

Response to BIS CMA Transition Team

***CMA6con: Transparency and disclosure: Statement of the CMA's
policy and approach***

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This response represents the views of law firm Allen & Overy LLP on the draft Competition and Markets Authority (CMA) guidance document *CMA6con: Transparency and disclosure: Statement of the CMA's policy and approach* (the **Draft Statement**). We have also responded separately to the following consultations:

- Competition Regime: Consultation on CMA priorities and draft secondary legislation
- CMA2con: Mergers: Guidance on the CMA's jurisdiction and procedure
- CMA3con: Market Studies and Market Investigations: Supplemental guidance on the CMA's approach
- CMA4con: Administrative Penalties: Statement of Policy on the CMA's approach

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

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 Yes, the Draft Statement is clear in this respect. Overall clarity in this area could however be improved. In our view having two key documents relating to transparency (i.e. the Draft Statement and *CC7: Chairman's guidance on disclosure of information*) is confusing and results in unnecessary duplication. This is particularly the case for the sections on obtaining and using information (chapter 4 of the Draft Statement and parts 6 to 9 of CC7) which are overlapping and repetitive. We acknowledge that CC7 relates only to Phase 2 mergers and markets inquiries, and reviews of undertakings and orders, but in the interests of clarity we would suggest that the CMA attempts to amalgamate all of its guidance on transparency into a single document.
- 1.2 We understand the need for the CMA to adopt a flexible approach and not to commit to apply the Draft Statement too rigidly (paragraph 1.9). However, where the circumstances of a case require the CMA to adopt an approach which is different to that set out in the Draft Statement, and these circumstances have arisen (or are expected to arise) again, the CMA should consider including details of this approach in any new versions of the Statement that are issued.

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 Subject to our comment at 1.1 above, the Draft Statement is sufficiently detailed overall in explaining the CMA's approach to transparency during the course of a case. In particular, we welcome the very useful section on how the CMA will engage with the parties in relation to requests for information.
- 2.2 In terms of the handling of confidential information, is there a particular format that the CMA expects non-confidential versions of submissions to take (e.g. the way the redactions are made, or the way the claims of confidentiality are presented)? If so, it would be helpful if this could be included in the Draft Statement.
- 2.3 On the specific content of these sections we consider that further details should be included in two areas:

- (a) Paragraph 3.7 of the Draft Statement sets out the information that the CMA will disclose to parties when they are informed of the opening of a formal case. The CMA states “*it might not be appropriate to name the parties directly involved at this early stage of a case.*” Presumably this is most likely to be the case where there is a whistleblower? If so, this should be added to the Draft Statement as an example.
- (b) The CMA states (at paragraph 4.5 of the Draft Statement) that it might not always be possible to discuss a draft of an information request with the intended recipients, giving the example of where the CMA is concerned there is a risk that the information will be destroyed. In its current guidance on transparency (OFT1234: Transparency – a statement of the OFT’s approach) the OFT gives a commitment (paragraph 3.20) that where it has not given advance notice of an information request it will be “*ready to explain [its] reasons for this*”. We consider that this commitment should be included in the Draft Statement.

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 The Draft Statement contains the right level of detail on this issue, but it could be clearer. It is not in our view user friendly to have to cross-refer between chapters 6 and 7 and Annexe C to determine the various grounds on which disclosure can be made. For example, paragraph 6.5 states that the CMA may disclose specified information to other UK public authorities under sections 241(a) and 242 of the EA02, and then refers to Annexe C for more details. But the only way to identify these grounds in Annexe C is to find the reference in the footnotes, and then follow this to the body of the text. The CMA should consider setting out the various grounds more clearly.
- 3.2 In addition, neither chapter 6 nor 7 refer to the fact that, under section 239 of the EA02, disclosure is not prohibited where the CMA has received the required consents (i.e. from the parties). It is important to include a reference to this provision which is commonly used by the OFT and CC in merger cases (where parties will routinely be requested to sign a confidentiality waiver to enable the OFT/CC to discuss the case with other competition authorities).

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 Please see 1.1 above. In our view, it would be useful and provide clarity if sections of CC7 which are not already captured in the Draft Statement are incorporated.

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

- 5.1 The language of the Draft Statement is user friendly. However, please see 1.1 above as to how the structure and content of the CMA’s guidance on transparency could be made more user friendly and with less risk of confusion.

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

- 6.1 No.

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 adoptions by the CMA?

- 7.1 Please see 1.1 above.

- 7.2 It would be helpful for the CMA to publish a document similar to Annexe B but listing all OFT and CC guidance, setting out clearly whether it is proposed that each guidance document will be put to the CMA Board for adoption, revoked or replaced. It will be vital, in order to mitigate any confusion once the CMA becomes operational and finalises its new guidance, to display a prominent link to this summary document on the CMA's website.