

RESPONSE TO COMPETITION AND MARKETS AUTHORITY CONSULTATION

BY BIRD & BIRD LLP

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

Introduction

This response is submitted by and on behalf of Bird & Bird LLP, an international law firm with substantial experience of representing and assisting businesses before competition authorities in a number of jurisdictions. The views now expressed are those of Bird & Bird LLP and not necessarily those of the firm's clients.

We welcome the opportunity to respond to the draft guidance of the CMA on transparency and disclosure. We confirm that we are happy for this response to be published on the CMA's website.

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

We consider that the draft Statement provided a reasonable level of clarity on the CMA's approach to transparency. However, we question the reference in paragraph 3.12 to the requirement to issue a Statement of Objections in Competition Act 1998 investigations. Paragraph 3.12 is concerned with the steps that must be taken by the CMA to share its provisional thinking. In contrast, a Statement of Objections is issued in order to set out the case against the defendant or investigated party so as to enable it to exercise its right of defence to the case against it.

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

In our view, chapter 4 of the draft Statement fails to provide guidance on the key issue which is or should be of concern to stakeholders. That is that, under section 241(1) of the Enterprise Act 2002, a public authority which holds "specified information" *may* disclose that information for purposes of facilitating the exercise of any of its statutory functions.

Section 244 provides that a public authority must nonetheless have regard to the three considerations set out in ss.244(2) and (3). These are the need to exclude disclosures contrary to the public interest or disclosures of commercial information where this might significantly harm legitimate business interests of the relevant undertaking or disclosure of private information where this might significantly harm the relevant individual's interests.

The draft Statement fails to give any information as to how the CMA will determine, or the criteria by which it will determine, which types of information are necessary to be disclosed in order to facilitate the exercise of its statutory functions, or how such factors will be balanced against the considerations which it is required to take into account under section 244. In this respect, the legislation is itself not clear, but the draft Statement fails to provide any guidance as to how the legislation will be applied in practice by the CMA.

The relevant provisions of the Enterprise Act do not define "confidential information" as stated in paragraph 4.14, but rather refer to "specified information", which relates to the affairs of an individual or any business of an undertaking (section 237(1)). The draft Statement refers, in our view, erroneously to the considerations required to be taken into account before disclosing such information (under section 244), in paragraph 4.14.

Further, we think that the draft Statement is not accurate in paragraph 4.19, where it is stated that the CMA may make disclosure (without consent of the relevant party) where the disclosure "is necessary for the purpose for which the CMA is permitted to make the disclosure". Rather, as already indicated, the CMA may disclose specified information to any other person for the purpose of facilitating the exercise of its statutory functions (section 241(3)), subject to the considerations in section 244.

In our view, confidential information is wider in scope than the information specifically referred to in section 244 of the Enterprise Act, by virtue of the definition of "specified information" in section 237, to which section 241 applies. However, some such information may be disclosed by the CMA to the extent necessary to facilitate the exercise of its statutory functions. We believe that the present draft Statement should provide clarity and guidance on the types of disclosure that will generally be considered "necessary" to facilitate the exercise of the CMA's functions. Further, we think the draft Statement should provide guidance on how this statutory power of disclosure will be balanced by the CMA, with the considerations that it will be required to have with regard to under section 244.

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

As stated in paragraph 6.4 of the draft Statement, the CMA may disclose specified information to UK public authorities for the purpose of facilitating the exercise by that authority of any relevant legislation specified in section 241(3). We consider that the draft Statement would be improved by an indication being given of the balancing exercise and considerations which will be applied by the CMA in deciding whether or not to exercise its power of disclosure. Except in relation to leniency applications (paragraph 6.8), the draft Statement does little more than to repeat the statutory provisions (see for example paragraph 6.7).

In relation to disclosures to overseas public authorities, we also consider that chapter 7 of the draft Statement merely repeats the statutory provisions of the Enterprise Act. It fails to give any explanation of the balancing of the discretionary power of the CMA to make such disclosures under section 243 of the Enterprise Act with the considerations to which it must have regard under section 243(6). The latter considerations are merely repeated in paragraph 7.10.

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

As stated above in response to questions 2 and 3, we consider that the draft Statement should include an explanation of the criteria that will in practice be applied by the CMA in deciding on whether or not to make disclosure under section 241(1) and 241(3) respectively. Further, the draft Statement fails to explain how such considerations will be balanced in practice by the CMA with the considerations to which it is required to have regard under section 244, and in the case of overseas disclosures, section 243(6).

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

We do consider that the draft Statement is sufficiently clear and comprehensible in terms of the language used.

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

We have no further comment on the draft Statement, other than our above responses to questions 2, 3 and 4.

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

We agree with the list in Annexe B.

**Bird & Bird LLP
London**

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