposed list.

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 proposed amendments to the Draft CMA CA98 Rules are clear and appropriate subject to our comments below.

2.2 Rule 4(3)(b) of the CMA CA98 Rules states 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, if the officer…is satisfied that such conditions as he considers it appropriate to impose in granting the individual's request are, or will be complied with*'. We strongly disagree with this approach. The Rule as is currently formulated provides the officer with absolute discretion to impose any conditions on the interviewee however unreasonable these might be. The Rule should be redrafted to clarify that the officer can only impose reasonable conditions.

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

3.1 Subject to our comments below we agree that the proposed approach to interviewing witnesses is clear and appropriate.

3.2 In para 6.27 of the Draft Guidance the CMA states that '*The interviewee will normally be asked to read through and check the transcript of the recording or the questions and answers in the note and to confirm, in writing that they are an accurate account of the interview*'. We would like the CMA to explain in which instances it will not ask the interviewee to clarify the accuracy of his/her statements and why.

3.3 In para 6.28 of the Draft Guidance the CMA notes that it will only permit a legal adviser who is also acting for the undertaking to be present at the interview if this will not risk prejudicing the investigation by leading, for example, to the destruction falsification or concealment of evidence (see fn 88 of the Draft Guidance). We strongly disagree with this approach. Legal advisers who deliberately obstruct the process of the interview would be subject to sanctions and that should be enough in order to safeguard against obstructive behaviour on their part. The CMA should not be able to exclude them simply on the ground of suspicions.

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

4.1 We welcome the CMA's efforts to provide further clarifications in relation to the use of 'confidentiality rings' and 'data rooms'. However since the publication of the Draft Guidance, the Competition Appeal Tribunal has handed down its judgment on *BMI Healthcare Ltd v Competition Commission* [2013] CAT 24, providing guidance on how confidentiality rings' and 'data rooms' should be used in order to enable the parties adviser's to formulate a proper and informed response. We believe therefore that the relevant part of the Draft Guidance (paras 11.24-11.26) should be reviewed to ensure compliance with the CAT's judgment.

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

5.1 We believe that the Guidance sets out the proposed settlement procedure clearly subject to our comment below.

5.2 In para 14.7 the CMA notes that as a minimum it will require the settling business to refrain from engaging again in the same or similar behaviour in the future. Does that mean that if a settling business engages in similar conduct in the future it will retrospectively lose the reduction granted as part of its settlement agreement?

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 believe that the settlement discussions should include the proposed maximum penalty as this will increase the transparency of the procedure and allow businesses to make more informed decisions as to whether to enter into settlement agreements.

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 agree with the proposed caps for settlement discounts.

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

CMA Panel Members

8.1 We believe that the CMA should make explicit/clear in its Draft Guidance the role that is envisaged for the CMA panel members (formerly CC panel members) in decisions as to the issuance of the Statement of Objections and the final decision. The Draft Guidance as it currently stands mentions almost nothing about the role that the CMA panel members will have in CA98 investigations.

8.2 We strongly believe that current CC panel members should be involved in Competition Act investigations from as early and to the greatest extent possible. The CC is widely recognised as one of the elite competition agencies worldwide and the strengths of this institution should not be lost when the CMA is established. Having current CC panel members involved in cases as soon as an initial filtering has been done will improve the quality of procedures and decision making.

Role of SRO

8.3 In paras 9.10 and 10.22 of the Draft Guidance the CMA notes that it is the SRO who is responsible for deciding whether to accept commitments offered by the parties after

consulting the Case and Policy Committee. However the CMA also notes (in the same paras) that the SRO's decision will need to be approved and accepted by the Case and Policy Committee. Does that mean that it is the Case and Policy Committee that is the ultimate decision maker? Further clarification is needed in relation to this question.

Procedural Officer

8.4 The Procedural Officer's (hereafter 'PO') role, as is explained in the Draft Guidance, is to resolve disputes in relation to case team decisions on certain procedural issues. The PO also will chair oral hearings in CA98 cases and will report to the SRO following the oral hearing to highlight any procedural issues that have been brought to his/her attention of the during the investigation and to confirm whether the parties' right to be heard has been respected.

8.5 In addition to its current responsibilities, we suggest that the PO should be able at any point in time to present to ultimate decision makers observations on any matter arising out of any CMA antitrust proceedings, including observations on matters of substance. Such observations may relate to, inter alia, the need for further information, the withdrawal of certain objections, the formulation of further objections or suggestions for further investigative measures. We note that such responsibilities are already within the role of the Hearing Officers in the EU[1].

Such a role will introduce an additional check and lead to more robust decisions. Especially for cases where an oral hearing has been held, the Procedural Adjudicator will have become particularly knowledgeable about the case, and his/her reports can help to ensure that due account is taken of all the relevant facts, including the factual elements relevant to the gravity and duration of any infringement.

Length of Procedure

8.6 Experience has shown that CA98 investigations can be rather lengthy something that was stressed by BIS in its recent consultation on *A Competition Regime for Growth: A Consultation on Options for Reform*. We are particularly concerned about this point. We therefore believe that the CMA should take steps to ensure that the length of the CA98 investigations is reduced. The CMA has stated that it will publish case-specific administrative timetables for Competition Act investigations (para 5.8 of the Draft Guidance). We suggest that the CMA should go further and introduce a target timescale of two years for all CA98 investigations . If the two year period was exceeded it would be incumbent on the CMA to explain why this has happened. The benefit of this non-statutory two year target timescale would be twofold. Not only would it provide greater certainty for those parties under investigation but it would also foster greater intellectual discipline around the scope of cases brought as well as procedural rigour as the CMA worked towards the two year goalpost.

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

9.1 We agree with the proposed transitional arrangements, as set out in the relevant paragraphs.

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.

[1] See Wils *The Role of the Hearing Officer in Competition Proceedings before the European Commission* (World Competition Journal, Vol 35, No3).

10.1 We agree with the Transition Team's proposal to extend the availability of SfOs to prospective vertical agreements. We see no reason as to why guidance should be limited to horizontal agreements.

BAKER & McKENZIE LLP

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