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

RESPONSE BY ASHURST LLP DATED 10 SEPTEMBER 2020

1. INTRODUCTION

1.1 This submission is made by Ashurst LLP in response to the CMA's consultation on draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases (the "**Consultation Document**") and the Draft Revised Guidance published on 5 August 2020. The submission is made on our own behalf and not on behalf of any of our clients that are involved in UK competition law proceedings.

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

1.3 We set out below our comments on the proposed changes. This submission adopts the defined terms used in the Consultation Document unless otherwise indicated.

2. INCREASED TRANSPARENCY AT CASE OPENING

2.1 We have concerns about the CMA's proposal to amend the Current Guidance to provide (in paragraph 5.7 of the Draft Revised Guidance) that the CMA will normally name the parties under investigation in case-opening announcements, other than in exceptional circumstances.

2.2 In our view, naming parties in case-opening announcements gives rise to a risk of causing reputational and financial harm to those parties (for example, through an impact on their share price). The potential benefits of this amendment to parties and interested stakeholders outlined at paragraph 1.25 of the Consultation Document are outweighed by the potential for harm to be caused to the parties. In particular:

(a) a material proportion of cases are closed without the CMA taking any enforcement action. In those cases, the named parties may have suffered significant adverse reputational and commercial consequences in the interim. For example, the CMA has recently closed four separate investigations into prices for hand sanitiser products during the Covid 19 pandemic without taking enforcement action. Had the relevant retailers been named when these cases were opened, it is highly likely they would have been subject to significantly detrimental adverse publicity;

(b) that adverse effect can be long-running with many cases taking more than a year (and in some cases considerably more) to reach a decision on whether to proceed; and

(c) those adverse effects will often not be rectified by a notice of termination of an investigation[1] being issued as this will typically attract far less publicity than the case opening announcement.

2.3 In this context, the CMA's concern about "information asymmetries" at paragraph 1.26 could be overcome by simply amending the guidance to say that if a party chooses to

[1] Section 25A(4) CA98 provides that if the CMA has identified an undertaking it must publish a notice if it decides to terminate its investigation.

announce that it is being investigated, the CMA will normally make public the subject matter of the investigation. Further, Section 25 of the Competition Act 1998 provides that the CMA may decide to open an investigation if it has "reasonable grounds for suspecting a breach of competition law". We are concerned that "reasonable grounds for suspicion" is not a sufficiently high threshold to protect undertakings from the risks of harm identified above. This is particularly the case in which a material proportion of cases are subsequently closed without enforcement action.

2.4 We note that the European Commission does not as a general rule name the parties to an investigation when it opens proceedings or when it conducts inspections prior to case opening.[2]

2.5 Finally, if, contrary to our observations above, the proposed amendment is to be introduced:

(a) it should not be applied retrospectively (i.e. parties to already open investigations should not be named automatically upon the change of guidance);

(b) the CMA must ensure that the case-opening announcement clearly identifies the product and geographic area under investigation; and

(c) it becomes even more important that the CMA concludes its investigation within a reasonable time.

3. CLARIFICATION OF THE BASIS ON WHICH THE CMA MAY SEEK TO EXPEDITE ITS ACCESS TO FILE PROCEDURE

Expedited access to file

3.1 We have concerns with the CMA's use of the expedited access to file procedure outlined in paragraph 11.25 of the Draft Revised Guidance, namely disclosing to the addressee(s) only the documents directly referred to in the Statement of Objections (and any Draft Penalty Statement issued to the addressee) together with a schedule containing a detailed list of the documents on the CMA's file. We consider that, in most cases, this approach will be neither the most efficient and practical approach, nor the best way of ensuring that a party's rights of defence are respected.

3.2 As a general point, it is not for the CMA to decide which documents on its file are exculpatory or otherwise relevant to a party's defence and therefore ought to be disclosed. Therefore the starting point should be that the CMA should ensure that the case file is ready for disclosure in its entirety at the time when the Statement of Objections is issued. The approach in paragraph 11.25 would lead to a lengthy incremental disclosure process which is more expensive and time consuming for the parties (and presumably the CMA), and prevents parties having access to the whole evidential picture at the time the Statement of Objections is issued. In circumstances in which the period available to respond to the Statement of Objections is short (and it is proposed will not generally be extended), it may significantly adversely affect the exercise of the rights of defence if exculpatory material is not made available until some time after the issue of the Statement of Objections.

3.3 If this expedited process is to be adopted, the time allowed for a party's representations on the Statement of Objections should not, therefore, start running until all disclosure requests

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[2] See, for example, Commission opens antitrust proceedings against a number of cement manufacturers (2010); Commission opens proceedings against suspected participants in several cartels for the supply of automotive wire harnesses (2012); Commission confirms inspection in the car sector in Germany (2017); Commission confirms unannounced inspections in the ethylene purchasing sector (2017); Commission confirms unannounced inspections in the styrene monomer purchasing sector (2018); Commission confirms unannounced inspections in the grocery retail sector in France (2019); Commission confirms unannounced inspections in the farmed Atlantic salmon sector (2019).

have been dealt with, including requests for redactions to be lifted and/or for documents to be removed from a confidentiality ring.

Confidentiality rings and data rooms

3.4 In relation to the use of confidentiality rings, we note that the use of such arrangements can mean that legal advisers are unable to take client instructions on documents, which is detrimental to parties' rights of defence. Therefore, confidentiality rings should only be used for genuinely sensitive material and not as a short cut to a proper disclosure exercise. In addition, the use of confidentiality rings typically increases the time required to respond to the Statement of Objections because further engagement with the CMA is usually required (e.g. in negotiating the removal from the confidentiality ring of exculpatory information so that client instruction may be taken), which means a longer deadline is given.

3.5 Further, Paragraphs 11.27, 11.29 and 11.30 and footnote 135 of the Draft Revised Guidance refer to parties' external advisers having access whereas paragraph 11.28 refers to "a defined group". The CMA should clarify the circumstances where in-house legal advisers will be admitted to a confidentiality ring.

3.6 Finally, we agree with the statement at footnote 136 of the Draft Revised Guidance that data rooms should only be used in exceptional circumstances. We would also observe that the starting point for the terms of access to data rooms must be what fairness requires.[3]

4. SENDING THE DRAFT PENALTY STATEMENT WITH THE STATEMENT OF OBJECTIONS

4.1 Overall we cautiously welcome the CMA's proposal to provide more information on the proposed level of penalty at an earlier stage. We consider this would enable addressees to better consider the possibility of settlement following receipt of the Statement of Objections.

4.2 However, we note the following concerns with the proposal:

(a) this proposed approach of issuing the Draft Penalty Statement at the same time as the Statement of Objections could be less efficient if the initial Draft Penalty Statement needs to be updated and reissued to take into account the addressees' representations on relevant aspects of the Statement of Objections, for example, the gravity and duration of the alleged infringement;

(b) conversely, there is a risk of confirmation bias, i.e. having issued the Draft Penalty Statement at the same time as the Statement of Objections, there is a risk that the CMA will be less receptive to the parties' representations on the Statement of Objections, including arguments that there has been no infringement or that no penalty should be imposed;

(c) linked to the above issue, if a figure is specified in the Draft Penalty Statement this could trigger requirements for the addressees to make regulatory filings/announcements and/or accounting provision at an earlier stage. The figure specified in an initial Draft Penalty Statement might turn out to bear little relation to the actual figure following consideration of the addressees' representations on the Statement of Objections;

(d) we welcome the CMA's statement that it will take into account the time necessary to address both liability and penalty in representations when setting the deadline for submission of these representations. However, there has been no amendment to the time period in paragraph 12.3 of the Draft Revised Guidance, which states that parties will have up to 12 weeks to respond to the Statement of Objections and now,

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[3] *BMA Healthcare and others v Competition Commission* [2013] CAT 24, para. 62

in addition, the Draft Penalty Statement: the maximum time period has not been extended to take account of the additional work likely to be involved in responding to a Draft Penalty Statement. This period set out in the guidance should be extended to reflect this additional work, and the time periods set by the CMA in practice should be extended by a similar period of time; and

(e) there should be no reduction in the level of detail currently provided in the Statement of Objections and the Draft Penalty Statement.

4.3 In relation to paragraphs 11.9 and 11.19 of the Draft Revised Guidance, the CMA should clarify that it will *never* include reference to the amount of any proposed penalty in its public announcement about the issue of a Statement of Objections, other than in respect of Statements of Objections issued to parties that have settled with the CMA. It would be inappropriate to announce a preliminary penalty figure before any infringement decision has been made, and would risk causing reputational and financial harm to the parties (for example, through an impact on their share price).

4.4 It would also be helpful if the CMA would clarify when in the process it proposes to issue requests for turnover information (i.e. we assume that would now need to take place well before the Statement of Objections is issued).

5. CLARIFICATION OF THE PROCESS RELATING TO CROSS DISCLOSURE OF PARTIES' REPRESENTATIONS ON A STATEMENT OF OBJECTIONS

5.1 We welcome the CMA's proposal for new evidence in an addressees' written or oral representations to be cross-disclosed to the other addressees of a Statement of Objections.

5.2 However, we are concerned that the line between "genuinely new evidence" and "arguments of fact or law or evidence which have already been disclosed to the addressees" will not always be clear cut. Accordingly, where there is any uncertainty, the CMA should err on the side of caution and treat material as new evidence that must be cross-disclosed.

5.3 In addition, the CMA should clarify that if any parties to the investigation have settled or entered into a leniency agreement, any manifest factual inaccuracies in the Statement of Objections identified by the leniency applicant or settling party should be disclosed to the other addressees.

6. CLARIFICATION OF THE PROCESS RELATING TO DISCLOSURE OF DIRECTORS' REPRESENTATIONS ON A STATEMENT OF OBJECTIONS

6.1 We refer to the CMA's proposal to amend paragraphs 12.7 and 12.11 of the Draft Revised Guidance to clarify that any written representations on the Statement of Objections by a director will only exceptionally be disclosed to the addressees of the Statement of Objections, such as where the CMA considers it necessary to do so for the rights of defence of an addressee.

6.2 We do not consider such an approach to be fair, and would recommend that the guidance should be clarified to make clear that any documents, including interview transcripts and written representations on the Statement of Objections, in which a director makes any admissions, denials or provides new evidence should be shared with addressees so that they can respond. That is because the director in question may have highly relevant information that is not known or available to either the company of which s/he was a director (e.g. where they left the company some time previously) or to other addressees. Absent that disclosure the rights of defence of the addressees of the Statement of Objections may be materially prejudiced as they will not have access to potentially exculpatory material (or indeed inculpatory material that may impact their engagement with the CMA). There is no reason why evidence from directors should be treated as being qualitatively different from any other evidence to which the CMA might have regard and which would normally be

disclosed as part of the case file. In this regard we would re-emphasise that it is not for the CMA to determine what information may or may not be exculpatory in nature.

6.3 In relation to the CMA's proposal to give directors an opportunity to submit representations "on a case by case basis", we make the following observations:

(a) the CMA should clarify how it will determine when directors are given an opportunity to submit representations "on a case by case basis". In particular, it cannot be assumed that representations on the part of the company will be adequate to protect the interests of the director. Similarly, it cannot be assumed that the rights of defence of a company will be adequately protected where a director has information that may be exculpatory but has never had the opportunity to provide that evidence (for example, where the individual is a former director who is no longer subject to duties in respect of the company);

(b) the current High Court disqualification process is inadequate for a director to contest the infringement finding (given that the High Court is not a specialist court like the Competition Appeal Tribunal). Therefore, where former directors are at risk of disqualification proceedings it is important that they should have an opportunity to make representations on the Statement of Objections and that their submissions are taken into account in making any final infringement decision. In particular, former directors may have relevant information that is not available to their former employer. In order to have a proper opportunity to make representations on the Statement of Objections, a former director is likely to require access to the CMA's case file. Provided the case file has been properly prepared by the CMA when the Statement of Objections was issued (see section 3 above), this should not cause delay to the case;

(c) it would be most efficient for directors to be asked to comment on the Statement of Objections at the same time as the addressees; and

(d) for the reasons given above, we consider that any director disqualification process should not commence unless the CMA has received representations on the substance of the alleged infringement from that director during the administrative phase (i.e. before any final infringement decision is reached).

7. CLARIFICATION OF THE CMA'S SETTLEMENT PRACTICES

7.1 We have concerns about the CMA's proposal at paragraph 14.21 of the Draft Revised Guidance to require a settling party formally to withdraw any representations it has made on the Statement of Objections save to the extent that they deal with manifest factual inaccuracies. In particular, whilst we acknowledge the settlement process requires settling parties to make a clear admission of liability, such admission cannot be assumed to invalidate all prior representations on the part of that party.

7.2 In particular, observations on facts, and conclusions that may be drawn from them, may be relevant to the rights of defence of other parties even where they do not meet the threshold of a manifest factual inaccuracy. Requiring settling parties to withdraw their representations on such issues may adversely affect the rights of defence of other parties and could be considered akin to the CMA requiring that the evidential record be changed.

7.3 The CMA is required to have regard to all addressees' representations on the Statement of Objections when deciding whether to proceed to an infringement decision (including a settlement decision) and, as part of that process, should be required to justify why it disagrees with any representations or evidence which are contrary to its own findings.

7.4 In addition, the CMA should clarify that any representations a settling party has made on the Draft Penalty Statement are not required to be withdrawn as these are likely to be relevant to the CMA's assessment of the settlement penalty.

8. CLARIFICATION OF THE SCOPE OF THE PROCEDURAL OFFICER'S ROLE

8.1 We consider that the nature and scope of the procedural complaints that fall within the Procedural Officer's remit is currently unclear and needs to be further particularised. This is particularly important given that the concurrent regulators rely on the CMA's guidance in respect of their own Procedural Officers.

8.2 For example, in a recent decision, the Ofgem Procedural Officer (citing the Current Guidance) decided that a number of significant procedural issues raised in the course of a CA98 investigation were not within his remit. [4] In particular, he decided that:

(a) concerns that the Ofgem case team had not had regard to the privilege against self-incrimination in using Ofgem's powers to compel interviews with officers of the company under investigation were outside the scope of his role as they concerned the scope of requests for information, related to the substance of the case and concerned potential conflicts between laws amounting to substantive legal issues that may ultimately need to be resolved by the courts; and

(b) concerns regarding the procedural basis upon which documents obtained by Ofgem in the course of unrelated regulatory proceedings were taken into account in the current investigation was outside the scope of his role as they concerned the scope of requests for information and related to the substance of the case.

8.3 In our view, both these issues (or at least parts of them) ought properly to be regarded as matters falling within the scope of the Procedural Officer. Further it will delay what are already lengthy administrative timetables if matters that can properly be adjudicated on by the Procedural Officer must instead be litigated in the courts. In short, it is in the interest of good administration for the scope of the Procedural Officer's remit not to be drawn unduly narrowly.

8.4 The proposed amendments in the Draft Revised Guidance in fact make the scope of the Procedural Officer's remit less clear and reduce the procedural protection for parties. In particular, the amendment to paragraph 15.4 gives the Procedural Officer significant discretion to reject any complaint which she does not consider to be a "significant procedural complaint", whatever its subject matter. The scope of the Procedural Officer's remit has also been reduced by deleting the last bullet point of paragraph 15.4 which previously made clear that "other significant procedural issues" not falling within another bullet point in the list could also be referred to the Procedural Officer.

9. CLARIFICATION OF THE CMA'S PRACTICE IN GRANTING EXTENSIONS FOR THE SUBMISSION OF WRITTEN REPRESENTATIONS

9.1 We consider that the amendment to paragraph 12.3 of the Draft Revised Guidance to the effect that the CMA considers that extensions are only likely to be granted in "exceptional circumstances" establishes too high a bar for the granting of extensions and is therefore likely to lead to unfairness. In this regard, we observe that deadlines for the submission of written representations are set by the CMA case team and not by statute (unlike, for example, CAT appeal deadlines).

9.2 If deadlines are only to be extended in exceptional circumstances, then:

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[4] Ofgem Procedural Officer decision 2018/1: Application by Economy Energy Trading Limited in relation to an Ofgem investigation under the Competition Act 1998 into a possible infringement of Chapter I by a small number of parties providing services to the energy industry.

(a) it is even more important that, as set out above, the time given for preparation of written representations only starts to run once access to the file is complete, and without errors and omissions (see paragraph 3.3 above), as in many cases, there is considerable engagement on whether full access to the case file has been provided (e.g. due to documents not being made available, documents being overly redacted and so on);

(b) additional time must be given if written representations on the Draft Penalty Statement are required to be prepared in parallel (see paragraph 4.2(d) above); and

(c) given its importance to the rights of defence, and the asymmetry as regards the time typically taken by the CMA to consider the evidence on the case file and write the Statement of Objections, and the time allowed to addressees to conduct the same exercise, the deadline set for key stages in the process (including responding to the Statement of Objections) must be a matter falling within the scope of the jurisdiction of the Procedural Officer

10. THE CMA'S EXPECTATIONS REGARDING THE ATTENDEES OF ORAL HEARINGS

10.1 In relation to the CMA's statement in paragraph 12.13 of the Draft Revised Guidance that the CMA would "expect" representatives of an addressee's business to attend the oral hearing, and that the Case Decision Group would also expect to hear from them when presenting the addressee's oral representations, we observe that:

(a) it may not always be appropriate to hear from business representatives at oral hearings, for example, where the focus of an addressee's submissions are on legal arguments; and

(b) individuals may not wish to prejudice their own rights of defence if they are at risk of director disqualification proceedings later.

10.2 In addition, it should be emphasised that the oral hearing is a key stage in the exercise of the rights of defence of the addressee. Its purpose is for addressees, for the first time, to highlight directly to the Case Decision Group issues of particular importance to their case, and which have been set out in its written representations (points raised orally are limited to those already submitted to the CMA in writing), and to clarify the detail set out in its written representations.[5] Oral hearings are not and should not be an opportunity for further evidence gathering by cross-examination of attendees. The CMA has a plethora of information gathering powers, including the ability to conduct compulsory interviews. As the penalties imposed by the CMA are quasi-criminal in nature, the oral hearing in an enforcement case is fundamentally different from the hearings conducted by the CMA in market investigations or Phase 2 merger cases.

10.3 Crucially, as a matter of general principle, a company should have discretion about how it chooses to exercise its rights of defence. The fact that representatives of an addressee's business do not attend or speak at an oral hearing should not prejudice its position.

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[5] Current Guidance, paras. 12.16-12.17.