

RESPONSE TO CMA CONSULTATION

GUIDANCE ON THE CMA'S INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES

1. INTRODUCTION

- 1.1 This response represents the views of Allen Overy Shearman Sterling LLP on the Competition and Markets Authority (CMA)'s consultation on draft guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8con), dated 2 August 2024 (Draft CMA8).
- 1.2 We welcome the opportunity to respond to this consultation and would be happy to discuss any of the points made in this response if the CMA would find it helpful to do so.
- 1.3 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.
- 1.4 Overall, we welcome Draft CMA8 as providing important guidance on the CMA's approach in relation to the changes to the U.K. competition regime that will be introduced by the Digital Markets, Competition and Consumers Act 2024 (DMCCA24), as well as providing clarity on certain aspects of current CMA practice.
- 1.5 As a general comment, we note that Draft CMA8 does not reference the sections of the Competition Act 1998 (CA98) that have been amended by the DMCCA24. For transparency and clarity, as well as consistency with amendments to other CMA guidance (e.g., draft CMA2 (*Mergers: Guidance on the CMA's jurisdiction and procedure*) and draft CMA108 (*Interim measures in merger investigations*)), we recommend that the CMA includes these references.
- 1.6 We set out below our specific comments on various sections of Draft CMA8.

2. THE LEGAL FRAMEWORK

- 2.1 In our view, paragraph 2.5 contains some repetition and would benefit from streamlining. We suggest that the CMA removes "in making any decision, or otherwise taking action" from the first part of the second sentence so that it reads: "In addition, for the purposes of any of its competition functions under Part 1 of the CA98, the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable ('the duty of expedition')".
- 2.2 Similarly, there appears to be some repetition in footnote 7. We suggest removing "that are not subject to that duty" at the end of the second sentence.

3. THE SOURCES OF THE CMA'S INVESTIGATIONS

- 3.1 We agree with the addition of a note that points readers of Draft CMA8 to definitions contained in Schedule 8A to the CA98 (paragraph 3.9). We suggest that the reference is amended to say: "Definitions relevant to cartels are also set out in paragraph 4 of Schedule 8A to the CA98" (amendment emphasised). This would aid clarity and signposting.
- 3.2 Given the potential significance of the CMA's employee whistleblowing reporting tool, we recommend that a description of the tool is placed in a standalone paragraph, separate from the more general information on complaints. For transparency, the CMA could consider including a note that

further guidance on the tool, including on what happens if a report is made, is available on the CMA's website.

- 3.3 We suggest that Draft CMA8 also makes more prominent reference to the CMA's informant reward policy. This is currently contained in footnote 16 but would benefit from being moved to the body of Draft CMA8, e.g., in paragraph 3.15.
- 3.4 The reference to the maximum level of financial reward in footnote 16 should also be corrected to reflect the higher amount of GBP250,000 that now applies. Before finalising the guidance, we recommend that the CMA checks the link to the informant reward policy as it takes the user to the current CMA8 guidance, rather than the "Rewards for information about cartels" webpage.

4. WHAT THE CMA DOES WHEN IT RECEIVES A COMPLAINT

- 4.1 Figure 2, which gives an overview of the process from the receipt of a complaint by the CMA to the opening of a formal CA98 investigation, remains useful. However, the CMA could consider updating the chart to reflect the fact that under its employee whistleblower reporting tool, complaints may be made by employees (or ex-employees), as well as by businesses and consumers. The whistleblower reporting tool is mentioned in the "Chart descriptions" on page 84 of Draft CMA8, but not in the chart itself.

5. DUTY TO PRESERVE DOCUMENTS

- 5.1 Draft CMA8 sets out the CMA's interpretation of what documents will be "relevant to the investigation" for the purposes of the duty of preservation. This includes, for example, "background information", such as "information about conditions in the market in which the suspected infringement occurred" (paragraph 5.10). It appears that this could cover a huge range of different information and material and, in our view, is too broad an interpretation.
- 5.2 At paragraph 5.11, Draft CMA8 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 then notes that the scope of an investigation may change over time and may be extended to areas "initially adjacent" to the original investigation. Is the CMA suggesting that, in taking a broad view of relevant documents, a person should know or suspect that documents in areas or markets adjacent to an investigation are or would be relevant to an investigation? In our view, this could create a disproportionate and unreasonable burden. Footnote 31 states that in practice the CMA will typically communicate to the parties any change in scope as soon as possible. We suggest that it would be reasonable for a person to know or suspect that documents are relevant to an investigation that has been expanded in scope only after the CMA has informed the parties under investigation of the new areas of concern. The CMA could consider clarifying these points.
- 5.3 More generally, we suggest that paragraph 5.11 could benefit from some redrafting to aid clarity.
- 5.4 In paragraph 5.12, Draft CMA8 uses the terms "business" and "person" interchangeably. Given that the relevant statutory provisions refer to "person", we suggest, that for clarity and consistency, Draft CMA8 uses "person" throughout this section.
- 5.5 It would be helpful if the CMA were to include some worked examples of when the duty to preserve documents might be infringed. We appreciate that an example is contained in draft CMA4 (*Administrative Penalties: Statement of Policy on the CMA's Approach*), but additional practical examples in Draft CMA8 would aid understanding of the new provision.
- 5.6 Finally, Draft CMA8 does not cover certain other important elements of the duty to preserve documents. Reference to and/or additional guidance on the following points would be welcome:

- (a) The circumstances in which a person might know or suspect that an investigation by the CMA is being or is likely to be carried out (section 25B(1) CA98). There is some useful guidance on this in the Explanatory Notes to the DMCCA24 (paragraph 543). We suggest that the CMA includes some explanation along these lines.
- (b) The fact that (as defined in section 59 CA98), documents include information recorded in any form.
- (c) Section 25B(3) CA98, which provides that “the reference to concealing a document includes a reference to destroying the means of reproducing information recorded otherwise than in legible form”.

6. INFORMATION REQUESTS

- 6.1 Footnote 35 states that where a section 26 notice is addressed to an “undertaking”, the requirement to comply applies to the undertaking as a whole and not just the legal entity to which the notice is served. Our understanding is that this statement derives from the Court of Appeal judgment in *CMA v BMW AG*. If so, it would be helpful if this case is cited in the footnote.
- 6.2 Paragraph 6.2 describes how a section 26 notice may require the production of documents or information held outside the U.K. or may be given to a person outside the U.K. Footnote 37 cites section 44B(2)(b) CA98 as authority for the former, but there is no reference to the statutory provision relating to the latter (section 44B(2)(a) CA98). For transparency and accuracy, we suggest this is included in a new footnote 38.
- 6.3 More generally, our view is that Draft CMA8 would benefit from further description and explanation of the new provisions concerning the extraterritorial effect of section 26 notices. For example, paragraph 6.2 states that “[a] section 26 notice may also be given to a person outside the UK in the circumstances set out in section 44B(3) of the CA98”, but does not set out what these circumstances are, i.e., that the person’s activities are being investigated as part of a CMA investigation, or the person has a U.K. connection (and what will amount to a U.K. connection).
- 6.4 It would also be helpful if the CMA reconsidered the final sentence of paragraph 6.2. The guidance appears to be saying that, despite the section 44B(3) provisions, following the Court of Appeal’s ruling in *CMA v BMW AG* section 26 notices can be issued even where a person is not being investigated by the CMA and has no U.K. connection. Clarification of this point would be welcome.
- 6.5 In addition, the CMA should ensure that any guidance in Draft CMA8 on section 44B CA98 aligns with the guidance on section 109B of the Enterprise Act 2002 in draft CMA2 (*Mergers: Guidance on the CMA’s jurisdiction and procedure*) relating to the extraterritorial effect of section 109 notices, given that the provisions mirror each other.
- 6.6 We welcome the amendments to paragraphs 6.10 and 6.12, in particular the deletion of the statement that the CMA will only agree to an extension of a deadline for responding to an information request in exceptional circumstances. Given the huge numbers of documents that can be responsive to information requests, it is important that recipients are given a reasonable opportunity to request an extension where needed.
- 6.7 We appreciate that the proposed deletions in paragraph 6.15 are intended to reflect the DMCCA24 revisions to section 26A CA98, i.e., enabling the CMA to interview individuals regardless of their connection with a business which is a party to an investigation. However, for clarity we think it is important for Draft CMA8 to explicitly state that the CMA can require individuals to answer questions whether or not they have any connection with the business under investigation.

- 6.8 In footnote 47, we suggest that “party” should be replaced by “person”.
- 6.9 We welcome the inclusion of footnote 51, which explains in detail when an individual has a “current connection with” the relevant undertaking, and therefore when the undertaking will receive a copy of the notice that the CMA wishes to interview the individual.
- 6.10 Consistent with the approach elsewhere in Draft CMA8, we suggest that the CMA includes a reference to CMA4 (*Administrative Penalties: Statement of Policy on the CMA’s Approach*) in a footnote to paragraph 6.26, which discusses penalties.

7. COMMITMENTS ON FUTURE CONDUCT

- 7.1 Paragraph 10.17 sets out that a person who fails to adhere to commitments may be subject to a court order requiring compliance and/or a fine. It should be added that, for both consequences, the failure should be “without reasonable excuse” (as set out in sections 31E and 35A(1)(a) CA98).

8. STATEMENT OF OBJECTIONS AND DRAFT PENALTY STATEMENT

- 8.1 Draft CMA8 now states that the CMA will “normally” provide the Draft Penalty Statement at the same time as the Statement of Objections (paragraphs 11.7 and 11.15). The CMA notes in the consultation document that this reflects its practice. We understand that the CMA may wish to have some flexibility over the timing of the Draft Penalty Statement. However, it would be helpful if the CMA could indicate in which circumstances it might not issue the two documents together. In any event, we would urge the CMA to issue the Draft Penalty Statement promptly after the Statement of Objections in order to give the relevant business sufficient time to comment.
- 8.2 Paragraph 11.17 appears to contain a typo – it should state “Where a Draft Penalty Statement is issued...” (amendment emphasised).

9. SETTLEMENT

- 9.1 We welcome the CMA’s review of its settlement policy. An effective settlement process leads to significant efficiencies for both the CMA and businesses under investigation in the form of a streamlined administrative process, as well as resource savings.
- 9.2 We support the CMA increasing the potential discounts available for non-cartel conduct to 40% (pre-Statement of Objections) and 25% (post-Statement of Objections) (paragraph 14.30 of Draft CMA8). This will increase the incentives for businesses to settle such cases.
- 9.3 We agree that the definition of “cartel conduct” in Draft CMA8 should mirror the definition in the Leniency Guidance (OFT1495) (footnote 209). However, given the significant difference in potential settlement discount available for cartel and non-cartel conduct, we consider that, for full transparency, Draft CMA8 should set out in full the definition of “cartel conduct” rather than just refer to the Leniency Guidance. This will ensure that users of Draft CMA8 are aware of important parameters, e.g., that resale price maintenance falls under the definition of “cartel conduct” for these purposes.
- 9.4 We encourage the CMA to keep its settlement process under review, in particular to assess if it would be appropriate to increase the potential discounts available for cartel conduct at a future date.

Allen Overy Shearman Sterling LLP

12 September 2024