RESPONSE OF CLIFFORD CHANCE LLP TO THE CONSULTATION ON CMA GUIDANCE AND RULES OF PROCEDURE FOR INVESTIGATIONS UNDER THE COMPETITION ACT 1998

Clifford Chance LLP welcomes the opportunity to comment on the draft CMA Guidance and Rules of Procedure for Investigations under the Competition Act 1998 (the "**Draft Guidance**").

Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on competition law for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

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 We generally agree with the list in Annexe A, and welcome the effort to ensure that existing, useful guidance remains available notwithstanding the legislative and institutional changes. However, some of the guidance documents that are to be adopted by the CMA Board will be incorrect in a number of important respects. For instance, the Powers of Investigation guidance (OFT404) omits any reference to the possibility of compulsory oral interviews and will contain incorrect information on the criminal nature of certain offences, and the Enforcement Guidance (OFT407) omits any reference to settlement procedures and will contain incorrect information on the test for interim measures.

1.2 Businesses that refer to these documents on the CMA's website will naturally assume that they are correct, and may be unaware of the caveats in Annex A and footnote 10 of the Draft Guidance that the Draft Guidance prevails in the event of any conflict. Consequently, we consider that, at minimum, there should be prominent warnings on each of the affected documents (and any web pages that link to them) that they are incorrect and out-of-date in certain important respects and should be read in conjunction with the Draft Guidance. A preferable solution, in our view, would be to eliminate guidance documents OFT404, OFT 407 and OFT451 in their entirety and to include all relevant information in the Draft Guidance. The relevant chapters of the Draft Guidance already contain most of the relevant information covered in those documents, so having separate, slightly more detailed guidance seems to us to serve little purpose, particularly when that separate guidance in wrong in material respects.

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 Rule 4(2) gives individuals the right to be accompanied by a legal adviser when providing an oral explanation of a document or orally confirming the location of a document, whereas Rule 4(3) provides for the possibility of oral interviews under Section 26A CA98 in the absence of a legal adviser (e.g. in the event of unreasonable delay in the arrival of the adviser). We query the reason for this difference. It seems

to us that due process requires more emphasis to be placed on allowing legal representation where a full cross-examination is taking place, not less. See also our response to Question 3.

2.2 Rule 1(4) provides that Rule 20 (regarding documents to be published by the CMA in the public register) applies only to the CMA. While we recognise that only the CMA has the statutory duty to maintain such a register, this Rule implies that the register may not include relevant decisions and orders of the concurrent regulators. If that were the case, it would be a missed opportunity. Given the ever-increasing number of concurrent regulators, a central repository of relevant documents for CA98 procedures would be an extremely useful asset.

2.3 Finally, Rule 19(1)(c) contains a new provision that would allow the CMA to dispense with normal notice requirements, and instead to publish a summary of the relevant notice, for persons who were party to an infringing agreement but against whom the CMA does not propose to make an infringement decision. We query whether this is acceptable, given:

2.3.1 the effect of Sections 58 and 58A CA98, which provide for the binding nature of findings of fact and decisions of the CMA in follow-on litigation. It seems to us that if a company was party to an agreement that is found to infringe the law, that company might face follow-on damages liabilities as a result of Sections 58 and 58A even if it is not a formal addressee of the decision. In those circumstances, fairness requires that the CMA should take appropriate steps to ensure that the company is aware of the CMA's intention to make an infringement decision, and the evidence and reasons for doing so; and

2.3.2 as noted by the European Court of Justice (the "**ECJ**"), the presumption of innocence "precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case" and that any such finding "must, in principle, be regarded as confidential as regards the public, and therefore as being of the kind covered by the obligation of professional secrecy. This principle stems, inter alia, from the need to respect the reputation and dignity of the person concerned as that person has not been finally found guilty of an infringement."[1]

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

3.1 We consider that the proposed approach to interviewing witnesses is unclear and inappropriate in a number of material respects.

3.2 The following aspects are unclear:

[1] *Pergan v. Commission*, Case T-474/04, [2007] ECR II-4225, paragraphs 76 and 78.

3.2.1 The most important consideration for any interviewee will be whether the interview will create or aggravate a risk of their criminal prosecution under the EA2002 cartel offence. The Draft Guidance is silent on this point. In our view, it should indicate that the CMA will explain to interviewees that statements made by them cannot be used in evidence against them in a criminal prosecution except in the limited circumstances set out in Section 30A CA98.

3.2.2 Similarly, Chapter 6 the Draft Guidance omits any reference to the privilege against self-incrimination. It is referred to in Chapter 7 as available to a business, but it is not made clear that it applies equally when information is requested during an Article 26A compulsory interview with a person connected with that business. Nor are the company's rights in this regard protected by Section 30A CA98, which applies only to proceedings against individuals, or by Section 30A(4) CA98, which protects the company only against use of evidence in proceedings that are criminal under UK law (notwithstanding that penalties for breach of the CA98 prohibitions are generally recognised to be criminal in nature for the purposes of the European Convention on Human Rights ("**ECHR**")).

3.2.3 As the European Court of Human Rights ("**ECtHR**") has noted, the privilege against self-incrimination and the right to silence "are generally recognised international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice and secure the aims of Article 6 [ECHR]."[2] Similarly, the ECJ has recognised that "the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove."[3]

3.2.4 We see no justification for distinguishing between answers given in writing and those given orally (which, by necessity, can only be given through employees or representatives of a company). To do so would circumvent the company's right not to incriminate itself, in a manner that would be wholly inconsistent with the fundamental rights of defence that are accorded to legal persons by virtue of Article 6 ECHR. We therefore submit that the Draft Guidance should make it clear that individuals cannot be compelled in an Article 26A interview to provide oral answers that incriminate an undertaking with which they have a connection.

3.2.5 Finally, it would also be useful to clarify that, where necessary and appropriate, interviews may take place remotely, e.g. via video-link. In our view, that would materially improve the CMA's ability to gather information from employees of multinational organisations.

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[2] Application 48539/99, *Allan v. United Kingdom* (2002) 36 EHRR 12, para. 44.

[3] Case 374/87 *Orkem v Commission* [1989] ECR 3283, para. 35.

3.3 The aspect of the Draft Guidance that we consider to be inappropriate is the proposed restriction on legal representation. Paragraph 6.28 and footnote 88 of the Draft Guidance explain that, in certain circumstances, the CMA may refuse to allow an interviewee to be represented by a legal adviser who is also acting for the undertaking under investigation. In our view, it would never be appropriate to deny an individual's right to legal representation of their choice in this way. First, the interviewee might themselves become the subject of a criminal investigation, in which case they have an inalienable right to "legal assistance of [their] own choosing", under Article 6(3)(c) ECHR. Second, Article 6(3)(c) also affords companies under investigation the right to their legal representation of choice. Where those companies are compelled to respond to questions through connected persons that right must extend to legal representation in respect of those questions. Employees who are denied the right to representation by a company lawyer will in many cases – in particular, if they are not themselves at risk of criminal prosecution – decide to have no legal representation at all, as they will not be liable in the event of a finding of infringement. Among other consequences, this would leave companies unable to assert their right to prevent the disclosure of legally privileged information – a "fundamental condition on which the administration of justice as a whole rests."[4]

3.4 Even if it were appropriate to restrict an interviewee's choice of lawyer, we do not consider that it would be appropriate to follow the approach to doing so that is described in footnote 88 of the Draft Guidance. This approach places the onus on companies and interviewees to satisfy the CMA that "the presence of lawyers acting for the undertaking at the interview will not increase any of the following the risks: (i) the destruction, falsification or concealment of evidence, (ii) the contamination of witness evidence, or (iii) the reduction of incentives for individuals being questioned to be open and honest in their accounts."

3.5 These considerations would allow the CMA to exclude company lawyers on a routine basis, on the grounds that employees may feel inhibited from being open and honest if a representative of their employer is in the room. Moreover, there is no indication of how companies under investigation might satisfy the CMA that this is not the case. Conditioning access to legal representation on the ability of undertakings to prove a negative seems to us to be fundamentally inconsistent with the proper exercise of rights of the defence. While we consider that there should be no restrictions at all on the presence of company lawyers at interviews, should the CMA opt to introduce such restrictions we submit that a more proportionate and proper approach would be to exclude company lawyers only exceptionally, if the CMA has specific reason to believe that their presence would give rise to one of the risks described in footnote 88. It should be for the CMA to put forward reasons why, in the circumstances, those risks are likely to arise, not for the company to justify its view that there is no such risk.

3.6 Finally, footnote 86 states that companies will only receive a transcript or note of the interview, for the purpose of making confidentiality representations, if the interviewee

[4] *R v Derby Magistrates Court ex p B* [1996] AC 487, 507. For more information on the absolute nature of the right to privilege, see our response to the "supplementary consultation on OFT guidance on applications for leniency and no-action in cartel cases" (OFT803suppcon).

has a current connection with them. Given that interviewees with a former connection to the company are also likely to be party to confidential and legally privileged information of the company under investigation, it seems to us that limiting the company's right to make confidentiality representations in respect of their interviews lacks justification. Conversely, allowing such representations would be consistent with Rule 7(5) of the draft CMA CA98 Rules, which envisages that information originating from a party may be treated as having been supplied by that party, even when actually supplied by a third party.

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

4.1 We agree that confidentiality rings and data rooms can play a useful role in facilitating mutually acceptable disclosures between parties to an investigation. However footnotes 156 and 157 envisage the imposition of such arrangements on parties, without their consent, on the basis that "the CMA has the discretion to decide that a [data room procedure or confidentiality ring] is a necessary and proportionate way of resolving the conflict between the confidentiality of information belonging to one party and respecting another party's rights of defence." In our view Section 244 EA2002 does not confer such a wide discretion on the CMA. That provision allows for disclosure where it is "necessary" for the purpose of allowing the CMA to carry out a CA98 investigation (Section 244(4)) and so far as it is not "practicable" to exclude disclosure (Section 244(3)).

4.2 However, it will always be possible for the CMA to identify those individual pieces of confidential information that must be disclosed to other parties in order to protect their rights of defence, without making a blanket disclosure of all confidential information, or an entire category of such information. Consequently, the use of confidentiality rings and data rooms can never be said to be "necessary" for the CMA to carry out its CA98 functions. For the same reason, we consider that it will always be "practicable" – i.e. able to be done or put into practice successfully – to avoid the unnecessary disclosure of confidential information. In our view, Parliament cannot have intended for practicability to be interpreted as subordinating the protection of commercially sensitive information to the administrative convenience of the CMA.

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

5.1 The description of the proposed settlement procedure is clear. However, we do have a concern that the procedure allows for settlements to be entered into by parties with no disclosure of significant exculpatory evidence that is held on the CMA's file. Both the "Summary Statement of Facts" and the Statement of Objections (under Rule 6 of the CMA's draft Rules) are required to contain evidence and facts on which the CMA relies, but neither is required to disclose substantial contradictory and/or exculpatory evidence of which the CMA is aware.

5.2 With a "streamlined" access to file (access to "key documents" only, again with no stated requirement to disclose key exculpatory documents) and no oversight by a Case Decision Group, it seems to us that there will be a material risk that businesses may

be induced to settle on the basis of disclosed evidence that has been "cherry-picked", and where the totality of evidence against them is weak. Accordingly, we recommend that the CMA includes in the Draft Guidance appropriate assurances that, where the CMA case team is in possession of evidence which materially contradicts the evidence on which it proposes to rely, or is otherwise substantially exculpatory to a party, that evidence will be disclosed in the Summary Statement and in either the Statement of Objections or through access to the file.

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 agree that settlement discussions should include the proposed maximum penalty the settling business would otherwise pay. It would be very difficult for businesses to decide upon the merits of proceeding with a settlement without this information.

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 We agree that these maximum discounts are broadly appropriate. However, the CMA might consider reserving itself a discretion to offer higher discounts in exceptional circumstances, where it is clear that the resource savings available to the CMA from settlement will substantially exceed the proposed caps.

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

8.1 Paragraph 6.3 of the Draft Guidance explains that the provision of false information is a criminal offence, whereas a failure to provide accurate information may result in the imposition of civil fines. While we appreciate that this reflects statutory language, it would be helpful if the Draft Guidance were to contain some clarification of the distinction between false and inaccurate information, perhaps by reference to whether the incorrectness of the supplied information was known and deliberate.

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

9.1 Our only concern regarding the proposed transitional arrangements is that applying the new compulsory interview powers to all investigations that are ongoing on 1 April 2014 may create incentives for case teams to delay the progress of current investigations in order to avail themselves of the possibility of compulsory interviews in four months' time. This concern would be addressed if the CMA were to apply compulsory interviews only to cases initiated after 1 April 2014, or cases initiated before that date for which no Statement of Objections has been issued as at 1 April 2014.

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 with this proposal. Recent case law on vertical arrangements is relatively sparse, and distribution models are changing rapidly as a result of increasing online sales. This means that there are a number of important areas of legal uncertainty, such as the assessment of whether online platforms are "genuine" agents, with which the OFT grappled in its recent online hotel booking case.

Clifford Chance LLP
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