

## Consultation: Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 – Response of Ashurst LLP

13 September 2024

### 1. Introduction

1.1 Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority (**CMA**) on the proposed changes to the guidance on the CMA's investigation procedures in Competition Act 1998 cases (2 August 2024) (**Draft CMA8**). This response contains our own views, based on our experience of advising and representing clients on the procedural application of the Competition Act 1998 (**CA98**), and is not made on behalf of any of our clients.

1.2 We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our responses.

1.3 As set out in more detail below, our main suggestions are that the guidance be amended to:

- (a) provide greater detail on how the CMA's duty of expedition will be applied and enforced, including the CMA's approach to deadlines for information requests.
- (b) provide additional guidance on when subjective suspicions may trigger the requirement to preserve documents.
- (c) remove the requirement for parties to retain all documents that are "*connected with the subject matter of the investigation*" and references to documents containing "*background information*".
- (d) limit the extent of the electronic information that the CMA may collect when entering premises with a warrant so that it does not include any electronic information accessible from the premises.

### 2. General comments

2.1 The Draft CMA8 includes commentary on the CMA's intention to act pursuant to its "*duty of expedition*" in investigatory and enforcement procedures: "*the CMA*

*must have regard to the need for making a decision, or taking action, as soon as reasonably practicable".<sup>1</sup>* We submit that the CMA should update the Draft CMA8 to more thoroughly explain whether:

- (a) the CMA will apply a measurable metric to determine whether (and to what extent) it is complying with its the duty of expedition. This would enable parties and practitioners to better understand the CMA's decision-making processes and offer greater certainty to parties.
- (b) the CMA will consider the reasonableness of any deadlines imposed on parties taking into account the scope of any information requested, allowing for flexibility in extenuating and nuanced circumstances (see paragraph 4.2 below), when applying the duty of expedition in the context of information requests and other procedural matters relating to parties to an investigation.

3. **Section 5 – Opening a formal investigation – Document preservation obligations**

*Suspecting documents would be relevant to an investigation*

- 3.1 We are concerned that the duty to preserve documents relevant to investigations, introduced by section 25B of the CA98 (as amended by the Digital Markets, Competition and Consumers Act), will give rise to considerable uncertainty for companies and individuals. We therefore request that the CMA provide clear guidance on when the obligation set out in section 25B will apply.
- 3.2 Section 25B requires documents to be preserved where a person knows or "suspects" that an investigation by the CMA is being, or is likely to be, carried out. This imposes a considerable burden on individual employees who are unlikely to possess the requisite knowledge or experience to evaluate accurately which documents may be relevant to an investigation. Individuals, and even companies, are often unaware that the CMA is conducting an investigation and they are even less likely to be aware of investigations by overseas regulators. As a result, businesses may retain swathes of their day-to-day documentation on the basis of a subjective (even if entirely unfounded) suspicion that they may be relevant to a future investigation of which they have no actual knowledge. This places a significant and disproportionate burden on companies.
- 3.3 Clear guidance is therefore required to provide companies with greater certainty on when subjective suspicions would trigger the requirement to preserve documents. This is particularly important given the high cost of preserving

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<sup>1</sup> Draft CMA8, paragraph 2.5.

documents and the risk to individuals and companies of incurring substantial fines for failing to retain documents.

*Interaction with other legislation*

- 3.4 For clarity, it would be helpful to amend the Draft CMA8 to explicitly state that the document preservation obligations under the CA98 supersede any other legislative requirements to delete data, in particular the "*right to erasure*" under section 47 of the Data Protection Act 2018.

*Extending the requirements of the CA98*

- 3.5 Paragraph 5.10 of the Draft CMA8 goes beyond the provisions set out in sections 25B of the CA98 (as amended) which requires companies to preserve documents which an individual knows or suspects to be "*relevant to the investigation*". Paragraph 5.10 of the Draft CMA8 seeks to extend the concept of relevant documents to documents that are "*connected to the subject matter of the investigation*", including documents containing "*background information*". The meaning of "*connected*" is undefined and could very easily be interpreted by the CMA to extend to documents that have no conceivable relevance to the investigation. This imposes an unreasonably disproportionate burden on parties to retain or produce a potentially unwieldy number of documents.
- 3.6 We therefore suggest reverting to the statutory test, that is to say, information that is "*relevant to the investigation*" so as to ensure the document preservation requirements on undertakings remain reasonable, proportionate and in line with the requirements set out in the CA98.

4. **Section 6 – The CMA's formal powers of investigation**

*Draft information requests*

- 4.1 Whilst we acknowledge that there may be instances where the CMA is not able to share information requests in draft form (as noted at paragraph 6.8 of the Draft CMA8), we consider that in such cases the CMA should acknowledge that there may be certain information that the undertaking is genuinely unable to provide for legitimate reasons. In these instances, the CMA should allow undertakings to respond to the best of their abilities, noting that they may not be able to provide a full response in the form requested.
- 4.2 In line with our above comment at paragraph 2.1 in respect of the CMA's duty of expedition, we consider that there should be flexibility to request an extension where the CMA has not been able to issue an information request in draft form. Otherwise, undertakings may be unfairly penalised for failing to provide information that, for good reason, they are not capable of obtaining by the

deadline set by the CMA, without having had an opportunity to engage constructively with the CMA.

*Powers when entering premises with a warrant*

- 4.3 We are concerned that the Draft CMA8 expands the CMA's power of production in relation to electronic information by allowing the CMA to require production *any* information "not only that which the CMA officer considers relates to a matter relevant to the investigation".<sup>2</sup> This exceeds the CMA's powers set out in section 28(2)(f) and 28A(2)(f) of the CA98 which only allow the CMA to require production of information which the "named officer considers relates to any matter relevant to the investigation". We consider that paragraph 6.36 of the Draft CMA8 should be amended to only refer to information relevant to the investigation in line with the primary legislation.
- 4.4 We would also welcome guidance from the CMA on how the power to request the production of electronic information will be used in practice, particularly in relation to how the CMA will take away the relevant electronic information.
5. **Section 7 – Limits on the CMA's powers of investigation**
- 5.1 Paragraph 7.1 of the Draft CMA8 states that the limitation on the CMA not being allowed to use its powers of investigation to obtain privileged communications "does not impact the CMA's powers under Part 2 of the Criminal Justice and Police Act 2001". Given the importance of protecting legally privileged material to maintain undertakings' right to confidential and privileged legal advice, the guidance should be amended to specifically refer to the limited sections within Part 2 of the Criminal Justice and Police Act 2001 which explicitly allow the CMA to obtain legally privileged information.
6. **Section 13 – The final decision**
- 6.1 In the event that an undertaking fails to comply with a direction, footnote 188 of Draft CMA8 states that the CMA may impose a fine which will be calculated using an "in the round" approach. As set out in our response to the CMA's consultation on its proposed approach to administrative penalties (submitted on 23 August 2024), we do not consider it appropriate to group breaches of Remedy Requirements (as defined in the Draft CMA4) with administrative penalties. Breaches of remedies (including directions) are not limited to procedural matters. It is therefore appropriate to follow a similar approach to the one used to determine penalties for substantive infringements under the CA98 (i.e., a stepped approach).

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<sup>2</sup> Draft CMA8, paragraph 6.36.

7. **Section 14 – Settlement**

- 7.1 We welcome the CMA's proposal to increase the settlement discount for non-cartel conduct to 40% to offer stronger incentives for businesses to settle cases involving non-cartel conduct. We would welcome explicit confirmation that Chapter II cases will also benefit from the higher settlement discount of up to 40%.