

## RESPONSE OF CLIFFORD CHANCE LLP TO THE DRAFT UPDATED GUIDANCE ON THE CMA'S INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES

Clifford Chance welcomes the opportunity to respond to the consultation of the Competition and Markets Authority (CMA) on the proposed changes to the Guidance on the CMA's investigation procedures in Competition Act 1998 (CA98) cases (the **Draft Guidance**).

Our observations below are based on the substantial experience of our lawyers in our antitrust practice of advising on UK CA98 investigations and compliance. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

## **Section 26 Notices**

- 1.1 Footnote 39 explains that the CMA considers that its powers to issue s.26 notices are "not limited" by the newly inserted s.44B CA98. This is on the basis that s.44B(7) states that "[n]othing in this section is to be taken to limit any other power of the CMA to give a notice under section 26 or 40ZD to a person outside the United Kingdom" and that the Court of Appeal in *CMA vs BMW*<sup>1</sup> effectively provides for such "other power" by ruling that (in the words of the Draft Guidance) s.26 "has extraterritorial effect generally, and the expression 'any person' in section 26 includes any person with or without a territorial connection to the United Kingdom".
- 1.2 We disagree that the Court of Appeal's ruling has such broad effect that it renders the new s.44B entirely redundant. In particular, s.44B(3)(b) requires that the addressee of a s.26 notice has a "UK connection" if their activities are not being investigated as part of an investigation under section 25 (i.e. they are a third party to the investigation). The ruling in *CMA vs BMW* did not concern such third-party information requests, as the parent companies to which the notices were addressed in that case formed part of the same undertaking as the UK entities that were the subject of the investigation. Moreover, the Court of Appeal's ruling makes it clear in several places that its ruling was motivated by considerations that apply only in respect of undertakings that are under investigation.<sup>2</sup>
- 1.3 We recognise that the CMA rarely issues such third-party s.26 notices in CA98 investigations. However, s.26 allows information requests to be sent to "any person" and, therefore, does not exclude that possibility. Consequently, we submit that the draft guidance should clarify that the CMA will not send s.26 notices to third parties that are not the subject of an investigation (and not part of any undertaking that is under

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<sup>&</sup>lt;sup>1</sup> [2023] EWCA Civ 1506

For example: (i) paragraph 52, which analyses the "umbrella" extra-territorial effect of s.25 and its application to "entities which are wholly offshore", being those which are suspected of having committed an infringement; (ii) paragraphs 54 and 57, which analyse the aim of the investigatory powers as "ensuring that wrongdoers were discovered and sanctioned" given the clandestine and extra-territorial operation of many cartels; (iii) paragraph 65, which analyses the perverse incentive for conspirators to move offshore to organise UK cartels if s.26 notices could not be addressed to them extra-territorially; and (iv) paragraphs 84-94, which ground the ruling in the concept of an undertaking comprising entities that committed an infringement and other entities within the same corporate group, and the joint and several liability of those entities for the infringement.

investigation) unless the "UK connection" conditions of s.44B(5) are met. In this respect, the guidance should make it clear that the s.44(B)(5)(d) condition of "carrying on business in the UK" will be interpreted consistently with the judgments of the Court of Appeal and the Competition Appeal Tribunal in *Akzo Nobel v. Competition Commission*. In particular, the guidance should be clear that, in line with those judgments, exporting goods or services from abroad to customers in the UK does not, on its own, suffice to "carry on business in the UK" (see our separate comments on the CMA's proposed amendments to CMA108, which made certain legal errors in this respect).

1.4 We consider this interpretation to be more consistent with the clear intention of Parliament, which inserted the new s.44B (through the Digital Markets, Competition and Consumers Act 2024) after the Court of Appeal's judgment in *CMA v. BMW* and cannot have intended the entirely of that provision to be otiose as a result of that preceding judgment. Indeed, it is a fundamental principle of statutory construction that Parliament must be deemed to have intended a statutory provision to have effect rather than being nugatory, on the basis that Parliament does not legislate in vain.

## **Privileged Communications**

1.5 Paragraph 7.1 of the Draft Guidance states that the prohibition on the CMA using its powers of investigation to require the production or disclosure of privileged materials "does not impact on the CMA's powers under Part 2 of the Criminal Justice and Police Act 2001". We understand this to be a reference to the CMA's powers to take from the premises any relevant document that is contained in something else (which may include privileged communications) where it is not practicable to separate out the relevant document at the premises. If so, that should be clarified, and the guidance should also make it clear that, in such circumstances, the CMA will not review such material unless the party under investigation and its lawyers have first had the opportunity to remove and redact any privileged communications from the combined materials.

Clifford Chance LLP September 2024

Judgment of the CAT in *Akzo Nobel v. Competition Commission* [2013] CAT 13 and judgment of the Court of Appeal in *Akzo Nobel v. Competition Commission* [2014] EWCA Civ 482.