RESPONSE TO CMA CONSULTATION: TRANSPARENCY AND DISCLOSURE: STATEMENT OF THE CMA'S POLICY AND APPROACH

Baker & McKenzie LLP welcomes the opportunity to comment on the CMA Consultation: Transparency and Disclosure: Statement of the CMA's Policy and Approach ("the Draft Statement"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on competition law.

1. Do you consider that the Draft Statement sets out a clear statement of CMA's commitment to transparency and the reasons why it is important?

1.1 We consider that the Draft Statement clearly sets out the CMA's commitment to transparency and the reasons why it is important.

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 *Announcing a formal case opening decision.* Paragraph 3.7 of the Draft Statement: we agree that as a general principle, the CMA should be committed to providing information about its case to the parties. In our experience, there can be real lack of information provided to parties that are subject to a CA98 investigation, though we recognise that the case initiation letters procedure set out in the OFT's guidance on investigation procedures in competition ("the CA98 Guidance") seeks to address this. Both the Draft Statement and the CA98 Guidance state that the CMA/OFT will provide a "brief description" of the case. It would be helpful if the CMA would clarify that the description will contain a sufficient amount of detail to enable the parties concerned to properly understand the case. Transparency will be improved if the CMA focusses on providing high quality information to the parties at the outset.

2.2 In addition, we consider that the information provided to the parties at this stage should identify the source of the investigation, for example, the name of a complainant. The OFT's current Transparency Statement [OFT1234] states that it will consider on a case by case basis whether or not to provide "something like a case initiation letter to complainants". We disagree with this and consider that the CMA should, in this consultation, state that complainants will not receive such information. The interests of justice do not require a complainant to receive information from the CMA about the progress of the case. There is a risk that providing case initiation information to the complainant will serve the complainant's commercial interests, for example, by enabling the complainant to make negative comments to the media about the CMA's developing case. It is sufficient that the complainant will in due course receive a non-confidential version of the Statement of Objections so there is no need for it to receive any additional information at this stage.

2.3 *Case opening announcement.* Paragraph 3.9 of the Draft Statement: we have concerns about the level of information to be published in the case opening announcement. Whilst there is clearly merit in providing the parties under investigation with detailed information about the case against them, the CMA should not publish the same level of detail on its website. Since the introduction of the CA98 Guidance, the information contained in the OFT's case opening notices has been relatively high-level and we hope this continues to be the case with the CMA. We are concerned that the Draft Statement does not rule out naming the parties

involved in the case opening announcement. Identification of the parties at such an early stage could be highly detrimental. There would inevitably be an adverse effect on the companies' share prices, on-going commercial relationships, and public image. We therefore believe that the CMA should state in the final Statement that it will not name parties in the case opening announcement.

2.4 *Engagement with relevant parties and announcements during a case.* We consider that it is good practice for the CMA to share its provisional thinking with the parties as this creates certainty for the parties and increases efficiency. In our view, the CMA should share its provisional (and indeed its developing) thinking with the parties as normal working practice, unless there is a good reason not to, which the CMA should set out in a letter to the parties.

2.5 However, we note that in paragraph 3.13 the CMA states that it will "take a flexible approach to sharing its developing thinking and/or evidence with parties directly involved and other interested persons". This is a rather vague statement and is not clear on what basis the CMA would make the decision as to whether or not its developing thinking should be shared, particularly with respect to CA98 investigations.

2.6 In addition, the CMA should clarify that, with respect to CA98 investigations, it will not share its provisional thinking more widely than with the parties to the investigation and the Formal Complainant (as set out in CA98 Guidance). Wider dissemination would create the same negative effects as described above in relation to case opening announcements due to the sensitive nature of the information involved.

2.7 *Requests for information.* We agree that the CMA should issue draft information requests to parties and would encourage it to discuss these drafts with the parties at the outset as a matter of practice. This will enable the parties and the CMA to work together efficiently to put together a sensible information request which can be met in realistic timeframes. As the Draft Statement recognises, it is vital for confidentiality to be respected by the CMA. At paragraphs 4.15 the CMA states that an example information that is unlikely to be confidential is "financial information or certain other data relating to a business which is more than two years old". It not clear what is meant by "certain other data" so this should be clarified in the final Statement.

2.8 *Disclosure of information obtained by the CMA.* We support the CMA's proposal to use confidentiality rings and data rooms in certain circumstances. However we note that the CMA proposes to allow the parties' legal advisers to use a data room only to carry out an assessment of a specific set of qualitative documents in "exceptional circumstances." It is not clear what would amount to "exceptional circumstances" so this needs to be clarified.

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 the other UK public authorities and overseas authorities?

3.1 *Disclosure to the UK public authorities.* We note that where the CMA discloses information to another authority to facilitate the exercise of the CMA's statutory functions, it will not generally give the persons to whom that information relates notice of the disclosure. In our view the CMA should always give such notice to the relevant persons as they have a right to know who has access to their information, particularly where that information is of a sensitive nature. The parties should also be given a reasonable opportunity to object in writing to any proposed disclosure. The same applies to information disclosed by the CMA to other public authorities to facilitate the exercise of the receiving authority's functions. If the CMA is minded to go ahead with a proposed disclosure after receiving objections from the relevant owner of the information, the CMA should set out its reasons in writing for proceeding with the disclosure. This may also be a matter that should be put to the Procedural Adjudicator in the case of CA98 investigations.

3.2 As a general comment, the Draft Statement provides much less detail on disclosure to the UK public authorities than the Competition Commission ("CC") Guidance: *Disclosure of information by the Competition Commission to other public authorities* [April 2006]. In our view the Draft Statement should incorporate a similar level of detail. For example, the Draft Statement does not clearly explain how the CMA will verify if there is an available statutory gateway to make a disclosure whereas the CC guidance provides an explanation. Also, the CMA does not explain how it will assess whether the disclosure is "necessary for the purpose", whereas the CC document states that the CC will consider whether the requesting authority would be able to obtain the information from another source. We consider that the CMA should apply similar principles in its assessment.

3.3 *Cooperation with overseas public authorities.* We consider that more detail in this section would be helpful. For example, will the CMA give notice to the relevant owner of the information prior to disclosure to the overseas authority? Will the owner of the information have the opportunity to object to any proposed disclosure and how will any such objections be addressed by the CMA? In our view the owner of the information should be entitled to such notice and have the opportunity to object.

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 refer to our responses to questions 2 and 3.

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

5.1 We consider that the Draft Statement is user friendly in terms of language. Some more detail would be helpful in respect of certain areas as identified above.

5.2 It would also be useful, in the final Statement, to include cross-references to other relevant guidance documents.

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

6.1 We have no additional comments.

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 to be put to the CMA Board for adoption by the CMA?

7.1 We have no comments on this list.

BAKER & McKENZIE

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