

Transparency and disclosure: Statement of the CMA's policy and approach

Summary of responses to the consultation

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This publication is also available at: www.gov.uk/cma.

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1 INTRODUCTION AND SUMMARY

Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) establishes the Competition and Markets Authority (CMA) as the UK's competition and consumer authority. The CMA will take on the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT). The CMA was established on 1 October 2013 and will gain its full functions and powers on 1 April 2014, when the OFT and CC will be abolished. The CMA will be a single centre of expertise in UK markets focusing on public competition and consumer enforcement, guidance, advocacy and leadership for the UK. Its primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 A series of draft guidance documents to assist the business and legal communities and other interested parties in their interactions with the CMA. *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6con) (the Draft Statement) was one of a number of draft guidance documents published for public consultation on 15 July 2013.¹ The Draft Statement details the CMA institutional approach to transparency and disclosure at a high level and provides an overview of the legal framework for disclosure within which it exercises its statutory functions
- 1.3 The consultation (the Consultation) on these documents closed on 6 September 2013.

Purpose of this document

- 1.4 The Consultation document accompanying the Draft Statement (the Consultation Document) set out a series of specific questions on which views of respondents were sought. This document sets out a summary of the responses received to the each of those questions, and the CMA's views on those responses.

¹ These documents are available at www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-1

Responses to the Consultation

1.5 Thirteen written Consultation responses referring to the Draft Statement were received. The Draft Statement was also discussed at a launch event for the CMA draft guidance on 24 July 2013 attended by members of the legal, academic and business communities.

Consultation questions

1.6 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised.

	Question	Chapter
1.	Do you consider that the Draft Statement sets out a clear statement of the CMA's commitment to transparency and the reasons why this is important?	2
2.	Do you consider that the Draft Statement contains the right level of detail in explaining how the CMA will engage with parties and other interested persons at each stage of its cases, and the CMA's approach to handling information (including in particular confidential information)?	3 and 4
3.	Do you consider that the Draft Statement contains the right level of detail in explaining the circumstances in which the CMA may disclose information to other UK public authorities and overseas authorities?	6 and 7
4.	Do you consider that there are any aspects missing from the Draft Statement in respect of the CMA's approach to transparency and disclosure?	5
5.	Do you consider that the Draft Statement is user friendly in terms of its content and language?	6
6.	Do you have any other comments on the Draft Statement?	7
7.	Do you agree with the list in Annexe B of the Draft Statement of existing OFT and CC guidance documents related to transparency and disclosure proposed to be put to the CMA Board for adoption by the CMA?	8

- 1.7 This document should be read in conjunction with the Consultation Document. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on www.gov.uk/cma. The *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6) (the Statement) constitutes a general statement of the CMA's policy and approach to transparency and disclosure. It applies to all specified information² received by the CMA in the exercise of its functions (unless otherwise stated), in particular information received in the course of its cases or investigatory work under the Competition Act 1998 (CA98) and Enterprise Act 2002 (EA02), and to its consumer enforcement actions. More detailed guidance on transparency and disclosure as they relate to specific areas of the CMA's work, including the applicable legal provisions, is set out in other CMA guidance documents. The Statement is not a substitute for detailed guidance and should be read alongside the guidance that applies to the specific areas of the CMA's work.

² As defined in sections 237 and 238 of the EA02.

2 THE CMA'S COMMITMENT TO TRANSPARENCY

Question 1: Do you consider that the Draft Statement sets out a clear statement of the CMA's commitment to transparency and the reasons why this is important?

2.1 In the Consultation Document, the CMA sought respondents' views on whether the Draft Statement sets out a clear statement of the CMA's commitment to transparency and the reasons why this is important.

Summary of responses

2.2 The vast majority of respondents felt that the Draft Statement clearly sets out the CMA's commitment to transparency and all were supportive of that commitment. However, some thought that there was scope for the overall clarity of the Statement to be improved. A further more specific comment called for greater emphasis in the Statement on the disclosure of information to main parties. Several respondents commented that they would like to see a clearer statement of the CMA's aims in the Draft Statement. Whilst these were considered comprehensible, several thought they were not as clear as the commitments previously found in *Transparency: A Statement on the OFT's approach* (OFT1234), at paragraph 1.5 (the OFT's Transparency Statement).

2.3 However, some respondents indicated that the Draft Statement lacked purpose, and questioned whether it would actually be referred to in practice given the continued existence of other guidance to which parties are still required to have regard. In particular, a few respondents viewed the Draft Statement as an unnecessary and confusing duplicate of CC7 (revised) (*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*) and called for these two key documents to be amalgamated. For example, chapter 4 of the Draft Statement and parts 6 to 9 of CC7 (revised), on the subject of obtaining and using information, were cited by one respondent as an incidence of overlap. Whilst some respondents' preference was for a single document on transparency, other respondents proposed more specific cross-referencing as an alternative to consolidation.

2.4 One respondent called for the Statement to give a commitment that it would be continuously updated on the basis of knowledge and experience acquired by the authority.

- 2.5 A couple of respondents expressed concern that the Statement took a non-committal approach on issues of accountability and the use of discretion, giving less detail on how the CMA will behave in these areas:
- several respondents noted differences between the Statement and the OFT's Transparency Statement, and questioned whether this indicated that the CMA is less willing to make specific procedural commitments and wishes to have greater discretion
 - the difference in language of 'aims' versus 'commitments' was also noted by some as being a weaker statement about how the CMA will approach transparency issues. For example, reference was made to the CMA's aim at paragraph 2.5 of the Draft Statement to keep the parties 'appropriately informed' during enforcement action, as compared to the OFT' commitment to 'regularly update' the parties,
 - a couple of respondents argued that wording from the OFT's Transparency Statement, including the aim to 'put things right as far as possible', should also be included in the CMA statement.
- 2.6 One respondent also suggested that the authority should commit to sharing its developing thinking early on in cases.

The CMA's view

- 2.7 The CMA welcomes respondents' support for its commitment to transparency and is pleased to note that the vast majority consider that this is clearly set out in the Statement.
- 2.8 The CMA has however noted the impression among a number of respondents that the CMA's commitments on its procedures, although clear and comprehensible, overall appear less firm than the OFT's commitments in the OFT's Transparency Statement. The CMA also notes the comment from some respondents that the Statement lacks purpose and appears to be a confusing duplicate of the CC's *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 (revised)), and should be amalgamated into a single document on transparency and disclosure.
- 2.9 The CMA is keen to reassure stakeholders of the CMA's ongoing and firm commitment to transparency. In particular, the replacement by the Statement of the OFT's Transparency Statement and the CC's *Disclosure of*

Information by the Competition Commission to other public authorities (CC12) is not intended and does not signify any dilution by the CMA of its commitment to transparency as compared to its predecessors. The CMA fully recognises and values the importance of being transparent in its work.

- 2.10 The CMA notes, however, that the Statement is umbrella guidance, the focus of which has been to develop a common approach across the CMA building on the OFT and CC's current (best) practices. In preparing its guidance, the CMA thought carefully about the approach to each of the guidance documents. It took into account a number of considerations in deciding which approach to adopt, including the (limited) time available, whether to replace the existing guidance entirely (as for example for the OFT and CC's Jurisdictional and Merger Procedural Guidance) or supplement the existing guidance (for example, the CMA's Supplemental Markets Guidance); or adopt the existing guidance with some minor amendments.
- 2.11 In respect to this Statement, the CMA decided that producing a separate umbrella statement of the CMA's policy and approach to transparency and disclosure covering at a high level all different areas of the CMA's work was the most appropriate approach in the circumstances. The CMA considered that it was important for the CMA to set out from the outset how it intends to be open and transparent generally in all areas of its work as well as to ensure that a clear and consistent approach to transparency and information handling is established and communicated at the beginning of the new regime introduced by the ERA13.
- 2.12 As umbrella guidance the guidance is necessarily constrained in its ability to cover all possible circumstances that may arise. A more detailed articulation of the procedural commitments in the various areas of work is to be found in the tool – specific guidance documents such as the *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8) and *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 (revised)).
- 2.13 The CMA notes that although the underlying general principles are the same, the nature and purpose of the Statement is different from the nature and purpose of, for example, CC7 (revised) which sets out a more detailed/specific articulation of the procedural commitments in the specific areas of merger inquiries, market investigations and reviews or undertakings and orders.

- 2.14 Moreover, when preparing the Statement, the CMA considered the need to strike a balance between the desirability of offering stakeholders certainty about the CMA's principles and processes and the need to preserve the CMA's ability to develop its practices over time, particularly in respect of those which are entirely new. Nonetheless, in light of respondents' concern, the CMA has reviewed the Statement and, where appropriate, it has sought to articulate its commitments in clearer and more certain terms.
- 2.15 The CMA is mindful of the need for the Statement to be as user-friendly as possible and to minimise the risks of confusion arising from the continued existence of more specific guidance. Wherever possible, the CMA has therefore made more extensive use of cross-references to tool-specific guidance in this Statement.
- 2.16 More generally, the CMA is mindful of the need to minimise the risk of confusion arising from the continued existence of guidance which does not take account of the creation of the CMA or the other changes to the competition and consumer regimes introduced by the ERR13. The CMA will therefore seek, when making such documents available on www.gov.uk/cma, to state clearly the basis on which those documents should be read (including adding 'health warnings' to those documents where appropriate).
- 2.17 The CMA further emphasises that the Statement is a living document which will be updated in light of the knowledge and experience which the CMA will acquire with time.

3 THE CMA'S APPROACH TO ENGAGEMENT DURING A CASE AND TO HANDLING INFORMATION

Question 2 : Do you consider that the Draft Statement contains the right level of detail in explaining how the CMA will engage with parties and other interested persons at each stage of its cases, and the CMA's approach to handling information (including in particular confidential information)?

3.1 The CMA sought respondents' views on whether the Draft Statement contained the right level of detail in explaining how the CMA will engage with parties and other interested persons at each stage of its cases, and the CMA's approach to handling information.

General

Summary of responses

3.2 Several respondents felt that the Draft Statement gave a sufficiently detailed account of the CMA's approach to transparency during the course of a case. However, a couple of respondents regarded it as providing less detail on procedure than previous guidance. Others felt that the Draft Statement was too high level.

3.3 One respondent argued that where the CMA intends to diverge from the approach detailed in the Statement, it should expressly inform the interested parties of its intention to do so and give a clear picture of the approach it expects to take instead.

The CMA's view

3.4 The CMA welcomes the general support for the level of detail in this Statement.

3.5 The CMA understands some respondents may have preferred this Statement to provide a more detailed account of the CMA's approach to engagement with parties and other interested parties and to handling information. However, the CMA considers that the extent of guidance currently provided is appropriate to the umbrella nature of the Statement and thus is necessarily constrained in its ability to provide details over the full range of circumstances which may arise.

Announcing a formal case opening decision

Summary of responses

- 3.6 Regarding the case description which is produced when a case is opened, one respondent noted that the CMA's undertaking to provide a 'brief description' may not be sufficient. In their view, the description should be sufficiently detailed so as to enable the parties to understand the case.
- 3.7 Respondents made a number of comments regarding the content of case opening announcements. In particular, some sought a commitment in the Statement that the CMA would not name parties in the announcement, due to the detrimental effect this could have on reputation, share price and on-going commercial relationships. However, others felt that the complainant should be named so that parties can identify the source of the investigation.
- 3.8 A few respondents requested an explanation of when the CMA would be likely to consider it 'inappropriate' to publish such announcements.
- 3.9 Several respondents expressed a preference for the position taken in the OFT's Transparency Statement on some specific issues. For example, one respondent preferred the approach in the OFT's Transparency Statement to the publication of case opening summaries, which is in line with the EU Commission practice of not routinely issuing press releases in Article 101 and 102 investigations.

The CMA's view

- 3.10 The CMA has noted respondents' comments in relation to case opening notices. The CMA agrees with one respondent's view that the description of the case provided should be sufficiently detailed so as to enable the main parties to understand the case. However, the CMA does not consider that this requires a change in the wording of the Statement.
- 3.11 The CMA is mindful of the potentially adverse impact a case opening announcement may have on businesses. The Statement explicitly states that the level of information in a case opening announcement may vary according to the circumstances of the case. Furthermore, it notes that it may not be appropriate to name the parties directly involved at this stage.
- 3.12 The CMA has noted that the majority of comments asking for clarification of its approach to naming parties in case opening notices mainly relate to CA98 cases. The CMA has clarified in more detail its approach to naming parties in case opening notices in the context of the *Competition Act 1998: Guidance*

on the CMA's investigation procedures in Competition Act 1998 cases (CMA8).³ Specifically, the CMA states in CMA8 that the CMA would not generally expect to publish the names of the parties at this early stage of an investigation other than in appropriate circumstances. These may include, for example, a situation where the parties' involvement in the CMA's investigation is already in the public domain or subject to significant public speculation (and the CMA considers it appropriate to publish details of the parties in the circumstances); where a party requests that the CMA name them (and the CMA considers it appropriate to publish details of the parties in the circumstances); or when the CMA considers that the level of potential harm to consumers or other businesses (including businesses in the same sector not involved in the investigation) from parties remaining unidentified is such as to justify disclosure.

- 3.13 The CMA has given careful consideration to the views expressed in some of the consultation responses that case opening notices should not be routinely published. The CMA has decided that, on balance, publishing case opening notices (once the main parties have been notified) has the key benefit of increased transparency of the CMA's work (in particular in relation to cases that do not end in a published decision but where the outcomes still affect behaviour in an industry), thereby also increasing its impact and accountability. Moreover, it ensures a more consistent approach to publication, thus minimising uncertainty for parties.
- 3.14 In light of this, the Statement continues to provide for publication of case opening notices in all cases other than criminal cartel and criminal consumer investigations, except if to do so would prejudice the case or would otherwise be inappropriate.
- 3.15 Specifically in response to the suggestion for additional clarity in respect of the circumstances in which the CMA would be likely to consider publication inappropriate, the CMA considers that the extent of guidance currently provided is appropriate.

Engagement with relevant parties and announcements during a case

Summary of responses

- 3.16 Many respondents argued that the Statement should contain a stronger commitment by the CMA to share its provisional and developing thinking.

³ See chapter 5 in CMA8.

However, this was coupled with a request by some respondents that such thinking should not be shared too widely, that is, not with anyone other than the parties and the original complainant.

The CMA's view

- 3.17 The CMA agrees with respondents that sharing its provisional and developing thinking with those directly affected in a case can play an important role in ensuring that issues are identified and misunderstandings are resolved as early as possible in a case – thus making the progress of a case quicker – as well as that properly informed decisions are reached.
- 3.18 The CMA notes suggestions for a stronger commitment. However, the CMA considers that this would not be practicable in all cases and may, in fact, risk leading to unnecessary delays to a case and/or making it difficult to comply with timetables.
- 3.19 In line with its umbrella nature, the Statement states that the timing and manner of engagement with relevant parties during the course of a case may vary depending on the type of work involved. Moreover, in accordance with the CMA's commitment to transparency, in addition to where legally required to do so, the CMA will take a flexible approach to sharing its developing thinking having regard to the desirability of ensuring that relevant parties are kept informed of key developments in the progress of their case.

Case closure announcements and decisions

Summary of responses

- 3.20 One respondent regarded the description of possible outcomes of Phase 2 merger clearance as inaccurate, and suggested that it be changed to 'clearance', 'a finding of a substantial lessening of competition (SLC)' or 'cancellation'.
- 3.21 A further specific comment was that the contents of the case-closure announcement should be sensitive to the concerns of parties who have not been found to have engaged in unlawful behaviour.
- 3.22 Greater clarification of what is meant by 'associated public documents' (at paragraph 3.23) was requested by one respondent. In this context, the respondent argued that the Statement should explain what this term covers, and contain a statement that the decision on how long to allow for review

should take into account the length of the document(s) and the corresponding risk of errors.

The CMA's view

- 3.23 Having considered the specific views expressed in some of the responses to the consultation in this area, the CMA has amended the description of the possible outcomes of Phase 2 merger cases (at paragraph 3.16 of the Statement) to include an SLC decision, an SLC with or without remedies (including a prohibition) or cancellation of reference.
- 3.24 With regards to the suggestion that the contents of the case closure announcement should be sensitive to the concerns of parties who have not been found to have engaged in unlawful behaviour, the CMA has noted the suggestion and agrees with it.
- 3.25 The Statement has been edited by the removal the term 'associated public documents' and clarifying that the reference is to any document which is to be published alongside the press release.
- 3.26 In relation to the suggestion that the Statement should contain a statement that the decision on how long to allow for review should take into account the length of the document and the corresponding risk of errors, the CMA notes that this would not be appropriate. The main purpose of providing to those directly affected a confidential text of the press release and any document which is to be published alongside the press release prior to the CMA's making a market-sensitive announcement, is to let them have sight of these documents and to allow them some time to develop a public line. Relevant parties are therefore not intended to review and/or provide comments on the documents provided.

Requests for information

Summary of responses

- 3.27 A small number of respondents requested clarification of the CMA's formal powers to gather information, and also had reservations about the efficiency of having such information contained in different documents.
- 3.28 It was also commented that on the subject of other types of case, such as criminal investigations or regulatory references and appeals, the Statement does not currently specify what alternative objectives and procedures will

apply. If these are not covered in guidance documents elsewhere, then it would be helpful if the Statement was expanded to include such information.

- 3.29 With regard to the language used on this subject in the Statement, one respondent argued that the CMA should have regard to the proportionality of its information requests, and thereby include an express reference to the principle of proportionality in the relevant paragraph.
- 3.30 On the subject of draft information requests, respondents welcomed the fact that the CMA will continue the OFT's practice of discussing drafts of such requests before their issuance. However, several respondents suggested that the Statement should include a commitment on the part of the CMA to explain its reasons when it decides not to give advance warning of an information request. An explanation was also requested in the event of the CMA not choosing to discuss draft information requests. This would be in line with the current position in OFT's Transparency Statement (at paragraph 3.20).

The CMA's view

- 3.31 The CMA has noted the reservations expressed in some consultation responses about the efficiency of having details on the CMA's formal information gathering powers contained in different documents. However, the CMA considers that this is the most appropriate approach in light of the umbrella nature of this Statement which constrains its ability to cover in detail all areas of the CMA's work and the full range of circumstances which may arise.
- 3.32 A couple of respondents noted that the Statement does not apply to criminal investigations or regulatory references and appeals but does not specify what alternative objectives and procedures will apply. The CMA recognises that for some of the CMA's functions more guidance may be helpful. The CMA will need to consider addressing this point at some opportune time. Meanwhile, in light of the views received on this issue, the CMA has included in the Statement some additional information.
- 3.33 The CMA has carefully considered the specific views expressed in a few consultation responses that the CMA should provide an explanation when it has not given notice of the issue of an information request and/or when it does not discuss draft information requests. The CMA considers that the Statement already indicates in what circumstances the CMA may decide not to discuss a draft information request and/or it will not give notice of an information request, namely when it would impracticable or inappropriate to

do so. More detailed guidance to draft information requests in some various areas of its work is set out in the relevant tool-specific guidance documents.

Identifying confidential information

Summary of responses

- 3.34 Respondents also made some specific suggestions on the approach set out in the Draft Statement to the CMA's treatment of confidential information. A couple of respondents argued that the CMA should commit in the Statement to expressly naming who will be responsible for decisions on confidentiality, as well as giving greater clarity on the process whereby such decisions will be reached.
- 3.35 One respondent would like the Statement to include (in an Annexe) a sample of the expected format for non-confidential versions of submissions. Such a precedent would give guidance on matters such as the way redactions are made and the way the claims of confidentiality are presented.
- 3.36 One respondent also requested that Phase 1 merger submissions be exempted from the requirement at paragraph 4.13 of the Statement that parties provide a second, non-confidential version of their key or substantial submissions.
- 3.37 In the interests of accurate statutory referencing, one respondent questioned the citation of section 244 of the EA02 in this part of the Statement. This was in relation to the discussion of the considerations of which the CMA must take account before disclosing confidential information. The view of one respondent was that 'confidential information' is wider in scope than the information referred to in section 244, due to the definition of 'specified information' given in section 237 of the EA02.
- 3.38 Respondents proposed a further matter for inclusion: guidance as to how the CMA will determine which types of information need to be disclosed in order to facilitate the exercise of its statutory functions. A greater indication of how those factors will be balanced against section 244 of the EA02 considerations was also preferred by respondents.
- 3.39 A specific request was received from one respondent that information which is subject to licensing constraints should be added to the list of confidential information in paragraph 4.16.
- 3.40 Several comments were also made about the Statement's coverage of information which is **unlikely** to be considered confidential:

- respondents queried paragraph 4.15 of the Draft Statement, which provides that this category includes ‘financial information **or certain other data** relating to a business which is more than two years old’,
- in addition to clarification of the meaning of ‘or certain other data’, it was felt by some that the above description implies that *any* such information which is more than two years old will no longer be confidential. One respondent argued that some types of financial information (for example, margin information) can remain sensitive for several years, especially if they don’t change substantially in that period. The publication of such data could thus potentially have a detrimental effect on a party’s business. This respondent therefore suggested that the five-year term used by the European Commission would be more suitable than the two-year term in the Draft Statement.

The CMA’s view

- 3.41 The CMA has noted and carefully considered the suggestions on the approach set out in the Draft Statement to the CMA’s treatment of confidential information. In response to the suggestion that the CMA should expressly name who is responsible for the decisions on confidentiality, the CMA notes that this will vary depending on the functions. However, the CMA notes that parties who are not satisfied with a decision on a confidentiality taken in the context of their cases may request a review of the decision by the Procedural Officer (PO) in CA98 investigations,⁴ and in merger cases⁵ and market studies and investigations. The PO’s contact details will be available on www.gov.uk/cma.
- 3.42 In relation to the comment concerning the desirability of the Statement containing a sample of the expected format for non-confidential versions of submissions, the CMA notes that the circumstances may vary so that there is not a common approach the CMA will favour. This approach provides the added advantage of flexibility for the CMA and its users. Parties who wish to seek a steer before preparing non-confidential versions may enquire with the relevant contact within the case team concerned.

⁴ Further information on the role of the Procedural Officer can be found in *Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases* (CMA8).

⁵ In Phase 1 merger cases, the procedure will only apply to disputes regarding the confidentiality of information that the CMA proposes including in published decisions.

- 3.43 As a more general comment, the CMA notes that, although it appreciates the value of guidance and templates for stakeholders, it considers that the extent of guidance currently provided in this Statement is appropriate to the umbrella nature of this document. Moreover, this Statement is not the appropriate context in which to include templates or proformas specific to particular areas of the CMA's work.
- 3.44 The CMA has noted the suggestion that Phase 1 merger submissions be exempted from the requirement at paragraph 4.13 of the Draft Statement that parties provide a second, non-confidential version of their key or substantial submissions. The CMA will give this suggestion further consideration going forward.
- 3.45 Several respondents requested more guidance as to how the CMA will determine which types of information need to be disclosed in order to facilitate the exercise of its statutory functions; and a greater indication of how those factors will be balanced against section 244 of the EA02 considerations. The CMA considers that this is not an issue it can provide guidance on as it will depend on the circumstances, hence a one-size-fits-all approach is not appropriate. The CMA has however clarified in the Statement that the considerations in section 244 of the EA02 are applied by the CMA on a case-by-case basis when the CMA is considering disclosure of specified information. When decisions are finely balanced, the CMA will have particular regard to the need for disclosure to achieve due process
- 3.46 The CMA has carefully considered the views expressed by several respondents in relation to this section of the Statement and particularly to the suggestion that using a two year reference period as a watershed to determine whether certain information is likely to be confidential is too short a period. The CMA has also noted these respondents' preference for adopting the five year term period used by the European Commission.
- 3.47 However, the CMA has decided to retain the current approach and level of detail, including the two-year reference period. While the CMA appreciates stakeholders' concerns around the commercial sensitivity of some of their business information which may remain sensitive for longer than two years, the Statement explicitly states that the assessment of what information will be considered confidential is done on a case-by-case basis and that the use of the two year reference period is purely intended to be a rule of thumb, thus allowing the CMA to take into account the individual circumstances of a case. Moreover, the CMA notes that the two-year period has been used in these terms by the CC which explicitly refers to it in CC7 (revised), whose experience to date is that this guidance has not raised any problems or

concerns in practice. Equally, the list of what information the CMA may be likely to consider confidential or not contained in the Statement is not exhaustive. Therefore, the fact that a certain type of information is not currently included in the list of what the CMA may consider confidential does not mean that it will not be considered confidential in an individual case.

Disclosure of information obtained by the CMA

Summary of responses

- 3.48 A general theme which emerged from the consultation responses was that this section of the Statement is currently too general and high level in nature. Some respondents argued that this makes it of limited utility in practice, with the result that readers will refer to other procedural guidance documents or Annexe C instead. One respondent argued that the Statement is too vague and does not set out whether the CMA will provide detailed information regarding proposed disclosure. That respondent expressed a strong preference for the process in the *Disclosure of Information by the Competition Commission to other public authorities* (CC12), and argued that this should be restated in full in the Statement.
- 3.49 Another suggestion was that the Statement should contain a clear and more detailed explanation of what is meant by the statement at paragraph 4.17 of the Draft Statement that ‘the CMA may use any information that it obtains during a case for the purposes of facilitating the exercise of its statutory functions’, and in particular whether this means the CMA may use information received during CA98 cases, mergers cases and/or market investigations for other functions.
- 3.50 Several comments were made on the disclosure of information claimed as ‘confidential’ by parties without informing those parties. A respondent argued that this was not appropriate in any circumstances, and sought a commitment in the Statement that the CMA will not disclose such information to third parties without both informing the parties and providing reasons. This practice should apply in all cases, rather than parties in CA98 cases being given ‘special treatment’.

The CMA’s view

- 3.51 The CMA has noted the specific views expressed in a number of consultation responses that this section of the Statement was too high level in nature and not user-friendly enough given the need to refer to Annexe C. While the CMA considers that the extent of guidance currently provided is appropriate

to the umbrella nature of the Statement, the CMA has amended the section in question to include the description of the legal framework regarding disclosure originally contained in Annexe C.

- 3.52 With regard to the comment made by several respondents that the CMA should inform the parties of its intention to disclose information which parties consider confidential in all cases (and not only in CA98 cases); the CMA notes that the Draft Statement already explicitly stated that it will generally seek to inform the party or parties claiming confidentiality or the party(ies) to whom the information relates of its intentions to make a disclosure. However, in light of the views expressed, the CMA has further clarified that other than in CA98 cases where notifying the parties in advance is a legal requirement and when information is shared with other regulators and/or investigating or prosecuting authorities in the circumstances set out in chapter 6 and 7 of the Statement, the CMA might choose not to do so if it considers that the party has already had sufficient opportunity to submit confidentiality claims, or if the CMA has sought to protect the information disclosed, for example by redacting and/or anonymising information or aggregating data.

Confidentiality rings and data rooms

Summary of responses

- 3.53 A variety of comments were also received on confidentiality rings and data rooms: a few respondents would like the Statement to include guidance on the use and workings of these, with one further suggestion being to include sample rules and undertakings in an Annexe to the Statement. Noting that the CMA proposes to allow the parties' legal advisers to use a data room only to carry out an assessment of a specific set of documents in 'exceptional circumstances', a couple of respondents then enquired about what constitutes 'exceptional circumstances'. It was also unclear to these respondents whether legal advisers would be able to use the data room with economists.
- 3.54 On the CMA's right to review adviser reports from the data room, one respondent requested a more explicit statement that this is permissible only at the stage when advisers are leaving the data room, rather than later.
- 3.55 Finally, a respondent argued for more permissive rules about access to data rooms, stating that access should be allowed as a matter of course and that advisers should be able to share (redacted) versions of their written data room reports with their clients and each other. The respondent believes that

the applicable rules in the EA02, codes of professional conduct and the data room rules themselves, provide sufficient safeguards.

The CMA's view

- 3.56 The CMA has carefully considered respondents' comments in relation to confidentiality rings and data rooms, particularly the reservations expressed by some around restricting legal advisers' access to data rooms.
- 3.57 The CMA has clarified in the Statement that both legal and economic advisers may have access to access to data rooms. The Statement provides that data rooms are typically used to provide access to data to enable parties' advisers to gain further understanding of the CMA's analysis and to confirm or challenge the CMA's findings or conclusions. This procedure may also be used to allow advisers to carry out an assessment of a specific set of qualitative documents.
- 3.58 In relation to several respondents' request that the Statement include more detail on the workings of confidentiality rings and data rooms, and the suggestion that sample rules and undertakings be included in an Annexe to the Statement, the CMA considers that given its umbrella nature, this Statement is not the appropriate context within which to include any more details and/or templates. Furthermore, given that at the date of publication of the Statement, a number of legal appeals relevant to the treatment of confidential information are pending, it would not be appropriate for the CMA to issue detailed guidance and/or templates at this stage.
- 3.59 However, the CMA has provided some more details in the Statement on the use of these procedures. More specifically, the Statement clarifies that access to documents in a confidentiality ring or data room will be subject to confidentiality undertakings provided by the persons with access, and for employees, their employer firm, which address how they may use the information disclosed to them and the restrictions that apply to onward disclosure. In the case of data rooms, the CMA will also require advisers to follow data room rules concerning the proper conduct of the data room, including making provision for bringing into and taking out of the data room such items as materials, notes and equipment
- 3.60 Also, it will be a condition of access to a confidentiality ring or data room that information reviewed by advisers is not shared with their client(s). It is for advisers to satisfy themselves of the steps they are required to take under any relevant professional conduct rules to ensure that they are able to operate on this basis.

4 DISCLOSURE TO UK AND OVERSEAS PUBLIC AUTHORITIES

Question 3: Do you consider that the Draft Statement contains the right level of detail in explaining the circumstances in which the CMA may disclose information to other UK public authorities and overseas authorities?

4.1 In the Consultation Document the CMA sought respondents' views on whether the Draft Statement contained the right level of detail in its explanation of the circumstances in which the CMA may disclose information to other UK and/or overseas public authorities.

Summary of responses

Disclosure to UK public authorities

4.2 It was the view of several respondents that the Draft Statement was lacking in detail when compared to previous CC guidance (particularly *Disclosure of Information by the Competition Commission to other public authorities* (CC12)). One respondent was particularly concerned about an apparent lack of detail in the explanation of how the CMA would identify the applicability of a statutory gateway.

4.3 A respondent argued that the Draft Statement in its current form was not user friendly. This was because readers were required to cross-refer between chapters 6, 7 and Annexe C in assessing the grounds upon which disclosure can be made.

4.4 One respondent identified that no reference had been made to the statutory gateway of consent, under section 239 of the EA02, whereby the CMA would not be prohibited from disclosing specified information where consent was received from the relevant parties.

Disclosure of specified information to other public authorities to facilitate the exercise of the CMA's statutory functions

4.5 Several respondents were of the view that notice must always be given to the owners of specified information, save for exceptional circumstances. This would ensure that those individuals could identify breaches of their rights and would provide an opportunity to object to the proposal. One of these respondents argued that if the CMA disclosed to other authorities, having received objections, the CMA should clearly set out its reasons for doing so.

Disclosure of specified information to facilitate the exercise of another authority's functions

- 4.6 Several respondents raised concerns regarding disclosure to other authorities without the consent of the person to whom the information relates, considering this to be an infringement of due process. Similarly, it was suggested that where information needed to be disclosed as a matter of 'urgency', due process requires the CMA to inform the party immediately after disclosure occurs.
- 4.7 Various respondents argued that the Statement's current form was of limited significance as it did little more than repeat the statutory provisions. It was suggested that a clear indication of the balancing exercise and considerations taken by the CMA in exercising its power of disclosure would be of greater practical assistance. A few respondents considered that the CMA's assessment of whether disclosure is 'necessary for the purpose'⁶ needed further explanation.
- 4.8 A small number of respondents considered that the CMA should only disclose information where there is a good reason for the other authority being unable or unwilling to obtain the information from a direct source. This would mirror the current CC Guidance on *Disclosure of information by the Competition Commission to other public authorities* (CC12).

The CMA's view

- 4.9 The CMA has noted the specific views and suggestions for additional clarity and detail expressed in relation to this chapter of the Statement. The CMA considers that the level of detail provided in this Statement is broadly appropriate and consistent with the umbrella nature of this document. The CMA agreed however with the suggestion that this chapter could be made more user-friendly by reducing cross-referencing to other chapters. The CMA has therefore reviewed the content of this chapter to make it more comprehensive and easier to read. The Statement now includes more information, previously contained in CC12.
- 4.10 Furthermore, having given further consideration to the concerns which emerged from the consultation in relation to the CMA's position on giving notice of disclosure, the Statement provides that in addition to when legally

⁶ Section 244(4) of the EA02.

required to do so and when leniency applications are concerned,⁷ the CMA will usually give notice of impending disclosure. However, in line with established case law,⁸ the CMA considers that it may not be appropriate to give notice in some circumstances such as: where notice may hamper an investigation; where information is being passed on to another UK public authority, or investigating or prosecuting authority (provided the Part 9 of the EA02 restrictions on use and further disclosure or equivalent legislative provisions affording the same or greater protection apply); where the information is required as a matter of urgency; or where advance notice would be impracticable due to the number of persons to whom notice would otherwise need to be given.

- 4.11 Having regard to the enhanced partnership working, the responsibility of members (and observers) of the UK Competition Network (UKCN)⁹ to protect any information disclosed to each other, including under Part 9 of the EA02, the CMA will generally not give the person to whom the information relates prior notice of its proposal to make a disclosure. The CMA considers that this will help ensure an effective operation of the UKCN which has been established to give effect to the statutory requirements of ERRA13 and in order to strengthen the collaborative framework through which the sectoral regulators and the CMA will work to further the interests of UK consumers.

Disclosure of specified information to overseas authorities

Summary of responses

- 4.12 There was general consensus among respondents that more detail was required in chapter 7 on disclosure to overseas public authorities, with one respondent suggesting that it did little more than repeat the statutory provisions.

⁷ The CMA will always discuss with the leniency applicant or its legal adviser first before disclosing information from a leniency applicant to another public authority. However, the CMA could refer cases of potential serious or complex fraud, in the form of cartel behaviour, to the SFO and the expectation should be that such referrals will be on the basis of full disclosure of all materials in the CMA's possession that relates to cartels. See *Applications for leniency and no-action in cartel cases* (OFT1495) for further guidance.

⁸ *R Kent Pharmaceuticals Ltd v Serious Fraud Office*, [2004] EWCA Civ 1494, 11 November 2004.

⁹ As at the date of publication, the UKCN brings together the CMA with the CAA, FCA, Ofcom, Ofgem, Ofwat, ORR and the Utility Regulator of Northern Ireland and the healthcare regulator, Monitor (with observer status).

- 4.13 Respondents highlighted particular areas of concern, for example:
- several respondents requested confirmation that the owner of the specified information would be notified prior to disclosure to the overseas authority, and that an opportunity to object would be provided. These respondents also requested guidance on how objections to disclosure would be handled by the CMA. Failure to notify and an opportunity to object would be a departure from previous CC guidance (CC12) for no clear reason,
 - one respondent sought clarification regarding the transition from the CC to the CMA. It was submitted that the CC is not currently under any EU obligations to disclose, as it is not recognised as a National Competition Authority by the European Competition Network. The respondent sought clarification that the CMA's EU disclosure obligations would not apply to information initially submitted to the CC.
- 4.14 However, several respondents welcomed the additional guidance on the factors the CMA will consider in disclosing to overseas authorities, but still requested further guidance on the considerations, such as what constitutes 'appropriate protection' against self-incrimination, what is 'sufficiently serious' and the extent the CMA will consider the overseas authorities' previous treatment of confidential information.

The CMA's view

- 4.15 Having noted the widespread demand from respondents for more detail about the CMA's disclosure of specified information to overseas authorities, the CMA has reviewed this chapter of the Statement to include some additional guidance in particular in relation to how the CMA will apply the considerations in section 243(6) of the EA02.
- 4.16 In light of the views expressed, the CMA has also clarified in the Statement that the CMA will generally give notice of impending disclosure. However, as also set out in relation to disclosure to UK public authorities, it may decide that it is not appropriate to give notice in some circumstances such as: where notice may hamper an investigation; where information is being passed on to another investigating or prosecuting authority; where the information is required as a matter of urgency; or where advance notice would be impracticable due to the number of persons to whom notice would otherwise need to be given.

- 4.17 With regards to the clarification sought by a respondent that the CMA's EU disclosure obligations would not apply to information submitted to the CC (often on a voluntary basis) in the course of current or past investigations as the CC is not a designated National Competition Authority and the information was disclosed in circumstances where there were limited gateways available for disclosure to other authorities, the CMA has noted the comment. However, the CMA does not consider that the statutory obligation is confined to designated competition authorities.

5 SUGGESTIONS FOR POSSIBLE OTHER AREAS TO BE COVERED IN THE STATEMENT

Question 4: Do you consider that there are any aspects missing from the Draft Statement in respect of the CMA's approach to transparency and disclosure?

5.1 In the Consultation Document the CMA sought respondents' views on whether there were any aspects missing from the Draft Statement in respect of the CMA's approach to transparency and disclosure.

Summary of responses

5.2 Those respondents who commented on this section pointed out that several accountability and procedural transparency commitments which exist in the OFT's Transparency Statement had been omitted from the Draft Statement. They expressed concerns that the CMA will be less committed to procedural transparency as a result. For example, respondents would like the CMA to commit to including timescales in its annual report, and the Statement does not contain such an undertaking. A couple of respondents also argued for the inclusion of a statement of intent to continue the practice of sharing research and preliminary findings when conducting market studies.

5.3 One respondent suggested that the Statement should include provisions about the revision of case timetables, similar to those currently found in OFT1234.

5.4 In the interests of accountability, a further respondent was of the view that parties should always be informed of key-decision makers.

5.5 One respondent suggested that the PO should have a broader role in Phase 1 of a merger case than just resolving confidentiality disputes. Instead, the role should encompass any disputes on procedure.

5.6 It was the view of one respondent that the Statement should provide for, and distinguish, the approach taken to confidentiality in scenarios where the CMA receives very large volumes of material from the parties in an investigation. The CMA should indicate its willingness to consider adopting an approach whereby it accepts the documents but invites submissions to confidentiality at a later stage.

5.7 On the subject of the balance between transparency and protecting confidentiality and legitimate interests, one respondent argued that the Draft Statement did not sufficiently acknowledge the harm which can result from

the authority failing to strike this balance correctly. In a related submission, a respondent requested that the CMA acknowledge the tension between a company's need to be transparent with external stakeholders about regulatory risks, whilst also preserving the confidentiality of an investigation which not yet been publicised.

- 5.8 One respondent argued that departure from the approach taken in the Draft Statement should only be allowed in exceptional circumstances, and that the current language on this matter constitutes too low a threshold.

The CMA's view

- 5.9 The CMA has considered carefully respondents' specific suggestions for areas of possible clarification or further guidance. Where practicable, the CMA has sought to amend the Statement to accommodate such requests. In other cases, the CMA considers that the extent of guidance currently provided is appropriate having regard to the nature of this Statement¹⁰ or that consideration should be given in the future to further guidance once the CMA has gained practical experience of applying its new processes and procedures.

¹⁰ In particular, given that this Statement is intended to cover all areas of CMA's work, and thus is necessarily constrained in its ability to provide extensive guidance on the full range of circumstances that may arise.

6 COMMENTS ON OVERALL CONTENT AND LANGUAGE

Question 5: Do you consider the Draft Statement is user-friendly in terms of content and language?

6.1 In the Consultation Document the CMA sought respondents' views on how user-friendly the Draft Statement is in terms of content and language.

Summary of responses

6.2 Numerous respondents considered that the language of the Draft Statement was user-friendly. However, a few respondents were concerned about the use of what they saw as some instances of vague and non-committal language.

6.3 As discussed above at paragraph 4.3, one respondent argued that the Draft Statement's structure was not user-friendly as a result of cross-referring between chapters 6, 7 and Annexe C.

The CMA's view

6.4 The CMA has noted the many positive responses received. The CMA has given careful consideration to all comments and suggestions made (including those on drafting) and sought to accommodate in the Statement those that it considered appropriate and within the scope of the Statement.

7 OTHER COMMENTS

Question 6: Do you have any other comments on the Draft Statement?

7.1 In the Consultation Document, the CMA asked respondents whether they had any other comments on the Draft Statement.

Summary of responses

7.2 One respondent welcomed the role of the PO, anticipating that the role will streamline the process for addressing disputes before the CMA. This respondent requested further detailed guidance on the process for appeals to the PO.

7.3 Another respondent raised concerns about the CMA potentially reviewing reports and notes prepared in both confidentiality rings and data rooms, to ensure that confidential material is not contained therein. It was submitted that this may be contrary to legal privilege. Rather, the Statement should acknowledge that measures to protect confidential material will be agreed with the parties in each case and will take the protection of legal privilege into account.

7.4 In relation to paragraph 4.5 of the Draft Statement, one respondent disagreed with the example of when the CMA may not provide advance notice of a proposed information request and suggested more detailed guidance would be helpful. It was submitted that the CMA should consult intended recipients and tailor the information request accordingly, save for cases where there are a large number of intended recipients.

7.5 A respondent submitted that to improve the CMA's transparency, the website must be clear and easily accessible. It was argued that the OFT's current website was confusing and made it difficult to locate relevant information. The CC's website however is much more user-friendly and should be used as a template for the development of the CMA's website.

7.6 Another respondent was concerned that engaging with 'other interested persons' may result in damage, as some may seek information for vexatious purposes. This respondent suggested that the Statement should instead

refer to 'other persons with a legitimate interest'. Other respondents raised general grammatical errors.¹¹

The CMA's view

- 7.7 In response to the suggestion for more guidance on the circumstances when the CMA may not issue a draft information request, the CMA has expanded the explanation of when this may occur. The CMA notes that the Statement is written at a high level and therefore it is not able to cover comprehensively all circumstances in which the CMA might seek evidence and comments.
- 7.8 In relation to the other comments received, the CMA has welcomed the various views expressed and has considered carefully respondents' specific suggestions for areas of possible clarification or further guidance. Where practicable, the CMA has sought to amend the Statement to accommodate such requests, for example in relation to confidentiality rings and data rooms. In other cases, the CMA considers that the extent of guidance currently provided is appropriate having regard to the nature of this Statement¹² or that consideration should be given in the future to further guidance once the CMA has gained practical experience of applying its new processes and procedures.
- 7.9 The CMA has noted the request for guidance in the future for the process of engaging with the PO. The CMA notes that guidance on how to engage the PO is already available in tool-specific guidance including the *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8) and the *Mergers: Guidance on the CMA's jurisdiction and procedures* (CMA2). Moreover, the PO's contact details will be available on www.gov.uk/cma.

¹¹ Paragraph C.2 – 'Expect' should be 'Except'; Paragraph 4.14 – The three bullets should be alternatives rather than cumulative – use 'or' rather than 'and'.

¹² In particular, given that this Statement is intended to cover all areas of CMA's work, and thus is necessarily constrained in its ability to provide extensive guidance on the full range of circumstances that may arise.

8 COMMENTS ON ANNEXE B ON STATUS OF OFT AND CC GUIDANCE DOCUMENTS

Question 7: Do you agree with the list in Annexe B of the Draft Statement of existing OFT and CC guidance related to transparency and disclosure proposed to be put to the CMA Board for adoption by the CMA?

8.1 Respondents' views were sought on the draft list of existing OFT and CC guidance relating to transparency and disclosure, which would be put forward to the CMA Board for adoption (Annexe B of the Draft Statement). The draft list also identified existing OFT and CC guidance that would be replaced or become obsolete. A separate consultation on the full list of existing OFT and CC guidance documents proposed to be adopted by the CMA Board (*Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance (CMA12con)*) was held between 17 September 2013 and 11 November 2013.

Summary of responses

- 8.2 Several respondents agreed with the list in Annexe B of the Draft Statement. However, one of these respondents suggested that the CMA update the guidance referred to in Annexe B to reflect the new organisation, rather than continuing to refer to the CC and the OFT.
- 8.3 Concern was raised by several respondents regarding the Statement and the *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 (revised))*. They submitted that the co-existence of these two documents resulted in unnecessary duplication. The respondents acknowledged that CC7 (revised) focuses on Phase 2 investigations and disclosure, rather than transparency, but still felt that there was scope for incorporating it more efficiently in to the Statement. They also pointed out that CC7 (revised) makes numerous references to a regime which will no longer exist, and that the one suggested amendment to it is not sufficient to remedy this. Therefore, respondents suggested an amalgamation of all the guidance on transparency, including CC7 (revised), into a single document.
- 8.4 One respondent submitted that a separate document is required which lists all OFT and CC guidance, explaining whether the guidance will be put to the CMA Board for adoption, replacement or revocation. This document should be prominent on www.gov.uk/cma.

The CMA's view

- 8.5 Given respondents' broad agreement with the list of guidance in Annexe B, the CMA has chosen not to make any amendments to that list. The guidance documents in Annexe B of the Statement (and identified in the column 'Adopted by the CMA Board') have now been adopted by the CMA Board.
- 8.6 The CMA is mindful of the need to minimise risks of confusion arising from the continued existence of guidance which does not take account of the creation of the CMA or the other changes to the mergers regime introduced by the ERRA13. The CMA will therefore seek, when making such documents available on www.gov.uk/cma, to state clearly the basis on which those documents should be read (including adding 'health warnings' to those documents where appropriate).
- 8.7 As regards to concerns expressed that there is unnecessary duplication between CC7 (revised) and the Statement and that this creates inefficiencies, the CMA notes that the nature and purpose of the Statement is different from the nature and purpose of CC7 (revised).
- 8.8 This Statement is an umbrella guidance, the focus of which has been on developing a common approach across the CMA on the OFT and CC's current (best) practices. As an umbrella guidance, its aim is to set out the CMA institutional approach to transparency and disclosure at a high level and thus is necessarily constrained in its ability to cover all possible circumstances that may arise. Although the underlying general principles are the same as in this Statement, CC7 (revised) sets out a more detailed/specific articulation of the procedural commitments in the specific areas of merger inquiries, market investigations and reviews or undertakings and orders.
- 8.9 However, the CMA is mindful of the need for the Statement to be as user-friendly as possible and to minimise the risk of confusion arising from the continued existence of more specific guidance. In light of the views expressed, wherever possible, the CMA has therefore made more extensive use of cross-references to tool-specific guidance in this Statement.

ANNEXE(S)

A. List of Respondents

- Allen & Overy LLP
- Ashurst LLP
- Baker & McKenzie LLP
- Bird & Bird LLP
- City of London Law Society
- Cleary Gottlieb Steen & Hamilton LLP
- Clifford Chance LLP
- Dickson Minto W.S.
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- Hogan Lovells LLP
- National Federation of Retail Newsagents
- Simmons & Simmons LLP