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CMA CONSULTATION ON SECOND TRANCHE OF CMA GUIDANCE DOCUMENTS

RESPONSE OF ASHURST LLP

1. INTRODUCTION

1.1 Ashurst LLP welcomes the opportunity to comment on the Competition and Market Authority's (**"CMA"**) consultation on the second tranche of its draft guidance documents (the **"CMA Consultation"**).

1.2 This response is made on our own behalf, in light of our experience in advising the main parties and third parties in relation to merger inquiries, market investigations, Competition Act 1998 (**"CA98"**) cases and the application of the criminal cartel offence, and not on behalf of any particular clients.

1.3 We confirm that the contents of this response are not confidential and may be published in full, as required.

1.4 This response is structured as follows:

(a) comments on the CMA's draft guidance and rules of procedure for investigation procedures under CA98 (section 2);

(b) comments on the CMA's draft guidance on its approach to the variation and termination of merger, monopoly and market undertakings and orders (section 3);

(c) comments on the CMA's draft guidance in concurrent application of competition law to regulated industries (section 4);

(d) comments on the CMA's draft cartel offence prosecution guidance (section 5); and

(e) comments on the CMA's proposed approach to the treatment of existing Office of Fair Trading (**"OFT"**) and Competition Commission (**"CC"**) guidance (section 6).

1.5 In addition to responding to the specific consultation questions, we have set out some general comments and observations on points that we consider to be relevant.

1.6 We note that the CMA Consultation is being undertaken in parallel with the consultation by the Department for Business, Innovation and Skills (**"BIS"**) on the second tranche of draft secondary legislation (the **"BIS Consultation"**). We have responded to the BIS Consultation separately as requested, but we note that some of the draft CMA guidance documents tie in directly with the proposed secondary legislation being consulted on by BIS, and similar points arise in relation to both on certain issues. We have therefore repeated certain points in our responses where appropriate, and a copy of our response to the BIS Consultation is annexed to this response.

1.7 We do not comment on the CMA's draft guidance in relation to the use of its consumer powers.

2. **COMPETITION ACT 1998: CMA GUIDANCE AND RULES OF PROCEDURE FOR INVESTIGATION PROCEDURES UNDER THE COMPETITION ACT 1998**

Q1. 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?

2.1 Please refer to section 6 of this response, setting out our response to the questions raised in the consultation document relating to the CMA's proposed approach to the treatment of existing OFT and CC guidance (**"Proposed Treatment of Existing Guidance"**) (CMA12con).

Q2. Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate? Please give reasons for your views.

Use of defined terms in the Draft CMA CA98 Rules

2.2 As regards the clarity of the Draft CMA CA98 Rules, we would comment that it is not obvious from the way in which defined terms are expressed (using all lower case letters) that they are indeed defined terms. This creates potential for misinterpretation since the definition is often critical to understanding the provision properly. For example, in Rule 3 it is the definition and not the substantive text which provides for the pool from which the relevant persons can be drawn. We would therefore suggest making defined terms more obvious to minimise the risk that essential definitions are overlooked. This might be done by using the standard technique in legal documents of capitalising the initial letter and/or (where appropriate) by locating the definition within the provision which uses it (as is done in relation to Rule 4 ("officer")) or simply adding "as defined" after defined terms.

2.3 With regard to specific definitions used, we note that the definition of "Procedural Officer" suggests that rather than being a specific role for an appointed person, as is currently the case for the OFT's Procedural Adjudicator, this could be a floating role allocated as required from case to case to a CMA Panel member, a CMA Board member or a member of CMA staff (i.e. a "relevant person"). We do not think that such a variety of approaches would be practicable and suggest that the definition should instead refer to "*the person(s) appointed to this position by [the CMA Board] from time to time*". We consider that the Draft CMA CA98 Rules should include a specific duty on the CMA Board to appoint an appropriately qualified and experienced Procedural Officer, to reflect the importance of this role in ensuring that the rights of defence of the parties are upheld.

Rule 3: Delegation of functions

2.4 We welcome the express procedural requirement in Rule 3 that the investigation phase up to and including issue of the Statement of Objections ("**SO**") and the decision-making phase from that point onwards will be presided over by different officials. We note that the post-SO phase must have at least two officials presiding. We also note that the Draft CMA CA98 Rules state (via the definition of "relevant person") that the officials concerned must be members of the CMA Board or CMA Panel, or members of CMA staff. As discussed further in relation to the Draft CMA CA98 Guidance in paragraph 2.46 of this response, in order to reduce to the minimum the risk of confirmation bias we consider that it would be appropriate and desirable for the Draft CMA CA98 Rules to require that:

(a) the Rule 3(1) relevant person should be a member of the CMA Board or a member of CMA staff; and

(b) a majority of the Rule 3(2) relevant persons should be drawn from the CMA Panel.

2.5 Moreover, we consider that the decision-making group for CA98 cases should comprise three or more persons, to avoid a decisional deadlock (with at least two CMA Panel members).

Rule 4: Legal advice during investigations and inspections

2.6 We welcome the insertion of Rule 4(3) confirming that the investigators will usually wait for legal advisers to arrive where a person is required under section 26A CA98 to answer questions, mirroring the corresponding provisions in Rule 4(1) regarding waiting for legal advisers in the context of a dawn raid.

2.7 However, we would question whether it is appropriate in this context to include Rule 4(3)(a), which implies that a request to wait for legal advisers before proceeding with questioning under section 26A CA98 may be refused if the officer "*considers it reasonable in the circumstances to do so*". It is unclear to us when it would be unreasonable not to wait for a reasonable time for lawyers to arrive in this context, other than the scenario which is already provided for separately in Rule 4(3)(b) i.e. where the officer considers that conditions imposed will not be complied with. This issue is not dealt with in the corresponding sections of the accompanying draft guidance on the CMA's investigation procedures in CA98 cases (**"Draft CMA CA98 Guidance"**) (see further paragraph 2.16 of this response). We therefore consider that Rule 4(3)(a) should be deleted, or alternatively that further clarification should be provided in the final version of the Draft CA98 Guidance as to the circumstances in which the CMA would not consider it reasonable to wait a reasonable time for a lawyer to arrive. We would also suggest that Rule 4(3)(b) should be amended to make clear that any conditions which the officer imposes must be reasonable, i.e. "… *satisfied that such conditions as he <u>reasonably</u> considers it appropriate to impose …*".

Rule 6: Notices, access to file and representations

2.8 We note that the Draft CMA CA98 Rules state that the person chairing an oral hearing *may* be the Procedural Officer or another relevant person (as defined) (Rule 6(5)) and must not be someone who has been involved in the investigation (Rule 6(6)). The Draft CMA CA98 guidance takes a more restrictive approach, stating at paragraph 12.13 that "*The hearing will be chaired by the Procedural Officer.*" Given that the oral hearing procedure is in essence an adversarial process, we consider that it should *always* be the appointed Procedural Officer who chairs the oral hearing, and not any relevant person. We would suggest that Rule 6(5) should be amended accordingly.

2.9 We consider that the wider approach set out in the Draft CMA CA98 Rules should be cut back and reflect the approach set out in the Draft CMA CA98 Guidance. In particular, we do not think that it would be appropriate to have a CMA Panel member acting as chairman of an oral hearing, as the rule contemplates (via the definition of "relevant person"). CMA Panel members will be appointed for their knowledge of matters relevant to the *substantive* assessment of cases but may not be sufficiently familiar with the detail of and principles underlying CA98 practice and procedure to act as Procedural Officer (for example, many current CC panel members are academic economists, or business people without legal expertise). Moreover, as noted above, we consider that the role of Procedural Officer should be a permanent appointment and be someone who is not involved in any casework.

Rule 8: Procedural complaints

2.10 We welcome the specific provisions for procedural complaints in Rule 8. We consider that the deadline of 20 days for a decision on a procedural complaint could be far too long in some cases and would hope that in practice the Procedural Officer will move much more quickly where required.

Rule 9: Settlement

2.11 We also welcome the new provisions regarding settlement in Rule 9. However, the references to a "single relevant person" and a "separate relevant person" (who must comprise at least two persons in accordance with Rule 9(3)) is rather confusing.

2.12 We find Rule 9(5) unclear as regards the procedural steps to be taken in a settlement case, particularly as it states that Rule 5 must be complied with, which in turn states that Rule 6 will apply, which sets out the full procedural requirements of an SO, access to the file and oral hearing. It would seem preferable instead for Rule 9 to give some indication of the provisions of Rules 5 and 6 which the parties might be required to waive partially or in full as part of the settlement process. There does not appear to be anything in Rule 9 as currently drafted which would permit the CMA to abbreviate the normal Rule 5 and Rule 6 procedure apart from the parties' agreement.

Q3. Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?

Issue of a notice under section 26A CA98

2.13 We consider that the Draft CMA CA98 Guidance should specify who within the CMA is authorised to issue a notice under section 26A CA98, specifically whether this is a step which can be taken by the Team Leader or Project Director, or whether it requires the authorisation of the SRO or indeed someone outside the investigation team. We consider that issuing a notice under section 26A CA98 should require the authorisation of the SRO, or potentially the Case and Policy Committee, to ensure that these significant new powers are exercised appropriately.

Potential requirement for an individual to answer questions immediately

2.14 We note that paragraph 6.18 of the Draft CMA CA98 Guidance reflects section 26A(1)(b) CA98 in envisaging that a person might be required to answer questions immediately on receipt of the section 26A notice. We would, however, welcome confirmation in the Draft CMA CA98 Guidance that in practice individuals will not usually be required to respond to a request to answer questions under section 26A CA98 immediately, but will be given reasonable notice (which even in exceptionally urgent circumstances, such as in the context of a dawn raid, should be at least a number of hours, and in other circumstances should normally be a number of days).

Issue of a formal notice to an individual with "a connection with" an undertaking under investigation

2.15 Paragraphs 6.20-6.21 of the Draft CMA CA98 Guidance combined with footnote 81 appear to grant the CMA considerable discretion when determining whether an individual has a "connection with" an undertaking under investigation within the meaning of section 26A(6) CA98. We would suggest that, in the absence of exceptional circumstances, the list of relevant individuals should not be extended beyond those already included in the lengthy list set out at footnote 81 of the Draft CMA CA98 Guidance, and that this should be made clearer in the final version of the guidance. We would also welcome express clarification in the guidance that professional and other advisers providing services on an arm's length basis to an undertaking would not be considered to have a connection with that undertaking within the meaning of section 26A(6) CA98.

Presence of a legal adviser

2.16 Paragraph 6.28 of the Draft CMA CA98 Guidance is clearly written with Rule 4(3) of the Draft CMA CA98 Rules in mind, but makes no express reference to it. We would welcome an express reference to the *right* of a person being interviewed to request the presence of a legal adviser and the *obligation* on the CMA officers to wait a reasonable time for the

lawyers to arrive, subject to any conditions imposed by the officer. As discussed above in paragraph 2.7 of this response, it is unclear to us when such a request could be considered to be unreasonable, other than in the scenario envisaged in Rule 4(3)(b) of the Draft CA98 Rules i.e. where the officer considers that conditions imposed will not be complied with include Rule 4(3)(a). If the CMA does not agree with our suggestion that Rule 4(3)(a) should be deleted, we would welcome clarification in the final version of the Draft CMA C98 Guidance on when the CMA would not consider it reasonable to wait a reasonable time for a lawyer to arrive.

2.17 We also note that the penultimate sentence of paragraph 6.28 ("*In cases where the CMA wishes to question a person having entered into premises as described at paragraph 6.44 below, the questioning may be delayed for a reasonable time to allow a legal adviser to attend*") suggests that it is only in the dawn raid context that CMA officers will consider waiting a reasonable time for lawyers to attend. This is incorrect: as currently drafted, Rule 4(3) of the Draft CA98 Rules applies to any interview under section 26A CA98, not only interviews during a dawn raid.

2.18 We would also request that the final sentence of paragraph 6.28 is expanded to provide more detail as to what the conditions imposed by the CMA officer while waiting for legal advisers might be.

Separate legal representation

2.19 With regard to the issue of whether a legal adviser also acting for the undertaking may be present at the interview to advise an individual being questioned under section 26A CA98, we are concerned by the CMA's apparent belief that the presence of the undertaking's lawyers at the interview of a connected individual might prejudice the investigation, and the suggestion in footnote 88 that the CMA considers that the presence of lawyers acting for the undertaking at the interview could increase the risk of destruction, falsification or concealment of evidence, the contamination of witness evidence or the reduction of incentives for individuals being questioned to be open and honest in their accounts. This suggests an alarming lack of confidence by the CMA in the professional integrity of lawyers acting on these matters and in the ability of the legal professions' regulatory authorities to enforce their ethical standards. We note in this regard that solicitors qualified in England and Wales who are employed as in-house counsel continue to be bound by the same ethical obligations as solicitors in private practice.

2.20 We acknowledge that there may be circumstances where the interests of an individual and the undertaking under investigation are not aligned, and that separate legal representation for that individual may be required. However, lawyers advising companies are well aware of this potential conflict of interest and other professional ethics issues in this context. Even where no professional conduct difficulties arise, we do not consider that it should be for the CMA to decide whether the individual can be advised by the lawyer advising the undertaking, if the individual wishes to be represented by him/her.

2.21 We note further in this regard that the statement in paragraph 6.28 of the Draft CMA CA98 guidance that "*In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation*" does not accurately convey the complexity of the professional ethics issues in such a situation. It may not be permissible for the undertaking's lawyers to act for both the business and its managers/employees, whatever the wishes of the individual. If the use of the words "*In some cases*" is intended to cover this point, we do not consider this to be sufficient.

2.22 Moreover, we would welcome confirmation in the Draft CMA CA98 Guidance that the CMA will permit the legal advisers of the undertaking under investigation to be present at the interview of any person connected to the undertaking (whether or not they are also advising the individual). This is essential to ensure that the rights of defence of the business are protected.

Q4. Do you agree with the proposed approach to use of 'confidentiality rings' and 'data rooms'?

2.23 We consider that standard procedure for access to the file should continue to be the release of the CMA's file in non-confidential format and in electronic form to all parties to which the SO is addressed.

2.24 Flexibility to use additional methods may be suitable in some cases. However different forms of access to the file should be adopted only with the agreement of parties to which the SO is addressed and such parties should not be put under any pressure to agree. For these reasons, we would suggest that paragraph 11.24 of the Draft CMA CA98 Guidance should be amended so that it is clear that, although CMA has the discretion to use these different forms of access to the file, it will only do so with the agreement of relevant parties (see further paragraph 2.29 of this response).

2.25 As regards data rooms,[1] we note that the limitations placed on advisers are, by their very nature, highly restrictive. As a result, parties need to have very sophisticated legal and economic advisers with detailed knowledge of their business and the relevant markets in order to be able to engage meaningfully with the confidential information within the data room. The data room rooms can also result in the legal and economic advisers being placed in a very difficult position of having to prepare a report on their client's behalf (i.e. within the data room itself) without having full client input or even being able to obtain client approval and sign-off. It is imperative that as part of any data room process, the adviser's client is given the opportunity to review and comment on a non-confidential version of any submission/report that is prepared on their behalf before any submission is made.

2.26 Further, attendance in data rooms can be very costly (in our experience disclosure via a data room can be relatively more costly, less productive and less efficient than disclosure via the standard access to the file process or confidentiality rings). This inefficiency arises due to factors including: the format in which the data/information is presented; the IT equipment made available for reviewing and preparing a submission within the data room; the lack of secretarial (and IT) support available; the limited hours of operation of the data room; the restrictions on information and the equipment that can be brought in and taken out of the data room etc. For these reasons, we consider that data rooms may only be appropriate in very few cases.

2.27 Further, the use of data rooms by the CC in market investigations has been very controversial and is the subject of a number of challenges before the Competition Appeal Tribunal (**"CAT"**). The design of data room rules and terms of access are key to its success. Problems arise, for example:

(a) where advisers authorised to access the data room cannot take proper instructions from their clients;

(b) where the advisers are unable to engage with their client in order to obtain approval and sign-off for any submission/report prepared on their behalf; and

(c) where the conditions on use of the data room are excessively restrictive (for example they unreasonably limit the ability of advisers to draft submissions/reports solely within the data room itself and based on the information disclosed in the data room).

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[1] As set out in the first bullet point in paragraph 11.24 of the Draft CMA CA98 Guidance.

2.28 As regards confidentiality rings,[2] we note that the Draft CMA CA98 Guidance contemplates two situations where a confidentiality ring might be used:

(a) first, where there is a very large volume of documents many of which are not key to the assessment but which are confidential, a limited category of people might be given access to the full confidential file in order to shortlist the documents to be released in non-confidential form for a condensed access to the file process; and

(b) secondly, where key information is confidential, a confidentiality ring might be needed so that the party's legal and economic advisers can fully understand and assess the CMA's analysis.

2.29 We agree that both of these scenarios might be appropriate in some cases, although we would emphasise that these should be considered to be exceptional approaches. In particular, these processes should not be imposed on a party which does not consent – we anticipate that the litigation risk for the CMA in such situations would be inevitably high.

2.30 In relation to the terms and conditions to be complied with by those being given access to the confidential data of others, we would urge the CMA to adopt a standard form set of confidentiality undertakings, based heavily on the corresponding undertakings used by the CAT for confidentiality rings used in its proceedings. The CAT's undertakings have been developed over a number of years and it would seem sensible and an efficient use of resources to make use of that expertise and experience. Further, given that it will be a criminal offence punishable by fine and/or imprisonment for any person to disclose information in breach of a confidentiality ring or data room (which will incentivise compliance), it should not be necessary for the CMA to insist upon more restrictive conditions than those routinely imposed by the CAT.

2.31 Lastly, we note that the use by the CMA of data rooms and confidentiality rings cannot reduce its obligation to provide adequate reasoning for any resulting infringement decision.

Q5. Is the proposed settlement procedure clear, and do you have any views on it?

2.32 We welcome the provision of guidance on settlement which we consider is long overdue. We welcome the CMA's recognition of the risks of settlement admission documents enhancing exposure to damages actions and the confirmation in paragraph 14.18 of the Draft CMA CA98 Guidance that the CMA is open to reasoned requests from the settling business to provide the confirmation that they accept the settlement requirements orally.

2.33 We consider that, for the most part, the description of the settlement process is clear and largely reflects the more recent approach of the OFT to early resolution. However we would welcome further clarification and guidance on the following points:

(a) paragraph 14.29 of the Draft CMA CA98 Guidance sets out that a party can withdraw from the settlement process if the Statement of Objections does not substantially reflect a party's admissions. We would welcome confirmation that a party can also leave the settlement discussions at any time before the settlement agreement is entered into. We would suggest that the most appropriate place to include this would be in paragraph 14.9 of the Draft CMA CA98 Guidance; and

(b) we note that there is no discussion of the procedure that the CMA will follow in "hybrid" settlement cases, where some parties decide to settle but some do not. Although we appreciate that such cases may have to proceed as best suits the case in question, it would be useful to have clarity as to:

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[2] As set out in the second bullet point in paragraph 11.24 of the Draft CMA CA98 Guidance.

(i) whether settlement is an "all or nothing" process or whether hybrid cases might be permitted; and

(ii) in the event of a hybrid case, who will be responsible for taking the final decision and how much the Case Decision Group (**"CDG"**) will be told about the settlement, and at what stage.

2.34 Overall, we consider that the most important issue in settlement is that the CMA should remain open and be prepared to listen to the parties. Our experience has been that once the settlement route is embarked on, very little discussion of the substance of the case is permitted. We fully accept that settlement is not a process of negotiation but if the CMA officers do not permit any dialogue regarding their Summary Statement of Key Facts, they risk losing potential settlement arrangements and the procedural efficiencies which they produce.

Q6. 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?

2.35 We agree that parties are much more likely to take a decision on whether to waive their procedural rights if they know the level of the potential fine and the amount of reduction which they are likely to be granted.

Q7. 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?

2.36 We note that the 20 per cent reduction for pre-SO settlement is somewhat more generous than the reductions available under the EU settlement process and we welcome this proposal. We consider that the availability of a 20 per cent reduction may result in more settlements than would take place if the only reduction available were 10 per cent.

Q8. Do you have any comments on any of the other amendments proposed for the Draft CMA CA98 Guidance?

Paragraph 5.9: publication of names of businesses under investigation

2.37 Given that the CMA will presumably already be in contact with the parties under investigation at the point at which a notice of investigation is published, we would request that the Draft CMA CA98 Guidance includes confirmation that the CMA will give the parties advance warning that they will be named and the expected timing of publication of the notice. We consider that this is important to enable a party which wishes to keep its identity confidential to make appropriate representations to the CMA and otherwise to protect its legal rights, particularly given that such notices have absolute privilege against defamation pursuant to section 57 CA98. In addition, such advance notice is required to enable parties to prepare their own press statements.

Paragraph 6.48: return of information

2.38 Footnote 105 to paragraph 6.48 of the Draft CMA CA98 Guidance is not clear – perhaps it should state "*The CMA will retain all information which remains relevant to the investigation*" or "*The CMA's investigation file will include all information which remains relevant to the investigation*".

Footnote 110 to paragraph 7.12: confidentiality of historical information

2.39 We do not agree that it is reasonable to apply a rule of thumb that information which is more than two years old is no longer confidential. We consider that the point at which historic information loses its commercial sensitivity is a matter for case by case assessment (and will depend on the conditions of the particular market in question). That

said, we agree that an indication of the CMA's general approach to the confidentiality of historical documents is useful guidance. We would suggest that the CMA should follow the approach of the EU Commission and EU courts and treat information which is five or more years old as normally not being confidential, subject to the parties demonstrating otherwise (see paragraph 23 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty etc.)

Chapter 8: Interim measures

2.40 We note the amendment to section 35 CA98 to change the jurisdictional test for issuing interim measures to prevent significant damage, and welcome the guidance given on how the concept of "significant damage" will be interpreted.

2.41 As regards the person authorised to take interim measures decisions, we note that the Draft CMA CA98 Guidance contemplates that the SRO can issue an interim measures direction. We do not consider that the requirement in paragraph 8.11 to "*consult other senior CMA officials as appropriate*" is adequate in this respect. Given the potential impact of an interim measures decision on the parties and the market, and its legal significance as an appealable act under sections 46 and 47 CA98, we consider that authorisation from a senior body of the authority should be required; it is not appropriate for one individual to take this type of decision on his/her own. We note in this regard that the SRO cannot engage in settlement discussions (a procedural step of much less impact or significance) without the authorisation of the Case and Policy Committee. We would suggest that the appropriate senior body in the interim measures context would also be the Case and Policy Committee (assuming that the CDG has not been appointed at this stage). This should also ensure that the CMA as an institution can act boldly and decisively.

2.42 As is referred to obliquely in paragraph 8.2 (and should perhaps be stated more explicitly), section 35(1) provides that interim measures directions cannot be issued unless the CMA has decided that the section 25 threshold is met. This is a significant condition, given that requests for interim relief are typically submitted at the outset of an investigation, when a third party complaint is first lodged. The section 25 threshold as to whether there are reasonable grounds for suspecting that competition law has been infringed is not a high standard but we are aware of a past case where no decision on interim measures could be taken because the question of whether the section 25 threshold was met was still outstanding. The CMA should therefore seek to ensure that where interim measures are being sought, the decision on whether to open an investigation is prioritised and resolved swiftly, if it is still outstanding at the time of the interim relief application.

2.43 We note that there is no clear statement as to the standard of proof which will be applied by the CMA in deciding whether it is necessary to act to prevent significant damage or to protect the public interest. The only indication of the standard of proof is made in paragraph 8.18 of the Draft CMA CA98 Guidance, which reflects the provisions of section 35(8) and (9) such that interim measures cannot be issued where the CMA is satisfied on the balance of probabilities that an agreement meets the conditions for an individual exemption from the competition prohibitions. We note that the standard of proof has a significant impact on the speed with which a decision can be made. In the High Court, the grant of injunctive relief is assessed by reference to whether there is a serious question to be tried, a lower standard than the balance of probabilities. We would welcome guidance on the standard of proof which the CMA considers should be satisfied for interim relief to be granted.

2.44 We note the reference in paragraph 8.25 of the Draft CMA CA98 Guidance to the OFT guidelines "Enforcement" (OFT 407) and "Involving third parties in Competition Act investigations" (OFT 451). Given that the legal test for the grant of interim relief has now changed (and that those documents were issued in 2004 and 2006 respectively), we

would urge the CMA to review and update them as a priority, if they are to be presented as current useful guidance.

Paragraph 11.21: omitting "routine administrative documents" from the file

2.45 We would urge caution where any omission is made of routine documents. We agree that "*correspondence setting up meetings or confirming timing for delivery of information*" are unimportant documents which can be excluded from the access to the file process. However, it is not just documents which "*relate to the substance of the case*" which might be exculpatory or relevant to the substantive assessment of the case. Documents on procedure or the conduct of the investigation can also have significance in a way which may not be obvious on the face of them. We would suggest that only the most anodyne and mechanical of administrative documents should be excluded.

Paragraph 11.30: identity of the CDG

2.46 As noted in paragraph 2.4 of this response, we consider that the CMA should take this opportunity to strengthen the procedural integrity of its decision-making processes by passing final decision-making authority to persons who are fully independent of the investigations side of the organisation. We consider that the CDG should always comprise three members, at least two of which should be CMA Panel members with relevant experience. We accept that it is necessary to have a person on the CDG who is a full time officer of the CMA or otherwise very familiar with the mechanics of decision-making (just as CC groups currently include a Chairman or Deputy Chairman), but we do not consider that it should be an official involved with the particular investigation.

Chapter 15: Complaints and the Procedural Officer

2.47 We welcome the retention by the CMA of the Procedural Officer (formerly the Procedural Adjudicator) role, and the additional clarification in paragraph 15.4 of the types of issues which can be referred to the Procedural Officer and discussion of the timetable and procedure for the handling of complaints, set out in paragraphs 15.7 to 15.11 of the Draft CMA CA98 Guidance.

Q9. Do you agree with the proposed transitional arrangements, as set out in paragraphs 3.41 to 3.43 above?

2.48 We have no objection to the application of the finalised CMA CA98 Guidance and the finalised CMA CA98 Rules applying to all on-going cases from 1 April 2014. However, we do not consider that the powers of the CMA to impose procedural fines under section 40A CA98 should be applicable to such cases, even if they are limited to procedural steps taken after that date. Such powers should only apply to investigations which first meet the section 25 threshold on or after 1 April 2014.

Q10. 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.

2.49 We welcome the decision of the CMA to continue to offer Short-form Opinions ("**SfOs**") and agree that this is a valued source of guidance and legal certainty which clients appreciate. We also welcome the extension of the SfO trial to include vertical agreements and agree that this will further enhance the process. Post-modernisation, there has been very little case law on the application of the competition prohibitions to vertical agreements and this is one of the key categories where an SfO could provide valuable guidance on the issue of appreciability, the application of individual exemption criteria under Article 101(3) or section 9 CA98, and the applicability of any exclusions. The potential to obtain the enhanced legal certainty for this type of assessment which an opinion from a national competition authority offers is certainly valuable to businesses.

2.50 We welcome the Transition Team's plan to issue updated SfO guidance around 1 April 2014 if their proposal is accepted by the CMA Board.

3. **REMEDIES: GUIDANCE ON THE CMA'S APPROACH TO THE VARIATION AND TERMINATION OF MERGER, MONOPOLY AND MARKET UNDERTAKINGS AND ORDERS**

Q1. Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the review of final undertakings and orders under the EA02? If not, what aspects do you think are missing?

3.1 We consider that the Draft Guidance covers the main changes introduced by the ERRA13 to the review of final undertakings and orders under the EA02. Our detailed comments in relation to specific points are set out below.

Q2. Do you agree with the proposed simplified approach to the reviews of undertakings and orders, as set out in the Draft Guidance?

3.2 We welcome the proposed simplified approach to the review of undertakings and orders as set out in the Draft Guidance. However we consider that the Draft Guidance could provide greater clarity in relation to timescales.

3.3 We note that paragraph 3.17 provides that "*the CMA will endeavour to conduct its review as efficiently as possible*" and appreciate that specific timescales will vary depending on the complexity of the issues involved as well as the available resources and responsiveness of the parties. However, we consider that it would be helpful if the Guidance were to give an indication of timescale in relation to specific elements of the process. For example, there might be an indicative period (say, 3 weeks) during which relevant parties are invited to comment on the review (paragraphs 3.6 and 3.8). An indication of the timescales involved is likely to assist parties in deciding whether to and/or when to initiate a review.

Q3. Do you agree with the list in Annexe B of the Draft Guidance of existing related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?

3.4 We suggest that the document "Merger Remedies: Competition Commission Guidelines" (November 2008, CC8) should be added to the list in Annexe B for the reasons set out in response to question 5 below.

Q5. Do you consider that the Draft Guidance is user friendly in terms of its content and language?

3.5 We consider that the Draft Guidance is relatively user friendly in terms of content and language. Where there is a lack of clarity, this tends to be due to the nature of the subject matter: we appreciate that the process of reviewing undertakings and orders will vary widely depending on the nature of the undertakings or orders concerned, the extent of the change in circumstances, the variation proposed and the number of parties involved.

3.6 However, we would encourage the CMA to consider including examples where possible in order to illuminate the Draft Guidance, e.g. by listing factors which might make a review "*particularly complex"* (paragraph 3.20).

Q6. Do you have any other comments on the Draft Guidance?

The ways in which a review may be initiated

3.7 We note that, in a change from the existing guidance,[3] the Draft Guidance specifically provides for reviews initiated by *"other interested parties"* in addition to the parties who

[3] *Memorandum of Understanding between the Office of Fair Trading and the Competition Commission on the variation*

have given undertakings and the CMA on its own initiative (paragraph 3.2). We consider that other interested parties who seek to initiate a review should be required to explain their interest as part of the supporting evidence submitted with the request (paragraph 3.3).

3.8 In addition, paragraph 3.6 states that "*the CMA will typically invite third parties to comment on the request for review and to submit any relevant evidence*". We consider that, where a review has been initiated by an interested third party, the parties who gave the undertakings or are the subject of an Order should be invited to comment on the request for review and submit any relevant evidence in all circumstances, and that this should be clarified in the final version of the Draft Guidance. The same point applies in relation to paragraph 3.8 in relation to reviews which have been initiated by the CMA.

3.9 Further, we consider that in many cases the parties who have given undertakings or are the subject of an Order should be approached by the CMA and invited to comment on the request for review in advance of any public consultation, as their views are likely to inform the nature of the public consultation that is conducted.

3.10 Paragraph 3.6 also states that "*the form of publication and extent of detail will depend on the circumstances of the case*". We note that paragraph 22 of the MOU provides examples of situations when more limited detail would be published (i.e. when the information is likely to lead to a change of behaviour in the relevant market(s) which could be damaging to consumers, and where the information includes commercially sensitive material which cannot satisfactorily be redacted). We recognise that this point is dealt with to an extent in footnote 9, but consider that it may be helpful if these examples are included in the body of the final version of the Draft Guidance in order to provide further clarity.

Deciding whether to conduct a review - prioritisation principles

3.11 We note that, in deciding whether to conduct a review, the CMA will act in accordance with its published prioritisation principles (paragraph 3.10 of the Draft Guidance). We appreciate that these have not yet been finalised, but we would welcome confirmation from the CMA that the principles will deal specifically with the CMA's priorities in considering the review of undertakings and orders. As discussed further in section 6 of this response, we would also encourage the CMA to publish its proposed prioritisation principles for consultation at the earliest opportunity.

3.12 Moreover, we consider that it would be undesirable if the prioritisation principles are such that the CMA is not required to consider a review of undertakings or Orders where a variation is necessary in order to ensure the parties are not in breach of the undertakings or Order, given that undertakings and Orders are enforceable by third parties through the courts.

3.13 Reviews involving mechanical or minor variations are likely to benefit from a streamlined procedure in keeping with the objectives of the Draft Guidance, particularly in urgent cases. We recommend that the CMA includes specific principles which would apply in these circumstances, and would welcome the opportunity to comment on the draft prioritisation principles before they are finalised.

3.14 We would also urge the CMA to have regard to these issues when initially accepting undertakings and imposing Orders. Given the potentially time-consuming nature of the review process, it would be sensible to incorporate a measure of flexibility within undertakings and Orders to provide for a less formal variation process for minor variations (such as extensions of time limits), or for variations that have been agreed between all

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and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Enterprise Act 2002 (the "**MOU**").

relevant parties and which may not require wider consultation (for example varying undertakings in relation to a specific customer where this has been agreed by the party giving the undertakings and the specific customer).

The CMA's assessment

3.15 We note that paragraph 3.21 of the Draft Guidance provides that the CMA will have regard to "*the need to ensure due process for both parties directly involved and other interested persons*". We consider that the CMA should also have regard to the costs incurred by all parties as a result of their participation in the review, as these may be significant relative to the issues at stake.

Key stages of the CMA's decision-making process

3.16 Paragraph 3.27 states that "*parties will be expected to demonstrate that their proposed variations will effectively address the competition problem*". We note that, when considering remedial action in merger cases, the EA02 requires the CC to "*have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it*"[4]. This means considering the cost of remedies, proportionality, and the effects of the action on any relevant customer benefits as well as effectiveness, as set out in the CC remedies guidelines.[5]

3.17 We consider therefore that the CMA should have regard to all of these considerations, rather than just effectiveness, when varying undertakings or Orders, in the same way as it does when originally accepting them. Accordingly, the CC merger remedies guidelines should be added to the list of documents in Annexe B to be adopted by the CMA.

3.18 We welcome the facility provided by paragraph 3.29 to "fast-track" certain reviews by publishing the provisional decision and reasoning as part of a notice of intention to vary or terminate the undertakings or order. In line with its aim of streamlining the review process, we would encourage the CMA to adopt this route whenever appropriate and in particular in relation to the categories of variations discussed at paragraph 3.14 above.

Documents relating to implementation of any variation or termination

3.19 We note that the CMA is required to consult on any changes to undertakings or orders for the periods set out in paragraph 3.33 of the Draft Guidance. Paragraph 3.34 provides that "*if the CMA considers that any representation necessitates material change to the proposed revised undertakings or order, it will give notice of the proposed modifications*." We consider that it would be helpful to clarify whether "giving notice" would involve a further consultation period, and if so, its likely duration and scope.

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4 Sections 35(4) and 36(3) EA02.

5 *Merger Remedies: Competition Commission Guidelines*, November 2008 (CC8).

4. REGULATED INDUSTRIES: GUIDANCE ON CONCURRENT APPLICATION OF COMPETITION LAW TO REGULATED INDUSTRIES

4.1 This section should be read in conjunction with our comments in response to the BIS Consultation, in particular on the Competition Act 1998 (Concurrency) Regulations 2014 (**"Draft Concurrency Regulations"**).[6][7]

Q1: Do you consider that the Transition Team's proposed approach to dealing with the revised requirement that Regulators' exercise competition powers in favour of sectoral powers is clear and appropriate? Please give reasons for your view.

4.2 The CMA's draft guidance on concurrent application of competition law to regulated industries (**"Draft Concurrency Guidance"**) contains very little detail on the Transition Team's proposed approach to dealing with the revised requirement that Regulators exercise competition powers in favour of sectoral powers.

4.3 In terms of the substantive decision as to whether a Regulator should use sectoral or competition powers, the Draft Concurrency Guidance simply observes that "*[e]ach Regulator will determine whether it may be more appropriate to proceed under the CA98 on a case-by-case basis*".[8] In order to encourage sectoral regulators to use their concurrent competition powers (given the spirit of the underlying legislation), it may be helpful for the Draft Concurrency Guidance to be amended so that they:

(a) observe that the use of competition powers gives rise to a number of benefits for consumers, including the possibility of recovering compensatory damages, encouraging compliance with competition law and promoting competition in the relevant industries; and

(b) provide that the CMA and Regulators should publish their decisions to use either their sectoral or competition powers including the reasoning on which those decisions were based. This would encourage well-reasoned, transparent and consistent decision-making and would enable interested parties to better understand the relevant considerations when such decisions are taken.

4.4 The Draft Concurrency Guidance and Draft Concurrency Regulations do not set out the factors which Regulators should take into account when deciding whether to use sectoral or competition powers. There are a number of practical difficulties associated with setting out such factors, in particular, it may be difficult to set out generic factors which would be appropriate to all of the Regulators in relation to all of the relevant sectoral powers. Moreover, it is not clear whether the CMA would have the power unilaterally to stipulate any such factors in the Draft Concurrency Guidance without those factors first being provided for in the Draft Concurrency Regulations. Notwithstanding these practical considerations, we consider that steps should be taken to encourage Regulators to make such decisions in a consistent, transparent and predictable manner, including through the following:

(a) the Draft Concurrency Regulations should be amended so that they explicitly encourage Regulators to engage in a dialogue with the CMA when taking a decision as to whether to exercise their sectoral or competition powers, thereby encouraging Regulators to take a systematic, deliberate and consistent approach when taking a decision to use either their sectoral or competition powers. We note

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6 A copy of our response to the BIS Consultation is annexed to this response.

7 In this section, the term "Regulators" is used to refer to all of the industry sector regulators with concurrent competition powers with the CMA as at 1 April 2014, as set out in the table at paragraph 2.1 of the Draft Concurrency Guidance.

8 Paragraph 4.4 of the Draft Concurrency Guidance.

that the Draft Concurrency Guidance notes as a general principle that "*[t]he CMA and the Regulators will always consult with each other before acting on a case where it appears that they may have concurrent jurisdiction*";[9] however, it appears that this obligation to consult only arises after a decision to use competition powers over sectoral powers has been made; and

(b) the CMA and Regulators should agree in bilateral Memoranda of Understanding the relevant factors that each specific regulator should take into account when deciding whether to use their sectoral or competition powers.

4.5 In terms of when a decision to use sectoral powers over competition powers is taken, we agree with the Draft Concurrency Guidance that Regulators should be encouraged to take this decision when they commence investigations and that this initial decision should be kept under review during the course of their investigations. We would, however, observe that any change between using sectoral and competition powers once a case has been commenced is likely to give rise to costs and procedural complexities for both Regulators and the parties/interested parties, and such a switch should only be undertaken after careful consideration (and in consultation with the relevant parties). We would add that these decisions should be communicated to relevant parties during the course of the investigation.

Q2: Do you consider that the Transition Team's proposed approach to allocation of cases between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.

4.6 We note that the Draft Concurrency Guidance sets out different approaches in relation to:

(a) the initial allocation of cases between Regulators and the CMA; and

(b) the transfer of cases pursuant to paragraphs 3.25 to 3.28 of the Draft Concurrency Regulations.

4.7 As regards the initial allocation of cases, we agree that the factors to be taken into account when allocating cases as set out in paragraph 3.21 of the Draft Concurrency Guidance are clear and appropriate. We agree that this list should not be exhaustive. Other factors may also be relevant to case allocation (and could be added to paragraph 3.21), for example:

(a) the intention of the underlying legislation, i.e. to encourage sectoral regulators to use their competition powers;

(b) where a case affects a regulated sector, whether elements of the case relate to non-regulated business activities within that same sector; and

(c) published administrative priorities and current case loads.

4.8 The Draft Concurrency Guidance states that *"[i]t is expected that agreement will generally be reached as to which United Kingdom authority is better or best placed to deal with a particular complaints within two months of receipt of the complaint by the first authority to receive it*".[10] We note that two months is a long period of time to determine which regulator should investigate a case and may be unreasonably long for many cases, for example simpler cases and urgent cases; indeed we consider that all cases should be capable of allocation within 30 working days. For this reason, at the least, the words *"(which may differ from the two-month period above)*" in paragraph 3.23 should be changed to *"(which may be less than the two-month period above)*".

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[9] Paragraph 3.20 of the Draft Concurrency Guidance.

[10] Paragraph 3.23 of the Draft Concurrency Guidance.

4.9 We note that there is no explicit provision for seeking and taking into account the views of complainants, parties to the investigation and third parties (together, **"interested parties"**) when taking an initial case allocation decision. The views of interested parties could assist the Regulators and the CMA in making a better informed decision on case allocation (for example by providing information on the scope of the alleged anti-competitive conduct and whether it affects more than one regulated sector).[11] Early engagement with interested parties may even reduce the likelihood of a case needing to be re-allocated as provided for in paragraphs 3.25 to 3.28 of the Draft Concurrency Regulations. In this regard we note that the Draft Concurrency Guidance explicitly provides for consultation with "*any other persons likely to be materially affected*" when taking a case reallocation decision.[12]

4.10 In relation to the transfer of cases as provided for paragraphs 3.25 to 3.28 of the Draft Concurrency Regulations, we note that a transfer of a case may give rise to very real concerns (and costs) for parties to an investigation, complainants and third parties, including increased administrative phase costs as a result of having to engage with a new regulator and delays in the reaching of a final decision. For these reasons it is vitally important that the views of interested parties are sought and taken into account (as provided for in paragraph 3.26).

4.11 Further, given these concerns, we agree that such a case transfer should only take place in "*exceptional circumstances*".[13] It is not clear from either the Draft Concurrency Guidance or the Draft Concurrency Regulations what constitutes "*exceptional circumstances*". It would be helpful if the Draft Concurrency Guidance could be expanded to include more detail on the factors that would be taken into account.[14] The Draft Concurrency Guidance observes that all case allocation decisions are reversible and therefore acknowledges the possibility of cases "ping-ponging" between the CMA and Regulators. It would be very unfortunate if any case were to be re-allocated more than once.

4.12 Lastly, we note that the Draft Concurrency Guidance makes no provision for the potential conflict between Regulators and the CMA in circumstances in which a Regulator has decided to use its sectoral powers instead of its competition powers (and the Regulator has not opened a CA98 investigation). We understand that in these circumstances a different CMA or Regulator is not prohibited from exercising competition powers in relation to the relevant agreement or practice, including, by way of example, opening a Competition Act investigation (although it would need to follow the initial case allocation procedures). It would be helpful if the Draft Concurrency Guidance could provide more details of relevant issues and appropriate courses of action in these circumstances.

Q3: Do you consider that the Transition Team's proposed approach to secondments and cooperative working between the CMA and Regulators is clear and appropriate? Please give reasons for your view.

4.13 No comment.

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11 Complainants could be encouraged to set out their views on case allocation in their initial complaint. In this regard, paragraph 3.36 of the Draft Concurrency Guidance could be amended to include guidance that complainants should consider including representations on case allocation in their complaint.

12 Paragraph 3.26 of the Draft Concurrency Guidance.

13 Paragraph 3.28 of the Draft Concurrency Guidance.

14 In this regard, the Draft Concurrency Regulations only require the CMA to be "*satisfied that doing so would further the promotion of competition within any market or markets in the United Kingdom for the benefit of consumers*", Regulation 8(1)(a). We note that the Government elaborates in the BIS Consultation: "*The power will be exercisable where …for example the CMA considers itself best placed to: make a decision that sets the appropriate precedent, in particular when similar issues arise across different sectors or parts of the United Kingdom; or enforce the CA98 prohibitions more effectively, for example because the regulator lacks the necessary resources or is unable to take a decision in a timely manner.*" (Paragraph 3.4.)

Q4: Do you consider that the Transition Team's proposed approach to information sharing between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.

Q5: Do you consider that the CMA and the Regulators should share additional categories of information, or share information of the type outlined in the Draft CMA Concurrency Guidance at different times? Please give reasons for your view.

4.14 We set out combined comments on questions 4 and 5 below.

4.15 Regulation 9 of the Draft Concurrency Regulations provides for the sharing of information between the CMA and Regulators "*in connection with concurrent cases*" (i.e. cases using competition powers). It should be made clear that information shared pursuant to Regulation 10 should only be used for competition cases and should not be used in relation to the exercise of sectoral powers, especially where Regulators do not have the power to collect that information using their sectoral powers. This may require Regulators to set up information barriers (i.e. "Chinese walls") to ensure that such information is not inappropriately used by the Regulators.

Q6: Do you consider that the Transition Team's proposed approach to the annual concurrency report is clear and appropriate? Please give reasons for your view.

Q7: Do you consider that the annual concurrency report should contain categories of information that is not envisaged in the Draft CMA Concurrency Guidance? Please give reasons for your view.

4.16 We set out combined comments on questions 6 and 7 below.

4.17 An Annual Concurrency Report serves several important functions, including promoting accountability and transparency. In order to ensure that the Annual Concurrency Report achieves such aims, the CMA should commit to publishing certain information as a minimum, in particular the information set out in paragraph 3.57 of the Draft Concurrency Guidance. As currently drafted, the Draft Concurrency Guidance only states that the CMA "*may*" include the stipulated information in their Annual Concurrency Report. This should be changed to "*shall*".

Q8: Do you agree with the Transition Team's proposed approach to transitional arrangements to account for the changes to competition concurrency introduced by Chapter 5 of Part 4 of the ERRA13? Please give reasons for your view.

4.18 It would be helpful if the Draft Concurrency Guidance would clarify how cases in progress as at 1 April 2014 will be treated.

5. CARTEL OFFENCE PROSECUTION GUIDANCE

A. GENERAL OBSERVATIONS

Statement of CMA's intention

5.1 We note the statement in paragraph 2.2 of the consultation document (CMA9con) that "*The intention of the CMA is to focus its criminal enforcement efforts on prosecuting individuals involved in hardcore cartels. The removal of the dishonesty element does not affect this.*"

5.2 We consider that it would be helpful to repeat this statement in the final version of the prosecution guidance document (the **"Prosecution Guidance"**). As currently drafted, paragraphs 2.1-2.5 of the draft Prosecution Guidance refer only to the original intention behind the creation of the offence and the inherent public interest in individuals involved in hardcore cartels being prosecuted. We would suggest that:

(a) a clear statement of the CMA's intention to focus its efforts on prosecuting individuals involved in hardcore cartels should be added at the end of paragraph 2.3 of the draft Prosecution Guidance; and

(b) confirmation that the removal of the dishonesty element does not affect the CMA's enforcement strategy should be expressly included at the end of paragraph 2.4 of the draft Prosecution Guidance.

More meaningful guidance

5.3 We recognise the limitations faced by the CMA as a result of the Prosecution Guidance being issued in the context of the criminal justice process rather than the civil competition enforcement regime, as discussed at paragraph 2.5 of the consultation document. However, we question whether this necessarily means that the CMA is unable to provide any guidance at all on its interpretation of the offence, or to refer to example scenarios where the CMA would or would not anticipate that a prosecution would be likely, as suggested in paragraph 2.6 of the consultation document.

5.4 Paragraph 2.8 of the consultation document states that "[t]*he publication of prosecution guidance is … an attempt to bring as much transparency as is reasonably possible to the CMA's exercise of its prosecutorial discretion in relation to the criminal cartel offence in the context of the removal of dishonesty as an element of the offence.*" Yet, in our view, as currently drafted the Prosecution Guidance is unlikely to be of significant practical assistance either to individuals faced with potential criminal prosecution under the revised offence or to their advisors.

5.5 Given the potentially significant expansion of the scope of the criminal cartel offence, and the introduction of new exceptions and defences, it is very important that clear and comprehensive prosecution guidance is available. Whilst it is correct that the criminal courts will provide clarification on the meaning of the legislation in due course (as stated at paragraph 2.6 of the consultation document), it is likely to take a number of years before the courts will have had an opportunity to consider the provisions.[15]

5.6 Moreover, it remains the case that the CMA is responsible for providing guidance on how it intends to exercise its prosecutorial discretion – that is not a matter for the courts. This does not require the CMA to set out definitive statements as to whether particular conduct will or will not fall within the scope of the offence, or whether a particular exception will or will not be available; rather, it requires the CMA to explain how it currently interprets the

[15] As acknowledged by Stephen Blake (Director, Cartels – OFT) in a speech delivered on 1 October 2013.

offence for the purposes of deciding whether or not the evidential test is met (see further below), and when it would or would not be likely to prosecute an individual.

5.7 We would therefore urge the CMA to reconsider whether it can go further in its final Prosecution Guidance in terms of providing guidance as to how the prosecution principles will be applied, together with additional illustrative examples, in order to provide greater transparency and a more meaningful guidance document. This is discussed further below in relation to specific areas of the guidance.

B. RESPONSE TO SPECIFIC QUESTIONS

Q1. Does the Draft Guidance fulfil its statutory purpose, namely to set out the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be instituted against an individual?

5.8 Section 190A(a) EA02, as inserted by Section 47(7) ERRA13, provides that "*The CMA must prepare and publish guidance on the principles to be applied in determining, in any case, whether proceedings for an offence under section 188(1) should be instituted*" (emphasis added). The statutory purpose of the Prosecution Guidance is therefore not only to set out the principles to be applied in determining whether proceedings for the revised cartel offence should be instituted against an individual, but rather to provide guidance on those principles and how they will be applied.

5.9 The principles themselves are already set out in the Code for Crown Prosecutors, which explains the principles to be applied during both parts of the Full Code test i.e. the Evidential Stage and the Public Interest Stage. In our view, the statutory purpose of the Prosecution Guidance is therefore to "add flesh to the bones" of the Code for Crown Prosecutors, providing guidance on how the CMA will apply those principles at each stage of the test. We do not consider that the draft Prosecution Guidance currently fulfils this purpose as well as it could do, as detailed below in response to questions 2 and 3.

5.10 As currently drafted, the draft Prosecution Guidance will do little to resolve the uncertainties and concerns around the scope and enforcement of the revised criminal cartel offence, which could have a serious and undesirable chilling effect on the entry into legitimate commercial agreements.

5.11 We note in this regard that prosecution guidance which has been prepared in relation to other offences has included greater detail clarifying the prosecutorial authorities' understanding of where the limits of the offence are and how they intend to exercise their prosecutorial discretion, including how they will treat particular types of cases which are recognised as being difficult – see for example the prosecution guidance on the offence of assisting or encouraging suicide, and the prosecution guidance for offences under the Bribery Act 2010.

Q2. Is the evidential stage of the test of the decision-making process explained clearly enough?

5.12 We consider that it would be helpful to include in the final Prosecution Guidance the additional guidance contained in the Code for Crown Prosecutors as regards the meaning of a "*realistic prospect of conviction*" i.e. that the CMA must consider that, based on an objective assessment of the evidence, an objective, impartial and reasonable jury hearing a case, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged (see paragraph 4.5 of the Code for Crown Prosecutors).

5.13 We would also suggest that the additional guidance contained in the Code for Crown Prosecutors regarding the need to assess whether any evidence can be used in court, the reliability of the evidence, and the credibility of the evidence, and the considerations to be

taken into account, should be included in the final Prosecution Guidance (see paragraph 4.6 of the Code for Crown Prosecutors). As currently drafted, paragraph 4.1 of the draft Prosecution Guidance simply states that the CMA "*must be satisfied that the evidence is admissible, reliable and credible*". We would suggest that it would be helpful to expand this statement in the final version and expressly explain that the CMA will consider:

(a) the likelihood of any evidence being held as inadmissible by the court and the importance of that evidence in relation to the evidence as a whole;

(b) whether there are any reasons to question the reliability of the evidence, including its accuracy or integrity; and

(c) whether there are any reasons to doubt the credibility of the evidence.

5.14 We welcome the clarification of the scope of the revised criminal cartel offence in paragraphs 4.4-4.10 of the draft Prosecution Guidance, and in particular the non-exhaustive list of illustrative examples in paragraph 4.9 of arrangements between undertakings which would not constitute evidence of the commission of the offence on the part of the individuals who reach agreement about them.

5.15 We would however urge the CMA to explain in more detail how it will assess the potential application of the exclusions under new section 188A EA02 and the defences under new section 188B EA02. We acknowledge that there are certain limitations on how far the CMA can go in terms of interpretation of the legislation. However, the CMA has already included a degree of interpretation and used a limited number of illustrative examples in certain areas of the draft Prosecution Guidance, for example:

(a) the explanation of the meaning of "agrees" in paragraph 4.6 and the clarification that this does not include "*the mere fact of an individual passing on confidential future pricing information to an individual at a competitor*", even though such conduct has been held to amount to an "agreement" (used interchangeably with the term "concerted practice") in the context of Article 101(1) TFEU[16]/Chapter 1 CA98;[17]

(b) the statement in paragraph 4.13 of the draft Prosecution Guidance that the notification exclusion under section 188A EA02 "*will not be satisfied if the arrangement merely provides that customers would be provided with a broad general disclaimer that its agreements may contain price fixing/market sharing provisions*";

(c) the examples set out in paragraph 4.16 of the draft Prosecution Guidance of genuine steps being taken in relation to one of the statutory exclusions which will be taken into account by the CMA in assessing whether there was such an intention even if the requirements of section 188A EA02 have not been met; and

(d) the statement in paragraph 4.24 of the draft Prosecution Guidance that "*the CMA takes the view that the term 'professional legal advisers' under subsection 188B(3) is intended to cover both external and in-house legal advisers qualified in the UK and that it could also apply to legal advisers qualified in foreign jurisdictions with an equivalent legal qualification.*"

5.16 Given that the CMA is comfortable with the inclusion of these statements detailing the CMA's interpretation of the legislation and illustrative examples of how the CMA will approach the potential application of the exclusions/defences in the context of the evidential stage of the test, we find it difficult to understand why further guidance and

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[16] Treaty on the Functioning of the European Union.

[17] Case C-49/92 *Commission v Anic Partecipazioni* [1999] ECR I-4125.

illustrative examples cannot be included in relation to other aspects of the offence (prefaced, if considered necessary, with "*the CMA takes the view that …*"). In particular, we consider that it would be helpful to include:

(a) illustrative examples of descriptions of the nature of the arrangements which the CMA would or would not consider to be "*sufficient to show why they are or might be arrangements of the kind to which section 188(1) applies*" (as required by section 188A(2)(b) EA02);

(b) further guidance and/or illustrative examples to explain how an individual might demonstrate that he had "no intention to conceal" the agreement from the CMA even if he did not actively notify the CMA of the agreement, and how an agreement might be brought to the attention of the CMA by an individual otherwise than by notification (as envisaged in paragraph 4.23 of the draft Prosecution Guidance);

(c) clarification of the CMA's views on whether the legal advice defence could apply where advice is sought from legal advisers in other jurisdictions (we note in this regard that there is no express requirement for the legal advice to be sought from a UK qualified lawyer in the legislation) – we note that the draft Prosecution Guidance states that the defence "may" apply in such circumstances (paragraph 4.24), but we would encourage the CMA to clarify whether it would consider that the defence would be likely to apply in such circumstances, thus making prosecution less likely;

(d) clarification that the CMA would not take into account whether the content of any legal advice received was correct, or followed by the individual, in assessing whether the legal advice defence was likely to be applicable in a particular case; and

(e) further guidance and/or illustrative examples to explain when the CMA would consider that the steps taken by an individual to disclose the arrangements to a professional legal adviser to obtain advice about them were not reasonable or genuine (as envisaged in paragraph 4.24 of the draft Prosecution Guidance).

5.17 We would also welcome clarification on how the CMA intends to apply the new regime to existing agreements which are subsequently amended.

Q3. Do you have any comments on the factors the CMA will take into account in considering the public interest in instituting a prosecution?

5.18 Given that the public interest stage of the test is arguably entirely within the CMA's control, and a matter for its discretion subject to the general guidance on relevant factors contained in paragraph 4.16 of the Code for Crown Prosecutors, we would encourage the CMA to go further in providing more detailed guidance on how its consideration of the public interest test factors, in particular the seriousness of the offence and the question of whether prosecution is a proportionate response (which are currently dealt with in much less detail than the culpability of the suspect).

5.19 In relation to the seriousness of the offence, we note in particular the statement in paragraph 4.34 of the draft Prosecution Guidance that "*Cartels that have been carried on for a prolonged period are more likely to require prosecution".* We would welcome further clarification as to what length of time the CMA would consider to be "*a prolonged period*" in this context. We would also emphasise that the duration of a cartel should not be a determining factor in deciding whether or not to prosecute: it will not always be the case that simply because a cartel is short lived, it is not appropriate to prosecute; similarly just because a cartel lasts many years does not mean that it will always be appropriate to prosecute the individuals involved.

5.20 With regard to the question of proportionality, we consider it highly unsatisfactory that paragraph 4.41 of the draft Prosecution Guidance merely states that "*The CMA should also consider whether prosecution is proportionate to the likely outcome".* First, this statement should be redrafted to make clear that the CMA *will* consider this question in every case. Secondly, it is insufficient to include this statement without any further explanation as to how the CMA will carry out its proportionality assessment in this context. As a minimum starting point, we would suggest that the additional explanation set out in paragraph 4.16(f) of the Code for Crown Prosecutors should be repeated in the final Prosecution Guidance, with reference to the issue of costs and the possibility of reserving prosecution for the main participants in order to avoid excessively long and complex proceedings.

5.21 In addition, we note that two of the relevant factors listed in paragraph 4.16 of the Code for Crown Prosecutors are not listed or explained in the draft Prosecution Guidance:

(a) First, paragraph 4.16(c) of the Code for Crown Prosecutors provides that the views expressed by the victim(s) about the impact that the offence has had should be taken into account as part of the public interest stage of the test; and

(b) Second, paragraph 4.16(g) of the Code for Crown Prosecutors provides that special care should be taken when proceeding with a prosecution where details may need to be made public that could harm (inter alia) sources of information. Where a cartel has been uncovered as a result of a leniency application by either an undertaking or an individual employee, consideration should be given to the need to protect the sources of information and maintain incentives for the CMA's leniency programme.

5.22 It is not clear to us why these factors have not been included in the draft Prosecution Guidance. We would suggest that these factors should be added to the list in the final version, together with guidance on how the CMA intends to apply them in the context of the revised criminal cartel offence.

5.23 We would also welcome further guidance on the interrelationship between the civil and criminal competition enforcement regimes. In particular, we would welcome further guidance on whether, and if so in what circumstances, the CMA may consider a criminal prosecution for the cartel offence to be appropriate when no CA98 civil investigation is being pursued.

Q4. Do you have any further comments on the Draft Guidance?

5.24 Please refer to our general comments in section 5A above.

6. PROPOSED APPROACH TO THE TREATMENT OF EXISTING OFT AND CC GUIDANCE

A. GENERAL OBSERVATIONS

6.1 We would observe that, as the list in Annex B to the consultation document (CMA12con) makes clear, there will be a very significant body of guidance applicable to the work of the CMA, covering CA98 enforcement, merger inquiries, market studies and investigations and other CMA work and policies. It will comprise documents originating from a number of different sources, including new CMA guidance, adopted OFT guidance and adopted CC guidance. We would request that the CMA invests in organising all of these publications in such a way that they are:

(a) appropriately classified and referenced (we note that some of the documents to be adopted do not currently have any document code/reference number); and

(b) easily retrievable from a single, comprehensive and regularly updated source/webpage.

This is not always the case currently.

B. RESPONSE TO SPECIFIC QUESTIONS

Q1: Do you agree with the proposed approach to the treatment of existing OFT and CC guidance and other publications?

6.2 We note that the OFT's Prioritisation Principles are included in the "*Replaced/obsolete*" column, and understand that the CMA is intending to adopt its own prioritisation policy. We accept that capacity constraints and administrative efficiency mean that not every case can be pursued, and we accept that the CMA will have discretion in this respect. We note also that the basis on which cases are accepted or rejected, for administrative reasons, is a fundamental element of enforcement policy with a direct impact on the authority's output and decision-making record. For that reason, we would encourage the CMA to publish its proposed CMA prioritisation principles for consultation at the earliest opportunity.

Q2: Do you consider that any of the existing OFT and CC guidance proposed for adoption (as set out in Annexe B, and subject to the limitations referred to therein) is, in any respect, no longer appropriate?

6.3 Please refer to the response to Q4 below.

Q3: Do you consider that the Transition Team's proposals set out at Annexe B provide sufficient information on the treatment of existing OFT and CC guidance after their functions are transferred to the CMA?

6.4 We would comment only that where a document has been replaced, it would be helpful to have a reference to the new document.

Q4: Do you consider that the CMA should prioritise updating any guidance document or producing new guidance on any topic after 1 April 2014?

6.5 We note the obligation under section 52 CA98 to publish general advice and information about the application and enforcement of the CA98 provisions. Much of the CA98 guidance to be adopted by the CMA is rather out of date, in many cases not updated since 2004 (for example, "Agreements and concerted practices" (OFT 401), "Abuse of a dominant position" (OFT 402), "Market definition" (OFT 403), "Powers of Investigation" (OFT 404), "Enforcement" (OFT 407), "Assessment of market power" (OFT 415) and "Vertical agreements" (OFT 419), all issued in December 2004). We accept that it might not be necessary or practicable to reissue all these documents in advance of the CMA

commencing operations in April 2014. However, many of the OFT CA98 guidance documents dating from December 2004 documents are referred to in the Draft CMA CA98 Guidance as being current documents which it would be useful to read alongside that guidance.

6.6 In relation to the adopted OFT CA98 guidance (and generally as regards all guidance adopted from the OFT and CC), we would encourage the CMA to review all adopted guidance which is more than, say, five years old in the near future, and to adopt a policy of aiming to review each guidance document at least once every five years, to ensure that the body of documents is kept up to date and current. We also consider that it would be preferable to consolidate overlapping guidance wherever possible. Considering whether consolidation can be done should form part of the review process for guidance documents, and it might be sensible to review all guidance on a particular topic at the same time, to facilitate consolidation.

Ashurst LLP

15 November 2013