CMA Transition Team on behalf of the CMA
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11 November 2013

Dear Sirs,

**GC100 response to the Competition and Markets Authority guidance Tranche 2**

**Introductory remarks**

The GC100 is a forum for general counsel and company secretaries in FTSE100 companies to provide practical and business-focused input on key areas of legislative and policy reform relevant to UK listed companies. The GC100 has recently formed a competition working group to focus on the important area of competition law, given the considerable change that has been brought about by the Enterprise and Regulatory Reform Act ("ERRA") and the formation of the Competition and Markets Authority ("CMA").

The GC100 welcomes the opportunity to comment on the second tranche of CMA guidance and rules and the additional transparency that the consultation provides.

Please note, as a matter of formality, that the views expressed in this response do not necessarily reflect those of all individual members or their employing companies.

This response focuses on specific issues which are particularly relevant to GC100 members, namely the prosecutorial guidance for the cartel offence and the guidance on Competition Act 1998 ("CA98") investigations. We have not commented on other areas.

**Cartel Offence Prosecution Guidance**

The GC100 notes the Government's intentions behind UK competition reform as a key driver of economic growth, but it is crucial to avoid any dampening of legitimate commercial activity as a result of these reforms and increasing compliance costs of business unnecessarily as a result of unclear or partial prosecution guidance. During the legislative process significant concerns were expressed about the legal uncertainty and additional regulatory burden arising from the apparent widening of the offence. Reassurances were given at various stages (in particular by the Department for Business, Innovation and Skills) that this uncertainty would be removed, or at least significantly reduced, by prosecutorial guidance. The draft guidance does not achieve this, in our view.

The GC100 considers that the CMA can and should provide additional comfort that legitimate commercial activity will not be prosecuted and that what is prohibited is clearer to industry. There are a number of options that could achieve this. We propose that the CMA should indicate more clearly in the guidance whether it considers that it would be in the public interest to prosecute an individual for conduct that does not infringe civil competition law. Such comfort would have benefits for the CMA as well as reducing uncertainty and cost of doing business in the UK.

We understand that the CMA considers itself constrained from offering more detailed guidance – but other precedents as well as the House of Lords judgement in the *Purdy*[1] case suggest that the CMA has significant flexibility. In addition, the OFT has for a long time seen the advantages of giving clear advice to industry of what constitutes an offence and the conduct that they would see as the type they would prosecute. We would ask that the CMA do the same.

The GC100 is also concerned that the CMA appears to take a narrow interpretation of the "no intention to conceal" defences under sections 188(B)(1) and (2) of the Enterprise Act 2002, as amended ("EA02"). This could lead to prosecutions for conduct that is not within the spirit of the legislation.

**Effect of limited scope of guidance**

As mentioned above, the requirement to publish guidance on the "*principles to be applied in determining whether proceedings should be brought*"[2] was introduced by Parliament in response to concerns raised by business that the removal of the requirement to prove dishonesty would cause many common and legitimate commercial arrangements to potentially fall within the offence. Expectations were raised at the time the legislation was being passed that the guidance would allay concerns that arrangements which are not characterised as "hard core cartel activity" would not be prosecuted.[3]

As Lord Marland said during the Second Reading of the Bill in the House of Lords "*These provisions, which will take out of the cartel offence those arrangements which have been notified to customers or publicised in the prescribed way, will provide a safe harbour for*

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1 R (on the application of Purdy) (Appellant) v Director of Public Prosecutions (Respondent) [2009] UKHL 45

2 Section 190A EA02

3 The OFT has previously taken the position that only the most serious hardcore cartel activity would be prosecuted under the existing criminal offence. For example the OFT's former director of cartel enforcement, Adrian Walker-Smith, stated before the Enterprise Act 2002 came into force that:

"*... criminal prosecution will be reserved for the really hardcore cartels with evidence of deep dishonesty. We will not deploy the whole weight of a criminal prosecution because a few executives get merry at a trade association dinner and engage in foolish talk that is forgotten the next day. If, however, we go to the other end of the spectrum and what we have is executives travelling specifically to a trade association meeting where there is a fictitious agenda and a fictitious set of minutes and the only purpose of the meeting is to collude on prices, then we should and we will prosecute the individuals*." Quoted in Michael O'Kane, *The Law of Criminal Cartels: Practice and Procedure*, OUP, 2009, page 33.

*those businessmen engaged in legitimate commercial behaviour. Further comfort will be provided by prosecutorial guidance and by the statutory defences in the Bill."*[4]

Similarly, the Department for Business Innovation and Skills stated in a note responding to similar concerns submitted by the CBI that "*[i]f needed, additional certainty could be achieved through the publication of prosecutorial guidance to make clear that individuals will not be prosecuted for their involvement in legitimate business arrangements*", and "*[i]f additional certainty to business that such inadvertent failures [to publish or disclose in accordance with applicable exemptions] would not lead to undue prosecutions is needed, this could be achieved through the publication of prosecutorial guidance committing that individuals involved in such legitimate arrangements would not be prosecuted. The position in the US may be instructive in this respect. To our knowledge, the US cartel provisions are all-encompassing and would, in theory, catch 'every contract or combination … in restraint of trade'. However, as we understand it, the US attorney's manual and Department of Justice statements make it clear that prosecution is reserved for hardcore 'per se' violations (essentially horizontal price fixing, bid rigging and market or customer allocation). Together with case law developments, this guidance has presumably proven sufficient for business to operate with certainty under the US rules and ensured that the broad wording of the cartel provisions do not 'chill' business or innovation."*[5]

Whilst we appreciate that the CMA is most likely to target hardcore cartels for prosecution, the limited scope of the guidance gives cause for material concern among members. Particular concerns arise because there remain a wide range of legitimate agreements which could technically be captured by the offence, for which the guidance does not provide sufficient reassurance that they will not be prosecuted. Just one example is agreements that are exempt under civil competition law because they are block exempted. This gives rise to a number of significant issues:

- **Legal uncertainty for business.** This is likely to be a particular burden on small businesses and non-specialist advisers, which are more likely to rely on what the guidance says "on its face" than on specialist competition advice or on their knowledge of the CMA's intentions in practice. There is also an issue of how CMA policy is differing from previous OFT policy in this area and what, if anything, business should stop doing which hitherto they have been involved in legitimately.

- **Practical difficulties for the CMA and for in-house legal teams.** The uncertainty about whether legitimate agreements may be prosecuted could lead to repeated notifications to the CMA or requests for legal advice on the same categories of clearly legitimate agreements. We recognise that in novel or potentially borderline cases, it is advantageous to incentivise business people to approach their in-house legal teams or disclose to the CMA. However where clearly legitimate agreements of the same type are entered into on a regular basis, but would otherwise risk falling within the offence, this runs the risk of adding to compliance costs for business and creating bottlenecks in in-house legal teams. We would also suggest that it is not in the best interests of the CMA to have to sift through many repetitive notifications of

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[4] Second reading of the Enterprise and Regulatory Reform Bill in the House of Lords (14 November 2012)

[5] A note on the application of the amended cartel offence to certain types of restricted agreements, Department for Business Innovation and Skills, 20 June 2012

clearly legitimate behaviour, rather than focusing on notifications that may give rise to a genuine question of compliance with civil competition law. Indeed, this practice of multiple notifications and discussion with regulators was just the type of activity the OFT were keen to reduce and which led to the publishing of detailed industry guidance several years ago, given the long delays created by authorities approving and commenting on various commercial arrangements.

- **Undermining compliance programmes within firms.** Clarity is particularly important to support compliance programmes. As the CMA recognises, most firms want to comply with competition law and the efforts of in-house compliance teams can have a very significant "multiplier effect" on the CMA's enforcement and advocacy work. Conversely, lack of clarity undermines those initiatives and has a negative impact on perceptions of the competition regime.

- **Money laundering compliance issues.** Without further guidance there is a serious risk that otherwise legitimate commercial conduct could be characterised as criminal activity under the money laundering regulations. This could create significant difficulties for businesses in regulated sectors where only an objective suspicion is required to report and/or seek consent to transact.

Accordingly, we consider that the prosecution guidance should provide more comfort that only hardcore cartel activity will be prosecuted, allowing businesses to continue legitimate commercial activity. If this is the CMA's intention (as paragraph 2.2 of the consultation document appears to indicate) then we can see no reason why the CMA should not provide additional comfort in the prosecution guidance.

GC100 proposes that an appropriate formulation could be to include the following in the factors relevant to the public interest test:

> "If, on the evidence available, the relevant agreement appears *prima facie* not to fall within the Article 101(1) TFEU or Chapter 1 Competition Act 1998 prohibitions, or (if it does appear to fall within those prohibitions) it appears reasonable to conclude that Article 101(3) TFEU or the exemptions in Chapter 1 of the Competition Act 1998 would apply to the agreement, this would be a very strong factor weighing against prosecution."[6]

**CMA has flexibility to provide additional comfort**

*Precedents suggest that CMA can go further*

We recognise that the CMA operates within the legislative framework set by Parliament, and is restricted from creating new exclusions or immunities not envisaged in the legislation.

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[6] The primary reasons for setting the "plausibility" threshold for exclusions and exemptions are: (a) in cases where there is material doubt about whether, for example, the conduct would have fallen within a block exemption or been justified on efficiency grounds, we do not consider that it would be in the public interest to bring a criminal prosecution – such prosecutions being reserved for clear-cut hardcore cartel behaviour; and (b) this would not require a firm decision on the application of exclusions or exemptions and may reduce the extent of any economic analysis required.

However there are precedents suggesting that the CMA could go further than the draft guidance does in explaining the factors that will bear on its decision as to whether a prosecution in any case would be in the public interest. For example, the Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide provides detailed guidance on the factors relevant to the public interest stage of the test.[7] This more detailed guidance was specifically required by the House of Lords in the *Purdy* case in large part because it considered that the lack of more specific guidance led to legal uncertainty in the application of the relevant offence; this reasoning would apply by analogy to the broadened criminal cartel offence.

We do not consider that providing additional comfort would conflict with Parliament's legislative intention – in fact it is consistent with it. Parliament specifically restricted the power to institute or consent to proceedings for the cartel offence in England and Wales or Northern Ireland to the Director of the SFO or the CMA, and required the CMA to publish the prosecution guidance. As is clear from the Hansard extract above, in doing so its intention was to provide additional comfort that only hardcore cartel activity would in practice be prosecuted.

*Practical issues can be overcome*

There may be some practical considerations if the CMA were to give greater comfort concerning conduct that does not infringe civil competition law, but we consider that they are manageable. We would be happy to discuss any specific concerns the CMA may have with a view to finding a workable solution.

We have identified the following hypothetical practical considerations:

- providing additional comfort may necessitate consideration of economic evidence in criminal cases;
- it could mean that analysis of a civil infringement would precede a criminal prosecution; and
- it could also mean that both the CMA and the European Commission consider whether the same conduct could constitute a civil infringement.

As set out below in more detail, we do not consider that any of these are insurmountable.

*Economic Evidence*

The prosecution guidance already suggests that the CMA may consider the seriousness of any harm or potential harm caused by the cartel, which may include an "*assessment as to the potential impact… on any particular market or the risk of that impact, the degree of limitation on customer choice… and the potential for the cartel to raise prices or restrict the supply of goods or services*".[8] This is an economic assessment. We do not consider that it would impose a significant or disproportionate additional administrative burden on the CMA

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[7] See http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html

[8] Para 4.33 Guidance

to assess whether it is plausible that an exemption may apply.[9] Moreover, as the CMA notes in para 4.30 of the guidance, the "*public interest factors relate to matters which are not elements of the offence that need to be proved before a jury*". Many of the arguments for excluding consideration of economic issues (i.e. that juries would have difficulty following the arguments) do not therefore apply to the decision whether to prosecute.

*Relationship with Civil Proceedings*

We recognise that the CMA will have to reflect, among other things, different approaches to evidence gathering and disclosure in a criminal case compared to a civil case. However this need not prevent the CMA from basing its public interest decision on, for example, whether *prima facie* there appears to have been a civil infringement. It also appears implausible that any efficiencies justification could apply (as is reflected in the suggested formulation above). By contrast, not taking the civil law into account at all would be to accept that the CMA may prosecute individuals for the criminal cartel offence in circumstances where there had been no civil infringement – clearly an undesirable outcome.

*Relationship with EU Proceedings*

Similar principles would apply in relation to the potential for parallel enforcement by the CMA under criminal law and the European Commission under civil law.

We note in addition that the Government expressed concerns during the consultation process and in Parliamentary debate on amendments to the cartel offence that providing additional safeguards to the offence could lead to it being characterised as national competition law, and that this could, as a result of the application of Regulation 1/2003, prevent the CMA from prosecuting individuals for the cartel offence where the European Commission launches a civil investigation.[10]

We do not consider that additional comfort about the CMA's application of the public interest test would create such risks:

- The proposed comfort above would not constitute a decision on civil competition law. It concerns only the public interest factors the CMA will take into account when considering whether to institute a prosecution for the cartel offence. Moreover, under the formulation set out above the thresholds used in the public interest test would be different to those that would be applied in an administrative decision on the civil infringement, referring as they do to "*prima facie*" grounds for believing

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[9] Note in addition that if the CMA is investigating an allegation of criminal cartel conduct, either it or the European Commission is highly likely also to consider this type of evidence in a civil investigation into the relevant undertakings.

[10] See paragraphs 6.31, 6.39 and 6.48 of the Government consultation (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf), paragraph 7.3 of the Government response to consultation (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf), and the response from Norman Lamb on 10 July 2012 to a proposed Labour amendment to the Enterprise and Regulatory Reform Bill which would add the words "with the intention of substantially reducing competition" to the cartel offence.

that the agreement would not fall within Article 101(1), or a "reasonable" conclusion that the 101(3) exemption would apply.

- As the Court of Appeal found in the *IB* case[11], "*[w]hen one reads the Modernisation Regulation as a whole, it is plain that it is concerned with the direct enforcement of Articles 81 and 82, that is to say with decisions whether agreements (etc) are valid or rendered invalid for infringement of those articles. The concern of the EU, plainly and understandably, is with avoiding the risk of 'limping' agreements, which are enforceable in one jurisdiction and not in another, and with ensuring that the same standards are applied throughout Member States to the question whether there has or has not been an infringement.*" By contrast, the cartel offence applies to the conduct of individuals and does not affect the validity of agreements.

- The cartel offence is not coextensive with the Article 101 prohibition. It is in some respects wider – for example since it technically could apply to conduct that would satisfy Article 101(3) - and in others narrower – since it applies only to a subset of anticompetitive horizontal agreements that are not made openly.[12] The CMA's public interest test prior to instituting a prosecution is not a part of the offence.

- By definition, the application of the public interest test as a filter to prosecutions could not cause the CMA to prohibit agreements that the European Commission or other national competition authorities permitted, so the risk of "limping agreements" would not arise (its effect would be the opposite – to reduce the possibility of criminal prosecution for agreements permitted by those other authorities).

**Interpretation of "no intention to conceal" defence**

We suggest that the guidance could be clearer on how the CMA assesses (at the evidential stage) whether individuals intended that the nature of the arrangements would be concealed from customers and/or the CMA. In particular, we are concerned that the CMA may be interpreting this defence unduly narrowly.

This defence aims to provide legal protection for arrangements which are not characterised by the "*clandestine conduct*" (para 4.37) which is typically a feature of cartels.

In the House of Lords[13] it was stated that this defence was included in response to concerns that arrangements of a type which are well known in the market and to customers could be caught by the offence when what distinguishes "hard core cartel" activity from legitimate behaviour is that it is "*clandestine to a high degree*"[14]: Viscount Younger continued:

> "*That is where the bar is set. Those responsible meet in secret, use code words and communicate through unofficial channels, thus bypassing a company's normal procedures. This element is already recognised in the Bill by the provisions that take*

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11 IB v The Queen [2009] EWCA Crim 2575 (http://www.bailii.org/ew/cases/EWCA/Crim/2009/2575.html)

12 See further paragraph 7.30 of the Government's response to consultation on options for reform.

13 Report, 26 February 2013.

14 Hansard, 26 February 2013 (Viscount Younger of Leckie).

*outside the offence arrangements that are disclosed to customers or publicised. We therefore think it appropriate to give further comfort in relation to the offence by providing individuals with a defence that they did not intend to conceal the nature of the cartel arrangements from customers or prosecutors, or that before making or implementing such arrangements they took reasonable steps to disclose them to professional legal advisers for the purpose of obtaining legal advice*."

We welcome recognition by the CMA of this central feature of "*hard core cartel conduct*" in the Draft Guidance when discussing the public interest stage of its decision whether or not to prosecute:

> *"The greater the degree of evidence of clandestine conduct and of conscious participation in a hardcore cartel, the more likely it is that a prosecution will be required. Conduct such as deliberate concealment, covert behaviour or misrepresentation are likely to be relevant."* (para 4.37)

However, the Draft Guidance appears to draw a stricter line in its discussion of evidence that may be relevant to this defence at the evidential stage. It appears to require evidence of an intention to notify customers or the CMA of the arrangements (para 4.23). This is not consistent with the policy set out above.

Moreover, this interpretation is not consistent with the differing construction of the section 188B(3) defence, which does require the individual to have taken reasonable steps to ensure disclosure to legal advisers. Had Parliament intended that active notification (or intention to notify) was required to satisfy the section 188B(1) or 188B(2) defences, it would have employed a similar construction for those defences.

We suggest that the defence should be available where there is evidence that the accused did not actively intend to conceal the arrangements from customers or the CMA, such evidence to be assessed in the round. Relevant evidence could include (in addition to evidence of any attempts by an individual to bring the arrangements to the attention of the CMA) whether the arrangements were:

- of a type that customers were aware of and accepted;
- disclosed to other Governmental or regulatory bodies;
- disclosed to other advisers, such as auditors;
- publicised in trade press;
- openly discussed within the company, or subject to standard company approval procedures;
- standard market practice; or
- not subject to abnormal levels of secrecy (e.g. use of code words, secret meetings etc).

We consider that such a position is consistent with the intended policy discussed in Parliament.

**Competition Act Investigation Procedures and Rules**

Our comments in this section of the response are focused on the following:

- the power to questions individuals;
- interim measures;
- publicity of investigations; and
- settlement.

**Power to question individuals**

It is helpful to have guidance on the CMA's policy for use of its powers to question individuals. However we have concerns about the CMA's proposed approach to use of these powers. We consider that the ability to question individuals is a powerful new tool that should be used appropriately in a way that does not undermine a company's rights of defence in CA98 investigations.

*Legal advice*

We consider that the draft guidance provides scope for undue restrictions on the ability of individuals and companies to obtain legal advice and exercise their rights of defence, in particular in choosing the identity of their legal adviser and the time available for the legal adviser to attend the interview.

It is clear that obtaining legal advice during CA98 investigations is crucial for both individuals and businesses.

- **Individuals** - although the CA98 provides for restrictions on the use of evidence obtained during questioning in proceedings against individuals, they may face reputational, employment and financial consequences as a direct result of the evidence they are required to provide. Most individuals will not understand their rights when being questioned without legal advice (e.g. in relation to privilege).

- **Businesses** - since an individual's conduct may be imputed to the business or used in an investigation for an alleged infringement by the business, they will need to know that the individual has appropriate legal advice. Moreover, since the individual may potentially disclose the business's privileged or confidential information, it is critical that the business's legal adviser attends the interview.

*Restrictions on ability to choose legal advisers*

We are concerned that the guidance purports to restrict the ability of an individual to choose their own legal advisers. The guidance suggests that the CMA would only permit legal advisers who are also acting for the undertaking to be present at the interview where the CMA was "satisfied" that their presence would not increase any risk of the falsification or concealment of evidence, the contamination of witness evidence, or the reduction of

incentives for individuals to be open and honest.[15] It is not clear what the CMA would require in order to be satisfied as to those risks, on what basis or how the business or advisers could be expected to provide that before the interview commences, particularly in a dawn raid scenario.

We consider that not permitting the individual to be represented by the company's legal adviser could cause significant practical difficulties, as set out below. But more importantly we consider that the CMA is approaching this issue from the wrong starting point.

In CA98 investigations, it is unlikely in most cases that there could be any conflict of interest between individuals and companies so there is no apparent reason to require separate legal representation or to deny the company's legal advisers access to such interviews.

We do not consider that the risks to which footnote 88 of the guidance refers would in practice justify preventing an individual from being represented by the undertaking's legal advisers. The CA98 provides adequate mechanisms to address these risks and to take action against anyone disrupting the CMA's investigation. In particular:

- S.43 CA98 makes it an offence to destroy, falsify or conceal documents;
- S.44 makes it an offence knowingly or recklessly to provide false or misleading information to the CMA, or to another person knowing that the information is to be used for the purpose of providing the information to the CMA; and
- the CMA has the power to impose an administrative penalty on any person who fails to comply with a requirement to answer questions during interview, if that requirement is validly imposed (this does not mean, for example, that the interviewee is obliged to disclose legally privileged information in order to be "open and honest in their account").

We do not consider that preventing an undertaking's legal adviser from being present during interviews would be a proportionate response to these perceived risks in most cases. If CMA were to maintain its position that it is able to restrict such advice, then this should be strictly limited to circumstances in which either:

- the interviewee objects to presence of the undertaking's legal adviser; or
- there are clear grounds for believing that risks would be significantly increased in that specific case (for example because the CMA has reason to believe that document destruction or witness interference has taken place or the undertaking has obstructed the inspection), and there are no less intrusive measures that could mitigate those risks.

It is also very important that businesses are aware of the evidence against them as soon as possible if they are to consider leniency or settlement discussions. This would be best achieved by their legal advisers being present during interviews. (Where the individual does not wish the undertaking's legal advisers to be present, it should be achieved by providing the undertaking with a recording or transcript of the interview at the earliest possible opportunity.)

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[15] Para 6.28 and footnote 88 Guidance

If the CMA were to prevent the undertaking having access to evidence provided during questioning until a later stage, such as at the Statement of Objections stage, this will risk prejudicing the undertaking's ability to apply for leniency or settlement, which could lead to increased costs and administrative burden both for the undertaking and the CMA.

The proposed approach could also lead to unwarranted inconsistency in the treatment of written and oral evidence, given that usual practice is to allow undertakings to make copies of written information taken during dawn raids.

In a dawn raid context, requiring individuals to obtain separate legal advice could also delay the interview, since it will necessitate finding and instructing those advisers, and for them to travel to the relevant site.

Finally, for any interview, requiring separate legal advisers will materially increase the costs associated with the investigation. If borne by the company (assuming that the CMA permits this), this will increase overall costs. If the company cannot or does not fund separate legal advice, there is a significant risk that individuals will be unable to afford, or otherwise unwilling to pay for, the specialist advisers required. This could seriously prejudice the position of both the individual and the business.

*Allowing sufficient time for legal advisers to attend*

Given the above, it is essential that individuals have a sufficient opportunity to obtain legal advice. We do not therefore consider that it would be appropriate for the CMA to require an individual to answer questions without the individual's chosen legal advisers present simply because the CMA considered that this would lead to an "unreasonable" delay.[16] Allowing sufficient time for the individual's legal adviser is crucial to protect both the position of the individual and the business. Any other approach would be disproportionate.

*Copies of recordings/ transcripts/ notes*

As noted above, it is important that if the undertaking's advisers are not present during an interview, the undertaking should be given a recording or transcript of the interview at the earliest possible opportunity in order to allow it to consider leniency or settlement discussions. This is reasonable and is consistent with current practice for documentary evidence taken during raids.

In addition, the company may wish to correct any inaccuracies in the responses in order to ensure that the CMA's evidence is accurate and that the company is cooperating fully with the investigation.

However, it is currently unclear at what stage the undertaking would be given access to interview transcripts.[17] We consider that it should be clarified that transcripts will be provided to the undertaking at the earliest possible opportunity after the interview (especially if the company's advisers have been excluded from the interview for a particular reason).

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16 Para 6.28 Guidance

17 See footnote 86 of the Guidance

We would also point out that even where the interviewee no longer has a connection with the business (for example former employees), the information they provide may still be confidential information protected by the CA98. Therefore the CMA should allow the business to make confidentiality submissions in respect of that information (as well as affording it access to any inculpatory or exculpatory evidence provided during the interview).

*Connection with the business*

We are concerned that the guidance on "connection with the business" may exceed what is provided for in the CA98. In particular, we note that "advising" a business is not the same as being concerned in the management or control of, or of being employed by or otherwise working for, the business. This also appears to go further than the explanatory notes to the ERRA, which note that "*This [definition] includes volunteers or contractors*".[18] It does not refer to professional advisers.

Any interview of professional advisers would also create significant confidentiality and/or privilege issues. As the legislation does not specifically refer to professional advisers, they may be obliged by both their contract with the client and/or their professional rules to refuse to provide confidential information on this basis.

To the extent that the CMA is concerned that professional advisers may themselves be implicated in the arrangements, the CMA would have scope to investigate those advisers directly and to ask questions of individuals with a connection to those advisory businesses.

Secondly, should the CMA maintain its position that advisers can be subject to its questioning powers, it would at minimum need to allow the business's legal advisers to attend the interview or have immediate access to the evidence provided in order to identify privileged or confidential information.

**Interim measures**

We welcome the CMA's commitment to proportionality given the potentially significant impact of interim measures at a time when no infringement has been established.

We note that the CMA states in para 8.12 of the guidance that it will consider taking particular action only where "*it has identified specific behaviour or conduct that it considers [on the balance of probabilities] is causing or will cause significant damage*". However the guidance suggests in paras 8.13 and 8.14 that in assessing the need for interim measures, the CMA will consider "*the effect the conduct is having or may have*", and that "*[d]amage will be significant where a particular person or category of persons is or may be restricted in their ability to compete effectively…*".

We consider that it would be helpful to clarify that the test for availability for interim measures should be whether they are necessary to prevent significant damage that the CMA considers, on the balance of probabilities, is occurring or will occur, since the use of the word "may" could imply a lower standard of proof, which we do not consider can be justified (if this is what was intended).

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[18] Para 317 ERRA Explanatory Notes

**Publicity**

We note the CMA's new power to publish specified information in a case opening notice, including the names of the parties and a summary of the suspected infringement, with absolute privilege from defamation. As the CMA will appreciate, there would be a significant reputational impact of being named, at a time when an infringement has not been established, and it may be that no infringement has taken place.

We therefore agree with CMA's apparent starting point that businesses should not generally be named in case opening notices.[19] However we would request further clarity as to whether the CMA has lowered the OFT's current bar for naming parties. For example, whilst the consultation document states that "*the CMA will continue with the OFT's current practice of naming parties to an investigation only in appropriate circumstances*"[20], the OFT's previous guidance stated that it would "*not publish the names of the parties under investigation in the case opening notice other than in exceptional circumstances*".[21]

In addition, the guidance includes an additional ground for publishing the parties' names compared to the current OFT guidance, where parties' involvement in the investigation is "*subject to significant public speculation (and the CMA considers it appropriate to publish details of the parties in the circumstances)*".[22] We are concerned that this could create an incentive for media speculation or rumours in order to pressure the CMA to publish the parties' names. It is not apparent that this is required given that the CMA already notes that it may publish the names of the parties under investigation at the request of the parties or where the CMA considers that the level of harm to consumers or other businesses from parties remaining unidentified justifies disclosure.

**Settlement**

We welcome the helpful transparency in the guidance concerning the CMA's settlement process. However we question whether the CMA's proposal in paragraph 14.8 of the guidance to enforce a decision which an appellant court had found to be invalid is appropriate. The legal effect of a successful appeal by a third party was at issue in the Court of Appeal's judgement in Deutsche Bahn AG & Others v Morgan Crucible Company PLC & Others.[23] Since that judgement is currently subject to appeal to the Supreme Court, with the hearing scheduled for March 2014, we would suggest that the guidance does not take a position on this point pending the outcome of that appeal.[24]

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19 Para 5.9 Guidance

20 Para 3.14 Consultation; para 5.9 Guidance

21 Footnote 44 OFT Guidance

22 Para 5.9 Guidance

23 [2012] EWCA Civ 1055. See for example para 17 of the judgement, available at http://www.catribunal.org.uk/files/1173_Deutsche_Bahn_Court_of_Appeal_Judgment_310712.pdf

24 See http://www.catribunal.org.uk/237-6896/1173-5-7-10-Deutsche-Bahn-AG--Others.html for further details of the case.

Yours sincerely

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