The City of London Law Society

City of London Law Society Competition Law Committee: Response to the CMA's Consultation on the Draft Guidance on the direct consumer enforcement regime set out in the Digital Markets, Competition and Consumers Act 2024 (CMA200con DRAFT)

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 version Guidance on the direct consumer enforcement regime set out in the Digital Markets, Competition and Consumers Act 2024 ("**DMCC**") (CMA200con DRAFT) ("**Draft Guidance**").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 The Committee members responsible for the preparation of this response are:

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2. General Observations

2.1 The Committee has consistently supported Government policy to move to a direct enforcement model for UK consumer protection law, given the success of that model for competition enforcement. We consider that this goal has been implemented effectively by Parliament in the DMCC. Overall, the Committee considers that the Draft Guidance provides helpful guidance on the operation of the new direct enforcement regime and has limited suggestions for improvements. As a result, rather than answer each of the CMA's consultations set out in CMA199, this response is limited to noting aspects where we suggest that further clarity would be helpful.

2.2 Before proceeding with those specific comments, we would make a general comment regarding the importance of adequate substantive guidance. When the Competition Act 1998 entered into force in March 2000, companies and their advisers were able to refer back to an established

(and well-reported) body of EU case law and block exemption regulations, as well as extensive OFT guidance, to establish whether their actions were liable to infringe the new law.

2.3 While we recognise that the DMCC makes relatively few changes to the substantive aspects of UK consumer law, the move to a direct enforcement regime, with the CMA able to levy substantial fines for the first time, materially (and intentionally) alters the risks arising from non-compliance with the law. Although some cases of non-compliance will be clear-cut, others are less so. In such cases, the absence of accessible case law, as well as the lack of coherent underlying principles similar to those governing competition law, makes it hard for companies to ensure compliance with confidence. Although guidance is available on the CMA website, some is out of date and the available resources are dispersed across different pages. In particular, we note that the CMA's guidance on unfair commercial practices (OFT1008), which we expect may be a key area of the CMA's enforcement activities, does not appear to have been updated since 2008.

2.4 While this situation flows to a large extent from the nature of the consumer law regime, which has developed in a relatively piecemeal manner from EU and domestic sources and has been enforced at a local level or through the courts, the change to a direct enforcement model led by the CMA, together with the reframing of substantive provisions, necessitates a step-change in this area. Although, over time, the CMA's own enforcement activity will presumably lead to a register of decisions to be drawn on for guidance, resolution by undertakings will continue, as will enforcement before the courts as a result of action by Trading Standards (and, potentially, the CMA and the sectoral regulators). Given this continued diversity, we would encourage the CMA to take an active approach to monitoring case outcomes - whether from direct enforcement proceedings, intervention by other regulators or court action - and providing up to date case details and guidance at a readily accessible location on the CMA website. This could usefully be undertaken in parallel with a wider redesign of the CMA website, which has recently become more difficult to navigate as a resource.[1]

3. Introduction (Chapter 1)

3.1 The question of whether the CMA chooses to use its new direct enforcement powers or to use the (enhanced) court-based enforcement route will have important implications for parties, as well as for the CMA. The balance between these two routes in practice will also be an important test of the new regime.

3.2 Given this, it is regrettable that the Draft Guidance states simply (at paragraph 1.9) that the CMA will "*choose the enforcement route it considers most appropriate, taking into account its published prioritisation principles*." While the Committee appreciates that the CMA must retain a degree of discretion in making this decision, and that it is best placed to assess which of its tools is suitable for addressing an issue, it would be helpful to have more guidance on the range of factors which the CMA may consider when making this choice.

[1] Notably, the primary navigation links are currently: 'Find a CMA case', 'Report a competition or market problem', 'Find a CMA consultation', 'Mergers' and 'Consumer law guidance' (but not, for example, Competition law guidance). Although there are also general links under the 'Documents' heading, these are hard to search, with e.g. 'Guidance and regulation' leading to a list of 306 documents with no underlying structure. This can make it difficult to find relevant materials.

3.3 Given the envisaged reliance on court enforcement in at least some cases, the helpful guidance on such proceedings provided at Annex B could be more frequently referenced in the main text, to increase its prominence for users of the document. Similarly, while Annex C includes a helpful process map for the CMA's direct consumer enforcement investigations, it is not referred to in the main body of the Draft Guidance. This risks the process map being missed by users of the Draft Guidance, especially given (as for any guidance) most users will not read from cover-to-cover. We also consider that additional detail could be added to the process map to make this more useful, such as information on indicative timescales. We are generally in favour of greater use of diagrams, charts and tables to help make guidance more user-friendly.

3.4 We also note that the published prioritisation principles state that, if the CMA is given new statutory powers, it may publish separate guidance in relation to the prioritisation principles which will inform CMA decisions in relation to specific functions. In recent years, the CMA has published separate guidance on how it discharges its functions under the Subsidy Control Act 2023 and the UK Internal Market Act 2020. The prioritisation principles therefore envisage that separate prioritisation guidance for direct consumer enforcement could be included in the Draft Guidance. We suggest that further thought be given to providing such specific prioritisation guidance in this instance since, while the CMA already enforces consumer law, the changes to enforcement introduced by the DMCC are significant.

3.5 Further guidance would also be welcome on the circumstances in which conduct that took place before the commencement date may be taken into account as noted in paragraph 1.18, in particular when considering "*factors relevant to any monetary penalty*". As the CMA is only able to impose a monetary penalty where infringing conduct takes place after the commencement date, taking account of pre-commencement date conduct in the assessment of any penalty would be inappropriate. This point is considered further below in relation to Chapter 7 (Penalties).

3.6 Paragraphs 1.11 and 1.12 of the Draft Guidance briefly describe the CMA's new duty of expedition and this duty is generally mentioned in the Draft Guidance wherever it discusses deadlines that will be imposed on parties and the CMA's approach to requests for extensions. While this is understandable, we consider (in the interests of balance and transparency) that the Draft Guidance would benefit from further content on how the duty of expedition will impact the CMA's own workstreams, including the CMA's analysis of submissions and evidence. For example, the Draft Guidance states it is expected that the deadline imposed on a party for submitting written representations on a PIN will typically be 20-30 working days from the date the PIN was given to the party. But, taking into account the CMA's duty of expedition, how long does the CMA typically expect to take to reach the point of issuing a PIN, and then (if appropriate) a FIN?

4. Enforcement process (Chapter 2)

Written representations on the PIN

4.1 The Draft Guidance notes that the deadline for submitting written representations shall be between 20 and 30 working days from the date the PIN was given to the party. Whilst we recognise that the CMA is subject to a duty of expedition, and there are benefits in concluding

investigations expeditiously, we are concerned that the proposed time period for responses may, particularly in more complex or larger scale investigations, severely restrict a party's ability to exercise its rights of defence in responding to a PIN. The CMA should therefore clarify in the Draft Guidance that there may be cases in which a longer time period than that currently described may be appropriate.

Oral representations on a Supplementary PIN

4.2 Paragraph 2.64 of the Draft Guidance notes addressees will have an opportunity to make representations on a Supplementary PIN (where one is issued). However, it does not confirm that this will include the opportunity to make both written representations and oral representations at an oral hearing. Consistent with the CMA's approach in competition law cases, where the CMA is addressing new allegations to a party in a Supplementary PIN, there should be an opportunity to respond both in writing and orally to those allegations.

Substantiation of claims

4.3 Paragraph 2.54-2.56 of the Draft Guidance and Rule 4 of the Draft Consumer Rules explain that the CMA can ask that a business substantiates claims that it has made as part of its commercial practice, and that if the business fails to do so by the specified deadline, the CMA may determine that the claim is inaccurate. The Guidance should clarify the consequences of such a determination. For example, if such a determination is decisive in a finding that the party under investigation has engaged in a misleading action for the purposes of s.226 DMCC, we doubt that a court would accept that the CMA could simply ignore substantiation of a claim that is provided shortly after the deadline expires, if the CMA still has plenty of time in the investigative process to consider the substantiation.

4.4 The above paragraphs and Rule 4 rely on s.195(3) DMCC as the basis that the CMA can determine that a claim is inaccurate if a party fails to provide evidence on accuracy within the timescale set by the CMA. While s.195(3) DMCC states that the CMA may determine that a respondent's factual claim is inaccurate if the respondent fails to provide evidence of accuracy in response to a requirement imposed under s.195(2), and s.195(2) provides that the CMA may require a respondent to provide evidence of accuracy of any factual claim made as part of a commercial practice of the respondent, these provisions do not expressly refer to a scenario where accuracy representations are provided after any CMA deadline.

Interconnected bodies corporate

4.5 The Draft Guidance explains at paragraph 2.65 that where it is considering making requirements imposed in a FIN binding upon other bodies corporate within the same group, it will take "*steps that it considers to be reasonable and proportionate to bring this to the attention of existing members of the party's group*". It adds in paragraph 2.66 that this may be by: (a) contacting such bodies corporate directly; (b) asking the party to make arrangements for any interconnected body corporate to be notified that may be bound; or (c) where neither (a) or (b) is practicable, publishing a notification on the CMA's webpage that it has given a PIN and inviting written representations from members of the party's group.

4.6 In light of the nature of the requirements which may be imposed on interconnected bodies corporate (e.g. financial penalties of up to 10% of the group's worldwide turnover), it is plainly inappropriate that the only mechanism by which such entities may be notified is via a notification on the CMA's webpage. Whilst there may be circumstances in which such a step is necessary, it should be adopted in addition to the direct notification methods, rather than as an alternative as currently proposed in the Draft Guidance.

4.7 We would suggest express acknowledgement at paragraph 2.67 of the potential role of external legal advisers in representing interconnected bodies corporate, and hence being able to receive notifications on behalf of such bodies, in addition to the party (where instructed to do so). We would also suggest the CMA avoid an overly formalistic process for managing submissions from interconnected bodies corporate, even if the DMCC does not confer a *right* on such bodies to make them. As described, the process set out in paragraph 2.68 could be unduly cumbersome in some cases.

4.8 We would also suggest that parties should not generally be required to provide the names and addresses of *all* interconnected bodies within their group and should rather be permitted, as a general principle, to omit details of entities having no connection with the business under investigation or with the UK.

4.9 As regards the extension of obligations to interconnected companies, s.200(3) DMCC allows the CMA to impose "*the requirements (or any particular requirements) […] upon **all** other members of the group (in addition to the respondent), as if each of them were the respondent*" (emphasis added). The Guidance should clarify that the reference to "any particular requirements" means that the CMA can opt not to impose any requirements at all on some group members, notwithstanding the reference to "all group members" in the wording of s.200(3). It should also clarify that any requirements that are imposed on other group members need not be the same for all such other group members. This is important, because remedies that are tailored to the business model of the company that has committed an infringement may not be appropriate for different business models of other group entities.

4.10 The Guidance should also clarify how this will work in respect of entities that become part of the group after the FIN is issued, e.g., because the group is acquired by another group of entities or acquires another group of entities. The assessment at the time of the PIN of whether it is "just, reasonable and proportionate" to impose requirement on all group members will not have considered these future group members. In our view, the CMA should clarify that:

(i) it will not, in the FIN, make requirements binding on all future group members automatically. If the FIN does include a provision allowing particular requirements to be imposed on entities that become part of the group post-FIN, such requirements will not become binding unless and until the CMA has given such entities notice under s200(7) (the statute is unclear on whether a failure by the CMA to serve notice renders the requirements non-binding);

(ii) before extending any requirements to entities that become part of the group, post-FIN, it will carry out an assessment of whether it is just, reasonable and proportionate to do so and will give the relevant entities the opportunity to make representations on this

assessment. Rule 9 of the Draft Direct Consumer Enforcement Rules should be amended to reflect this point, as well as point (i) above;

(iii) to the extent that the relevant requirements are not appropriate for the business model of entities that become part of the group post-FIN, the CMA may use its powers under s.196 DMCC to vary the relevant directions, so that they are just, reasonable and proportionate for the new group entities. Again, new group entities should have the opportunity to make representations in respect of any proposed variation;

(iv) where the infringing business is acquired post-FIN by another business, the CMA will not generally consider it just, reasonable or proportionate to extend remedies to entities in the group of the acquirer, given that they will have had no involvement in the infringement and no oversight of the infringing company at the time of the infringement. In particular, liability for monetary penalties should never be extended to other group entities in these circumstances. In our view, imposing vicarious liability in such circumstances would be inconsistent with the presumption of innocence that is required by the Human Rights Act 1998;[2] and

(v) it should be possible for potential acquirers to consult with the CMA prior to making an acquisition of a business that is subject to a FIN, to obtain comfort that the CMA will not extend directions or liability for monetary penalties to entities within the acquirer's group.

4.11 The CMA should also commit that, if a group entity (that was not itself the infringing entity) ceases to be part of the group, the CMA will revoke any requirements imposed on that entity.

5. Information Notices (Chapter 3)

5.1 This section explains that the CMA's duty of expedition under s.327 of the DMCC will be reflected in the deadlines that it sets for information notices. We submit that the guidance should clarify that the CMA's duty of expedition also implies the need for information notices to be appropriately proportionate and focused, in the interests both of progressing the investigation expeditiously and of not imposing excessive burdens on businesses.

6. Undertakings and settlement (Chapter 4)

6.1 It would be helpful to have more guidance at paragraph 4.14 on the factors that the CMA will consider when deciding whether to consult on proposed undertakings. It would also be helpful if the CMA could specify whether its default position will be to consult or not. Experience with Competition Act cases demonstrates the value of consultation but also how it can materially impact the timing of the undertakings process. The benefits of consultation may be particularly apparent where the proposed undertakings include ECMs.

6.2 We note that the maximum penalty discounts for settlement are significantly higher than those available under the competition regime. We agree with this in principle, bearing in mind the

[2] Schedule 1, Article 6(2).

novelty of the enforcement regime and the potential uncertainties over compliance identified above and consider that the proposed discount levels should encourage settlement, without unduly pressurising parties to waive their rights of defence.

6.3 We would also suggest that the CMA should remain open to accepting undertakings at a very late stage of an investigation, where they address its concerns.

7. Remedies (Chapter 5)

7.1 It would be useful for the paragraph 5.5 of the guidance to include some illustrative examples, drawn from the CMA's decisional practice, of the types of remedies that it has sought (or undertakings accepted) for the most common types of infringement.

7.2 In addition, as regards Online Interface Notices ("**OINs**"), paragraph 5.26 of the Draft Guidance is unclear as to whether an OIN can be addressed to a third-party online interface that is not established in the UK, has no subsidiary in the UK and carries out its business entirely outside the UK (e.g. where UK customers access digital content hosted on servers that are located outside the UK). In particular, it is unclear whether the wording "directs activities in the course of carrying on a business to consumers in the UK" requires only that the relevant consumers are located in the UK, or also that the relevant business is carried on in the UK. Our view is that the wording is intended to capture circumstances, such as those that arose in *Akzo Nobel v. Competition Commission*, where a foreign parent was considered to be carrying on business in the UK as a result of its oversight of strategic and operational decisions of a UK subsidiary. Online interface providers that carry on their business entirely outside the UK and do not direct the activities of a UK subsidiary or branch, should therefore be recognised as outside the jurisdictional scope of the CMA's powers to impose third party OINs, even if some UK consumers use their services. That would be consistent with the presumption that statutes should not be interpreted as having extra-territorial effect in the absence of clear indications that Parliament intended them to have such effect.[3]

8. Penalties (Chapter 7)

8.1 While we acknowledge the importance of setting penalties at a level that incentivises compliance with consumer law, as noted above the general nature of some consumer protection provisions, combined with a relative lack of accessible case law, may make the boundaries of compliance unclear. This should be taken into account in the penalty setting process, particularly in the early stages of regime implementation.[4]

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[3] See the Supreme Court judgment in *R (KBR Inc) v. Director of the Serious Fraud Office* [2021] UKSC 2 at [21].

[4] By way of analogy, the Government appears to be taking a measured approach regarding offences during the early stages of the UK's new national security regime, with the National Security and Investment Act 2021 having come into force in January 2022, and like the consumer law regime lacking accessible case-law and having unclear boundaries of compliance. The Government's most recent annual report (published on 10 September 2024) on how it is operating the national security regime reveals that while there have been offences, the Government has not yet issued any penalties or pursued any criminal prosecutions, instead being content with relevant parties providing reassurance they have taken steps to prevent any recurrence (at least 49 parties have submitted a retrospective validation application since the national security regime commenced, meaning they committed an offence by completing a transaction without first obtaining mandatory approval). We recognise that the CMA will want to start imposing penalties for consumer law breaches when the DMCC commences, but

8.2 The Draft Guidance provides for different categories of substantive penalties, depending on whether the level of economic or non-economic harm to consumers is “major”, “significant” or “moderate” (see Table 2 on page 72), and for administrative penalties seriousness of the breach takes into account whether the breach is “major”, “significant” or “moderate” (see Table 6 on page 83). This is therefore important terminology. Notwithstanding this, it is not clear in either case what would be considered “major” compared to “moderate” or “moderate” compared to “significant”. We consider this ought to be clarified in the Draft Guidance. The addition of worked examples would be helpful in this regard.

8.3 It would be helpful to specify that the ‘turnover’ referred to in paragraph 7.44 (and elsewhere) as the basis for a penalty calculation is the party’s worldwide turnover, as this is not clear from the context.

8.4 Paragraph 7.11 of the Draft Guidance states that "*the CMA will generally determine a starting point of up to 30% of the party’s UK turnover*". Unlike CA98 infringements, this is not limited to turnover in markets affected by the infringement. Moreover, the guidance is unclear as to whether it will take a party's group turnover for the purposes of applying the starting point in the same way as for the statutory cap: it refers only to a "party's" turnover, which is defined in the Glossary as "any natural or legal person that is subject to" an investigation or enforcement action.

8.5 If group (or all UK) turnover is intended to be captured for the starting point, this could have disproportionate results for groups of companies that operate multiple different businesses in the UK, of which only one is found to have committed an infringement, in particular if the infringing business represents only a small portion of the group's UK turnover. We therefore submit that the starting point should be (i) based on the UK turnover of the group entities that were involved in the infringement, or (ii) the turnover relating to products or services to which the infringement relates. This latter approach (ie (ii) above) would be our strong preference, as it would focus the penalty assessment on the products and services affected by the infringement and avoid creating perverse incentives for corporate reorganisations. If the CMA is not minded to do that, it should at least take into account the extent to which the turnover relating to products or services involved in the infringement accounts for a small percentage of a party's group UK turnover when assessing proportionality under Step 4 (paragraphs 7.35-7.40 of the Draft Guidance).

8.6 More generally, certain provisions of the Draft Guidance appear to cater for retroactive application of the DMCC to both penalties and the establishment of enhanced consumer measures (“**ECMs**”). Notably, the Draft Guidance suggests the CMA may consider pre-commencement conduct as part of the duration assessment in penalties calculations, in particular when determining the seriousness of the infringement (paragraph 7.24) and when considering aggravating factors (paragraph 7.34). This appears to run counter to the specific statutory provisions of the DMCC (s.339), as well as broader public law principles of good administration. Similar concerns could arise should the CMA seek to impose direct enforcement

consider that a measured approach to setting levels of penalties would typically be most appropriate in the early stages of the regime (at least for infringements where the boundaries are not clear).

of ECMs based on pre-commencement date conduct, as suggested by paragraph 1.18. The Committee would therefore ask that these provisions be reconsidered.

8.7 To the extent that the CMA continues to consider it has the ability to take into account conduct pre-dating the commencement of the DMCC when setting penalties (despite the fact that the CMA can impose penalties only for conduct after the commencement date), it would be helpful for the Draft Guidance to explain the legal basis for this proposition. Absent such explanation, relevant parties are likely to challenge the CMA on this point, and therefore clearly setting out the basis for this in the Draft Guidance would be helpful. The Committee would also welcome greater clarity from the CMA as to the extent to which (and how) any pre-commencement conduct will be considered.

9. Decision-making process (Chapter 8)

9.1 We support the principle (at paragraph 8.20) that, where the FDG includes the SRO, the other members will be of equivalent or greater seniority. Even with this safeguard, the SRO's presence in, or absence from, the FDG is likely to have a material bearing on the nature of the decision-making process. As a result, it would be helpful to have more guidance on the factors that may affect the CMA's decision of whether to include the SRO, rather than simply that the CMA will decide on whether this is "appropriate" in each case. There could also be a presumption that the SRO will be a member of the FDG, rather than simply stating that the SRO "may be" a member. Knowing whether this will be the case from the outset of an enforcement case, absent exceptional circumstances, would help provide procedural certainty and aid parties' engagement with the CMA during the investigation.

9.2 We also support the establishment of a procedural complaints process in connection with the direct enforcement regime, with complaints referred to a 'procedural complaints adjudicator' who will not have been involved in the day to day running of the investigation or as a decision maker. It is unclear, however, whether the CMA intends to appoint an individual to act as the 'Procedural Officer' in respect of consumer law investigations, as it has done for competition investigations. We consider that there is benefit in appointing a single individual to act as the Procedural Officer, in particular to ensure consistency across cases.

9.3 On more minor points, the connection between the second sentence of paragraph 8.15 and the first sentence, which it aims to explain, was not entirely clear to us. We would therefore suggest that the drafting be clarified. We would also suggest including a footnote cross-referencing the relevant paragraphs of Chapter 8 at paragraph 2.45, when the concept of the Final Decision Group is first introduced.

18 September 2024