

ENERGY MARKET INVESTIGATION

Notice of the Competition and Markets Authority's intention to open a disclosure room to allow further review of the profitability analysis conducted to determine the retail return on capital employed of the Six Large Energy Firms following publication of the provisional findings

As part of the energy market investigation (the 'Investigation'), the Competition and Markets Authority (the 'CMA') has received information and/or data from a number of parties which the CMA has used and taken into account in producing its provisional findings published on 7 July 2015 (the 'PFs').

In particular, the CMA has received information and/or data which has been used and taken into account in producing the profitability analysis conducted to determine the retail return on capital employed ('ROCE') of the Six Large Energy Firms included in Appendix 10.3 of the PFs, entitled 'Analysis of Retail Supply Profitability – ROCE and economic profit' (the 'ROCE Appendix').

The ROCE Appendix contains 'specified information' within the meaning of section 238 of the Enterprise Act 2002 (the 'Act'), to which the general restriction on disclosure by the CMA in section 237 of the Act applies.

In order to allow parties, through their external advisers, to understand the CMA's case concerning the ROCE Appendix (and certain other economic and financial analyses), the CMA, pursuant to section 241 of the Act, operated a disclosure room process from 13 to 31 July 2015 (the 'PFs Disclosure Room').¹ Included in the PFs Disclosure Room was a partially redacted version of the ROCE Appendix which, among other things, included a number of summary statements concerning limited qualitative underlying evidence that had been redacted prior to disclosure through the PFs Disclosure Room.

Following the PFs Disclosure Room, two parties submitted that the ROCE Appendix was 'central' to the CMA's assessment of potential detriment arising from the adverse effects on competition identified in the PFs and the proportionality of any remedies, and that they were unable to understand and prepare proper and informed submissions to the ROCE Appendix. The CMA has carefully considered these submissions, and has decided to operate a further disclosure room, for a short

¹ See the [Notice of intention to open a disclosure room and operate a confidentiality ring](#).

period, concerning a fully unredacted version of the ROCE Appendix (the 'ROCE Disclosure Room'). Specific details of the ROCE Disclosure Room are set out below.

ROCE Disclosure Room

The ROCE Disclosure Room will include a fully unredacted version of the ROCE Appendix. External advisers of each party accessing the ROCE Disclosure Room will also have access to the confidential submission(s) made on their behalf in connection with the ROCE Appendix, Appendix 7.5 entitled 'Retail descriptive statistics', Appendix 10.2 entitled 'Retail energy supply profit margin analysis', and Appendix 10.5 entitled 'Assessment of the competitive benchmark in retail energy supply' during operation of the PFs Disclosure Room.

The ROCE Disclosure Room will be open on each CMA Working Day² from **30 September to 2 October 2015** inclusive. Its hours of operation will be from 9:30am until 5pm on each day. A set of rules will govern the operation of the ROCE Disclosure Room, including the equipment and software that will be provided by the CMA.

Access to the ROCE Disclosure Room

In order to safeguard the confidentiality of the ROCE Appendix, and in line with the CMA's Disclosure Room procedures,³ access to the ROCE Disclosure Room will be granted to a limited number of approved external legal and/or economic advisers of certain parties as noted above. These external advisers and their firms/employers will be required to sign undertakings and agree to comply with the Disclosure Room Rules before they will be granted access to the ROCE Disclosure Room.

The draft undertakings that the external legal and economic advisers approved by the CMA (and their firms/employers) will be required to sign before they will be granted access to the ROCE Disclosure Room by the CMA are attached at Appendices 1 and 2 of this Notice.

The CMA is prepared to approve the same (or a sub-set of) external legal or economic advisers as were Authorised Advisers for the PFs Disclosure Room, subject to a limit of 12 Authorised Advisers per party to access the ROCE Disclosure

² CMA 'Working Day' means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

³ See the CMA's guidance documents 'Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973', CC7; and 'Transparency and disclosure: the CMA's Policy and Approach', CMA6.

Room, and a limit of two Authorised Advisers per party to access the ROCE Disclosure Room at any one time.

This notice invites interested parties to submit expressions of interest to access the ROCE Disclosure Room, together with an explanation of their interest and the reasons for requesting access to the ROCE Disclosure Room, and details of the interested party's external legal and/or economic advisers (ie name, job title and employer) seeking entry to either the ROCE Disclosure Room.

This notice also invites parties expressing an interest to access the ROCE Disclosure Room to submit comments with regard to the CMA's approach to disclosing the ROCE Appendix, including the attached draft undertakings and Disclosure Room Rules. Comments in this regard should be supported with an appropriate explanation so that the CMA is in a position to properly consider the merits of the comments received.

Any expressions of interest together with any comments interested parties have on the attached documents must be submitted to the Investigation team at will.fletcher@cma.gsi.gov.uk **as soon as possible and in any event no later than 5 pm on Wednesday 23 September 2015**. The CMA will consider the comments and each expression of interest received within the above deadline, and the reasons given for access to be granted, before deciding, at the CMA's discretion, whether to grant access to the interested party to the ROCE Disclosure Room and whether any amendment is to be made to the attached documents.

ENERGY MARKET INVESTIGATION

UNDERTAKINGS GIVEN BY [Name of Firm] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE RETURN ON CAPITAL EMPLOYED DISCLOSURE ROOM FOLLOWING PUBLICATION OF THE PROVISIONAL FINDINGS

WHEREAS

- I. On 26 June 2014, the Gas and Electricity Markets Authority, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the 'Act'), made a reference to the chair of the Competition and Markets Authority (the 'CMA') for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 for an investigation into the Supply and Acquisition of Energy in Great Britain (the 'Investigation').¹
- II. On 7 July 2015, the CMA published its provisional findings (the 'PFs'). The PFs are based, amongst other things, on financial analyses of the data received by the CMA during the Investigation from a number of parties, including the six large energy firms (the 'Six Large Energy Firms') and other energy suppliers, and take into account the parties' representations received either in writing and/or at oral hearings. One of these analyses is the profitability analysis conducted to determine the retail return on capital employed ('ROCE') of the Six Large Energy Firms included in Appendix 10.3 of the PFs, entitled 'Analysis of Retail Supply Profitability – ROCE and economic profit' (the 'ROCE Appendix').
- III. In order to allow parties, through their external advisers, to understand the CMA's case concerning certain economic and financial analyses relating to the PFs, including the ROCE Appendix, and to prepare proper and informed responses on behalf of the parties concerning such analyses, the CMA operated a disclosure room process under section 241 of the Act from 13 to 31 July 2015 (the 'PFs Disclosure Room'). Included in the PFs Disclosure Room was a partially redacted version of the ROCE Appendix which, amongst other things, included a number of summary statements concerning limited qualitative underlying evidence that had been redacted prior to disclosure through the PFs Disclosure Room (pursuant to section 244 of the Act).

¹ For the terms of reference, see: Ofgem (26 June 2014), [Decision to make a market investigation reference in respect of the supply and acquisition of energy in Great Britain](#).

- IV. Following the PFs Disclosure Room, two parties submitted that the ROCE Appendix was 'central' to the CMA's assessment of potential detriment arising from the adverse effects on competition identified in the PFs and the proportionality of any remedies, and that they were unable to understand and prepare proper and informed submissions to the ROCE Appendix. They requested access to a fully unredacted version.
- V. In light of its further consideration of the matter, the CMA has decided to operate a supplementary disclosure room for a short period (between **30 September and 2 October 2015**) for a limited number of external advisers for certain parties, concerning a fully unredacted version of the ROCE Appendix (the 'ROCE Disclosure Room'). External advisers of each party accessing the ROCE Disclosure Room will also have access to the confidential submission(s) made on their behalf in connection with the ROCE Appendix, Appendix 7.5 entitled 'Retail descriptive statistics', Appendix 10.2 entitled 'Retail energy supply profit margin analysis', and Appendix 10.5 entitled 'Assessment of the competitive benchmark in retail energy supply' during operation of the PFs Disclosure Room (the 'Confidential Submission(s)' and, together with the ROCE Appendix, the 'Disclosed Material').
- VI. The CMA considers that the Disclosed Material includes 'specified information' within the meaning of section 238 of the Act to which the general restriction on disclosure in section 237 of the Act applies.
- VII. Access to the ROCE Disclosure Room is provided for the purpose of allowing the parties' advisers to review and understand the CMA's analysis and/or statements included in the ROCE Appendix, to prepare further submissions and make further representations to the CMA on the ROCE Appendix and relevant sections of the PFs, and to prepare and conduct an appeal against any decision of the CMA in connection with the Investigation, in the event of an appeal (the 'Permitted Purpose').
- VIII. Access to the ROCE Disclosure Room will only be granted to an external legal and/or economic adviser who has been approved in writing by the CMA and who has given undertakings in such form as the CMA requires in accordance with paragraph VIII below (the 'Individual Undertakings') and in respect of whom written undertakings have been provided by such adviser's relevant firm/employer (the 'Firm Undertakings') (each such Adviser being an 'Authorised Adviser').
- IX. The CMA must be informed of the date(s) on which each adviser is seeking entry into the ROCE Disclosure Room. The CMA must receive a signed copy

of the Individual Undertakings by 4pm of the CMA Working Day² before the date of first entry by the Adviser to the ROCE Disclosure Room. The CMA must receive the original signed copy of the Individual Undertakings before the time of first entry by the adviser to the Disclosure Room. The CMA must have accepted the signed Individual Undertakings before access to the ROCE Disclosure Room is granted to any adviser.

- X. The ROCE Disclosure Room shall operate in accordance with the rules which are annexed to the Individual Undertakings (Annex A – the ‘Disclosure Room Rules’) and subject to the Individual Undertakings below.
- XI. Disclosure of the Disclosed Material, or removal from the ROCE Disclosure Room of the Disclosed Material, or any part thereof, by the Authorised Advisers other than in accordance with the Individual Undertakings and the Disclosure Room Rules attached as Annex A, is not permitted without the express, and prior, written consent of the CMA. Breach of the Individual Undertakings by any Authorised Adviser may result in:
 - (a) the CMA:
 - i. terminating the Authorised Adviser’s access to the ROCE Disclosure Room and refusing the Authorised Adviser access to any subsequent disclosure room or confidentiality ring run by the CMA, whether relating to the Investigation or any other investigation;
 - ii. referring the breach to the Authorised Adviser’s regulatory body, if applicable, which may decide to take disciplinary action in relation to the breach.
 - (b) a breach by the Authorised Adviser of his or her obligations under Part 9 of the Act (as regards the disclosure and use of the Disclosed Material) which constitutes a criminal offence under section 245 of the Act.

NOW THEREFORE

[Name of Firm], which has been engaged by [Name of Party] in connection with the Investigation, undertakes to the CMA that:

- A. Only the Authorised Advisers at [Name of Firm] shall be given access to the Disclosed Material;

² CMA ‘Working Day’ means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

- B. It will notify the CMA immediately if it becomes aware of, or suspects that, there has been any breach of these undertakings or that any Authorised Adviser at [Name of Firm] has failed to comply with the Individual Undertakings or the Disclosure Room Rules attached to Annex A; and,
- C. It will notify the CMA immediately if any Authorised Adviser has ceased employment with [Name of Firm] during the operation of the Disclosure Room or in the period of 12 months from the date of the Disclosure Room taking effect;

Further, [Name of Firm] also undertakes to the CMA to use all reasonable endeavours to ensure that each Authorised Adviser at [Name of Firm] instructed by [Name of Party]:

- D. Will abide by their Individual Undertakings; and,
- E. Will abide by the Disclosure Room Rules which are annexed hereto;

PROVIDED THAT

These undertakings shall not apply to any part of the Disclosed Material that:

- i. belongs or relates solely to [Name of Party] or to [Name of Party]'s business and which does not include any confidential information belonging to, relating to, or deriving solely or partially from, any other party of the Investigation or to any individual domestic customers interviewed;
- ii. at the time of disclosure is in the public domain or that subsequently comes into the public domain, except through breach of the Individual Undertakings or of undertakings given by external legal and/or economic advisers for any other Relevant Party in relation to the Disclosure Room; and,
- iii. is required to be disclosed by law or regulation, so long as [Name of Firm] consults with the CMA (except where prohibited) prior to disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure;

AND IN AGREEMENT THAT

These undertakings and the Disclosure Room Rules shall be governed by and construed in accordance with English law, and [Name of Firm] submits to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with, these undertakings and the Disclosure Room Rules, and that to the extent there is any conflict between these Undertakings and the Disclosure Room Rules (concerning the ROCE Disclosure Room) and the Individual Undertakings, Firm Undertakings and

Disclosure Room Rules concerning the PFs Disclosure Room, these Undertakings and Disclosure Room Rules will prevail.

[Name of Party] has given full and informed consent to the restrictions placed upon [Name of Firm] on the further disclosure of information, subject to the undertakings above.

[Name of Firm]

[*signature*]

[*Date*]

ANNEX A: RULES OF THE RETURN ON CAPITAL EMPLOYED DISCLOSURE ROOM FOLLOWING PUBLICATION OF PROVISIONAL FINDINGS

(‘the Disclosure Room Rules’)

- I. The Disclosure Room Rules apply to the ROCE Disclosure Room referred to in the Undertakings to which the Disclosure Room Rules are attached.
- II. Terms used in the Disclosure Room Rules have the meaning they are given in the Undertakings.
- III. The CMA will make the ROCE Disclosure Room available at its offices at Victoria House, Southampton Row, London, WC1B 4AD to the Authorised Advisers (as described in recital VIII to the Undertakings).
- IV. Entry to the ROCE Disclosure Room, conduct within it and use of the Disclosed Material by an Adviser is permitted subject to the Disclosure Room Rules and is conditional on:
 - (a) The Adviser giving and complying with the Disclosure Room Undertakings; and
 - (b) Where relevant, the Adviser’s firm/employer giving and complying with the Disclosure Room Undertakings in respect of the Adviser.
- V. Only the Authorised Advisers will be allowed in the ROCE Disclosure Room, subject to a maximum of two Authorised Advisers per party to the Investigation (‘Party’) at any one time.
- VI. The ROCE Disclosure Room will be open on each CMA Working Day³ **from 30 September until 2 October 2015 inclusive**. Its hours of operation will be from 9.30am until 5pm on each day. Should the CMA decide to open the ROCE Disclosure Room beyond that time or period, access will continue to be governed by the Individual Undertakings, Firm Undertakings, and the Disclosure Room Rules.
- VII. At all times that the ROCE Disclosure Room is open, a member of CMA staff will be present to oversee compliance with the Disclosure Room Rules and shall be the person any Authorised Adviser should contact in the event of a

³ CMA ‘Working Day’ means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

query or difficulty concerning the operation of the ROCE Disclosure Room (including IT matters).

- VIII. In addition to the Disclosed Material, the following material will be made available in the ROCE Disclosure Room: a printed copy of the published ROCE Appendix, a copy of any Confidential Submission(s) made on behalf of the Relevant Party and stationery.
- IX. The Disclosure Room will contain one laptop per Authorised Adviser with the following specification:
- (a) Word, Excel and PowerPoint software;
 - (b) access to two printers;
 - (c) no storage medium other than the hard disk will be available (ie the USB ports and the CD writer – if any – will be disabled);
 - (d) no internet or email capacity; and
 - (e) the computers available for use by the Authorised Advisers of each Relevant Party will be networked to each other.
- X. All printing activity will be logged automatically.
- XI. Authorised Advisers will be provided with A4 sized envelopes in which they may store any printed materials and any handwritten notes. The envelope(s) will be sealed and placed in a secure location at the CMA's offices, which will be locked overnight. After the closure of the ROCE Disclosure Room any such materials will be destroyed by the CMA.
- XII. Authorised Advisers may talk to each other in the ROCE Disclosure Room but any conversations must be kept as brief and as quiet as possible to avoid disturbing other users of the ROCE Disclosure Room.
- XIII. The CMA will, upon request and subject to availability, provide a breakout room during the opening hours of the ROCE Disclosure Room for reasonable use by the Authorised Advisers who are present in the ROCE Disclosure Room for:
- (a) Discussions between Authorised Advisers who are present in the breakout room ('internal communications'); or
 - (b) External telephone conversations ('external communications')

But a breakout room may not be used for internal communications and external communications at the same time.

- XIV. Requests to use a breakout room must be made to the CMA staff member present in the ROCE Disclosure Room on the day the Authorised Advisers wish to use the breakout room and when making the request an Authorised Adviser must indicate whether the breakout room is to be used for internal discussion or external communication. In the event that more than one Relevant Party wishes to use the breakout room, each party concerned shall be able to use the breakout room for a maximum of 2 hours at any one time and the priority given to parties will be determined by the order in which the Relevant Party's Authorised Adviser(s) made the request to the CMA staff member. In the event of a dispute, the matter shall be resolved by the CMA staff member in the ROCE Disclosure Room.
- XV. Authorised Advisers must not bring into the ROCE Disclosure Room or breakout room any device allowing external communication (eg mobile phones, PDAs, laptop computers) or storage devices (eg memory sticks or dictaphones) except as permitted in the circumstances set out in Rule XVI. An Authorised Adviser may only bring into the ROCE Disclosure Room his/her own material (eg notes, copies of working papers or other documents or textbooks) in non-electronic format provided that:
- (a) the material is reasonably required to facilitate the Permitted Purpose;
 - (b) the material has not been supplied by the CMA;
 - (c) the Authorised Adviser has informed the CMA, by 2pm of the CMA Working Day⁴ before, of the specific material that he/she intends to bring into the ROCE Disclosure Room;
 - (d) the Authorised Adviser presents, in advance of bringing into the ROCE Disclosure Room, the material to the CMA for inspection by a CMA staff member;
 - (e) the CMA has approved the material presented for inspection;
 - (f) the material is not removed from the ROCE Disclosure Room (except to be taken to a breakout room used for internal communications as per Rules XVI); and

⁴ CMA 'Working Day' means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

(g) the material is handed over to the CMA for destruction by the end of the ROCE Disclosure Room.

XVI. Where a breakout room is to be used for internal communications:

- (a) Authorised Advisers may take copies of their Confidential Submission(s) and draft Confidential Supplementary Submission(s) and handwritten and printed notes prepared in the ROCE Disclosure Room, as well as his/her material approved by the CMA as per Rule XV, into the breakout room but are reminded that, in doing so, they must not breach the Individual Undertakings.
- (b) Authorised Advisers must not carry into the breakout room any device allowing communication with a person outside the breakout room(s) (eg mobile phones, PDAs, laptop computers, memory sticks).

XVII. Where the breakout room is to be used for external communications:

- (a) Authorised Advisers may, with the approval of the CMA, carry mobile phones into the breakout room.
- (b) Authorised Advisers must not take into the breakout room copies of their Confidential Submission(s) and draft Confidential Supplementary Submission(s) and/or any other material (whether in hard copy or electronic form) prepared in the ROCE Disclosure Room.

XVIII. The usual rules for access to the CMA's offices will apply. In particular, visitor badges must be worn visibly at all times. The Authorised Advisers must not leave the ROCE Disclosure Room at any time without informing a member of the CMA staff and outside the ROCE Disclosure Room may be accompanied by a member of CMA staff where appropriate.

XIX. A failure to abide by the Disclosure Room Rules by an Authorised Adviser:

- (a) will result in a breach of the Individual Undertakings which could result in the Authorised Adviser being removed from the ROCE Disclosure Room, and the Authorised Adviser may be barred from participation in any subsequent disclosure room or confidentiality ring whether relating to the same investigation or any other investigation run by the CMA;
- (b) will result in a breach of the Individual Undertakings which may be referred to the Authorised Adviser's regulatory body, if applicable, who may subsequently decide to undertake disciplinary action;

- (c) where Firm/Disclosure Room Undertakings have been given by an Authorised Adviser's firm/employer, may result in a breach of such Undertakings and may be barred from participation in any subsequent disclosure room or confidentiality ring whether in relating to the same investigation or any other investigation run by the CMA;
- (d) where Firm/Disclosure Room Undertakings have been given by an Authorised Adviser's firm/employer, may result in a breach of such Undertakings which may be referred by the CMA to the firm/employer's regulatory body, if applicable, which may subsequently decide to undertake disciplinary action in relation to the breach;
- (e) may result in a breach by the Authorised Adviser of his/her obligations under Part 9 of the Act (as regards the disclosure and use of the Disclosed Material) which constitutes a criminal offence under section 245 of the Act.

XX. The CMA may, at any time, (without consultation), vary the ROCE Disclosure Room Rules where it considers there is a good reason, which may include a reasonable suspicion that a breach of the Disclosure Room Rules, the Individual Undertakings, or the Firm Undertakings, has occurred. The variations will have effect as regards Authorised Advisers (and, if relevant, an Authorised Adviser's firm/employer) as soon as the variations are notified to the Authorised Adviser (and, if relevant, the Adviser's firm/employer).

ENERGY MARKET INVESTIGATION

UNDERTAKINGS GIVEN BY [Name of Adviser] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE RETURN ON CAPITAL EMPLOYED DISCLOSURE ROOM FOLLOWING PUBLICATION OF PROVISIONAL FINDINGS

WHEREAS

- I. On 26 June 2014, the Gas and Electricity Markets Authority, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the 'Act'), made a reference to the chair of the Competition and Markets Authority (the 'CMA') for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 for an investigation into the Supply and Acquisition of Energy in Great Britain (the 'Investigation').¹
- II. On 7 July 2015, the CMA published its provisional findings (the 'PFs'). The PFs are based, amongst other things, on financial analyses of the data received by the CMA during the Investigation from a number of parties, including the six large energy firms (the 'Six Large Energy Firms') and other energy suppliers, and take into account the parties' representations received either in writing and/or at oral hearings. One of these analyses is the profitability analysis conducted to determine the retail return on capital employed ('ROCE') of the Six Large Energy Firms included in Appendix 10.3 of the PFs, entitled 'Analysis of Retail Supply Profitability – ROCE and economic profit' (the 'ROCE Appendix').
- III. In order to allow parties, through their external advisers, to understand the CMA's case concerning certain economic and financial analyses relating to the PFs, including the ROCE Appendix, and to prepare proper and informed responses on behalf of the parties concerning such analyses, the CMA operated a disclosure room process under section 241 of the Act from 13 to 31 July 2015 (the 'PFs Disclosure Room'). Included in the PFs Disclosure Room was a partially redacted version of the ROCE Appendix which, amongst other things, included a number of summary statements concerning limited qualitative underlying evidence that had been redacted prior to disclosure through the PFs Disclosure Room (pursuant to section 244 of the Act).

¹ For the terms of reference, see: Ofgem (26 June 2014), [Decision to make a market investigation reference in respect of the supply and acquisition of energy in Great Britain](#).

- IV. Following the PFs Disclosure Room, two parties submitted that the ROCE Appendix was 'central' to the CMA's assessment of potential detriment arising from the adverse effects on competition identified in the PFs and the proportionality of any remedies, and that they were unable to understand and prepare proper and informed submissions to the ROCE Appendix. They requested access to a fully unredacted version.
- V. In light of its further consideration of the matter, the CMA has decided to operate a supplementary disclosure room for a short period (between **30 September and 2 October 2015**) for a limited number of external advisers for certain parties, concerning a fully unredacted version of the ROCE Appendix (the 'ROCE Disclosure Room'). External advisers of each party accessing the ROCE Disclosure Room will also have access to the confidential submission(s) made on their behalf in connection with the ROCE Appendix, Appendix 7.5 entitled 'Retail descriptive statistics', Appendix 10.2 entitled 'Retail energy supply profit margin analysis', and Appendix 10.5 entitled 'Assessment of the competitive benchmark in retail energy supply' during operation of the PFs Disclosure Room (the 'Confidential Submission(s)' and, together with the ROCE Appendix, the 'Disclosed Material').
- VI. The CMA considers that the Disclosed Material includes 'specified information' within the meaning of section 238 of the Act to which the general restriction on disclosure in section 237 of the Act applies.
- VII. Access to the ROCE Disclosure Room is provided for the purpose of allowing the parties' advisers to review and understand the CMA's analysis and/or statements included in the ROCE Appendix, to prepare further submissions and make further representations to the CMA on the ROCE Appendix and relevant sections of the PFs, and to prepare and conduct an appeal against any decision of the CMA in connection with the Investigation, in the event of an appeal (the 'Permitted Purpose').
- VIII. Access to the ROCE Disclosure Room will only be granted to an external legal and/or economic adviser who has been approved in writing by the CMA and who has given undertakings in such form as the CMA requires in accordance with paragraph VIII below (the 'Individual Undertakings') and in respect of whom written undertakings have been provided by such adviser's relevant firm/employer (the 'Firm Undertakings') (each such Adviser being an 'Authorised Adviser').
- IX. The CMA must be informed of the date(s) on which each adviser is seeking entry into the ROCE Disclosure Room. The CMA must receive a signed copy

of the Individual Undertakings by 4pm of the CMA Working Day² before the date of first entry by the Adviser to the ROCE Disclosure Room. The CMA must receive the original signed copy of the Individual Undertakings before the time of first entry by the adviser to the Disclosure Room. The CMA must have accepted the signed Individual Undertakings before access to the ROCE Disclosure Room is granted to any adviser.

- X. The ROCE Disclosure Room shall operate in accordance with the rules which are annexed to the Individual Undertakings (Annex A – the ‘Disclosure Room Rules’) and subject to the Individual Undertakings below.
- XI. Disclosure of the Disclosed Material, or removal from the ROCE Disclosure Room of the Disclosed Material, or any part thereof, by the Authorised Advisers other than in accordance with the Individual Undertakings and the Disclosure Room Rules attached as Annex A, is not permitted without the express, and prior, written consent of the CMA. Breach of the Individual Undertakings by any Authorised Adviser may result in:
 - (a) the CMA:
 - i. terminating the Authorised Adviser’s access to the ROCE Disclosure Room and refusing the Authorised Adviser access to any subsequent disclosure room or confidentiality ring run by the CMA, whether relating to the Investigation or any other investigation;
 - ii. referring the breach to the Authorised Adviser’s regulatory body, if applicable, which may decide to take disciplinary action in relation to the breach.
 - (b) a breach by the Authorised Adviser of his or her obligations under Part 9 of the Act (as regards the disclosure and use of the Disclosed Material) which constitutes a criminal offence under section 245 of the Act.

NOW THEREFORE

I, [Name of Adviser], [Job title] at [Name of Firm], who has been engaged by [Name of Party] in connection with the Investigation, undertake to the CMA in my own name:

- A. To abide by the Disclosure Room Rules which are annexed hereto;

² CMA ‘Working Day’ means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

- B. To use the Disclosed Material for, and only for, the Permitted Purpose on behalf of [Name of Party];
- C. To hold the Disclosed Material in strict confidence and not to discuss, disclose, transmit, communicate or otherwise make the Disclosed Material available in any other manner to any other person (including any other legal adviser, economic adviser, officer or employee of [Name of Firm] and [Name of Party], who is not an Authorised Adviser and excluding the CMA's staff and members of the Investigation;

Disclosure Room Submission

- D. I may prepare in the ROCE Disclosure Room, by myself or in connection with one or more of the other Authorised Advisers of [Name of Party], one or more further submission(s) to the CMA in respect of the ROCE Appendix (the 'Confidential Supplementary Submission(s)'). The Confidential Supplementary Submission(s) prepared in the ROCE Disclosure Room will, together with any Confidential Submission(s), constitute a further 'response' to the ROCE Appendix and the relevant sections of the PFs, and may contain any of the Disclosed Material.
- E. The Confidential Supplementary Submission(s) must be provided to the CMA **by 5 pm on 2 October 2015** and must not be removed from the ROCE Disclosure Room except that drafts may be taken into a breakout room used for internal discussion (as described in the Disclosure Room Rules).
- F. Following provision of the Confidential Supplementary Submission(s) on behalf of [Name of Party] to the CMA under paragraphs D and E:
 - a. I may, on reasonable request to the CMA, inspect a copy of the Confidential Submission(s) and the Confidential Supplementary Submission(s) at the CMA's offices, provided:
 - i. the inspection is for the Permitted Purpose;
 - ii. the request for inspection includes the reason(s) why inspection is requested and the proposed duration of the inspection;
 - iii. the CMA is given reasonable time to consider the request for inspection;
 - iv. I may not bring into any room made available for inspection of the Confidential Submission(s) or the Confidential Supplementary Submission(s) (the Inspection Room) any device allowing external

communication (for example, a mobile phone, PDA or laptop computer) or any storage device (for example, a memory stick or dictaphone) but I may bring into any Inspection Room my own documents subject to complying with the Disclosure Room Rules which I acknowledge will apply during operation of the Inspection Room;

v. I may not remove from the Inspection Room the Confidential Submission(s), the Confidential Supplementary Submission(s) or any notes that I prepare in the Inspection Room.

G. I may prepare a non-confidential version of the Confidential Supplementary Submission(s) (the 'Non-Confidential Supplementary Submission(s)') which can be removed from the ROCE Disclosure Room, subject to the following conditions:

- a. The Non-Confidential Supplementary Submission(s) must not include any financial information included in the Disclosed Material;
- b. The Non-Confidential Supplementary Submission(s) can only be removed and shared with [Name of Party] after the CMA has had reasonable time to ensure that the Non-Confidential Supplementary Submission(s) do not include any financial information included in the Disclosed Material;
- c. The Non-Confidential Supplementary Submission(s) must be no longer than is reasonably necessary for the Permitted Purpose;

H. To notify the CMA immediately if I become aware of or suspect that any of [Name of Party]'s Authorised Advisers have failed to comply with the Individual Undertakings or the Disclosure Room Rules, or any of the firms that such Authorised Advisers represent have failed to comply with the Firm Undertakings;

PROVIDED THAT

These undertakings shall not apply to any part of the Disclosed Material that:

- i. belongs or relates solely to [Name of Party] or to [Name of Party]'s business and which does not include any confidential information belonging to, relating to, or deriving solely or partially from, any other party to the Investigation;
- ii. at the time of disclosure is in the public domain or that subsequently comes into the public domain, except through breach of the Individual Undertakings

or of the other undertakings given by external legal and/or economic advisers for any other Relevant Party in relation to the ROCE Disclosure Room; and

- iii. is required to be disclosed by law or regulation, so long as I consult with the CMA (except where prohibited) prior to disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure;

AND IN AGREEMENT THAT

These undertakings and the Disclosure Room Rules shall be governed by and construed in accordance with English law, and I submit to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with, these Undertakings and the Disclosure Room Rules, and that to the extent there is any conflict between these Undertakings and the Disclosure Room Rules (concerning the ROCE Disclosure Room) and the Individual Undertakings, Firm Undertakings and Disclosure Room Rules concerning the PFs Disclosure Room, these Undertakings and Disclosure Room Rules will prevail.

[Name of Party] has given full and informed consent to the restrictions placed upon [Name of Adviser] on the further disclosure of information, subject to the undertakings above.

[Name of Adviser] of [Name of Firm]
[signature]
[Date]

ANNEX A: RULES OF THE RETURN ON CAPITAL EMPLOYED DISCLOSURE ROOM FOLLOWING PUBLICATION OF PROVISIONAL FINDINGS

(‘the Disclosure Room Rules’)

- I. The Disclosure Room Rules apply to the ROCE Disclosure Room referred to in the Undertakings to which the Disclosure Room Rules are attached.
- II. Terms used in the Disclosure Room Rules have the meaning they are given in the Undertakings.
- III. The CMA will make the ROCE Disclosure Room available at its offices at Victoria House, Southampton Row, London, WC1B 4AD to the Authorised Advisers (as described in recital VIII to the Undertakings).
- IV. Entry to the ROCE Disclosure Room, conduct within it and use of the Disclosed Material by an Adviser is permitted subject to the Disclosure Room Rules and is conditional on:
 - (a) The Adviser giving and complying with the Disclosure Room Undertakings; and
 - (b) Where relevant, the Adviser’s firm/employer giving and complying with the Disclosure Room Undertakings in respect of the Adviser.
- V. Only the Authorised Advisers will be allowed in the ROCE Disclosure Room, subject to a maximum of two Authorised Advisers per party to the Investigation (‘Party’) at any one time.
- VI. The ROCE Disclosure Room will be open on each CMA Working Day³ **from 30 September until 2 October 2015 inclusive**. Its hours of operation will be from 9.30am until 5pm on each day. Should the CMA decide to open the ROCE Disclosure Room beyond that time or period, access will continue to be governed by the Individual Undertakings, Firm Undertakings, and the Disclosure Room Rules.
- VII. At all times that the ROCE Disclosure Room is open, a member of CMA staff will be present to oversee compliance with the Disclosure Room Rules and shall be the person any Authorised Adviser should contact in the event of a

³ CMA ‘Working Day’ means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

query or difficulty concerning the operation of the ROCE Disclosure Room (including IT matters).

- VIII. In addition to the Disclosed Material, the following material will be made available in the ROCE Disclosure Room: a printed copy of the published ROCE Appendix, a copy of any Confidential Submission(s) made on behalf of the Relevant Party and stationery.
- IX. The Disclosure Room will contain one laptop per Authorised Adviser with the following specification:
- (a) Word, Excel and PowerPoint software;
 - (b) access to two printers;
 - (c) no storage medium other than the hard disk will be available (ie the USB ports and the CD writer – if any – will be disabled);
 - (d) no internet or email capacity; and
 - (e) the computers available for use by the Authorised Advisers of each Relevant Party will be networked to each other.
- X. All printing activity will be logged automatically.
- XI. Authorised Advisers will be provided with A4 sized envelopes in which they may store any printed materials and any handwritten notes. The envelope(s) will be sealed and placed in a secure location at the CMA's offices, which will be locked overnight. After the closure of the ROCE Disclosure Room any such materials will be destroyed by the CMA.
- XII. Authorised Advisers may talk to each other in the ROCE Disclosure Room but any conversations must be kept as brief and as quiet as possible to avoid disturbing other users of the ROCE Disclosure Room.
- XIII. The CMA will, upon request and subject to availability, provide a breakout room during the opening hours of the ROCE Disclosure Room for reasonable use by the Authorised Advisers who are present in the ROCE Disclosure Room for:
- (a) Discussions between Authorised Advisers who are present in the breakout room ('internal communications'); or
 - (b) External telephone conversations ('external communications')

But a breakout room may not be used for internal communications and external communications at the same time.

- XIV. Requests to use a breakout room must be made to the CMA staff member present in the ROCE Disclosure Room on the day the Authorised Advisers wish to use the breakout room and when making the request an Authorised Adviser must indicate whether the breakout room is to be used for internal discussion or external communication. In the event that more than one Relevant Party wishes to use the breakout room, each party concerned shall be able to use the breakout room for a maximum of 2 hours at any one time and the priority given to parties will be determined by the order in which the Relevant Party's Authorised Adviser(s) made the request to the CMA staff member. In the event of a dispute, the matter shall be resolved by the CMA staff member in the ROCE Disclosure Room.
- XV. Authorised Advisers must not bring into the ROCE Disclosure Room or breakout room any device allowing external communication (eg mobile phones, PDAs, laptop computers) or storage devices (eg memory sticks or dictaphones) except as permitted in the circumstances set out in Rule XVI. An Authorised Adviser may only bring into the ROCE Disclosure Room his/her own material (eg notes, copies of working papers or other documents or textbooks) in non-electronic format provided that:
- (a) the material is reasonably required to facilitate the Permitted Purpose;
 - (b) the material has not been supplied by the CMA;
 - (c) the Authorised Adviser has informed the CMA, by 2pm of the CMA Working Day⁴ before, of the specific material that he/she intends to bring into the ROCE Disclosure Room;
 - (d) the Authorised Adviser presents, in advance of bringing into the ROCE Disclosure Room, the material to the CMA for inspection by a CMA staff member;
 - (e) the CMA has approved the material presented for inspection;
 - (f) the material is not removed from the ROCE Disclosure Room (except to be taken to a breakout room used for internal communications as per Rules XVI); and

⁴ CMA 'Working Day' means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

(g) the material is handed over to the CMA for destruction by the end of the ROCE Disclosure Room.

XVI. Where a breakout room is to be used for internal communications:

- (a) Authorised Advisers may take copies of their Confidential Submission(s) and draft Confidential Supplementary Submission(s) and handwritten and printed notes prepared in the ROCE Disclosure Room, as well as his/her material approved by the CMA as per Rule XV, into the breakout room but are reminded that, in doing so, they must not breach the Individual Undertakings.
- (b) Authorised Advisers must not carry into the breakout room any device allowing communication with a person outside the breakout room(s) (e.g. mobile phones, PDAs, laptop computers, memory sticks).

XVII. Where the breakout room is to be used for external communications:

- (a) Authorised Advisers may, with the approval of the CMA, carry mobile phones into the breakout room.
- (b) Authorised Advisers must not take into the breakout room copies of their Confidential Submission(s) and draft Confidential Supplementary Submission(s) and/or any other material (whether in hard copy or electronic form) prepared in the ROCE Disclosure Room.

XVIII. The usual rules for access to the CMA's offices will apply. In particular, visitor badges must be worn visibly at all times. The Authorised Advisers must not leave the ROCE Disclosure Room at any time without informing a member of the CMA staff and outside the ROCE Disclosure Room may be accompanied by a member of CMA staff where appropriate.

XIX. A failure to abide by the Disclosure Room Rules by an Authorised Adviser:

- (a) will result in a breach of the Individual Undertakings which could result in the Authorised Adviser being removed from the ROCE Disclosure Room, and the Authorised Adviser may be barred from participation in any subsequent disclosure room or confidentiality ring whether relating to the same investigation or any other investigation run by the CMA;
- (b) will result in a breach of the Individual Undertakings which may be referred to the Authorised Adviser's regulatory body, if applicable, who may subsequently decide to undertake disciplinary action;

- (c) where Firm/Disclosure Room Undertakings have been given by an Authorised Adviser's firm/employer, may result in a breach of such Undertakings and may be barred from participation in any subsequent disclosure room or confidentiality ring whether in relating to the same investigation or any other investigation run by the CMA;
- (d) where Firm/Disclosure Room Undertakings have been given by an Authorised Adviser's firm/employer, may result in a breach of such Undertakings which may be referred by the CMA to the firm/employer's regulatory body, if applicable, which may subsequently decide to undertake disciplinary action in relation to the breach;
- (e) may result in a breach by the Authorised Adviser of his/her obligations under Part 9 of the Act (as regards the disclosure and use of the Disclosed Material) which constitutes a criminal offence under section 245 of the Act.

XX. The CMA may, at any time, (without consultation), vary the ROCE Disclosure Room Rules where it considers there is a good reason, which may include a reasonable suspicion that a breach of the Disclosure Room Rules, the Individual Undertakings, or the Firm Undertakings, has occurred. The variations will have effect as regards Authorised Advisers (and, if relevant, an Authorised Adviser's firm/employer) as soon as the variations are notified to the Authorised Adviser (and, if relevant, the Adviser's firm/employer).