RESPONSE OF CLIFFORD CHANCE LLP TO THE COMPETITION AND MARKETS AUTHORITY CONSULTATION ON DRAFT REVISED GUIDANCE ON INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES

Clifford Chance LLP welcomes the opportunity to respond to the consultation on the draft revised guidance on the investigation procedures of the Competition and Markets Authority (**CMA**) in Competition Act 1998 (**CA98**) cases. Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on antitrust investigations for a diverse range of clients, and across a large number of jurisdictions. However, the comments below do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Question 1: Do you agree with the proposed changes to the Current Guidance on complaint handling?

1. We understand that the formal complainant status was intended to reflect the judgment of the Competition Appeal Tribunal (**CAT**) in the Pernod Ricard case.[1] That judgment establishes that, in comparable cases, the CMA's discretion should normally be exercised in favour of disclosure of a non-confidential version of the Statement of Objection (**SO**) and of giving a complainant the opportunity to submit its views before a decision is taken not to investigate the complaint any further. We assume that the CMA will continue to respect third party rights. However, the guidance is now less clear on the circumstances which will be treated as "comparable" to those in Pernod Ricard.

2. In addition, paragraph 3.22 of the revised guidance indicates that complainants may receive a non-confidential version of the SO or a draft case closure letter "where certain circumstances are met". We assume that this refers to the circumstances described in paragraphs 10.4 and 12.6-12.8, in which case these paragraphs should be cross-referenced.

Question 2: Do you agree with the proposed changes to the Current Guidance on information handling?

3. The revised guidance proposes to make a "streamlined approach" to disclosure the "normal or typical mode". We have a number of concerns with that proposal. In particular, our experience is that the "streamlined" approach has considerable potential to reduce the efficiency of access to file - not (as the consultation document asserts) to increase efficiency – for the following reasons:

   (a) The CMA is not best placed to identify exculpatory documents, and so often omits these from the list of "key documents" that it discloses. For example, in one case on which we advised, around a third of the documents that were relied in the response to the SO were not contained in the CMA's list of key documents. Where access to file is negotiated in parallel with the process of drafting a response to the SO, parties must therefore review the key documents, then submit "reasoned requests" for additional documents, before reviewing all the

[1] Pernod Ricard [2004] CAT 10, paras 238 - 239.

disclosed evidence in the round (including re-reading the key documents) and requesting appropriate extensions to the deadline for responding to the SO. Each of these additional rounds of requests and reviews creates additional and unnecessary costs and delay. Instead, parties under investigation should be free to read the SO, then read the file and then draft their response with a complete understanding of the evidence base.

(b) The CMA is increasingly bringing cases on the basis of parental liability against the previous or new shareholders of a business. In some cases, the business in question was sold a number of years ago and the former shareholder no longer has access to information about the company. New shareholders may also have limited information about past conduct (particularly if there has been a change of management). The rights of defence of such shareholders are distinct from those of the company itself. In such cases, the CMA's file may be the only source of information which allows the shareholder to exercise its rights of defence, and a high-level index may not give a business a reasonable opportunity to assess whether a given document may be relevant to its defence. In addition, such former or current shareholders are expected to complete the process of reviewing disclosed documents, requesting additional documents and responding to the SO within the same time frame as other parties. In such cases, we consider that the CMA ought to be prepared to disclose a limited set of key documents prior to the issue of the SO, in order to put former shareholders on a more equal footing with other parties under investigation.

(c) Requiring addressees to make reasoned requests for additional documents on the file (paragraph 11.22 of the revised guidance) is inconsistent with their unfettered right to inspect documents "that relate to the matters referred to in the [SO]", to the extent that they do not contain confidential information or are internal documents (Rule 6 of the CMA's CA98 Rules). Given that, in practice, all the documents on the CMA's file will have the requisite relationship to matters referred to in the SO, conditioning access to those documents on the submission by parties of justifications for such access would be a clear breach of their statutory rights of defence.[2] Moreover, our experience is that the "detailed list" of all the documents on the CMA's file (paragraph 11.21(b) of the revised guidance) is often not sufficiently detailed or organised for the parties to be able to understand their potential significance.

4. We therefore consider that a better and more efficient system would be for the CMA to offer the parties a choice well in advance of issuing the SO, so that they can make a properly informed choice as to whether to accede to the CMA's "streamlined" process or request access to the complete file (subject to an appropriate confidentiality ring). If parties do agree to a streamlined procedure, paragraph 7.8 should make it clear that the CMA will only request confidentiality representations on the documents held on its file if and when those documents are requested by another party under investigation.

5. We also consider that the CMA's current approach towards confidentiality rings and data rooms (as outlined in the revised guidance) gives rise to various inefficiencies. In

[2] That the CMA is required only to offer a "reasonable opportunity" to inspect such documents does not allow it to limit the scope of documents disclosed, only the way in which it does so.

particular, confidentiality rings often apply to large volumes of documents, which may still be redacted, and only cover external advisors. Further applications must then be made to extend the scope of the confidentiality ring, to request unredacted versions of the documents and to release redacted versions from the confidentiality ring in order to allow external advisors to obtain instructions. A more sensible approach would be to operate a strong default rule that material will be disclosed, at least into confidentiality rings, on an unredacted basis. In addition, given the ethical obligations to which in-house counsel are subject, the CMA's default position of hostility towards their inclusion in the confidentiality ring is unreasonable.

6. We also consider that the CMA should reconsider the reasonableness of some of the restrictions and obligations in its standard form confidentiality agreements, in order to reduce the resources that are inevitably required to negotiate the tempering of their most excessive aspects (e.g. those that restrict the locations at which documents may be accessed irrespective of the security measures in place, and the excessive penalties in the event of minor and inadvertent technical breaches of the restrictions).

Question 3: Do you agree with the proposed changes to the Current Guidance on interim measures (described in Chapter 5)?

7. The revised guidance provides for a streamlined access to file procedure for parties against which interim measures are proposed to be imposed, with paragraph 8.9 of the revised guidance indicating that a party will be required to request additional documents "where necessary for its rights of defence". This gives rise to a similar objection to the one outlined in paragraph 3(c) of this response. Rule 13(1) of the CMA's CA98 Rules gives parties an unfettered right to "inspect the documents in the CMA's file relating to the proposed direction" to the extent that they are not confidential or internal.[3] Requiring parties to demonstrate the "necessity" of access to such documents would therefore breach their statutory rights of defence.

8. A potential addressee of interim measures must have the opportunity to make meaningful representations to the CMA on the basis of its right to full access to the file, particularly given the substantial harm it may suffer as a result of the interim measures. In this light, while the introduction of a declaration of truth appears appropriate, such a declaration cannot, of itself, discharge the CMA's duty to consider all the relevant facts or allow the CMA to make less use of its compulsory powers to gather sufficient evidence.

Question 4: Do you agree with the proposed changes to the Current Guidance on engagement with the parties (described in Chapter 6)?

Draft penalty statement (paragraphs 12.29-12.36 of the revised guidance)

9. We have concerns about the proposal to restrict oral hearings on the draft penalty statement to a telephone call or video-conference (paragraphs 12.31 of the revised guidance). Penalty issues often raise significant issues of both fact and law, particularly in cases involving novel or unusual applications of the law, such as the recent pay-for-delay and excessive pricing cases. In our experience, parties under investigation view

[3] That the CMA is required only to offer a "reasonable opportunity" to inspect such documents does not allow it to limit the scope of documents disclosed, only the way in which it does so.

being able to make their representations to the Case Decision Group (**CDG**) in person as an important component of their rights of defence.

10. Similarly, we consider that an oral hearing at which the full CDG is not represented (paragraph 12.31 of the revised guidance) would be inadequate and would undermine the concept of a CDG. The opportunity for parties have a right to make their points directly to all the decision-makers on their case is instrumental in ensuring that they feel they have been treated fairly.

Deadlines for responding (paragraph 12.2 of the revised guidance)

11. The removal of the guidance on the time period for providing written representations on the Statement of Objections potentially reduces legal certainty. Such time periods are not published, making it is extremely difficult for parties to predict the approach which the CMA will take on an important procedural issue. The wording in the existing guidance provides the CMA with an appropriate degree of flexibility.

12. In addition, given the nature of the streamlined process for access to file proposed by the CMA, the suggestion that parties provide requests for extensions at the time the deadline is set (i.e. prior to even being able to review the entire file) is unrealistic and disproportionate.

State of play meetings (paragraph 4.9 of the revised guidance)

13. Paragraphs 4.9 and 4.10 of the revised guidance now provides that the case team "may" (rather than "will") share its provisional thinking on a case and that it will "be able" to do so at the State of Play meeting before the issue of an SO. This implies that it might not share its provisional thinking at a pre-SO meeting (even if it is able to) and that it will not be able to do so at an earlier stage.

14. In our view, both of these positions would reduce procedural efficiency. The sharing of provisional thinking at State of Play meetings is an important means of ensuring that parties have a degree of transparency regarding ongoing investigations, which may take several years. In fact, case teams will typically have formed some initial views at a relatively early stage in the investigation. Refusing to discuss those views, as a default position, at the initial State of Play meetings prevents the parties under investigation from being able to correct any misapprehensions on the part of the case team. Such misapprehensions can lead to a significant drain on the CMA's resources if they cause case teams to pursue pointless lines of inquiry. Case teams should therefore update the parties as to their provisional thinking at both the initial State of Play meeting and each subsequent State of Play meeting.

15. In addition, paragraph 9.9 of the revised guidance now provides for the possibility that the Senior Responsible Officer (SRO) will not attend a State of Play meeting. Given that it is the SRO who is the decision maker for key matters such as the issue of the SO, we consider that approach to be misguided, for the same reasons as those described in paragraph 14 above.

Involvement of complainants and third parties in investigations

16. The revised guidance largely removes references to the involvement of third parties who are not complainants in investigations, with the exception of paragraphs 12.6-12.10. The CMA is, however, increasingly undertaking investigations which have the potential to adversely affect the rights of third parties. For example, in excessive pricing cases under Chapter II, action taken by the CMA to require a dominant provider to reduce its prices may also adversely affect new entrants.

17. It is questionable whether the CMA can determine those third parties which are "directly and materially affected by the outcome of the CMA's investigation" by applying the same criteria as are applied to complainants.[4] Such an approach would deprive third parties which are adversely affected by the CMA's proposed intervention of procedural rights. The previous guidance recognised that at the SO stage, the category of third parties which may be "materially affected" could also encompass "third parties who are positively affected by the agreement/behaviour in question".[5] This is consistent with the approach of the European Commission and is an approach which should, in our view, be continued.

Question 5: Do you agree with the proposed changes to the Current Guidance on commitments (described in Chapter 7)?

18. The revised guidance notes that commitments will be accepted "only in cases where the competition concerns are readily identifiable". Commitments are, however, often used by the European Commission in cases where the competition concerns are novel or not so obvious as to merit a fine. Limiting the use of commitments to clear-cut cases, therefore, appears overly restrictive.

19. Similarly, footnote 150 of the revised guidance excludes the possibility of commitments in excessive pricing cases, and incorrectly includes them in the category of cases which the CMA considers "are most likely by their very nature to harm competition".[6] The case law of the courts and the decisional practice of the CMA and its predecessors offers very little guidance on the precise point at which pricing will become excessive, focusing only on the pricing policy that was adopted by the undertaking under investigation. The CMA ignores the fact that price increases may provide a signal for new entry, thereby promoting, rather than harming, competition. There is, therefore, no basis on which the CMA can conclude *a fortiori* that excessive pricing is likely to harm competition and should never be the subject of commitments.

20. In cases in which the CMA is advocating a novel theory of harm, clear guidance is invariably useful. This is particularly likely to be the case during the period immediately after Brexit. As such, the CMA's approach of adopting reasoned decisions in adopting commitments (e.g. in the commitments accepted in relation to MFN clauses

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4 As proposed in paragraphs 12.6 (including footnote 192) and 10.4 of the revised guidance.

5 *Involving third parties in Competition Act investigations* (OFT451), footnote 21.

6 Excessive pricing is in fact likely to stimulate competition, by incentivising new entry. At worst, it has neutral effects on competition.

for live online bidding auction platform services) has been highly valuable and this practice should be continued.

Question 6: Do you agree with the other proposed changes to the Current Guidance?

21. We have the following additional comments:

(a) In section 5 of the revised guidance ("opening a formal investigation"), the description of the test that must be satisfied for the opening of an investigation (as set out in s.25 CA98), and the consequent use of the CMA's formal powers of investigation, has been deleted (paragraphs 4.12 and 5.2 of the existing guidance). That seems to us to be a vital piece of information for a document that purports to give guidance on CA98 procedures.

(b) Paragraph 11.11 of the revised guidance now provides that the parties will generally be given notice of the CMA's announcement that an SO has been issued, but the reference to parties being given "sight of the content" of the notice has been deleted. Given the serious implications for businesses that are named in such an announcement (including exposure to standalone damages claims, harm to goodwill, share price and commercial relationships and, for public companies, additional reporting requirements) and the CMA's absolute privilege against defamation claims in respect of such announcements (s.57 CA98), we consider that it would be highly inappropriate to deny such businesses the opportunity to point out any instances in which the draft announcement incorrectly describes the allegations against them.

(c) The revised guidance now omits paragraph 12.6 of the existing guidance, which provides for parties to be given one further opportunity to make confidentiality representations to the CMA, if no confidential version of the SO has been received within the deadline set by the CMA. We therefore suggest that a footnote is added to paragraph 12.4 to cross reference paragraph 7.10 of the revised guidance, which is generally applicable and does provide for such an opportunity. We also consider that the proposed 2 week standard deadline (halved from the 4 week period specified in the existing guidance) will in most cases be too short to allow for confidentiality representations, and that the resulting, routine requests for a longer deadline are likely to create unnecessary inefficiency.

(d) There is an extraneous "again" in paragraph 14.15.

(e) Paragraph 16.5 states that, when carrying out an inspection on behalf of the European Commission, the CMA will have additional powers, including the power to "ask for facts relating to the subject matter of the investigation". That description is incorrect. The extent of the relevant power in Article 20(2)(e) of Regulation 1/2003 is limited to asking for "explanations on facts [...] relating to the subject matter of the investigation". It does not confer a broad power to demand facts, only to demand explanations of facts that have already been established as such.

(f) Paragraph 16.10 should be qualified to state that "the range of documents that can benefit from legal professional privilege is <u>in some respects</u> narrower than

when the CMA is investigating suspected infringements of Article 101 or 102 on its own behalf or on behalf of another NCA". There are some respects in which the EU law of privilege may (subject to certain ongoing litigation before the UK courts) confer wider protection, e.g. documents generated when gathering information from employees of the company under investigation.

Question 7: Are there other aspects of our CA98 investigation procedures where you think further changes could be made to enhance the efficiency of our investigations or improve certainty for businesses?

22. We consider that the CMA's excessively restrictive policy on disclosure of internal documents gives rise to procedural inefficiencies. For instance, in one case in which we were involved the CMA resisted disclosure of records of its communications with a government department on the basis that these were "internal documents", notwithstanding that they were for the purpose of gathering information from that department on its role as the primary customer of the company under investigation and therefore amounted to important evidence. Adopting such an intransigent approach serves only to prolong investigations and render the CMA's decisions more vulnerable to appeal.

Question 8: Are there other aspects of the Current Guidance which you consider could be streamlined or simplified?

23. In cases where the CMA is alleging parental liability on the part of a new or previous shareholder, the CMA should be prepared to consider any request by the parties to have representatives at each other's hearings (paragraph 2.12 of the revised guidance). As parental liability gives rise to joint and several liability, the shareholders have a clear interest in understanding the case against the company.

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