# Linklaters Response to Consultation on CMA Competition Act Guidance and Rules of Procedure

## November 2013

### 1 Introduction

These comments are submitted by Linklaters LLP in response to the consultation document issued by the Competition and Markets Authority ("**CMA**") Transition Team on 17 September 2013 entitled *Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998.*

Linklaters welcomes the opportunity to comment on the proposed Rules and Draft Guidance. While we are broadly in agreement with the proposed Rules and Draft Guidance, we have a number of comments on specific aspects of the documents which we outline below in Section 2 in response to the questions posed.

### 2 Responses to consultation questions

**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?**

We agree with the proposed list.

**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.**

We consider that the proposed amendments are clear and appropriate.

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

While it is made clear that the CMA may only issue a notice to question an individual who has a 'connection with' an undertaking under investigation, the wording of the Draft Guidance at paragraph 6.21 and at footnote 81 leaves open the category of individuals who may be considered to have a 'connection with' the undertaking. In the interests of certainty, we think that it would be more helpful for this category of individuals to be confined, in the absence of exceptional circumstances, to the extensive list provided in footnote 81.

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

Paragraph 11.24 of the Draft Guidance states that the CMA will consider requests for access to file via data rooms or confidentiality rings only "*where there are clearly identifiable benefits in doing so and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned*." The Draft Guidance goes on to state that access to confidential information on this basis will only be given "*where access to certain confidential information is essential for the party's legal and/or economic advisers to understand the CMA's analysis, and where using a data room/confidentiality ring procedure is a necessary and proportionate way of resolving this*."

In our experience, we consider it likely that some form of data room/confidentiality ring will be required in most cases (except possibly in Chapter II cases), as any allegations of anticompetitive

conduct are likely to, by their very nature, be evidenced by other parties' confidential documents. Allowing parties – or where appropriate their external advisers – access to such documents is crucial to parties being able to understand the case against them and defend themselves rigorously. We would therefore hope the CMA will continue the Competition Commission's ("**CC**") approach of allowing external advisers access to such information as a matter of course.

The Draft Guidance states at paragraph 11.24 (second bullet) that in some cases "*the CMA's case file may be disclosed to a limited category of persons […] [who would identify] a shortlist of the documents to which the party to the investigation would seek access (non-confidential versions)*." This is explained as a method of expediting the process where there are large volumes of documents which are not key documents in the statement of objections ("**SO**").

We do not see the use of data rooms or confidentiality rings as being an appropriate means of limiting the parties' access to the file. Rather these tools should be used solely for concerns relating to confidentiality. Otherwise, it would be worrying from the perspective of the rights of the defence for access to the file to be limited in this way. As a practical matter, we do not understand how the proposed use of data rooms or confidentiality rings would lead to an expedited process, unless it is used to outsource the work of identifying relevant documents in the file to the parties' advisers. While we support the objective of giving parties swift access to file, it is important this procedure is not used to erode parties' rights to access the case file.

More appropriately, in relation to expediency, we hope that the CMA will continue the procedure which has been followed by the OFT in some cases of providing parties with a list of key documents relied upon in the SO. In our experience, such lists have been extremely helpful in prioritising and expediting the review of case files.

We welcome and consider it appropriate that parties' have the opportunity to engage in, consent to and raise concerns around the use of these processes as set out at paragraph 11.25 of the Draft Guidance.

Protection of parties' confidential information is patently important in relation to how the CMA treats information it receives and to the willing participation and smooth running of investigations more generally. In this respect, it is appropriate that illegitimate disclosure of confidentiality ring/data room information is punished as a criminal offence as outlined at paragraph 11.26 of the Draft Guidance. However, as noted above, this must be balanced against the parties' rights to know the case against them and to mount an informed defence. In this respect, we are disappointed that further guidance has not been provided on the restrictions that the CMA would impose in relation to information received by members of a data room/confidentiality ring. As held by the CAT in the recent *BMI Healthcare Limited*[1] appeal following the Competition Commission's refusal to permit BMI Inspectors to use any of the data from the disclosure room, while controls are necessary, such stringent restrictions may frustrate the parties' ability to defend themselves.

In particular, we consider it crucial that those within the data room/confidentiality ring be able to use information which is potentially exculpatory or otherwise undermines the case made against them. In addition, it may be necessary for other external advisers beyond those who were initially granted access to the data room/confidentiality ring to have access to such information to facilitate the preparation of the defence. Further guidance around how the CMA proposes to address these issues would be welcome.

[11] *BMI Healthcare Limited v Competition Commission* Case No. 1218/6/8/13, CAT decision of 27 September 2013.

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

We welcome the fact that the Draft Guidance does not follow the example of the European Commission in limiting the use of the settlement procedure to cartel cases. We see no reason why settlements should not, in appropriate cases, be available, for example, in the context of a Chapter II / Article 102 investigation, even though it may be case that in practice settlements are most used in the context of cartel-type cases. We note in this respect the practical value public decisions in Chapter II/Article 102 cases play in guiding businesses about how they can conduct their business in compliance with competition law.

In addition, we welcome the clarification at paragraph 14.20 of the Draft Guidance that settlements will be possible after the issuing of the statement of objections (again in contrast to the European Commission's approach). Often it is only once the full extent of the case against the parties has been set out in the statement of objections that the value of a settlement is made clear to the parties.

**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?**

We agree that as part of the settlement discussions, each of the parties should be informed of the maximum penalty to which it is exposed. The draft penalty calculation is likely to enable potentially settling parties to calculate the benefit of the settlement process in their own circumstances.

**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?**

We agree with these proposed caps and more generally with the principle that the administrative efficiencies of settling pre-SO (together with the additional risk taken on by parties who settle at that preliminary stage) should be recognised through the availability of a higher discount.

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

***Access to file and to confidential information***

We welcome the clarification that the CMA proposes to continue the OFT's typical approach of not naming parties to an investigation before the statement of objections stage. In light of the considerable reputational harm that being named in an investigation can attract, and in view of the presumption of innocence, we consider it appropriate that parties are only exposed to this potential reputational harm once the CMA is able to put forward a cohesive case.

Guidance on the circumstances in which the CMA may consider it appropriate to name the parties in the Notice of Investigation is also welcome. We summarise below our views on each circumstance identified in the consultation paper of where the CMA will consider it appropriate to name parties prior to the SO stage.

- *Situations where the parties' involvement in the CMA's investigation is already in the public domain or subject to significant public speculation (and the CMA considers it appropriate to publish details of the parties in the circumstances).*

Where there is only *"significant public speculation"*, we suggest it would be appropriate that the parties' consent is sought before their involvement in the investigation is made public.

- *Where a party requests that the CMA name them in the notice of investigation (and the CMA considers doing so to be appropriate in the circumstances)*

We agree this is appropriate.

- *Where the CMA considers that the level of potential harm to customers or other businesses (including businesses in the same sector not involved in the investigation) from parties remaining unidentified is such as to justify disclosure*

It is difficult to conceive of a situation where the harm to other businesses or consumers would be such as to justify naming parties in the notice of investigation. In this respect, we would seek further guidance and perhaps examples of how perceived harm to businesses/consumers will be weighed against the potential harm to those under investigation in practice, and assurance that this rationale would not be used as a catch all for justifying naming parties in the Notice of Investigation.

***Interim measures***

We welcome the extended guidance on examples of when interim measures may be appropriate and the types of measure that may be imposed.

**Change of standard for imposition of interim measures from "serious, irreparable damage" to "significant damage"**

This change represents a lowering of the standard for imposition of interim measures.

We welcome the Draft Guidance at paragraph 8.14 on the kinds of damage – as a question of fact – that interim measures could be issued to prevent. However, we consider the Draft Guidance provides insufficient clarity around the degree of damage necessary. The definition of *"significant"* at paragraph 8.14 as "*such that may significantly damage their commercial position*" is circular and the examples given at paragraph 8.14 do not provide clarification on the magnitude of damage that would be necessary to issue interim measures.

We consider such guidance particularly important in view of the fact that the damage need no longer be *"irreparable"*. While we consider it appropriate that damage need not be permanent, we would hope that in practice the CMA will exercise the discretion under paragraph 8.15 to "*take into account the facts of the case, the nature of competition in the relevant market(s) and the potential duration of the interim measures in determining the period over which the relevant damage is assessed*" to prevent interim measures being granted because of perceived harm which is merely transitory.

**Possible content of interim measures**

Paragraph 8.17 of the Draft Guidance states that an interim measure may be imposed requiring a party to "*cease supply of any good or service if the supply of that good or service is causing or may cause significant damage to consumers, competitors, or competition in the market(s) in question*".

We query the appropriateness of such an interim measure, in particular in view of the damage that being forced to stop selling a particular product or service (as opposed to continuing to supply or reversing price increases/decreases) could have on parties' business. It is difficult to envisage a situation where the supply of a product could cause significant damage to competition in a market in the manner detailed at paragraph 8.14; rather, an additional supplier of a product should be pro-competitive.

If this category remains as a possible interim measure, we would welcome further guidance on the circumstances in which it may be appropriate.

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

We agree with the transitional arrangements as set out.

**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.**

We are in favour of extending the short form opinion ("**SfO**") procedure to cover vertical agreements and can see no reason why, in principle, the procedure should be limited to horizontal agreements. Indeed, the requirement that the relevant question be "novel or unresolved" before it is deemed suitable for an SfO will, in general, be more likely satisfied by questions relating to vertical agreements.

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