EDWARDS WILDMAN

CONSULTATION ON
COMPETITION AND MARKETS AUTHORITY (CMA) GUIDANCE – PART 2

Response of Edwards Wildman Palmer LLP

Consultation on Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998

Introduction

- This response has been prepared by Edwards Wildman Palmer LLP (**Edwards Wildman**), an international law firm with offices in London and 15 other locations across the United States, Europe and Asia. The views set out in the response reflect our lawyers' experience representing clients before the EU and UK competition authorities and are provided in the interests of assisting Government and the CMA Transition Team. We have not consulted with our clients as part of the preparation of this response and, as a result, the response does not necessarily represent their views. We are happy for this response to be published on the gov.uk website.

- This response relates to the Consultation Document *Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998* (**Consultation Document**); which incorporates, at Annex B, the *Draft CMA CA98 Rules* (**Draft Rules**) and, at Annex C, the draft guidance document *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (**Draft Guidance**). To the extent that terms have been defined in the Consultation Document and/or Draft Guidance, this response adopts the same terms.

General comments

- As the Transition Team will be aware, the OFT carried out an extensive consultation on its Competition Act procedures in 2012, which led to the adoption (or codification) of a number of practices that increased the transparency and consistency of its practices. The changes were, for the most part, beneficial for all stakeholders. We are therefore pleased that the CMA is planning to build on this experience in its own procedures.

- In particular, we welcome the adoption by the CMA of the OFT's revised decision-making procedures and the clarification of the respective roles of the Case Decision Group and the Case and Policy Committee. We also welcome the adoption of the Procedural Officer role on a permanent basis, as well as the additional guidance provided in relation to the Procedural Officer's powers and responsibilities. Finally, we welcome the new guidance on the early resolution/settlement procedure, which provides helpful insight into the OFT's experience of the procedure to date.

- The ERRA has, in a number of ways, strengthened the powers of the CMA in conducting investigations, particularly in relation to information gathering (through the introduction of compulsory interview powers and civil sanctions for non-compliance with investigatory requirements) and the imposition of interim measures. We have some

concerns regarding the manner in which the CMA proposes to use these powers. We have expressed our concerns regarding the approach to administrative penalties in response to the earlier consultation[1], and we do not propose to repeat these (to the extent they are relevant) here.

Questions

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 note that the OFT's Prioritisation Principles will become obsolete. While acknowledging that such general statements of prioritisation principles have their limitations, the OFT document has proved helpful by describing the general framework for analysis of the OFT's proritisation decisions. We would therefore encourage the CMA to develop its own prioritisation principles and to consult on them in due course, in keeping with its commitment to transparency in its work.

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 have no comments on the wording of the proposed amendments to the Draft Rules. To the extent that we have comments on the manner in which the Draft Rules will be applied, as described in the Draft Guidance, these are set out below.

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

3.1. The new power to interview individual witnesses is a potentially powerful one that needs to be applied with care and in a proportionate manner. With this in mind, we would suggest that this power should generally be used to arrange planned interviews with key individuals, with ample prior warning to both the individual and the relevant undertaking. Although the Draft Guidance does provide some guidance on the circumstances in which the power will be used, the CMA will retain significant discretion as to its application and, in particular, the extent of any advance notice that will be given. For example, paragraph 6.26 of the Draft Guidance states that no notice will be given "*where the effective conduct of the investigation means that the CMA considers it necessary to ask an individual questions about facts or documents immediately*". While this is anticipated to be "*generally … during the course of an inspection*", this phrase is still very broad since it leaves open the possibility of such practices being adopted more widely.

3.2. In addition, footnote 84 states, in relation to the obligation to provide a copy of the notice to the undertaking, that the "*CMA may consider that providing a copy of the formal*

[1] Edwards Wildman response to the consultation on *Administrative Penalties: Statement of Policy on the CMA's Approach* dated 6 September 2013.

interview notice to the relevant undertaking before conducting an interview is not practicable or appropriate where a delay in conducting an interview may compromise the investigation or otherwise undermine the CMA's ability to exercise its functions under the CA98". It appears to us that the only situation in which prior notification to the undertaking could compromise an investigation would be if an interview occurred before planned dawn raids. It would be helpful if this were confirmed, or if there are other possible situations that the CMA has in mind that they be clarified. Otherwise, the wording creates a level of uncertainty for undertakings which is undesirable, given that the subject of the investigation in relation to which the interview is being conducted is the undertaking.

3.3. Paragraph 6.27 of the Draft Guidance states that the interviewee will "*normally*" be asked to read through and check the transcript of the recording or question and answer session to confirm its accuracy. As a matter of good procedure, and to ensure the accuracy and completeness of the transcript (particularly a transcript based on an interview that is not recorded), it would appear to us to be in the best interests of both the CMA and the witness that the transcript <u>always</u> be verified by the witness.

3.4. Paragraph 6.28 of the Draft Guidance states that a witness will be entitled to legal representation, which may be provided by the same legal adviser as the one instructed by the undertaking under investigation, or a separate adviser. This paragraph goes on to state that "*the CMA will only permit a legal adviser also acting for the undertaking to be present at the interview if it is satisfied that doing so will not risk prejudicing the investigation*". We foresee a number of potential problems with this approach:

(a) it gives the CMA a significant and unduly broad discretion to exclude legal advisers from an interview;

(b) it is unclear whether this principle will apply where the witness expressly chooses to be represented by the same legal adviser as the undertaking under investigation. If it does, this could lead to a situation in which the witness may be interviewed without any legal representation;

(c) by refusing to allow the undertaking to have legal representation when a witness is answering questions relating to an alleged by the undertaking, the CMA may infringe the undertaking's legitimate rights of defence. Under the current CA98 procedures, there is no scope for the OFT to prevent legal advisers being present when individuals are being questioned, for example during inspections. The changes to the legal framework do not appear to justify such a weakening of undertakings' rights of defence.

3.5. It is important that both undertakings and witnesses be given the security of having legal representation, and a failure to adhere to this principle could constitute an infringement of Article 6 ECHR. In particular, legal representation is important in ensuring that the privilege against self-incrimination is respected. Without legal representation, a witness cannot be given assistance in knowing which questions they are obliged to answer and which questions they would be entitled to refuse to answer, exercising the privilege of self-incrimination. In the context of CA98 investigations, the privilege against self-incrimination applies to the undertaking under investigation, not the witness, and it is

therefore important that the undertaking's legal adviser be present to provide this assistance.

3.6. We note that footnote 88 refers to certain risks which may be increased by the presence of an undertaking's lawyers. We do not believe that any of these reasons justify the prevention of an undertaking's lawyer from attending an interview, in particular given that:

(a) the destruction, falsification or concealment of evidence constitutes a criminal offence, and the witness will be told and the lawyers will be aware of this fact. It is not easily clear how the presence of a lawyer could increase the risk of a criminal offence being committed in such circumstances, and in any event should this occur the appropriate course of action would be for the CMA to pursue criminal proceedings, not curtail an undertaking's rights of defence; and

(b) it is unclear how a lawyer could "contaminate" witness evidence or reduce openness and honesty in the presence of CMA officials. Again, to the extent that a lawyer's actions lead to the destruction, falsification or concealment of evidence, the CMA may pursue criminal proceedings. A witness will also be aware of his legal obligations to answer fully and honestly.

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

4.1. Firstly, we welcome that clarification in paragraph 11.21 of the Draft Guidance that routine correspondence will not be included in the file. This will go some way to reducing the administrative burden in preparing non-confidential versions of documents ahead of access to file. That said, we assume that such documents will be included in the case file in exceptional circumstances where this is necessary to enable a party to exercise its rights of defence, for example where correspondence setting up a meeting with a third party is the only evidence of the case file of such a meeting having taken place and the knowledge of this meeting is material for an undertaking's defence.

4.2. As regards the first bullet point of paragraph 11.24, we assume that in applying this principle due consideration will be given to the CAT's ruling in *BMI Healthcare Limited v Competition Commission (No. 1)*[2] regarding the extent to which an authority can limit the use of confidential information in a data room by those advisers who have been given access.

4.3. In addition, in light of the CAT's judgment in that case, we would caution the CMA against taking too cavalier an approach to disclosure of confidential information against the owner's express wishes. It is clear that advisers must have the ability to use the information in the data room in order to allow a proper and informed response to be made to the CMA's case. On the other hand, the owner of confidential information has a legitimate interest in preventing unduly wide use of its information. This suggests that, while granting access to data for external economic advisers should be broad enough to enable comparative analysis to be undertaken, disclosure of qualitative documents to

[2] Case No 1218/6/8/13, [2013] CAT 24, judgment of 1 October 2013.

external legal advisers should be used more sparingly, if at all. We acknowledge, however, that it is ultimately for the CMA to carry out the balancing exercise required of it under s.244 EA02.

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

5.1. Generally, we consider the description of the settlement procedure to be clear and very helpful.

5.2. Paragraph 14.6 of the Draft Guidance suggests that the prospect of reaching settlement in a "reasonable timeframe" will be a consideration in determining whether a case is suitable for settlement. It would be useful to know what the CMA would consider to be a "reasonable timeframe", since it is not under any statutory deadlines which would clearly impact on the timeframe for settlement discussions.

5.3. We also note that the Draft Guidance contains limited discussion of how the CMA will deal with situations in which some parties settle but others proceed. While we acknowledge that such a situation in the implicit context for the scenario in the third bullet point of paragraph 14.8, it would be helpful to have more guidance on the circumstances in which the CMA may be prepared to accept such a 'hybrid' settlement, in light of the OFT's experience in this area.

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 consider it to be important that the settlement discussions should include the proposed maximum penalty in order to allow parties under investigation to make a fully informed decision regarding settlement. Merely disclosing the settlement discount (which in any event parties will know cannot exceed the cap) will not give parties sufficient information to assess the concrete benefits of settlement and goes against the CMA's commitment to transparency.

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 note that these amounts are materially lower than previous reductions offered by the OFT. While we acknowledge the desirability of clarity on this point, as well as greater consistency with European Commission practice, we suspect that in some cases this level of settlement discount will provide insufficient incentive for undertakings to settle, given the potentially significant sacrifice in terms of their rights of defence.

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

Case opening announcements

8.1. We note that paragraphs 5.7 – 5.9 of the Draft Guidance have altered the position currently taken by the OFT in relation to naming parties at the point of opening an investigation. Whereas the previous guidance said that the OFT "***will not*** *publish the names of the parties under investigation in the case opening notice other than in exceptional circumstances*", the Draft Guidance now says "*The CMA* ***would not generally expect*** *to publish the names of the parties under investigation other than in appropriate circumstances*" (emphasis added).

8.2. This softening of language appears to reflect a marginally increased likelihood that parties will be named. The issue of whether parties should be named at the point of opening a CA98 investigation was subjected to consultation when the OFT updated the CA98 guidance in 2012, and respondents overwhelmingly rejected this. It is not clear what has changed in the space of a year to justify weakening the position previously adopted and creating uncertainty for parties under investigation. The absolute protection from defamation that the ERRA has given the CMA does not justify a change in policy. In our view, the wording should remain as previously drafted.

Interim measures

8.3. We welcome the greater detail provided in the Draft Guidance regarding the factors that the CMA will take into account when assessing whether to implement interim measures. As a drafting point, we think the factors that the CMA is required to, and will take into account, could be set out more clearly, perhaps using sub-headings – i.e. (i) an assessment under s.35(1) CA98 of the existence of serious damage, (ii) urgency, (iii) balance of interests, and (iv) the application of any exceptions under s.35(8) and s.35(9) CA98.

8.4. In our view there is potential for the relevant factors listed in paragraph 8.14 of the Draft Guidance to be interpreted too widely, given that they cover any type of damage to a person or class of persons. In particular, financial loss may be caused by any number of factors not related to alleged infringement, and there may be no way to ascertain with any degree of certainty the cause of the loss. While we appreciate that the CMA needs to maintain flexibility in the application of s.35 CA98, we would caution against it placing too much store on these factors without a comprehensive assessment of the causal link between the alleged infringement and the loss.

8.5. It is important that intervention by the CMA does not unduly interfere with undertakings' right to do business as they see fit, provided that their actions do not infringe competition law. The scope of competition law is often unclear and we would suggest that undertakings should be entitled to make their own risk assessments and proceed accordingly, unless and until their actions are shown to infringe, even where this causes financial loss to competitors (given that this is often the natural outcome of market competition). Excessive intervention, forcing undertakings to change their market behaviour without proof of infringement in circumstances where any loss that is subsequently found to have been wrongfully could be financially compensated, could disrupt this principle. In many cases, the degree of harm caused, and the extent of any

contribution to that harm caused by the conduct of the undertaking under investigation, may be assessed only following a full market assessment. In such cases, bearing in mind the potential economic costs of over-intervention, we would suggest that any intervention by the CMA should be left to the final decision.

Decision making

8.6. We agree with the amendments made to paragraphs 13.3 and 13.5 of the Draft Guidance, on the basis that they help resolve the previous ambiguity between the respective roles of the Case Decision Group and the Case and Policy Committee in final decisions.

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

9.1. The transitional arrangements appear sensible and reasonably clear. However, we anticipate that fact-specific issues and questions will arise in relation to ongoing investigations around the transition date and the OFT and CMA should be prepared for the additional administrative burden this may create.

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 welcome the proposal to extend the availability of SfOs to vertical agreements, given the complexity of the issues such agreements often raise and the relative scarcity of current legal guidance due to a relatively low level of enforcement in such cases. We look forward to further information being provided in due course.

Edwards Wildman Palmer LLP
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