Plan S Price Transparency Framework: Recommendations

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1. Provide a lead-in time – of between 12 and 24 months – for a requirement to implement these (or whatever framework is, or frameworks are, adopted by Plan S).

2. Ask publishers to report in Q3 for articles published in the preceding calendar year. For example, July 1, 2022 for papers published in 2021. Reporting any earlier than Q3 of each year means that few publishers would have complete figures for the preceding year.

3. Consider commissioning an aggregation service, for example through a tender exercise. The chosen supplier will require time to develop the service. In order to encourage widespread uptake by publishers, an authentication system may be required to make the data available only to customers and not to other publishers.

4. Provide guidance on what publishers should do with data they collect in the interim before an aggregation service is up and running.

5. Develop an advocacy plan to promote awareness of and use of this framework (or whatever framework or frameworks are adopted by Plan S) to stakeholder communities. Active work to encourage and require compliance is going to be needed.

6. Consider providing an incentive for earlier implementation by publishers. This might take the form of positive acknowledgement on relevant discussion lists and the cOAlition S website.

7. Consider establishing this approach as a formal standard (e.g. NISO) and establish a mechanism to review the framework at least every three years.

8. Consider hosting a hackathon on using/implementing data from early adopters or asking one or more libraries to do this on your behalf.

Recommendations for Publishers

1. It is recognised that the arrangements should operate in a manner that does not risk infringing competition law. The disclosure of strategically sensitive information between competitors risks infringing competition law where it has the object or effect of restricting competition in the relevant market. Our legal advice has been that the risk to publishers of sharing information requested in this framework is low as it does not

appear to involve the sharing of strategically sensitive information, the exercise is driven by customers, and the objectives are pro-competitive because the intention is to empower customers to make informed choices about services by giving them access to relevant information in a readily accessible and standardised manner. At least one publisher has formed a different view, identifying certain of the information requested as strategically sensitive, and concluding that sharing the information presents competition risk unless the information is shared only with customers and not with competing publishers. You will need to form your own view and should consider taking legal advice. For transparency we have shared our legal advice – *it is legal advice to Information Power and not any other party*.

2. We have recommended to cOAlition S that they consider making data available in a way that makes it accessible to customers only. In whatever way cOAlition S decides to move forward, and despite the view that any competition risk would be low, we recommend that publishers do *not* access other publishers' data.

3. It will be important to engage with your manuscript submission system provider. These systems will need to evolve to facilitate publisher automation and therefore compliance with the requirements.

SHOOSMITHS

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OPEN ACCESS PRICE TRANSPARENCY

COMPETITION LAW CONSIDERATIONS

This note sets out our high-level comments on the competition law position with regard to the proposed arrangements described in the independent report published by Information Power on behalf of cOAlition S in relation to developing a framework for the transparent communication of Open Access services (the "Report").

1 EXECUTIVE SUMMARY

1.1 For the reasons below, we consider the proposals to be very low risk from a competition law perspective.

1.2 As explained in Section 4 below, we do however recommend changes to some of the terminology used in relation to the proposals, principally that they should refer to "value" or "service" (or similar), rather than "price" (for example in relation to the current references to "price transparency" and "price information"). This is to avoid giving the (wrong) impression that the proposals involve a disclosure of the prices that publishers charge (which they do not), which could be suggestive of competition law concerns.

2 THE PROPOSALS

2.1 The proposals are as described in the Report. In brief, the proposals involve publishers periodically completing a standardised framework document with information about their publications. The framework document is divided into three parts: (i) Section 1 – "Basic title metadata"; (ii) Section 2 – "Contextual metadata"; and (iii) Section 3 – "Pricing information". We understand that publishers will additionally submit the data to CrossRef, an aggregation service, who will make it openly available.

3 COMPETITION LAW CONSIDERATIONS

3.1 As we understand it, and consistent with the over tenor of the Report, the rationale for the proposals is very much to benefit customers – the proposals are intended to enhance customers' ability to make informed choices about publications by giving them access to relevant information in a readily-accessible, standardised manner. In principle, therefore, the objectives of the proposals are pro-competitive.

3.2 It must however be recognised that, regardless of whether the proposals are intended to be pro-competitive, it is important that they are structured and operated in a manner that does not (inadvertently) risk giving rise to competition law sensitivities. In this regard, we have "sense checked" the proposals with regard to the following competition law considerations:

3.2.1 Disclosure of information between competitors

The proposals will involve publishers disclosing certain information about their publications through the framework document.

Whilst the information in question is intended for use by the publishers' customers, it is assumed that rival publishers will have access to the information. The disclosure of information between competitors risks infringing competition law where it has the object or effect of restricting competition in the relevant market.

The law in this area is complex but we make two broad observations, as follows:

a) First, competition law concerns could arise only if the proposals involve a disclosure of <u>strategically sensitive</u> information between competitors – the proposals do not appear to involve any such disclosure.

Information is strategically sensitive if it reduces strategic uncertainty in the market – broadly, it means commercially sensitive information. Future pricing information is usually regarded as the most sensitive information, but information relating to other

commercial parameters (such as costs, capacities, qualities, marketing plans, risks, investments, technologies and R&D) can also be sensitive, depending on the facts.

The information that publishers will submit does not appear to be strategically sensitive.

As detailed more fully in the Report, Section 1 ("Basic title metadata") and Section 2 ("Contextual metadata") of the framework document request certain information about the publishers' titles. By its nature, this information seems to be non-strategic.

Section 3 of the framework document is headed "Pricing information". What it seeks to achieve is an indication of each publication's focus from a values/services perspective:

- Publishers will not submit any information about the prices they charge.[1]
- Publishers will indicate what percentage of their (undisclosed) prices they would allocate to the different focuses that are listed. This is intended as a convenient mechanism to broadly identify and quantify each publication's focus.
- The categories to which publishers are invited to allocate figures are fairly wide and non-specific (for example, they include journal development, peer review sales & marketing, author & customer support, and services pre- and post-publication).
- The information that each publisher provides may potentially be aggregated across a number of publications.

Overall, whilst the information will hopefully enable customers to better compare different publications/titles, it seems unlikely that the information could give publishers any meaningful insight into rivals' strategy, ie that it is not strategically sensitive.

b) Second, the fact that the proposals have been driven by customers (ie rather than by publishers) offers additional comfort as to the competition law position.

As we understand it, the proposals have been driven by customers' wish for greater transparency, to help them make better informed purchasing decisions. Again, the law in this area is complex, but these points offer additional comfort from a legal perspective (and the fact that publishers may have been consulted on the proposals and/or may choose to submit the data to CrossRef does not in principle alter the position).

3.2.2 Standardisation between competitors

Depending on the circumstances, agreements between competitors that standardise aspects of their commercial conduct may benefit competition (eg because it enhances customers' ability to compare offerings) or may be detrimental to competition (eg standardisation reduces scope for rivalry). Whilst we have not considered the position in detail, for a number of reasons it seems very unlikely that these proposals could be detrimental to competition in this regard.

3.2.3 Competition between publishers

Over and above the comments made above, the proposals would not seem capable of having any detrimental effect on competition between publishers. We assume that all publishers will have the opportunity to participate, on fair and non-discriminatory terms. We further assume that

[1] Publishers will be invited to input their list prices, but we understand that (i) these do not reflect actual pricing to customers (bearing in mind that the prices charged to customers are usually individually negotiated and will typically reflect discounts off the list price) and (ii) publishers' list prices are publicly available, in particular from the publishers' own websites. On that basis, there appears to be a solid basis for taking the view that publishers' list prices are not strategically sensitive.

participation is not unduly burdensome for publishes (ie such that smaller players will not be precluded from participating).

3.2.4 Competition between customers

The proposals also seem incapable of having any detrimental effect on competition between customers. We assume all customer will have access to the output of the proposals, on fair and non-discriminatory terms (ie so that no customers are potentially excluded).

4 RECOMMENDATIONS – USE OF TERMINOLOGY

4.1 For the reasons explained above, we consider the proposals to be very low risk from a competition law perspective (principally because, as explained, they do not appear to involve any disclosure of strategically sensitive information).

4.2 We do however note that the proposals (as reflected in the Report) refer on numerous instances to "pricing transparency" (eg in the title to the Report) and to "pricing information" (eg in the heading to Section 3 of the framework document). As noted above, pricing information is usually regarded as the most sensitive commercial information, such that any disclosure of such information between competitors is potentially problematic from a competition law perspective.

4.3 In the proposals, the principal reference to "pricing" is in relation to Section 3 of the framework document. In that section, publishers are asked to indicate what percentage of their (undisclosed) prices to customers they would allocate to various different areas of focus, simply as a convenient mechanism to broadly identify and quantify each publication's focuses. In reality, therefore, the proposals do not involve any disclosure of pricing information in a conventional sense (other than the disclosure of list prices, as described above in footnote 1, but that is not a primary objective of the proposals).

4.4 In our view:

4.4.1 The current references in the proposals to "price transparency" and "price information" (and similar) risk giving the impression that the proposals involve a disclosure of pricing information between competing publishers.

4.4.2 There is a risk that the current references to "price" could act as something of a red flag trigger that could cause the proposals to attract competition law scrutiny, since they are suggestive of the proposals involving an exchange of something – pricing information – that in fact they do not.

4.4.3 <u>The above risk could readily be managed by using terminology that does not imply any disclosure of the prices that publishers charge. "Value" or "service" would seem to be obvious alternatives that could be used (and, in our opinion, they would better reflect the parameters on which the proposals seek to achieve transparency) – we would recommend that this change is made, to minimise the risk of unwelcome competition law scrutiny.</u>

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