CMA CONSULTATION ON FIRST TRANCHE OF CMA GUIDANCE DOCUMENTS

RESPONSE OF ASHURST LLP

1. INTRODUCTION

1.1 Ashurst LLP welcomes the opportunity to comment on the Competition and Market Authority's (**"CMA"**) consultation on the first tranche of its draft guidance documents (the "**CMA Consultation"**).

1.2 This response is made on our own behalf, in light of our experience in advising the main parties and third parties in relation to both merger inquiries, market investigations and Competition Act 1998 cases, and not on behalf of any particular client.

1.3 We confirm that the contents of this response are not confidential and may be published in full, as required.

1.4 This response is structured as follows:

(a) comments on the CMA's draft guidance on its jurisdiction and procedure in merger cases (section 2);

(b) comments on the CMA's draft supplemental guidance on its approach to market studies and market investigations (section 3);

(c) comments on the CMA's draft statement of policy on its approach to administrative penalties (section 4); and

(d) comments on the CMA's draft statement of its policy and approach to transparency and disclosure (section 5).

1.5 In addition to responding to the specific consultation questions, we have set out some general comments and observations on points that we consider to be relevant.

1.6 We note that the CMA Consultation is being undertaken in parallel with the consultation by the Department for Business, Innovation and Skills (**"BIS"**) on the Government's strategic steer to the CMA and draft secondary legislation (the **"BIS consultation"**). Some of the draft CMA guidance documents tie in directly with the proposed secondary legislation being consulted on by BIS, and whilst we recognise that the two consultations are separate, similar points arise in relation to both. It is unclear to us whether the responses to the two consultations will be considered by separate teams; we have therefore repeated certain points in our responses where appropriate.

1.7 We do not comment on the CMA's draft guidance on its approach to cost recovery in telecoms price control references.

2. MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE

A. General observations

2.1 As a preliminary observation, we support the adoption of a single guidance document covering both the first and second phases of UK merger control (the **"Draft Mergers Guidance"**). We also support the decision to base the Draft Mergers Guidance on the existing jurisdictional and procedural guidance documents published by the Office of Fair Trading (**"OFT"**) and Competition Commission ("**CC**").

2.2 However, we wish to highlight the fact that the Draft Mergers Guidance has failed to comment on a significant potential advantage of bringing the OFT's and CC's processes under the jurisdiction of the CMA – namely the possibility of tailoring the Phase 2 period to the size and complexity of individual cases.

2.3 Whilst it is important to retain a "fresh pair of eyes" at Phase 2, as explained further at paragraphs 2.20 to 2.22 below, we consider there to be considerable potential for the Phase 2 process to be expedited (or at the very least reduced in intensity, for example, in terms of information requested from both merging parties and third parties) in a variety of circumstances.

2.4 For example, where the parties have come very close to agreeing remedies with the CMA at Phase 1, but the time period expired before agreement was reached, the CMA should consider moving quickly towards negotiating remedies with the merging parties, subject to their agreement and the involvement of third parties. There may also be potential for efficiencies to be generated where both the merging parties and the CMA's Phase 1 decision maker agree that no substantial lessening of competition arises in respect of certain aspects of the transaction, allowing the CMA to focus solely on those areas of concern (for example, probing third party evidence in greater depth than at Phase 1 to test the parties' arguments) instead of the current system where the CC would re-investigate the entirety of the transaction.

2.5 We also wish to point out that whilst the Draft Mergers Guidance encourages parties to approach the CMA to discuss a proposed transaction,[1] under the OFT's current approach it is rarely possible for parties to approach the OFT to discuss a proposed transaction without the OFT opening a case file, which has the consequence under its internal procedure that the OFT must issue a decision and as a result levy a merger fee (unless a the transaction is found not to qualify as a relevant merger situation under the EA02 or one of the very limited exceptions applies). We would suggest that, under the new regime, it should made easier for parties to approach the CMA to discuss a proposed transaction without a case file being automatically opened and the consequent likelihood of a merger fee becoming payable.

2.6 In section 2B of this response we set out some comments on areas of the guidance that have changed but which are not specifically addressed by the consultation questions. We then turn to the specific consultation questions in section 2C.

2.7 Our comments are focused on areas of the Draft Mergers Guidance over which the CMA has discretion. We do not comment on procedural issues that have already been determined by the Enterprise and Regulatory Reform Act 2013 ("**ERRA 2013**").

B. Comments on areas of the guidance that have changed which are not covered by the specific consultation questions

2.8 We consider that there are a number of areas of the Draft Mergers Guidance that are not sufficiently explored by the consultation questions. This section therefore sets out our additional comments on the Draft Mergers Guidance.

<u>The use of information gathering powers in Phase 1</u>

2.9 We recognise the potential benefits of information gathering powers at Phase 1, particularly where third parties unconcerned about a transaction may be reluctant to provide crucial evidence on areas such as expansion plans (in the case of competitors) or successful negotiations with the merging parties (in the case of customers), or simply to express any view at all. Moreover, where parties are concerned about data protection issues, the use of formal powers is helpful in allaying their concerns.

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[1] For example, paragraph 6.23 of the Draft Mergers Guidance.

2.10 The ability to use information gathering powers at Phase 1 does, however, come with an obligation to apply a rigorous approach to determining whether or not to use the powers. Given the increasingly burdensome nature of information requests, it is important that the CMA's management ensures a proportionate approach.

2.11 The majority of merging parties and third parties have cooperated with the OFT's mergers branch for many years despite the absence of information gathering powers. In the case of third parties, senior managers regularly give up their limited time to assist case teams (including through answering extensive follow-up questions) even where they are unconcerned about a transaction. We also note that whilst the CC has held information gathering powers for many years, formal powers (i.e. s.109 notices under EA02) are only used sparingly and where approved by the Inquiry Director and, if appropriate, the Inquiry Group. Often the threat of using formal powers is sufficient to encourage a response.

2.12 We welcome the proposal at paragraph 7.5 of the Draft Mergers Guidance for a degree of flexibility in the format and timing of requests where recipients promptly bring any difficulties in responding to the CMA's attention.

The new process for considering undertakings in lieu at Phase 1

2.13 As set out above, we broadly welcome the new process for considering undertakings in lieu at Phase 1. In particular, we welcome the proposal in the Draft Mergers Guidance that case teams will still be open to ongoing dialogue with merging parties as to remedies at any stage of the Phase 1 investigation or during pre-notification discussions.[2] The ability for parties to review the full text of the CMA's Phase 1 decision prior to agreeing remedies is also welcome.[3]

2.14 However, we note that the Draft Mergers Guidance does not address the interaction between undertakings in lieu and the exercise of the de minimis discretion. The OFT's *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* explains at paragraphs 2.18 to 2.20 that the question of whether undertakings in lieu could in principle be offered by the merging parties to remedy in a clear-cut way any substantial lessening of competition concerns created by the merger is a key factor in deciding whether to apply the de minimis exception. It would be helpful if this point was also emphasised in the undertakings in lieu section of the CMA's jurisdictional and procedural guidance.

Access to the Phase 1 decision maker

2.15 We note that paragraphs 7.55 to 7.59 of the Draft Mergers Guidance envisage no substantive changes to the Phase 1 decision making process and imply that the decision maker will not attend the issues meeting or CRM nor have their identity revealed to the parties prior to making his or her decision.

2.16 We consider that the introduction of a new process for considering undertakings in lieu creates an ideal opportunity to review this aspect of the Phase 1 decision making process. Confirming the identity of the decision maker to the parties and allowing the parties an opportunity to meet the decision maker prior to the decision meeting (potentially at the issues meeting) would greatly enhance the transparency of the process and allow the parties' evidence to be heard more effectively by the decision maker than via a "devil's advocate". In this regard, the fact that any undertakings in lieu will be agreed after the decision meeting will remove the historic risk that the decision maker's judgement could be affected by knowledge of an offer of undertakings in lieu by the parties.

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[2] Paragraph 8.9 of the Draft Mergers Guidance.

[3] Paragraph 8.12 of the Draft Mergers Guidance.

The ability to use the CMA Phase 1 submission as an "initial Phase 2 submission"

2.17 We welcome the introduction of this power, set out at paragraph 11.7 of the Draft Mergers Guidance. Where merging parties choose to take advantage of this option, it is important that the case team ensures that the relevant Phase 1 submission is made available to the Phase 2 Inquiry Group given that the initial submission is an important opportunity for the merging parties to outline a transaction and its rationale.

The power to suspend an investigation following a reference

2.18 We welcome the increased flexibility that this power will bring, particularly for parties to smaller transactions.

Fast track reference cases

2.19 We welcome the retention of the fast track reference option (set out at paragraphs 6.62 to 6.66 of the Draft Mergers Guidance) and suggest that the CMA explores how the efficiency of the fast track process may be maximised given that the Phase 1 and 2 processes will be conducted by the same institution.

Retaining members of the Phase 1 case team for the Phase 2 investigation

2.20 We note that the Draft Mergers Guidance proposes that the CMA would "*normally expect to have a degree of case team continuity by retaining at least some of the Phase 1 case team to work alongside newly assigned staff on the in-depth Phase 2 investigation when a matter is referred*.[4]"

2.21 Parties to merger investigations have, for many years, valued the CC's "fresh pair of eyes" which have avoided issues of confirmation bias by case teams in Phase 1 and problems for case teams in transitioning between two different legal standards on the same case. Moreover, in many instances, a new case team adds value simply by generating new ideas and approaches. Whilst the Inquiry Group at Phase 2 may adopt a questioning approach to the Phase 1 case team's analysis at Phase 2, it is vital that there is a degree of independence at Phase 2. We therefore recommend that the Phase 1 case team is supervised by new economic and legal directors at Phase 2 in order to strike a balance between the potential for efficiencies to be generated through a degree of continuity and the need for independence and fresh ideas at Phase 2.

2.22 We also note a number of more specific issues that the CMA should have regard to:

(a) Phase 1 staff will need to be given the required training in order to work on cases at Phase 2, including a thorough understanding of the process and legal standards. Staff will also need to be able to adjust to the concept of providing more neutral papers to the Inquiry Group than those drafted at Phase 1 (in which the case team plays a more pivotal role in determining the outcome of cases);

(b) OFT and CC economists have, to some degree, developed different skill sets and it will be important for directors to ensure that the right staff are assigned to the right cases; and

(c) there may be benefits in using Phase 2 experts such as accountants and econometricians to review complex Phase 1 material, where appropriate.

[4] Paragraph 10.8 of the Draft Mergers Guidance.

Considering proportionality in deciding whether to send an enquiry letter or initiate an investigation

2.23 The Draft Mergers Guidance notes that, in deciding whether to send an enquiry letter, the CMA will consider whether "*the case in question is one in which there is a reasonable prospect that its duty to refer is met*".[5] We agree with this proportionate approach. However, we would encourage the CMA to consider carefully whether or not to start the statutory timetable and proceed to a decision where it transpires following the response to an enquiry letter that the CMA's belief that there was a reasonable prospect that its duty to refer is met is no longer justified.[6]

2.24 We also draw the CMA's attention to the fact that the share of supply test must rely on a *reasonable* description of goods and services and encourage the CMA to take a proportionate approach in deciding which transactions qualify for investigation given the significant increases in merger fees in recent years.[7]

C. Responses to specific consultation questions

Q1. Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?

2.25 We agree with the list in Annex D of the Draft Mergers Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption. More specifically, we consider that there is merit in initially adopting the existing guidance documents in order to ensure that there is consistency between the CMA's analysis and that of the OFT and the CC both during and in the months after the transition period. However, we urge the CMA to keep the documents under review and to make revisions in due course, as appropriate, to reflect developments both in case law and economic techniques.

Q2. What, if any, further guidance do you think that the CMA should produce in the future in relation to its operation of the UK merger regime?

2.26 We do not consider that the CMA should produce any further guidance in relation to its operation of the UK merger regime at this stage. However, this should be kept under review as the CMA establishes itself and evolves.

Q3. Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form?

2.27 The draft Remedies Form is clear and comprehensible. However, we note that the draft Remedies Form requires a considerable amount of information to be provided by merging parties within a short time frame. It will therefore be important for the CMA to be flexible as to the precise information required according to the individual circumstances of a case.

2.28 We would also encourage the CMA to ensure that case teams are available to discuss remedies both during the investigation and immediately after the decision (as set out at paragraph 2.13 below).

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5 Paragraph 6.15 of the Draft Mergers Guidance.

6 Paragraph 6.19 of the Draft Mergers Guidance.

7 Paragraph 4.56 of the Draft Mergers Guidance.

Q4. Do you consider the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs to be clear and understandable?

2.29 We consider that the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs is clear and understandable.

2.30 However, we note that the option to extend the Phase 1 consideration period of 50 working days by a further 40 working days for "special reasons" would result in a particularly lengthy Phase 1 process both for the CMA, merging parties and third parties. We therefore urge the CMA to adopt a clear and transparent process for determining whether the consideration period will be extended and, in the event of an extension, to seek to work efficiently with merging parties in order to agree remedies as expeditiously as possible.

2.31 Further, we are concerned that the five day period for offering UILs after the CMA's Phase I decision (introduced by the insertion of section 73A into the EA02 by ERRA 2013) does not offer sufficient time for the parties to prepare a fully fledged proposal. We would therefore suggest that any offer of UILs made by the parties should not be rejected on a first review by the CMA, and that the CMA should actively liaise with the parties to request further detail or clarification if required.

Q5. Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?

2.32 We have concerns as to how the CMA's Draft Mergers Guidance on the rejection of a Merger Notice after the commencement of the initial period will be applied (set out at paragraphs A.5 and A.6 of the Draft Mergers Guidance).

2.33 In particular, we are concerned about the implication of section A.5.c of the Draft Mergers Guidance which states that the CMA can, at any time during the 40 working day initial period, reject a Merger Notice if "*the parties fail to provide on time, or at all, the information required to be included in the Merger notice, or any supplementary information request by the CMA using its powers under section 109 of the Act*".

2.34 Given that the CMA anticipates requesting that information is provided within tight deadlines (potentially as short as one business day) in order to meet its 40 working day timetable it may be impossible for merging parties to provide the requested information in time. This may be due to a myriad of reasons, not least the availability of staff at the business.[8] Whilst, subject to the particular circumstances of a case, it may be reasonable to "stop the clock" when outstanding information is awaited; only in exceptional circumstances should a Merger Notice be rejected and the clock re-started during the 40 working day period in response to a delay in providing information. Moreover, if such drastic action is contemplated by the CMA, the parties should have the right to a procedural review.

Q6. Is the template Merger Notice clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?

2.35 We are concerned that the scope of information requested in the template Merger Notice is significantly more extensive than the OFT's current merger notice form and may lead to the process becoming "form driven" rather than "issue driven", as well as inevitably (and in our view, often unnecessarily) leading to increased costs and delay.

2.36 We therefore consider that the scope of information requested upfront in the Merger Notice as a "starting point" for the CMA's assessment should be reduced. To the extent

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[8] Paragraph 7.2 of the Draft Mergers Guidance.

that more detailed information on a particular point is required in an individual case, this could be requested by the case team.

2.37 Whilst we acknowledge the possibility of derogations/information waivers being granted from certain elements of the template Merger Notice in appropriate cases, we do not consider that adopting such an extensive Merger Notice and then granting derogations from it is an appropriate starting point. Furthermore, the criteria for assessing which derogations may be granted are not clear from the Draft Mergers Guidance, which gives no examples of potential derogations or the threshold that will be applied by case teams in deciding whether to accept a derogation (see, for example, paragraph 6.59 of the Draft Mergers Guidance).

2.38 If the CMA decides to proceed with a more extensive Merger Notice from which parties can request derogations, we would strongly encourage the CMA to clarify in the final version of the Draft Mergers Guidance the areas in respect of which derogations may be available, and how requests for derogations will be assessed. In this regard, we consider that there are a number of key areas where the CMA should consider granting derogations on a regular basis:

(a) horizontal effects – guidance note 9 states that the description of competitive dynamics should include a wide range of information including product characteristics, differentiation, an explanation of how pricing is determined and details of the supply chain.

(i) under the current system, merging parties would not typically provide this level of information to the OFT in a submission where the industry is already well known to the OFT mergers branch. We therefore urge the CMA to use a degree of discretion based on its combined OFT and CC experience and recognise that not every case will justify requesting all the information. To fail to use a degree of judgement would result in a real risk to the timing of the process and undermine the certainty envisaged by ERRA 2013 through the introduction of the statutory timetable; and

(ii) the current merger notice form (under section 96 of the Enterprise Act 2002 (**"EA02"**)) simply requests a "description of how competition works in the market."[9] The current merger notice also sets a combined horizontal market share threshold of 10 per cent for information request purposes and we would encourage the CMA to consider routinely granting waivers below this level of market share.

(b) vertical and other effects – in a similar way, we are concerned about the extensive nature of the information requested at guidance note 17. However, we note that some of the information may be waived to the extent that the vertical relationship is not considered material by the CMA. We would encourage the CMA to take a flexible approach, drawing on its combined OFT and CC experience. Moreover, we note that the current OFT merger notice only requests details of vertical links where either of the parties has greater than 15 per cent of the share of supply of any inputs or outputs in a vertical supply chain.[10] The CMA should also consider adopting a market share threshold in order to enhance the efficiency of the review process;

(c) loss of potential competition – this theory of harm arises in only a limited number of cases and, accordingly, the CMA should regularly grant information waivers. Where the merging parties are potential competitors, but only one of several potential competitors, the amount of information requested should be reduced;

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9 Section 16(g).

10 Section 18.

(d) coordination – again, only a limited number of merger investigations involve consideration of coordinated effects. This is reflected across both OFT and CC merger decisions. Accordingly, the CMA should regularly grant information waivers in this area without requiring detailed justification;

(e) increase in the merging parties' buyer power – the question at paragraph 27 asks for details of the merging parties' ability to obtain more favourable commercial conditions from suppliers as a result of the transaction for any products or services which the merging parties both purchase. As it stands, this question would apply to almost any transaction, the vast majority of which would not be capable of leading to an increase in the merging parties' buyer power. We note that guidance note 14 states that some or all of the information listed may be waived to the extent that the horizontal overlap(s) are not considered material by the CMA. However, the CMA should have regard to the parties' combined share of purchases (rather than combined market share) and consider introducing a threshold below which no further details are required. For example, even where parties have a large share of a market, they may account for only a tiny proportion of purchases (e.g. where the key inputs are energy, water, commodity products, etc.). The CMA should therefore maintain the efficiency of the notification process by regularly granting information waivers in this area;

(f) potential for entry or expansion – we agree (as per guidance note 12) that this information should only be requested where the parties are seeking to argue that barriers to entry and expansion are low and that, even where entry arguments are made, information waivers may be appropriate (for example, where the OFT or CC has recently reported on entry in the same industry). We would also encourage the CMA to recognise that the merging parties may only be able to provide basic contact details for potential entrants; and

(g) conglomerate effects – as illustrated by OFT and CC practice to date, this theory of harm will only merit consideration infrequently:

(i) the CMA's position should therefore be to grant an information waiver in the vast majority of cases. Even where consideration of conglomerate effects is relevant, we note that the CC has not found a substantial lessening of competition as a result of conglomerate effects under the Enterprise Act 2002. Moreover, where conglomerate effects are considered, they may often be dismissed without requiring significant amounts of information;[11]

(ii) guidance note 20 states that "*Where relevant, the merger parties should provide the following…*" (emphasis added). This appears to be at odds with the request for information on conglomerate effects at paragraphs 33 and 34 of the template Merger Notice. We would encourage the CMA to clarify this point, preferably introducing the "where relevant" statement to the main body of the section of the Merger Notice section on conglomerate effects.

2.39 We welcome the statement at paragraph A.2 that the CMA may modify the Merger Notice from time to time. It will be important for the CMA to keep the efficiency of the process under review and to modify the template Merger Notice accordingly.

2.40 Lastly, at paragraph 5, the template Merger Notice invites the merging parties to "*explain why*" a merger qualifies for investigation. In practice, merging parties may genuinely believe in certain cases that a merger is unlikely to qualify and will expect the CMA to undertake a rigorous assessment of the (often complex) legal issues surrounding

[11] See, for example, paragraphs 138 to 141 of the OFT's decision on the Anticipated acquisition by Princes Limited of the canning business of Premier Foods Group Limited, 19 August 2011.

jurisdiction. The CMA should consider explicitly stating in its guidance how merging parties should approach such cases (for example, through pre-notification discussions). The CMA should also give consideration to introducing a specific version of the Merger Notice for such cases.

Q7. Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?

2.41 We agree with the proposed harmonisation for all merger cases of the point in time at which the merger fee is payable.

Q8. Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?

2.42 We have a number of further comments on the explanation in the Draft Mergers Guidance on the updated process for notifying mergers:

(a) in relation to the case team allocation form (described at paragraph 6.47 of the Draft Mergers Guidance), it would be of assistance to merging parties if the day on which the weekly meeting used to allocate case teams and the deadline for submitting the allocation form for consideration at that meeting were made publicly available (for example, on the mergers page of the CMA's website)[12];

(b) the introduction of a 40 working day assessment period is welcome. However, there must also be a degree of certainty under the new process as to the timing of the overall assessment period if the rationale for the introduction of the 40 working day timetable is to be realised. In particular, we note that:

(i) the Draft Mergers Guidance envisages a minimum period of two weeks from initial contact with the CMA until notification.[13] In order to provide a degree of certainty to merging parties, the CMA should target a two week period as an upper time limit for pre-notification discussions unless a transaction raises particularly complex issues. Equally, in cases where there are very limited overlaps between the parties (e.g. those that only qualify on turnover but where the merging parties wish to achieve the certainty of a CMA clearance decision) the CMA should be flexible in allowing pre-notification discussions to be limited or bypassed altogether; and

(ii) where merging parties make best efforts to provide the information set out in the Merger Notice, the CMA should ensure that resources are available such that the timetable may be started as soon as possible after the Merger Notice is received. We note that, historically, the OFT mergers branch informed parties whether their notification was a "satisfactory submission" within two working days. The CMA should aim for this level of efficiency going forward, with the five to ten working days proposed at paragraph 13(b) of the template Merger Notice considered an upper limit to the target period;

(c) we further note that the CMA proposes in its Draft Mergers Guidance that "*Where information important to begin a merger investigation is missing from a submitted Merger Notice, the CMA will inform the merging parties of this fact at the earliest opportunity (and generally within five to ten working days of receipt of that Merger Notice)*"[14] (emphasis added):

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12 The European Commission already does this and, in our experience, it is very helpful for planning purposes.

13 Figure: The key stages of a typical Phase 1 inquiry, page 36 of the Draft Mergers Guidance.

14 Paragraph 6.58 of the Draft Mergers Guidance.

(i) we consider that it would only be appropriate to refuse to accept a Merger Notice as complete where the outstanding information is necessary to begin a merger investigation. Information that the case team considers to be potentially informative, but that is not essential to begin an investigation, should not be required to start the clock. Where the CMA does consider that important information is missing, it will be important to communicate this to the merging parties as soon as possible. If the information was not requested during pre-notification discussions, the case team should explain why the information is required before the timetable can commence; and

(ii) we would also strongly encourage the CMA to avoid an "iterative" process in which questions are sent in response to material submitted as part of the original information request in pre-notification, the answers to which are then required before the timetable may start. Such a process would quickly undermine the 40 working day timetable;

(d) we welcome the recognition in the Draft Mergers Guidance that merging parties may be subject to other regulatory processes in addition to UK merger control and the possibility of the CMA reaching a decision more quickly than the standard statutory timetable; and

(e) where the parties receive an enquiry letter, the CMA should ensure that a reasonable time period is given to respond, especially where parties have undertaken a good faith analysis that the transaction is not capable of leading to a substantial lessening of competition. This is particularly important where powers under s.109 EA02 are used (as envisaged at paragraph 6.17 of the Draft Mergers Guidance in relation to completed mergers).

Q9. Do you have any comments on the draft template order, or on the guidance on the CMA's use of interim measures included in the Draft Guidance?

2.43 We do not have any comments on the draft template order. In relation to the guidance on the CMA's use of interim measures, we welcome the CMA's recognition at paragraph 7.36 of the Draft Mergers Guidance of the importance of proportionality and a desire not to burden benign transactions with delay and cost.

2.44 However, we are concerned that, in its current form, the Draft Mergers Guidance will lead to a more, rather than less, burdensome process. In particular:

(a) the deletion of s.71 EA02 means that the CMA will be required to serve an initial enforcement order if it suspects there to be a risk of pre-emptive action rather than accept initial undertakings from the parties;

(b) paragraph 7.35 of the Draft Mergers Guidance states that the threshold the CMA applies for considering whether it is appropriate to make an interim order at Phase 1 is a "low one"; and

(c) the same paragraph also adds that, in a completed merger, the CMA will "*normally make an interim order at the same time as an enquiry letter is sent out or after being informed of the merger by the parties*".

2.45 Taken together, the Draft Mergers Guidance therefore implies that an interim order will be made in relation to almost every completed merger. In contrast, s.72(3B) of ERRA 2013 states that the power to make an interim order arises where "*the CMA also has grounds for suspecting that pre-emptive action has or may have been taken*". Moreover, the Draft Mergers Guidance does not appear to envisage any interaction between the parties as to the scope of the application of the order before it is issued and may result in disproportionate and erroneous use of the order.

2.46 We urge the CMA to engage with the parties on a case-by-case basis, considering the nature of the merger and whether any steps towards integration have been taken. As the Draft Mergers Guidance is currently worded, the CMA does not even have to establish that the turnover or share of supply tests are met before making an interim order.[15] Merging parties therefore run the risk that an interim order will be imposed where they have made a good faith decision not to notify the CMA about a transaction that may not even qualify, let alone lead to competition issues. In certain cases, it may lead to merging parties effectively facing compulsory notification.

2.47 In light of this, we recommend that the CMA:

(a) introduces a short window of time (e.g. two weeks) in which to allow the parties to provide basic information on the nature of the transaction (e.g. whether it leads to any horizontal or vertical overlap) prior to a decision to make an interim order being taken;

(b) ensures that there is a process whereby merging parties that have serious and credible concerns about the decision to make an interim order have an opportunity for discussion with the relevant decision maker and, if appropriate, the Director of Mergers; and

(c) ensures that the burden on the CMA of making interim orders in cases where it is not necessary to do so is taken into account in the process for determining whether to make interim orders (akin to the administrative priority criteria used by the OFT in relation to enforcement cases).

2.48 We also note that there may be merit in the CMA clarifying its approach to anticipated mergers set out at section C.12 of the Draft Mergers Guidance (i.e. that the CMA would not normally expect to make an interim order at Phase 1 in an anticipated merger, and would only do so in "wholly exceptional" circumstances) within the main body of the Draft Mergers Guidance.

Q10. Do you agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E of the Draft Guidance?

2.49 We do not have any comments on the proposed transitional arrangements for merger cases ongoing as at 1 April 2014.

3. MARKET STUDIES AND MARKET INVESTIGATIONS: SUPPLEMENTAL GUIDANCE ON THE CMA'S APPROACH

A. General observations

Combining existing guidance

3.1 The draft supplemental guidance on the CMA's approach to market studies and market investigations (the **"Draft Markets Supplementary Guidance")** explains the changes to the market studies and market investigations regime introduced by ERRA 2013. We understand that it is intended that the Draft Markets Supplementary Guidance will supplement the existing OFT and CC guidance on the markets regime which will be put to the CMA Board (once established) for adoption. Accordingly, in order to obtain a complete picture of the procedures and substantive guidance in respect of the markets regime, a user will be required to review the existing OFT and CC market studies and market investigation guidance[16] in conjunction with the Draft Markets Supplementary Guidance.

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[15] Paragraph 7.33 of the Draft Mergers Guidance.

[16] Market studies: Guidance on the OFT approach" (OFT519); Market investigation references (OFT511); Guidelines for market investigations: Their role, procedures, assessment and remedies (CC3 Revised).

3.2 The Draft Markets Supplementary Guidance confirms this as follows:

> "*As those pre-existing documents were published prior to the amendments to the EA02 made by the ERRA13, they will (if and when adopted) need to be read subject to the Draft Guidance and to certain other 'global' changes resulting from the coming into force of the ERRA13*."[17]

3.3 We consider that this approach is not user-friendly and is likely to cause confusion, particularly for parties who are less familiar with the markets regime. We consider that a simpler approach would be to update the existing guidance to reflect the changes introduced by the ERRA 2013.[18]

3.4 We have commented in the context of previous consultations[19] that, given the degree of overlap between the OFT's and the CC's market study and market investigation work, we believe that it would be clearer and more user-friendly to cover both areas in the same guidelines. We consider that certain changes arising from ERRA 2013 make the case for such combined guidance even stronger, for example, the extension of investigatory powers which will now span the "end-to-end" markets process, reflecting the fact that there will no longer be a distinction between the early stages of a market study and the stage which commences once the OFT believes it has the power to make a market investigation reference.

3.5 Further, chapter five of the Draft Markets Supplementary Guidance, which describes the transitional arrangements that will apply to ongoing markets work as of 1 April 2014, will not be required when these cases reach their conclusions. We would therefore suggest that this chapter is placed in a separate document to ensure that the guidance documents relating to the markets regime do not contain sections which will become irrelevant at a point in the near future.

Formatting section headings and sub-headings

3.6 As regards the formatting of the document, we would suggest that section headings and sub-headings within chapters which are currently in the same format[20] should be formatted differently to provide a clearer delineation of topics within each chapter, and to help users to scan the guidance document for relevant information.

The impact of ERRA 2013 on the substantive assessment

3.7 The consultation document states that the Draft Markets Supplemental Guidance provides an overview of the changes introduced by the ERRA 2013 to the conduct of market studies and market investigations by the CMA under EA02, focussing on the legal framework, the decision-making processes and key procedural aspects of market studies and market investigations, rather than the substantive assessment to be undertaken by the CMA in such cases. It is our understanding that the CMA's substantive assessment will follow the existing CC market investigation guidelines (CC3). It is however unclear how the existing substantive assessment guidance will apply in the context of new procedures introduced by the ERRA 2013. For example, it is unclear how the substantive assessment will be

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17 Paragraph 1.5 of the Draft Markets Supplementary Guidance.

18 We note that the recent update of the CC's market investigation guidelines (published prior to the adoption of the reforms in April 2013) states the CC's intention to update it to reflect legislative changes introduced by the ERRA 2013 (See CC3 (Revised) — Guidelines for market investigations: Their role, procedures, assessment and remedies, paragraph 6). We are not aware of any plans to update the relevant OFT guidance documents.

19 For example, see Ashurst LLP's response to the OFT consultation on its Market Studies Guidance dated 12 August 2009.

20 For example, in chapter one of the Draft Markets Supplementary Guidance, the section titled "Who does what" has three subsections "The CMA", "Sectoral regulators" and "The Secretary of State". The section heading and subheadings are all currently in the same format.

carried out in full public interest market investigation references, or how the CMA will approach the design of remedies in cross-market references in cases where there is a need to balance the benefits of adopting standard remedies with the need to reflect specific market circumstances.

3.8 The most recent version of CC3 indicates that the document will be updated to reflect ERRA 2013 "in due course". It is not clear, however, whether this refers to both the procedural and the substantive aspects of the guidance. We consider that it is important that consideration is given to the possible need for revisions to the substantive aspects of CC3, particularly in relation to cross-market references.

B. Areas of the Draft Markets Supplemental Guidance where clarity could be improved

Chapter 1: Introduction

Preliminary work leading to a market study

3.9 Paragraph 1.10 of the Draft Markets Supplementary Guidance describes the preliminary assessment that the CMA may carry out in advance of launching a market study, which may include consulting with stakeholders and other interested parties. It would be useful for this section to include more information on how this engagement with key stakeholder will be structured, in particular the form of any engagement (for example, will it be conducted in a similar way to calls for information using requests for information and round table discussions?)[21] and the possible timescales for the overall process as well as responses to any information requests.

What is a market investigation?

3.10 Footnote 12 of the Draft Markets Supplementary Guidance explains that a market study does not need to be undertaken for the CMA to make a market investigation reference, mentioning a super complaint as an example of an alternative route. This footnote should clarify that the changes to time limits introduced by ERRA 2013 (i.e. the requirement for the CMA to launch a market study by publishing a market study notice and to publish a market study report within 12 months of publication of the market study notice) will not apply to the process adopted by the CMA following a super complaint.

Who does what

3.11 Paragraphs 1.16 to 1.20 of the Draft Markets Supplementary Guidance set out the role of the CMA, sectoral regulators and the Secretary of State (**"SoS"**) in relation to the markets regime. This section could also usefully include a brief section on the role of (i) any public interest expert appointed by the SoS following a full public interest reference and (ii) any independent third parties who might be appointed to oversee the implementation of remedies and resolve disputes which may arise over the implementation.

3.12 Paragraph 1.19 lists the sectoral regulators with concurrent competition powers enabling them to make market investigation references. It would be helpful to explain the Financial Conduct Authority's (**"FCA"**) objective to promote competition and its powers to make an enhanced referral to the CMA where an FCA market study identifies a possible competition issue that may benefit from technical competition expertise or require statutory powers under competition law that sit within the CMA.[22] It would also be useful

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[21] Paragraph 1.9 of the Draft Markets Supplementary Guidance.

[22] See "The FCA's approach to advancing its objectives" (July 2013), page 42.

to note the relevant time limits that apply to the CMA's review process (the CMA has a statutory duty to review and respond to these referrals within 90 days).[23]

Decision-making by the CMA in market cases

3.13 Paragraph 1.22 of the Draft Markets Supplementary Guidance indicates that there will be a degree of case team continuity within the CMA between market studies and market investigations for efficiency reasons. Whilst we recognise the potential for improved effectiveness and significant efficiency benefits by providing some continuity of team members and knowledge across the different stages of an investigation (for both parties and the CMA), it is also important to retain the fresh thinking which is currently available through the institutional separation of Phase 1 and Phase 2 investigations.

3.14 Whilst we note that the CMA panel members who might reasonably be expected to be a member of the market reference group will not be involved in the decision as to whether to make a market investigation reference[24], it would be helpful to explain what additional safeguards will be put in place to avoid the risk of confirmation bias. Of particular importance is to ensure that key roles within the Phase 2 case team which are instrumental in driving the thinking and direction of the market investigation, for example the Economics Director and Inquiry Director, are filled by different staff.

Market studies and market investigations references

3.15 We note that bullet point three of paragraph 1.23 of the Draft Markets Supplementary Guidance appears to envisage that, in certain circumstances, the CMA Board may decide not to consult stakeholders on market investigation reference proposals. As this is a key change to the OFT's current practice of consulting on all proposed market investigation reference decisions (i.e. provisional decisions to make and not make references to the CC), more clarity on what is meant by this statement would be helpful.[25]

3.16 It is our understanding that cases in which the CMA will not be required to consult on a market investigation decision would be limited to cases where the CMA provisionally decides not to make a reference and no third parties request that a reference be made during the consultation period specified in the market study notice.[26] It would be helpful to include a statement that, in most cases, a consultation with relevant persons will take place and provide examples of the circumstances where the CMA may decide not to consult.

3.17 Paragraph 1.23 Draft Markets Supplementary Guidance would benefit from a cross-reference to paragraph 2.17 which explains the role of the SoS in deciding whether defined public interest issues are relevant and, if so, the type of public interest reference that should be made.

3.18 Paragraph 1.26 states that the market reference group will oversee the implementation of remedies "…*up to the point at which the reference is finally determined*". This paragraph should specify what this means, namely the point at which remedies are implemented by accepting Final Undertakings from the relevant parties or by the imposition of an order.

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[23] These powers are provided for under the new section 234H of the Financial Services and Markets Act 2000.

[24] Paragraph 1.24 of the Draft Markets Supplementary Guidance.

[25] See "OFT 1308: Practice on consultation on proposed decisions in relation to market investigation references" (March 2011).

[26] See ERRA 2013 explanatory notes, "Section 38: Market studies and market investigations: consultation and time-limits", paragraphs 300 to 301 at http://www.legislation.gov.uk/ukpga/2013/24/notes/division/5/3/4/2/6/1.

Chapter 2: Market Studies

Proposed decisions and market study reports

3.19 We note that, as described in footnote 36 of the Draft Markets Supplementary Guidance, the SoS will have powers to decrease the statutory market study maximum time limits (as set out in paragraph 2.9 of the Draft Markets Supplementary Guidance) by order. We consider that this footnote would benefit from a description of the circumstances which might result in the SoS making such an order.

Investigatory powers for market studies

3.20 The section relating to investigatory powers for market studies describes the extensions to existing powers of investigation to provide the CMA with a single set of investigatory powers across the entire markets process. This section would benefit from a description of the duties which accompany the use of investigatory powers; for example, the duty to use powers reasonably and proportionately, which applies to all public bodies.

3.21 Paragraph 2.14 of the Draft Markets Supplementary Guidance states that the CMA can impose financial penalties in the event of non-compliance with mandatory requests made using its investigatory powers (either intentionally or without reasonable excuse). It is important for this paragraph to specify the safeguards in place to protect parties issued with such a fine, namely that financial penalties for failure to comply are subject to full merits review by the Competition Appeals Tribunal (**"CAT"**).

3.22 The Draft Markets Supplementary Guidance notes (in paragraph 2.15) that the CMA's engagement with parties will be flexible and will depend on each party's circumstances. We consider that this paragraph should also indicate that the CMA will aim to be flexible, fair and reasonable in its requests for information and with regard to the deadlines it sets for parties to respond to such requests.[27]

Cases raising public interest issues

3.23 We would suggest that paragraph 2.20 of the Draft Markets Supplementary Guidance should clarify that "*other public interest considerations may be specified in future by order*" of Parliament.

Issuing intervention notices

3.24 We note that footnote 51 of the Draft Markets Supplementary Guidance sets out when the time period for the SoS to issue an intervention notice starts in circumstances where the CMA has not issued a market study notice and the SoS considers there to be relevant public interest issues. It would be helpful for the footnote to specify the circumstances in which market investigation references will not have been preceded by a market study (for example, a super complaint).

3.25 Paragraph 2.26 states that when the SoS determines that a public interest consideration is relevant, he/she must decide whether to make a restricted public interest reference or a full public interest reference. It would be helpful to describe the difference between a restricted and full public interest reference (or at least refer to the description in paragraph 2.18 of the Draft Markets Supplementary Guidance). It would also be helpful to provide some indication of the factors which will determine the type of public interest reference that is made.

3.26 Paragraph 2.26 goes on to explain that, in cases where the SoS decides to make a full public interest reference, he/she is able to appoint public interest experts with relevant

[27] See "CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies", paragraph 57.

expertise to advise the CMA during the market investigation. The Draft Markets Supplementary Guidance would benefit from further information on the role of any such public interest expert, in particular, how the expert will work alongside the CMA panel members and case team and what their role will be in decision-making throughout the market investigation process.

3.27 In market studies where a public interest intervention notice is issued, the CMA must provide the market study report to the SoS, who then decides whether the public interest consideration is relevant and if so what type of reference should be made.[28] Although the ERRA 2013 does not specify a binding time period within which the SoS must make this decision, an indication of the likely timescale is needed to give parties some clarity as to the timing of this stage of the process. A description of what information will be included in the SoS' reference decision would also be helpful (at paragraph 2.28 of the Draft Markets Supplementary Guidance).

Cross-market references

3.28 Whilst cross-market investigations appear to be an efficient way of addressing competition concerns which may arise in multiple markets, there is a need for a clear delineation of scope in such investigations to avoid unnecessary burdens on businesses (as set out in paragraph 2.36 of the Draft Markets Supplementary Guidance). It may be useful for paragraph 2.36 of the Draft Markets Supplementary Guidance to indicate that this concern needs to be weighed against the need for the scope to be wide enough to allow effective remedies to be implemented. For example, if the scope is too narrow, effective remedies may be impossible because they would only be partial and may therefore risk distorting competition.

Chapter 3: Market investigations

Time limits and procedures

3.29 Unlike the market studies chapter, this chapter of the Draft Markets Supplementary Guidance does not include a statement indicating that the specified statutory timescales relating to market investigations are upper limits, and that the CMA will aim to complete the market investigation process in a shorter period of time where possible.[29] This statement should be included as the CMA should be seeking to alleviate the burden on businesses and minimise the associated regulatory risk arising from uncertainty by pursuing shorter investigations wherever possible.

3.30 Paragraph 3.6 of the Draft Markets Supplementary Guidance explains that the CMA may extend the statutory 18 month time limit for a market investigation by a maximum of six months if it considers that "*there are special reasons why the investigation cannot be completed and the report published within 18 months*". Paragraph 3.7 goes on to explain that an extension is most likely in "*complex cases (for example, where there are multiple parties, issues and/or markets)*". This example is very general and appears to cover circumstances applicable to the vast majority of market investigations. Accordingly, this paragraph would benefit from more clarity as to the situations in which an extension may occur. This could include hypothetical examples of previous market investigations where extensions would have been likely to be requested had an 18 month statutory timescale been in place.

3.31 Paragraph 3.7 also indicates that "[it] *should generally be clear by the time of the provisional findings how likely it is that an extension will be needed*". Given that one of the main purposes of providing guidance is to ensure that those involved know what to

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[28] Paragraphs 2.25 to 2.28 of the Draft Markets Supplementary Guidance.

[29] See the draft supplementary Guidance Paper, footnote 38.

expect, we would suggest a firmer position which indicates that in most cases, the likelihood of an extension can be indicated by the provisional findings stage.

Questions to be decided on a full public interest reference

3.32 As a general observation on public interest issues, we believe that further information is required on the role that public interest issues will play in public interest references. It is unclear how the public interest issues will be assessed and the relative weight that will be given to them compared to any possible competition issues identified when making the final decision.

3.33 Paragraph 3.10 of the Draft Markets Supplementary Guidance sets out the questions that the CMA must consider in full public interest market investigations. This is the only information provided in the Draft Markets Supplementary Guidance on how the CMA will assess public interest consideration, which we consider to be insufficient. In order for parties being investigated to be able to understand the case being made against them and to provide comprehensive, relevant representations during a full public interest market investigation, they need a clear understanding of the process and the substantive analysis that will be undertaken in these cases. This is particularly important given that the public interest could potentially be a countervailing factor where an adverse effect on competition (**"AEC"**) has been identified.

3.34 We consider that additional information is required in a number of areas, in particular:

(a) how the CMA will define and analyse admissible public interest considerations;

(b) the typical factors the CMA will take into account in assessing whether admissible public interest considerations are sufficient to reach a finding that the market features which give rise to the AEC do not operate against the public interest; and

(c) an explanation of the role and responsibilities of the public interest expert and the part they will play in the decision-making process.

It is also important for parties to understand the extent to which they will have access to these experts and the form this engagement will take. For example, will parties be able to make written submissions directly to the experts and will the experts attend hearings?

Reporting procedure following a full public interest reference

3.35 Further clarity is needed on the role of the SoS in deciding "*whether to make an adverse public interest finding and, if so, how the adverse effects should be remedied, taking into account the recommendations included in the CMA's report on the matter*".[30] We believe that parties need clarity on whether the SoS could decide not to follow the recommendations of the CMA and, for example, decide to impose remedies which have not been considered by the CMA. Paragraph 3.14 should also indicate whether the CMA's market investigation report will be published alongside the SoS's decision or at an earlier point.

Chapter 4: Implementation of remedies

Time limits and procedures

3.36 We consider that this section of the Draft Markets Supplementary Guidance should explain how the statutory time limits relating to the implementation of remedies will be affected in the event of an appeal of a market investigation decision.

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[30] Paragraph 3.14 of the Draft Markets Supplementary Guidance.

3.37 The second bullet point in paragraph 4.10 of the Draft Markets Supplementary Guidance notes the CMA's powers to require parties to appoint (at their cost) a monitoring trustee. The CMA's Draft Mergers Guidance states that the CMA must approve this remuneration package to ensure that the structure of the package does not result in incentives that adversely affect the trustee's ability to perform its role.[31] It also mentions that "[the] *need for a monitoring trustee will depend among other things upon the nature of the divestiture package and the risk profile of the remedy*".[32] We believe that it is important for the final version of the Draft Markets Supplementary Guidance to state what factors will be considered when deciding whether a monitoring trustee is required.

Scope of the CMA's order-making powers

3.38 Further details would be helpful in paragraph 4.10 of the Draft Markets Supplementary Guidance on the role of monitoring trustees and the powers that any such trustee will have.

Interim measures

3.39 Paragraph 4.11 of the Draft Markets Supplementary Guidance explains the CMA's ability to prevent any pre-emptive action undertaken by parties between the final report being published and the remedies being implemented. Examples of pre-emptive action that might impede the taking of final action in relation to an investigation would be helpful.

C. Responses to specific consultation questions

Q1. Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA 2013 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?

3.40 Generally yes, although as noted above at paragraph 3.28, we consider that further guidance is needed in relation to cross-market references.

Q2. Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?

3.41 Yes. However, as described in section 3B of this response, there are a number of areas in which further information and/or expansion is required.

Q3. Do you agree with the list in Annexe B of the Draft Guidance of existing markets -related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?

3.42 No. We consider that the memorandum of understanding between the OFT and the FCA[33], which describes the way the OFT and the FCA will work together (in the context of the FCA's extended competition objective) should also be put to the CMA Board for adoption by the CMA.

Q4. Do you consider that the Draft Guidance is user friendly in terms of its content and language?

3.43 No. Please see the responses set out in section 3B of this response.

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31 Footnote 166 of the Draft Mergers Guidance.

32 Paragraph 8.37 of the Draft Mergers Guidance.

33 "Memorandum of Understanding between the Office of Fair Trading and the Financial Conduct Authority" (April 2013)

Q5. Do you have any other comments on the Draft Guidance?

3.44 Yes. Please see the responses set out in section 3B of this response.

4. ADMINISTRATIVE PENALTIES: STATEMENT OF POLICY ON THE CMA'S APPROACH

A. Responses to specific consultation questions

Q1. Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to administrative penalties ?

4.1 We note that neither the statement of the policy objectives of imposing administrative penalties set out in section 3 of the CMA's draft statement of policy on its approach to administrative penalties (the "**Draft Penalties Policy Statement**") nor the more detailed discussion of the roles and policy objectives of administrative penalties in section 3 of the consultation document mentions he principles of proportionality and procedural fairness.

4.2 We consider that the CMA should have regard to both these principles when deciding whether to impose administrative penalties for failure to comply with Investigatory Requirements, and that this should be expressly included in the final version of the CMA's policy statement.

4.3 In relation to the principle of proportionality, we would emphasise that it is a fundamental principle of any fair enforcement regime that penalties should be proportionate to the offences or infringements committed. Whilst we recognise the potential adverse consequences for the CMA if a person fails to comply with Investigatory Requirements, it is important to ensure that penalties imposed remain proportionate, particularly when, as discussed further below, many of the businesses engaged with the UK regime are relatively small, and failure to comply with Investigatory Requirements may be unintentional (as recognised in Example 1 of Annexe A to the Draft Penalties Policy Statement, which is discussed further below).

4.4 In this regard, we would also question whether it is correct that the CMA's approach to administrative penalties should be aimed at deterring future non-compliance with the relevant CMA powers not only by those on whom penalties have been imposed (i.e. specific deterrence) but also other persons who may be considering future non-compliance (i.e. general deterrence) (as stated in paragraph 3.1 of the Draft Penalties Policy Statement). Whilst we recognise the importance of ensuring a wider general deterrent effect in other contexts, such as penalties for infringement Article 101 TFEU[34]/Chapter 1 Competition Act 1998 (where infringements are often difficult to detect, and penalties need to be set at a sufficiently high level to ensure potential infringers do not take the view that it is "worth the risk" to enter into anti-competitive agreements), we do not consider that the position is necessarily the same in the context of administrative penalties for non-compliance with Investigatory Requirements.

4.5 If, for example, a business were to fail to comply with an Investigatory Requirement in circumstances similar to those outlined in Example 1 of Annexe A (i.e. a wholly unintentional failure to comply, due to administrative error, which is quickly rectified), we do not consider that it would be appropriate to include an additional element of penalty in respect of general deterrence (indeed, we do not consider that it would normally be appropriate to impose any penalty in such circumstances – see further paragraphs 4.10 and 4.15 below). Moreover, deterrence is only one aspect of the rationale for imposing a punishment; it is equally important that the penalty is proportionate to the seriousness of the infringement and any harm that has been caused.

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[34] Treaty on the Functioning of the European Union.

4.6 In relation to the principle of procedural fairness, we note that the CMA is committed to this principle throughout its work, and we consider that this should be expressly reiterated in the final version of the CMA's policy statement.

4.7 Finally, we note that the consultation document includes a much more detailed discussion of the roles and objectives of administrative penalties than the Draft Penalties Policy Statement itself. We consider that it would be helpful to include the additional explanations contained in the consultation document in the final version of the policy statement, so that this further detail is not lost when the final version of the policy statement is issued.

Q2. Do you agree that the level of detail in the Statement is appropriate? Please give reasons for your views.

4.8 We note that there are a number of instances where more detailed explanations of the CMA's approach have been included in the consultation document which are not repeated in the Draft Penalties Policy Statement itself. We would suggest that it would be helpful if this additional information could be added into the final version of the penalties statement. For example:

(a) paragraphs 3.3-3.8 of the consultation document in relation to the role and policy objectives of administrative penalties; and

(b) paragraph 4.13 of the consultation document regarding the assessment of minor failures in the context of general compliance with Investigatory Requirements or accidental failures which are promptly corrected.

4.9 We are also concerned that there is an apparent tension between the guidance set out in the consultation documents and the Draft Penalties Policy Statement on the one hand, and the CMA's proposed approach to the hypothetical scenarios included in Annexe A on the other, which may need to be addressed by including more detail in the final version of the policy statement.

4.10 By way of example, based on the guidance set out in the consultation document and the Draft Penalties Policy Statement, we would not have anticipated that it would be more likely than not that penalties would be imposed in a scenario akin to Example 1 of Annexe A, involving an unintentional failure to comply with a formal information request under section 109 Enterprise Act 2002 which is rectified as quickly as possible, yet the analysis in Annexe A concludes that "*In some cases of this nature the CMA <u>may</u> decide not to impose an administrative penalty*"(emphasis added) – implying that the starting point would be that a penalty would be imposed in the majority of cases. This would seem to contradict the acknowledgment in paragraph 4.13 of the consultation document (which is not included in the Draft Penalties Policy Statement itself, but which we consider should be – see paragraph 4.8 above) that "*it would not necessarily serve the CMA's intended policy objectives to punish disproportionately minor failures in the context of general compliance with Investigatory Requirements, or accidental failures which are promptly corrected.*"

4.11 This would suggest that more detail may need to be included in the final version of the CMA's policy statement in order to make the CMA's approach clearer to understand. Alternatively (and in our view, preferably), we would suggest that the practical examples in Annexe A should be revisited, and it should be made clear that in a scenario akin to Example 1 the CMA would <u>not</u> generally impose an administrative penalty, provided the failure to comply is rectified satisfactorily within a short space of time and there were no/minimal adverse consequences for the CMA's investigation. Moreover, we would emphasise that it should be no part of the CMA's policy to punish minor failures (or indeed any failures) "disproportionately". It is likely that such a disproportionate penalty would be in breach of the Human Rights Act 1998.

Q3. Do you agree with the approach in chapter 4 of the Statement to determining whether to impose a penalty, the level at which penalties should be set and the various factors to be taken into account? Please give reasons for your views.

Determining whether to impose a penalty

4.12 We agree that in determining whether to impose an administrative penalty the CMA should have regard to the role and objectives of administrative penalties. In this context it will also be important to have regard to the additional principles of proportionality and procedural fairness discussed above in response to Question 1.

4.13 We also agree that where it is clear that there has been wilful non-compliance with an Investigatory Requirement, more stringent measures are likely to be required to deter a person from failing to comply with future Investigatory Requirements, and that such intentional failures should be treated more severely than negligent failures.

4.14 However, we do not consider that it is appropriate in this context to have regard to whether there is an element of recidivism i.e. where a person has previously failed to comply with an information request or CMA decision, whether in the current investigation or previously (as suggested at paragraphs 4.1 and 4.17 of the Draft Penalties Policy Statement). We do not consider that recidivism would normally be an appropriate factor to take into account in determining whether to impose an administrative penalty for failure to comply with an Investigatory Requirement given the wide variety of circumstances which might lead to delays in compliance and, in particular, the possibility that non-compliance may be accidental/unintentional.

4.15 With regard to the CMA's assessment of whether a person has a "reasonable excuse" for its failure to comply, whilst we understand that the CMA wishes to make clear that it will not be acceptable simply to argue that the deadline was forgotten for no good reason, as noted above we would suggest that where a failure to comply can be shown to be unintentional, the failure is rectified satisfactorily within a short period of time, and there are no/minimal adverse consequences for the CMA's investigation, the CMA should not generally seek to impose a penalty.

4.16 In respect of cases where the failure to comply has been remedied, whilst we agree that there may be circumstances where it is nonetheless appropriate to impose a penalty in order to reflect the gravity of the failure, we would question whether regard should be had to the need to achieve general (as opposed to specific) deterrence in such circumstances (see further our comments at paragraphs 4.4-4.5 above).

The level at which penalties should be set

4.17 We do not support the proposed increase in the maximum penalty levels set out in the draft Competition and Markets Authority (Penalties) Order 2014. As explained in our response to the separate BIS consultation on the CMA strategic steer and draft secondary legislation, we do not consider that there is a sufficient evidential basis to support the proposed increase.

4.18 In particular, we do not agree that the current maximum levels are set too low. As no penalties at all have been imposed under the current Order, there is no evidence of businesses being able or willing simply to absorb the costs of administrative penalties in order to "game the system". In our experience, the opposite is in fact true as the possibility of fines (at the level currently set) does act as a deterrent to failing to comply with procedural requirements.

4.19 Further, it is important to note in this context that in practice the majority of larger transactions and investigations will fall under the jurisdiction of the European Commission.

The turnover of many businesses engaged with the UK regime is relatively small: for example, in the mergers context, the application of the share of supply test under the EA02 means that businesses with a UK turnover well below £70 million can often be caught by the UK merger regime,[35] and small business are often also involved in market and antitrust investigations. Against this background, the level of fines which can be imposed under the current rules can already add up to a significant proportion of the turnover of many businesses engaged with the UK competition regime, particularly when both a fixed rate and a daily penalty rate for each calendar day are applied (resulting in a potential fine under the current rules of £55,000 for a failure to comply for just one week, and further fines of up to £35,000 for each additional week).

4.20 Given the frequent difference in size of businesses engaged with the UK regime compared to the EU regime, we do not consider it appropriate that the proposed maximum daily penalty under the UK regime for failure to comply with these sort of requirements would exceed the maximum daily penalty under the EU regime in all cases where the annual turnover of the business in question is less than £109.5 million.[36]

The factors to be taken into account when setting the level of penalty

4.21 For the reasons discussed in paragraph 4,14 above, we do not consider that recidivism would normally be an appropriate factor to take into account when setting the level of penalty imposed (other than in exceptional circumstances, for example it could be shown that a person had repeatedly deliberately failed to comply with Investigatory Requirements).

4.22 In addition to the factors listed at paragraph 4.10 of the Draft Penalties Policy Statement, and noting that the list is in any event intended to be non-exhaustive, we would recommend adding a factor along the following lines: "*whether the failure to comply with the Investigatory Requirement was due to a rogue employee and the extent to which management was in a position to detect such a failure to comply*". Although this may arguably be covered by the umbrella factor "*the reasons given by a person for the failure to comply with the Investigatory Requirements*", we consider that it would be worthwhile giving prominence to this point given its potential importance in failures to comply with Investigatory Requirements in Competition Act 1998 investigations.

Q4. Do you agree with the approach in the Statement to assessing the turnover of enterprises owned or controlled by P? In particular, do you have views on whether turnover based on material influence should be used in all cases? Please give reasons for your views.

4.23 Before commenting on the proposed approach to assessing the turnover of enterprises owned or controlled by a person for the purposes of calculating penalties for failure to comply with Merger IMs, we wish to emphasise that we strongly oppose the introduction of a new penalty for failure to comply with Merger IMs amounting to a maximum of 5 per cent of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by the party which has failed to comply with the Merger IMs. We consider that the current legislation provides a sufficient deterrent by empowering the Competition Commission (and in due course the CMA) to bring civil proceedings against

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[35] Indeed, the BIS consultation on options for reform of the UK competition regime launched in March 2011 noted that the majority of cases found to meet the "realistic prospect of a substantial lessening of competition" test for reference at the OFT stage qualified on the basis of the share of supply test, rather than on the basis of turnover, and that the percentage of such cases has increased over time, from 43 per cent in 2004-05 to 68 per cent in 2009-10, while the percentage of cases qualifying on turnover has fallen (Box 4.1, BIS consultation on options for reform of the UK competition regime, March 2011).

[36] Under the EU regime, the European Commission may impose daily penalties of up to five per cent of the undertaking's average daily turnover in the preceding business year. The maximum daily penalty which could be imposed under those rules would be less than £15,000 (i.e. the maximum daily penalty rate proposed in the BIS consultation) wherever the annual turnover of the business in question was less than £109.5 million.

the party which has failed to comply with the Merger IMs, including "*for an injunction or an interdict or for any other appropriate relief or remedy*."[37] In our experience, companies wish to avoid such civil proceedings at all costs, and the existing rules therefore already provide an effective deterrent.

4.24 That said, if such penalties are to be introduced, we disagree with the proposed approach in the Draft Penalties Policy Statement (reflected in the draft Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014) to the assessment of turnover of enterprises owned or controlled by P for the purposes of calculating the maximum level of penalty which can be imposed.

4.25 We strongly recommend that the concept of control for this purpose should be limited to enterprises in which a person has a controlling interest i.e. where that person is a parent undertaking of the body corporate in question within the meaning of section 1162 of the Companies Act 2006 (or would be a parent undertaking of that body corporate within the meaning of that section if the person were an undertaking within the meaning of section 1161 of the Companies Act 2006). In other words, we would recommend deleting Article (2)(1)(c)-(e) and Article 2(4) of the draft Order.

4.26 Defining the concept of control to include the ability to materially influence and/or ability to directly or indirectly control the policy of the enterprise (as envisaged by Article 2(4) of the draft Order) will require the relevant regulator to engage in a potentially complex assessment, which would be likely to be the subject of challenge in many cases. We consider that limiting the definition to enterprises in which a person has a controlling interest would provide greater certainty to businesses in understanding the potential penalties they might face, and so increase the potential deterrent effect of the penalty.

Q5. Is the Statement sufficiently clear to assist you in understanding how the CMA will set administrative penalties for failure to comply with the relevant Investigatory Requirements? Please describe any areas which are not sufficiently clear, the reasons for this, and any recommendations you may have.

4.27 As noted above in response to Question 2, we consider that there are a number of steps which should be taken to make the final version of the CMA's policy statement clearer:

(a) including the additional explanations/detail currently set out in the consultation document in the final version of the policy statement (see paragraph 4.8 above)

(b) clarifying the CMA's approach to unintentional/accidental failures to comply (see paragraphs 4.10-4.11 and 4.15 above); and

(c) revisiting the example scenarios included in Annexe A, where the current analysis does not always appear to reflect the general principles set out in the Draft Penalties Policy Statement (in particular in relation to Example 1, as discussed in paragraphs 4.9-4.11 above).

4.28 In the interests of completeness, it would also be useful to know on what basis the CMA could recover the penalty and any interest which has not been paid in Scotland (paragraph 5.4 of the Draft Penalties Policy Statement indicates that in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA).

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[37] Section 94 EA02.

5. TRANSPARENCY AND DISCLOSURE: STATEMENT OF THE CMA'S POLICY AND APPROACH

A. General comments

5.1 It is extremely important for both main parties and third parties in cases to understand the approach that will be taken by the CMA when balancing its transparency aims and the need to maintain the confidentiality of information that it obtains during the course of its work.

5.2 We consider that greater emphasis should be placed in the final version of the draft statement of the CMA's policy and approach to transparency and disclosure (the **"Draft Statement"**) on disclosure of information to the main parties.[38] Main parties will be significantly affected by any CMA decision on remedies or fines and are in a different position from other interested parties: it is critical that they know the case against them, and have sufficient opportunity to reply to it. This is particularly true in the context of CA98 enforcement cases where the CMA's investigations can result in criminal sanctions for individuals convicted of the criminal cartel offence and quasi-criminal sanctions for companies in the form of very large fines.[39] Against this background, disclosure of information to the main parties goes to the very heart of fairness, and the CMA's processes should avoid the possibility that adverse findings are reached on the basis of information which has not been properly put to the main parties for comment (including internal analysis which relates directly to the alleged theory of harm, such as the advisory report prepared for the OFT by Professor Shaffer in the *Tobacco* case) or only disclosed in summary form or at a late stage in the process (e.g. after the statement of objections or provisional findings have been published).

5.3 The disclosure of information to main parties as a means of achieving due process and ensuring the main parties in inquiries are treated fairly is currently briefly mentioned in paragraph 2.3 of the Draft Policy Statement. However, we would suggest that, given the importance of this issue, greater prominence should be given to the need to disclose information to main parties in the final version of the guidance – some suggested revisions to particular paragraphs of the guidelines in this regard are set out in our response to the specific consultation questions in section 5B of this response.

B. Responses to specific consultation questions

Q1. 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?

5.4 We consider that the Draft Statement is generally clear about the CMA's aims to be open and transparent whilst seeking to maintain (as appropriate) the confidentiality of information it obtains in the exercise of its functions, and the reasons why this is important. However, we consider that there are a number of specific areas where clarity could be improved in the final version of the policy statement, as set out below in response to Questions 2-4 and 6. In addition, as already noted above at paragraphs 5.2-5.3, we consider that greater emphasis should be placed on disclosure of information to main parties.

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[38] We recognise that current practice in market investigations is to treat a range of market participants as "main parties". The distinction between main parties and other interested parties in market investigations is arguably less apparent than in merger cases. However, it remains the case that it is particularly important for those parties who may be required by the CMA to take remedial action to be properly informed of the case against them.

[39] We are not aware of any proposals to introduce new limitations on the access to the file procedure in CA98 enforcement cases under the new CMA regime. However, we wish to emphasise that it is extremely important that full access to the file is maintained, and that redactions are kept to a minimum (or alternatively that confidentiality rings are put in place to enable confidential information to be shared – see further paragraphs 5.18-5.22 of this response.

Q2. 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)?

5.5 We consider that there are a number of areas where the Draft Policy Statement would benefit from the inclusion of more detail on the approach which the CMA will follow.

Disclosure of working papers (paragraph 3.13)

5.6 Paragraph 3.13 of the Draft Statement states that the CMA "*may share its developing thinking or evidence when doing so would be helpful to the progression of the case at appropriate stages, to verify the information it has received or when it is otherwise appropriate to do so*" (emphasis added). In our view a degree of disclosure of the CMA's thinking at an early stage in the case is very important in all cases. As noted in section 5A of this response, it is important that the main parties to a case are able to understand the case against them and to respond to it at a formative stage in the decision-making process. The appropriate stage for disclosure may well be prior to the drafting of any statement of objections or provisional findings (see paragraph 5.2 above), which are published at a fairly advanced stage of the process, by which point "the die is cast" in most cases.

5.7 We consider that the disclosure of working papers would be valuable in the performance of all of the CMA's functions. However, it is currently our experience that the CC has been more willing to make use of working papers in its Phase 2 merger inquiries and market investigations than has the OFT in antitrust investigations. Working papers allow the parties to have a more effective and efficient dialogue with the CC. This is beneficial in terms of reaching agreement on factual points and focussing on the key areas of disagreement, issues that need to be looked at in more detail and the type of evidence on which a case might turn. As a consequence, the parties are more likely to accept (or at least recognise the accuracy of) the CC's findings. In contrast, the parties typically have very little engagement with the OFT between the initial information-gathering stage and receipt of a statement of objections. At that point, parties effectively see the OFT's case for the first time and are obliged to correct the manifold errors of factual assessment and analysis. As a consequence, positions are much more likely to become entrenched with the likelihood of appeals ultimately increasing and the prospects of settlement being reduced. In our view, the CMA should adopt the CC's approach of providing working papers to the parties in relation to its functions that were previously performed by the OFT, as well as those currently performed by the CC.

5.8 We agree that it may be appropriate to disclose working papers by publishing them on the CMA's website. That said, where confidentiality or concerns about the efficacy of an investigation mean that it would be impracticable to publish information on the CMA's website, this should not prevent the main parties (and other affected parties) having access to the CMA's developing thinking.

5.9 Whilst we recognise that there will be no formal obligation on the CMA to disclose all working papers, the value of opening a dialogue between the parties and the regulator is such that we would strongly recommend that the CMA should, in practice, send working papers and put-back to the main parties in all cases and that this should be expressly recognised in the final version of the Draft Policy Statement.

Disclosure of financial information or data relating to a business that is more than two years old (paragraph 4.15)

5.10 Paragraph 4.15 of the Draft Policy Statement provides that disclosure of financial information or data relating to a business that is more than two years old will be considered to be unlikely to cause harm to the person to whom it relates. We consider this

to be a very short time period given the variety and range of information that will be provided to the CMA. Very often information that is only two years old will still be highly confidential. For example, business strategy documents such as 5-Year Plans would remain highly confidential after two years, as would the terms of current contracts with a duration of more than two years.

5.11 We would therefore suggest that it would be more appropriate to adopt a similar approach to that taken by the European Commission and the European Courts when considering confidentiality issues in the context of access to the file (including in merger cases), namely not to presume that information pertaining to the parties' turnover, sales, market share data or other similar information is no longer confidential until it is more than five years old.[40]

5.12 The same concern arises in relation to paragraph 4.16 of the Draft Policy Statement, which lists financial information or data relating to a business that is less than two years old as an example of information the disclosure of which may be harmful or which may need to be protected. Again, we would suggest that a more appropriate time period in this context would be five years.

Market and non-market sensitive announcements (paragraphs 3.21 and 3.23)

5.13 Paragraph 3.23 of the Draft Transparency and Disclosure Policy Statement states that the parties may be provided with advanced copies of market sensitive announcements as little as one hour prior to their publication and paragraph 3.21 of the Draft Policy Statement sets no minimum time for the provision of advanced copies. We are mindful that minimising the gap between sharing advanced copies and publication can reduce the risk of leaks, which is especially important where the announcement contains market sensitive information. Moreover, an hour may be (just) sufficient to review a short press release.

5.14 However, it is unclear whether this guidance is meant to apply to the publication of more substantial documents, such as a statement of objections or provisional findings report, which can run to several hundred pages. The inclusion of "*associated public documents*" in paragraph 3.23 of the Draft Transparency and Disclosure Policy Statement would appear to be wide enough to capture these longer publications. It is our experience that the versions of these documents that are initially published will occasionally contain significant errors (for example, the failure to redact all confidential information), which could be avoided by giving the parties adequate time to review them. We believe that the final version of the CMA's policy statement should clarify the documents to which these paragraphs relate and that it should state 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.

Informing the party to whom the information relates of the CC's intention to make a disclosure (paragraph 4.20)

5.15 Paragraph 4.20 of the Draft Transparency and Disclosure Policy Statement states that, other than in antitrust investigations, the CMA may disclose information that a party has claimed is confidential without informing the party of its intention to make a disclosure, where, for example, the CMA believes that the party has had sufficient opportunity to explain the sensitivity and likely harm or where the CMA has sought to protect information to be disclosed. We do not agree that these circumstances would justify disclosure without first informing the party to whom the information relates of the CMA's intention.

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[40] See paragraph 23 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 81 of the EC Treaty, Articles 53,54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ C325, 22.12.2005, p.7).

5.16 In particular, it is unclear how the fact that a party has had an opportunity to explain the sensitivity and likely harm justifies proceeding with disclosure of the information without at least alerting the party to the CMA's decision. Similarly, whilst we recognise that anonymising or aggregating data may allow publication of additional detail without infringing confidentiality, it remains important that parties should have the opportunity to review the proposed protections prior to publication to ensure, for example, that there is not sufficient information elsewhere in the publication to allow their identity to be established.

5.17 Moreover, failure to inform a party to whom information relates of the CMA's intention to make a disclosure unfairly deprives that party of its ability to exercise its legal rights, for example, by seeking an injunction to prevent disclosure in circumstances where it considers that to be an appropriate course of action. Whilst we recognise that the CMA does not wish to be drawn into a time-consuming iterative redaction process, it is imperative that a party is notified of the CMA's intention to disclose information relating to it sufficiently in advance of disclosure to enable it to exercise its legal rights should it wish to do so.

Confidentiality rings and data rooms (paragraphs 4.25-4.26)

5.18 Paragraph 4.25 of the Draft Transparency and Disclosure Policy Statement states that: "*Datarooms may be considered in two situations in particular: to allow the parties' economic advisers to carry out their own analysis of the underlying data to confirm or challenge the CMA's findings or conclusions, and in exceptional circumstances, to allow parties' legal advisers to carry out an assessment of a specific set of qualitative documents*" (emphasis added). It is unclear to us why access to the data room should only be extended to the parties' legal advisers in exceptional circumstances. Nor is it apparent why their access should be restricted to a specific set of qualitative documents.

5.19 Professional advisers do not act in isolation from one another. It is important that the legal advisers are able to understand the economic analysis that underpins the CMA's arguments and that the economic advisers are able to understand the qualitative aspects. Whilst the use of a confidentiality ring or data room may not be appropriate in every case, where it is appropriate we consider that permitting both economic and legal advisers to access the full set of data is essential to enable the economic and legal advisers to discuss the data and its analysis with one another and, where they are acting for the main parties to the inquiry or investigation, to determine how best to respond to the case being made against their client. Consequently, we consider that the final version of the guidance should not draw a distinction between the parties' professional advisers in terms of granting access to any data room or documents.

5.20 Paragraph 4.26 of the Draft Policy Statement indicates that the CMA may "*reserve the right to review the reports and/or notes prepared by* [persons entering the data room] *to ensure they do not contain any confidential information*". We would not object to the CMA briefly reviewing any reports/notes prepared by advisers for this purpose, subject to the caveat that any such materials should not be used by the CMA for any other purpose and, in particular, should not be considered formal submissions on behalf of the advisers' clients. This is necessary to protect the parties' right of defence.

5.21 Paragraph 4.26 of the Draft Transparency and Disclosure Policy Statement also states that access to documents in a confidentiality ring or data room will be subject to confidentiality undertakings and/or data room rules. We consider that such safeguards are essential, but that the process of negotiating undertakings and data room rules should not be allowed to create unnecessary delays. We would therefore suggest that the CMA considers adopting template undertakings and data room rules in consultation with stakeholders, with the onus being on parties to demonstrate good cause for any proposed amendments in an individual case.

5.22 Further, as noted in our response to the BIS consultation on options for reform of the regulatory and competition appeals framework,[41] we see value in the CAT having a role in supervising confidentiality rings imposed by the CMA at the administrative stage, not least because the CAT has substantial experience in drafting, administering and enforcing confidentiality rings.

Q3. 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?

5.23 We note that paragraph 6.3 of the Draft Policy Statement states that "[w]*here the CMA discloses information* [to other UK public authorities] *for the purposes of exercising its functions, it will not generally give the persons to whom that information relates notice of the disclosure.*" We recognise that it will not be appropriate to give notice in certain circumstances. However, in the absence of a compelling reason, we consider that the starting point should be that the parties will be notified of any disclosure to another public authority (whether based in the UK or overseas).

5.24 With regard to disclosure of information to overseas authorities, we note that paragraph 7.10 of the Draft Policy Statement states that one of the factors the CMA will consider when deciding whether to disclose information to an overseas public authority is "*whether the law of the overseas country to whose authority disclosure would be made provides appropriate protection against self-incrimination in criminal proceedings*." It is unclear whether this will include self-incrimination in the context of cartel investigations, given that the European Court of Human Rights and the European Court of Justice have recognised that the magnitude of fines imposed on cartel participants is such that they should be considered quasi-criminal. We consider that this point should be clarified in the final version of the CMA's policy statement.

Q4. Do you consider that there are any aspects missing from the Draft Statement in respect of the CMA's approach to transparency and disclosure?

Circumstances in which the CMA may deviate from its guidance (footnote 3)

5.25 We agree with the CMA's statement that it may be appropriate to maintain confidentiality in criminal cartel and consumer rights investigations and that the same should be true of any parallel civil investigations. However, the Draft Policy Statement makes no mention of the possibility that a civil investigation could develop into a criminal one as new evidence comes to light. We consider that the final version of the policy statement should state that it may be appropriate to maintain the confidentiality of a civil investigation where there is a reasonable prospect that it will give rise to a criminal investigation.

Identifying confidential information (paragraph 4.12)

5.26 Paragraph 4.12 of the Draft Policy Statement states that the CMA may require the parties to identify any information that they consider to be confidential when it is submitted to the CMA. We would suggest that this could be extended to include the identification of parties' confidential information in draft CMA publications, by way of a process akin to the the CC's existing put-back process in Phase 2 merger inquiries and market investigations.

Q5. Do you consider that the Draft Statement is user friendly in terms of its content and language?

5.27 Subject to our comments in relation to areas of the Draft Statement where increased clarity would be welcomed, we consider that the statement is generally user friendly in terms of its content and language.

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[41] BIS consultation, "*Regulatory and competition appeals: options for reform",* launched 28 June 2013.

Q6. Do you have any other comments on the Statement?

5.28 No further comments.

Q7. 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?

5.29 We consider that the memorandum of understanding between the OFT and the FCA[42], which describes the way the OFT and the FCA will work together (in the context of the FCA's extended competition objective) should also be put to the CMA Board for adoption by the CMA.

ASHURST LLP

10 SEPTEMBER 2013

[42] "Memorandum of Understanding between the Office of Fair Trading and the Financial Conduct Authority" (April 2013)