

Competition and Markets Authority Consultation Guidance on the CMA's investigation procedures in Competition Act 1998 cases Response of Herbert Smith Freehills LLP

1. **INTRODUCTION**

- 1.1 Herbert Smith Freehills LLP welcomes the opportunity to provide comments in response to the CMA's consultation document *Guidance on the CMA's investigation procedures in* Competition Act 1998 cases (CMA8con) of 2 August 2024 (the Guidance). The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of any of our individual clients.
- 1.2 The Digital Markets, Competition and Consumers Act 2024 (DMCC Act) makes a number of changes to the Competition Act 1998 (CA98) and we welcome the CMA's updates to the Guidance in order to reflect these changes. It is also helpful to see the CMA's current practice reflected in the Guidance.
- 1.3 Our comments set out below highlight some areas where we consider it would be helpful to see more detail in the Guidance.

2. DUTY OF EXPEDITION

- 2.1 The DMCC Act imposes a new duty of expedition on the CMA, which requires it to take action as soon as reasonably practicable when making a decision or otherwise taking action for the purposes of its competition functions under the CA98.
- 2.2 The CMA is also required to carry out its investigations and make decisions in a procedurally fair manner, and it will need to carefully balance this requirement against the new duty of expedition. We would urge the CMA to ensure that the duty of expedition does not unduly affect the timelines such as those for responding to information requests, inspection of the file, responding to the Statement of Objections or the treatment of requests for extensions, as this would ultimately affect the rights of defence of the parties and the quality of the information gathered by the CMA.

3. DUTY TO PRESERVE DOCUMENTS RELEVANT TO INVESTIGATIONS

- 3.1 Under changes introduced by the DMCC Act the CA98 now imposes a duty on a person who knows or suspects that an investigation is being or is likely to be carried out by the CMA, to preserve documents. We have some concerns over the looseness of this obligation and would welcome more detailed guidance around this new duty with practical examples.
- 3.2 The documents in scope are potentially wide and the CMA will determine on a case-bycase basis whether a document is relevant, taking into account the circumstances of the

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case, but the Guidance only provides very high-level examples. It is not clear what is meant by "a person" and whether this could mean "any person". It is also not clear at what point such a person would be considered to have the requisite knowledge or suspicion for the obligation to preserve evidence to be triggered.

- 3.3 The Explanatory Notes specify that, in practice, the duty would arise where a business receives a case initiation letter from the CMA and is therefore aware that conduct is under investigation. It may further arise where an individual working for a business is aware that a customer has reported their suspicions of price fixing and that the customer has been interviewed by the CMA, or where members of an anti-competitive agreement are tipped-off that one of their members has blown the whistle to the CMA. It would be helpful to have these examples included in the Guidance. The example set out in the Administrative Penalties Statement of Policy, in scenario 6, could also be included in this Guidance as doing so would make if more user friendly than cross referring to another document.
- 3.4 Footnote 29 of the Guidance flags that the duty to preserve documents also applies where a person knows or suspects that the CMA is assisting, or is likely to assist, an overseas regulator in carrying out any of its functions which correspond or are similar to the relevant functions of the CMA. The Guidance should provide greater clarity around this requirement, and we would in particular expect to see more guidance around how and when a person can be expected to know that the CMA is assisting or is likely to assist an overseas regulator.

4. WRITTEN INFORMATION REQUESTS

- 4.1 The CMA's powers to require the production of documents or information held outside the UK and to address a section 26 notice to a person outside the UK are now set out in the legislation.
- 4.2 There is possibly a greater risk that, where the CMA serves a section 26 notice upon a person outside of the UK, such a person (natural or legal) may not be aware of the extent of the single economic undertaking to which they belong. Such a person may not comply with the relevant section 26 notice, which could result in the single economic undertaking (of which the person is a part) facing sanctions and/or offences for a failure to respond. The Guidance should therefore make clear that the CMA will use its best endeavours to ensure that the relevant undertaking is informed of the relevant section 26 notice.

5. ADVANCE NOTICE ON USING DRAFT INFORMATION REQUESTS

5.1 The CMA proposes to take into account its duty of expedition in considering whether to send an information request in draft. In our view, sending a section 26 notice in draft form

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- often assists with expediency as it ensures the questions are aligned with the recipient's business functions and understanding of the substance of what the CMA is requesting.
- 5.2 Similarly, on including the duty of expedition as a consideration when deciding whether to grant an extension to the deadline specified in an information request, the CMA should bear in mind that where the requested information cannot be obtained in the time available, a reasonable extension will ensure that comprehensive and accurate answers are provided to the CMA, which increases the overall efficiency of its investigation processes.

6. POWER TO REQUIRE INDIVIDUALS TO ANSWER QUESTIONS

- 6.1 Under changes introduced by the DMCC Act the CMA can now require any individual to answer questions on any matter relevant to the investigation after giving formal written notice, as opposed to only an individual who has a current or past connection with a business which is a party to the investigation.
- 6.2 If the recipient fails to comply with the formal notice without reasonable excuse the CMA can impose administrative penalties. The concept of 'reasonable excuse' is not defined and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. Given the CMA's broad powers and taking into account how potentially burdensome and intrusive these powers may be for a person who has no connection to the undertaking, the Guidance should include the factors the CMA will consider in order to accept that the recipient has a reasonable excuse for failing to comply with the formal notice to answer the CMA's questions.

7. POWERS WHEN ENTERING PREMISES WITH A WARRANT

- 7.1 The DMCC Act expands the CMA's powers which now allow it to access any information stored in electronic form and which is accessible from the premises, regardless of whether or not the information relates to a matter under investigation. These powers are very wide, and the guidance should provide more details around the measures and processes the CMA will adopt in order to ensure that privileged documents and documents outside scope remain protected during this process.
- 7.2 The CMA will also have new powers to seize and sift materials from domestic premises during dawn raids. This has been prompted by the change in working patterns and the increase in remote working practices. The guidance should however recognise other implications of remote working practices such as the possibility of shared devices being

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used at the domestic premises and should specify how it will address such issues in the context of its new powers to seize and sift at domestic premises.

8. **SETTLEMENT**

8.1 We welcome the CMA's proposals to increase the settlement discounts in relation to non-cartel conduct to 40% pre-Statement of Objections and to 25% post-Statement of Objections. We believe this may represent a stronger incentive for businesses to settle cases, in particular at pre-SO stage. At this stage it is more difficult for businesses to engage with the detail of the case against them due to the lack of detailed information. Businesses may therefore be less likely to consider settlement pre-SO in principle, but the increase in discount to 40% may create an added incentive.

Herbert Smith Freehills LLP 6 September 2024

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