# PRO FORMA TEMPLATES FOR CMA DISCLOSURE ROOM UNDERTAKINGS

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

1. **External advisers retained by parties to advise in relation to CMA investigations (see *Disclosure Room Undertakings: Adviser*)**
2. **The firms to which those advisers belong (see *Disclosure Room 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 Disclosure Room 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; the types of document proposed to be prepared in a Disclosure Room, etc.**

.

# Disclosure Room Undertakings: Adviser

**When drafting the Undertakings using this template, your attention is drawn to the ‘Disclosure Room Undertakings: Drafting Notes (‘DN’) which will help clarifying certain concepts and tailoring this document to the specific needs of the investigation at hand.**

**These undertakings and rules cover both the case where the Disclosure Room is used to prepare a Report to be taken out by advisers and the case where advisers prepare their submissions to the CMA in the disclosure room. Your attention is drawn to Drafting Note 14.**

**[NAME OF INVESTIGATION]**

**UNDERTAKINGS GIVEN BY [Name of Adviser] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE [X] DISCLOSURE ROOM [BEFORE/FOLLOWING X] [DN1]**

**WHEREAS**

1. [Brief overview of the Investigation (including the empowering statutory provision(s)]
   1. **See DN2 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 DN3 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 disclosure room commencing on [insert date] (‘the Disclosure Room’). A reference to the Disclosed Material in these undertakings includes a reference to any part of the Disclosed Material;

**See DN4 and DN5**

*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 disclosure room commencing on [insert date] (‘the Disclosure Room’).* *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 (‘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 Disclosure Room pursuant to section [X] of the EA02. [**See DN6**]. Access to the Disclosure Room is restricted to the [external legal and/or economic[**See DN7]** 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 DN8**].
3. Access to the Disclosure Room will be granted to, and only to, an adviser:
   1. who has been approved in writing by the CMA;
   2. who has given written undertakings acceptable to the CMA (‘the Individual Undertakings’); and
   3. 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)] OR [arrangements specified by the CMA*] (each such adviser being an ‘Authorised Adviser’); [**See DN9]**

1. [*The number of Authorised Advisers is limited to [number – X] [for each Relevant Party*] **[see DN10].**
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 to the Disclosure Room (‘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 Disclosure Room, 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. The Disclosure Room is to operate in accordance with the Disclosure Room Rules which are annexed to these undertakings and subject to the Individual Undertakings and the Firm Undertakings.
4. Disclosure, or removal from the Disclosure Room, 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 Disclosure Room 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;
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] 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], who has been engaged by [Name of Party] in connection with the Investigation undertake to the CMA in my own name:

*General*

1. To abide by the Disclosure Room Rules which are annexed to these undertakings;
2. To use the Disclosed Material for, and only for, the Permitted Purpose;
3. Save as provided in paragraphs [\*], 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 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. Save as provided in paragraph [8 or 9], not to make any electronic or non-electronic copy in any format of the Disclosed Material;
2. Save as provided in paragraph [8 or \*], not to remove the Disclosed Material from the Disclosure Room;
3. [Save as provided in paragraph [\*],] to ensure that any analysis I undertake, or any document I prepare, which contains or refers to the Disclosed Material or which derives wholly or partially from the Disclosed Material, or any knowledge I obtain in the Disclosure Room, is not used, disclosed or made available in any way to:
   1. disclose the Disclosed Material to any Non-Authorised Person;
   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]; [**DN11]**
4. 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];
   3. the Disclosure Room Rules; or
   4. [the Firm Undertakings given in respect of any of the Authorised Advisers of Name of Party]’;

*Disclosure Room Report*

1. That while I may, in order to facilitate the Permitted Purpose, prepare in the Disclosure Room, by myself or with one or more other Authorised Advisers of [Name of Party], [one report] on behalf of [Name of Party] which may contain the Disclosed Material (the ‘Report) and which may be removed from the Disclosure Room, I will ensure:
   1. the Report does not include or refer to any Disclosed Material [that is/relating to] [description of information which the CMA considers confidential/highly sensitive, hence should not leave the building
      1. ];
   2. the Report is no longer than is reasonably necessary for the Permitted Purpose;
   3. any working files (including ‘stata-do-files’) used to perform analysis referred to in the Report are saved in [X] of a laptop provided in the Disclosure Room;
   4. only one copy of the Report is removed from the Disclosure Room, subject to the procedure in sub-paragraph (e) except that :
      1. drafts of the Report may be taken into a breakout room used for internal discussion (as permitted in the Disclosure Room Rules);
      2. *[on [one/two] occasions during the period when the Disclosure Room is open and prior to removal of the Report, one copy of a draft of the Report may be removed from the Disclosure Room, subject to the procedure in sub-paragraph (e)* **DN 12***];*
   5. prior to removal of the Report [(*or a draft of the Report*)] from the Disclosure Room and no later than [time and date of last day of the Disclosure Room], the Report *[(or draft Report*)] is provided to a member of CMA staff for inspection and is removed from the Disclosure Room only after the member of CMA staff has confirmed to an Authorised Adviser of [Name of Party] that the Report [(or draft Report)] has been prepared in accordance with sub-paragraphs (a) to (d).
2. That once the Report [*or any draft Report*] has been removed from the Disclosure Room, I will ensure:
   1. the Report [or draft Report] is used for, and only for, the Permitted Purpose (which may include the preparation of one or more submissions to the CMA);
   2. any copies of the Report [or draft Report] or the Disclosed Material contained or referred to in the Report [or draft Report] I make are solely for my use or the use of any other Authorised Adviser of [Name of Party] for the Permitted Purpose and in accordance with these undertakings];
   3. I keep secure at all times:
      1. the Report [and any draft Report];
      2. all copies of the Report [or draft Report] prepared by or provided to me; and
      3. any 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. 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] and highlights any Disclosed Material.

1. That while I may, in order to facilitate the Permitted Purpose, share a non-confidential version of the Report or a non-confidential version of the submission with [Name of Party], I will not share any such document until [written] confirmation has been obtained from a member of CMA staff that the restrictions in paragraph [6] have been complied with (including by making the necessary redactions) in relation to that document.
2. **DN 13**[*That* w*hile I may share [a general, non-confidential, [summary] of the Report [including an explanation of the methodology used in the CMA’s analysis]*]*the conclusion of my assessment of/key trends arising from] 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 6.]*

[*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, 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. That save as provided in sub-paragraph [13], 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, return them to the CMA or render them permanently inaccessible to any person 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 Report and any submission or other document containing 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 [12](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;

### [Disclosure Room Submission See DN14

1. That while I may, in order to facilitate the Permitted Purpose, prepare in the Disclosure Room, by myself or with one or more of the other Authorised Advisers of [Name of Party], one or more submissions on behalf of [Name of Party] to the CMA in respect of [case team to complete] (each a ‘Confidential Submission’) which will constitute a ‘response’ to [[case team to complete], and may contain any of the Disclosed Material relating to [[case team to complete] (the ‘Sensitive Information’), I will ensure:
   1. any Confidential Submission is provided to the CMA by 5 pm [case team to insert date – usually the last day of the Disclosure Room];
   2. any working files (including ‘stata-do-files’) used to perform analysis referred to in any Confidential Submission submitted to the CMA are saved in [X] of a laptop provided in the Disclosure Room;
   3. any Confidential Submission is not removed from the Disclosure Room except that:
      1. drafts of any Confidential Submission may be taken into a breakout room used for internal discussion (as permitted in the Disclosure Room Rules);
      2. during the period after any Confidential Submission has been submitted to the CMA up to the relevant concluding event [specified by paragraph 12(i) or (ii)], Authorised Advisers of [Name of Party] will be given access to that Confidential Submission at the CMA’s offices on such terms as the CMA reasonably specifies;
2. That while I may, in order to facilitate the Permitted Purpose, prepare in the Disclosure Room, by myself or with one or more of the Authorised Advisers [Name of Party], a non-confidential version of any Confidential Submission (each a ‘Non-Confidential Submission’) which may be removed from the Disclosure Room and shared with[Name of Party, I will ensure that:
   1. any Non-Confidential Submission must not include any of the Sensitive Information, [including/in particular case team to complete];
   2. any Non-Confidential Submission must be no longer than is reasonably necessary for the Permitted Purpose;
   3. only one copy of any Non-Confidential Submission is removed from the Disclosure Room subject to the procedure in sub-paragraph (d);
   4. prior to the removal of any Non-Confidential Submission from the Disclosure Room and no later than [time and date of last day of the Disclosure Room], the Non-Confidential Submission is provided to a member of CMA staff for inspection and is removed from the Disclosure Room only after the member of CMA staff has confirmed to an Authorised Adviser of [Name of Party] that it has been prepared in accordance with sub-paragraphs (a) to (c).

**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 and the Disclosure Room Rules 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 and the Disclosure Room Rules.

[Name of Party] has given full and informed consent to the terms of these undertakings and the Disclosure Room Rules, 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]

# Disclosure Room Undertakings: Firm

**When drafting the Undertakings using this template, your attention is drawn to the ‘Disclosure Room Undertakings: Drafting Notes (‘DN’) which will help clarifying certain concepts and in tailoring this document to the specific needs of your particular investigation.**

**These undertakings and rules cover both the case where the Disclosure Room is used to prepare a Report to be taken out by advisers and the case where advisers prepare their submissions to the CMA in the disclosure room. Your attention is drawn to Drafting Note 13.**

**[NAME OF INVESTIGATION]**

**UNDERTAKINGS GIVEN BY [[Name of Firm] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE [X] DISCLOSURE ROOM [BEFORE/FOLLOWING X] [DN1]**

**WHEREAS**

1. [Brief overview of the Investigation (including the empowering statutory provision(s)]
   1. **See DN2 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 DN3 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 disclosure room commencing on [insert date] (‘the Disclosure Room’).A reference to the Disclosed Material in these undertakings includes a reference to any part of the Disclosed Material;

**See DN4 and DN5**

*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 disclosure room commencing on [insert date] (‘the Disclosure Room’). 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 (‘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 Disclosure Room pursuant to section [X] of the EA02. [**See DN6**]. Access to the Disclosure Room is restricted to the [external legal and/or economic[**See DN7]** 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 DN8**].
3. Access to the Disclosure Room will be granted to, and only to, an adviser:
   1. who has been approved in writing by the CMA;
4. who has given written undertakings acceptable to the CMA (‘the Individual Undertakings’); and
5. 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)] OR [arrangements specified by the CMA*] (each such adviser being an ‘Authorised Adviser’); [**See DN9]**

1. [*The number of Authorised Advisers is limited to [number – X] [for each Relevant Party*] **[see DN10].**
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[[2]](#footnote-2)] must be given to the CMA of the date on which the adviser first wishes be granted access the Disclosure Room (‘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 Disclosure Room, 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. The Disclosure Room shall operate in accordance with the Disclosure Room Rules which are annexed to these undertakings and subject to the Individual Undertakings and the Firm Undertakings.
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 Disclosure Room 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 Disclosure Room 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(s) of Adviser[s]] [is/are employed by Name of Firm] as a [legal/economic adviser]] [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];
   3. the Disclosure Room rules by an Authorised Adviser of [Name of Party] *or* [Name of Firm
   4. [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 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 [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]

# Disclosure Room Drafting Notes

**DISCLOSURE ROOM UNDERTAKINGS: DRAFTING NOTES**

These Drafting Notes have been prepared to assist in the preparation of Disclosure Room Undertakings. They should be read with the Disclosure Room Undertakings template, according to the instructions given in that template.

**Drafting Note (‘DN’) 1: “the [X] Disclosure Room’**

As multiple disclosure rooms may be held during the course of an investigation, it is advisable to define the disclosure room in each case by reference to the topic at issue or the material which is being disclosed. This will be helpful for case management purposes.

**DN2: 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’).’

**DN3: 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].’

**DN4: Description of material being disclosed**

This section of the template is the opportunity to describe what is being disclosed in the room. 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, it reserves the ability to amend the description. However, any amendment should be done formally, for example, by the advisers signing a replacement schedule or amendment. The revised schedule or amendment should be kept by the CMA with the original undertakings.

**DN5: Disclosed Material**

The defined term which has been chosen is ‘Disclosed Material’, as this is a more general term which could be used in a disclosure room whether that room contains data or documents or both.

**DN6: 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.

**DN7: Advisers**

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.

**DN8: 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 [X]:

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.

**DN9: Definition of Authorised Adviser**

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

**DN10: Limit on the number of Authorised Advisers**

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

**DN 11**

Paragraph 6(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

**DN12**

These arrangements for taking out drafts may be formalised depending on the circumstances.

**DN13**

Paragraphs 10 and 11 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 10 but not 11, or both etc.)

Note the second option in paragraph 11 (by implication) permits advisers to share some Disclosed Material with their clients.

If a stricter regime is envisaged, requirements for the CMA to check what is shared under paragraph 11 as well as under paragraph 10 could be added here.

**DN14: ADVISERS PREPARING SUBMISSIONS IN THE DISCLOSURE ROOM?**

The usual position is that advisers should be permitted to prepare a Report in the Disclosure Room and then prepare a submission on the basis of the Report outside the Disclosure Room. However, there may be rare occasions where case teams consider that, *submissions* should be prepared in the Disclosure Room – generally where the information is too sensitive to be permitted to leave the CMA’s offices. The template allows for case teams to provide for such an eventuality. A combination of both approaches may be used.

**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

**DN16: Format**

* CD-Rom
* USB
* Secure e-mail file transfer e.g. Egress

**DN17: Breakout rooms**

As far as practicable, more than one breakout room may be required depending on the number of Advisers involved in the disclosure.

We envisage two different uses for breakout rooms:

1. Providing a space for Advisers of the same party to discuss the Disclosed Materials

* In this situation, Advisers are permitted to take into the breakout room handwritten and typed notes prepared in the Disclosure Room or their own materials that they have been permitted to bring into the Disclosure Room. This reflects the CAT’s view, expressed in *BMI v. CC*, about the facilities which could be provided by the CMA in order to enable the Permitted Purpose to be fulfilled. However, Advisers are not permitted to take in phones, as we consider that there is too much of a risk in allowing Advisers to have materials from the Disclosure Room in a room where they also have a means of external communication, especially as no member of CMA staff will be present in the breakout room.

1. Providing a space for Advisers to make external calls

* In this situation, phones are permitted. However, no notes of any kind prepared in the Disclosure Room (or pre-existing documents) are permitted to be taken into the breakout room (although blank paper is permitted so that advisers can take notes). Given that phones cannot be taken in to the Disclosure Room, the CMA may need to assist the Advisers by retrieving the necessary phones from where they have been deposited in advance of the Disclosure Room.

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)
2. 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-2)