# City of London Law Society Competition Law Committee

## RESPONSE TO CONSULTATION ON CMA COMPETITION ACT GUIDANCE AND RULES OF PROCEDURE

These comments are submitted by the Competition Law Committee of the City of London Law Society ("CLLS") in response to the consultation document issued by the Competition and Markets Authority (CMA) Transition Team on 17 September 2013 entitled *Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998*.

The Competition Law Committee members responsible for the preparation of this response were:

- Robert Bell, Partner, Bryan Cave LLP (Chairman, CLLS Competition Law Committee);
- Howard Cartlidge, Partner, Olswang LLP; (Leader, Competition Act Guidance Working Party)
- Nicole Kar, Partner, Linklaters LLP, (Vice-Chairman of CLLS Competition Law Committee);
- Samantha Mobley, Partner, Baker & McKenzie LLP;
- Nigel Parr, Partner, Ashurst LLP.

In summary, we broadly welcome the proposed Rules and the Draft Guidance. However, we have some specific comments on certain aspects of them. A particular issue which we consider requires clarification is the role of members of the CMA (formerly CC) panel in decision-making.

Below are our responses to the specific consultation questions.

**CONSULTATION QUESTIONS**

**Question 1: Do you agree with the list in Annexe A of the Draft CMA CA98 Guidance of existing CA98-related OFT guidance documents that the Transition Team proposes to put to the CMA Board for adoption?**

We agree with the proposed list.

**Question 2: Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate? Please give reasons for your views.**

We have comments only on sub-paragraph (3) of Rule 4. In (b), the conditions imposed by the CMA officer should be reasonable, rather than wholly left to the officer's discretion. This could be effected by referring to "*such **reasonable** conditions as he considers it appropriate to impose*" (word in bold added).

**Question 3: Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?**

In general, we are satisfied with the proposed arrangements, but we have two concerns:

- **Paragraph 6.21 (and footnote 81):** this purports to give the CMA absolute discretion as to which individuals should be treated as having "*a connection with*" the relevant undertaking. The guidance should be more explicit in confining such persons to the (lengthy) list in footnote 81 unless there are special circumstances which mean it is reasonable to extend the class of persons. In addition, individuals included in the list in footnote 81 should in principle not include professional and other advisers unless those individuals satisfy the terms of section 26A(6) of the CA98 – advisers providing services on an arm's length basis to an undertaking should not be treated as having a relevant connection with it.
- **Paragraph 6.28:** we do not consider that the CMA should be entitled to exclude an individual's legal adviser from being present at an interview solely because the legal adviser also acts for the undertaking under investigation and the CMA considers that there is no risk of prejudice to the investigation. Legal advisers who deliberately obstructed questioning would themselves be subject to sanctions; the CMA should not be free to exclude them based on the CMA's suspicions as to their possible role or conduct.

**Question 4: Do you agree with the proposed approach to use of 'confidentiality rings' and 'data rooms'?**

We consider that paragraphs 11.24 to 11.26 of Draft Guidance should be reviewed to ensure compliance with the Competition Appeal Tribunal's judgment in *BMI Healthcare Limited v Competition Commission (No. 1)* [2013] CAT 24. In particular, the Draft Guidance should set out in as much detail as possible the principles to be applied and best practice for ensuring that parties' advisers can formulate a proper and informed response to confidential documents in the CMA's file.

**Question 5: Is the proposed settlement procedure clear, and do you have any views on it?**

We have no comments on the proposals set out in Chapter 14 of the Draft Guidelines.

**Question 6: Do you agree that settlement discussions should include the proposed maximum penalty the settling business should pay or would it be sufficient if the CMA only set out the settlement discount on an undisclosed penalty?**

We agree that settlement discussions should include the proposed maximum penalty. This is an essential element in a business's decision as to whether or not to enter into a settlement.

**Question 7: Do you agree that the proposed caps for settlement discounts at up to 20% for pre-SO settlement and up to 10% for post-SO settlement are appropriate?**

We agree with these proposed limits.

**Question 8: Do you have any comments on any of the other amendments proposed for the Draft CMA CA98 Guidance?**

With respect to the guidance on **interim measures**, we would suggest two minor amendments:

- **Paragraph 8.13:** in a situation where interim measures are potentially relevant, it is highly unlikely that the CMA will be able to carry out a detailed assessment of the relevant markets. We would suggest that the second sentence of this paragraph should read "*In particular, the CMA will* ***to the extent reasonably practicable carry out an initial assessment of*** *the nature of the market(s) in question and the dynamics of competition within the market(s), the effect the conduct is having or may have on a particular business or categories of businesses in the market(s), or the effect that the conduct is having or may have on the public interest*." (words in bold added).
- **Paragraph 8.17:** the word "*important*" in the first bullet point does not appear to add anything (since significant damage is already required).

With respect to **decision-making** (Chapters 11 and 13), we consider that the Draft Guidance should make clear what role the CMA envisages will be played by members of the CMA (formerly CC) panel in decisions as to Statements of Objections and the final decision. We understand that the CMA considers that panel members may be appointed consistent with the Draft Guidance as it is currently written. However CMA needs to make clear it fully supports their inclusion in a clear policy statement and does not remain equivocal on this point.

**The CLLS views it as very important that panel members are involved in CA98 decision-making to provide further assurance that confirmation bias will be avoided. The Guidance needs to be much clearer on this point**

**Question 9: Do you agree with the proposed transitional arrangements, as set out in paragraphs 3.41 to 3.43 above?**

We agree with the proposed transitional arrangements.

**Question 10: Do you agree with the Transition Team's proposal to extend the availability of SfOs to prospective vertical agreements in addition to prospective horizontal agreements? Please give reasons for your view.**

We strongly support the Transition Team's proposal to extend the availability of SfOs to prospective vertical agreements. There is no reason in principle why guidance should be limited to horizontal agreements.

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

**11 November 2013**