Hogan Lovells

COMPETITION AND MARKETS AUTHORITY

CONSULTATION DOCUMENTS – PART 2

RESPONSE OF HOGAN LOVELLS INTERNATIONAL LLP

8 NOVEMBER 2013

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A. INTRODUCTION

1. This document contains the response of Hogan Lovells to the following consultation documents of September 2013:

   (a) Guidance on the CMA's investigation procedures in Competition Act 1998 cases and Competition and Markets Authority Competition Act 1998 Rules (the "CA98 Consultation Document");

   (b) Competition Law in the Regulated Industries: Concurrent application to regulated industries guidance (the "Concurrency Consultation Document"); and

   (c) Prosecution guidance on the criminal cartel offence (the "Cartel Offence Consultation Document").

2. As noted in our response to the Part 1 consultation exercise (submitted on 6 September 2013), we welcome the fact that the CMA Transition Team is conducting such a comprehensive consultation exercise, and we welcome the opportunity to comment on the consultation documents.

3. We have not sought to address every question raised by the consultation documents, but rather have focussed our comments on a small number of substantive issues that are, in our view, of key importance, and where we believe further reflection or changes are necessary.

4. If there are any issues that we have not commented upon but in relation to which you would like our views, or if there is anything you would like us to elaborate on, please contact Karman Gordon or Christopher Hutton in the first instance.

B. CA98 CONSULTATION DOCUMENT

5. We set out below a brief comment in relation to the draft revised CA98 Rules, followed by a number of observations on the draft CA98 Guidance.

Draft CA98 Rules

6. In our view, the proposed new Rule 19(1)(c) may, in the absence of further guidance, place too much weight on the CMA's administrative convenience, to the potential detriment of an undertaking's rights of defence.

7. Even if a party to an infringing agreement is not an addressee of (for example) a Statement of Objections, it may still have a legitimate interest in the contents of that document and the ultimate infringement decision. For example, although that undertaking would not be liable to follow-on damages claims, a claimant may nevertheless seek to rely on the findings of fact contained in the infringement decision as persuasive (even though not binding) when bringing a stand-alone claim against that undertaking, as may a defendant to a follow-on claim when bringing a contribution claim.

8. It would, therefore, be helpful if guidance could be provided as to when and how such parties can apply to the CMA for copies of the relevant documents in circumstances where it has exercised its discretion under Rule 19(1)(c) (we note that paragraph 12.7 of the draft Guidance provides guidance on disclosure of non-confidential versions of the Statement of Objections to third parties; however the focus of that section is on assisting the CMA rather than on parties' rights of defence).

Draft CA98 Guidance

Notice of investigation

9. We welcome the indication that the CMA would not generally expect to publish the names of the undertakings subject to an investigation other than in appropriate circumstances, and that it will usually only include parties' names in the notice of investigation at a later stage, typically following the Statement of Objections (paragraph 5.9).

10. However, in our view, further thought should be given to the examples set out in the draft Guidance of the circumstances in which the CMA will consider it appropriate to publish the parties' names. In particular, the fact that undertakings' involvement in an investigation is "*subject to significant public speculation*" is not on its face an appropriate reason for the CMA to publish the names of those undertakings. If the intention behind this example is to enable the CMA to confirm that certain parties are not under investigation in order to prevent unwarranted speculation, that can be done without also having positively to name the parties that are under investigation. In addition, the draft Guidance states that the CMA may publish the names of the undertakings subject to the investigation "*where a party requests that the CMA name them in the notice of investigation*". It is not clear from the draft Guidance whether a request by one party could result in all parties being named, or whether the CMA would only publish names if all the parties make such a request. Further clarification on this point would be helpful.

The power to require individuals to answer questions

11. The CMA's proposed approach regarding its power to require individuals to answer questions (paragraphs 6.18 to 6.28) raises a number of serious concerns which in our view have the potential to result in significant harm to an undertaking's rights of defence. The following paragraphs outline our concerns with respect to three aspects of the draft Guidance:

    (a) The procedures for providing formal notices (paragraphs 6.20 to 6.24);

    (b) Post-interview "checking" procedures (paragraph 6.27); and

    (c) The proposed approach to the attendance of undertakings' legal advisers at interviews (paragraph 6.28).

Formal notice procedures

12. Paragraph 6.23 of the draft Guidance provides that, in accordance with the new section 26(A) of CA98, where an individual who the CMA wishes to interview has a current connection with an undertaking under investigation, the CMA must provide a copy of the notice to that undertaking. The Explanatory Notes to section 39 of the ERRA state that the purpose behind the new section 26(A) is to "[ensure] *that companies are able to offer legal support to individuals who may be asked questions about them, and that they are aware that such questions are being asked*".

13. Whilst the statement in paragraph 6.23 that the CMA will "*take such reasonable steps to provide that notice before the interview takes place and, in general…provide a copy of a notice to a relevant undertaking at the same time as, or as soon as reasonably practicable after giving notice to the individual*" is welcome, it is in practice little more than a rephrasing of the statutory obligations placed on the CMA by sections 26A(3) and (4). Given the serious detriment to an undertaking's rights of defence that could result if the

CMA does not provide it with a copy of the relevant notice in advance of an interview taking place (in particular because the undertaking's legal representatives could not possibly attend an interview of which they are not aware), the CMA should provide further guidance on the situations in which it will not provide a notice to the undertaking before the interview takes place (and the steps that the CMA would subsequently take in relevant cases to ensure protection of the undertaking's rights of defence).

14. Further, in our view, the CMA should provide guidance on its approach where it wishes to interview an individual with a former connection to an undertaking under investigation. Although we recognise that there may be circumstances in which it would not be appropriate to give notice to an undertaking with a former connection (for example, if the employee is a whistleblower and the former employer is not aware that it is a party to the investigation), it is nevertheless difficult to reconcile why, as a matter of course, an undertaking should be entitled to receive notice of the CMA's intention to interview its current employees, but not former employees. The possible impact on the undertaking's rights of defence is no less because the individual is a former employee; indeed, it may be greater given that a former employee will not owe the undertaking any duty of fidelity and/or fiduciary duty. Likewise, in a situation where the CMA wishes to ask an individual about the conduct of undertakings under investigation with which he or she has in one case a current and in the other a former connection, it would arguably be a perverse outcome for the former employer not to be given notice of that interview in circumstances where the current employer is provided with notice.

Post-interview "checking" procedures

15. On a similar note, paragraph 6.27 of the draft Guidance (in footnote 86) states that the CMA will send a copy of a transcript or note of an interview to an undertaking with which the individual has a current connection and to which the CMA has given a copy of the formal interview notice to allow that undertaking to make confidentiality representations. Again, in our view, the implicit distinction drawn by the CMA between those undertakings with which the individual has a current connection and those (if any) with which he or she was formerly connected is not the correct one. The determining factor should be whether the interviewee was being asked about the undertaking's conduct in his capacity as a person connected with that undertaking, not the interviewee's relationship with that undertaking at the time the question is asked.

16. Paragraph 6.27 also states that an interviewee will "*normally be asked to read through and check the transcript of the recording or the questions and answers in the note and to confirm, in writing, that they are an accurate account of the interview*". It is not clear why such an approach would not be followed without exception – in our view this should always be the case. However, if the current caveat is to remain, the guidance should at the very least indicate the circumstances in which an individual will not be asked to check the accuracy of the interview record. It would also be helpful for the guidance to make clear the timeframe in which an interviewee will be asked to confirm the accuracy of the record, and whether an interviewee will be allowed a "cooling off" period to correct any inaccurate statements made during the interview.

Attendance of undertakings' legal advisers

17. We have a number of serious concerns about the CMA's proposed approach to whether an undertaking's legal advisers may attend interviews of individuals connected with that undertaking. Paragraph 6.28 of the draft Guidance states 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. This is the case even if the individual has chosen to be represented by the legal adviser who is also acting for the undertaking under investigation.

18. In our view the approach as currently drafted is weighted far too much in favour of the CMA's convenience at the potential expense of undertakings' rights of defence.

19. Indeed, the Government has recognised the potentially significant impact of the new interview power on undertakings' rights of defence, stating that:

> "*there is a potential issue here about rights of defence and privilege against self-incrimination, because in antitrust (as opposed to criminal cartel) cases it is the undertaking not the individual that enjoys these rights. Where this is relevant and employees or former employees of undertakings under investigation (including Board members and, in the case of a partnership, partners) are being interviewed either they could only be interviewed in the presence of a legal representative of the relevant undertaking or the use to which any self-incriminating replies given at a compulsory interview could be put would be restricted.*" (paragraph 6.55 of the Government's response to the consultation *Growth, Competition and the Competition Regime*).

20. Given the potential for significant detriment to undertakings that is inherent in the interview power, the situations in which a legal adviser acting for the undertaking should not be permitted to be present should, in our view, be very limited indeed. The draft Guidance should make that clear as a point of principle. Further, we consider that the CMA's approach as reflected in paragraph 6.28 requires revision in order to strike a more appropriate balance between the rights of defence and the CMA's ability to conduct its investigation effectively. Our suggestions are as follows:

    (a) First, specific guidance should be provided as to the circumstances that may lead the CMA to conclude that there is a risk that its investigation will be prejudiced so as to justify excluding an undertaking's legal adviser (given, in particular, the fact that a legal adviser can, like any other person, already be charged with obstruction under section 42 of CA98 in the event of improper behaviour);

    (b) Secondly, the CMA should only prohibit an undertaking's legal adviser from attending an interview if it is satisfied that the investigation will be prejudiced; not because it is satisfied that there is a risk that it will be prejudiced; and

    (c) Thirdly, a legal adviser acting for the undertaking should only be prohibited from attending an interview if the CMA is satisfied that his attendance <u>would</u> prejudice the investigation; not that a legal adviser may only attend if the CMA is satisfied that his attendance <u>would not risk</u> prejudicing the investigation.

Interim measures

21. Paragraph 8.18 of the draft Guidance, which states that the "*CMA will not seek interim measures where the CMA is satisfied that, on the balance of probabilities, the agreement meets the conditions for an individual exemption from the prohibition against anti-competitive agreements*", is little more than a restatement of the statutory limit on the CMA's power contained in sections 35(8) and (9) of CA98.

22. In light of the new lower standard that the CMA must overcome in order to impose interim measures, and given the potential for significant interference with an undertaking's commercial activities in circumstances where, by definition, there has been no finding of unlawful conduct, it would be helpful for the CMA to provide further guidance on the approach it will adopt, in practice, to assessing whether an agreement would meet the exemption criteria in the context of determining whether to impose interim measures.

Access to file

23. We welcome the provision of guidance on the treatment of confidential information in the context of access to file, and on the circumstances in which the CMA would envisage adopting either a data room or a confidentiality ring.

24. However, we have some concerns about the potential negative impact that the use of a physical data room could have on an undertaking's rights of defence. Paragraph 11.24 of the draft Guidance states that "*the CMA envisages that the data room procedure would be used in cases where access to certain confidential information is essential for the party's legal and/or economic advisers to understand the CMA's analysis*" (emphasis added). If access to the information is essential to understand the CMA's analysis, it is surely arguable that legal and/or economic advisers should be provided with access that is less physically restricted, and also potentially that the undertaking itself, or at least a limited number of named individuals at the undertaking, should be provided with access to that information. We therefore consider that the CMA should exercise extreme caution before deciding to use a data room, particularly given that the confidential information that the CMA would be seeking to protect could be adequately protected using the less restrictive approach of a confidentiality ring.

25. In any event, further guidance should be provided on the safeguards that the CMA will adopt to ensure that the use of a data room will not negatively impact a party's rights of defence. For example, the guidance should be explicit that persons who are permitted access to a data room will be provided with a reasonable period of time in the data room and an opportunity to confer and to draft a proper response while in the data room. We note, in this regard, the recent judgment of the Competition Appeal Tribunal in in *BMI Healthcare and others v Competition Commission* ([2013] CAT 24).

Composition of the Case Decision Group

26. We note paragraph 11.30 of the Draft Guidance states that a Case Decision Group "*may*" include a member of the CMA panel. We consider that being able to draw on the experience and expertise of a CMA panel member is likely to be of significant benefit to a Case Decision Group and improve the robustness of decision-making. Given that a major driver of the current reforms is to improve enforcement of CA98 cases including by improving the robustness of decision-making, we consider that the draft Guidance should go further and state that a Case Decision Group will normally contain a member of the CMA panel.

Settlement

27. Given the increasing prevalence of settlements/early resolution agreements in CA98 cases and the OFT's experience over several years of dealing with such agreements, we welcome the inclusion of guidance on the CMA's approach to settlement.

28. We consider that the draft Guidance is broadly appropriate and sensible in relation to this issue, subject to the following points:

(a) In our view, a requirement that a would-be settling undertaking must admit "*the facts of any implementation of the infringement*" (as indicated by the first bullet point of paragraph 14.7 of the draft Guidance) is likely to have a chilling effect on settlements in effects cases, given that making such an admission may in practice increase an undertaking's exposure to damages claims. This requirement has the potential to undermine the CMA's stated purpose of resolving cases efficiently. If there is nevertheless to be such a requirement, further guidance should be provided as to the circumstances in which the CMA would consider it "*appropriate*" to include this requirement as part of a settlement;

(b) The first bullet point of paragraph 14.8 of the draft Guidance appears to suggest that the CMA's ordinary investigative procedures will, in effect, be suspended with respect to a settling undertaking. This apparent approach is said to be in furtherance of "*the CMA's objective of resolving the case efficiently*". We are concerned that such an approach would place too much weight on the CMA's convenience at the potential expense of parties' rights of defence and robust investigatory procedures and decision-making, especially in cases where not all parties to the investigation settle. It must always be borne in mind that a party may decide to settle for a wide variety of factors, only one of which may be that the party engaged in some form of unlawful conduct. The CMA should not close its mind to seeking relevant evidence from a party relating to the alleged infringement, including (importantly) potentially exculpatory evidence, simply because that party has settled. The CMA would still enjoy efficiency benefits resulting from, for example, reduced or no representations in response to a Statement of Objections, and therefore the settlement would further its stated objective of "*resolving the case efficiently*". In any event, we would caution that the CMA's aim of "*resolving a case efficiently*" may not always be best served simply by undertaking a "*streamlined administrative process*", for example if that results in a decision that cannot be sustained before the Competition Appeal Tribunal. See also paragraphs (f) and (g) below on related issues;

(c) A business is likely to carry out a careful weighing of pros and cons before deciding whether or not to engage in settlement discussions, in particular given the potentially adverse inferences that may be drawn from its willingness to engage in such discussions. We therefore welcome the statement in paragraph 14.10 of the draft Guidance that "*the CMA will not make any assumptions about a business' liability from the fact that it is interested in engaging in or engages in settlement discussions*". In our view, it would assist businesses if the CMA were to explain what safeguards will exist to ensure that no such assumptions will be made (and that no adverse effects will therefore arise);

(d) The CMA should set out the specific factors that it will take into account when determining the timetable for settlement discussions, and indicate how those factors are likely to impact on the timetable and procedure (paragraph 14.12 of the draft Guidance);

(e) A Case Decision Group should normally be appointed to decide whether to accept a settlement (as opposed to being appointed only in exceptional cases as envisaged in footnote 204). The involvement of a Case Decision Group would

provide an additional safeguard against the inappropriate acceptance of settlement (and helping to avoid situations, as in the *Tobacco* case, where the purported infringement could not be sustained before the Competition Appeal Tribunal). In our view, the advantages of appointing a Case Decision Group to oversee settlement outweigh any perceived disadvantages in terms of streamlining the process;

(f) The position set out in paragraph 14.20 of the draft Guidance – notes of settlement discussions will be "*put on the file but will not be disclosed to other businesses involved in the investigation*" – raises concerns about respect for an undertaking's rights of defence. Information provided to the CMA by a party during settlement discussions must be disclosed to other parties if it relates to the alleged infringement, particularly where such information may amount to exculpatory evidence (for example, if a party engaging in settlement discussions admits to being a party to a number of parallel bilateral anticompetitive agreements with parties X and Y but denies the existence of a similar alleged bilateral agreement with party Z, that denial is clearly exculpatory evidence that should be disclosed to party Z);

(g) The position set out in paragraph 14.21 of the draft Guidance, which suggests that new documents or information provided during settlement discussions "*may*" be provided to other parties (and even then only to the extent that they go beyond identifying any manifest factual inaccuracies in the summary statement of facts or Statement of Objections), is insufficiently precise and raises concerns about respect for an undertaking's rights of defence, particularly where such information may contain exculpatory evidence;

(h) Any infringement decision or Statement of Objections must squarely reflect (or be narrower than) the admission made by a settling business. The statement in paragraph 14.23 of the draft Guidance that the decision and/or statement of objections will "*substantially reflect the admission made by the settling business*" is likely to give rise to uncertainty and is inappropriate in the context of the undertaking having waived a number of its procedural protections. At the very least, guidance should be provided on the procedures the CMA would adopt in the event that it proposes to widen the scope of an alleged infringement beyond an admission previously made by a settling party;

(i) By including a cap on the potential settlement discount (see paragraph 14.27 of the draft Guidance), the CMA would be unnecessarily fettering its discretion. We would therefore suggest that no cap should be set out in the Guidance. In any event, we consider the proposed cap in the draft Guidance (20 per cent), is too low;

(j) There is an inherent tension between paragraphs 14.29 and 14.33 of the draft Guidance. On the one hand, paragraph 14.29 states that where a business withdraws from the settlement procedure because the CMA's position no longer reflects that which that business had admitted, "*the settling business' admission would not be disclosed to other businesses involved in the investigation or the Case Decision Group or used in evidence against any of the parties to the investigation*". But this purported safeguard would be worthless if the CMA has already issued a press release announcing that business had settled and/or refers

to that business as having settled in any press release accompanying the issue of a Statement of Objections, as envisaged by paragraph 14.33.

C. CONCURRENCY CONSULTATION DOCUMENT

29. We have previously commented on the potential implications of the changes to the concurrency regime. Although in general terms the Concurrency Consultation Document provides some welcome guidance as to how some of the practical problems of concurrency will be dealt with, including inconsistency and the risk of double jeopardy, we have a number of specific comments, which are set out in the paragraphs below.

30. The Concurrency Consultation Document makes a number of references to the "Memoranda of Understanding" that the CMA expects to agree with the Regulators. However, these Memoranda have yet to be agreed, and as a result the Concurrency Consultation Document is of limited use in some instances. However, it is clear that any such Memoranda will need to be detailed and consistent, to provide the level of transparency and certainty required.

31. We welcome the formation of the United Kingdom Competition Network (UKCN) and consider that, if it works well, it will contribute towards avoiding some of the risks associated with a fragmented enforcement regime. However, we again note that the "Statement of Intent" of the UKCN has not yet been finalised. To the extent that this document will provide important background to the operation of the concurrency regime, it is to be regretted that it has not been possible to append a draft of that document to the Concurrency Consultation Document.

32. As to case allocation, the regime envisaged by the relevant draft secondary legislation (i.e. the draft Competition Act 1998 (Concurrency) Regulations 2014) will give the CMA the final say as to whether it, or the relevant Regulator, should deal with a complaint or investigation. Given the importance of this issue, the list of "general principles" set out at paragraph 3.21 of the draft Guidance is inadequate. Further guidance should be given as to circumstances in which the CMA will take a case, not just the issues that might be considered relevant.

33. At paragraph 3.27 of the draft Guidance it is stated that the "*CMA expects that the circumstances in which it would take over a case* [already allocated to a Regulator] *are likely to be rare*". Given the potential consequences of such a move, and the uncertainty that will persist every time a sectoral Regulator initiates an investigation as to whether the CMA will take the case (which it can do, until a Statement of Objections is issued, against the relevant Regulator's wishes), further guidance should be provided as what factors the CMA will take into account when considering taking over a case in these circumstances.

34. One of the reasons why a number the OFT's decisions under CA98 have been overturned before the Competition Appeal Tribunal is the OFT's failure to fully understand and appreciate the specific industry and market context. Equally a lack of expertise in bringing CA98 cases has, in the past, been identified as a factor that has inhibited sectoral Regulators from bringing such cases. As a result, we strongly support:

    (a) The need for cooperation between the CMA and the relevant sectoral Regulator, as envisaged at paragraph 3.30 of the draft Guidance. Such cooperation is essential, particularly where CMA has taken on a case that would otherwise fall within the remit of a sectoral Regulator.

(b) The use of arrangements for staff sharing and cooperative arrangements, as set out at paragraphs 3.32 to 3.35 of the draft Guidance.

35. Paragraph 3.36 of the draft Guidance states that complaints about a breach of competition law should be made to the CMA and copied to the relevant Regulator (or *vice versa*). However, it is not clear why this is considered necessary, not what will be the consequences (if any) of failing to do this will be. We submit that it should not provide grounds for rejecting a complaint. Given the function and operation of the UKCN, the CMA and Regulators will be able to keep each other informed of complaints received.

36. At paragraph 3.48, it is stated that *inter alia* if the CMA has taken custody of a case and decides to issue a Statement of Objections or final decision, a draft document will be shared "*no later than 15 working days*" prior to issue. The sectoral Regulator will have 10 working days to make comments, with (presumably) the remaining 5 working days being the period that the CMA will have to review the document in light of the comments received. We observe that these limited time periods, albeit expressed as a minimum, are wholly unrealistic. Statements of Objections and final decisions can be very detailed, lengthy documents. It is not realistic to expect a sectoral Regulator to have reviewed, and have fully considered the implications of, such documents within a short period of time, even where there has been prior consultation.

D. CARTEL OFFENCE CONSULTATION DOCUMENT

37. We welcome the CMA Transition Team's effort to be as transparent as possible in producing prosecution guidance for the cartel offence, appreciating that the nature and status of such guidance differ from other guidance documents. It is helpful, for example, to have the evidential and public interest stages of the CMA's assessment addressed in the context of the offence itself and the relevant exclusions and defences, as opposed to having to refer separately to the Code for Crown Prosecutors and the relevant statutory provisions.

38. That said, we note that the statutory requirement is for the CMA to publish guidance "*on the principles to be applied in determining, in any case, whether proceedings for an offence under the Act should be instituted*"[1](emphasis added). This requirement in and of itself must surely provide the CMA with a certain degree of latitude in terms of explaining how it will exercise its prosecutorial discretion beyond merely restating the statutory provisions. Given this, the approach taken in the Cartel Offence Consultation Document is in our view overly cautious. Even accepting that the CMA is constrained from providing any interpretation of the applicable exclusions and defences to the offence that might constitute an improper "gloss" on the legislation, the Consultation Document provides very little insight into a number of issues relevant to the CMA's exercise of its discretion. As such, its usefulness to individuals, companies and the legal community is severely limited.

39. By way of illustration of the above concern:

(a) The fundamental principle that the offence itself is intended to capture only behaviour leading to the most serious and damaging forms of anti-competitive agreement, and that this will normally involve an element of concealment, needs to be brought out more explicitly (as opposed to being in the legislative

[1] Section 109A EA02 as amended.

background section). As we understand it, this principle is key to understanding how the CMA proposes to exercise its discretion as to whether to prosecute;

(b) There are a number of broadly and/or vaguely drafted statements in the public interest stage section (in particular) which could lead to a wide range of interpretations and unclear repercussions and would benefit from a greater degree of explanation to the extent that the CMA is able to provide this. These include:

(i) the draft Guidance states that the CMA should consider whether prosecution is "*proportionate to the likely outcome*" (paragraph 4.41). No further indication is, however, provided as to how such a proportionality assessment will be conducted;

(ii) the draft Guidance states that one factor relevant to the public interest assessment will be whether an individual's conduct was contrary to guidelines set out in an undertaking's compliance policy (paragraph 4.38). This factor could conceivably apply to a range of scenarios with a range of outcomes (and could be either positive or negative as regards the decision as to whether to prosecute). For example, blatant disregard of a comprehensive and widely communicated compliance policy is one thing; acting in ignorance of an insufficiently disseminated policy is another. Again, it would be helpful if these sorts of issues could be "unpicked" to a greater degree, perhaps by way of illustrative examples. In this regard, we note that the draft Guidance does not shy away altogether from providing interpretation of the legislation (at paragraph 4.6, for instance, an example is provided of behaviour that would not constitute an "agreement"). It may also be worth considering, by way of (partial) analogy, the guidance published by the Ministry of Justice in relation to the Bribery Act 2010.[2] Whilst this document does not have a direct read across to the draft Guidance[3], it nevertheless relates to a set of criminal offences that are, like the cartel offence, prosecuted before the courts and where prosecutorial discretion must therefore be preserved. That guidance contains (with appropriate caveats) a set of principles and case studies which provide considerable detail and practical assistance to companies in terms of understanding how to comply with their legal obligations.

40. In light of the above, we would urge the CMA Transition Team to consider whether the draft Guidance can be expanded and/or restructured to provide a greater degree of detail and clarity wherever possible.

41. Finally, we note that Section B of the Consultation Document ("*impact of the new cartel offence on existing OFT guidance documents*") lists a number of existing guidance documents – most notably OFT515 *Powers for investigating criminal cartels* – as out of date, with the "*CMA to consider issue of new guidance (separate workstream)*". OFT515 in particular is an important piece of guidance in terms of facilitating companies' and individuals' understanding of the nature and scope of the powers that may be used against them. We would therefore urge the CMA to prioritise the workstream that is considering the replacement for this document, so that appropriate new guidance can be issued as soon as possible.

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2 www.justice.gov.uk/guidance/bribery.htm

3 It is published in accordance with section 9 of the Bribery Act, which requires the provision of specific guidance as to procedures that companies can put in place to prevent bribery.