



## **Competition Committee of the City of London Law Society's response to the OFT consultation paper "A Guide to the OFT's Competition Act 1998 investigation procedures"**

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### **1. Introduction**

The Competition Committee of the City of London Law Society ("CLLS") welcomes the fact that the OFT is updating its guidance on its Competition Act 1998 investigation procedures.

We begin with our response to questions 6 and 8 - general comments on the guidance and our views on what additional guidance would be useful. These comments encapsulate our most substantive views on the guidance.

In section 3 we express our views on the specific questions posed in the Consultation Paper.

### **2. General Comments / Additional Guidance**

#### Settlement

The guidance does not adequately deal with the settlement process. Apart from a brief mention in paragraph 11.2, settlement is not dealt with at all.

The CLLS is of the view that it is very important to set out the procedure for settlement as fully as possible. This will help companies when making the decision whether or not to go down this route. In our view, the more transparent the settlement process, the increased likelihood that companies under investigation will be willing to explore this as an option.

In addition to providing an overview of the complete settlement process, specific issues that we believe should be addressed are:

- timing for settlement – the process does not necessarily have to start after the SO (e.g. the BA case);
- the likely obligations to be imposed on a company seeking settlement;
- the importance of having a clear, objective and factual basis for settlement so that the case does not have to be re-opened if new evidence comes to light. Guidance on what level of evidence is necessary to meet this threshold would be useful;
- relatedly, what happens when the OFT uncovers new facts/evidence that make admissions already made by settlement companies unsustainable (drawing on the OFT's experience in the Dairy investigation).

As settlement is an 'investigation outcome' it may be best dealt with in Section 10.

#### Inspection of OFT file

Paragraphs 11.19 to 11.22 dealing with inspection of the OFT's file do not give specific guidance on what materials will be included in the file. An overview of the types of documents that would typically be included in the file would be helpful.

Guidance on the content of the OFT's file is particularly relevant where there are parallel civil and criminal investigations. In particular, we believe that the OFT needs to give clear guidance as to whether exculpatory evidence coming to light as a result of a criminal investigation will be put on the OFT's civil file. This type of guidance is particularly needed in the light of the Criminal Procedures Investigation Act, which requires the disclosure of exculpatory evidence to defendants and also contains restrictions on the further disclosure of this evidence. In principle, it must be unfair if exculpatory evidence that exists in the criminal case is not disclosed to parties to the civil proceedings.

The CLLS appreciates that the preparation of a non-confidential version of the file is both burdensome and time-consuming for the OFT. Thought might be given to imposing confidentiality rings on the parties' advisers and allowing them access to all the material on the file. Specific requests could then be made by advisers where they wished to disclose a document to their clients and only at that stage would the need arise to produce a non-confidential version of the document.

### Interim proceedings

The CLLS would welcome more detailed guidance on the circumstances in which the OFT would be prepared to take interim measures.

In particular:

- What level of evidence must the OFT have before it will impose interim measures on parties despite the investigation not being complete?
- How quickly into an investigation will the OFT be prepared to impose interim measures?
- Has the OFT's recent experience on the LME case changed its approach to the suitability and effectiveness of interim measures? Would it be prepared to give an early indication as to whether a case might be appropriate in terms of priorities for an application for interim measures?

### Leniency

The consultation document contains no guidance on how the OFT will verify the accuracy of evidence provided as part of a leniency application. The CLLS believes that it is imperative that evidence provided as part of leniency is subject to careful scrutiny, in particular when it comes to individual accounts and witness statements. We would therefore welcome information on how the OFT scrutinises leniency evidence.

### Non-disclosure of Statement of Objections

Paragraph 12.6 states that formal complainants and other interested third parties receiving a non-confidential version of a SO must not disclose the document to anyone else. However, the OFT does not say how it will impose this requirement. Will the OFT require the recipients to enter into confidentiality undertakings?

### Decision-making Process

The guidance is very short on precisely how the decision-making process works and who the decision-maker(s) is/are at each stage. We believe it is important that this is spelt out. It is clearly vital that parties know who the ultimate decision-maker(s) is/are so that they can ensure that their representations, written or oral, are addressed to them.

### **3. Specific OFT Questions**

- Q1. We are proposing to offer potential complainants the opportunity to have informal discussions with us in some cases before they decide whether to submit a formal, written complaint.**

**What are your views on this initiative? Will it help to encourage the submission of well-reasoned complaints?**

The CLLS welcomes this initiative as informal discussions with potential complainants should help to filter out frivolous, unsubstantiated complaints at an early stage. We would expect the introduction of informal discussions to reduce the number of formal complaints as potential complainants are unlikely to proceed where the OFT has indicated that it would not be minded to open an investigation. This should alleviate resource burdens for the OFT, potential complainants and companies subject to complaints that may not ultimately be pursued by the OFT.

Those that do proceed to make a formal complaint, having received an indication from the OFT that it could be a suitable case for investigation, should have increased incentive to present a comprehensive and well-reasoned complaint.

We are of the view that it would be useful for the paper to include some further guidance on the format and level of information required from a potential complainant at this informal stage. For example, it could be useful to specify some minimum information requirements, rather than simply referring to the provision of a basic level of information. It could be useful to specify with who, the discussions would be. We assume initial contact would still be through the ERC

- Q2. We are proposing to commit to informing complainants within four months from the date we receive their substantiated complaint whether or not we intend to open a formal investigation.**

**What are your views on this initiative? Will it assist complainants in submitting well-reasoned complaints?**

Giving potential complainants an indication of how long the process is likely to take before they will know whether or not a case will be investigated could encourage potential complainants to come forward.

In addition, advising that swift feedback will be facilitated if complainants provide well-reasoned and substantiated complaints may encourage complainants to ensure that their complaints meet this criteria.

**Q3. We have described how we decide which cases to prioritise.**

**Does this guidance give sufficient information on how we conduct our prioritisation assessments?**

The CLLS believes that the guidance would benefit from more detailed information on this point. In particular, we would like to see more detail on the prioritisation principles themselves.

In paragraph 4.5 the OFT simply names the prioritisation principles and goes on, in paragraph 4.6, to refer to its separate Prioritisation Principles guidance. However, we believe that it would be useful to provide a brief overview of each principle and how it is applied in practice in this document.

Providing greater detail on each of the prioritisation criteria may aid complainants in drafting their complaints – they can make sure that the OFT is provided with sufficient and relevant information to be able to apply these principles in a meaningful way.

**Q4. We have described the ways in which we scrutinise our investigation process.**

**Does the guidance provide sufficient information on how we scrutinise our cases?**

Steering Committee

The guidance states that a Steering Committee will be appointed “where appropriate” – it would be useful if the OFT could expand on the circumstances in which a Steering Committee is likely to be used.

Will the parties to proceedings be informed that a Steering Committee has been appointed and be told who sits on the Steering Committee?

The guidance should make it clear what information the Steering Committee has access to – does it have access to review the full spectrum of information used by the case team in its investigation?

How much weight is given to the views of the Steering Committee? The CLLS would welcome guidance on what happens if the Steering Committee and the case team reach very different conclusions. Who decides on the most appropriate course of action in these circumstances? We assume it is the SRO in light of paragraph 9.7.

#### Other

The guidance refers to case updates – guidance on how often the OFT is willing to give these would be useful (e.g. is the OFT open to having regular calls in which it updates the parties to proceedings on the progress of its investigation?).

In certain types of case, particularly Chapter 2 cases or where market definition or theories of harm are crucial, it may be helpful to putting back material before the issue of an SO, an approach which Ofcom has often adopted with considerable benefits.

The CLLS believes it may be helpful to consider holding meetings where possible, not just in the circumstances envisaged in paragraph 9.1.

The guidance could helpfully provide more information about the respective roles of the SRO, the Team Leader and the Project Director.

**Q5. We have set out our oral representations process, which is a key part of parties' rights of defence.**

**What further information, if any, would be useful about how this process works?**

The CLLS would welcome guidance on how useful and effective the OFT considers oral hearings to be. Are there particular circumstances / types of cases in which an oral hearing would be recommended?

We note that the guidance states the SRO, who is ultimately responsible for deciding whether there has been an infringement, will “typically” attend an oral hearing. We are of the view that the decision maker should always attend these hearings. Recipients of a SO should have the opportunity to address the decision maker directly.

The OFT should consider having an independent hearing officer in the same way as the European Commission. In addition to general responsibilities (ensuring that the right to be heard is safeguarded in competition proceedings and being available to

consider disputes between the OFT and parties to the proceedings) the hearing officer could have a specific role in relation to oral hearings.

As with the European process, the hearing officer could be involved in the organisation and conduct of the oral hearing and resolving disputes on access to the file. The hearing office could also report on conclusions to be drawn from the hearing.

**Q6. Does the guidance cover in sufficient detail all aspects of the processes in our investigations under the Act? If not, what additional guidance would be useful?**

See section 2 above.

**Q7. Do you have any comments on how easy the guidance is to understand and whether its format is easy to follow?**

The guidance is clear and accessible. The section on Investigation Outcomes may fit better after the sections dealing with process. It may also make the guidance more comprehensive and free-standing if, instead of cross-referring to other guidance, the relevant principle was actually set out in this guidance.

**Q8. Do you have any other general comments on the OFT's procedures in our investigations under the Act?**

See section 2 above.

**Competition Committee of the City of London Law Society**

**8 November 2010**

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**THE CITY OF LONDON LAW SOCIETY  
COMPETITION LAW COMMITTEE**

Individuals and firms represented on this Committee are as follows:

Robert Bell (Speechly Bircham LLP) (Chairman)

A. Bavasso (Allen & Overy LLP)

M.P. Grenfell (Norton Rose LLP)

Ms J. Hulsmann (Clifford Chance LLP)

Miss D.K. Livingston (Herbert Smith LLP)

Mrs S. Mobley (Baker & McKenzie LLP)

Mrs M.A. Moore (Travers Smith LLP)

Dr A.N. Parr (Ashurst LLP)

A. Potter (Freshfields Bruckhaus Deringer LLP)

W. Siberry (Slaughter and May)

M.R. Smith (Simmons & Simmons)

P.A. Wareham (Hill Dickinson LLP)