# PRO FORMA TEMPLATES FOR CMA CONFIDENTIALITY RINGS UNDERTAKINGS

**This document contains pro forma templates and associated drafting notes for the undertakings to be given to the CMA regarding access to confidentiality rings in CMA investigations, by:**

1. **External advisers retained by parties to advise in relation to CMA investigations (see *Confidentiality Ring Undertakings: Adviser*)**
2. **The firms to which those advisers belong (see *Confidentiality Ring Undertakings: Firm*)**

**These templates are based on recent CMA practice and are intended to provide advisers and parties with an indication of the basic terms/provisions and conditions that may typically be included in CMA Confidentiality Rings undertakings.**

**If/as appropriate, these may be tailored for each particular case, taking into account, for example, the nature of the CMA’s investigation and purpose of the disclosure exercise; the nature and sensitivity of the data/information to be disclosed; etc.**

# Confidentiality Ring Undertakings: Adviser

**[When drafting the Undertakings using this template, your attention is drawn to the ‘Confidentiality Ring Undertakings: Drafting Notes which will help clarifying certain concepts and tailoring this document to the specific needs of the particular Investigation.]**

**[NAME OF INVESTIGATION]**

**UNDERTAKINGS GIVEN BY [NAME OF ADVISER] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE [XXX] CONFIDENTIALITY RING [FOLLOWING/BEFORE XXX]**

**WHEREAS**

1. [Brief overview of the Investigation (including the empowering statutory provision(s)]
	1. **See Drafting Note (‘DN’) 1 for example text for CA98, market investigations and merger inquiries**
	2. **Incorporate definitions of:**
		* **the Competition and Markets Authority (‘the CMA’)**
		* **relevant legislation e.g. the Enterprise Act 2002 (‘the EA02’), the Competition Act 1998 (‘the CA98’) and**
		* **‘the Investigation’.**
2. [Background information: i.e. description of stage of the Investigation; CMA/CAT actions so far]
	1. **See DN2 for example text**
3. [Background continued: e.g. request made by party/ies; rationale for the disclosure which is being facilitated by these undertakings etc.]
4. The CMA has decided to disclose the following:
5. [Description of disclosed material]
6. [Description of disclosed material]
7. [etc.]

(the ‘Disclosed Material’) by means of a confidentiality ring commencing on [insert date] (‘the Confidentiality Ring’). A reference to the Disclosed Material in these undertakings includes a reference to any part of the Disclosed Material.

**See DN 3 and DN4**

*OR*

[*The CMA has decided to disclose the material set out in Schedule 1 [which may be amended from time to time by the CMA] (‘the Disclosed Material’) by means of a confidentiality ring commencing on [insert date] (‘the Confidentiality Ring’)*. *A reference to the Disclosed Material in these undertakings includes a reference to any part of the Disclosed Material*]

1. The CMA considers that the ‘Disclosed Material’ [is/includes] specified information within the meaning of section 238 of the [EA02] [Enterprise Act 2002 (‘the EA02’)] to which the general restriction on disclosure in section 237 of the EA02 applies. The CMA may disclose specified information to any other person in circumstances permitted by the EA02.
2. The CMA has decided to disclose the Disclosed Material [to certain parties the Investigation], [to Name of Party]] ([each a] [the] ‘Relevant Party’) by means of the Confidentiality Ring pursuant to section [X] of the EA02. [**See DN5**]. Access to the Confidentiality Ring is restricted to the [external legal and/or economic[**See DN6]** advisers] of the Relevant Parties and is provided for the sole purpose of allowing the advisers of a Relevant Party, on behalf of the Relevant Party, [to review and understand [X]], to prepare submissions and representations to the CMA regarding [X], and (if relevant) to prepare and conduct an appeal against any decision of the CMA in connection with the Investigation, including an appeal in which the Relevant Party is, or is intending to apply to be, an intervener, in which case the arrangements established by these Undertakings may be extended to apply for the purposes of such appeal (‘the Permitted Purpose’); [**See DN7**].
3. Access to the Confidentiality Ring will be granted to, and only to, an adviser:
4. who has been approved in writing by the CMA;
5. who has given written undertakings acceptable to the CMA (‘the Individual Undertakings’); and
6. if relevant, in respect of whom the adviser’s firm/employer has given written undertakings acceptable to the CMA (‘the Firm Undertakings’);

in accordance with [*the arrangements in recital (9*)][*arrangements specified by the CMA*] (each such adviser being an ‘Authorised Adviser’); [**See DN8]**

1. *[The number of Authorised Advisers is limited to [number – X] [for each Relevant Party]]* **[see DN9].**
2. *[The arrangements for obtaining CMA approval of an adviser and for giving undertakings in respect of an adviser are:*
	1. *notice of not less than [insert time – e.g. 2 CMA working days[[1]](#footnote-1)] must be given to the CMA of the date on which the adviser first wishes be granted access the Confidentiality Ring (‘the Access Date’);*
	2. *by 4pm on the CMA Working Day before the Access Date the Individual Undertakings signed by the adviser and, if relevant, the Firm Undertakings signed on behalf of the adviser’s firm/employer, must be provided to (and received by) the CMA;*
	3. *before the adviser attempts to access the Confidentiality Ring confirmation in writing must be obtained from the CMA that it has approved the adviser and has accepted the signed Individual Undertakings and, if relevant, the signed Firm Undertakings*.] [**see DN 10]**
3. Subject to the Individual Undertakings and the Firm Undertakings, the CMA will make the Disclosed Material available to [the Authorised Advisers] [Name of Adviser] by encrypted Egress email [*unless otherwise specified in Schedule 1]*. [Each Authorised Adviser] [[Name of Adviser] will then be permitted:
	1. [*provided the Disclosed Material is password-protected,* to download the Disclosed Material via Egress onto a computer or into a secure folder on a server of the Authorised Adviser’s firm/employer; and
	2. to print copies provided each Authorised Adviser only has one hard copy in existence at any one time (each a ‘Permitted Copy’)

[**See DN11]**

1. Disclosure of the Disclosed Material other than in accordance with the Individual Undertakings is not permitted without the express and prior written consent of the CMA. Breach of the Individual Undertakings by an Authorised Adviser may result in:
	1. the CMA:
		1. terminating the Authorised Adviser’s access to the Confidentiality Ring and refusing the Authorised Advisor access to any subsequent disclosure room or confidentiality ring run by the CMA, whether relating to the Investigation or any other investigation;
		2. where relevant, referring the breach to the Authorised Adviser’s regulatory body which may decide to take disciplinary action in relation to the breach.
	2. a breach by the Authorised Adviser of his or her obligations under Part 9 of the EA02 (as regards the disclosure and use of the Disclosed Material) which constitutes a criminal offence under section 245 of the EA02;
2. [Name of Firm] has been instructed by [Name of Party], which is a Relevant Party, for the purpose of providing [legal/economic] advice to [Name of Party] in relation to the Investigation. [Name of Adviser] is [employed by [Name of Firm] as a [legal/economic adviser]] [a partner in [Name of Firm]].

**NOW THEREFORE**

I, [Name of Adviser], [Job title] at [Name of Firm], which has been engaged by [Name of Party] in connection with the Investigation, undertake to the CMA in my own name:

1. To access the Disclosed Material only through the Permitted Copies and in the secure electronic format provided by the CMA using only:
	1. a computer which is password-protected and accessible to only the Authorised Advisers of [Name of Party] [Name of Firm] ; or
	2. a secure folder on the server of the Authorised Adviser’s firm/employer to which only the Authorised Advisers of [Name of Party] [Name of Firm] have access (such access to be controlled by appropriate information barriers and privacy settings of no less a standard than would be applied to personal data or price sensitive client information held by the Authorised Adviser’s firm/employer, or the firm/employer’s own commercially sensitive information, and any variation of these access permissions is to be made only with the express written consent of the CMA);
2. To use the Disclosed Material for, and only for, the Permitted Purpose;
3. [Save as provided in paragraphs 6 and 7], to hold the Disclosed Material in strict confidence and not to disclose or make available in any manner the Disclosed Material to any other person (including any other legal adviser, economic adviser, officer or employee of [Name of Firm] and [Name of Party]) except:
	1. another Authorised Adviser of [Name of Party], or
	2. a member of CMA staff or a CMA panel member working on the Investigation (or the court if in the course of an appeal),

(such a person being a ‘Non-Authorised Person’);

1. Not to make any electronic or non-electronic copy in any format of the Disclosed Material other than the Permitted Copies, save that I may copy the Disclosed Material for, and only for, the purposes of preparing a [summary,] report or submission within the scope of the Permitted Purpose;
2. To ensure that, [save as provided in paragraphs 6 and 7], any document (including any [summary], report or submission) I prepare, or analysis I undertake, which contains or refers to the Disclosed Material or which derives wholly or partially from the Disclosed Material is not used, disclosed or made available in any way to:
	1. disclose the Disclosed Material to any Non-Authorised Person; or
	2. enable or assist any Non-Authorised Person to gain an understanding of [Name of Party]’s position or potential future position in any market relative to any other market operator (other than relative to a market wide benchmark) [any other description of information]; [**DN12]**

**[DN 13 – sharing with clients]**

1. [For the avoidance of doubt] while I may share a non-confidential version of any report or submission with [Name of Party] to facilitate the Permitted Purpose, I will ensure, including by making any necessary redactions, that (i) the restrictions in paragraph [5] are complied with in relation to any such non-confidential report or submission; and that (ii) the non-confidential report or submission is only shared with [Name of Party] after the CMA has confirmed in writing to an Authorised Adviser of [Name of Party] that the non-confidential [summary]/report or submission does not include any of the Disclosed Material and meets the requirements in paragraph 5.
2. [*While I may share [a general summary of/the conclusion of my assessment of/key trends arising from] the Disclosed Material with [Name of Party], to facilitate the Permitted Purpose [only to the extent that…], I will ensure that, if so required by the CMA, [the non-confidential [summary] is only shared with [Name of Party] after the CMA has confirmed in writing to an Authorised Adviser of [Name of Party] that the non-confidential summary does not include any of the Disclosed Material and meets the requirements in paragraph 5.*]

[*or*]

[*such general summary/conclusion/key trends] is/are not used or made available in any way to:*

* 1. *disclose to any Non-Authorised Person, [specific] information regarding:*
		1. *the Disclosed Material relating to [X]; and*
		2. *the Disclosed Material relating to [Y];*
	2. *enable or assist any Non Authorised Person to gain an understanding of* [*Name of Party]’s position or potential future position in any market relative to any other market operator (other than relative to a market wide benchmark) and in particular does not reveal [description of information which should not be given to the party – if different from 7a(i) and (ii)];*

*[and, if so required by the CMA, that these are not shared with [Name of Party] until after the CMA has confirmed in writing to an Authorised Adviser of [Name of Party] that they comply with the requirements above ]*

1. To ensure that any submission I prepare containing or referring to the Disclosed Material is submitted to the CMA separately from any other submission on behalf of [Name of Party], highlights any Disclosed Material *[and is accompanied by any working files (including ‘stata-do-files’) used to perform any analysis referred to in the submission*]; **DN 14**
2. To keep secure at all times:
	1. the Disclosed Material and the Permitted Copies provided to me; and
	2. any [summary] report, submission or other document prepared by or provided to me which contains or refers to the Disclosed Material

(together the ‘Relevant Material and Documents’), including in a manner which means the Relevant Material and Documents are not accessible to any Non-Authorised Person;

1. That, save as provided in paragraph 11, within 5 CMA working days of the relevant concluding event I will:

* 1. return to the CMA or destroy the Relevant Material and Documents or, where the Relevant Material and Documents are in electronic form and their destruction is not possible, to return them to the CMA or render them inaccessible from any computer system, disk or device so that they are not readily available to any person; and
	2. where the Relevant Material and Documents are destroyed or rendered inaccessible, inform the CMA of the manner of the destruction or rendering inaccessible;

The relevant concluding event is:

1. if there is an appeal against a decision of the CMA in connection with the Investigation in which [Name of Party] is a party or is intervening, the conclusion of the appeal;
2. if there is no such appeal, the expiry of the period for bringing such an appeal, or
3. if I cease to advise [Name of Party] in relation to the Investigation or appeal before the event specified by (i) or (ii), my ceasing to advise [Name of Party] in relation to the Investigation or appeal.
4. That, while the Authorised Advisers of [Name of Firm] may retain one copy (between them) of the Disclosed Material, Permitted Copies and any [summary] report, submission or other document which contains or refers to the Disclosed Material if it is required to comply with [Name of Firm]’s professional indemnity insurance policy or any applicable law, legislation or court order, I will ensure that:
	1. the copy is stored securely in accordance with the undertaking in paragraph 9;
	2. the CMA is notified of the retention within 5 CMA working days of the relevant concluding event specified by paragraph 10(i) or (ii); and
	3. the CMA is consulted as far as practicable prior to any disclosure of the copy under [Name of Firm]’s professional indemnity insurance policy or any applicable law, legislation or court order;
5. To notify the CMA immediately if I become aware of or suspect that there has been a breach of:
	1. these undertakings;
	2. the Individual Undertakings given by another Authorised Adviser of [Name of Party] [Name of Firm]]; or
	3. [the Firm Undertakings given in respect of any of the Authorised Advisers of Name of Party*]].*

**PROVIDED THAT**

These undertakings shall not apply to any part of the Disclosed Material that:

1. belongs or relates solely to [Name of Party] or to [Name of Party]’s business and which does not include any confidential information belonging to, relating to or deriving solely or partially from any other party to the Investigation;
2. is information that has previously been disclosed by the CMA to [Name of Party in the Investigation;]
3. at the time of disclosure is in the public domain or subsequently comes into the public domain, except through breach of these undertakings, the Individual Undertakings given by other Authorised Advisers or the Firm Undertakings;
4. is required to be disclosed by law, legislation or court order, as long as, and unless prohibited by law, legislation or court order, I consult with the CMA as far as practicable prior to the proposed disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure; or
5. is covered by a confidentiality ring established by the Competition Appeal Tribunal in the course of an appeal against the decision of the CMA in connection with the Investigation in which [Name of Party] is a party or is intervening.

**AND IN AGREEMENT THAT**

These undertakings shall be governed by and construed in accordance with English law and I submit to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with these undertakings.

[Name of Party] has given full and informed consent to the terms of these undertakings, including the restrictions placed upon [Name of Adviser] on the disclosure of information by these undertakings.

[Name of Adviser] of [Name of Firm]

[*signature*]

[Date]

# Confidentiality Ring Undertakings: Firm

**[When drafting the Undertakings using this template, your attention is drawn to the ‘Confidentiality Ring Undertakings: Drafting Notes which will help clarifying some concepts and in tailoring this document to the specific needs of the particular Investigation.]**

**[NAME OF INVESTIGATION]**

**UNDERTAKINGS GIVEN BY [NAME OF FIRM] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE [XXX] CONFIDENTIALITY RING [FOLLOWING/BEFORE XXX]**

**WHEREAS**

1. [Brief overview of the Investigation (including the empowering statutory provision(s)]
	1. **See the Drafting Guide at Drafting Note (‘DN’) 1 for example text for CA98, market investigations and merger inquiries**
	2. **Incorporate definitions of:**
		1. **the Competition and Markets Authority (‘the CMA’)**
		2. **relevant legislation e.g. the Enterprise Act 2002 (‘the EA02’), the Competition Act 1998 (‘the CA98’) and**
		3. **‘the Investigation’.**
2. [Background information: i.e. description of stage of the Investigation; CMA/CAT actions so far]
	1. **See DN2 for example text**
3. [Background continued: e.g. request made by party/ies; rationale for the disclosure which is being facilitated by these undertakings etc.]
4. [The CMA has decided to disclose the following:
5. [Description of disclosed material]
6. [Description of disclosed material]
7. [etc.]

(the ‘Disclosed Material’) by means of a confidentiality ring commencing on [insert date] (‘the Confidentiality Ring’).] A reference to the Disclosed Material in these undertakings includes a reference to any part of the Disclosed Material;

**See DN3 and DN4**

*OR*

*[The CMA has decided to disclose the material set out in Schedule 1 [which may be amended from time to time by the CMA] (‘the Disclosed Material’) by means of a confidentiality ring commencing on [insert date] (‘the Confidentiality Ring’). A reference to the Disclosed Material in these undertakings includes a reference to any part of the Disclosed Material;]*

1. The CMA considers that the ‘Disclosed Material’ [is/includes] specified information within the meaning of section 238 of the [EA02] [Enterprise Act 2002 (‘the EA02’) to which the general restriction on disclosure in section 237 of the Act applies. However, the CMA may disclose specified information to any other person in circumstances permitted by the EA02.
2. The CMA has decided to disclose the Disclosed Material [to certain parties], [to Name of Party] ([each a] [the] ‘Relevant Party’ /] by means of the Confidentiality Ring pursuant to section [X] of the EA02. [**See DN5**]. Access to the Confidentiality Ring is restricted to the [external legal and/or economic **See DN6**] advisers] of the Relevant Parties and is provided for the sole purpose of [allowing the advisers of a Relevant Party, on behalf of the Relevant Party, to review and understand [X], to prepare submissions and representations to the CMA regarding [X], and (if relevant) to prepare and conduct an appeal against any decision of the CMA in connection with the Investigation, including an appeal in which the Relevant Party is, or is intending to apply to be, an intervener in which case the arrangements established by these Undertakings may be extended to apply for the purposes of such appeal (‘the Permitted Purpose’) [**See DN7**]
3. Access to the Confidentiality Ring will be granted to, and only to, an adviser:
4. who has been approved in writing by the CMA;
5. who has given written undertakings acceptable to the CMA (‘the Individual Undertakings’); and
6. where relevant, in respect of whom the adviser’s firm/employer has given written undertakings acceptable to the CMA (‘the Firm Undertakings’);

in accordance with [*the arrangements in recital (9*)] [*arrangements specified by the CMA*] (each such adviser being an ‘Authorised Adviser’); [**See DN8]**

1. [*The number of Authorised Advisers is limited to [number – X] [for each Relevant Party*]]; **[see DN9].**
2. *The arrangements for obtaining CMA approval of an adviser and for giving undertakings in respect of an adviser are:*
	1. *notice of not less than [insert time – e.g. 2 CMA working days] must be given to the CMA of the date on which the adviser first wishes be granted access the Confidentiality Ring (‘the Access Date’);*
	2. *by 4pm on the CMA Working Day before the Access Date the Individual Undertakings signed by the adviser and, if relevant, the Firm Undertakings signed on behalf of the adviser’s firm/employer, must be provided to (and received by) the CMA;*
	3. *before the adviser attempts to access the Confidentiality Ring, confirmation in writing must be obtained from the CMA that it has approved the adviser and has accepted the signed Individual Undertakings and, if relevant, the signed Firm Undertakings;*
3. Subject to the Individual Undertakings and the Firm Undertakings, the CMA will make the Disclosed Material available to [the Authorised Advisers] [Name of Adviser] by encrypted Egress email [*unless otherwise specified in Schedule 1*]. [Each Authorised Adviser] [[Name of Adviser] will then be permitted:
	1. [*provided the Disclosed Material is password-protected,* to download the Disclosed Material via Egress onto a computer or into a secure folder on a server of the Authorised Adviser’s firm/employer]; and
	2. to print copies provided each Authorised Adviser only has one hard copy in existence at any one time (each a ‘Permitted Copy’)
4. Disclosure of the Disclosed Material other than in accordance with the Individual Undertakings, is not permitted without the express and prior written consent of the CMA. Breach of the Individual Undertakings by an Authorised Adviser or of the Firm Undertakings by an Authorised Adviser’s firm/employer may result in:
	1. the CMA:
		1. in the case of a breach by an Authorised Adviser, terminating the Authorised Adviser’s access to the Confidentiality Ring and refusing the Authorised Advisor access to any subsequent disclosure room or confidentiality ring run by the CMA, whether relating to the Investigation or any other investigation;
		2. in the case of a breach by a firm/employer, terminating the firm/employer’s participation in the Confidentiality Ring and refusing a request to participate in any subsequent disclosure room or confidentiality ring run by the CMA, whether relating to the Investigation or any other investigation;
		3. where relevant, referring the breach to the regulatory body of the Authorised Adviser or firm/employer which may decide to take disciplinary action in relation to the breach;
	2. a breach of the obligations under Part 9 of the EA02 (as regards the disclosure and use of the Disclosed Material) which constitutes a criminal offence under section 245 of the EA02.
5. [Name of Firm] has been instructed by [Name of Party], which is a Relevant Party, for the purpose of providing [legal/economic] advice to [Name of Party] in relation to the Investigation. [Name of Adviser[s]] [is/are] employed by [Name of Firm] as a [legal/economic advisers]] [is/are] [a] partner[s] in [Name of Firm]].

**NOW THEREFORE**

[Name of Firm] which has been engaged by [Name of Party] in connection with the Investigation undertakes to the CMA that:

1. It will give only Authorised Advisers of [Name of Party *or* Name of Firm] access to the Disclosed Material and only in accordance with the terms of the Individual Undertakings given by those Authorised Advisers; **DN 15**
2. It will notify the CMA immediately if it becomes aware of or suspects that there has been any breach of:
	1. these undertakings;
	2. the Individual Undertakings given by an Authorised Advisers of [Name of Party *or* [Name of Firm]; or
	3. [the other Firm Undertakings given in respect of any of the Authorised Advisers of [Name of Party]’. **DN 15**
3. It will notify the CMA immediately if any Authorised Adviser ceases to be at [Name of Firm] before:
	1. if there is an appeal against a decision of the CMA in connection with the Investigation in which [Name of Party] is a party or is intervening, the conclusion of the appeal;
	2. if there is no such appeal, the expiry of the period for bringing such an appeal.

Further, [Name of Firm] undertakes to the CMA to use its reasonable endeavours to ensure that the Authorised Advisers at [Name of Firm] comply with the Individual Undertakings which they have given.

**PROVIDED THAT**

These undertakings shall not apply to any part of the Disclosed Material that:

1. belongs or relates solely to [Name of Party] or to [Name of Party]’s business and which does not include any confidential information belonging to, relating to or deriving solely or partially from any other party to the Investigation;
2. is information that has previously been disclosed by the CMA to [Name of Party] in the Investigation;
3. at the time of disclosure is in the public domain or subsequently comes into the public domain, except through breach of these undertakings, the Individual Undertakings or the other Firm Undertakings;
4. is required to be disclosed by law, legislation or court order, as long as, and unless prohibited by law, legislation or court order, [Name of Firm] consults with the CMA prior to the proposed disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure; or
5. is covered by a confidentiality ring established by the Competition Appeal Tribunal in the course of an appeal against the decision of the CMA in connection with the Investigation in which [Name of Party] is a party or is intervening.

**AND IN AGREEMENT THAT**

These undertakings shall be governed by and construed in accordance with English law and [Name of Firm] submits to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with these undertakings.

[Name of Party] has given full and informed consent to the terms of these undertakings and the Individual Undertakings given by the Authorised Advisers of [Name of Firm], including the restrictions placed upon those Authorised Advisers on the disclosure of information.

 [Name of Firm]

[*signature*]

[Date]

# Confidentiality Ring Drafting Notes

**CONFIDENTIALITY RING UNDERTAKINGS: DRAFTING NOTES**

**Drafting Note (‘DN’) 1: “Brief overview of the Investigation’**

The following examples provide a reflection on the amount and nature of the information to be included in the recital:

CA98 example: ‘In exercise of its powers under section 25 of the Competition Act 1998, the Competition and Markets Authority (‘CMA’) is investigating the conduct of [name of party] for suspected breaches of Chapter [I] / [II] of CA98 and/or the Treaty of the functioning of the European Union (‘the Investigation’).’

Markets example (Phase 2): ‘On [Date], in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (‘the Act’), the Competition and Markets Authority (CMA) made a reference for a market investigation in to the supply or acquisition of [relevant market] (‘the Investigation’).’

Mergers example (Phase 2): ‘On [Date], in exercise of its powers under [section 22] / [section 33] of the Enterprise Act 2002 (‘the Act’), the Competition and Markets Authority (CMA) referred the [completed] [anticipated] acquisition by [name of acquiring party] of [name of acquired party] / [name of acquired party assets] for investigation and report (‘the Investigation’).’

**DN2: ‘Background Information’**

CA98 example: ‘On [Date] the CMA issued a Statement of Objections (the ‘S.O’) to [Name of Party] and [Name of Party] (together ‘the Parties’) alleging, on a provisional basis, a breach of the prohibition contained in Chapter [I] / [II] of CA98, and subsequently gave the Parties an opportunity to inspect the case file.’

Mergers and Markets example: ‘On [Date] the CMA published its provisional findings in the Investigation (‘the Provisional Findings’), in which it found a [summary of findings] and a consequent [substantial lessening of competition] / [adverse effect on competition] [in the [X] market].’

**DN3: ‘Description of the material to be disclosed’**

This section of the template is the opportunity to describe what is being disclosed in the ring. The more descriptive and specific this section can be, the better.

If the description is lengthy it may be preferable to put it in a schedule. The second version of recital (4) provides for this. If required, this section reserves the ability to amend the description so that material can be added to the confidentiality ring. However, any amendment should be done formally, for example, by the advisers signing (or at least acknowledging receipt in writing of) a replacement schedule. The revised schedule (or other amendment) should be kept by the CMA with the original undertakings.

**DN4: ‘Disclosed Material’**

The defined term which has been chosen is ‘Disclosed Material’, as this is a general term which can be used to cover data, information or documents.

**DN5: Statutory Gateway**

The CMA may disclose specified information under the Enterprise Act 2002 (‘the EA02’) if one or more statutory gateway applies. The gateway most likely to be relevant is that in section 241: disclosure is made for the purpose of facilitating the exercise by the CMA of any of its statutory functions, though the ‘consent’ gateway in section 239 may also be relevant.

**DN6: Type of Adviser**

The question of who is permitted to participate in a confidentiality ring or disclosure room is determined on a case by case basis, taking into account matters including the nature of the disclosed information and the reason for its disclosure. However, the CMA’s usual approach is to limit access to the **parties’ external legal and/or economic advisers**. Occasionally, however, it may be appropriate to allow participation by internal personnel such as employees of parties.

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**DN7: the ‘Permitted Purpose’**

In addition to the reference provided in the Undertakings regarding allowing the parties to be provided with the gist, the following are possibilities for the Permitted Purpose:

1. To review the CMA’s figures, economic analysis and/or modelling.
2. To enable the parties’ Advisers to further understand the CMA’s analysis in order to allow such Advisers to prepare submissions and representations to the CMA.

The following text could be used for either, adapted as appropriate:

Example text:

‘for the purpose of understanding and providing observations to the CMA on the latter’s [Provisional Findings] / [Statement of Objections] / [[X] Working Paper] / [Insured Price Analysis] / [Price Concentration Analysis].’

For CA98 cases, consider also:

1. To enable [Name of Party] to exercise fully its rights of defence.

To enable the same Undertakings to be used in the event of any appeal, Permitted Purpose is defined to include use for such an appeal.

**DN8: Definition of Authorised Adviser**

Note, this definition does not limit the definition of an Authorised Adviser to the Authorised Adviser of a particular party.

**DN9: Limit on the number of Authorised Advisers**

This recital is optional – it may be used if helpful to clarify the point.

**DN 10**

This recital is optional as the arrangements for obtaining CMA approval of an adviser and giving undertakings could just as well be set out in other communications with advisers.

Receipt of scanned copies of signed undertakings is acceptable to the CMA.

**DN11: Method of Disclosure**

The usual way to make the Disclosed Material available is via encrypted Egress email. The email can be sent to each Authorised Adviser who can download and print his or her own copy or the email can be sent to a named Authorised Adviser who can then distribute hard copies to the other Authorised Advisers in his or her firm.

Where a stricter regime is wanted and a Confidentiality Ring with additional protections (also referred to as Confidentiality Ring+) is envisaged, the Disclosed Material is/may be provided on a hard drive.

There may be other ways of making information available, for example by encrypted CD Rom/ Memory stick being handed to the party’s legal advisers who then have permission to provide copies to the other permitted advisers of that party. These possibilities should be discussed on a case by case basis.

**DN 12**

Paragraph 5(b) is intended to cover confidential/market sensitive information that, while not falling within the definition of Disclosed Material, is created or derived from the Disclosed Material.

**DN 13**

Paragraphs 6 and 7 may be mixed and matched depending on what, in the circumstances of the case, it is considered that advisers may be able to share with their clients. (For example, one could simply have paragraph 6 but not 7, or both paragraph 6 and 7 etc.)

Note the second option in paragraph 7 (by implication) permits advisers to share some Disclosed Material with their clients.

If a stricter regime is appropriate, **requirements for the CMA to check what is shared could be added here.** For example, paragraph 6 could be redrafted:

*That [for the avoidance of doubt,] while I may share a non-confidential version of any [summary], report or submission with [Name of Party] to facilitate the Permitted Purpose, I will not share any such document until [written] confirmation has been obtained from the CMA that the restrictions in paragraph [5] have been complied with (including by making the necessary redactions) in relation to that document.*

**DN 14**

Provision for supplying working files to the CMA should be considered where it is expected that advisers will undertake quantitative work/analysis on the basis of the Disclosed Material. Such files will enable the CMA to understand and assess the merits of the arguments/challenges made by advisers.

**DN 15**

The firm undertakings can relate to the Authorised Advisers of either the particular firm or (more broadly) the particular Party (this latter would include Authorised Advisers from different firms e.g. from a firm of solicitors and a firm of economists). The broader option [should be used if firm A is going to allow Authorised Advisers from firm B to work on the Disclosed Material in firm A’s offices.

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1. A ‘CMA working day’ is any day of the week, Monday to Friday, on which the CMA’s offices are open (and excludes public or bank holidays). [↑](#footnote-ref-1)