Baker McKenzie.

RESPONSE TO CMA CONSULTATION: REVISED CA98 PROCEDURES GUIDANCE

Baker McKenzie welcomes the opportunity to comment on the CMA's consultation on proposed revisions to its published guidance on procedures for running Competition Act 1998 (CA98) cases. Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK competition law. We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

1. Introduction

1.1 We agree with the CMA's stated aim to facilitate, wherever possible, procedural efficiencies that it considers would support its aim of progressing and concluding its CA98 investigations as quickly as possible, while maintaining its commitment to due process and robust decision making. However, it is important to balance this against protecting rights of defence and the position of leniency applicants.

1.2 We have a number of comments on some of the CMA's proposals, as set out below.

2. Opening a formal investigation – increased transparency at case opening

2.1 The CMA is proposing to amend the Current Guidance to provide that, contrary to current practice, the CMA will normally name parties under investigation in case-opening announcements, other than in exceptional circumstances, such as where doing so might prejudice a CMA investigation or an investigation by one of its partners. We disagree with these proposed changes: we consider that identification of the parties at such an early stage could be highly detrimental, would go against the parties' rights of defence and put leniency applicants in a difficult situation, thus undermining the CMA's leniency regime.

2.2 In particular, it is possible that as an investigation progresses, the CMA may change the scope of a case, including the scope of the parties covered by it. For example, the CMA may decide to drop its case against a party early on in the investigation. Naming companies at an early stage, before the CMA has enough evidence and has decided how to scope its Statement of Objections ("SO"), would be damaging to companies' reputations, and potentially attract unfair litigation. There would likely be an adverse effect on the companies' share price, on-going commercial relationships, and public image.

2.3 Whilst we appreciate that the CMA wants to gain consumers' trust and give them the confidence that the CMA addresses their concerns seriously, we consider that this objective may be achieved without publicly identifying the parties at the case opening stage. The fact of the investigation itself will assure consumers that their concerns are being addressed. If consumers or other third parties have in their possession information that is potentially relevant to the industry sector in question, they can bring that information forward to the CMA, without needing to know which specific companies are under investigation. Indeed, a broader sector-based announcement may encourage more and broader engagement from consumers and third parties, than an announcement which suggests the focus is just on a few identified parties. The CMA has a number of tools at its disposal to inspire consumer confidence, such as its practice of sending warning letters to companies and high profile compliance awareness campaigns, e.g. the 'Cheating or Competing' campaign launched earlier this year.

2.4 We note that the CMA does not intend to mention in a case-opening announcement whether a party to the alleged infringement has applied for leniency. This would put companies in a very difficult position, where their employees, shareholders, customers, suppliers and other business partners are made aware that the company is under investigation (through the CMA's proposed press release) but cannot be informed as to the company's approach of cooperating with the authority and the potential mitigation of any penalty that might arise.

2.5 We therefore believe that the CMA should retain its current practice of not naming parties in the case opening announcement other than in exceptional circumstances.

3. Information handling – clarification of the basis on which the CMA may seek to expedite its access to file procedure

3.1 We broadly support the use of confidentiality rings in certain circumstances, where this can facilitate a more efficient procedure. However, in our experience of using confidentiality rings in a CA98 investigation, the confidentiality undertakings process can be highly onerous in terms of the ongoing obligations it places on individual external lawyers and the law firm itself. It can also create additional work, where lawyers are permitted to view documents that their client cannot view (without specifically requesting access, which may be denied). We consider that in principle, the CMA should try as much as possible to limit the use of confidentiality rings, and, where one is used, limit the amount of material that is subject to a confidentiality ring, so that as far as possible there is parity of information between a law firm and its client.

3.2 In addition, in order to preserve rights of defence, we consider that the CMA should adopt a generous approach in response to requests for disclosure of additional documents. Documents referred to in the Statement of Objections are likely to be the best and clearest evidence available to the CMA which supports the allegations described in the SO. Even as part of a streamlined access to file process, it remains essential that parties can request and access the further materials available on the CMA file, including materials which may contradict or cast doubt upon the evidence relied upon by the CMA and the conclusions drawn in the SO. In our view the default position of the CMA should be to provide access to any additional materials from the file that may be requested by the parties, other than in exceptional circumstances where the volume and breadth of materials requested is manifestly excessive.

3.3 Regarding the proposal that the CMA will no longer give businesses a second opportunity to make confidentiality representations, we urge the CMA to set reasonable deadlines, and that the Revised Guidance makes it clear that the parties can request an extension, which the CMA will not unreasonably refuse to grant.

4. Issuing the CMA's provisional findings – sending the Draft Penalty Statement with the Statement of Objections

4.1 We agree with the proposal to send the Draft Penalty Statement (DPS) at the same time as the SO. This will enable the parties to take the penalty information into account when responding to the SO. We agree with the CMA that this revised process will be more efficient, and save time and resources. The Revised Guidance should make it clear that the CMA's deadline for the parties to respond will take account of the fact that parties will need sufficient time to consider and respond to both the DPS and SO at the same time. We expect that the deadline will be appreciably longer than a typical deadline under the Current Guidance for responding to an SO, as a party may well wish to make representations on the DPS which are material, and which are different to (and not simply an adjunct to) the representations made in response to the SO.

5. Right to reply – clarification of the process relating to disclosure of directors' representations on a Statement of Objections

5.1 The proposal to provide third parties who are current or former directors of an Addressee of the SO with an opportunity to submit written representations on a non-confidential version of the SO could create tension with a leniency applicant, given the obligation to secure cooperation and inform the

CMA if one of its employees or cooperating former employees is providing information inconsistent with the content of the leniency application. We acknowledge that in practice this risk may not be great, given that as long as the entity is a leniency applicant that is in due course awarded some form of leniency, then a cooperating director should not be subject to disqualification.

5.2 In circumstances where a director or former director of a leniency applicant is approached in this way, then we consider that the CMA should either (i) allow the employer to fully brief the director as to the company's leniency application (notwithstanding confidentiality obligations attaching to the leniency process) and to see what representations have been made, or (ii) accept that, to the extent those representations run contrary to the leniency application, that cannot be held against the leniency applicant as representing lack of cooperation with the CMA. On a related point, we are of the view that it would be appropriate for the CMA to acknowledge in its Revised Guidance that there can be a time lag between a director or former director providing written or oral representations to the CMA, and a leniency applicant receiving the official record of those representations. In such circumstances, in instances where the leniency applicant may wish to submit clarifications or comments to the CMA regarding those director representations, for the purposes of meeting its obligation for cooperation as a leniency applicant, appropriate leeway needs to be granted to the leniency applicant as to the timing of such clarifications and comments.

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