

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

Consultation document CMA6con – July 2013

Herbert Smith Freehills LLP Response

Introduction

Herbert Smith Freehills LLP welcomes the opportunity to comment on the CMA's draft Statement on transparency and disclosure (the "Draft Statement"), which underlines the CMA's commitment to best practices in all areas of its work. We note the fact that more detailed guidance on transparency and disclosure as it relates to specific areas is available in various other documents, some of which are as yet not available, and we have or will provide further comments on the CMA's proposed approach to transparency and disclosure in each of these consultation documents.

By way of general comment and in the interest of transparency in general, we would welcome a clear, logical and user friendly CMA website that organises relevant guidance and publicly available materials in a logical and easily accessible way. The current CC website is a good example of a well organised website, with older materials easily accessible on a dedicated National Archive section.

The comments in this response are those of Herbert Smith Freehills LLP and do not represent the views of our individual clients.

1. 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?

- 1.1 We believe that the Draft Statement gives a clear explanation of the reasons why transparency is important and of the CMA's aims in this area. The extent of the CMA's "commitment" to achieving those aims is however less clearly articulated. See our comments in this regard under questions 4 and 5 below.

2. QUESTION 2

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



2.1 The Draft Statement is a helpful guide to the approach the CMA will take to engaging with parties and other interested persons which contains an adequate level of detail. The Draft Statement also sensibly acknowledges that one size does not fit all and that, in some circumstances, it may be necessary to depart from the approach outlined in the Draft Statement (e.g. see paragraph 1.9). However, in our view the Draft Statement should also:

2.1.1 expressly acknowledge that, in such circumstances, the CMA's approach may diverge significantly from that which the parties and other interested persons might legitimately anticipate in light of the Draft Statement; and

2.1.2 make a commitment that, wherever possible in such circumstances, the CMA will inform relevant parties and other relevant interested persons of its intention to diverge from the Draft Statement and give as clear a picture as possible of the approach the CMA expects to take instead.

3. **QUESTION 3**

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

3.1 Chapters 6 and 7 combined with Annexe C explain the circumstances in which the CMA may disclose information to other public authorities in the UK or to overseas public authorities in a clear and concise way. It would be helpful if the Draft Statement would provide more detail on the limits on the extent to which information gained as a result of the exercise by the authorities of their statutory functions can be disclosed. Paragraph 7.10 lists some of the factors the CMA will have regard to in deciding whether to disclose information to an overseas public authority. Further guidance on these considerations, such as what are matters which are 'sufficiently serious', what constitutes 'appropriate protection' against self-incrimination (as was for example set out in an earlier OFT consultation paper on 'The overseas disclosure of information' OFT 507) would be helpful.

4. **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?

4.1 We do not feel that the Draft Statement sufficiently recognises the potential harm to the parties under investigation (both undertakings and individuals) that can result when an authority fails to achieve the right balance between ensuring an appropriate degree of transparency on the one hand and protecting confidentiality and legitimate commercial and



personal interests on the other. For example, publishing a CA98 case-opening statement on the CMA's website can, if not drafted carefully, cause unwelcome and potentially damaging media enquiries and speculation which may be inappropriate at such an early stage of the CMA's investigation.

4.2 We would welcome a clear explanation in the Draft Statement of the approach the CMC expects to take with regard to claims for confidentiality when receiving very large volumes of material from the parties in an investigation under CA98. Identifying confidential documents amongst very large submissions of material can be both time consuming and costly. In circumstances where the authority ultimately decides not to pursue that investigation and third parties are never given access to the file, the time and cost of identifying documents containing confidential passages, creating non-confidential versions of those documents, and justifying a claim for confidentiality, may ultimately be wasted. It may also be the case that material which the parties view as highly confidential at the time the documents are submitted ceases to be confidential by the time any statement of objections is issued and access to the file is given. In our experience, some case officers have been willing in such circumstance to accept large volumes of documents on the basis that submissions as to confidentiality will be invited at a later stage, should the investigation proceed. In our view this approach can be a pragmatic solution in some circumstances which avoids unnecessary costs and we would encourage the CMA to indicate its willingness, in the Draft Statement, to consider adopting this approach in appropriate cases.

4.3 It would also be helpful if in the Draft Statement the CMA would acknowledge and address the issue of tension between on the one hand a company's need to be transparent with external stakeholders (such as investors/shareholders and lenders) and markets about the legal and regulatory risks it faces and on the other hand the need to preserve the confidentiality of an on-going investigation that may not yet be in the public domain. For example, this tension is acknowledged at paragraph 3.26 of the OFT's guidance on applications for leniency and no-action in cartel cases (OFT1495).

5. **QUESTION 5**

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

5.1 The Draft Statement is a user-friendly document, at least from the perspective of experienced practitioners.



6. **QUESTION 6**

Do you have any other comments on the Draft Statement?

6.1 We have the following specific comments on the drafting of certain passages of the Draft Statement:

- 6.1.1 In several places (e.g. paragraph 2.5) the Draft Statement refers to engagement with "other interested persons", including by keeping such parties informed. Bearing in mind our comments above about the potential damage that can be caused where a balance between transparency and the legitimate interests of the parties is not maintained and that some may seek information from an authority for vexatious purposes, we suggest that the Draft Statement refers instead to "other persons with a legitimate interest".
- 6.1.2 In paragraph 2.6, we suggest that the third sentence be amended by adding the words "the breadth and content of" after the words "When formulating".
- 6.1.3 We welcome the acknowledgement in the Draft Statement of the need for information requests to be formulated with precision so as to avoid imposing an unnecessary burden on the parties and to avoid the CMA receiving large volumes of irrelevant material. In our experience, early consultation with the parties, along the lines described in paragraphs 4.3 and 4.5, not only makes the process of responding to such requests more efficient but it also improves the quality of the evidence the authority ultimately receives.
- 6.1.4 However, we disagree with the example given in paragraph 4.5 of circumstances in which it may not be possible to shape an information request having regard to the intended recipient, the documents it may hold and the manner in which it may store them. Except in cases where the number of intended recipients is expected to be very large, we think it appropriate and advisable to consult the intended recipients in precisely the way envisaged and to tailor the information request accordingly. As explained above, this is likely to improve the quality of the information provided to the CMA and, in our experience, when an authority sends identical versions of the same information request to multiple recipients the result can be that information is requested which the recipient is unable to provide, which causes confusion, and, more importantly, the authority may fail to request relevant evidence which one party alone is well placed to provide.
- 6.1.5 In paragraphs 4.15 and 4.16, we believe that the two year threshold beyond which financial and other data is thought unlikely to be confidential is too short.



We consider that the period referred to should be five years, which is the period commonly applied by the European Commission.¹

7. **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?

- 7.1 We agree with the proposed list of existing OFT and CC guidance documents set out in Annexe B which will be put to the CMA Board for adoption by the CMA. We note that the original text of the adopted guidance will be retained unamended and will continue to refer to the 'OFT' and 'CC' and certain departments and teams not replicated in the CMA. We consider that the CMA should endeavour to produce, as soon as possible, an updated version of those guidance documents which, as a minimum, reflect the new merged regulator and its relevant departments.

Herbert Smith Freehills LLP
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¹ http://ec.europa.eu/competition/antitrust/business_secrets_en.pdf