# **Eversheds Sutherland** (International) LLP

Response to the CMA's consultation on the Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases

13 September 2024

#### 1. Introduction

- 1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to respond to the consultation on the draft updated *Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8),* as published by the Competition and Markets Authority ("CMA") on 2 August 2024 (the "Guidance").
- 1.2 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.
- Our response reflects our experience in advising clients in respect of investigations by the CMA, sectoral regulators and other competition regulators globally.
- 1.4 We have commented below on certain aspects of the Guidance where we consider that the CMA could provide additional guidance or clarification.
- 1.5 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 to the extent necessary.

# 2. Territorial scope of the Chapter 1 Prohibition

2.1 Section 119 of the Digital Markets, Competition and Consumer Act 2024 ("DMCC Act") will expand the territorial reach of the Chapter 1 prohibition of the Competition Act 1998 ("CA98"). Once that provision enters into force, the CMA will be able to investigate agreements which "are likely to have an immediate, substantial and foreseeable effect on trade within the UK," even if they are not implemented or intended to be implemented in the UK. Whilst the expansion of the territorial scope of the Chapter 1 prohibition is mentioned in footnote 3 of the Guidance, the Guidance would benefit from providing detail on how the CMA will determine whether an agreement is likely to have an "immediate, substantial and foreseeable effect on trade", including the factors the CMA may take into account.

#### 3. Duty to preserve documents relevant to investigations

Trigger point for the duty to arise

- 3.1 Section 121 of the DMCC Act introduces a duty to preserve documents which applies where "a person knows or suspects that an investigation by the CMA under section 25 [CA98] is being or is likely to be carried out". Paragraph 5.9 of the Guidance would benefit from providing detail on what the CMA will consider when determining if a person should have suspected that the CMA was or was likely to carry out a CA98 investigation. This is particularly important given the severity of the penalties that could be imposed for violating this provision.
- 3.2 Paragraph 543 of the Explanatory Notes to the DMCC Act states:

"In practice, the duty would arise where a business receives a case initiation letter from the CMA and so is aware that its conduct is under investigation. 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 members of an anti-competitive agreement are "tipped off" that a member of the agreement has blown the whistle to the CMA. The duty would apply in this case to the individual and their employer."

3.3 We would welcome further examples to enable both businesses and individuals to better understand to whom, and when, this duty will apply.

Scope of the duty

3.4 Paragraphs 5.10 and 5.11 of the Guidance set out the types of documents which the CMA would regard as being relevant to an investigation. Paragraph 5.11 states that "where a person knows or suspects that the CMA is carrying out an investigation, they should take a

broad view of relevant documents." It would be helpful if the CMA could confirm in the Guidance if this only applies when a person knows or suspects that the CMA is carrying out an investigation and not when a person knows or suspects that an investigation is likely.

3.5 Whilst we appreciate that the CMA has a discretion to determine whether a document is relevant to an investigation on a case-by-case basis, it would be helpful if the CMA could provide some more examples of the types of documents which are likely to be relevant to a CA98 investigation.

### Document retention policies

- 3.6 Paragraph 5.12 of the Guidance states that the CMA expects a person who knows or suspects that the CMA is carrying out a CA98 investigation to suspend routine document destruction relating to potentially relevant documents. Furthermore, the CMA expects a document retention policy to specifically provide for the preservation of documents relevant to a CA98 investigation.
- 3.7 Suspending routine document destruction processes is a time consuming and expensive process. It would, therefore, be helpful if the CMA could provide further clarity on when the obligation will arise, the duration of the suspension and the CMA's expectations as to what would fall within the category of potentially relevant documents, particularly in circumstances where a person is not aware, but suspects, the CMA is carrying out a CA98 investigation. This clarity will enable businesses to ensure they are meeting the requirements in their document retention policy.

## 4. **Privileged communications**

4.1 The CMA has the power to remove documents from the premises for the purposes of a CA98 investigation when it is not practicable to review them at the premises. Whilst paragraph 7.1 of the Guidance stipulates that the CMA cannot use its powers of investigation to require anyone to disclose privileged communications, the Guidance does not explain what processes the CMA will have in place (and in our experience, does currently have in place) to seek to protect privileged material. It would be helpful if the CMA could set out these processes in the Guidance to provide transparency and clarity for businesses.

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