



Chairman's Guidance on Disclosure of Information in
Merger Inquiries, Market Investigations and Reviews of
Undertakings and Orders accepted or made under the
Enterprise Act 2002 and Fair Trading Act 1973

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1. Introduction

- 1.1 This is the Guidance of the Chairman of the Competition Commission (the CC Chairman) to the groups of the Competition Commission (the CC) appointed to consider merger inquiries and market investigations and to review undertakings and orders under the Enterprise Act 2002 (the Act) and the Fair Trading Act 1973 (FTA 1973) (referred to below as 'Groups') on the disclosure of information. The Guidance has been issued by the CC Chairman under paragraphs 19A (7) and (8) of Schedule 7 to the Competition Act 1998 following consultation with the members of the CC and other appropriate persons.
- 1.2 The Guidance explains the CC's transparency aims and the statutory framework relating to the CC's handling and disclosure of information. It provides guidance on disclosure during merger inquiries, market investigations and reviews of undertakings and orders. Finally, it provides guidance on various practical aspects of handling information received and requests for confidentiality.
- 1.3 The Guidance should be read in conjunction with the CC's *Rules of Procedure*,¹ which bind Groups.

2. Transparency aims

- 2.1 The CC aims to be open and transparent in its work while, as appropriate, maintaining the confidentiality of information that it obtains during its inquiries and reviews.²
- 2.2 Transparency facilitates inquiries for a number of reasons:
 - (a) First, it is a means of achieving due process and of ensuring that by having a better understanding of the CC's analysis affecting them, the main parties in inquiries are treated fairly.
 - (b) Secondly, it enables other interested persons, such as consumers and their representative bodies, suppliers and customers and other persons who may be affected by the CC's decision, to understand the issues that the CC is considering and then to form effectively their input to the process.
 - (c) Thirdly, transparency helps main parties and other interested persons when they are providing the CC with information, including identifying inaccuracies and incomplete or misleading information.
 - (d) Fourthly, as a result of the above, the effectiveness, efficiency and quality of CC inquiries and decisions are improved.

3. Scope and application of this Guidance

- 3.1 The Guidance applies to all merger and market inquiries investigated by the CC and also to the review by the CC of undertakings accepted and orders made under the Act and the FTA 1973. It applies throughout these inquiries or reviews (for example,

¹ *Competition Commission Rules of Procedure, 2006 (CC1)*.

² Unless stated to the contrary, reference to inquiries is to merger inquiries, and market investigations. References to reviews are to reviews of undertakings and orders under the Act or the FTA 1973.

from the reference through to final determination, including the reconsideration of any decisions that are remitted back to it).

- 3.2 The Guidance provides guidance on the treatment of information as provided for in [Part 9](#) of the Act.³
- 3.3 Although this Guidance sets out the general framework within which the CC considers disclosure issues, the circumstances of an individual case (including practical considerations) may call for a flexible approach to the means by which the CC achieves its transparency aims.⁴ There can be many reasons for this including, for example:
- (a) the nature of the inquiry or review—for example, market investigations typically involve several main parties, and there is often widespread interest in the investigation leading to extensive use of the CC's website as a means of disclosure;
 - (b) the nature of the information—the information may be confidential information or may be information to which the Data Protection Act 1998 applies so it may be appropriate for any disclosure to be on a limited and restricted basis;
 - (c) the relevance of the information to the case—the information may be confidential but nonetheless disclosure may be necessary because of its relevance; and
 - (d) practical and timing considerations—for example, in a merger inquiry information about the CC's developed thinking on remedies and submissions received may be included in a remedies working paper provided to the main party but not usually published.⁵
- 3.4 The Guidance reflects the current practices of the CC. However, the CC is continuously developing its procedures as it aims to develop best practice. If a Group encounters a situation not covered in this Guidance, or if it considers that it wishes to depart from the Guidance, the Chairman of the Group should normally consult the CC Chairman.

4. Statutory considerations relevant to disclosure

4.1 The Act imposes a general restriction on the disclosure by the CC of 'specified information'. Specified information includes information that the CC obtains in merger inquiries or market investigations,⁶ but does not include information which is already lawfully in the public domain.⁷ Where that information relates to the affairs of an individual or to the business of an undertaking disclosure is prohibited during the lifetime of the individual or while the undertaking continues in existence, save as permitted by the Act.

4.2 The Act permits the CC to disclose 'specified information':

³ Unless stated to the contrary, references in this guidance to sections are to sections of the Act.

⁴ The possible manner of disclosure is discussed in [Part 9](#).

⁵ As described in [Merger Remedies: Competition Commission Guidelines, November 2008 \(CC8\)](#), a provisional decision on remedies may be set out in the form of a remedies working paper or provisional decision document published on the CC website or circulated to relevant parties.

⁶ See sections 237 and 238 of the Act. This general restriction on disclosure also applies to any information obtained by the CC under [Part 7](#) (Miscellaneous Competition Provisions), under any of the enactments listed in [Schedule 14](#) to the Act, or under any secondary legislation specified by the Secretary of State in an order (section 238).

⁷ Section 237(3).

- (a) if the CC obtains the required consent or consents;⁸
- (b) if the disclosure is required for the purpose of a Community obligation;⁹
- (c) if the disclosure is made for the purpose of facilitating the exercise by the CC of any function it has under or by virtue of the Act or any other enactment;¹⁰
- (d) if the information is disclosed to another person for the purpose of facilitating the exercise by that person of any function he has under or by virtue of the Act or another enactment specified in Schedule 15 to the Act or such subordinate legislation as the Secretary of State may specify in an order;¹¹ or
- (e) if the information is disclosed:
 - (i) in connection with the investigation of any criminal offence in any part of the UK;
 - (ii) for the purposes of any criminal proceedings there; and
 - (iii) for the purpose of any decision whether to start or bring to an end such an investigation or proceedings.¹²

4.3 The circumstances described in paragraph 4.2 are often referred to as 'information gateways'. Where the CC discloses information to a person there may be restrictions on the further disclosure or use of the information by that person.¹³ In some instances the CC's consent is required before the disclosed information may be disclosed further.¹⁴

4.4 If any of these information gateways apply and before disclosing any specified information, the CC must have regard to three considerations:¹⁵

- (a) the need to exclude from disclosure (so far as practicable) any information whose disclosure the CC thinks is contrary to the public interest;
- (b) the need to exclude from disclosure (so far as practicable):
 - (i) commercial information whose disclosure the CC thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or
 - (ii) information relating to the private affairs of an individual whose disclosure the CC thinks might significantly harm the individual's interests; and
- (c) the extent to which the disclosure of the information mentioned in (b)(i) or (ii) is necessary for the purpose for which the CC is permitted to make disclosure.

⁸Section 239 specifies the consents that are required.

⁹Section 240.

¹⁰Section 241(1).

¹¹Section 241(3).

¹²Section 242(1).

¹³Sections 241(2)(4) and 242(2).

¹⁴Section 241(2).

¹⁵Section 244.

- 4.5 These three considerations apply on each occasion that the CC is considering disclosure of specified information: for example, in correspondence, at hearings and in a disclosed or published document. The Act does not contain specific provision for excisions from reports, save in some cases concerning public interest considerations.¹⁶
- 4.6 The CC will give special consideration to the potential harms associated with disclosure where 'sensitive information' is concerned, sensitive information being information referred to in the first and second of the considerations (ie 4.4(a) and (b)). The CC's processes provide persons with the opportunity to state a view on the sensitivity of the information they have provided (see [Part 9](#)). It is the Group's responsibility to consider whether the disclosure of the information claimed by a party to be sensitive would in fact harm a person. If harm or potential harm is established, the Group will go on to consider whether the circumstances of the case merit disclosure of the information in any event.

5. Approach to disclosure of information received during inquiries or reviews

- 5.1 When determining how best to achieve the transparency aims of the CC (see paragraph 2.2), Groups must have regard to the statutory framework (see [Part 4](#)) and the CC's Rules and guidance published by the CC or the CC Chairman relating to the CC's process and conduct of investigations.¹⁷
- 5.2 Additionally, Groups should have regard to:
- (a) the desirability of Groups taking a consistent approach when applying the principles of disclosure;
 - (b) the desirability of avoiding unnecessary burdens on business, the need to conduct investigations effectively and efficiently, the need to reach properly reasoned decisions within statutory and administrative timescales;
 - (c) the need to disclose information supplied to the CC so that interested persons (main parties or other interested persons) are able to comment on matters affecting them and so that they can draw to the CC's attention any inaccuracies, incomplete or misleading information;
 - (d) the need to protect some information provided to it in the course of its inquiries or reviews and the importance of maintaining the CC's reputation for doing so;
 - (e) the CC's analysis as it affects them; and
 - (f) the desirability of making sufficient information available to the public so that the public may become aware of the main issues arising in inquiries and reviews and are in a more informed position to provide information to the Group.

These considerations may inform the Group as to whether particular information should be disclosed, to whom and the manner of disclosure.

¹⁶Sections 118 and 177.

¹⁷ For example, Groups contemplating the disclosure of information to a public body (during investigations) should have regard to the CC's guidance on the [Disclosure of information by the Competition Commission to other public authorities, April 2006 \(CC12\)](#). Groups should also have regard to the CC's [Merger Procedural Guidelines \(CC18\)](#) and [Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013 \(CC3\)](#), as appropriate.

- 5.3 For the most part these factors will not be in conflict with the CC's transparency aims and its statutory functions. However, when decisions are finely balanced, Groups should pay particular attention to the need to achieve due process.
- 5.4 In the following parts guidance is provided by reference to the various types of information the CC receives during an inquiry or review and to the format in which it is received. Guidance is also provided on the considerations relevant to the disclosure by the CC of its assessment, analysis and thinking. More information about the manner and timing of disclosure can be found in subsequent parts of this Guidance.

6. Information received by the CC

- 6.1 This part lists the main types of information received by the CC in the course of an inquiry or review by reference to the format in which information is received and provides guidance to Groups on their approach to disclosure for each type. In respect of each type this Guidance suggests the usual approach, timing and manner of disclosure. These may need to vary according to the circumstances.

(a) Responses to information requests in the First Day letter, CC questionnaires, etc

- 6.2 The information received through such responses from main and third parties is predominantly of a factual nature (often of confidential information relating to the firm's business) although there may be some content that expresses the party's views. The factual information in particular may be revised or supplemented in the course of the CC's inquiry or review. Particularly in inquiries, some of the information initially received may enable the development of the CC's understanding of the market and the parties concerned but may not be of relevance to the CC's analysis and ultimately, its findings.
- 6.3 In most inquiries and reviews it will not be appropriate to disclose these responses. However, as the inquiry or review develops, the Group may need to consider which of the factual information provided is relevant to its analysis and as such should be disclosed. The usual form of disclosure of such information will be through the incorporation of relevant material into the CC's documents (eg annotated issues statement, any disclosed working papers, provisional findings decision and report, and for reviews, the provisional decision and final decision or notice of intention to vary or terminate the remedy). Data will often be aggregated (see [Part 9](#)). See paragraphs 6.4 to 6.8 below in relation to the handling of any views included in such responses.

(b) Other written submissions from main parties

- 6.4 During the course of an inquiry or review main parties are likely to make numerous submissions, either at the party's initiative or in response to a request from the CC. A distinction can generally be drawn in submissions between key arguments and detailed evidence, the latter often containing confidential information though the former may also contain some confidential information. The latter type of information should be treated in a similar way as responses to CC information requests (see paragraphs 6.2 and 6.3).

- 6.5 Groups should aim to disclose the main parties' key arguments on the issues raised in the inquiry or review, in particular from their responses to the First Day letter and the CC's key publications (eg issues statement, annotated issues statement in market investigations, notice of provisional findings and notice of possible remedies in inquiries and provisional decision on remedies (usually published in market investigations only) and responses to any views of other main or third parties or working papers disclosed to it.¹⁸ However, it is unlikely to be necessary or practical for all such submissions to be disclosed. For example, the CC often receives the same key arguments repeatedly.
- 6.6 Generally, Groups should aim to disclose key arguments through publication because of the second, third and fourth of the aims mentioned in paragraph 2.2. An exception is when the response is to a communication (eg an annotated issues statement or a working paper) that was not published. In cases where there are several interested persons (eg market investigations involving several main parties or when there are interested third parties) publication may also be a practical means of ensuring due process. When publication is not practical or appropriate, Groups should consider whether disclosure to one or more parties is appropriate for the purpose of achieving due process.

(c) Other written submissions of third parties

- 6.7 Similarly, Groups should aim to disclose third parties' key arguments on the issues raised in the inquiry or review, in particular in third parties' responses to the CC's key publications and responses to the disclosed submissions of other parties and any disclosed working papers.
- 6.8 Generally, Groups should aim to disclose responses to publications through publication because of the second, third and fourth reasons mentioned in paragraph 2.2. However, when that is not practical or appropriate, Groups should consider whether disclosure to main and sometimes other third parties by some other means is appropriate for the purpose of achieving due process.

(d) Surveys commissioned by main and third parties

- 6.9 Groups should aim to disclose reports of surveys commissioned by main and third parties. This is particularly the case if the survey was commissioned in contemplation of the inquiry or review by the party submitting the survey. A summary of the survey methodology should similarly be disclosed, when available. However, Groups should be sensitive to concerns about the commercial value of the survey, particularly if the survey was prepared for purposes unrelated to that party's involvement in the CC's inquiry or review.
- 6.10 Generally, Groups should aim to disclose such reports through publication for the reasons that apply to other aspects of key submissions. However, when that is not practical or appropriate, Groups should consider other means of disclosure to main and sometimes interested third parties.
- 6.11 Sometimes the CC will also receive underlying data or information relating to the survey. Because of the likely sensitivity of that data, particularly when it is personal

¹⁸ Groups should also consider whether any additional key arguments were provided earlier in response to the CC's questionnaires etc that should be disclosed.

data for the purposes of the Data Protection Act 1998, it is not presumed that the information will be disclosed. Generally, it will not be necessary to disclose the underlying data. Additional comment on the manner of any disclosure is found in [Part 9](#).

(e) Information received in the course of hearings, meetings and telephone conversations

- 6.12 During inquiries or reviews there will be numerous oral communications between a party and the CC including hearings, meetings and telephone conversations. The purpose of such communications and the nature of the information exchanged will vary, and these factors will be relevant to the consideration of whether any disclosure is necessary. For example, communications concerned with the administration and conduct of the case will seldom, if ever, merit disclosure. In contrast, hearings are occasions on which submissions relevant to the CC's analysis are made by main or third parties, so that it is necessary for Groups to consider the appropriateness of disclosing the content of hearings and the manner of that disclosure.
- 6.13 For hearings with main or third parties¹⁹ held by Groups or CC staff, Groups should consider whether any points arising should be disclosed to another main or third party.²⁰ Generally, when hearings are held in private (including joint hearings), transcripts or notes prepared of the hearings should not be disclosed except to the parties in attendance.²¹ However, Groups should consider the need to disclose key arguments by providing a summary of the key points (such an approach would help ensure consistency with the approach to written submissions (see paragraphs 6.4 to 6.8)). In contrast, the transcripts of round-table hearings with experts should be disclosed and may often be suitable for publication.²²
- 6.14 When preparing summaries of key points, Groups should have regard to the need to exclude confidential information. Generally, summaries should be disclosed through publication. However, there may be occasions when it is not appropriate to disclose the summaries due to the sensitivity of the information or the identity of the person providing evidence (or both). The information may, for example, refer to a party's future business strategy. In such circumstances, Groups will need to consider whether alternative means of disclosure of the key points raised is appropriate.

(f) Information from referring body on making a referral or advising on the need for review of remedies

- 6.15 When making a reference, the Office of Fair Trading (OFT), or the Minister or regulator who has made the reference (the 'referring body'), is required by law to publish the reasons for making the reference. Similarly, when the OFT advises on the need for a review of an undertaking accepted or order made under the Act or the FTA 1973, the OFT usually publishes a non-confidential version of its advice on its website together with its reasons either at the time of submitting the advice or to

¹⁹ This includes hearings held via telephone conference calls and also meetings on the substance of the inquiry or review.

²⁰ As explained in [CC18](#), summaries of main party hearings in merger inquiries will not normally be published. For timing, resource and confidentiality reasons, summaries of hearings in response to notices of possible remedies are seldom prepared in merger decisions, though the key points are included in provisional remedies decisions.

²¹ The *CC Rules of Procedure* provide for hearings to be held in public or private at the Group's discretion ([Rule 7](#)).

²² For example, in the Groceries market investigation (reported in 2008) the CC published the transcripts of two economic round tables on local competition and buyer power.

coincide with the publication by the CC of its provisional decision.²³ Typically, the referring body will also provide the CC with additional information from its files which may be of use to the CC at the early stage of its inquiry (for example, to identify issues which enable the CC to explore and formulate its theories of harm). The information shared with the CC may include written submissions from main and third parties, analysis conducted by or reports commissioned by the referring body, and clarification of the approach taken by the referring body. Similarly, in reviews, the OFT will provide to the CC any application that originated the review and any further submissions received.

- 6.16 Discussions between the referring body and the CC (which may take place either shortly before or following the reference or request for review) are likely to be useful to the CC as it prepares for the inquiry or review, but these discussions are unlikely to involve the exchange of information that ought to be disclosed.
- 6.17 Groups should consider whether there is a need to disclose any information received in writing from the referring body to parties for reasons of due process but generally, this will not be necessary for a number of reasons.
- 6.18 For example, in inquiries (a) to the extent the issues raised are relevant to the CC's investigations, the issues will be explored in hearings, requests for information and various CC publications; and (b) submissions or analysis made or undertaken prior to the reference may be irrelevant to the direction the CC's inquiry takes. The submissions and analysis may be out of date or may be superseded by later submissions and responses to the CC during its inquiry or review. Examples of when the content of documents passed to the CC may need to be disclosed, however, are: (a) where the CC is making use of economic or profitability analysis undertaken by the referring body; and (b) where parties have indicated that submissions made to the referring body are to be treated as submissions to the CC (in this second example, the guidance provided in paragraphs 6.2 to 6.11 will be applicable).
- 6.19 A further example is when the CC is reviewing remedies and bases its assessment on the published advice of the OFT. There will generally be no need to disclose the submissions received by the OFT because the information will be contained in the OFT's decision disclosed to the relevant party. However, should that not be the case, the Group will need to consider whether disclosure by it is appropriate.

(g) Other information from public bodies

- 6.20 During the course of an inquiry or review, the CC may have contact with a variety of public bodies, notably the OFT, sector regulators or other government departments. Often, these will be for the purpose of seeking clarification about an existing regulatory regime or their experience of a regulated industry. Such clarification provides assistance to the CC as it seeks to understand the industry that is the subject of the inquiry or review and may also be useful when considering candidate remedies. Public bodies (including the referring body) may also submit evidence to the CC's inquiry or review.

²³ See paragraph 22 of the Memorandum of Understanding between the OFT and the CC on variation and termination of merger, monopoly and market undertakings and orders under the FTA 1973 and the Act (10 March 2011). www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/our_role/ms_and_fm/pdf/mou_between_of_t_and_cc.pdf.

6.21 When considering the appropriateness of disclosure, a distinction can be made between assistance provided to aid the CC's understanding of the industry and submissions of views from the body concerned on the evidence submitted and the CC's thinking. Any materials provided to aid the CC's understanding will feed into the Group's thinking and will not usually be appropriate to disclose on a stand-alone basis. However, when the body is providing views, these should be treated in the same way as evidence received from any other third party and the guidance on disclosure of third party evidence will apply to it.

7. Views and findings of the CC, CC analysis and reports of surveys commissioned by the CC and analysis,

(a) Views and findings of the CC including key decision documents

7.1 The CC's Rules require the CC to publish a number of documents, notably the provisional findings and notice of possible remedies, during an investigation.²⁴ Additionally, the CC has developed a practice of consulting on its provisional decision on remedies (usually through disclosure to the merger parties in merger inquiries and publication in market investigations).²⁵ The disclosure of provisional findings and a provisional decision on remedies is the main means by which the CC ensures due process and fulfils its duty to consult on certain decisions under section 104 of the Act. When reviewing remedies, the CC similarly publishes a provisional decision either before or as part of publishing a notice of intention to vary or terminate undertakings or orders.²⁶

7.2 The CC is not subject to a general obligation to disclose all its thinking in advance of consulting on its provisional decisions. However, the CC's practices have developed to provide insight prior to this. Earlier disclosure can improve the efficiency of the inquiry or a particularly complex review as it gives main parties (and interested third parties) the opportunity to comment before the publication or disclosure of the key documents mentioned in the paragraph above. At an early stage of either a merger or a market investigation the CC should publish an issues statement which will set out the theories of harm the CC proposes to explore. It should also disclose an annotated issues statement at a later stage (typically before the hearings with main parties).²⁷ The annotated issues statement provides an overview of the CC's current thinking with reference to the theories of harm and analysis conducted to date. In the case of mergers, the annotated issues statement is disclosed to the merger parties (but is not usually published)²⁸ and in the case of market investigations, it is disclosed to the main parties (usually by publication).

(b) Internal papers

7.3 In the course of conducting an inquiry or review, there will be many written communications among the Group or with the CC staff and CC advisers. These are internal

²⁴ CC1.

²⁵ As described in CC8, in merger inquiries a provisional decision on remedies may be set out in the form of a remedies working paper or provisional decision document published on the CC website or circulated to relevant parties.

²⁶ See the [Memorandum of Understanding](#), op cit, paragraphs 36, 38, 43 and 46–50.

²⁷ To enable a party to respond to CC questions at a hearing, it may be necessary, for the purpose of due process, to make a disclosure of certain information held by the CC (*Sports Direct International PLC v CC* [2009] CAT 35). The disclosure of an annotated issues statement will generally be the means of providing the necessary information but Groups should consider whether this needs to be supplemented (see paragraph 7.4).

²⁸ See CC18, paragraph 3.47.

papers and there is no general obligation to disclose all working papers.²⁹ However, Groups may disclose some working papers (or extracts from them) during the course of an inquiry or review, where they consider that to do so would assist parties to understand their developing thinking. Whether it is appropriate or practical to do so may depend upon timing considerations; for example, it would not be sensible to do so when the CC is soon to disclose that thinking in an annotated issues statement or provisional findings. However, parties will have the ability to comment following disclosure.

- 7.4 In merger inquiries it is generally more appropriate to disclose working papers (or extracts) to main parties (and occasionally interested third parties) by supplying the party concerned with the document. For market investigations, the purpose of the disclosure and the content of the paper will be relevant to the Group's consideration of the manner of disclosure. Sometimes in market investigations, exclusive disclosure to certain parties will be appropriate (for example, when the analysis is the assessment of a firm's profitability), but often disclosure through publication will be appropriate. If working papers are disclosed, Groups generally need not revise and disclose subsequent versions of these papers. This is because the more developed analysis and comment within the paper is usually included in the next key publication of the CC.

(c) Surveys commissioned by the CC or conducted in-house

- 7.5 Reports of surveys commissioned or prepared by the CC should generally be disclosed. Usually this will be through publication (accompanied with an explanation of the methodology) but there may be instances when it is inappropriate to publish the report.
- 7.6 Groups should also consider the need to provide other information relating to the survey. For example, it will often be appropriate to disclose cross-tabulations of the survey results to the merger parties and one or more main party in a market investigation.³⁰ On occasion, a Group may consider it appropriate to disclose other underlying information. If so, the Group would need to have regard to the particular considerations that arise in relation to that information (for further information see [Part 9](#)).

8. Timing of disclosure of information

- 8.1 Inevitably, information will be received throughout the course of an inquiry or review. As confidentiality claims can affect the timing of disclosure, it is not possible to be prescriptive in this Guidance, nor in the administrative timetable, about the timing of disclosure. In the following paragraphs, further guidance is provided as to some factors to be taken into account. Furthermore, this Guidance is supplemented by the additional detail provided in respect of particular types of documents listed in Parts 6 and 7.
- 8.2 When considering the timing of disclosure, Groups should have regard to the requirement to conduct inquiries and reviews fairly.³¹ The purpose of the disclosure as well

²⁹ The working papers provide a snapshot of the issues, analysis and views that are relevant at the time of disclosure and may change.

³⁰ A cross-tabulation, or contingency table, is a grid that shows the numbers or percentages of answers to a survey question by a selection of subgroups within the total sample. Cross-tabulations may be used to study the correlation between two variables.

³¹ *Sports Direct International PLC v CC* [2009] CAT 35.

as its practical aspects will be relevant considerations. Timing may also be affected by the CC's developing practice when conducting inquiries and reviews, particularly as it aims to increase efficiency and meet its statutory deadlines.

- 8.3 There are, however, several key stages in inquiries: for example, the publication of the issues statement, disclosure of the annotated issues statement, main party hearings, the provisional findings, the notice of possible remedies and disclosure of the CC's provisional decision on remedies) and similarly in reviews (for example, provisional decision or notice of intention to vary or terminate the remedy). When a Group has identified that disclosure is appropriate, it should aim to make the disclosure by the time of the next key stage of the inquiry or as soon as possible afterwards. For example, by the time of publishing provisional findings, the Group should aim to have disclosed all key submissions received. If information is disclosed during a consultation period under section 104 of the Act (for example, the period for the consideration of provisional findings), a Group should consider whether the consultation period should be extended or additional time allowed to enable a party to respond specifically to the additional material that has been disclosed. Relevant considerations will include the nature, materiality and relevance of the information to a Group's findings, the administrative and statutory timetable and issues of practicality.
- 8.4 The appropriateness of disclosure is not limited to these key stages. As noted (see paragraphs 7.3 and 7.4) in merger and market inquiries it may be helpful for a Group to share its approach and developing thinking prior to the provisional findings by the disclosure of some working papers, in addition to the disclosure of the annotated issues statement.

9. Practical aspects of handling information received and requests for confidentiality

(a) Receipt of information and preparation prior to disclosure

- 9.1 Groups are able to provide an assurance that before making a disclosure and when considering the manner of disclosure (see paragraph 9.14) they will take into account the representations made as to the sensitivity of the information supplied (see paragraph 4.4) but because of the need to ensure that the CC's processes are fair they should avoid providing a commitment that the information provided to it will not be disclosed.³² Taking into account any explanation provided by the party submitting information (see paragraph 9.2) they will be able to assess whether disclosure is necessary and if so the manner of disclosure to provide necessary protection of the information. In the past, main and third parties have cooperated with the CC's information requests in the knowledge that the CC would be sensitive to such requests for confidentiality.
- 9.2 In respect of all information supplied (whether or not it appears likely that the Group will wish to disclose the information to others), parties should be required to make known to the Group which information they claim to be confidential, and provide sufficient information as to why by explaining, for example, the nature of the information, the harm that could be caused, the likelihood of harm and magnitude of that harm. For example, a party will have failed to give sufficient explanation about the

³² In respect of CC surveys, the CC will seek to ensure that survey respondents are informed about how confidentiality will be protected at the time they agree to participate in the survey.

sensitivity of information if a document is marked 'confidential' without further explanation. Where information supplied by a party is about another person or business, the party supplying the information should supply full details of its source and the circumstances in which it was obtained.

- 9.3 When providing key submissions, parties should also provide a second version of the same that excludes information that the party considers to be confidential (together with the explanation referred to above).³³ Groups may consider allowing a short interval (up to a week) between the receipt of the full version and the non-confidential version, though care should be taken to avoid the CC's administrative timetable being adversely affected.
- 9.4 All information excluded should be clear to the Group so that it may assess whether the non-confidential version is satisfactory, having regard to its intention to disclose information, the purpose of such disclosure, and this Guidance. A black-lined version of the original document is suitable for this purpose and Groups should ask for this.
- 9.5 On receipt of any non-confidential versions of submissions or summaries of documents, Groups should consider the need to make any modification to ensure adequate and appropriate disclosure for their purposes. In addition to considering the representations from the person that provided the information, Groups should also consider whether disclosure of the information will harm another person (for example, because it relates to another person or because the disclosure would enable information that is confidential to another person to become known).
- 9.6 The following are examples of information for which disclosure is unlikely to cause harm to the person to whom it relates so that any person claiming likely harm should ensure that it has supplied sufficient information to assist the Group when deciding whether disclosure is appropriate (see paragraph 9.2):
- (a) financial information or data relating to a business that is more than two years old; and
 - (b) information which can readily be deduced from information in the public domain.
- 9.7 The following are examples of information the disclosure of which may be harmful or which may need to be protected. In such cases, if a Group considers that disclosure is necessary, it will need to consider the manner of disclosure:³⁴
- (a) financial information or data relating to a business that is less than two years old;
 - (b) responses to surveys (in aggregate or individually) the disclosure of which could be harmful to a firm or individual or where the identity of the person providing the information should be protected;
 - (c) information relating to the future strategy of a business or information relating to the past strategy of a business; and
 - (d) information which, if disclosed, may adversely affect the competitive process in the market.

³³ Parties are responsible for ensuring that the format of the non-confidential version prevents excised text from being read.

³⁴ For guidance on manner of disclosure see paragraphs 9.11–9.20.

- 9.8 It is the usual practice of the CC to be in contact with the party that is claiming that information should not be disclosed in the course of preparing material that is to be posted on the CC's website (including summaries of hearings, key submissions, provisional findings, provisional decisions on remedies (usually only on markets), any provisional decision of a review and final decision or notice of intention to vary or terminate the remedy). Often it is possible to use ranges, redactions etc to allay concerns about disclosure (see paragraph 9.14).
- 9.9 Groups are reminded of the opportunity provided to parties to make further representations to the Chief Executive of the CC if they wish to dispute the proposal of a Group to disclose information.³⁵ This is additional to the opportunity for parties to make known their concerns to the Group. Groups are required to have regard to the views of the Chief Executive if the party has made representations to him. The decision to disclose will, however, remain that of the Group.
- 9.10 Before disclosing information that a party has claimed is confidential (including when it proposes to make limited or restricted disclosure), a Group should consider whether to inform the party to whom the information relates of its intention to make a disclosure. It might choose not to do so when the Group believes that the party has had sufficient opportunity to explain the nature of the sensitivity and likely harm, or when the Group has sought to protect the information to be disclosed or when to do so would jeopardize the proposed publication date of key CC publications or otherwise delay the progress of the inquiry or review (for example, delay would allow others insufficient time to comment on the document once disclosed).

(b) Manner of disclosure of information

- 9.11 A distinction can be made between the need to make a disclosure having taken the considerations in paragraph 4.4 into account and the form the disclosure will take to meet the purpose of the disclosure and may in some cases be subject to limits on onward disclosure by the recipient, so that any onward disclosure of the information would be an offence under section 245 of the Act. Disclosure can be achieved in various ways. With the exception of certain key CC documents (see paragraph 6.5) there is no presumption that disclosure is in a particular manner. In this section, further guidance is provided on the manner of disclosure of information.
- 9.12 The preceding paragraphs provide an indication only of when disclosure through publication may be appropriate based on the CC's experience. The CC's website can be an effective and practical way of making a disclosure. In particular, it can be an effective means of making disclosure to a large number of parties (and therefore may be useful in market investigations). However, the sensitivity and nature of the information concerned and practical issues arising may mean that publication of a particular document or piece of information is not appropriate.
- 9.13 As explained below, there may be a number of options open to Groups when considering the manner of disclosure. When determining which is appropriate, Groups should consider such factors as fairness, the nature of and sensitivity of the information, the materiality of the information to the inquiry or review and the CC's analysis, the phase of the inquiry or review, the impact upon the administrative or statutory timetable and the resources of the CC. When contemplating the method of

³⁵ *General Advice and Information*, March 2006 (CC4), paragraph 6.30.

disclosure, a balance will need to be struck between these factors, the starting point being consideration of section 244.

- 9.14 Groups will often have to consider how information contained in any disclosed documents should be presented or how access should be allowed to confidential information in order to provide protection. There are a number of possible ways in which confidential information may be protected including:
- (a) provision of ranges as an alternative to providing exact figures (for example, when indicating market shares (see paragraph 9.16));
 - (b) provision of aggregated data as an alternative to individual responses or data (for example, by aggregating sales or purchase figures or by providing a summary of responses from customers);
 - (c) provision of aggregated summaries of submissions and responses to questionnaires;
 - (d) excision of the confidential information from documents (for example, of names, locations and data) when the information excised is not material to the CC's inquiries or its decision or where the excision does not affect the comprehension of the document for the reader concerned;
 - (e) anonymizing the information;
 - (f) disclosure to one or more parties but without publication;
 - (g) disclosure subject to restrictions (for example, disclosure to parties' professional advisers subject to receipt of undertakings); and
 - (h) use of a data room (for example, when a Group considers that access to specific data should be provided but that the sensitivity of the information concerned necessitates additional safeguards to protect the information (see paragraphs 9.17 to 9.19)).
- 9.15 Of the forms identified in paragraph 9.14, the first four methods will be the usual approaches to take. The sixth, (f) is generally applicable when a Group considers it necessary to disclose a working paper (or part of a working paper) to a party for reasons of due process, and the information is pertinent to one party only. This may also be the method deployed when a Group is concerned that wider publication could be harmful to the functioning of the market.

Market share by range

- 9.16 Usually the ranges appropriate to use in respect of market shares in non-confidential versions of disclosed documents will be:

Between 0 and 4.99 per cent	[0–5] per cent
Between 5.0 and 9.99 per cent	[5–10] per cent
Between 10.0 and 19.99 per cent	[10–20] per cent
Between 20.0 and 29.99 per cent	[20–30] per cent

Between 30.0 and 39.99 per cent	[30–40] per cent
Between 40.0 and 49.99 per cent	[40–50] per cent
Between 50.0 and 59.99 per cent	[50–60] per cent
Between 60.0 and 69.99 per cent	[60–70] per cent
Between 70.0 and 79.99 per cent	[70–80] per cent
Between 80.0 and 89.99 per cent	[80–90] per cent
Between 90.0 and 100 per cent	[90–100] per cent

Data rooms

- 9.17 The use of a data room is an option that may be considered when a Group is satisfied of the need to disclose the information for reasons of due process but considers that, due to the nature of the information, additional safeguards are appropriate. Use of a data room has the advantage of limiting further use of the information (and, in the case of surveys, may be a way of ensuring that the identity of individual respondents remains anonymous). However, because of the resource implications associated with their operation they should be used sparingly.
- 9.18 As their name implies, data rooms may be used when a Group concludes that it is appropriate to provide access to data in order to enable the parties' economic advisers to gain further understanding of the CC's analysis and to examine the data in order to respond to the CC's findings. It will seldom be appropriate to allow access to the parties' other advisers or to use a data room to enable greater access to other information. Those having access to a data room are bound by the rules which the CC applies to the data room and also to undertakings which they provide. These make provision for the proper conduct of the data room and restrict the use and further disclosure of information to which the advisers have access.
- 9.19 The point at which access should be provided will depend upon the circumstances of the case. Generally, a Group should be resistant to requests made early in an investigation when the relevance of the information requested remains unclear. This is because of the sensitivity of the information and also the resource implications of setting up a data room. Groups may wish to consider both the need for and alternatives to a data room. In merger inquiries, because of the relative brevity of the investigatory period, it is likely that the need for a data room will not become clear until the inquiry has reached provisional findings. In this circumstance the CC will be mindful of the need to allow the parties adequate time to make representations after access has been provided, within the confines of the need for the CC to comply with its statutory and administrative deadlines.

Surveys

- 9.20 Particular issues arise in respect of the handling and disclosure of underlying data. Relevant considerations will include the application of the Data Protection Act 1998, which applies to personal data and the Code of Conduct of the Market Research Society (Groups should have regard to the version that is current when considering a particular disclosure issue), the latter requiring the anonymity of respondents to be

preserved unless they have given informed consent. If a Group considers it necessary to disclose any of the underlying data, it must ensure that the identities of the persons who participated in the survey are protected. Anonymization is not always sufficient, and additional protection may be necessary to ensure that the identity of those who participated is not traceable.

Roger Witcomb
Chairman
5 April 2013

Explanatory note

This note does not form part of the Guidance. This note and the table below are intended to assist the reader in understanding whether a Group may decide to disclose or publish any of the information it receives during the course of a merger inquiry or market investigation. While the table below gives a general indication, it should be read in conjunction with the Guidance and in the event of conflict between the table and the *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973*, the Guidance prevails.

<i>Type of information</i>	<i>Publication on CC website</i>	<i>Disclose to main or one or more third parties</i>	<i>Chairman's Guidance</i>
Main party responses to CC questionnaires	No	May be disclosed	6(a)
Third party responses to CC questionnaires	No	May be disclosed	6(a)
Main party key arguments and views in submissions	✓	Additional information may be disclosed	6(b)
Third party key arguments and views in submissions	✓	N/A	6(c)
Surveys commissioned by main and third parties	✓	✓	6(d)
Oral communications—administration and conduct of case	No	No	6(e)
Summaries of hearings with main parties	No (mergers) ✓ (markets)	No (mergers) N/A (markets)	6(e)
Summaries of hearings with third parties	✓ Unless (a) anonymity needs to be maintained or (b) response is to notice of possible remedies (mergers)	Additional information may be necessary	6 (e)
Information from referring body on making a reference or request for review	No	No	6(f)
Information from public bodies	No unless information submitted as evidence to investigation	No unless evidence submitted as evidence to investigation	6(g)
Issues statement, theories of harm, provisional findings, notices of possible remedies and final report	✓	Additional information may be disclosed	CC Rules 7(a)
Annotated issues statement	✓ (markets)	Disclosed to main parties (mergers)	7(a)
Provisional decision on remedies (markets only)	✓ (markets)	✓ Disclosed to main parties (mergers)	7(a)
Papers internal to the CC	No	No	7(b)
Working papers	Some	Some	7(b)
Surveys commissioned by the CC	✓	✓	7(c)



