TRANSPARENCY AND DISCLOSURE: STATEMENT OF THE CMA'S POLICY AND APPROACH
(CMA6CON, JULY 2013)

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RESPONSE TO THE CMA'S CONSULTATION ON TRANSPARENCY AND DISCLOSURE: STATEMENT OF THE CMA'S POLICY AND APPROACH (CMA6CON, JULY 2013)

1. INTRODUCTION AND SUMMARY

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the draft for consultation of "*Transparency and disclosure: Statement of the CMA's policy and approach*" (the ***Draft Statement***).

1.2 Our comments are based on our extensive experience representing clients in matters conducted by both the Office of Fair Trading (***OFT***) and the Competition Commission (***CC***), together with significant experience with similar matters in other jurisdictions. We believe this experience gives us valuable insight into best practices in the UK and internationally.

1.3 The comments contained in this paper are those of Freshfields Bruckhaus Deringer LLP and are confined to those areas which we feel are most significant in terms of the impact on UK business and consumers. Our comments do not necessarily represent the views of any of our clients.

1.4 We welcome the CMA's review of existing guidance. The additional detail provided in the Draft Statement is itself a welcome step toward greater transparency. However we have a number of concerns with aspects of the guidance. For ease of reference, we have grouped these concerns by relevance to the consultation questions.

2. 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)?

Transparency and disclosure

Publication of case opening information

2.1 The Draft Statement (at paragraph 3.9) suggests that at the same time as or following the public announcement of a case opening, the CMA will also publish a brief description of the case, the relevant legislation, the industry sector concerned and the CMA's reasons for starting a formal case. This policy appears to be a departure from the OFT's current approach, which is not to publish a case opening summary unless there are good reasons to do so. The existing OFT transparency guidance states that the OFT will "*not routinely publish case opening summaries. We do not, however, rule out publishing information about an enforcement case at an earlier stage in the investigation than is our current practice where it seems to us that there are good reasons to do so*".

2.2 The OFT adopted the approach of not routinely publishing case opening summaries, but determining on a case by case basis whether it would be appropriate to publish such information, following the identification of concerns during consultation

on its guidelines.[1] This accords with the European Commission, which does not routinely issue press releases on the issue of statements of objections, or on the conduct of dawn raids, but deals with each case on a case by case basis. Nor does the European Commission routinely publish opening summaries for Article 101 or 102 investigations, although it may issue press releases on a case by case basis.

2.3 We believe that an important distinction can be made between the process for soliciting third party views in merger cases and the need for widespread "invitations to comment" in enforcement cases.

2.4 In enforcement cases, it is difficult to see when the publication of an "opening summary" would not prejudice the companies involved. We are concerned that it will be particularly damaging to the parties concerned if the CMA publishes a summary of the conduct or issue being investigated at a very early stage. The threshold for opening of an investigation is generally low, with the Competition Act allowing the OFT to open an investigation if there are "*reasonable grounds for suspecting*" that a relevant breach has occurred. We therefore consider that it would be appropriate for CMA to pay particular attention to the level of information released in the public domain at such an early stage of the investigation and to the potentially detrimental impact inaccurate information may have on a party. Reputational damage would be likely to arise irrespective of whether the companies are identified in the summary, given the speculation that would arise on any such announcement.

2.5 Further, no justification has been advanced in relation to any change of policy since this matter was, fairly recently, last consulted upon. Accordingly, we would suggest that the approach to publication of opening summaries should go no further than that consulted on and adopted in the OFT's existing guidelines – as set out in paragraph 2.1 above.

Case closure announcement and decision

2.6 Section 3.17 of the Draft Statement suggests that the level of detail in the publication of a case closure announcement and decision will reflect statutory requirements and "*depend on the nature of the outcome, whilst also having regard to the CMA's transparency aims*". We agree that it is appropriate to consider the outcome of the case when deciding on the level of detail to include in a public announcement / decision. In particular, the publication of some information can have an impact on confidentiality of the parties' information or on the parties' reputation, even when published in a case closure / no grounds for action decision. Accordingly, whilst we recognise that the CMA is subject to statutory requirements in some circumstances to publish the reasons for its decisions, we consider that it would be appropriate for the Draft Statement to confirm that the CMA will in particular be sensitive to the concerns of parties that have not been found to have been engaged in unlawful behaviour when deciding what information to publish.

Disclosure of information obtained by the CMA

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[1] The CC is in a different position as it opens matters following a reference, and has jurisdiction over a more limited range of matters.

2.7 Section 4.20 of the Draft Statement notes that if the "*CMA disagrees with a request or claim for confidentiality, or considers that it is necessary for the purpose of exercising its functions to disclose the information to other parties, the CMA will generally seek to inform the party claiming confidentiality or the party to whom the information relates of its intention to make a disclosure*", but that,"*[o]ther than in CA98 investigations, the CMA may choose not do so if it considers that the party has had sufficient opportunity to submit confidentiality claims, or if the CMA has sought to protect the information to be disclosed (for example, by anonymising or aggregating data)*".

2.8 We do not consider it appropriate in any circumstances for the CMA to disclose information over which parties have claimed confidentiality to third parties without informing the parties that it intends to do so and providing its reasons for that decision. Given that parties will by definition consider this information to be sufficiently sensitive to require protection, it is reasonable to give them notice of the intended disclosure so that they can anticipate and take steps to mitigate any harm to their business (for example, where such information may be disclosed to customers).[2]

2.9 Furthermore, in order for the expanded opportunity to appeal decisions on confidentiality to the Procedural Officer to be effective, parties must be informed of the CMA's intention to disclose in advance and its reasons for doing so.

2.10 We therefore consider that the CMA should always tell parties in advance if it intends to disclose information over which they have claimed confidentiality. We do not consider that this would impose a disproportionate administrative burden on the CMA, particularly given the magnitude of potential harm to parties that can result from such disclosures.

Obtaining and using information

Chapter 4 - Obtaining and using information

2.11 The Draft Statement indicates, at footnote 38, that Chapter 4 on obtaining and using information does not apply to "*criminal cartel investigations, criminal consumer investigations and regulatory references and appeals cases, as the procedure in such cases differ from those described in this Chapter*". Whilst we acknowledge that obtaining and using information in such cases may require a different approach, the Draft Statement fails to specify what alternative objectives and procedures will apply in such cases.

2.12 Chapter 4 of the Draft Statement contains guidance of significant importance for parties under investigation, both in relation to the procedures the CMA will follow and the factors it will have regard to in obtaining and using information. This guidance is equally as important to parties under criminal investigation or appealing a

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[2] We also consider that it would be appropriate for the CMA to take a consistent approach across its tools; it is not apparent to us why parties involved in CA98 cases should be afforded special treatment with respect to notifying them of the intention to disclose their confidential information.

regulatory decision. We assume that this guidance will be provided in the tool-specific guidance documents to be published for consultation shortly. However to the extent that it is not, we would welcome an expansion of the Draft Statement to cover the CMA's approach in obtaining and using information in such cases.

Requests for information

2.13 We welcome the CMA's guidance in paragraph 4.3 of the Draft Statement concerning its approach when requesting information. However, given that responding to such requests can impose substantial costs on business in terms of management time and adviser fees, we consider that it would also be appropriate for the CMA to have regard to the proportionality of its requests, in addition to the factors listed in paragraph 4.3. This is particularly important given the CMA's expanded investigatory powers and its ability to use such powers to require information from third parties.

2.14 We would therefore welcome a specific reference to the principle of proportionality in the CMA's approach to information gathering.

3. 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?

Disclosure under an EU obligation

3.1 We welcome the sections in the Draft Statement setting out the circumstances and types of information that the CMA may disclose to other UK public authorities and to overseas public authorities.

3.2 It would be helpful, however, for the Draft Statement to confirm that confidential information previously disclosed to the CC will not be subject to EU disclosure obligations. The CC is not a designated National Competition Authority (***NCA***) in the European Competition Network (***ECN***) and is not subject to EU obligations to disclose information it receives in the course of exercising its statutory functions to the European Commission and/or other European competition authorities. However, when the CMA succeeds the CC, it will be a designated NCA in the ECN and subject to EU disclosure obligations.

3.3 When parties to current or past CC investigations disclosed confidential information to the CC (often on a voluntary basis), they did so in circumstances where there were limited gateways through which it could be disclosed to other authorities. We consider that it would not be appropriate for disclosure of this information to occur following the succession of the CMA as a result of its expanded role.

3.4 We would therefore welcome confirmation in the Statement that the CMA's EU disclosure obligations will not retrospectively apply to confidential information disclosed to the CC.

Disclosure to UK public authorities

3.5 According to Section 6.3 of the Draft Statement, "*Where the CMA discloses information for the purposes of exercising its functions, it will not generally give the person to whom that information relates notice of the disclosure*". For the reasons set out in paragraphs 2.7 to 2.10 above, we consider that the CMA's "default" position, in light of the potentially significant effect the disclosure of confidential information can have, should be that parties will be informed of any such disclosure in advance unless there are exceptional circumstances (such as where the disclosure would jeopardise an ongoing investigation of which the parties are not aware).

3.6 The same considerations apply to paragraph 6.8 of the Draft Statement in respect of information disclosed to other public authorities for the purpose of facilitating the exercise of their functions.

Disclosure otherwise than on the basis of an EU obligation

3.7 We welcome the guidance provided at paragraph 7.10 of the Draft Statement concerning the factors the CMA will consider before disclosing information to other overseas authorities. However we would suggest that in addition to those factors, in deciding whether to make a disclosure the CMA also has regard to any available evidence (including any concerns the parties may have) concerning whether the relevant overseas authority adopts equivalent procedures on treatment of evidence and protection of confidential information, including commercial information, both in law and in practice, to those adopted by the CMA.

3.8 We would further suggest that in defining the purposes for which information is disclosed to the relevant authority, the CMA ensures that those purposes are defined carefully and narrowly so as to avoid the use of information in ways that were not within the CMA's original contemplation.

3.9 It follows from these suggestions, and those made in paragraphs 2.7 to 2.10 and 3.5 to 3.6 above, that we consider that the CMA should inform the parties in advance if it intends to disclose information over which they have claimed confidentiality, unless there are exceptional reasons not to do so.

4. QUESTION 6: DO YOU HAVE ANY OTHER COMMENTS ON THE DRAFT STATEMENT?

Role of the procedural officer

4.1 The change in the Draft Statement to relying on a procedural officer, rather than the Senior Responsible Officer at the OFT, or the Chief Executive at the CC, to resolve disputes regarding the proposed disclosure of information is a welcome development. In our experience, procedural officers effectively and efficiently carry out a similar role in other agencies, such as the European Commission, and we expect that this change will streamline the process for addressing any such disputes before the CMA. However, given the limited guidance currently provided on the processes for appeals to the procedural officer in mergers and markets cases, it would be helpful for the CMA to provide more detailed guidance on those processes in due course.

Confidentiality rings and data rooms

4.2 Paragraph 4.26 indicates that in the case of both confidentiality rings and data rooms, the CMA will "*reserve the right to review reports and/or notes prepared by the parties' advisers to ensure they do not contain any confidential information*". Whilst we appreciate that the CMA wishes to avoid confidential information being disclosed contrary to data room agreements, we are concerned that the CMA reviewing advisers' notes may be contrary to the principle of legal privilege. The appropriate measures to protect confidentiality may vary from case to case, however we consider that it would be appropriate for the Draft Statement to acknowledge that these measures will be agreed in each case having regard to the protection of legal privilege.