RESPONSE OF THE CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE TO THE CMA's CONSULTATION ON THEIR DRAFT REVISED GUIDANCE ON CMA'S INVESITIGATION PROCEDURES IN COMPETITION ACT 1998 CASES

1. Introduction

This response is submitted by the Competition Law Committee of the City of London Law Society (CLLS) in response to the CMA's Consultation on their draft revised guidance on CMA's investigation procedures in Competition Act 1998 cases.

The CLLS represents approximately 17,000 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.

The Competition Law Committee members responsible for the preparation of this response are: Robert Bell, Partner, Rosenblatt Limited (Chairman, CLLS Competition Law Committee); and Charles Bankes, Partner, Simmons & Simmons LLP

2. Our Response

We would preface our more detailed remarks with a general point in relation to CMA's procedures. Whilst we accept that there is room to improve and better explain the CMA's processes, we do not accept that there should be any less rigour in those processes or any erosion of the rights of defence.

This fundamental principle should be foremost in the CMA's mind. Breaches of competition law are serious and have serious consequences for those who are the subject of an investigation. Every party has a right to be considered innocent until guilt is proved to the appropriate standard.

With that general point in mind we would comment as follows: -

(a) Publication of the names of parties at the start of a formal investigation

The CMA justifies making this change by general reference to its statutory duties and for the need for transparency. It appears to give no or no adequate consideration to ,nor does it make mention of, the impact of such an announcement on parties who may, ultimately, many months later be found not to have breached competition law at all. To us this practice appears to be out of line with other agencies. It is also possible that in some cases, the parties under investigation may find out for the first time upon publication of an announcement by the CMA that they are under investigation. We believe this is wrong.

We would suggest that if the CMA decides to proceed with this reform the CMA should give sufficient notice to the relevant party or parties of its intended announcement. Secondly where, at the end of an inquiry, the CMA decides for whatever reason not to find an infringement, it should announce that fact in unqualified terms.

(b) Draft penalties statement with the SO

The CMA is proposing that the SRO should settle the Draft Penalty Statement (DPS) at the same time as the SO. We find this proposal troubling.

Under the present procedure the DPS is settled only **after** the CMA has considered the parties' response to the SO and will input from the CDG. Thus, the DPS which the parties receive reflects the CMA's view of the gravity of the case after the responses have been received and the CDG has been fully engaged.

The SRO is, in effect, the prosecuting officer. As a result an early DPS will be an unfiltered reflection of the CMA's case without any ability to take into account the parties' views As the publication of the DPS comes too early in the process, the actual penalty may be significantly different and the parties will not have had an opportunity to engage before its publication. There is no opportunity for the parties to correct mistaken facts or views on the part of the CMA or to give the parties the ability to make submissions on mitigating factors. As it stands it is a fundamental watering down of the principles of the rights of defence

Therefore, the CLLS does not agree with this proposal and would ask the CMA to reconsider this amendment to its procedures.

(c) Disclosure of directors' representations

We have no problem with disclosure of a non- confidential version of the SO to directors of the parties being investigated under the Company Directors' Disqualification Act 1986. However, we are concerned about the proposal that representations by directors may not be disclosed to the parties. Again, this is a troubling watering down of the rights of the defence. From our point of view this proposal would only be acceptable if the CMA did not propose to rely on those representations in any way.

(d) Procedural Officer

We believe the scope of issues that the Procedural Officer (PO) will consider is too narrow. There appears to be a mismatch between what the consultation says and what the draft guidance says. The consultation (para 1.49) suggests that the PO can consider "other significant issues" beyond those listed in that paragraph. However, paragraph 15.4 of the draft guidance says that an issue must be both significant and one of those listed. As the PO is very careful only to accept cases which is not within the Officer's remit, we think that the PO's jurisdiction should reflect the wider remit of the consultation document.

(e) Other matters

In our past responses to CMA consultations the CLLS have encouraged the CMA to include in its guidance more detail on how it collects and handles electronic data during its inspections. This is a considerably complex area and the CMA appears to have detailed and proportionate processes in place. However, that said the guidance currently remains very thin on this issue and we would encourage the CMA to provide more detail on its processes and procedures in this regard.

If you have any questions or queries in relation to this submission or wish to discuss any particular aspect please do not hesitate to contact Robert Bell on robert.bell@rosenblatt-law.co.uk or 020 7955 1511

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