Law Society of Scotland

Consultation Response

Updated CMA transparency and disclosure statement (CMA6), including new overseas investigative assistance guidance

June 2024

Photo: Eilean Musdile Lighthouse, Loch Linnhe

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Competition law sub-committee welcome the opportunity to consider and provide comments on the Competition and Markets Authority (CMA) consultation on an updated version of its transparency and disclosure policy and approach.[1]

General Remarks

We consider that it is an opportune time for an update to the CMA's guidance given statutory developments, (specifically the enactment of the Digital Markets, Competition and Consumers Act 2024 (DMCCA)), as well as the wider benefit in keeping guidance under review so that it best reflects practical learnings, changes to the legal framework and developments in regulatory practice.

We are supportive of the CMA's overall aim of achieving greater transparency - noting the duty of expedition that the DMCCA places on the CMA in the exercise of (broadly) its competition law and consumer powers - and accordingly the need to carry on its statutory functions in an efficient and timely manner.

However, we consider it of central importance that the CMA continues to ensure that an appropriate balance is obtained between achieving these objectives, and at the same time respecting undertakings' legitimate expectations as to the handling of their sensitive commercial information and recognising the significant impact that CMA action (particularly potential enforcement action) can have on the relevant undertakings.

[1] Consultation on updated CMA transparency and disclosure statement (CMA6), including new overseas investigative assistance guidance | Connect: Competition and Markets Authority (link here)

Detailed Remarks

Commercially Sensitive Information

As the draft Guidance recognises it is a criminal offence under Part 9 of the Enterprise Act 2002 (the "2002 Act") for the CMA to disclose specified information absent consent or another basis for disclosure specified under Part 9; and even when such a Part 9 "Gateway" is potentially applicable, the CMA must consider the matters specified in section 244 before making a disclosure.

We consider that there is a compelling public interest (which is relevant to the CMA's approach to section 244(2)[2]) in those businesses with whom the CMA engages having confidence that the CMA will respect the commercial confidentiality of their business information. Without this, relevant stakeholders will be far more reluctant to disclose information to the CMA absent legal compulsion, which in turn will impact detrimentally on the informal dialogue that exists, and (as recognised in the draft Guidance[3]) works well, between undertakings and the CMA. This lack of trust would also be likely to lead to more challenges to the scope and wording of formal, legally compelled information requests, with the corresponding impact on the speed of the CMA's work.

There is also, in our opinion, a continued need for the CMA to recognise that relevant stakeholders may be better placed than the CMA to know what is and what is not commercially sensitive information, the disclosure of which could have an adverse commercial impact on them. This should be reflected in the manner in which the CMA approaches the considerations specified in Part 9 of the 2002 Act, in particular that specified in section 244 (3)(a),[4] such that an undertaking's views on commercial sensitivity are afforded significant weight provided that this is supported by, on its face, credible reasoning.

In consideration of the above, we propose that:

[2] The need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest

[3] Paragraph 4.1: "The CMA often relies upon the co-operation of third parties, including businesses and individuals, and routinely requests information on an informal basis (i.e. not using formal investigatory powers)".

[4] Paragraph 4.1: "The CMA often relies upon the co-operation of third parties, including businesses and individuals, and routinely requests information on an informal basis (i.e. not using formal investigatory powers)" (link here)

- In paragraph 4.12, the CMA "recognises that the confidentiality of parties' information is an important *and often critical* consideration for those who participate in a CMA case".

- In paragraph, 4.13, we would recommend the following textual change: "When providing key or substantial submissions, parties should *generally* also provide a second, non-confidential version, *though the CMA's request for this will be informed by the applicable process and stage in that process".*

  We recognise the need for and support the CMA seeking to ensure confidentiality submissions do not unduly hold up an investigation, which we do understand is an issue in practice for the CMA. However, undertakings may provide informal submissions to the CMA, or engage on calls for which the CMA prepares an attendance note, at a very early stage of a competition law/merger control inquiry. We consider that it is not an efficient use of resources for either the undertaking or the CMA to engage on confidentiality issues at that early stage and that the undertaking will (at that part of the process, at least) have a legitimate expectation for its input to be treated, holistically, as confidential absent its consent.

- In paragraphs 4.28/4.29, we consider that the CMA should make clear that an undertaking will be informed of any decision to disclose its information, along with the CMA's reasoning for doing so, in a manner that allows that undertaking the reasonable opportunity to consider any challenge (including judicial) to that decision.

  We would also submit that it is critical, as a matter of due process, that (in paragraph 4.29) the CMA states that it *"will"* (as is currently the case), rather than "may", provide details of the information it proposes to disclose.

- We also have concerns surrounding whether the CMA should be in a position to decide, without engaging with an undertaking in advance, to disclose information on the basis of protections that it has applied (e.g. anonymisation/aggregation). Depending on the market or nature of the investigation these measures may not be sufficient to address confidentiality concerns and this should be tested with the relevant undertakings.

- As general practice, we consider that it should be for the CMA to issue draft information requests (this should be stated as such in paragraph 4.6).

We would have further concerns if a general duty of expedition on the CMA translates to truncated response timeframes or default refusals to extend

response time-frames or otherwise lessen the ability for an undertaking to have substantive engagement with the CMA on what is being sought and why. We consider that the parliamentary driver to the duty of expedition was, in part at least, to increase certainty for relevant stakeholders and not to undermine it.

We are also of the view that there is a need to recognise and accommodate commercial reality. For example, information requests are often directed (through no fault of the CMA) to the incorrect people within an organisation and it can take time for those initial recipients to identify those individual/s who are best placed to deal with the request. This needs to be seen alongside the fact that the CMA will often be seeking granular, and historic, information that takes time to collate (indeed, sometimes to even locate) and that often involves multiple departments within the recipient organisation. Additionally, an undertaking will need an appropriate amount of time to formally verify its response in accordance with what can (quite correctly) be detailed corporate governance mechanisms.

In view of this, we consider that statements such as that in paragraph 4.6 (that the CMA is "unlikely to agree to deadline extensions" absent "very good reasons") should be softened, if not in the guidance then in the CMA's actual practice; or be clearly predicated on undertakings receiving reasonable response timeframes at the outset.

Announcing a formal case opening decision

We have concerns with the CMA's revised intention to "normally identify" [5] undertakings that are subject to formal investigation but to which the CMA has not formally alleged wrong doing (through a Statement of Objections).

In our view it is clear that the CMA will not be in a position at such an early stage of the investigation to publicly suggest a breach of the law, which would almost inevitably be how the market and/or press would understand an announcement, irrespective of any caveats that the CMA might (or might not) include in a public notice. Competition law cases, in particular, are highly complex and fact specific and the CMA should not take any steps that are liable to trigger a market reaction at such an early stage.

We submit that the CMA should reconsider this approach and, while investigations are at any early stage, leave it with undertakings to decide whether or not to announce that they are subject to a CMA investigation (further to, for example, an anonymised CMA announcement) based on, for example, their stock-market or other regulatory obligations or their general public communications protocols.

[5] paragraph 3.9 of the draft Guidance (found here)

In support of this submission, we note the following:

- Consumers and customers may find it difficult to fully understand the nuances of the CMA's actual position and premature announcements may lead to premature decisions with prejudicial outcomes e.g. termination of contracts.

- An announcement that the CMA has opened an investigation into named undertakings may create uninformed speculation, which may of course be fuelled by third parties with their own motivations, as to the nature and consequences of what would at that stage not even be an allegation of misconduct. This may cause a market impact with severe and adverse consequences for the named undertaking, for example by impacting on available investment given the value that investors place on stability and predictability.

- There is also a risk of early publicity giving rise to inappropriate and unhelpful pressure on the CMA to conduct its investigation in a given way or at a given pace.

For further information, please contact:

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