

Competition Commission Guidance for the Disclosure of Information to other public authorities

Response to the consultation on the draft Guidance

Introduction

1. In May 2005 the Competition Commission (CC) issued for consultation draft Guidance on *Disclosure of Information by the Competition Commission to other public authorities*. That Guidance is to form part of the advice and information published by the CC under Schedule 7 to the Competition Act 1998.

Overview of responses

2. We received nine responses from interested parties, as well as responses to a previous draft from the Office of Fair Trading (OFT) and some of the sectoral regulators. The comments contained in these responses are reproduced in full in the 'consultations' section of our website. Respondents included law firms, a consumer body, a regulated entity and a regulator. Following careful consideration of these responses, the CC has now published a revised final version of the guidelines which takes account of specific issues raised.
3. In the light of the responses, the CC has reviewed the draft Guidance and made a number of clarifications and amendments to the final version. (The CC's response to each set of comments is shown below in bold, and changes made to the draft guidance in the light of such comments are shown in bold italics.) The most significant of these are as follows:
 - The CC has sought to describe with greater clarity the procedure where the CC discloses information on its own initiative (see, in particular, paragraph 14 below).
 - It is made clearer in the Guidance that advance notice of a proposed disclosure will be the norm and provides for any exceptions to be interpreted restrictively (see paragraphs 23 to 30 below).
 - The Guidance makes it clearer that the CC will generally not disclose information where the requesting authority can obtain it from a different source (see, in particular, paragraph 38 below).
 - Although the Guidance was originally intended to form an annex to the Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries (CC7), on reflection the CC considers that it would be more appropriate to issue the Guidance as a stand-alone guidance document.
4. As a matter of policy, the CC intends in the future to provide a copy of the confidential version of its final reports to the OFT in cases where it has reached an adverse finding and implemented remedies, to enable the OFT to comply with its general monitoring functions under the Enterprise Act 2002 (2002 Act). A reference to this proposed practice has been incorporated into the final version of the Guidance (in paragraph 2).

5. As noted in the introduction to the CC's consultation paper, the CC is extremely sensitive to issues of confidentiality and commercial sensitivity and, in particular, of the need to ensure that appropriate safeguards are in place where it is proposed that information obtained for a particular purpose be used for another purpose. The CC anticipates that only in exceptional cases would it make disclosures without first consulting parties and taking account of their comments. As recognized in the responses, the CC has hitherto applied a very high standard in protecting the commercial sensitivities of companies which are subject to various inquiries. Companies can rely on the discretion of the CC to protect commercially sensitive data. The CC does not believe that the overall standard of protection afforded to parties who provide information in the course of inquiries will be adversely affected as a result of the arrangements described in the Guidance.

Specific issues

Significance of the consent gateway

6. Two respondents (Lawrence Graham and the CAA) suggested that more prominence might be given to the statutory gateway contained in section 239 of the 2002 Act, namely that a disclosure may be made with consent of the party to which the information related. One of those respondents (the CAA) considered that if a party gave its consent to a proposed disclosure, there was no reason why the CC needed to carry out the balancing act set out in paragraph 8 of the draft Guidance.
7. **In giving prior notice of a proposed disclosure, the CC will normally invite the party concerned to consent to the proposed disclosure. A clarification to this effect has been inserted in what is now paragraph 8 of the final version of the Guidance. However, even if a party gives its consent to a proposed disclosure, the CC is under a statutory duty to have regard to the section 244 considerations before going ahead and making a disclosure.**

Disagreements as to availability of appropriate gateway

8. One respondent (Lawrence Graham) noted that paragraph 5 of the draft Guidance provided that the CC would require the requesting authority to provide details of the function or purpose for which the information was required, and queried what would happen in the event of a disagreement between the CC and a requesting authority on whether there was an appropriate statutory gateway. **Since the CC's power to make a disclosure is discretionary, its view of the appropriateness or otherwise of a particular statutory gateway would be decisive.**
9. The same respondent also queried whether the parties concerned would have an opportunity to make representations on whether a proposed disclosure was necessary for the function or purpose for which it was required. **The CC will normally assess whether there is a suitable statutory gateway before giving prior notice of an impending disclosure of specified information (as defined in the Act), since—absent a suitable gateway—there is no reason for the CC to assess the statutory considerations relevant to disclosure. However, in responding to notice of a proposed disclosure, a party will normally have an opportunity to comment on the need for a disclosure.**
10. One respondent (the CAA) noted that there could be some difficulty in a public authority specifying the function or purpose for which information was required where it was unaware of the precise nature of information in the CC's possession, and suggested that the CC should accept necessarily broad specification of the

information being requested. **For reasons of both fairness to parties and efficient allocation of CC resources, the CC will not look kindly on broad or speculative information requests by public authorities, but will instead require the subject matter of a request to be clearly delineated. Public authorities would normally become aware of relevant information by reviewing the CC's published reports though, in exceptional cases, the CC may inform an authority that it holds relevant information on its own initiative.**

11. One respondent (Simmons & Simmons) expressed concern that the need to verify the availability of a statutory gateway was qualified, as paragraph 5 of the draft Guidance stated that the CC would *normally* begin by verifying that there was an available gateway. **The CC acknowledges that it cannot disclose specified information without first establishing the existence of a suitable gateway. This has been clarified in the final version of the Guidance by deletion of the word 'normally' in the first line of what is now paragraph 6.**

Distinctions where the CC discloses on own initiative

12. Two respondents (Lawrence Graham and the CAA) suggested that the Guidance might usefully contain further clarification on the procedure the CC would follow in making disclosures on its own initiative. In particular:
 - It was not clear whether and how the requirement for the requesting authority to provide the information set out in paragraph 5 of the draft Guidance (ie details of the function or purpose for which information is required and the scope of the request) would apply in cases where the CC decided to pass information on its own initiative to another public authority.
 - It was not clear whether the CC intended positively to seek out situations in which it would disclose information on its own initiative or would simply do so when it became aware of such situations passively.
 - It might be useful if the Guidance set out how the CC would decide on its own initiative whether particular information was relevant to another public authority, and in particular one with sectoral responsibilities.
13. **It is not envisaged that the CC will commonly make disclosures on its own initiative. The CC focuses on complying with its own statutory functions and does not as a matter of course consider whether evidence it receives relates to the functions of another public authority. In cases where it believes that it has obtained evidence in the course of an inquiry relevant to the functions of other authorities (for example, evidence of a breach of the Competition Act/EC Treaty prohibitions or evidence to suggest that a market investigation under the 2002 Act may be warranted), the CC will consider setting this out in its report and leaving it to the relevant public authority to consider whether to make a request for information. However, the CC acknowledges that there may be cases where it would not be appropriate to announce publicly that it has uncovered such evidence in the course of one of its inquiries.**
14. ***Additional text has been added to paragraph 2 and what is now paragraph 6 of the final version of the Guidance to make it clearer that, in cases where the CC decides to disclose information on its own initiative, the procedure may differ slightly from cases where the CC has received a request. In particular, the CC will normally take its own preliminary view on whether there is a suitable statutory gateway, although it may subsequently liaise with the relevant public***

authority to clarify the point, whilst endeavouring not to disclose any specified information. Given the large range of functions which are relevant to the statutory gateways contained in Part 9 of the Act, and the need for the CC to focus on its own statutory functions, we do not believe it is appropriate to set out Guidance on the types of cases in which the CC would decide on its own initiative whether particular information was relevant to another public authority. The example given in paragraph 2 of the Guidance should provide an adequate illustration.

Comments on public interest consideration

15. A number of respondents commented on the CC's proposed approach to the first consideration contained in section 244 of the Act, namely the need to exclude from disclosure (so far as practicable) any information whose disclosure the CC thinks is contrary to the public interest.
16. Two respondents (Clifford Chance and JCWP) have suggested that an increased prospect of disclosure of evidence could reduce the expansiveness of the evidence provided by witnesses, particularly third parties, and consequently raise public policy issues. **As noted above, the CC is extremely sensitive to issues of confidentiality and commercial sensitivity and, in particular, of the need to ensure that appropriate safeguards are in place where it is proposed that information obtained for a particular purpose be used for another purpose. Additional wording has been added to paragraph 3 of the Guidance to reinforce that point.**
17. One respondent (Lawrence Graham) has suggested that when prior notice of a proposed disclosure is given, a party should not be limited to making representations as to the potential harm to his interests, but should also be entitled to comment on other statutory considerations (namely whether disclosure may be contrary to the public interest). **There would be nothing to prevent any party making such observations, and the CC would take them into account when considering whether to make a proposed.**
18. One respondent (NGT) questioned the 'presumption' in paragraph 6 that disclosure of information to another public authority to enable it to carry out its statutory functions would not be contrary to public policy. The respondent stated that such a 'presumption' would enable other authorities to have access to information they would otherwise be unable to obtain through their own powers; that there was a practical danger that the information gathered during a CC inquiry would be misleading in the context of the receiving authority's activities; and that there might be an inherent unfairness where a receiving authority received information in relation to one undertaking but not others involved in same activities.
19. **While the CC's position remains that the disclosure of specified information to another public authority to enable that other authority to carry out its statutory functions will not generally be regarded as contrary to the public interest (and, indeed, is clearly contemplated under the statutory framework), there is no 'presumption' in favour of disclosure and the CC will always deal with proposed disclosures on a case-by-case basis. We do not believe that there will be many cases where such disclosures would enable other public authorities to have access to information they would otherwise be unable to obtain through their own powers, though they may become aware of information relevant to their functions by means of CC reports or disclosure on the CC's initiative.**
20. **While the CC accepts that caution will have to be applied whenever an authority proposes to use information gathered in relation to a particular**

inquiry for other purposes—since such information may be highly specific to its own inquiry—it will be for the receiving authority to interpret the information fairly and to use its own information-gathering powers to obtain information on other undertakings involved in the same activities.

Applying ‘significant harm’ test

21. One respondent (the NCC) has pointed out that the confidentiality of a document should be assessed by reference to whether its disclosure would give rise to substantial harm, not on the basis that it was communicated to the public authority in confidence. **Such a view is clearly contemplated in the statutory framework, and is reflected in what is now paragraph 8 of the Guidance.**
22. The same respondent suggested that no commercial organization supplying information to a public body should be entitled to oppose its disclosure on grounds of commercial confidentiality unless, when it supplied the information, it officially notified the public authority in writing that its disclosure would cause the organization substantial harm, specifying clearly what harm it would cause. **When gathering information in the course of an inquiry, the CC normally requires parties to specify which parts it regards as sensitive, and why, so that it may have regard to the three statutory considerations set out in section 244 prior to disclosing the information to others for the purpose of its inquiry (see paragraph 4.1 of CC Guidance CC7). However, given that the information would be being disclosed, and possibly used, for a purpose other than that for which it was obtained, the CC believes it would normally be unfair not to give parties a further opportunity to comment on the proposed disclosure, other than for one of the reasons set out in what is now paragraph 8 of the Guidance.**

Issues arising from prior notice provisions

23. A number of respondents (Clifford Chance, Freshfields, Lawrence Graham) asserted that parties should be given reasonable prior notice of disclosure in all but the most exceptional cases. **The CC anticipates that disclosures made without advanced notification will be rare, and has made an amendment to what is now paragraph 8 to make this clearer (ie replacing reference to ‘some cases’ with ‘a limited number of cases’).**
24. Two respondents (JCWP and Lawrence Graham) suggested that the interests of fairness dictated that, in the main, parties should be informed of the scope of disclosure and, where possible, given equal access to disclosed information. **In giving prior notice of a proposed disclosure, the CC’s practice has been to send to the party or parties concerned a copy of the proposed disclosure (or extracts of the disclosure relevant to that party). Additional text has been added to what is now paragraph 8 of the final version of the Guidance to make it clearer that, when giving such prior notice, the CC will provide details of the information it proposes to disclose by way of a detailed description, inventory or draft of the proposed disclosure.**
25. A number of respondents commented on the examples given in what is now paragraph 8 of the Guidance of cases where advance notice may be forgone. One respondent (Lawrence Graham) has queried whether a requesting authority will have to ask the CC not to give advance notification, or whether the CC will take the decision itself. **This will normally depend on the grounds on which advance notice is forgone. For example, in cases where the requesting authority considers that advance notice may hamper the investigation, it will normally be**

for that authority to make a case to the CC for non-notification. A public authority respondent (TSSE) has commented that if the CC does not agree to forgo prior notice, the requesting authority should be allowed to withdraw its request for disclosure, rather than risk tipping off the subject of an investigation. **The CC would undoubtedly accede to such a request if no information had been disclosed.**

26. **In cases where the CC decides on its own initiative to disclose information, it may itself decide whether to forgo advance disclosure although, as noted in paragraph 14 above, it may liaise with the relevant public authority in advance of the disclosure (while endeavouring not to disclose any specified information).**
27. In relation to the cases where advance notice is forgone on the grounds that it may hamper the requesting authority's investigation (the first bullet of what is now paragraph 8):
 - Two respondents (Lawrence Graham and Freshfields) suggested that there should be an obligation on the CC to inform the parties concerned at a later stage that disclosure had taken place. **However, while the CC will consider in every case the need for retrospective notice of a disclosure, the CC does not believe it would be appropriate or practical to impose a general obligation to this effect, given the ongoing sensitivity of certain information provided by complaints. To the extent that an investigation is pursued and, for example, infringement proceedings are commenced, it will be for the requesting authority to inform a party of the evidence against him.**
 - One of the respondents who asserted that parties should be given reasonable prior notice of disclosure in all but the most exceptional cases has suggested that the first bullet be amended to read 'where advance notice, or any notice, may *significantly* hamper the requesting authority's investigation'. **However, given the clarification to the main body of what is now paragraph 8 of the Guidance referred to in paragraph 23 above, the CC does not consider that such a variation is necessary.**
 - One respondent (NGT) has queried whether the first bullet relates only to criminal investigations, and requested further information on what might hamper an investigation. ***Additional wording has been added to give an example of what might be said to hamper an investigation.* That wording makes it clear that the first bullet does not relate only to 'criminal' investigations.**
28. Two respondents (Clifford Chance and NGT) have suggested that the second bullet of paragraph 7 (cases where information can be shown to be reasonably required as a matter of urgency) goes too far. **However, given the clarification to the main body of what is now paragraph 8 of the Guidance referred to in paragraph 23 above, the CC does not consider that this is the case.**
29. One respondent (Lawrence Graham) has suggested that where advance notice would be impracticable due to the number of persons involved (the third bullet of what is now paragraph 8 of the Guidance), the CC could publish a notice on its website announcing that it intends to disclose a certain class or type of information to another authority and inviting representations from interested parties. ***Additional wording has been added to what is now paragraph 8 allow for such a procedure, where appropriate.***
30. One respondent (Simmons & Simmons) has requested further clarification on the circumstances that may justify exception on grounds of impracticability. **However,**

the list of exceptional cases set out in what is now paragraph 7 is intended to be for illustration rather than exhaustive, and it is neither possible nor practicable to anticipate and provide for every type of exceptional circumstance in the Guidance itself.

Onward disclosure and use

31. Two respondents (Lawrence Graham and Freshfields) suggested that the CC should insist that disclosed information could only be used for the purpose for which it was disclosed and should seek assurances from every requesting authority on the point. Should the receiving authority wish to use the same information for different purposes at a later date, argued the respondents, it should be obliged to clear this with the CC first. In particular, the responses noted that the wording at the end of what is now paragraph 9 of the final version of the Guidance was not explicit enough, as it did not reflect the fact that the CC should ensure that appropriate safeguards were in place to prevent the information disclosed being used inappropriately. To address this, respondents suggested that paragraph 9 should instead state that, before disclosure, the CC would ensure that it received appropriate undertakings from the recipient of the information that they would not use it for any purpose other than that for which it was disclosed.
32. Another respondent (Clifford Chance) argued that the CC should err on the side of non-disclosure and be satisfied that the receiving authority upheld similar standards of confidentiality protection to CC before making a disclosure. Any other approach would undermine the 'hard-earned goodwill' which CC currently enjoyed, and lead to less full and frank exchange of ideas during inquiries.
33. Another respondent (NGT) was concerned that the assurances referred to at the end of paragraph 9 of the Guidance might be weak in legal effect; and that, even if they were legally binding, they did not give information owners any rights to enforce them to protect their interests.
34. **The statutory gateways under the 2002 Act contain express restrictions on the use which might be made of information disclosed under a gateway. The CC anticipates that this will provide adequate protection.**
35. A respondent (Simmons & Simmons) has queried whether the protection provided by prohibitions on onward disclosure under the 2002 Act could be undermined as a result of the freedom of information regime. **However, information which is exempt from disclosure by virtue of the exemption in Part 9 of the 2002 Act will continue to be covered by statutory protection in the hands of any authority which is subject to equivalent statutory restrictions on the use of information.**

Assessing whether disclosure is 'necessary for the purpose'

36. One respondent (Lawrence Graham) has asked the CC to clarify whether the requirement on a requesting authority to demonstrate that the information is or may be relevant to its investigation (in paragraph 9 of the draft Guidance) is part of the requirement to specify the function or purpose for which information is required (referred to in paragraph 5 of the draft Guidance). **The CC believes that, while there is a conceptual distinction between assessing whether there is an appropriate statutory gateway and whether information which it is proposing to disclose is necessary for the purpose for which the disclosure is contemplated, there is, in practice, a degree of overlap between the two questions. Additional wording has been added to what is now paragraph 10 of**

the final version of the Guidance to clarify that there is a degree of cross-over between the two questions.

37. One respondent (Freshfields) has suggested that the CC amends the section in paragraph 9 of the draft Guidance which reads: 'the requesting authority will need to demonstrate that the information is or may be relevant to its investigation or other statutory function' so that it reads: 'is or *will become* relevant to its investigation ...'. **The CC believes that this proposed new standard is slightly too high, but that the drafting could be tightened up. *The relevant section in what is now paragraph 10 has been amended to read: 'is or is very likely to become relevant to its investigation ...'.***
38. The same respondent has also submitted that there should be a presumption against releasing information which the CC believes can be obtained from another source, and that the third bullet of paragraph 9 of the draft Guidance should be amended to refer to '*serious* doubts as to the accuracy of the information'. **Such clarification appears reasonable in the circumstances. *Additional wording has been added to the main body of what is now paragraph 10 to clarify that the CC will generally not be minded to disclose information unless there is a good reason why a requesting authority is unable or unwilling to obtain the information from a more direct source, and to introduce the requested qualification into the third bullet.***
39. One respondent (NGT) has noted that it may be difficult for a requesting authority to demonstrate that information is relevant (ie necessary for the purpose) without seeing it. **In such circumstances, it will be for the CC to assess, on the basis of representations from the requesting authority, whether the information is necessary.**

Criminal offences/proceedings

40. One respondent (Clifford Chance) has raised a legal issue concerning the disclosure of information to be used in criminal proceedings. It notes that information provided to the CC is subject to section 117 of the Act, ie subject to criminal penalties in circumstances where it may be false or misleading. Such information, it argues, is not provided on a voluntary basis and (under the *Saunders* principle) should not be used in any criminal investigations by other authorities to which it was passed. Public interest, argues the respondent, would not be served by disclosure in such circumstances.
41. **The CC is entitled to require information to be produced for the purposes of its statutory functions. Once received the CC is entitled, in the circumstances and subject to the constraints set out in the 2002 Act, to pass incriminating evidence to other public authorities. The use or non-use of such materials is then a matter for the prosecuting authority to determine, not the CC.**
42. The same respondent has requested further guidance on how the CC would assess the proportionality of an information request in relation to disclosures made in connection with the investigation of any criminal offence or for the purpose of criminal proceedings (referred to in paragraph 10 of the Guidance). **However, the principles of proportionality are well established and must be applied to the specific facts and circumstances of the case. We do not, therefore, believe that there is a need for further guidance.**

Notification of disclosure following objections

43. The CC states in paragraph 11 that if it is minded to go ahead with a disclosure after receiving objections, it will 'normally notify' an objecting party before it makes the disclosure. One of the respondents (Freshfields) considered that, given the sensitivity of information disclosure, the CC should be under a duty to make every effort to alert the objecting party before it made a disclosure. Only by doing so could parties be given a proper chance to exercise their legal right to have the decision reviewed. Another respondent (Simmons & Simmons) has requested clarification on the circumstances in which the CC might not notify an objecting party, and whether the CC will provide reasons to objecting party as to why it has ultimately decided to go ahead with a disclosure. ***Additional wording has been added to what is now paragraph 12 of the final version of the Guidance to address these issues.***

Timing of disclosures

44. One respondent (Lawrence Graham) has asked for clarification on whether the CC will only disclose information when the inquiry in relation to which information was gathered has been finished, or whether the CC will contemplate disclosure during an ongoing inquiry. ***As noted in paragraph 1 of the Guidance, a request for information may be made during an inquiry or after final determination of a reference, and the timing of the CC's response will depend on the particular circumstances. However, the CC is unlikely to want to divert resources in the middle of an inquiry to deal with disclosure issues not fundamental to the inquiry, and will normally leave it to end of inquiry to deal with a request, unless the requesting authority can demonstrate a particular need for expedition.***
45. A public authority respondent (TSSE) has suggested that the Guidance should include a timetable for disclosure following a request by a public body. ***However, while the CC intends to deal with requests as expeditiously as is practicable, it does not consider it necessary to set a timetable. The amount of time taken to deal with particular requests will depend on the scope of the request, its urgency and the resources available within the CC to deal with the request.***

Administrative responsibility for disclosures

46. Two respondents (Lawrence Graham and Freshfields) sought further clarification on the level at which information requests are determined within the CC. ***In cases where an information request is received prior to final determination of a reference, it will normally be for the relevant inquiry group to consider the request. In other cases, the decision will be taken by the CC Council, though the Council may decide to delegate decision-making to the Chairman, one of the Deputy Chairmen or the Chief Executive.***

Extent of disclosure

47. One respondent (Lawrence Graham) has queried the form in which disclosure is made, and, in particular, whether the CC will disclose information to a receiving authority in its original format or will sift out irrelevant information. The same respondent has asked whether—in cases where the identity of the party providing the information is not relevant or needed in order to understand and rely on the information—the CC will keep that information confidential. ***The CC's normal***

practice would be to excise irrelevant or unnecessary information when making a disclosure.

Interaction with Commission Guidance CC7

48. One respondent (Simmons & Simmons) has submitted that the draft Guidance should be consolidated into CC7 rather than appear as an annex to that document. ***On reflection, the CC has concluded that it would be better to issue the Guidance as a stand-alone document.***

Respondents

49. We are grateful to the following for their responses to this consultation exercise:
1. Civil Aviation Authority (CAA)
 2. Clifford Chance
 3. Freshfields Bruckhaus Deringer
 4. Joint Competition Working Party of the UK Bars and Law Societies (JCWP)
 5. Lawrence Graham
 6. National Consumer Council (NCC)
 7. National Grid Transco
 8. Simmons and Simmons
 9. Trading Standards South East (TSSE)