DRAFT REVISED GUIDANCE ON THE CMA'S INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

1. Introduction and Summary

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the 'Draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases' (***Draft Guidance***) published by the Competition and Markets Authority (***CMA***) on 21 June 2018.

1.2 Our comments are based on our substantial experience of representing clients in investigations by the CMA and the sector regulators under the Competition Act 1998 (***CA98***) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (***TFEU***), as well as competition and regulatory investigations by authorities across Europe, the US and Asia.

1.3 We have focussed our comments on those issues we feel are most important in terms of ensuring that decisions taken at any stage in a CA98 investigation are reached on a well-informed and procedurally fair basis. We would be happy to discuss any of these issues in more detail if that would be helpful.

1.4 We have also contributed to the response being submitted by the Joint Working Party of the Bars and Law Societies of the United Kingdom (***JWP***) and agree with the points raised in that response.

2. Complaint handling

2.1 We are concerned that the proposal to cease the practice of granting Formal Complainant status to certain complainants risks diluting the rights of complainants that were recognised by the Competition Appeal Tribunal (***CAT***) in *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading [2004]*. In that case, the CAT found that 'complainants should be afforded a structured opportunity to be heard by [the OFT]' and that if complainants are 'closely associated with proceedings' as Article 27(1) of Regulation 1/2003/EC requires for investigations by the European Commission, there would be fewer and less costly appeals and better decision making[1].

2.2 In our view, new paragraph 3.22 ('the CMA may provide a complainant with information during an investigation' and 'a complainant may be provided with a non-confidential version of a Statement of Objections or an opportunity to comment on a draft case close letter, where certain circumstances are met'[2]) does not provide sufficient certainty that complainants who meet the relevant standing test will be afforded a structured opportunity to be heard and be closely associated with the proceedings.

2.3 We note, however, new paragraphs 10.4-10.5 and 10.14 of the Draft Guidance, which provide that the CMA will give complainants an opportunity to comment on the CMA's intention to close a case or issue a no grounds for action decision if the CMA

[1] Judgment in Case 1017/2/1/03 dated 10 June 2004 (paragraph 241)

[2] Emphasis added

decides that such complainants are 'directly and materially affected by the outcome of the CMA's investigation'. In addition, new paragraph 12.6 provides that complainants who are, in the CMA's view, 'directly and materially affected by the outcome of the CMA's investigation' may be provided an opportunity to submit written representations on the Statement of Objections. Given these rights are being granted to this class of complainant, and therefore a 'two tier' complainant system is being retained in practice, it is unclear why the category of Formal Complainant status (which was intended to guarantee rights for complainants 'materially affected by the subject matter of the complaint') should be removed or what procedural benefits would arise as a result.

3. Information handling

3.1 We are concerned that the proposals to adopt a 'streamlined access to file' will dilute parties' fundamental rights of defence and risk creating inefficiencies as parties inevitably seek to negotiate access to further documents and extensions to deadlines for written submissions. In particular:

(a) removing the indicative time limit for parties to inspect the file, but stating that such time will be the same as given for written representations[3], risks undermining the ability of parties to understand the CMA's case and review all the evidence before drafting their response. The process by which access to the file is negotiated in parallel with the process of drafting a response to the Statement of Objections raises a number of procedural issues in practice, and creates serious risks for parties' rights of defence if they are responding to allegations without having access to all the evidence;

(b) only including documents that are directly referred to in the Statement of Objections, together with a schedule of other documents on the CMA's file, risks denying access to important evidence for the parties, or at best creates a protracted period of negotiation for access to such documents and requests for extension of deadlines for written responses. A key purpose of the access to file procedure is the opportunity that it affords parties to access potential *exculpatory* evidence on the CMA's file. Indeed, this is one of the most important aspects of parties' rights of defence. By their nature, documents containing exculpatory evidence are unlikely to be referred to in the Statement of Objections. We are therefore seriously concerned that the CMA's proposed approach of giving businesses 'a reasonable opportunity to inspect additional documents' provided requests are made within a set deadline[4] risks undermining fundamental principles of equality of arms that access to file is intended to guarantee; and

(c) in order to ensure parties' rights are properly protected, we believe that parties should be offered the choice of following a 'streamlined process' or having access to the full file (in which case parties must be provided sufficient opportunity to review all the evidence before preparing their response).

---

[3] Draft Guidance, paragraph 11.20

[4] Draft Guidance, paragraph 11.22

4. Interim measures

4.1 We support the proposal that persons applying to the CMA for interim measures should be required to provide a declaration of truth[5]. Interim measures can lead to significant disruption and costs for business so should only be applied if the CMA is satisfied that the test in section 35 CA98 is met based on reliable evidence.

4.2 The requirement to provide a declaration of truth should help the CMA assess the strength of the applicant's evidence, but it cannot discharge the CMA of its duty to fully test the evidence with both the applicant and the parties subject to investigation, who should be provided sufficient opportunity to make representations in writing or orally as appropriate.

5. Engagement with the parties

Oral hearing on draft penalty statements

5.1 We are concerned that the proposed amendments will downgrade a key procedural step on penalty setting, an issue which often raises complex issues of fact and law[6]. In particular, we believe that:

(a) parties should be offered the right to an oral hearing in person (not just via telephone or video conference); and

(b) if such a right is accepted, the full Case Decision Group (***CDG***) should be in attendance.

5.2 The introduction of the CDG in 2012 was a significant development in improving the robustness of the CMA's decision-making. The system should not be compromised by not having the full group present at a key stage such as an oral hearing on penalty.

Deadlines for responding

5.3 We are concerned that the requirement for any requests for an extension to the deadline for written responses to a Statement of Objections should be 'communicated to the CMA at the time the deadline is set'[7] is unrealistic, particularly given the proposal for 'streamlined access to file' where parties will be required to request extensions before they have been able to review all the evidence.

State of play meetings

5.4 In order to ensure that decisions are reached on a well-informed and procedurally fair basis, we believe that, as a guiding principle, parties must be kept fully informed of the progress of the case and the CMA's reasoning throughout. It is therefore vital that the CMA shares its provisional thinking at state of play meetings. The Draft Guidance appears to cast doubt on whether such reasoning will be shared by stating that the CMA 'may' rather than 'will' share the case team's provisional thinking at state of play meetings[8].

---

[5] Draft Guidance, paragraph 8.5

[6] Draft Guidance, paragraph 12.31

[7] Draft Guidance, paragraph 12.2

[8] Draft Guidance, paragraph 9.9

5.5 This statement also appears to be inconsistent with paragraph 9.10 of the Draft Guidance, which states that the CMA 'will be able to update parties on its provisional thinking on the case, including the key potential competition concerns identified'. Given the importance of these meetings, the Draft Guidance should clearly state that the CMA will update the parties on the case team's provisional thinking at all state of play meetings.

Involvement of complainants and third parties in investigations

5.6 We would be concerned if the proposed changes in Chapter 12 of the Draft Guidance could deprive certain third parties of the right to contribute to the CMA's investigation. We note, in particular, that third parties will be assessed on the same basis as complainants in establishing standing to comment on the non-confidential version of the Statement of Objections[9] and the bar for a third party to demonstrate that they 'are likely materially to assist the CMA in its investigation' has been raised[10]. The CMA must ensure that these changes will not deter contributions from third parties who would otherwise assist the CMA in its investigation by contributing (or adding weight to) important evidence.

6. Commitments

6.1 We note the statement in paragraph 10.18 of the Draft Guidance that commitments will only be accepted 'where the competition concerns are readily identifiable' reflects the existing position. We would, however, urge the CMA not to interpret this requirement in an overly-restrictive manner that could exclude the possibility of commitments being accepted in cases where the competition concerns are novel or were not sufficiently clear prior to investigation as to merit a fine.

7. Other comments

7.1 In terms of CA98 enforcement generally, we believe that further improvements could be made to the concurrency regime in order to ensure greater consistency across the CMA and sector regulators in how their powers are exercised, both in terms of legal certainty for business and enforcement procedures and timescales. We would therefore encourage all sector regulators to adopt (as far as possible) the CMA's Draft Guidance (when finalised).

7.2 A consistent approach to how investigations are conducted would facilitate best practice and would help ensure cases are dealt with in a fair and efficient way across all sectors. We expect that such improvements across the regime as a whole will come into sharper focus when demands on the authorities increase following the UK's departure from the European Union.

Freshfields Bruckhaus Deringer

1 August 2018

[9] Draft Guidance, paragraph 12.6

[10] Draft Guidance, paragraph 12.7