Consultation on updated CMA transparency and disclosure statement (CMA6), including new overseas investigative assistance (May-June 2024)

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation on the draft updated CMA transparency and disclosure statement (the ***Guidance***), including the CMA's new draft Investigative Assistance Guidance (the ***IA Guidance***).

1.2 This response is based on our significant experience and expertise in advising clients in matters conducted by both the CMA and the European Commission (***EC***), together with significant experience with similar matters in other jurisdictions.

1.3 This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

1.4 Likewise, this response does not necessarily in all respects represent the personal views of every partner in the Firm.

2. General

2.1 We welcome the CMA's review of the existing guidance, particularly in the context of the new and expanded powers granted to the CMA through the passage of the Digital Markets, Competition and Consumers Act 2024 (the ***Act***). Overall, the updated Guidance is clear, consistent and helpful. However, there are certain points in the Guidance which, in the Firm's view, warrant expansion, clarification, or revision. These are outlined below for the CMA's consideration.

3. Areas where further Guidance is needed or where the draft Guidance needs to be clarified

Duty of expedition

3.1 The Guidance refers at various points[1] to the CMA's duty of expedition provided for in s.327 of the Act, which now applies across all of the CMA's tools (as opposed to just its mergers functions). This duty is framed as requiring the CMA to *"have regard to the need for making a decision, or taking an action, as soon as reasonably practicable"*. The Guidance indicates that the policy goal of the duty of expedition is – at least in part – to "*help to ensure that companies are not tied up in regulatory process for any longer than necessary,*"[2] which is, of course, a worthwhile objective.

3.2 We note, however, that it will be critical to ensure that this duty is properly applied in practice, and is not used to seek to "justify" investigative steps that are unlawful or otherwise fall short of the principles of better regulation. It is also critical that parties

[1] Paragraphs 2.1 and 4.6 of the Guidance.
[2] Competition reform: policy summary briefing - GOV.UK (www.gov.uk)

subject to CMA proceedings have sufficient clarity about how the duty will be applied in practice.

3.3 The Firm will comment on the duty of expedition in more detail in its forthcoming response to the CMA consultation on the new digital markets competition guidance, given that it is the Act, rather than the Guidance, that extends the role of this duty. There are, however, two overarching points that are particularly important for the CMA's consideration of the Guidance:

(a) First, the duty of expedition now applies to all aspects of the CMA's conduct of proceedings. That means that the duty should apply equally to the "internal" aspects of the CMA's proceedings as well as those that involve interactions with third parties. This should be reflected in how the CMA conducts its investigations (i.e., internal steps should be subject to the same degree of expediency as external-facing steps, such as information requests). At present, this does not appear to be reflected in the Guidance (which instead refers only to requirements imposed upon, or other engagement with, the parties involved in proceedings).

(b) Second, the duty of expedition does not and cannot in any way override (or limit) parties' legal rights of due process. In particular, this duty does not negate or limit the requirement for the CMA to set deadlines that are reasonable in the circumstances. Similarly, this duty does not lessen the CMA's duty to make sufficient inquiries to respond to submissions made by parties involved in proceedings. To avoid confusion in future proceedings, this position should be reflected in the Guidance.

3.4 For example, it is important that the CMA should not use the duty as a means of denying reasonable requests for extensions of time from parties. Nor should it lead to the CMA behaving disproportionately, or inconsistently with the principles of better regulation and/or its public law duties. The overall timing of cases can often be influenced by delays beyond the parties' control, and it is critical that the CMA should not seek to "recoup" lost time, under the cover of being required to meet the duty of expedition, by imposing unreasonable deadlines on parties or denying valid, reasoned requests for extensions of time. This would carry a clear risk of compromising parties' rights of defence, which are unaltered by the introduction of the duty of expedition.

3.5 The Guidance also suggests at paragraph 4.6 that the duty of expedition may justify decisions not to send draft information requests to parties, or alternatively to refuse parties' requests for extensions ("*unless there are very good reasons*", the nature of which are not explained further). As explained further below, we believe that this mischaracterises the applicable legal framework. The reasonableness or otherwise of a deadline for a request for information should be assessed based on the nature of that request. If the CMA's initial deadline is unreasonable, it should not require the provision of "*very good reasons*" (which are currently unclear) for the recipient to obtain an extension to that deadline to ensure that a reasonable period of time is provided to respond. This text is, in our view, potentially misleading and so should be removed from the Guidance.

3.6 We therefore believe that it would be helpful for the CMA to provide a more detailed explanation of how it expects the duty of expedition to be used in practice. This might include a more detailed explanation of how the CMA expects the duty to guide its decision-making in practice, taking into account due process considerations. In particular, it would be helpful for the CMA to provide examples of circumstances (commonly found in proceedings today) in which it may make use of the duty of expedition to accelerate investigations. It would also be useful to understand examples of the circumstances in which the CMA will be typically inclined to grant or refuse parties' requests for extensions to information requests, or to allow parties to review draft information requests.[3]

Announcing a formal case opening decision

3.7 Further to the above, and in relation to paragraph 3.9 of the Guidance, in our experience, the CMA's ability to run cases expediently is, in general, likely to be enhanced where it is able voluntarily to share more information with the parties about how it expects the case to proceed (i.e., beyond those milestones mandated by statute).

3.8 For example, in some recent cases where the CMA appears to have had relatively well-developed process plans that would have enabled it to commit to reporting in advance of its statutory deadlines, it has not shared any significant information about these (indicative) plans with the parties involved in those cases. Having advance notice about the contemplated steps in CMA cases, and the timing of those steps, would greatly help the parties involved in their own preparations (which would, in turn, help support the CMA's duty of expedition and the efficient progression of the investigation more generally). By contrast, there seems to us to be no obvious justification (in light of the CMA's broader aspirations to be transparent) not to share those indicative plans with the parties involved. Parties involved in proceedings are well able to understand the concept of plans being shared on an indicative basis, and that these may be subject to change. Accordingly, we would encourage the CMA to commit to such active engagement and transparency with parties, in a manner consistent with its expediency duty and objectives.

3.9 As regards the publication of case opening announcements, we consider it would be helpful for the CMA to provide further guidance on the factors it will consider when deciding whether to publish certain notices, and the information and level of detail which will be included in these, so that affected parties are able to understand when they may or may not be identified in a case opening announcement (which is particularly important in circumstances where affected parties are subject to regulatory reporting requirements). For example, the Guidance states at paragraph 3.9 that, in relevant cases, the CMA will normally identify the parties directly involved in a case opening announcement, "*unless in the circumstances it is not appropriate to do so (such as if doing so would risk prejudicing the CMA's case)*". We would encourage the CMA to provide here further guidance or examples of the circumstances in which a case opening announcement would not identify the parties directly involved.

[3] While such requests are invariably fact-specific, the CMA has been able to provide guidance (for example) on the types of derogations that are commonly granted – or not – to interim enforcement orders, even though these are similarly fact-specific requests.

3.10 Similarly, we would encourage the CMA to provide further guidance at paragraph 3.11 of the 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: as currently drafted, paragraph 3.11 of the Guidance offers no such guidance on this issue.

Engagement with relevant parties and announcements during a case

3.11 Consistent with our comments on paragraphs 3.9 and 3.11 of the Guidance, and for the same reasons, we would encourage the CMA to provide examples of what, in its view, might constitute the "*exceptional circumstances*" referred to in paragraph 3.14 of the Guidance.

3.12 We note that at paragraph 3.15 the Guidance refers to the flexible approach the CMA will take to sharing its developing thinking and/or evidence with directly involved parties and other interested parties if appropriate. While we acknowledge there may be some circumstances in which it will not be appropriate for the CMA to do so, we would generally encourage the CMA to err on the side of more open communication between the case teams and parties to ensure parties are able to assist the CMA as effectively as possible, similar to the commitment the CMA has recently made in connection with the handling of Phase 2 merger investigations.[4]

Case closure announcements and decisions

3.13 In relation to case closures, we do not think that there is a strong case for the proposed deletion in former paragraph 3.17 (and neither do we understand the reasoning behind it).

3.14 Based on our experience, we think it is important for the CMA to continue to give reasons where it has decided to close a case on prioritisation grounds, at least to the parties directly involved. It will not be uncommon for parties who have been subject to, for example, an investigation carried out by the CMA, to have expended considerable resources (both in terms of time and money) in responding to and/or assisting the CMA in relation to that investigation. The vast majority of businesses in that position would need, as a matter of good governance, at a minimum, to be able to explain to key stakeholders why the CMA had decided to close the case against them.

3.15 More broadly, there is also an important interest in advisers, businesses, and consumers being able to understand how the CMA Prioritisation Principles are being applied in practice – particularly in circumstances where the CMA remains keen to encourage proactive submissions from third parties (i.e., so that third parties are better placed to assess whether the time and cost of making a submission is warranted). There are, of course, trade-offs here, as any information being published should not result in the undue disclosure of commercially sensitive information relating to the parties involved in the proceedings, but these issues can be handled on a case-by-case basis, rather than by introducing a new blanket rule that case closure announcements on the basis of prioritisation grounds should be terminated.

[4] See Chapter 11 of the revised CMA2 Guidance.

3.16 Ultimately, it is not obvious why a relatively non-prescriptive commitment to explain why a case will be closed should impose any material burden on the CMA, particularly given that the CMA will likely already have articulated the basis to close the case in some detail in its internal consideration of the matter. We would therefore urge the CMA to reconsider the deletion of this element of the Guidance.

Market and non-market sensitive announcements

3.17 Paragraph 3.22 of the Guidance states that the CMA will not "*as a matter of course*" discuss the text of press releases with parties in advance of issue. This is not consistent with our experience to date, as the CMA has typically taken into account representations on the factual accuracy of press releases. Given that the CMA's announcements and/or publications can have significant, broader consequences for the parties involved (for example vis-a-vis private litigation), it is important and appropriate that the CMA be open to representations on the factual content of such announcements, particularly where the legitimate commercial interests of the parties involved could be materially affected. Accordingly, paragraph 3.22 of the Guidance should make clear that the CMA will remain open to representations on the factual accuracy of its draft announcements. It is also important that the CMA retains flexibility to agree to receive more detailed comments in other cases, where appropriate (such that the "*as a matter of course*" language should remain).

3.18 Paragraph 3.24 of the Guidance refers to those "*directly affected*" or "*directly involved*" being informed of or provided with the confidential text of a press release and any document which is to be published alongside it. In some cases, we note that the CMA has sought to impose (in some cases stringent) restrictions on the number and identity of individuals within a business/its adviser group that are permitted to have access to this information. In our experience, there may be cases in which it is necessary for a broader constituency of individuals to be made aware of an impending announcement (including, for example, European legal counsel or financial advisers to the parties) to be able to make all preparations that are necessary or advisable to respond to the announcement. In those circumstances, recipients may well agree to give appropriate undertakings as to the confidential treatment of the material, and may well in any case be subject to wider restrictions (e.g., professional obligations) that would preclude unauthorised further disclosure. Overall, we consider that the CMA should be open and flexible in relation to who should have access to this information, and that it would be appropriate to highlight any material restrictions that the CMA intends to apply in this regard within the Guidance, so that parties are able to plan on this basis.

Requests for information

3.19 As mentioned above, we are concerned that as currently drafted, the final sentence of paragraph 4.6 of the Guidance mischaracterises the applicable statutory framework as regards extensions to comply with requests for information (***RFIs***). The reasonableness of a deadline for an RFI must be assessed in the circumstances of the case – as explained above, if the original deadline was wholly unreasonable then a request for such deadline to be extended does not require the production of "*very good reasons*".

3.20 Equally, the draft Guidance removes the indication in paragraph 4.10 that any decision about whether to impose a penalty in relation to an incomplete RFI response will take into account whether or not the CMA had sent a draft of that request to the parties beforehand. It is not clear why this indication has been deleted from the Guidance. Indeed, this general principle is still contained in paragraph 4.3 of the CMA's Statement of Policy on the CMA's approach to administrative penalties (although we understand that a revised version of this document may also be consulted upon in due course).[5] The CMA should, at least, clarify the position in relation to whether prior sight of a draft RFI will still be a relevant consideration in this context. Moreover, we are not aware of any policy reason that might justify the removal of this text. Where parties have not had the chance to comment in advance on the nature of a statutory information request (including on matters such as the extent to which the party actually holds the information requested, particularly in the form sought by the CMA, and how long it might take – in practice – to collate that information in a sufficiently robust manner), it is entirely sensible that this should be one factor taken into account when the CMA is considering sanctions for a failure to comply with that request. This is particularly the case in light of the enhanced enforcement powers of the CMA brought about by the Act, which could bring significantly higher fines for the failure to respond to an RFI.

3.21 If the CMA's intention is that the existence of consultation on a draft request should instead be taken into account within the assessment of whether a party had a reasonable excuse for not responding to an information request (i.e., so no fines would be applied), then this should be made clear in the Guidance.

Identifying confidential information

3.22 The CMA is proposing to substitute "*past*" business strategy for "*current*" business strategy in the examples given in paragraph 4.17 of the Guidance of the types of information which will "*normally be considered to be confidential*" by the CMA when it is considering whether disclosure is appropriate. We would urge the CMA to reconsider this amendment, as in our experience the 'past' strategy of a business can enable its present, or even future, strategy to be inferred. For example, the specific commercial drivers of a previous price increase (or decrease) might be similar to those for a future price increase (or decrease). A strategy adopted in relation to a particular customer in a previous tender might well be very similar to the strategy for that customer on the next tender.

3.23 The commercial significance of historic information will typically be fact-specific (for example, to the extent a business maintains a broadly consistent commercial strategy, it is more likely that its past strategy could offer insights into its **present** strategy), and it would be reasonable for the CMA to exercise discretion in determining whether the disclosure of information relating to past or historic business strategy would allow third parties to infer information of current relevance (and we note that it is open to parties – further to paragraph 4.13 of the Guidance – to provide an explanation as to why particular information should be considered confidential). We consider, however, that the CMA should reinstate the specific reference to "*past*" strategy in paragraph 4.17 of the Guidance so as to clarify that

[5] See CMA 4, "Administrative penalties: Statement of Policy on the CMA's approach", January 2014.

this **can** be considered by the CMA as being potentially relevant to its assessment of whether disclosure is appropriate (which we note would also be consistent with the approach the CMA usually takes to confidentiality representations made in the context of Competition Act 1998 (***CA98***) cases).

Disputes regarding the conduct of a case

3.24 Paragraph 5.2 of the Guidance refers to the roles of the Procedural Officer (***PO***) and the "*designated relevant person*" in relation to certain procedural complaints. We consider it would be helpful for the CMA to provide clarification on the roles and remits of both (whether in this Guidance or other, forthcoming guidance yet to be published for consultation).

3.25 ***Procedural Officer (PO)***: the Guidance notes that parties are able to request a review of the handling of a complaint by the PO "*where the complaint concerns certain procedural disputes in CA98 investigations, and disputes relating to requests for confidentiality in merger cases and market studies and investigations*". However, the PO's remit is in reality relatively limited, and there would be considerable merit in expanding the PO's remit beyond the scope of review provided for in the current PO guidance.[6] In this regard, we note that the underlying statutory instrument that establishes the role of the PO does not limit its mandate to the very narrow version of the role currently preferred by the CMA, and therefore that it would be entirely within the control of the CMA to provide the role with more meaningful powers.

3.26 Disputes can arise in a number of important contexts not captured by the PO's existing scope of review (i.e., the scope or content of RFIs; or the ways in which a party might be expected to discharge its obligations to the CMA under, e.g., a notice pursuant to Section 26 CA98 when attempting to agree search terms to be applied over potentially relevant datasets). There is currently no procedural safeguard against unduly onerous CMA requests or behaviour in this respect, other than potentially costly and disruptive litigation before the CAT.[7] The ability to request a review from the CMA's General Counsel in relation to matters falling outside the PO's remit is not an adequate substitute, as the General Counsel may be perceived as not to be sufficiently independent from CMA investigations, case teams and decision makers to provide a meaningful check and balance. This is relevant to the present Guidance given the interplay between the PO's role and remit and the way in which the CMA suggests in the Guidance that it proposes to have regard to its expanded duty of expedition (as addressed at paragraphs 3.1 – 3.6 above).

3.27 **"*Designated relevant person*"**: the Guidance refers to the "*designated relevant person*" as providing an avenue for parties to request a review of the handling of any complaint in respect of procedural disputes in consumer direct enforcement investigations. The Firm notes that, per FN72 of the Guidance, this will be explained in greater detail in forthcoming guidance on the CMA's Consumer Direct Enforcement regime: however, this has not yet

[6] See Procedural Officer: raising procedural issues in CMA cases

[7] More broadly, given the CMA's expanded remit under the Act and new (and untested) enforcement powers and procedures, we are concerned that a single PO may not have sufficient capacity to deal with all procedural complaints expeditiously. We therefore invite the CMA to consider whether more than one PO might be appropriate going forward.

been made available for consultation. A PO (or equivalent) in relation to CMA consumer direct enforcement cases should be guaranteed as a minimum. We look forward to considering further guidance on the role of the "*designated relevant person*" when available.

4. Comments on the IA Guidance and Cooperation with Overseas Public Authorities

4.1 We recognise the importance of international co-operation and encourage the CMA to co-operate and co-ordinate its investigations with competition authorities overseas. We welcome the new IA Guidance on how the CMA proposes to exercise its powers in relation to the provision of investigative assistance to overseas authorities. We address below certain points which require clarification, and note more generally the importance of the CMA's role in relevant situations between UK businesses and foreign authorities. In those circumstances, we would encourage the CMA to exercise caution before imposing obligations on UK businesses at the request of overseas authorities, and to ensure that the interests of UK consumers are considered when the CMA provides such assistance. We suggest the interests of UK consumers are expressly included in the factors the CMA will consider when responding to requests from overseas authorities in Chapter 7 of the Guidance.

4.2 As noted in the Guidance, the exercise of investigative assistance powers must be subject to certain conditions so as to ensure fairness and transparency to business and protection of fundamental rights. In this respect, we have the following comments.

Relevant considerations relating to overseas disclosures:

4.3 Given the potential impact of a decision by the CMA to disclose information to an overseas public authority, we suggest that the CMA clarifies whether the guidance in paragraphs 7.21 and 7.22 of the Guidance is entirely within the discretion of the CMA. The previous guidance helpfully provided EU data protection 'equivalence' as being an appropriate benchmark against which the 'appropriateness' of protections could be measured. This has now been deleted in the Guidance. It would be helpful for the Guidance to clarify whether the CMA has complete discretion to determine (i) whether protections are "*appropriate*", and (ii) if there are additional considerations which should be taken into account. If the CMA does not have full discretion over these decisions, the Guidance should clarify what other guidelines the CMA should follow in making these decisions. In addition, it would be beneficial to have further information and/or examples demonstrating what the CMA might consider "*corresponds or is substantially similar*" to protections provided in any part of the UK in order to determine whether a protection is "*appropriate*".

Scope of assistance that may be provided:

4.4 Paragraph 7.43 of the Guidance explains that where the CMA is using its powers to assist an overseas public authority, the "*relevant safeguards*" which would apply are the same as those which are in place where the CMA is using its powers domestically. We recognise that the Guidance has provided one example of the "*relevant safeguards*" (i.e., in relation to the privilege against self-incrimination). For the avoidance of doubt, this is appropriate (and welcome). However, it is not clear whether the CMA is suggesting that **all** safeguards

a party could usually expect in the context of a domestic investigation would apply in such a scenario, and whether parties could expect those safeguards to be in place throughout the duration of its interactions with the overseas authority to whom the CMA was providing assistance. There are, for example, different approaches taken to legal privilege in different jurisdictions. We consider that it would be helpful if the CMA could be more explicit – if this is indeed its intention – that in circumstances in which it decides to provide assistance to an overseas public authority it will guarantee that **all** relevant safeguards which would apply if the CMA was conducting a domestic investigation would apply equally in this scenario.

Consideration of requests for investigative assistance:

4.5 In this section of the Guidance, it should be made clear that assistance can be sought (and given) only in relation to conduct and/or behaviour that would otherwise be unlawful under UK competition law. Likewise, businesses that are the object of the investigative assistance request should not be subjected to any more onerous obligations than would otherwise be imposed or expected of them under UK competition law. In other words, enforcement should be limited to identical enforcement tools as would be available for breach of UK competition law.

4.6 In paragraph 7.45 at the third bullet point, the Guidance provides that the CMA will consider whether the matter for which the overseas public authority is seeking assistance is "*sufficiently serious*". We appreciate the Guidance states, at paragraph 7.20, that the CMA will consider each matter on a case-by-case basis. However, we would suggest providing more nuanced guidance regarding the meaning of "*sufficiently serious*".

4.7 The last sentence of the final bullet in paragraph 7.46 of the Guidance seems somewhat circular – 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 the overseas public authority's simple say-so is considered "*conclusive*" as to such grounds. We would encourage the CMA to consider providing greater clarity over the extent to which it would expect to scrutinise the overseas public authority's request to ensure that it is limited in scope to matters which are relevant and does not amount to a "fishing expedition", as well as to scrutinise the proportionality of the overseas public authority's request and measures so as to limit disproportionate requests. We would also expect the CMA to maintain a role in the supervision of the information request and any challenges to the scope of the overseas public authority's request. We would invite the CMA to make such clarifications in the Guidance.

Freshfields Bruckhaus Deringer LLP

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