JOINT WORKING PARTY OF THE BARS AND LAW SOCIETIES OF THE UNITED KINGDOM ("JWP")[1]

RESPONSE TO THE CMA'S CONSULTATION DOCUMENT "DRAFT REVISED GUIDANCE ON THE CMA'S INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES"[2]

25 JULY 2018

I INTRODUCTION

1. The JWP welcomes the OFT's Consultation Document as a contribution to the process of increasing the transparency of the CMA procedures. Transparency is a topic on which the CMA (and the OFT before it) and JWP have had a productive series of exchanges of views since the entry into force of the Act.

2. The JWP has the following general points to make on the Consultation Document.

    a. The JWP welcomes the CMA's commitment to improve the CA98 investigations process in a manner which retains high procedural standards and analytical rigour, ensuring that decisions are well-reasoned, robust and take account of all relevant considerations (paragraph 1.14).

    b. However, the JWP has concerns that some of the proposed changes to the Current Guidance would not fully protect the parties' rights of defence. Specific comments on the proposed changes are set out below.

II RESPONSE TO CONSULTATION QUESTIONS

Question 1: Do you agree with the proposed changes to the Current Guidance on complaint handling (described in Chapter 3?

3. We are concerned about the proposal to scrap the Formal Complainant status (paragraphs 3.2-3.7). We believe this status was intended to correlate broadly to the *Pernod Ricard* case.[3]

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1 The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprise barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. The JWP is co-chaired by George Peretz QC of Monckton Chambers (GPeretz@Monckton.com; tel 020 7405 7211) and Brian Sher, partner, CMS Cameron McKenna Nabarro Olswang LLP (brian.sher@cms-cmno.com; tel 020 7524 6453).

2 CMA8con, 21 June 2018.

3 *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10. See the footnote 5 to para 1.7 of OFT451 (withdrawn August 2015).

Provided the CMA does not plan to act in disregard of third party rights recognised by the CAT, then it may matter little in practice (in which case, why change?), but for complainants who are not advised, or advised poorly, the revised guidance hardly invites them to make use of their rights.

4. Furthermore, the drafting at new paragraph 3.22 is vague in stating that "a complainant may be provided with a non-confidential version of a Statement of Objections or an opportunity to comment on a draft case closure letter, where certain circumstances are met." There is no indication of what is meant by "where certain circumstances are met"?

Question 2: Do you agree with the proposed changes to the Current Guidance on information handling (described in Chapter 4)?

5. We have concerns in relation to access to file (paragraphs 4.2-4.10) and, in particular, the proposal to make the streamlined approach the normal or typical mode of disclosure (paragraph 4.6).

6. The documents referred to in paragraph 4.3 as "key documents" are not the key documents in the case in the broadest sense. Rather, they are the documents on which the CMA relies. In our experience, the documents that the parties regard as key are often to be found in the "non-key documents" part of the file. The purpose of the access to file process is to ensure that the evidence is considered in the round and is given appropriate weight. As such, even if the CMA only relied on 5-15% of the documents on its file (paragraph 4.4), this would equally be consistent with the CMA adopting a selective approach to or inappropriate weighting of the evidence.

7. 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 year 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.

8. The process by which access to the file is negotiated in parallel with the process of drafting a response to the SO is impracticable and inefficient. The parties should be free to read the SO, then read the file and then draft their response with a complete understanding of the evidence base. Instead, at present (and as proposed by the CMA in this consultation),

parties have to form a partial view based on the limited material the CMA provides initially, and then a party has to fight to obtain more in lengthy correspondence. Once more material has been found, a party then needs to go back and read the rest of it again in the light of the new material, which increases time and hence cost unnecessarily. As does the fact that a party then needs to argue with the CMA about the impact of the delay in getting the documents for the timetable for submitting a response to the SO. As such, the JWP does not agree that the "streamlined process" generally results in savings of time or resource for "all the parties" (paragraph 4.5).

9. We also think the discussion of confidentiality (paragraphs 4.11 *et seq*) is inadequate. This has been a real problem in practice. The JWP is aware of cases where extremely large number of documents have been placed into strict confidentiality rings, which only cover external advisors. Further applications are then having to be made regarding the scope of the confidentiality ring and the provision of unredacted documents, even within the ring. Once the documents have been reviewed by external advisors, further submissions are then required to release documents from the ring in a redacted form, including in order to allow external advisors to obtain instructions.

10. The JWP believes that there should be a clear statement that <u>everything</u> in the SO will be unredacted, at least within the confidentiality ring. Likewise, the simplest way to deal with confidentiality issues in the file would be to operate a strong default rule that material will be disclosed, at least into confidentiality rings, on an unredacted basis.

11. If the CMA wishes to streamline the process, the CMA should offer the parties a choice well in advance of issuing the SO. If the parties indicate that they are happy to receive just the documents on which the CMA replies, plus an opportunity to select other docs from a complete and accurate list during the time period for responding to the SO, then they can go along with that "streamlined" process. But if a party states that it wants the whole file, the CMA should arrange access for a complete file (subject to a confidentiality ring, and agreeing any redactions needed within that), in <u>advance</u> of issuing the SO.

12. Finally, the JWP considers that in light of the implementation of the General Data Protection Regulations 2016 (GDPR), the CMA should also provide guidance as to how it will treat personal data gathered in the course of a CA98 investigation. The CMA may gather significant personal data through unannounced inspections or section 26 notices and clear guidance is required on how such data will be processed by the CMA in line with data protection legislation and parties rights to raise concerns if this does not occur.

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

13. While the introduction of a declaration of truth appears appropriate, the imposition of interim measures may have serious implications. As such, it is unclear that a declaration of truth would, 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, particularly where the evidence involves an element of subjective interpretation (paragraph 5.5). It is unclear from the guidance whether the party which is the subject of the proposed temporary direction will have the possibility to make oral as well as written representations. Given the shorter timescales, the ability to make oral representations is likely to be particularly important. .

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

Oral haring on the draft penalty statement

14. We have concerns about the proposal to downgrade or eliminate the oral hearing on the draft penalty statement (paragraphs 6.2-6.6). This is suggestive of a dismissive attitude to penalty issues, which can often raise significant issues of both fact and law.

15. This is particularly the case where the CMA is perceived to be doing something new, like with the pay for delay cases and excessive pricing cases recently, where parties feel strongly about issues that arise in relation to penalties. If, as the CMA states, requests for oral hearings on draft penalty statements have been made infrequently (paragraph 6.4), parties should continue to have this option. Where such hearings are held, it is because the parties consider them to be an important part of the rights of defence.

16. The idea that the CMA just goes ahead without the full CDG (paragraph 6.5 second bullet) strikes us as inadequate and undermining the concept of a CDG. This would be a shame: the CDG framework is a welcome feature of CMA enforcement by comparison with the European Commission. We would not wish to downgrade the fairness of that procedure under which, at present, that parties have a right to make their points directly to the decision-maker if they so wish to do.

Deadlines for responding

17. The removal of the guidance on the time period for providing written representations on the Statement of Objections potentially reduces legal certainty (paragraph 6.8). 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 existing wording provides the CMA with an appropriate degree of flexibility.

18. 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)(paragraph 6.9) is unrealistic and disproportionate.

State of play meetings

19. State of play meetings are an important means of ensuring that parties have a degree of transparency regarding ongoing investigations, which may take several years. The value of such meetings is, however, dependent on the case team sharing their provisional thinking on the issues in each case. The JWP is concerned that the Draft Revised Guidance would reduce the level of transparency which parties can expect by stating that the CMA "may" rather than "will" share the case team's provisional thinking (paragraph 9.9. of the Draft Revised Guidance). This change is in any case inconsistent with the next paragraph of the Draft Revised Guidance, although paragraph 9.10 is unclear as to which State of Play meeting is referred to. Given the purpose of these meetings, the CMA should be able to update the parties as to the case team's provisional thinking at both the initial State of Play meeting and each subsequent State of Play meeting.

Involvement of complainants and third parties in investigations

20. Chapter 6 also addresses the rights of third parties to submit representations on a non-confidential version of the Statement of Objections (paragraphs 6.18-6.21). The Draft 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.

21. 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.

[4] As proposed in paragraphs 12.6 (including footnote 192) and 10.4 of the Draft Revised Guidance.

This is inconsistent with the previous guidance which recognised that at Statement of Objections 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]

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

22. The Draft Revised Guidance notes that commitments will be accepted "only in cases where the competition concerns are readily identifiable" (paragraph 10.18). 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.

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 Draft 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.

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