Transparency and Disclosure:

Statement of the CMA’s Policy and Approach

Summary of Responses to the Consultation

CMA6

19 December 2024

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1. Introduction and Background

1.1 The CMA is committed to being open and transparent about the work it does and how it engages with those directly involved in or affected by its work, while seeking to give appropriate protection to the confidentiality of information it obtains in the exercise of its functions.

1.2 The guidance document CMA6 *Transparency and disclosure: Statement of the CMA's Policy and Approach* (the 2014 CMA6) sets out the CMA's policy and approach to transparency and information disclosure across its tools. It was published in 2014, when the CMA's powers vested. The 2014 CMA6 is supplemented by more detailed guidance on transparency and disclosure in tool specific guidance.[1]

1.3 The CMA reviewed whether the 2014 CMA6 should be updated both in view of the Digital Markets, Competition and Consumers Act 2024 (DMCCA24) and changes in other legislation and CMA practice since 2014.

1.4 The CMA concluded that the general approach to transparency and disclosure in the 2014 CMA6 remains fit for purpose.

1.5 However, parts of the 2014 CMA6 required updating to reflect developments in CMA practice, as well as legislative developments since 2014, and in particular the DMCCA24.

1.6 The CMA therefore prepared the draft *CMA6 Transparency and Disclosure: Statement of the CMA's Policy and Approach* (the Draft CMA6), on which it consulted from 24 May 2024 to 24 June 2024.

The Draft CMA6

1.7 New text in the Draft CMA6 (in comparison to the 2014 CMA6) largely related to CMA functions introduced by the DMCCA24, such as the new consumer direct enforcement powers,[2] as well as the new motor-fuels information gathering function.[3] The Draft CMA6 also contained changes made to reflect current CMA practice as well as to take account of information law

[1] For example, CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases* discusses transparency and disclosure in CA98 case in more detail: see, for example paragraph 11.21 of CMA8.

[2] See Chapter 4 of Part 3 of the DMCCA24.

[3] See sections 310 to 317 of the DMCCA24.

developments (for example, the 2014 CMA6 refers to now repealed data protection legislation).

1.8 As with the 2014 CMA6, the Draft CMA6 was supplemented by more detailed guidance on transparency and disclosure in tool-specific guidance.[4] The Draft CMA6 in some places referred to guidance which the CMA is aiming to publish in the near future following consultation (for example, guidance on the new CMA direct enforcement model for consumer law that will be created by the DMCCA24, and updated guidance on the CMA's markets functions).

1.9 The draft *Digital Markets Competition Regime Guidance* ('the draft DMCR Guidance') which was also the subject of a parallel consultation to the Draft CMA6, contained specific wording on the CMA's approach to transparency and disclosure in respect of the CMA's digital markets competition regime functions under Part 1 of the DMCCA24. The DMCR Guidance also referred to the Draft CMA6.[5]

Overseas Investigative Assistance Guidance

1.10 The main new addition in the Draft CMA6 (in comparison to the 2014 CMA6) was the Overseas Investigative Assistance Guidance (OIA Guidance) at paragraphs 7.29 – 7.57 of the Draft CMA6. The DMCCA24 gives the CMA the power to conduct investigative steps on behalf of other overseas authorities (referred to as 'Overseas Investigative Assistance' or 'OIA').[6] This power will apply across the CMA's competition, consumer protection and digital markets competition regime functions.

1.11 The CMA is required under the DMCCA24 to prepare and publish guidance on how it will exercise these new powers.[7] The OIA Guidance needs

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[4] See paragraph 1 above.

[5] The final version of the DMCR Guidance also refers to CMA6: see paragraph 1.3 and footnote 360 of that guidance.

[6] Those enforcers who have investigatory powers for consumer protection purposes under Schedule 5 of the Consumer Rights Act 2015 (CRA15) may also provide investigative assistance to overseas enforcers by using those powers in connection with infringements of overseas laws which correspond to or are similar to domestic consumer protections laws. The IA Guidance is applicable to those enforcers to the extent they provide investigative assistance. For simplicity, references to the CMA in the IA Guidance should be taken to include those enforcers who have investigatory powers for consumer protection purposes under Schedule 5 of the CRA15, unless the context requires otherwise. Any statements in the IA Guidance that relate purely to the CMA's own policy, practice or experience will not apply to other enforcers. See paragraph 7.32 of the Draft CMA6 as well as section 318(2) DMCCA24 and Schedule 5 of the Consumer Rights Act 2015 for more information about which UK enforcers can provide overseas investigative assistance under the DMCCA24.

[7] Section 323(1) of the DMCCA24.

Secretary of State approval in order to be published. [8] In contrast, the remainder of CMA6 does not require Secretary of State approval.

1.12 The CMA must have regard to the OIA Guidance when exercising its OIA functions under Part 5 of the DMCCA24.[9]

Responses to consultation

1.13 The CMA received 3 responses to the Draft CMA6 consultation from external stakeholders. The CMA thanks respondents for their comments.

The final guidance

1.14 A summary of the CMA's response to the feedback received is set out in this document which also explains the key changes the CMA has made to Draft CMA6 as a result.

1.15 This document is not intended to be a comprehensive record of all views expressed, nor to be a comprehensive response to all individual views, however it does set out the key general views received and the most pertinent. All non-confidential responses to the consultation are available on the consultation webpage.

1.16 The OIA Guidance was approved by the Secretary of State for Business and Trade on 17 December 2024.

1.17 The final version of CMA6, including the OIA Guidance approved by the Secretary of State, will take effect from 1 January 2025.

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[8] Section 323(3) of the DMCCA24.

[9] See section 323(5) of the DMCCA24. That subsection also requires UK enforcers other than the CMA providing investigative assistance to overseas public authorities under those functions to have regard to the IA Guidance. And see also footnote 3 above.

2. Summary of responses to the consultation

2.1 A summary of the CMA's response to the feedback received is set out in this document which also explains the key changes the CMA has made to Draft CMA6 as a result.

The Duty of Expedition

2.2 All respondents commented on the duty of expedition. Respondents noted that CMA6 should make explicit that the duty of expedition does not and cannot override or limit a party's legal rights of due process. One respondent argued that the Draft CMA6 does not reflect the duty of expedition in the CMA's internal aspect of proceedings and that it expressly should. There were also calls for an explanation of how the CMA expects to incorporate this duty in its internal processes as well as examples of where the duty of expedition is used to accelerate investigations, and how the CMA would balance the duty of expedition with other duties.

CMA views

2.3 The CMA notes that the duty of expedition is a general duty on the CMA in respect of its competition, consumer and digital markets functions under which the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable (emphasis added). It is clear that this duty does not override the CMA's administrative law duties, including the duty to act reasonably and fairly. As such, the CMA does not consider that it is necessary to indicate this on the face of CMA6. Nor does the CMA consider it necessary or appropriate to discuss in CMA6 how it will operationalise this duty in its internal processes. How the duty will be operationalised will vary according to the function to which the duty applies. Moreover, how the duty applies to a specific case will depend upon the circumstances of each case.

Announcing a formal case opening

2.4 There were some comments as to the level of detail that the CMA would share on case opening, including the circumstances in which the CMA might not name parties at case opening. In particular, one respondent raised concerns about the CMA 'normally' identifying undertakings that are subject to formal investigations but to which the CMA has not formally alleged wrongdoing. They submitted that the CMA should alter this approach so as not to risk prejudicial outcomes for businesses, unintended market impacts and confirmation bias for the CMA's investigation.

2.5 One respondent asked for further guidance on the circumstances and factors the CMA would consider when exercising its discretion on publishing a notice in relation to its assistance to an overseas public authority.

2.6 One respondent suggested that the Guidance should provide more detail on the grounds on which the CMA would ordinarily identify the parties involved in a case for the first time, where the parties were not identified at case opening. They also asked for clarification in paragraph 3.14 of the circumstances in which the CMA will make an announcement when it makes a decision to prosecute in a criminal investigation. . =.

CMA views

2.7 The CMA notes that its practice is that it will normally publish the names of the parties under investigation in a case opening announcement, other than in exceptional circumstances, such as where doing so could, in the CMA's view, prejudice a CMA investigation.[10]

2.8 The CMA's practice in this regard is well-established, with the CMA having moved to a policy of naming parties in CA98 and consumer cases in 2020, following a public consultation on the approach.[11] The CMA has an explicit power under CA98 to identify in a case opening notice any party whose activities are being investigated as part of the investigation.[12] There will be a similar explicit power under the new direct consumer enforcement regime when that regime enters into force.[13]

2.9 The CMA remains of the view that the public interest in the transparency of its work means that the CMA should normally publish the names of parties under investigation in case opening announcements, other than in exceptional circumstances. The public has an interest in being made aware of the parties under investigation, provided the CMA makes clear that there should be no

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[10] Se for example, CMA8 at para. 5.7. And see also Transparency in consumer enforcement cases: updated supplementary note (publishing.service.gov.uk) at para. 9.

[11] See, for example, Response to consultation: Revised guidance on the CMA's investigation procedures in Competition Act 1998 cases

[12] See section 25A(1)(d) CA98.

[13] See section 180(3)(c) DMCCA24. The relevant explanatory note for section 180(3)(c) DMCCA24 says that "[t]he CMA may publish a notice of investigation under this section, setting out what and, so far as possible, whom, it is investigating and indicating the investigation timetable...This will signal to other market participants that the CMA has reasonable grounds for suspecting either that the practice constitutes a relevant infringement or that there has been or is consent or connivance in the practice by another relevant person. This may encourage consumers, other traders or other entities to come forward with relevant information or evidence. Publication of a notice is not mandatory in all cases (e.g. it may not be appropriate if potential prejudice may be caused to the investigation)."

assumption that there has been an infringement of the law. Moreover, parties in a sector that are not under investigation should also be protected from unwarranted public speculation that they might be under investigation. Including the names of the parties under investigation in CMA case opening announcements also means that third parties, including individual consumers, who have information that may be relevant to the investigation are alerted to the investigation in a way that enables them to come forward with that information. Furthermore, where a party has been identified in a case-opening announcement, and the CMA subsequently closes the investigation without taking action against that party (for example, where the investigation has been closed on administrative priority grounds) the CMA will publish a case closure announcement to that effect.[14]

2.10 Consistent with its practice to date, the CMA has indicated that an exceptional circumstance in which the CMA would not name the parties to a case is where doing so could prejudice the CMA's case or that of one of the CMA's enforcement partners. The CMA does not consider that it would be helpful to provide further examples, which would be hypothetical and by definition rare. The CMA takes a similar view with respect to providing more examples of when the CMA would not name a party when it takes the steps set out in paragraph 3.13 of CMA6.

2.11 The CMA has however provided further information at paragraph 3.11 of CMA6 as to the circumstances in which the CMA may decide to publish a notice saying that it is providing investigative assistance to an overseas public authority.

2.12 The CMA has also clarified at paragraph 3.14 of CMA6 that the CMA will normally make an announcement when it makes a decision to prosecute in a criminal investigation, and has removed the additional wording included in the Draft CMA6 that referred to doing so 'in appropriate cases'.

Case closure announcements and decisions

2.13 Two respondents were both sceptical as to what they perceived as the CMA moving to a policy in paragraph 3.18 of CMA6 of not providing an explanation when deciding to close a CA98 case on prioritisation grounds. One respondent in particular considered this to be an important aspect of CMA6 as

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[14] See, for example, paragraph 3.18 of CMA6 and para. 10.11 of CMA8. Under CA98, such an announcement is required where a named party's investigation has been closed in such circumstances: see section 25A(4) CA98. And note section 180(4) DMCCA24 which requires a case closure announcement where the CMA closes a direct consumer enforcement case in which a case opening announcement has been issued.

businesses should be able to explain to their stakeholders why the CMA has decided to close the case against them as a matter of good governance.

CMA views

2.14 The CMA notes that the changes made to paragraph 3.18 relate to the information to be provided on the CMA webpage when the CMA closes such cases on the basis of administrative priorities. They do not change the information that will be provided to the parties who have been under investigation in a CA98 case and whose cases have been closed on the basis of administrative priorities.[15]

Market and non-market sensitive announcements

2.15 One respondent commented on the proposed changes in paragraph 3.22--3.24 of CMA6 in respect of market and non-market sensitive announcements. The respondent suggested, for example, that in some cases, it is necessary for a broader group to be made aware of an impending press release (including the confidential text of a press release) to be able to make the necessary preparations.

CMA views

2.16 The CMA has noted the points made by the respondent but does not propose to make any changes to the text in paragraphs 3.22-3.24 of CMA6, which are reflective of CMA practice in this area. In the CMA's view, the approach set out properly balances the interests of giving advance notice to parties of CMA announcements with the importance of protecting confidential (and as the case may be, potentially market-sensitive) information as well as the need for an efficient process for making CMA announcements.

Requests for information

2.17 Respondents argued that the grounds set out in CMA6 for extensions to comply with requests for information are too restrictive. One respondent argued that the reasonableness of a deadline for an information request must be assessed in the circumstances of the case, if the original deadline was wholly unreasonable, the firm argued that an extension would not require 'very good reasons'. The same respondent also suggested giving examples of

[15] See, for example, paragraphs 10.2—10.12 of (CMA8) *Guidance on the CMA's Procedures in Competition Act 1998 Cases*.

circumstances in which the CMA would be inclined to grant or refuse parties' requests for extensions to information requests.

2.18 Another respondent was concerned about the proposed approach of the CMA in paragraph 4.6 of CMA6 to whether it will discuss a draft information request with an intended recipient. They said that the practice of discussing a draft information request with a party is helpful to allow parties to produce meaningful responses for the CMA and caution against over-reliance on the duty of expedition to justify not issuing a draft request for information.

CMA views

2.19 The CMA aims to set reasonable deadlines in the course of its cases. It is appropriate that the CMA should expect that a party has very good reasons for requesting extensions in such circumstances. The CMA will give due consideration to the reasons provided for a request for an extension. Given that each such request will be considered on its own facts, the CMA does not consider it helpful or appropriate to provide examples of when extensions will be granted.

2.20 With respect to discussing a draft information request with an intended recipient in advance, the CMA considers that paragraph 4.6 sets out an appropriate approach in this regard, one reflective of CMA practice. It is appropriate that the CMA take into account the circumstances of the case when deciding whether it should discuss a draft information request with an intended recipient.

Disclosure in connection with the conduct of a case

2.21 One respondent suggested that it should be made clear that an undertaking will be informed of any decision to disclose its information, along with the CMA's reason for doing so. The same respondent was also concerned about whether the CMA should be able to decide, without engaging with undertakings in advance, to disclose information based on protections it has applied (anonymisation/aggregation). The respondent was also sceptical about whether these safeguards are sufficient to address confidentiality concerns and suggest that these safeguards be tested with the relevant undertakings.

CMA views

2.22 Paragraph 4.29 of CMA6 makes it clear that as well as complying with any relevant obligations under the applicable statutory regime, the CMA will take such steps as it considers reasonable and practicable in the circumstances of the case to seek further views on confidentiality from the party claiming

confidentiality, or the party to whom the information relates, where it intends to make a disclosure. In making this assessment, the CMA will have regard to the extent to which the party has already had an opportunity to make confidentiality claims, as well as any steps the CMA proposes taking to protect the confidentiality of the information concerned (for example, by anonymising or aggregating data). The CMA considers that this is a fair, reasonable and lawful approach to disclosure of information.

Identifying confidential information

2.23 One respondent suggested reconsidering the substitution in paragraph 4.17 of CMA6 of 'past' business strategy for 'current' business strategy in relation to the type of information that will normally be considered confidential by the CMA. The respondent argued that the past strategy of a business can enable identification of its present or future strategy.

2.24 Another respondent proposed textual changes for paragraph 4.12 of CMA6 that acknowledge that the confidentiality of parties' information is a critical consideration for those that participate in the CMA's cases.

CMA views

2.25 The CMA has clarified the third bullet point of paragraph 4.17 of CMA6 so that it refers to information relating to the intended strategy of a business, which it considers provides appropriate protection for strategic information in this context, which in some circumstances might include where past information is indicative of intended strategy.

2.26 The CMA has not however added wording to paragraph 4.12 of CMA6 to the effect that the confidentiality of information is a crucial consideration for those participating in CMA cases. The CMA notes that the current wording already explicitly states this is an important consideration and does not consider that this needs further gradation.

The scope of the Procedural Officer role

2.27 One respondent commented on the remit of the Procedural Officer's role in handling procedural disputes, requests for confidentiality in merger cases and market studies and investigations. The respondent argues that there is merit in expanding the role of the Procedural Officer beyond the scope of review as they considered it relatively limited.

2.28 The same respondent also suggested that in disputes arising outside of the Procedural Officer's remit, there is no procedural safeguard against onerous

CMA requests or behaviour. The respondent called for a Procedural Officer or its equivalent to be appointed in direct consumer enforcement cases.

CMA view

2.29 The CMA considers that the current scope of the Procedural Officer's role is appropriate. The Procedural Officer, for example, provides a mechanism for handling disputes relating specifically to the confidentiality of information that the CMA proposes to publish in mergers and markets cases. Moreover, Chapter 5 sets out the process of raising complaints about the conduct of an ongoing CMA case where these are outside the scope of the Procedural Officer's remit.

2.30 Further information about procedural complaints in direct consumer enforcement cases can be found in the CMA's draft *Direct consumer enforcement guidance and rules* published for consultation on 31 July 2024. A final version of that guidance and rules will be available in due course.

Investigative Assistance and Cooperation with Overseas Authorities

2.31 One respondent welcomed the introduction of investigative assistance in the OIA Guidance contained at paragraphs 7.29-7.57 of CMA6 and, in particular, the relevant safeguards set out in paragraph 7.43 (in the section of CMA6 on the 'Scope of assistance that may be provided') of the OIA Guidance. However, this respondent and another recommended the provision of more examples in the OIA Guidance of how the powers would be used.

2.32 One respondent submitted that it would be helpful if the OIA Guidance explained what the CMA may consider 'corresponds or is substantially similar' to protections provided in any part of the UK to determine whether a protection is 'appropriate'.

2.33 Another respondent suggested that the CMA should ensure that it is satisfied that the principles drafted in 7.44-7.48 (Consideration of requests for investigative assistance) of the OIA Guidance provide a sufficient basis to exercise discretion on whether to provide assistance on the basis of its administrative priorities. This is, it was suggested, to mitigate the risk of the CMA being overwhelmed with requests.

2.34 One respondent asked for clarification in the OIA Guidance on the application of safeguards that would apply where the CMA is using its investigative powers for a domestic investigation where those powers are exercised to assist an overseas public authority.

2.35 One respondent suggested that OIA enforcement should be limited to identical enforcement tools as would be available for breaches of UK competition law.

2.36 One respondent asked for clarification of the meaning of 'sufficiently serious' in paragraph 7.45 of the OIA Guidance.

2.37 One respondent said that it found the last sentence of the final bullet in paragraph 7.46 of the OIA Guidance somewhat circular. It said that on the one hand, the CMA must satisfy itself that there are reasonable grounds to suspect an infringement of overseas law in cases where, if the infringement occurred in the UK, the CMA would have to have such reasonable grounds to suspect. Yet on the other hand, it suggested that the overseas public authority's simple say-so is considered 'conclusive' as to such grounds. It encouraged the CMA to consider providing greater clarity over the extent to which it would expect to scrutinise the overseas public authority's request.

2.38 One respondent suggested that the interests of UK consumers should expressly be included in the factors discussed in the OIA Guidance that the CMA will consider when responding to requests from overseas authorities.

CMA views

2.39 The CMA has considered whether it could include further examples in the OIA Guidance, but has concluded that it would not be appropriate to do so at this early stage of the OIA regime. The CMA will consider updating the OIA Guidance with examples when it has more experience of providing OIA.

2.40 When assessing overseas protections, the CMA will compare the protections in the overseas country to those existing in the UK in order to determine whether the protections correspond or are substantially similar to those provided in the UK. This will be assessed on a case-by-case basis and the CMA does not consider that it would be appropriate for it to provide further details or more specific examples in this regard.

2.41 With respect to the concern expressed about mitigating the risk of being overwhelmed with OIA requests, the CMA has added a reference at paragraph 7.29 of the OIA Guidance to clarify that providing OIA is at the CMA's discretion.

2.42 In response to the points about the CMA being limited to the identical enforcement tools as would be available for breaches of UK competition law when providing investigative assistance to overseas public authorities, the CMA notes that the OIA Guidance at paragraph 7.41 is clear that when providing such investigative assistance, the CMA must use the formal

information gathering powers it would normally use in respect of its own functions. This reflects the relevant OIA statutory provisions and the CMA does not consider it necessary or appropriate to add further commentary in this regard.

2.43 In paragraph 7.43 of the OIA Guidance, the CMA has further clarified the safeguards that would apply where the CMA is using its investigative powers for a domestic investigation where those powers are exercised to assist an overseas public authority.

2.44 The CMA, at the third bullet point of paragraph 7.45 of the OIA Guidance, has already provided an indication of what it considers to be 'sufficiently serious' for the purposes of OIA and does not consider it appropriate to provide further examples at this time. As the CMA gains more experience of the OIA regime it may add further examples of what it considers to be 'sufficiently serious'.

2.45 The CMA notes that at the fourth bullet point of paragraph 7.46, the OIA Guidance states that when determining whether it has reasonable grounds to suspect a breach of the overseas law, the CMA is to regard as conclusive a certificate issued by the overseas public authority. This is directly reflective of the relevant statutory provision.[16] The CMA does not consider this leads to any circularity. The CMA considers it likely that requests for overseas investigative assistance will be accompanied by such certificates, in which case the CMA will be precluded from substituting its own view for that of the overseas authority. If the CMA receives requests for overseas investigative assistance without such a certificate, however, the CMA may in due course update the OIA Guidance to reflect its experience of assessing whether it has reasonable grounds for suspecting there has, or may have been, a breach of the law of the overseas country or territory.

2.46 Paragraph 7.48 of the OIA Guidance sets out relevant and appropriate factors that the CMA will consider when considering whether to provide OIA. The CMA does not consider the interests of UK consumers to be a relevant or appropriate factor in this specific context, which focuses on operational considerations for the CMA.

[16] Section 321(9) DMCCA24.

3. List of respondents

- City of London Law Society
- Freshfields
- Law Society of Scotland