THE CMA'S CONSULTATION ON INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES (CMA8)

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

SEPTEMBER 2024

RESPONSE TO THE CMA'S CONSULTATION ON INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES (CMA8)

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation on its draft updated Guidance on the CMA's investigation procedures in Competition Act 1998 (***CA98***) cases (***Draft CMA8***).

1.2 Draft CMA8 sets out various changes to reflect developments in CMA practice and policy, as well as a range of amendments and additions to reflect changes to the CMA's approach made by the Digital Markets, Competition and Consumers Act 2024 (***DMCCA24***).

1.3 This response is based on our significant experience and expertise in advising clients on a wide range of CMA investigations under the CA98, together with our significant experience with similar proceedings conducted by competition authorities in other jurisdictions.

1.4 We have confined our comments to those areas which we feel are most significant to ensuring the effective operation of CA98 investigations and providing clarity and certainty for companies. This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

2. General observations

2.1 We welcome Draft CMA8 as a useful indication of the approach the CMA intends to take to investigation procedures in CA98 cases. Guidance is particularly important since the DMCCA24 not only substantially expands the CMA's powers in conducting investigations but also greatly enhances the CMA's ability to impose administrative penalties for breach of investigatory and remedy requirements.[1] We recognise that the significant expansion of the CMA's investigatory powers under the DMCCA24 is intended to strengthen the CMA's enforcement capability, however, it is equally important that the CMA implements these powers in a manner that respects parties' rights of defence and legitimate interests.

2.2 As set out in more detail below, we consider that Draft CMA8 can be further improved and the comments below are intended to help clarify the CMA's envisioned approach in order to ensure the effective and timely management of CA98 investigatory proceedings, in particular by providing additional:

(a) guidance as to the type of agreements implement outside the UK that meet the threshold of having, or being likely to have, "*immediate, substantial and foreseeable effects*" within the UK;

(b) clarity in respect of the practical application of the duty to preserve documents relevant to CA98 investigations;

(c) context around the CMA's reliance on the Court of Appeal's judgment in *CMA v BMW AG* [2023] EWCA Civ 1506 for its enhanced powers to give section 26 CA98 notices;

[1] As defined in paragraph 1.3 of the CMA's draft Administrative Penalties: Statement of Policy on the CMA's Approach (the ***draft Penalties Statement***).

(d) clarity as to the circumstances the CMA considers that sending a draft information notice may not be consistent with the duty of expedition;

(e) clarity as to the CMA's intention to interview individuals 'not connected' with the business subject to an investigation and recognition of an individual's ability to have proper legal representation with respect to any interview; and

(f) clarity around the practical implementation of the CMA's enhanced powers during an inspection in respect of electronic materials, including potentially expanding the guidance to provide for the deletion of information that the CMA considers irrelevant (rather than the return of that information).

Changes pursuant to DMCCA24

3. Changes to the requirement for agreements, decisions and practices to be implemented in the UK

3.1 The DMCCA24 amends the jurisdictional reach of Chapter I CA98 such that agreements implemented outside the UK will now be reviewable by the CMA to the extent they have, or are likely to have "*immediate, substantial and foreseeable effects*" within the UK.[2] This marks a distinct departure from previous practice with regard to the CMA's jurisdiction to review agreements, decisions and practices implemented abroad.

3.2 To ensure that UK and overseas businesses are able to assess compliance with UK competition law, it would be helpful if Draft CMA8 could articulate more precisely the meaning of *'immediate, substantial and foreseeable',* given that this formulation appears to derive from the *'qualified effects'* doctrine developed through European case law. The guidance would benefit from some illustrative examples as to the type of agreement implemented outside the UK but might otherwise produce such '*immediate, substantial and foreseeable*' effects within the UK.

4. The duty to preserve documents relevant to investigations

4.1 We welcome the explanation in Draft CMA8 regarding the obligation to preserve documents relevant to an investigation. However, our view is that this section of the guidance would benefit from further clarity and illustrative examples relating to exactly *when* such a duty arises and in respect of precisely *which* documents, not least because of the enhanced administrative penalties that could be imposed for associated breaches of the duty to preserve. More particularly:

Substantive scope of the obligation and 'relevance'

4.2 First, in terms of identifying which documents might be subject to the duty to preserve, the guidance merely refers to documents that are deemed to be 'relevant' to a *possible* investigation. However, CMA8 as currently drafted provides very little guidance or precision as to when a document would or should be considered 'relevant' to an investigation, even less so to an investigation that has not yet been initiated by the CMA and is only possible. Indeed, it is often unclear what the scope of a CA98 investigation is, especially in the early stages of an investigation, making the 'relevance' test challenging to apply in practice.

[2] s119 DMCCA24, footnote 3 Draft CMA8.

4.3 While the guidance attempts to address this point by suggesting that individuals should take a "*broad view*" of relevant documents, this is entirely unsatisfactory (not least given the enhanced severity of potential penalties), and not overly helpful, since the guidance suggests that such a "*broad view*" includes:

(a) ordinary course documents on market conditions, which are typically prepared by many different functions at all levels of a business; and

(b) documents relating to areas which are initially adjacent to the investigation.

4.4 While the CMA notes that this will not extend to documents which relate to a "*completely different and unrelated business area*", this requires a value judgment of what is "*completely*" unrelated, which is difficult for any individual to assess against the threat of potential fines.

4.5 Moreover, we consider the CMA has missed an opportunity to clarify *who* within an undertaking potentially susceptible to investigation must have the requisite knowledge or suspicion to trigger a business-wide obligation to preserve documents. We can readily envisage circumstances where a junior employee within an undertaking may regrettably engage in prohibited conduct, contrary to the undertaking's compliance policies, and which the employee conceals from management. That individual may have grounds to suspect that the CMA may pursue an investigation: is an undertaking to be fixed with that suspicion – and therefore be subject to potentially significant fines – in such circumstances? This would in our view be a strikingly unfair and disproportionate result.

4.6 Accordingly, it would be helpful for Draft CMA8 to define more precisely how 'relevant' issues/documents in a CA98 investigation are to be determined by those trying to comply, perhaps by reference to illustrative examples. The CMA should also make clear that the relevant knowledge and suspicion must vest at an appropriately senior level within a relevant undertaking.

4.7 As a drafting matter we note that while paragraphs 5.9 and 5.11 of the draft guidance (consistent with the language of s.25B of CA98) refers to a "person", paragraph 5.12 of the draft guidance refers to "a business". The circumstances where knowledge is to be imputed to a business is precisely the difficulty we raise here, and in our view should be clarified in the guidance.

Temporal scope of the obligation

4.8 Second, a further difficulty with the way in which the duty to preserve documents is currently drafted is that there is no certainty for businesses as to exactly when this duty arises. There are two elements to this uncertainty: (i) when would a person be considered to know that a CMA investigation is 'likely'; and (ii) when would or should a person 'suspect' that an investigation is being or is likely to be carried out by the CMA?

4.9 We note that the Explanatory Notes to the DMCC Bill[3] state that - in practice - the duty would arise where a business receives a case initiation letter from the CMA, making it aware that its conduct is under investigation. While this is a fairly obvious example, it should be included in the guidance. The Explanatory Notes go on to state that it may further arise where, for example, 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

[3] Explanatory Notes to the Digital Markets, Competition and Consumers Bill, as introduced in the House of Commons on 25 April 2023 (Bill 294) (***Explanatory Notes***), paragraph 497.

anti-competitive agreement are "tipped off" that a member of the agreement has blown the whistle to the CMA. One assumes that these are examples of circumstances in which an individual does not yet know that there will be an investigation, but could infer that an investigation could be likely based on the complaint or the whistleblower respectively. However, that inference is a subjective assessment; where one person might (reasonably?) suppose a complaint or tip-off might lead to an investigation, another person may also conclude that such an investigation is unlikely.

4.10 Take the first example for instance, what if the person believes (or knows) that the customer's suspicions of price-fixing are completely unfounded, or that the complaint is frivolous? Is it then reasonable for that individual not to suspect an investigation will follow when it knows the allegation is erroneous? Or should they suspect an investigation merely *because* the customer has complained? This would necessitate the individual in question understanding the inner workings of the CMA and its own measures for deciding whether or not to open an investigation. Surely businesses cannot be asked to make such judgement calls?

4.11 Moreover, while the examples in the Explanatory Notes are somewhat helpful, they seem to suggest that the critical question a business should ask itself is whether it knows or (reasonably?) believes that a third party (customer or competitor) has complained to the CMA. We consider it tenuous to hinge the application of the obligation on whether or not one thinks a third party has complained to the CMA – until the receipt of a request for information (RFI) (at which point a business would be deemed to know of a possible investigation), how would one know that initially?

4.12 Going further, does the third party have to have actually complained to the CMA for the business whose conduct is in question to know or suspect a possible investigation, or is it sufficient that the third party knows (or suspects?) an infringement such that there is a risk that they *might* complain in the future (but haven't yet done so). Respectively, does the reverse mean that if (hypothetically) an in-house counsel finds out about an infringement, but is 100% sure no one outside the business knows, they could fail to preserve documents without risk of penalty? If no one else knows about the infringement, then the risk or suspicion of a 'possible' investigation is much lower. Too low to trigger the obligation to preserve?

4.13 As foreseen by the guidance, this uncertainty would also arise in the context of investigations by other competition authorities[4]: how is a business to know or suspect that the CMA is assisting an overseas regulator?

4.14 A separate, but related, point that Draft CMA8 does not address is for *how long* a person remains subject to the duty to preserve. For example, a business may receive an RFI in relation to a potential infringement, but in respect of which the CMA has not yet opened an investigation. If, following submission of a response to the RFI, the business hears nothing further from the CMA, does that business continue to be bound by the duty to preserve documents or information that was subject to the RFI? When can the business assume that a CMA investigation is no longer possible or likely? This is an important fact for businesses, who may be required to invest substantial time and money in order to effect the preservation, for instance, of electronic data that could necessitate additional server storage etc. The current draft implies an open-ended (and highly expensive) obligation to preserve relevant documents, which

[4] See footnote 29 of Draft CMA8: "*In addition, the duty to preserve documents 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 (section 25B(1)(b) of the CA98)*."

cannot be the CMA's intention. As such, additional explanation as to when the obligation can be considered to come to an end, should also be included.

4.15 Such questions highlight the inadequacy of this section of the guidance and we invite the CMA to expand and more precisely delineate the meaning and scope of the duty to preserve so that the duty can be better articulated and understood by those trying to comply. We note in this regard that similar concerns to those identified herein were identified by legal practitioners to policy stakeholders at roundtable held by BEIS (as was) in relation to the DMCC Bill as long ago as 11 May 2023 where it was acknowledged that this may be an issue for guidance. It is deeply regrettable that detailed guidance is not yet forthcoming given the substantial uncertainty that this creates for business, who may be faced with the invidious choice of hugely costly data storage (diverting investment from other activities) or risk possible fines.

4.16 In addition to the above suggestions, we consider that this section of Draft CMA8 could be further improved by clarifying that:

(a) the "good practice" described in the guidance is not the minimum threshold that must be met by a person in fulfilling the duty to preserve documents, and that the CMA will, when assessing a person's efforts to preserve information and any "reasonable excuse" for failing to do so, take into account the efforts made by a person in adhering to this "good practice", acknowledging that such efforts should be reasonable and proportionate in the circumstances; and

(b) the extension of the duty to preserve information relating to adjacent areas should extend only to areas that are (at least) reasonably foreseeable to come within the scope of the investigation.

5. Service and the extraterritorial effect of notices[5]

5.1 DMCCA24 provides that the CMA can give a section 26 notice to a person outside the United Kingdom if the person's activities are being investigated as part of an investigation under section 25 or the person has a UK connection.

5.2 Draft CMA8 goes further than the DMCCA24 by relying on a Court of Appeal judgment that is currently the subject of appeal to the Supreme Court, in particular:

(a) At paragraph 6.2, the draft guidance notes that that the definition of "*any person*" under the CA98 includes "*any undertaking*". Draft CMA8 goes further in footnote 35 to say that "*Section 59(1) of the CA98 defines 'person' as including 'any undertaking'*" and that where an information noticed is "*addressed to an 'undertaking', the requirement to comply with the notice applies to the undertaking as a whole…*". To assist stakeholders, we consider there would be merit in stating expressly that this (and related) points, which we presume derive from the Court of Appeal's judgment in *CMA v BMW AG*, are currently the subject of an appeal at the UK Supreme Court.

(b) Draft CMA8 expressly relies on the Court of Appeal's judgment in *CMA v BMW AG* at footnote 39 as the basis for the assertion that its powers are not limited by section 44B of the CA98 and that section 26 of the CA98 has extraterritorial effect generally, and the expression 'any person' in section 26 includes any person with or without a

[5] s144 and Sch. 13 DMCCA24, paragraph 6.2 Draft CMA8.

territorial connection to the UK. As outlined above, we consider it would assist stakeholders to note that the Court of Appeal's findings are currently the subject of an appeal before the UK Supreme Court. Plainly, depending on the result of that appeal, it is possible that the draft guidance will need to be re-drafted in due course.

6. Written information requests and the duty of expedition[6]

6.1 The guidance in Draft CMA8 implies that sending a draft information notice may not be consistent with the duty of expedition. Given there are no statutory deadlines in which the CMA needs to carry out a CA98 investigation, it is unclear in what context the duty of expedition would override the principles of good administration in providing a draft information request to parties. We suggest that the guidance should more clearly set out the circumstances where the CMA considers this is the case and ensure that there is consistency with CMA's Statement on Transparency and Disclosure (***CMA6***).[7]

6.2 Indeed, the duty of expedition applies equally to "*internal*" steps that the CMA takes with respect to how it conducts investigations and evidence gathering. The provision of a draft information notice provides parties with an opportunity to suggest to the CMA: (i) appropriate scoping of requests, in order that the CMA only receives information relevant to its investigation; and (ii) staggered timelines for the provision of information, in order that the CMA can receive information which is easier to obtain sooner.

6.3 As we have set out in more detail in our response to the CMA's consultation on CMA6, it is critical that the duty of expedition is properly applied in practice and is not used to seek to "*justify*" investigative steps that are unlawful or otherwise fall short of the principles of better regulation.

6.4 More generally, the CMA should more firmly commit to sharing a draft information request unless it would not be practical or appropriate to do so, rather than limit itself to recipients of "*large information requests*" only.[8]

7. The power to interview any individual (irrespective of connection to a business under investigation)

7.1 Given the broadening of the power to conduct interviews (i.e., removal of the requirement that the individual in question be 'connected' with the business subject to an investigation),[9] it would be helpful if the guidance could set out further explanation as to when the CMA can exercise this power, particularly in what circumstances the CMA envisages using this new power. Illustrative examples would be helpful.

7.2 Moreover, Draft CMA8 should also explicitly refer to the right of the individual in question to obtain proper legal representation before any such interview, not only to have a legal adviser present during the interview. We consider that this additional comfort would be helpful, both in respect of individuals with a current connection to the business, and those without. Further, the draft guidance provides little information about when transcripts or recordings of such

---

[6] s327 DMCCA24, paragraphs 2.5, 6.8, and 6.10 Draft CMA8.

[7] In particular, paragraph 4.6 of CMA6.

[8] Paragraph 6.7 Draft CMA8.

[9] s142 DMCCA24, paragraph 6.2 Draft CMA8.

interviews would be made available to the undertaking subject to the investigation, which may be necessary for that undertaking to vindicate its rights of defence.

8. Enhanced power of production during an inspection in relation to information in electronic form which is accessible from the premises[10]

8.1 The broadening of the guidance at paragraph 6.35 of Draft CMA8 regarding the extent of the search that CMA officers may conduct with a warrant to include electronic material accessible from the relevant premises implies that electronic material will be produced by a party "*on the premises*". However, in our experience, in instances where electronic material to be produced is of a large size, for efficiency reasons this material will typically be transferred digitally to a CMA server, this transfer having been discussed and agreed with the CMA officers during the investigation, and may therefore not be at any point on the party's premises. We do not therefore consider the phrase "*(which, having been produced, will be on the premises)*" to be accurate in all circumstances.

8.2 Paragraph 6.36 of Draft CMA8 addresses the power for CMA officers to require the production of electronic material when carrying out an inspection under a warrant. As drafted, paragraph 6.36 appears to suggest that this power relates to **all** electronic material accessible from the premises regardless of whether CMA officers consider it to be relevant to the investigation ("*It should be noted that this power of production will apply to* ***any such information****, not only that to* ***which the CMA officer considers relates to a matter relevant to the investigation***") (emphasis added). The guidance refers in a footnote to Sections 28(2)(f) and 28A(2)(f) CA98 as providing the legal basis for this statement. However, those sections of CA98 make clear that the 'relevance' qualification **does** apply to this power: section 28(2)(f) (and its equivalent for domestic raids set out in section 28A(2)(f) states that an officer empowered under a warrant can "*require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation*"). It is therefore not apparent to us on what legal basis the CMA claims it has the power to require the production of electronic material that is not related to a matter relevant to the investigation. We request that this is urgently clarified. It is self-evident that such a power could lead to perverse outcomes (for example, as drafted the guidance suggests that a CMA officer could require the production of financial or personnel records held electronically by a business which are clearly and obviously outside the scope of its investigation, and without regard to data protection or other legal considerations).

9. Assistance during an inspection, including to access information held electronically and accessible from the premises and with the separation of privileged material and non-privileged material[11]

9.1 The guidance indicates, at paragraph 6.38, that the CMA may compel any person on the party's premises to assist the CMA's officers in accessing information held electronically. However, we consider that the CMA should acknowledge that (particularly in the age of cloud storage) there may be instances where a person off-site may be better placed to assist the CMA in accessing electronic information (and in respect of other requests the CMA officers may have)

[10] ss122 and 141 DMCCA24, paragraphs 6.36 – 6.38 Draft CMA8.

[11] ss122 and 131 DMCCA24, paragraph 6.38 Draft CMA8.

and accordingly that the CMA will not consider it obstructive where a person that is on the premises may not have the technical expertise or access that the CMA requires.

10. Return of information

10.1 In light of the expansion of the CMA's search powers in Draft CMA8 to include electronic material and our comments at paragraph 8.2 above, we recommend that paragraph 6.48, regarding the return of information that the CMA does not consider relevant for the purposes of its investigation or is duplicated, be expanded to provide for the deletion (rather than return) of such material that was provided to the CMA in an electronic format.

11. Settlement discount cap for non-cartel conduct

11.1 At paragraph 14.30 of Draft CMA8 the CMA introduces a 40% settlement discount cap in relation to non-cartel conduct. Differentiating between cartel and non-cartel conduct – and providing for a higher potential settlement discount in respect of non-cartel conduct – is a welcome feature of the new guidance which we consider is likely to provide greater incentives for parties being investigated in respect of non-cartel conduct to consider settling with the CMA. We note, however, that parties who may have been involved in cartel conduct have the option of applying to the CMA for leniency, with the possibility of complete immunity from financial penalties. While we recognise the importance of potential immunity from fines for self-reporting cartelists as a matter of policy, it does mean that there remains a considerable mismatch between the overall level of discount available to cartelists and what might be available for parties involved in non-cartel conduct. We consider that there may be value in the CMA reflecting further on whether the settlement discount cap for non-cartel conduct might in fact be even more effective if it were raised to 50 – 60%, for example.

12. Conclusion

12.1 We welcome the updated guidance in Draft CMA8 in light of the new and broadened investigative powers bestowed on the CMA by the DMCCA24. However, Draft CMA8 would benefit from further clarification in a number of places (as outlined in our response above), if it is to support the CMA in achieving its objectives of effective and timely management of investigatory proceedings. We remain available for further dialogue with the CMA and other stakeholders on Draft CMA8.

Freshfields Bruckhaus Deringer LLP

September 2024