

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

**RESPONSE TO OFT SUPPLEMENTARY CONSULTATION ON GUIDANCE ON APPLICATIONS FOR LENIENCY AND NO-ACTION IN CARTEL CASES**

*This response is submitted by the Competition Law Committee of the City of London Law Society ("CLLS") in response to the OFT's Supplementary Consultation on Guidance on Applications for Leniency and No-Action in Cartel Cases published in October 2012 ("Supplementary Consultation").*

*The CLLS is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise on and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.*

1. **QUESTION 1: What is your view on the option of the OFT not requiring LPP waivers as a condition of leniency? Which option with respect to the treatment of LPP in leniency cases do you consider ensures the OFT's ability to bring effective prosecutions whilst preserving leniency incentives and respecting the rights of interested parties: the one set out in this Supplementary Consultation or the one set out in the Draft Revised Guidance? Please give reasons for your view.**
  - 1.1 The CLLS welcomes the proposed option of the OFT not requiring LPP waivers as a condition of leniency in either civil or criminal cartels cases. As the OFT rightly acknowledges and took into consideration, LPP is a basic fundamental human right (*R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*<sup>1</sup>; *R v Derby Magistrates ex parte B*<sup>2</sup>). In our view it is important for the OFT to follow good practice in respecting fundamental human rights as other jurisdictions with newer antitrust regimes will no doubt look to the OFT as an example when setting their own practices.
  - 1.2 If the OFT pursues the option of requiring LLP waivers, there is a real risk that depriving parties of their fundamental right to privilege would make them more reluctant to alert the OFT to the existence of a cartel in exchange for leniency. Potential leniency applicants may be less willing to be frank when seeking legal advice, thus disincentivising leniency applications. In particular, waivers would increase the risk of documents become disclosable in civil proceedings and in criminal, administrative and civil cases in other jurisdictions. A reluctance to come forward to the OFT would seriously undermine the rationale of the leniency regime (cartel detection). Compulsory waivers would also likely lead to a more limited manner in which internal investigations are conducted. For example, there may be a tendency to refrain from asking open questions which could lead to comments by the witness which go beyond the focus of the leniency application. This approach would clearly contradict the idea of unearthing any competition law infringements within a company, which leniency generally supports.
  - 1.3 The OFT now acknowledges in the Supplementary Consultation that LPP waivers for the purpose of criminal cartel prosecutions are not required by other key antitrust regulators such as the Canadian Competition Bureau, and the US Department of Justice. If, as we strongly support, the OFT decides that it will not require waivers, it will be in line with some of the most sophisticated antitrust leniency regimes in the world, which already have considerably more experience in dealing with criminal cartel investigations. This procedural alignment would be welcome as it would ensure some level of consistency between leniency regimes in

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<sup>1</sup> [2003] 1 AC 563.

<sup>2</sup> [1995] 4 AER 526.

other jurisdictions. The OFT itself has stated in the past that "differing approaches to disclosure and privilege around the world can cause difficulties in international cartel cases."<sup>3</sup>

- 1.4 The OFT states that in its Draft Revised Guidance, it was mindful of its disclosure obligations as a criminal prosecution authority when prosecuting the criminal cartel offence under CPIA 96. However, we agree with the OFT's conclusion in the Supplementary Consultation that CPIA does not place an obligation on the OFT to demand a waiver of LPP. Section 3 requires a prosecutor to disclose material to the accused that has not already been disclosed and that is in the prosecutor's possession or that the prosecutor has inspected. CPIA does not however require the OFT to actually take steps to obtain possession of or to inspect material for that purpose. Therefore, it seems that the OFT was previously interpreting its duties as a prosecutor too widely in its proposal to require LPP to be waived. For the avoidance of doubt, it is important that the OFT clearly states in its guidance that it will never ask for a waiver of privilege.
- 2. QUESTION 2: What is your view of the proposed IC procedure? Do you have any alternative suggestions as to how the OFT can satisfy itself as to whether documents benefit from LPP?**
- 2.1 We understand the rationale for the OFT wanting legal advice as to whether or not to accept a claim for LPP, in the event that it does not require waiver of LPP as a condition of leniency.
- 2.2 We agree that use of independent counsel is preferable to use of an OFT lawyer who may not be objective, even if that OFT lawyer is unconnected with the case. We suggest that the IC should be a reputable senior QC (who is not the OFT's standing counsel) with significant experience of criminal procedure and dealing with LPP. The QC may require the support of a junior barrister, depending on the volume of documents to be reviewed. One approach may be to use different IC in different cases in order to avoid a potential risk of a "standard form" prosecution counsel approach. It would be worth the OFT explaining in its guidance how it will seek IC's opinion - will the OFT ask the party for a list of documents (as produced in at the disclosure stage of standard litigation proceedings) and if the majority are subject to a claim for LPP, ask for an IC opinion at this point?
- 2.3 As the IC will be instructed by the OFT, the OFT will presumably pay IC's legal fees. We recommend that the OFT expressly states this in its guidance.
- 2.4 In making materials available to the IC, it is imperative that it is clear that this is a compulsory disclosure. This is essential in order to avoid the risk that other jurisdictions (such as the US) might treat the disclosure to IC as voluntary or inadvertent, resulting in a waiver of LPP. To this end, we think that the OFT should have to issue a notice under section 193 of the Enterprise Act 2002 to the party, requiring it to disclose the material to IC. Section 193 does not appear to require that information may be disclosed only to the OFT, so there appears to be scope for the OFT to use this statutory provision to require that the documents are disclosed to IC. Alternatively, the OFT could consider adopting the approach used in the US, where documents are reviewed *in camera* by the court for the purpose of determining whether they are privileged. If a judge rules that the documents are privileged, this would not result in a waiver of privilege. In the UK, the option would be for the Competition Appeal Tribunal ("CAT") to conduct an *in camera* review on an application by the OFT. The CAT would then order production of the documents for its review - this would not amount to voluntary or inadvertent disclosure.
- 2.5 In addition, the OFT needs to give guidance on how disputes relating to LPP would be resolved. It would be open to a party to seek judicial review in the event it disagrees with the

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<sup>3</sup> OFT paper: *Project Condor Board Review*, page 2.

OFT's decision on disclosure of material. However, in our view the leniency applicant should have the right to challenge the IC's opinion received, before the OFT, without prejudicing its leniency application.

**3. QUESTION 3: Do you have any comments on the proposed amended paragraphs for the Final Guidance?**

3.1 We do not have any additional comments other than the views expressed above.

**Membership of the Leniency Working Party of the CLLS Competition Law Committee**

This response has been prepared, on behalf of the CLLS Competition Law Committee, by the following working party:

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