

RESPONSE OF CLIFFORD CHANCE LLP TO THE CMA TRANSPARENCY AND DISCLOSURE: STATEMENT OF THE CMA'S POLICY AND APPROACH

Clifford Chance LLP welcomes the opportunity to comment on the BIS CMA Transition Team's draft statement of policy on the CMA's policy and approach towards transparency and disclosure (the "**Draft Statement**").

Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on competition law investigations for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

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?

- 1.1 While the aims set out in Section 2 of the Draft Statement¹ are comprehensible, we do not believe them to constitute as clear a statement as that previously set out in the OFT's to-be-superseded transparency statement². The CMA's "aims" are, in general, less firm than the OFT's "commitments". For example, where the OFT committed to "*consistently provide parties with information at the start of an enforcement action*", the CMA aims to engage with parties "*at an early stage*". Similarly, the CMA aims to keep parties "*appropriately informed during the course of a case*" in contrast to the OFT's commitment to "*regularly update parties on case status and timescales*".
- 1.2 The impression given is that the CMA is less willing to make specific procedural commitments to promote transparency, and may prefer to do so at its own discretion without being held to account by the parties involved. Indeed, language similar to the OFT's request to be held to account and stated aim to "*put things right as far as possible*"³ is not included as an up-front commitment in the Draft Statement. We believe that the CMA should state its goals more precisely, in a way which indicates that it will take responsibility for meeting them, to give companies a greater degree of certainty as to how it will behave.
- 1.3 We also believe that the clarity of the CMA's commitment to transparency is somewhat obscured by the continuing profusion of separate official guidance on the topic. While we understand the reasons for publishing separate procedural guidance in relation to the CMA's merger, market studies/investigations, and consumer-related activities, we believe it would be helpful if the provisions in these guidance documents relating to transparency and disclosure could either be consolidated into the Draft Statement, or at least cross-referenced in the draft statement if too detailed/specific for inclusion. The current cross-references in the footnotes to the Draft Statement are not specific enough – referring only to individual documents or to the entire suite of documents listed in paragraph 1.4, rather than to the specific sections of those documents which deal with transparency. Further to this (and as

¹ Particularly those set out in Draft Statement, para. 2.5.

² "Transparency: a Statement on the OFT's approach", May 2010 ("**OFT1234**"), para. 1.5.

³ *Ibid*, para. 1.7.

discussed in more detail in our response to Question 7), we do not see the need for the re-adoption of the *Chairman's guidance on disclosure of information in merger and market inquiries* ("CC7").

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)?

- 2.1 As mentioned above regarding the CMA's aims, we believe that the Draft Statement generally provides less procedural detail than previous guidance in relation to the specific steps the CMA will take to ensure procedural transparency, primarily through its failure to hold the CMA as accountable to its transparency commitments as the CMA's predecessors are currently held.
- 2.2 As another example of this, the OFT's current detailed explanation of how it will publish and refine expected timescale indications in competition enforcement investigations, which is stated as a commitment ("*we will share our expected timescales, in the form described above, with those directly affected by the case*")⁴ is shortened in the Draft Statement to the brief and non-committal "*the CMA will review from time to time the information provided and consider whether it is appropriate to update the information provided to the parties*"⁵.
- 2.3 In relation to identifying confidential information, the Draft Statement states that "confidentiality claims will be rigorously assessed and claims should be kept to the minimum extent necessary to protect confidentiality". We consider that the Draft Statement could usefully explain who will be responsible for decisions in relation to confidentiality and how these decisions will be reached.
- 2.4 As other examples of this lack of detail are due to omissions from the current Draft Statement, we discuss them further in response to Question 4.

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?

- 3.1 The Draft Statement provides significantly less detail than current guidance in relation to the specific steps the CMA will take to avoid inappropriate disclosures.
- 3.2 For example, as well as watering down the statement in the CC's to-be-superseded guidance on disclosure to public authorities⁶ that it "*will generally seek to give the 'owner' of the information . . . notice of any impending disclosure*" (the Draft

⁴ *Ibid*, paras. 3.24-3.26.

⁵ Draft Statement, para. 3.10.

⁶ "Disclosure of information by the Competition Commission to other public authorities", April 2006, ("CC12"), para. 8.

Statements indicates only that the CMA "may" do so)⁷, the Draft Statement also omits⁸ important detail on how the CMA will apply the criteria for determining whether to proceed with a disclosure despite objections and whether a disclosure meets the statutory "necessary for the purpose" criteria.⁹

- 3.3 We consider that the CMA should commit to giving notice of an impending disclosure, unless inappropriate in the circumstances described in the Draft Statement. In our view, an important objective of transparency is to allow verification that the CMA and other public authorities respect their obligations under the Enterprise Act 2002 ("EA2002"), including the prohibitions on the use of disclosed information that are contained in Sections 241(2A) and 241(4). If information is disclosed without notice, it will be almost impossible for parties to identify breaches of their rights in this respect. Moreover, in the interests of legal certainty, we suggest that an explicit statement is included in the Draft Statement of the balancing tests/criteria the CMA will apply in determining whether to make a disclosure to public authorities, with a stated default position of non-disclosure if the tests are not met.

| |
|--|
| <p>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?</p> |
|--|

- 4.1 As discussed in response to Question 2, the omission of a number of accountability commitments included in the current guidance lead us to question the CMA's commitment to procedural transparency. To note two examples:
- 4.1.1 while we welcome the CMA renewing¹⁰ the current OFT commitment¹¹ to discuss drafts of information requests with intended recipients in advance of their issuance, we note that the CMA has not restated the OFT's further commitment to explain the reasons for any failure to hold such advance discussions¹²; and
- 4.1.2 the previous OFT commitment to include details in its annual report on project/case timescales (including an outline of reasons for any extensions of initial indicative timescales)¹³ has not been included amongst the items that the CMA "*will aim*" to include in its Performance Report¹⁴.

⁷ Draft Statement, para 6.8.

⁸ Annexe C to the Draft Statement simply restates the statutory provisions regarding disclosure, without any attempt (such as that set out in CC12) to describe how the CMA will apply this law.

⁹ In contrast to the detail contained in CC12, paras. 9-10.

¹⁰ Draft Statement, para. 4.5.

¹¹ OFT1234, para. 3.15.

¹² *Ibid*, para. 3.20.

¹³ OFT1234, para. 3.55.

¹⁴ Draft Statement, para. 5.8.

- 4.2 We also note that, while the CMA's "*flexible approach*" to sharing its developing thinking/evidence with parties¹⁵ is similar to that currently adopted by the OFT¹⁶, the Draft Statement omits to include any statement of intent similar to the OFT's currently-stated plan to continue its practice of sharing research and preliminary findings when conducting market studies.¹⁷ Again, it appears that the CMA wishes to avoid being held to any standard procedure.
- 4.3 The Draft Statement also provides that "the CMA will place a case opening announcement on its website announcing its decision to formally begin a case except if to do so would prejudice the case or would otherwise be inappropriate". There is no indication of when this might be inappropriate, therefore it may be appropriate to indicate clearly that such circumstances may include damage to reputation, goodwill, share price and commercial relationships. Further, it may be appropriate for the CMA to only publish details of the parties or sector under investigation once a Statement of Objections has been issued.

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

- 5.1 Apart from the concerns we have already generally expressed regarding vague or non-committal language, we have no specific concerns with the language employed in the Draft Statement.

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

- 6.1 We have the following comments of a minor nature:
- 6.1.1 In paragraph 4.14 of the Draft Statement, the three bullets should be alternative rather than cumulative requirements (i.e. the second and third bullets should be separated by an "or" rather than an "and");
- 6.1.2 In Annexe C, paragraph C.2, line 3, the word "expect" should be "except".

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?

- 7.1 It is unclear to us why the CC7 merger disclosure guidance will continue in effect following the creation of the CMA. The one amendment to CC7 currently suggested in Annexe A to the Draft Statement and the notes on how it ought to be read across included in Annexe B are not sufficient to render relevant a document full of references to a specific regime that will no longer exist. While we understand that CC7 is focused on disclosure, rather than transparency, we believe that its key

¹⁵ Draft Statement, para. 3.13.

¹⁶ OFT1234, para 3.22

¹⁷ *Ibid*, para. 3.23.

messages could be more efficiently incorporated into the section of the Draft Statement dealing with disclosure (paragraphs 4.17-4.28).

Clifford Chance LLP
September 2013