The City of London Law Society

City of London Law Society Competition Law Committee: Response to the CMA's Consultation on the Draft CMA Transparency and Disclosure: Statement of the CMA's Policy and Approach (CMA6)

1. Introduction

1.1 The Competition Law Committee of the City of London Law Society ("**CLLS**") welcomes the opportunity to comment on the consultation by the Competition & Markets Authority ("**CMA**") on the draft updated version of CMA6, Transparency and Disclosure: Statement of the CMA's Policy and Approach, including the CMA's new overseas investigative assistance guidance.

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee**") comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent grantors and recipients of subsidies as well as third parties who may have an interest in the grant of particular subsidies.

1.3 We understand the main purpose of this revision to be to update the existing CMA guidance to reflect: (i) general developments in practice since it was issued in 2014; and (ii) specifically, to take account of changes to the law that will be introduced by the Digital Markets, Competition and Consumers Act 2024 ("**DMCC24**"). It also contains the CMA's statutory guidance on requests for investigative assistance by overseas authorities as required by section 323(1) DMCC24.

1.4 We set out below our comments by reference to particular sections of the paper.

2. CMA aims in respect of transparency, information requests, and handling of information (Section 2)

2.1 Given the introduction of the duty of expedition under the DMCC24, we understand why the CMA wishes to include a reference to this in section 2.

2.2 However, there will be a need in practice to balance this duty alongside other due process obligations and aims, for example, of transparency and confidentiality, which may at times conflict with the pressure for expedition (as well as with each other: there is nothing new for the CMA in having to carry out this kind of balancing assessment). We would suggest that some acknowledgement or discussion of this issue in paragraph 2.1 would be helpful to contextualise the new duty of expedition. Please see further our comments on section 4 below.

3. Transparency during the course of a case (Section 3)

3.1 Paragraphs 3.14 and 3.15 of the draft address the CMA's approach to publication of the identity of the parties to a relevant process at the point that the CMA reaches certain decision making points, such as the issue of an SO (in CA98 investigations) or undertakings in lieu or provisional findings and remedies in Phase 2 merger enquires. However, we note that in at least some of

these cases it would normally be the practice of the CMA to have published the names of the parties at an earlier stage (e.g. for mergers this is normally at the point of the initial invitation to comment). It might therefore be helpful to provide a little more detail in paragraphs 3.14 and 3.15 on exactly when the CMA would ordinarily identify the parties involved in a case for the first time.

3.2 Paragraph 3.14 of the draft indicates that "*the CMA will normally make an announcement where it makes a decision to prosecute in a criminal investigation, in appropriate cases*." As currently drafted, it is not clear whether the CMA will publish such an announcement "*normally*" or "*in appropriate cases*". It would be helpful if this provision could be clarified: if the intention here is to indicate that, in appropriate cases, the CMA's ordinary practice would be to make a prosecution announcement, we believe it would be useful to further elaborate on what these cases may be, or specify the exemptions to when an announcement will be made.

3.3 Finally, we note that in paragraph 3.18, some pre-existing wording has been deleted which seems to imply that the CMA no longer expects to explain why a case has been closed on the basis of prioritisation grounds. We are not clear on the rationale for this decision given that this will invariably decrease visibility into the CMA's work and decision-making processes, as well as reduce valuable insight into the CMA's assessment of a case against its Prioritisation Principles.

4. Obtaining and using information (Section 4)

4.1 In paragraph 4.4, the CMA is proposing to delete wording indicating that it will (where practicable and appropriate) discuss an information request with an intended recipient prior to sending the request. Paragraph 4.6 indicates that whether the CMA sends a request in draft will depend on "*all the circumstances*" including: (i) whether there are multiple parties; (ii) whether there is a particular need for urgency; (iii) whether the CMA has a statutory or administrative deadline to meet; or (iv) owing to the duty of expedition.

4.2 We understand that there will be cases where discussion of an information request is not necessary or appropriate in a given case. However, our experience is that the CMA's practice of sending requests in draft and then discussing them with the intended recipient can be enormously helpful both in ensuring that requests are scoped in a way that will produce a meaningful response for the CMA and in reducing unnecessary burdens on parties that might otherwise have to spend time gathering information that is not in fact required. We would be concerned if the updated wording in this guidance is intended to signal a change of practice in this regard. Moreover, in our view, the guidance should specify that the CMA will explain to the parties the reasons for any failure to hold such advance discussions and share draft RFIs. We also do not consider that the duty of expedition should necessarily be a reason not to issue an RFI in draft: a discussion around a draft RFI will likely result in more targeted responses from the parties, expediting the entire process. It is therefore important that the CMA does not overly rely on the duty of expedition as grounds for not providing a draft.

4.3 In a similar vein, paragraph 4.6 indicates that the CMA will consider representations about the scope of any information required and the deadline for compliance but that "*having regard to the duty of expedition*" the CMA is "*unlikely to agree to deadline extensions unless ther are very*

good reasons why a party is unable to comply with the deadline". We understand that the duty of expedition will be a relevant factor for the CMA to consider in this context. However, it is also the case that CMA information requests can be exceptionally onerous for the recipients to deal with, and that there are a multitude of circumstances in which RFIs cannot be completed within the timeframe initially made available (e.g. if information is held in multiple different locations or with many custodians, is more extensive than has been anticipated, or is less readily available on a company's systems than expected and requires additional work to put it in the form required by the CMA; and notably, if compliance with an information request requires the use of forensic search tools which can be time consuming to set up).

4.4 Our experience in practice has been that the CMA is willing to have a reasonable discussion about sensible approaches to these challenges and to delay or phase deadlines where appropriate. We would be concerned if paragraph 4.6 is intended to indicate any change of approach in this regard. If the CMA is concerned (whether because of the duty of expedition or otherwise) to reduce the time taken by parties to respond to RFIs then this should be the subject of a more holistic overview and discussion. It would not be realistic to expect that this outcome can be achieved purely through exhortations to the parties to work faster; changes would also need to be made to the way that RFI requests are put together to make them narrower and more targeted.

5. Cooperation with overseas public authorities (Section 7)

5.1 Our experience is that understanding the extent to which information shared with the CMA may subsequently be passed on (whether to Government, other regulators, or overseas authorities) is a concern for many parties that participate in CMA processes.

5.2 To that end, our main observation on section 7 is that it would be helpful if the CMA could give as many examples as possible of the circumstances in which the powers described in this section will be used, as in previous guidance. We note that the CMA has sought to identify relevant factors at 7.45-7.48, and we appreciate that to some extent the CMA will want to develop experience in the operation of this regime. However, to the extent that there is scope to provide more specific examples (e.g. in the form of hypothetical case studies) of how the CMA intends to approach these issues that would be helpful.

5.3 We would also suggest that, to mitigate against the risk of being overwhelmed with requests for assistance, the CMA should ensure that it is satisfied that the principles laid out in 7.45-7.48 (and in particular the first bullet point of 7.48) provide it with a sufficient basis to exercise a discretion on whether to provide assistance on the basis of its administrative priorities.

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