

Disclosure of information by the Competition Commission to other public authorities

Consultation document

Introduction

This consultation document seeks views on guidance the Competition Commission (the Commission) proposes to issue concerning disclosure of information gathered in the course of its merger and market inquiries to other public authorities. The guidance will form part of the advice and information published by the Commission under Schedule 7 to the Competition Act 1998.

In 2003, the Commission Chairman issued guidance to groups on disclosure of information in the course of merger and market inquiries (CC7). While that guidance sets out the statutory considerations relevant to disclosure of information in general terms, it focuses on disclosure of information by the Commission during merger or market inquiries for the purpose of carrying on its own statutory functions. However, the Commission may be approached by another public authority and asked to disclose information received during such an inquiry to assist that other authority in carrying out its statutory functions. In some cases, the Commission may even decide on its own initiative that it might be appropriate to pass information to another public authority to assist that authority in carrying out its statutory functions.

The Enterprise Act 2002 (the Act) contains a general prohibition on the disclosure of 'specified information'¹ relating to the affairs of an individual or any business of an undertaking, but sets out a number of circumstances in which the Commission may disclose 'specified information' to other persons to facilitate the carrying out of their functions.² Before making any such disclosure, the Act requires the Commission to have regard to three statutory considerations, namely:

- (a) the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest;
- (b) the need to exclude from disclosure (so far as practicable)—
 - (i) commercial information whose disclosure the Commission 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 Commission thinks might significantly harm the individual's interests; and
- (c) the extent to which the disclosure of the information mentioned in paragraphs (i) or (ii) is necessary for the purpose for which the Commission is permitted to make disclosure.

The Commission is extremely sensitive to issues of confidentiality and commercial sensitivity. It is particularly aware of the need to ensure appropriate safeguards are in place

¹'Specified information' is information which the Commission receives in connection with its functions under the Act or any subordinate legislation specified by order of the Secretary of State. See section 238(1) of the Act.

²For further details, see paragraphs 2.1 – 2.5 of CC7.

where specified information may be used for a purpose other than that for which it was obtained. The draft guidance sets out how the Commission intends to reach decisions on whether to make such disclosures. It provides that the Commission will normally seek to give the owner of the information notice of any impending disclosure in sufficient time to allow him to make comments or raise an objection except where it is not appropriate or practicable to give such notice.

The Commission welcomes comments on the guidance either of a general nature or on any specific points.

This consultation document can be found on www.competition-commission.gsi.gov.uk

Responses

You can respond to this consultation:

by email to: susan.maunsell@competition-commission.gsi.gov.uk

by post to: Susan Maunsell
Competition Commission
Victoria House
Southampton Row
London
WC1B 4AD

When responding, please say whether you are responding as an individual or representing the views of an organization. If responding on behalf of an organization, please make it clear whom the organization represents.

Enquiries

If you have any questions relating to this consultation either email as above or telephone 020 7271 0287.

Closing date

Responses should be received by 4 August.

A summary of the consultation and outcome will be provided in September/October on www.competition-commission.org.uk. The final version will be published.

Confidentiality

The Commission may wish to publish your response. If you do not want all or part of your response, or your name, made public, please state this clearly in your response. Any confidentiality disclaimer that may be generated by your organization's IT system or included in a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested.

Disclosure of information by Competition Commission to other public authorities

1. This guidance contains advice and information published by the Commission under paragraph 7A of Schedule 7 to the Competition Act 1998. It explains how the Commission intends to deal with requests by other public authorities for disclosure of 'specified information' received by the Commission during the course of a merger or market inquiry,³ to assist such other authorities in carrying out their statutory functions such as investigations and general market monitoring functions. For example, the Office of Fair Trading (OFT) may be conducting an investigation under the Competition Act 1998, and may believe that the Commission has obtained information in the course of an inquiry which is relevant to its own investigation. It might ask the Commission to disclose any relevant information in its possession. Such a request might be made during an inquiry or after final determination of a reference.⁴

2. In addition to receiving requests, the Commission may decide on its own initiative to pass specified information to another public authority to assist that authority in carrying out its statutory functions. For example, where the Commission believes that it has evidence of a breach of the prohibitions contained in the Competition Act 1998 or Articles 81 and/or 82 of the EC Treaty, it may decide to pass that information to the OFT. The factors to be taken into account by the Commission in determining whether to make the disclosure will be the same as for requests.

3. As set out in paragraph 2.1 of the Chairman's *Guidance on Disclosure of Information in Merger and Market Inquiries* (CC7), the Act imposes a general restriction on the

³The statutory provisions on disclosure in relation to regulatory inquiries conducted by the Commission differ slightly from those relating to merger and market inquiries, though the Commission would normally expect to apply a similar approach when deciding whether to disclose sensitive information which it received in the course of such an inquiry to another public authority.

⁴References are 'finally determined' in accordance with section 79(1) (mergers) and section 183(3) (market investigations) of the Act.

disclosure by the Commission of specified information relating to the affairs of an individual or the business of an undertaking that it has obtained in connection with the exercise of its functions under Part 3 (mergers) or Part 4 (market investigations) of the Act. However, as described in paragraph 2.2, there are a number of circumstances in which the Commission may disclose such specified information (known as 'statutory gateways' for disclosure) to public authorities without necessarily obtaining the consent of the person or persons to whom the information is confidential.

4. Of particular relevance in the context of requests by other public authorities are the statutory gateways described in paragraphs 2.2.(d) and 2.2.(e), which allow the Commission to disclose information to UK public authorities exercising certain defined statutory functions. In considering whether to exercise its discretion to make such a disclosure through one of these statutory gateways, the Commission will have regard to the three statutory considerations summarized in paragraph 2.6 of the *Chairman's Guidance on Disclosure* [which are also set out above in the introduction to the Consultation Document].
5. The Commission will normally begin by verifying that there is an available statutory gateway. In the case of information requests, the Commission will require the public authority requesting the information (the requesting authority) to provide details of the function or purpose for which the information is required and to specify the scope of the information request.
6. If the Commission concludes that there is a statutory gateway, it will consider whether it would be contrary to the public interest to disclose any of the information. In general, the Commission will not regard the disclosure of specified information to

another public authority to enable that authority to carry out its statutory functions as being contrary to the public interest.

7. The Commission will then go on to assess whether a proposed disclosure would significantly harm the legitimate business interests of an undertaking to which it relates or significantly harm an individual's interests. The Commission is sensitive to issues of confidentiality and commercial sensitivity, and will generally seek to give the owner of the information notice of any impending disclosure in sufficient time to allow him to make comments or raise an objection. However, in some cases it may not be appropriate or practicable to give notice of a proposed disclosure either at all or in time to enable the owner of the information to have an opportunity to respond. Such cases include:
 - where advance notice, or any notice, may hamper the requesting authority's investigation;
 - where the information can be shown to be reasonably required as a matter of urgency, in which case the Commission will normally write to tell the owner immediately the disclosure has been made; or
 - where advance notice would be impracticable due to the number of persons involved.

8. Whether or not the owner of the information objects to a proposed disclosure, the Commission will balance the potential harm to legitimate (business) interests (and any detriment to the public interest) against the extent to which disclosure of the information is 'necessary for the purpose' for which the Commission is permitted to make the disclosure. In carrying out this balancing act, the Commission will take into account whether the requesting authority is subject to statutory or other legal restrictions on onward disclosure. Where there would be no statutory or other legal

restrictions on disclosure, the Commission may instead be satisfied with assurances as to the treatment of the information from the public authority concerned.

9. In order for the Commission to assess the extent to which the disclosure of information is 'necessary for the purpose', the requesting authority will need to demonstrate that the information is or may be relevant to its investigation or other statutory function. In addition, the Commission will consider whether the requesting authority would be able to obtain the information from another source, such as the 'owner' of the information (normally the undertaking or individual to whom it relates) by using its own investigatory powers. There may be practical reasons why a requesting authority is unable or unwilling to obtain the information from a more direct source, such as:
 - an investigation may be hampered if, during its early stages, the subject of the investigation becomes aware that he is under scrutiny;
 - in cases where the Commission has expended considerable resources in obtaining information (for example, by carrying out or commissioning customer surveys), there could be significant duplication of resources if the requesting authority had to conduct a similar process; or
 - the requesting authority may already have sought to obtain the information from its 'owner' and may have received no response or may have some doubt as to the accuracy of the information.

10. In relation to disclosures under paragraph 2.2.(e), made in connection with the investigation of any criminal offence or for the purpose of criminal proceedings, the Commission is expressly prevented under the Act from making a disclosure unless it is satisfied that the disclosure is proportionate to what is sought to be achieved by it. In practice, the Commission will assess the proportionality of an information request

under any of the statutory gateways when weighing up the three statutory considerations prior to reaching a decision on whether to make a disclosure.

11. If the Commission is minded to go ahead with a proposed disclosure after receiving objections, it will normally notify an objecting party before it makes the disclosure.