



Disclosure of information by the Competition Commission  
to other public authorities

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## Disclosure of information by the Competition Commission to other public authorities

1. This guidance contains advice and information published by the Competition Commission (CC) under paragraph 7A of Schedule 7 to the Competition Act 1998. It explains how the CC intends to deal with requests by other public authorities for disclosure of 'specified information'<sup>1</sup> received by the CC during the course of a merger or market investigation,<sup>2</sup> 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 CC has obtained information in the course of determining a reference which is relevant to its own investigation. It might ask the CC to disclose any relevant information in its possession. Such a request might be made during a CC investigation or after final determination of the reference.<sup>3</sup>
2. In addition to receiving such requests, the CC 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 CC 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 CC in determining whether to make the disclosure will be broadly similar to those for dealing with requests, albeit that the procedure is likely to necessitate some additional steps (as set out in paragraph 6 below). Where the CC implements remedies as a result of its findings, the CC will generally provide a copy of the confidential version of final merger and market investigation reports to the OFT *without* notice, to enable the OFT to comply with its general monitoring functions under the Enterprise Act 2002 (the 2002 Act).
3. As set out in paragraph 2.1 of the Chairman's *Guidance on Disclosure of Information in Merger and Market Inquiries* (CC7), the 2002 Act imposes a general restriction on the disclosure by the CC 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 of CC7, there are circumstances in which the CC 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. 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 should be used for another purpose.

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<sup>1</sup>'Specified information' is information which the CC 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 Enterprise Act 2002.

<sup>2</sup>The statutory provisions on disclosure in relation to regulatory inquiries conducted by the CC differ slightly from those relating to merger and market investigations, though the CC would normally expect to apply a similar approach when deciding whether to disclose sensitive information which it received in the course of such an investigation to another public authority.

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

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) of CC7, which allow the CC to disclose information to UK public authorities 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 2002 Act or another enactment specified in Schedule 15 to the 2002 Act or such subordinate legislation as the Secretary of State may specify in an order;<sup>4</sup> or
  - the information is disclosed:
    - in connection with the investigation of any criminal offence in any part of the UK;
    - for the purposes of any criminal proceedings there; or
    - for the purpose of any decision whether to start or bring to an end such an investigation or proceedings.
5. In considering whether to exercise its discretion to make such a disclosure through one of these statutory gateways, the CC will have regard to the three statutory considerations set out in the 2002 Act,<sup>5</sup> namely:
- the need to exclude from disclosure (so far as practicable) any information whose disclosure the CC thinks is contrary to the public interest;
  - the need to exclude from disclosure (so far as practicable)—
    - commercial information whose disclosure the CC thinks might significantly harm the legitimate business interests of the undertaking to which it relates;
    - or
    - information relating to the private affairs of an individual whose disclosure the CC thinks might significantly harm the individual's interests; and
  - the extent to which the disclosure of the information mentioned in subparagraphs (i) or (ii) is necessary for the purpose for which the CC is permitted to make the disclosure.
6. The CC's starting point will be to verify that there is an available statutory gateway. In the case of information requests, the CC 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. In cases where the CC is considering whether to disclose information on its own initiative, it will form a preliminary view on whether there is a suitable statutory gateway, although it will normally liaise with the relevant public authority to clarify the point. At this stage, the CC will endeavour not to disclose any specified information, but will seek to consult the relevant authority on a no-names basis.
7. If the CC 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

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<sup>4</sup>Section 241(3) of the 2002 Act.

<sup>5</sup>Section 244 (as referred to in paragraph 2.6 of CC7).

CC 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.

8. The CC will next 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 CC is sensitive to issues of confidentiality and commercial sensitivity, and will generally seek to give the 'owner' of the information (normally the undertaking or individual to whom it relates) notice of any impending disclosure in sufficient time to allow them to make comments, raise an objection or indicate that it consents to the proposal. When giving such advance notice, the CC will provide details of the information it proposes to disclose relevant to the party concerned by way of a detailed description, inventory or draft of the proposed disclosure. However, in a limited number of cases the CC may conclude that it is not 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 (for example, if the OFT or a sectoral regulator is investigating a possible infringement of the Competition Act 1998, the subject of such an investigation may seek to destroy evidence if it becomes aware of the investigation);
  - where the information can be shown to be reasonably required as a matter of urgency, in which case the CC 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, in which case the CC will consider whether it is appropriate to 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.
9. Whether or not the owner of the information objects to a proposed disclosure, the CC will balance the potential harm to legitimate (business) interests against the extent to which disclosure of the information is 'necessary for the purpose' for which the CC is permitted to make the disclosure. In carrying out this balancing act, the CC 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 CC may instead be satisfied with assurances as to the treatment of the information from the public authority concerned.
10. In order for the CC 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 is very likely to become relevant to its investigation or other statutory function (this will normally have been established in the context of clarifying the existence of a statutory gateway as set out in paragraph 6 above). In addition, the CC will consider whether the requesting authority would be able to obtain the information from another source, such as the 'owner' of the information, by using its own investigatory powers. In such cases, 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, 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 CC 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 serious doubts as to the accuracy of the information.
11. In relation to disclosures made in connection with the investigation of any criminal offence or for the purpose of criminal proceedings, the CC is expressly prevented under the 2002 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 CC 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.
12. If the CC is minded to go ahead with a proposed disclosure after receiving objections, it will seek to notify an objecting party before it makes the disclosure, and will normally provide reasons for proceeding in the face of the party's opposition.

