CLLS RESPONSE TO OFCOM CONSULTATION ON REVISING THE ENFORCEMENT GUIDELINES AND RELATED DOCUMENTS

1. INTRODUCTION

1.1 This response is submitted by the Competition Law Committee of the City of London Law Society ("CLLS") in response to the Ofcom's Consultation on revising its enforcement guidelines and related documents.

1.2 The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The Competition Law Committee is one of those Committees and a list of members of the Committee can be found at the following link:

http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=109&Itemid=469

The CLLS welcomes the opportunity to respond to this Consultation and thanks Ofcom for granting an extension of time until 13th March to allow the Committee to make its views known. The CLLS' comments are related to (i) the Draft Enforcement Guidelines for Competition Act Investigations ("the Draft Competition Guidelines") and (ii) the Draft Advice for Complainants.

2. THE DRAFT COMPETITION GUIDELINES

2.1 The CLLS agrees with Ofcom's objectives of increasing transparency and clarity into its investigations and procedures in competition investigations. The Draft Competition Guidelines go some way in aligning Ofcom's competition enforcement procedures with that of the Competition & Markets Authority ("CMA"). However the CLLS has a number of concerns about some of the proposals, and believes that the level of clarity in some areas should be improved, as further explained below. In addition, in a number of respects, the Draft Competition Guidelines fall below the standard of the CMA's guidelines, which is regrettable. We firmly believe that the CMA's guidelines in Competition Act cases should form the baseline for concurrent regulators and not some form of aspirational objective which can be departed from.

Timing

2.2 The CLLS does not agree with Ofcom's proposal to move away from its eight week target for deciding whether to open a competition investigation. Eight weeks is already a lengthy period in which to decide whether or not to proceed with an investigation and during this time, parties are left in a state of uncertainty. There is a risk that without the constraint of an internal target (albeit non-statutory), the decision to open an investigation could be significantly delayed. The CLLS considers that the current target be retained.

2.3 As for the timetable for the investigation itself, the Draft Competition Guidelines state that Ofcom is generally unable to give an indication of the likely timescale of an investigation. Paragraphs 3.10 and 3.38 of the Draft Competition Guidelines state that Ofcom will provide regular updates on the progress of the investigation. The CLLS urges

Ofcom to firmly commit to providing a clear administrative timetable in order to allow parties to an investigation to be better able to plan and manage their resources. It is important that parties that are subject to an investigation have a clear understanding of the timing for the issue of key documents such as the Statement of Objections, so that they can manage internal resources to respond to information requests. We would urge Ofcom to consult the main parties to an investigation in setting the timetable ahead of its publication on the Ofcom website, and to allow the parties to comment on the timetable.

2.4 The CLLS would also encourage Ofcom to commit to provide parties with information about the process and timing for the Ofcom's own internal decision making procedures, so that the key milestones are clarified and expectations can be managed accordingly.

Publicity

2.5 The Draft Competition Guidelines state that Ofcom intends to publish the identity of the subject of the investigation and the identity of any complainant on its website when announcing the opening of an investigation. The publication of the identity of the parties could be detrimental to a party's commercial interests and reputation. The inevitable interest from the media and stakeholders such as shareholders and customers, and the possibility of such information serving as a trigger for premature damages claims, are likely to place intense pressure on parties under investigation, all at a time when Ofcom is a long way from reaching a preliminary conclusion that there has indeed been an infringement. We therefore consider that at this stage the names of the parties and complainants should not be published.

2.6 The CLLS also considers that it is important that the opening announcement is carefully phrased so as to make clear that it refers only to the opening of an investigation and that there has been no infringement finding.

Power to require an individual to answer oral questions

2.7 We note that interviews with individuals will usually be recorded. We suggest that Ofcom follows the approach of the CMA and confirms in the Draft Competition Guidelines that it will produce a transcript of the interview and will ask the interviewee to confirm, in writing, that the transcript gives an accurate account of the interview. The individual should also be given the opportunity to identify any confidential information in the transcript.

Powers to enter and search premises

2.8 It would be helpful to include more details of Ofcom's powers to enter and search premises in the Draft Competition Guidelines, or to at least cross-refer to the corresponding CMA *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*. In particular, it is important for the Draft Competition Guidelines to explain the legal position in relation to legally privileged communications and protection against self-incrimination.

Confidentiality

2.9 Paragraph 3.33 states that Ofcom may consider the use of confidentiality rings or data rooms. The CLLS agrees that these processes can be beneficial as they can avoid the need to produce large volumes of redacted data. We further agree that the use of confidentiality rings should be decided on a case by case basis as the process may not be suitable in all

cases. It would be helpful if the Draft Competition Guidelines would set out how such processes will be managed in compliance with the Competition Appeal Tribunal's judgment in *BMI Healthcare Ltd v Competition Commission* [2013] CAT 24.

Decision makers

2.10 The CLLS welcomes the improved transparency to the decision making process and agrees that there should be separate decision makers for (i) overseeing the investigation and issuing the statement of objections ("SO") and (ii) for issuing a supplementary statement of objections, draft penalty statement and infringement decision (paragraphs 4.4 and 4.5). We agree that it is appropriate that the first stage case supervisor is a senior member of Ofcom's executive and that members of the executive with Board-delegated authority and who have not been involved in the investigation are the second stage decision makers. In our experience it is important and beneficial to have senior individuals playing a key role in all stages of an investigation. We emphasise that it is important that the second stage decision makers are completely separate from the investigating team in order to avoid the risk of confirmation bias. However, we believe that there should be three second stage decision-makers in competition cases, one of whom should be a senior competition lawyer, unconnected with the investigation. Moreover, we consider that Ofcom should move towards the practice adopted by the CMA and other regulators like the FCA, so that two of the three decision-makers are 'senior panel members' (i.e. they are not Ofcom employees).

2.11 The CLLS would also welcome more clarity on how the internal decision making process will work in practice, and the approach Ofcom will take to internal checks and balances. For example, before the SO or final decision is issued, will lawyers and economists from outside the case team analyse and review the relevant facts and key underlying evidence, and highlight to the case team and the relevant decision maker(s) the legal and/or economic risks associated with the proposed course of action? Such an approach is used by the CMA to ensure robust internal scrutiny.

State of Play Meetings

2.12 The CLLS has concerns about Ofcom's proposal to hold state of play meetings only on a case by case basis. We consider that Ofcom should offer three state of play meetings as a matter of practice: (i) once the case has been opened; (ii) before the SO is issued; and (iii) after the SO is issued. This would be in line with current CMA practice in its competition investigations. Our experience is that businesses that are subject to antitrust investigations place value on direct access to the case team and decision-makers, particularly over the course of a long investigation. We believe that such discussions can be productive for Ofcom as a way of clarifying important issues and can assist the parties to understand Ofcom's position. Greater access to Ofcom gives a party to an investigation greater confidence that its view has been heard and taken into account.

Oral Hearing

2.13 The CLLS considers that oral hearings are an essential feature of the rights of defence of the parties. We think it is important that the investigating case team and decision makers should as a matter of practice attend the oral hearing in order to hear the parties make their case. It is important for the parties to feel that they have proper access to the decision-makers, and a chance to make their case in front of them. This may help reduce the feeling that they need to appeal if the decision goes against them (on the grounds that their case has not been properly heard).

2.14 It would be useful to clarify how the oral hearing will work. We suggest that Ofcom and the parties agree an agenda in advance of the hearing and that the agenda should include reasonable periods of time for the parties to make oral representations and for the Ofcom staff present to ask questions on its representations. This would be in line with the approach of the CMA in its competition investigations.

2.15 We believe that the oral hearing should be a two way communication, meaning that the parties should have the opportunity to question Ofcom and vice versa. Without such interaction, the value of having direct access to the decision makers and the opportunity to be heard would be significantly diluted.

2.16 We note that the hearing will be transcribed. We consider that the subject of the investigations should be asked to confirm the accuracy of the transcript and to identify any confidential information. This should be made clear in the Draft Competition Guidelines.

Letter of facts

2.17 Paragraph 4.24 states that where Ofcom acquires new evidence that it wishes to rely on, Ofcom "may" put this evidence to the subject of the investigation and give it the opportunity to respond. The CLLS considers that "may" should be replaced with "will".

Draft penalty statement

2.18 The CLLS believes that Ofcom should provide a detailed calculation of penalties in its SO and are glad that Ofcom is proposing to set out its reasons for the proposed level of penalty. We think that the Draft Competition Guidelines should make it clear that Ofcom will set out the key aspects relevant to the calculation of the penalty that it proposes to impose including, for example, the starting point percentage, the relevant turnover figure to be used, the duration of the infringement, any uplift for specific deterrence, any aggravating/mitigating factors (and the proposed increase/decrease in the penalty for these), and any adjustment proposed for proportionality.

Settlement

2.19 The CLLS welcomes the inclusion of guidance on settlement procedures as this improves transparency. We have a number of comments on the procedure.

2.20 First, we note that the party will be sent a summary statement of facts for the purpose of settlement discussions, including the provisional level of penalty. In our view the Draft Competition Guidelines should confirm in paragraph 5.19 that the party will have sight of the key documents on which Ofcom is relying as part of the access to file process.

2.21 We are concerned that the Draft Competition Guidelines do not state that the subject of the investigation will be given the opportunity to give representations on the statement of facts and on the draft penalty. We urge Ofcom to clarify this and to confirm that the parties will have such an opportunity (as they do in CMA investigations).

2.22 Paragraph 5.20 of the Draft Competition Guidelines states that if the subject of the investigation is not prepared to agree to settle on the basis of the statement of facts, it is unlikely to be appropriate to continue the settlement process. The CLLS does not agree that this should be Ofcom's starting position. If a party does not agree with all or part of the statement of facts, settlement should not automatically be ruled out at that stage. The party should have the right to make representations and Ofcom should make the decision

as to whether to continue with settlement on a case by case basis in light of those representations.

Interim Measures

2.23 The Draft Competition Guidelines do not clearly explain the circumstances in which Ofcom considers it would be appropriate to impose interim measures. We note that the CMA explains the factors that it will take into account when considering whether conduct is causing or is likely to cause significant damage with regard to the facts of the case (paras. 8.13-8.20, *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*). It would be helpful if Ofcom were to include similar guidance in the Draft Competition Guidelines. Ofcom's Draft Advice for Complainants provides examples of the type of evidence it may expect to receive in an application for interim measures - it would be helpful if this information was included in the Draft Competition Guidelines as well.

3. DRAFT ADVICE FOR COMPLAINANTS

3.1 The Draft Advice for Complainants states that Ofcom expects complainants to try to resolve matters through commercial discussions before approaching Ofcom, and that Ofcom may not accept a complaint if the complainant has not made appropriate attempts to resolve problems directly with the subject of the complaint. The CLLS disagrees with this position. There are often legitimate commercial reasons for not engaging directly with the subject of the complaint. Businesses should not be discouraged from approaching Ofcom on the basis that they have not first tried to resolve the issue directly.

3.2 We note that Ofcom is open to listening to concerns but it will not give a view on the merits of a potential complaint. We consider that Ofcom should be able to give at least a preliminary view, in line with the approach of the CMA, who will provide an initial view as to whether it would be likely to investigate the matter further if an in depth complaint were to be made. This would provide more certainty to the complainant and allow it to assess it is worth spending the time and resources in proceeding with the complaint. Ofcom also expects at this stage that the potential complainant provide as much evidence as possible. It would be helpful to clarify what kind of evidence Ofcom would expect and the level of detail.

City of London Law Society Competition Law Committee
13th March 2017