CMA CONSULTATION ON INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES: CMA8 RESPONSE FROM THE CITY OF LONDON LAW SOCIETY

1. INTRODUCTION AND SUMMARY

1.1 The City of London Law Society (CLLS) welcomes the opportunity to comment on the Competition and Markets Authority (CMA)'s proposed changes to its guidance on investigation procedures in Competition Act 1998 (CA98) cases (CMA8).

1.2 The CLLS represents approximately 17,000 City lawyers 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 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, including merger control proceedings

1.3 Our comments are based on our members' significant experience and expertise in advising on competition act investigations before the CMA.

1.4 The Committee members responsible for the preparation of this response are:

- Nicole Kar, Paul, Weiss, Rifkind, Wharton & Garrison LLP (Chair of the Committee);
- Ian Giles, Norton Rose Fulbright LLP (Vice Chair);
- Mark Daniels, Norton Rose Fulbright LLP.

1.5 We welcome the CMA's prompt action to update CMA8 to reflect the passage of the Digital Markets, Competition and Consumers Act 2024 (the DMCC Act).

1.6 Our comments in relation to CMA8 are set out in sections 2 to 6 below grouped by subject-matter and with reference to the relevant paragraphs of the draft version of CMA8.

2. DUTY OF EXPEDITION

2.1 Paragraph 2.5 has been amended to refer to the CMA's new duty of expedition. We consider that the guidance could usefully elaborate on how the CMA's approach to taking forward CA98 investigations is likely to be impacted by this new duty compared to the CMA's previous approach (such as the impact on relevant timescales given paragraph 2.5 is expressed to apply to all stages of a relevant investigatory and enforcement process). This will be important for parties under investigation to understand, especially given (as acknowledged in the

guidance) the CMA also needs to comply with its requirement to carry out investigations and make decisions in a procedurally fair manner according to the standards of administrative law, and also the Human Rights Act 1998.

3. DUTY TO PRESERVE DOCUMENTS

3.1 Paragraphs 5.9 - 5.12 of the draft revised guidance cover the CMA's expectations regarding the new duty to preserve documents that are relevant to a CA98 investigation. The CMA is proposing a very broad approach, including that this duty will not be restricted to documents relevant to the subject matter of the investigation or proving/disproving an infringement but would also apply to documents containing background information, such as conditions in the market in which the suspected infringement occurred. In practice this very broad approach is likely to mean that companies under investigation will need to suspend all routine document destruction/retention policies for the entire duration of any CMA investigation, i.e. for many years. We question whether this is necessary and proportionate as a blanket policy and suggest that a better approach would be for the CMA and parties to agree the approach on a case-by-case basis, taking account of factors such as the nature of the alleged infringement and the market concerned.

3.2 Paragraph 5.11 notes that the scope of a CMA investigation may change over time and extend into adjacent areas, with the implication being that the duty to preserve documents would extend to the revised scope. We consider that the guidance could usefully clarify that a party would not be held liable for failing to preserve documents relevant to the extended scope of the CMA's investigation (but not the original scope) where any such destruction took place before the extended scope was communicated to the party (assuming the CMA agrees that this would be a fair approach).

3.3 Paragraph 5.11 also clarifies that the duty to preserve documents would not apply to documents that are clearly irrelevant to the CMA's investigation, such as those relating to a completely different and unrelated business. While this is helpful, we think there is a tension with the CMA's very broad approach to relevance that may make it practically impossible for many or even most businesses to identify whether a business area is clearly irrelevant from the CMA's perspective. For example, a financial services firm may have activities that are clearly in different markets (such as banking and insurance activities), but would the CMA see these as "completely different and unrelated"? The guidance would benefit from the addition of worked examples in this regard.

3.4 It would also be helpful if paragraphs 5.9 - 5.12 could provide guidance (possibly by adding examples) on the point in time from which the CMA would typically consider a person to be in the position of knowing or suspecting that the CMA is or is likely to be carrying out a CA98 investigation or providing investigative assistance to an overseas regulator – and whether/how the duty to preserve documents might apply differently to an individual directly implicated in potentially problematic conduct compared to the organisation for which they

work. The Explanatory Notes to the DMCC Act (paragraphs 541 - 544) suggest that some *actual* awareness of a CMA investigation is needed (e.g. a CMA case initiation letter, or some kind of awareness that a customer has reported suspicions and been interviewed by the CMA, or members of an anti-competitive agreement being "tipped off" that a member of the agreement has "blown the whistle"). This indicates that, e.g. an internal whistleblower or an internal company investigation that identified potential concerns would not be sufficient of themselves to invoke the duty.

3.5 At paragraph 6.17, we suggest that "and the relevant statutory definition" be added for completeness at the end of the following sentence (noting that footnote 55 includes the definition): "The CMA will determine whether an individual has a 'current connection with' the relevant undertaking on a case-by-case basis, taking account of the circumstances of the case.[55]" We also consider that the guidance could usefully include some commentary on the circumstances in which the CMA is more likely to interview an individual who does not have a current connection to a party under investigation and examples of the types of individuals the CMA may want to interview who do not have a current connection.

4. DAWN RAIDS

4.1 Paragraph 6.36 explains that, when conducting a dawn raid under a warrant, the CMA can now require the production of any information stored in electronic form and accessible from the premises regardless of whether it is considered to relate to a matter relevant to the investigation, but can only take copies of or possession of anything so produced in accordance with this power if considered to relate to a matter relevant to the investigation. We think the guidance could usefully elaborate on what this means in practice and how (if at all) this change is expected to impact on the CMA's approach during a dawn raid compared to the previous position.

4.2 Paragraph 6.38 mentions the CMA's new power to require assistance from any person on the premises during a dawn raid (when conducted under a warrant), and gives certain examples of assistance regarding electronic information. Given the potentially very broad scope of this power, we think the guidance would benefit from further examples of types of assistance the CMA may reasonably require and possibly even examples of things the CMA would not expect. Alternatively, to the extent that the examples already mentioned are likely to be the main types of assistance required it would be helpful if the guidance could specify this. We note that the DMCC Act gives the examples of providing passwords or encryption keys and operating equipment on the premises. We also consider that the guidance should clarify that such assistance can only be as a relevant officer may "reasonably require".

4.3 At paragraph 7.1, the draft revised guidance clarifies that the limitation on the CMA not being able to require anyone to produce or disclose privileged communications also applies to producing, taking possession of, taking copies of,

or taking extracts from a privileged communication, but this limitation does not impact on the CMA's powers under Part 2 of the Criminal Justice and Police Act 2001. We think it would be helpful if the guidance could briefly expand here on the relevance of this not impacting on the CMA's powers under Part 2 of the Criminal Justice and Police Act 2001. The current drafting leaves this point "hanging".

5. EXTRATERRITORIAL APPLICATION OF INVESTIGATION POWERS

5.1 Proposed amendments to paragraph 6.2 of CMA8 provisionally set out the conditions under which a section 26 notice may be given to a person outside the UK. In particular, the first and final draft sentences rely on the Court of Appeal's judgment of 17 January 2024 in CMA vs BMW AG [2023] EWCA Civ 1506 to assert that (i) the term "any person" under section 26 of the CA98 includes "any undertaking", and (ii) section 26 has "extraterritorial effect generally". We consider that these sentences should be deleted for the following reasons:

First, this interpretation goes further than the powers adopted by Parliament in the DMCC Act. Section 15 of the DMCC Act introduces a section 44B(3) in Chapter 3 of Part 1 of the CA98 which expressly limits the CMA's power to give a notice under section 26 to a person outside the UK to if "(a) the person's activities are being investigated as part of an investigation under section 25, or (b) the person has a UK connection." The purpose of paragraphs (a) and (b) is therefore to restrict the application of notices under section 26 and ensure that they cannot be given to "any person". Whilst the draft revised CMA8 explicitly refers to section 44B(3) of the CA98, the amendments attempt to circumvent the intention of the legislator by referring to the Court of Appeal's judgment in CMA vs BMW.

Secondly, in circumstances where the Court of Appeal's judgment in CMA vs BMW is currently on appeal to the Supreme Court, and where the Competition Appeal Tribunal adopted a different interpretation of section 26 in its judgment in BMW v CMA [2023] CAT 7, it would be premature to rely on the Court of Appeal's judgment until the appeal has been resolved.

6. SETTLEMENT DISCOUNT FOR NON-CARTEL CONDUCT

6.1 The Committee welcomes the addition of an up to 40% discount for settlement of non-cartel conduct pre-Statement of Objections (SO) and considers that this could act to incentivise more parties to abuse of dominance cases and anti-competitive agreements which are not cartels to enter into settlement discussions and agreements with the CMA.

6.2 We also note that a maximum settlement discount of 40% for non-cartel conduct is aligned with the proposed maximum discount under the consumer law enforcement regime (as set out in the CMA's draft direct consumer enforcement guidance) where a party agrees to settle prior to the CMA issuing a Provisional Infringement Notice (PIN), as is the maximum discount of 25% where a party

settles a consumer case or non-cartel case post-PIN/SO. We can see the logic in aligning maximum settlement discount levels for non-cartel conduct and consumer law infringements.