**Transparency and Disclosure: Statement of the CMA's Policy and Approach**

**Response To Consultation**

This paper sets out the response of Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb") to the CMA Transition Team's consultation on *Transparency and Disclosure: Statement of the CMA's Policy and Approach* (the "Consultation" and "Draft Statement").

Cleary Gottlieb limits this response to high-level comments on a few specific areas of the Consultation.

## 1. SHARING OF PROVISIONAL THINKING

Under the Draft Statement, the CMA will generally take a "*flexible approach to sharing its developing thinking and/or evidence*", including where it "*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*".[1]

Our view is that disclosure of the CMA's developing thinking is crucial in all cases, and should be shared as early as possible in the process. This enables the parties to properly scrutinise the CMA's developing thinking, so that they can "*draw to the CC's attention any inaccuracies, incomplete or misleading information*".[2] This is especially true when parties are dealing with novel and/or complex theories of harm. Sharing the CMA's provisional thinking can avoid decisions being reached on the basis of information that was not properly scrutinized, or scrutinized only at a late stage in the process. Both lead to a waste of time and resources. The sharing of the CMA's provisional thinking is therefore an important means of achieving due process and "*improves the effectiveness and efficiency of the CMA's work, and the quality and robustness of its decision-making*".[3]

We believe that the Draft Statement should include a stronger assurance that the CMA will share its developing thinking as early as possible in all cases.

## 2. CONFIDENTIALITY RINGS AND DATA ROOMS

It is essential for parties to access data on which decisions are based in order to test the CMA's conclusions. The use of confidentiality rings and data rooms play a key role in this. As investigations increasingly use analysis of data in their competitive assessment, allowing access to data becomes even more important to protecting the parties' procedural rights of defence.

According to the Draft Statement, the CMA may consider using confidentiality rings and data rooms in "*certain circumstances*", taking into account factors such as "*the progress*

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1 Paragraph 3.12-3.13, Draft Statement. However, the CMA is obliged to share its provisional thinking in certain specified circumstances, as set out in Paragraph 3.12 of the Draft Statement.

2 Paragraph 5.2(b), Chairman's Guidance on Disclosure of Information.

3 Paragraph 2.3, Draft Statement.

*of the case*" and *the resource implications of operating confidentiality rings and data rooms*."[4] Allowing access to data need not necessarily create any material delay or burden on resources during the investigation process. By setting out clear, detailed guidance as to the practical workings of confidentiality rings and data rooms (which we look forward to seeing in the upcoming consultation on the *Competition Act 1998: Guidance of the CMA's investigation procedures*), and introducing data room access as a standard part of the process, the organisation, collection and access of data could be managed more effectively and any timing implications minimised as a result.

The Draft Statement explains that data rooms should be considered in two particular circumstances: "*to allow parties' economic advisers to carry out their own analysis of the underlying data*" and "*in exceptional circumstances, to allow parties' legal advisers to carry out an assessment of a specific set of qualitative documents*".[5] It is unclear why legal advisers would not be permitted to analyse the underlying data together with economic advisers, as they will presumably be working together in drafting any subsequent submissions. It is also unclear why legal advisers are permitted to access documents only in "*exceptional circumstances*", and why their assessment is only limited to "*a specific set of qualitative documents*". We believe these restrictions seriously threaten the parties' procedural rights of defence. Notably, legal advisers would be bound not only by the data room rules and Part 9 of the Enterprise Act 2002 ("EA02"), but also by their professional conduct rules.

In addition, advisers should not be stopped from sharing their written data room reports with their clients (and each other) in redacted form. There are already suitable safeguards in place to prevent this resulting in the disclosure of confidential data.

## 3. DISCLOSURE TO UK PUBLIC AUTHORITIES

Pursuant to the Draft Statement, the CMA may disclose specified information[6] to another UK public authority under the 'information gateways' set out in Part 9 of the EA02, in order to facilitate the exercise of such other public authority's statutory functions[7]. If any of the 'information gateways' apply, and before disclosure, the CMA must consider: (1) the need to exclude disclosure of information that is contrary to the public interest; (2) the need to exclude information that might significantly harm the legitimate business interests of an undertaking or the interests of an individual; and (3) the extent to which disclosure is necessary for the purpose.[8] Disclosure may be on the CMA's own initiative or following a request from another UK authority, and can be made without the consent of the persons to

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4 Paragraph 4.22 and 4.27, Draft Statement.

5 Paragraph 4.25, Draft Statement.

6 Specified information relates to the affairs of an individual, or any business of an undertaking, that the CMA receives in connection with investigations under the EA02 (Section 237 and 238, EA02).

7 The 'information gateways' permit disclosure in order to facilitate the exercise by another UK public authority of specified statutory functions under the EA02, specified enactments or specified subordinate legislation (Section 241(3), EA02). They also allows disclosure in connection with the investigation of any criminal offence or criminal proceedings in the UK, or for the purpose of deciding whether to start or bring to an end such an investigation or proceedings (Section 242, EA02).

8 Section 244, EA02.

whom the information relates (with the exception of leniency materials).[9] Notice may not be given in certain situations where it would not be appropriate to do so, including *inter alia* where "*the information is required as a matter of urgency*".[10]

It is a clear infringement of due process to refuse the party to whom the information relates an opportunity to comment or make objections to the proposed disclosure, such as whether disclosure of the information is "*necessary for the purpose*". We believe that in cases where the "*information is required as a matter of urgency*", the CMA should always inform the owner of the information immediately after the disclosure, (as was the practice previously set out in the CC's Guidance on *Disclosure of Information by the Competition Commission to Other Public Authorities* ("CC12 Guidance")[11]). In each case, the CMA should also provide reasoned justifications for why disclosure was sufficiently urgent to deprive the persons to whom the information relates a chance to object.

Further, the CC12 Guidance stated that the CC would give "*notice of any impending disclosure in sufficient time to allow* [the undertaking or individual to whom the information relates] *to make comments, raise objection or indicate that it consents to the proposal*" and would provide a "*detailed description, inventory or draft of the proposed disclosure*", except in a limited number of cases.[12] However, the Draft Statement only says that the CMA "*will consider a party's representation regarding the nature of any information they have provided*".[13] This is overly vague and does not set out, for example, whether the CMA will provide detailed information regarding the proposed disclosure to allow for properly reasoned objections. It is also unclear why the parties should be limited to making representations in respect of the "nature" of the information they have provided, instead of being able to comment on the proposed disclosure more broadly. For these reasons, we believe that the process in the CC12 Guidance should be restated in full in the Draft Statement.

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9 Paragraph 6.8, Draft Statement.

10 *Ibid.*

11 Paragraph 8, CC12 Guidance.

12 *Ibid.*

13 Paragraph 4.19, Draft Statement.