CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE

Response to consultation on the draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases

1. **Introduction and summary**

1.1 This response is submitted to the Competition & Markets Authority (**CMA**) by the Competition Law Committee of the City of London Law Society (**CLLS**), in response to the consultation on the draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases.

1.2 The CLLS represents approximately 15,000 City solicitors through individual and corporate membership, including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

1.3 The CLLS members with primary responsibility for the preparation of this response are:

- Charles Bankes (Simmons & Simmons LLP) (Chairman Competition Review Working Party)
- Jenine Hulsmann (Clifford Chance LLP)

1.4 We broadly welcome the CMA's efforts to realign its Guidance on the CMA's investigation procedures in Competition Act 1998 cases (the guidance) with its current investigational practices. The guidance is a useful document, providing clarity and predictability to businesses and practitioners involved in investigations, while contributing to the integrity of the investigation process. The guidance is, of course, useful only to the extent that it is respected by the CMA in its investigational practice and we consider that the regular review of the guidance is a worthwhile exercise.

1.5 We have set out comments below as to where we think the draft revised guidance might be supplemented or reconsidered, as well as offering some observations on the CMA's investigation process. While we welcome the CMA's commitment to improve the CA98 investigations process in a manner which retains high procedural standards and analytical rigour, we have concerns that some of the proposals would not fully achieve this objective and require further consideration.

1.6 In particular, we suggest that the CMA should translate into formal guidance policies it has developed for the handling of electronic data during investigations. We identify concerns around the CMA's proposed adoption of an increasingly limited disclosure model, both in the context of an investigation case file and the adoption of interim measures. We also advocate the careful operation of the CMA's commitments regime, taking a balanced approach to the role afforded to third parties.

2. **Complaint handling**

2.1 We understand that the formal complainant status was intended to reflect the judgment of the CAT in the *Pernod Ricard* case. 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 SO and of giving a complainant the opportunity to submit its views before a decision is taken not to investigate the complaint any further.[1] 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*.

3. Information handling

Treatment of electronic data during inspections and investigations

3.1 The CMA routinely collects large amounts of electronic data during inspections, reflecting the increasingly limited significance of hard-copy documents. We understand that the CMA has, in practice, established internal protocols and practices for collecting and handling data in its various guises. The draft guidance is entirely silent on this. The CMA's methodology would be usefully translated into formal guidance. This would give businesses clarity as to how data, which may be highly sensitive, is handled by the CMA during investigations. This may be useful, in particular, for smaller businesses that may not have in-house technicians who are able to advise on the approach adopted by the CMA in a given investigation. We anticipate that CMA case teams would also find it useful to be able to point to a clearly stated policy when undertaking inspections and subsequently handling and reviewing data.

3.2 In particular, the CMA's guidance might usefully explain:

(A) How the CMA typically extracts and handles different forms of data, such as mobile phone data, soft copy documents and emails / PST files etc.

(B) How CMA deals with password-protected files or corrupted files.

(C) What process the CMA will adopt in reviewing data it collects, including:

  (1) The role of the CMA's digital forensics team and its interaction with the case team;

  (2) How data sets may be filtered for legal privilege and / or relevance, or de-duplicated, with an explanation of the CMA's use of a review platform; and

  (3) Proforma documentation for these processes.

(D) The CMA's policy on data preservation and the destruction of data which are not retained on file.

GDPR

3.3 We suggest that the CMA should include, within its guidance, a statement as to how it discharges its obligations under the General Data Protection Regulation in the context of investigations, given that information collected by the CMA is likely to include personal data.

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

Interviews: presence of legal advisers

3.4 We recommend that the guidance should clarify the CMA's position on the attendance of lawyers at interviews.

Inspection of the file

3.5 The CMA's current approach to access to the file after a Statement of Objections gives rise to concerns.

3.6 The draft guidance outlines a limited access to file process, whereby the CMA would provide addressees of a Statement of Objections only with copies of documents that are directly relied upon in the Statement of Objections. In practice this means the CMA will provide copies of documents that it considers supportive of its case. It is an important right of defence that the addressee of a Statement of Objections should be provided with copies of all <u>relevant</u> documents, whether those documents may be interpreted as supportive of or inconsistent with the CMA's case. Having completed the substantial task of reviewing each document on its case file, it should be incumbent upon the CMA to identify each document containing relevant information.

3.7 Requiring addressees to make reasoned requests to inspect further documents from a brief index of documents places an unnecessary burden upon addressees in accessing potentially relevant documents on the file and risks offending their rights of defence. At worst it may mean that an addressee will fail to see information relevant to its case. Failure properly to disclose relevant documents in the context of a quasi prosecutorial procedure has, in other contexts, called the entire process into doubt.

3.8 This may well also generate inefficiencies and delay in the investigation process:

(A) It will take time for businesses to request documents, while considering and responding to those requests will place an additional administrative load upon the CMA's case team.

(B) The CMA commits to giving addressees a reasonable period in which to inspect documents. This 'reasonable period' is determined by reference to the specific access to file process, with regard to the volume of documents in play. But in circumstances in which an addressee is presented with additional material during that period, the original timeframe is likely to prove inappropriate. The addressee is generally required to prepare its response to the Statement of Objections at the same time as inspecting the case file and their response will be directly influenced by the material reviewed. It is plainly undesirable that an addressee must reconsider and potentially redraft its response on the basis of information being disclosed to it in a staggered process. The likely outcome will be that parties are forced to submit applications for extended time in which to respond to the Statement of Objections.

(C) As addressees request different volumes of additional material, at different times during the inspection process, the granting of extensions could lead to misalignment of overall deadlines for responses to a Statement of Objections, as between addressees. This issue is even more acute given the proposals regarding confidentiality. In cases where an extremely large number of documents are

placed into strict confidentiality rings, which only cover external advisors, further applications will need to be made regarding the scope of the confidentiality ring and the provision of unredacted documents, even within the ring, as well as the release of redacted documents from the ring.

3.9 That the CMA provides addressees with relevant documents is all the more important as it is not inevitable that an addressee will always be familiar with documents on the case team's file: for instance parent companies responding to an investigation in which documents have been gathered from inspections of subsidiary companies which have subsequently been divested. A high-level index may not give a business a reasonable opportunity to assess whether that document may be relevant to its response to CMA allegations. Therefore the CMA must always be willing to adjust its general practice to address the circumstances of the case.

3.10 Finally, providing an open and transparent access to file process is in the CMA's interest, promoting confidence in the investigation process among addressees and meeting standards of disclosure appropriate for a process that may lead to severe sanctions for companies and affect the livelihoods and careers of individuals involved in or responsible for the practices under investigation.

Procedure after a Statement of Objections

3.11 The distinction between a letter of facts and supplementary statement of objections in not clear. In our view if the CMA wishes to add in any way to its procedure after it has issued a statement of objections, it must give the parties the maximum clarity both on what additional information it wishes to introduce and how it intends to rely on that information. It is not appropriate for the CMA to rely on an unclear "materiality" threshold to allow the parties only the more limited procedural rights that come from a letter of facts. Further clarity on this threshold would be welcome; as would a general statement that a supplementary statement of objections is considered to be the default position.

Representations on a draft penalty statement

3.12 In our experience, parties in many cases will limit representations on a draft penalty statements to written observations and a telephone call. However, the parties should have the option of attending in person, particularly in cases where the CMA proposes to impose a fine in novel cases or to apply an approach to fining which does not reflect past precedent. The CMA should clarify how an oral hearing by telephone would work; in particular will it be transcribed?

4. Interim measures

4.1 We note the efforts that have been made in the draft revised guidance to develop the CMA's policy on the use of interim measures. We also acknowledge wider public commentary that encourages the CMA to make greater use of interim measures.[2]

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[2] For example, the House of Lords Select Committee Report on Online Platforms and the Digital Single Market (10th Report of Session 2015-2016), https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf , para. 200

4.2 In our view, interim measures must be used with great caution, given the high chance of a mistake and the significant likelihood of commercial harm being suffered by the addressee. In particular, we refer to the proposal at para. 8.9 of the draft revised guidance that the CMA would provide potential addressees of interim measures with only those documents which are relied on in the proposed directions, rather than each relevant document on the CMA's file. An addressee must be given a chance to make useful and meaningful representations to the CMA, particularly given the substantial harm it may suffer as a result of the interim measures. A very limited inspection process is unlikely to give sufficient protection to the rights and interests of that business. 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.

4.3 To that end, we suggest that the CMA commits to provide potential addressees of interim measures with a level of disclosure more closely aligned to that required in relation to interlocutory injunction proceedings before the courts of England and Wales. These practices provide a useful benchmark, having been refined over time to balance fairly the interests of applicants and respondents. Reference to this standard would respect the rights of defence of potential addressees, whilst also limiting the prospect of appeals based on the failure to do so.

4.4 In proceedings for interlocutory injunctions before a court, even if the initial proceeding is ex parte with only the applicant represented, there is a duty thereafter to provide all the evidence to the respondent, unless the court orders otherwise (and the defendant may apply to have that order set aside).[3] By analogy, the general rule applied by the CMA should be for all documents on the file to be provided to the addressee. This is consistent with the well-established principle obliging a party seeking interlocutory relief on an ex parte basis to offer 'full and frank disclosure'.[4] We acknowledge that the CMA may, with good reason, withhold evidence on grounds of commercial confidentiality. However, it would be more reassuring to addressees if the guidance was to state clearly that where disclosure must be limited to protect commercial confidentiality, evidence will usually be released within a confidentiality ring to the advisers to the affected party. Often that would be information provided by an applicant, but the CMA should apply the same standard as regards evidence used in proceedings initiated by the CMA.

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[3] See, in particular, Part 23.9 of the Civil Procedure Rules.

[4] In *Cherkasov & Ors v Olegovich, the Official Receiver of Danyaya Step LLC* [2017] EWHC 3153 (Ch) (05 December 2017) the Chancellor Sir Geoffrey Vos explained:

> "*The general principles as to the duty of full and frank disclosure are well known and were set out by Scrutton LJ in R v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington ex parte Princess Edmond de Polignac [1917] KB 486 at page 514:-*
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> > *"It has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts … if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement."*
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> *In an equally well-known passage in Brink's Mat Ltd v. Elcombe supra, Ralph Gibson LJ made clear at page 1356 that "[t]he applicant must make proper inquiries before making the application … The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries"*."

4.5 While there is often good reason to limit the circulation of commercially sensitive information, it should hardly ever be necessary to withhold it altogether, especially in cases where the affected parties could suffer serious damage and do not have the protection of a cross-undertaking in damages, such as they would have in a court process. They should be entitled not only to information that may show that the allegations are unfounded, but also information that shows that a remedy may be excessive – or could be structured in a less damaging way to the parties affected - in light of the evidence on harm actually likely to be suffered by the applicant (and/or other businesses or consumers said to be affected by the conduct).

5. **Commitments**

5.1 We broadly endorse the CMA’s commitments regime. It is, to our view, a useful enforcement tool that promotes procedural efficiencies and enables the CMA to avoid tying up resources unnecessarily, whilst still protecting the interests of consumers. Commitments may be a particularly useful tool in the context of a likely increase in the CMA’s workload post-Brexit.

5.2 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.

5.3 We acknowledge that in cases in which the CMA is advocating a novel theory of harm, clear decisional practice is likely to be most 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 for live online bidding auction platform services) have been highly valuable and this practice should be continued.[5]

Third parties

5.4 In relation to the role of third parties in CMA investigations, we observe that care must be taken to balance the significant interest some third parties may have in CMA actions against the importance of protecting the rights of undertakings involved.

5.5 The draft guidance appears to envisage a limited role for third parties within an investigation. We appreciate the CMA’s concern that the interests of parties to an investigation should not be compromised in particular in the event that a party is not ultimately an addressee of a CMA infringement decision (in accordance with Pergan principles).

5.6 However, we equally encourage the CMA to give full consideration to the views of third parties that are likely to be directly affected by the CMA’s process, in particular when the CMA is considering remedies or commitments that will directly impact upon third parties (for instance contractual counterparties). The previous guidance recognised that at Statement of Objections stage, the category of third parties which may be "materially

[5] See for example, Case number 50408 – Auction services - Decision to accept binding commitments offered by ATG Media in relation to live online bidding auction platform services

affected" could also encompass "third parties who are positively affected by the agreement/behaviour in question". This is consistent with the approach of the European Commission and is an approach which should be continued.

6. **'Hybrid' settlements**

6.1 We note that the CMA has, at paragraph 14.13, acknowledged the possibility of 'hybrid' cases which involve both settling and non-settling parties. In light of General Court's recent judgment in the *ICAP* case,[6] we suggest that this revision of the guidance is a good opportunity for the CMA to explain what measures it will consider taking to protect the rights of defence of non-settling parties in hybrid cases.

7. **Conclusion**

7.1 The CLLS Competition Law Committee would be happy to discuss these comments further with the CMA if that would be helpful.

CLLS Competition Law Committee

2 August 2018

[6] *Icap plc and Others v European Commission*, Case T-180/15