

Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries

1. Introduction

- 1.1. This document sets out the guidance of the Chairman of the Competition Commission ("the Chairman") to merger reference groups and market reference groups (referred to below as "groups" or "group") on the disclosure of information during Competition Commission ("the Commission") inquiries. It should be read in conjunction with the Commission's Rules of Procedure which are binding on members of groups and which must be followed.
- 1.2. The guidance has been issued by the Chairman under paragraph 19A (7) and (8) of Schedule 7 to the Competition Act 1998, following consultation with members and other appropriate persons.
- 1.3. The guidance will apply to all merger and market references made to the Commission on or after 20 June 2003 under Parts 3 and 4 of the Enterprise Act 2002 ("the Act")¹ subject to the transitional and transitory provisions and savings set out in Schedule 24 to the Act so that it will not apply to any references to which the "old law" as defined in paragraphs 13(10) and 14(3) of the Schedule continues to apply.
- 1.4. The guidance does not apply to newspaper merger references made under section 59 of the Fair Trading Act 1973 and to references of mergers of water and sewerage undertakings made under section 32 of the Water Industry Act 1991.
- 1.5. The Commission aims to be open and transparent in its work while maintaining confidentiality of information that it obtains during its inquiries.
- 1.6. Transparency facilitates inquiries for a number of reasons.
 - First, it is a means of achieving due process and that by having a better understanding of the case against them, the main parties in an inquiry are treated fairly.
 - 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 Commission's decision, to understand the issues that the Commission is considering.
 - Thirdly, transparency helps main parties and other interested persons when providing the Commission with information, including identifying inaccuracies and incomplete or misleading information.
 - Fourthly, the effectiveness, efficiency and quality of Commission inquiries and decisions are improved.

¹ Unless stated to the contrary, references in this guidance to sections are to sections of the Act.

- 1.7. When considering the disclosure of information, members should bear in mind that it is desirable for a consistent approach to disclosure to be followed from one inquiry to another. If a group encounters a situation not covered in this guidance or when it considers that it wishes to depart from the guidance, the chairman of the group should normally consult the Chairman.

2. Statutory considerations relevant to disclosure

- 2.1. The Act imposes a general restriction on the disclosure by the Commission of "specified information"³ that it has obtained in connection with the exercise of any function that the Commission has under Part 3 (mergers) or Part 4 (market investigations) of the Act⁴. Section 237(2) prohibits the Commission from disclosing specified information during the lifetime of the individual, or while the undertaking continues in existence, unless the disclosure is permitted under Part 9 of the Act. However, the Act does not prevent the disclosure of any information which has on an earlier occasion been disclosed to the public in circumstances that do not contravene section 237(2) or any other enactment or rule of law prohibiting or restricting the disclosure of the information⁵.
- 2.2. Part 9 of Act sets out the circumstances in which the group may disclose "specified information", namely:-
- (a) if the Commission obtains the required consent;⁶
 - (b) if the disclosure is required for the purpose of a Community obligation;⁷
 - (c) if the disclosure is made for the purpose of facilitating the exercise by the Commission of any function it has under or by virtue of the Act or any other enactment;⁸
 - (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

³ "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).

⁴ See section 237 and 238 of the Act. This general restriction on disclosure also applies to any information obtained by the Commission 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).

⁵ Section 237 (3).

⁶ Section 239. If the information relates to the affairs of an individual the consent of the individual is required. If the information relates to the business of an undertaking the consent of the person for the time being carrying on the business is required. In the case of a company, consent may be given by the director, secretary or other officer of the company. In the case of a partnership, consent may be given by a partner and in the case of an unincorporated body or association consent may be given by a person concerned in the management or control of the body or association.

⁷ Section 240.

⁸ Section 241(1).

or such subordinate legislation as the Secretary of State may specify in an order;⁹

(e) if the information is disclosed:-

(i) in connection with the investigation of any criminal offence in any part of the United Kingdom;

(ii) for the purposes of any criminal proceedings there;

(iii) for the purpose of any decision whether to start or bring to an end such an investigation or proceedings.¹⁰

2.3. If information is disclosed in the circumstance described in paragraph 2.2.(c) so that it is not made available to the public, it must not be further disclosed by a person to whom it is disclosed other than with the agreement of the Commission for the purpose of facilitating the functions of the Commission under the Act or any other enactment.¹¹

2.4. Information disclosed in the circumstance described in paragraph 2.2.(d) must not be used by the person to whom it is disclosed for any purpose other than a purpose relating to a function of that person under or by virtue of the Act or an enactment specified in Schedule 15 to the Act or such subordinate legislation as is specified by order.¹²

2.5. Information disclosed in the circumstance described in paragraph 2.2.(e) must not be used by the person to whom it is disclosed for any purpose other than that for which it is disclosed. The Commission is, however, prevented from making a disclosure in the circumstance described in paragraph 2.2 (e) unless it is satisfied that the making of the disclosure is proportionate to what is sought to be achieved by it.¹³

2.6. Before disclosing any specified information, the Commission is required to have regard to the three considerations, namely¹⁴:

(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.

⁹ Section 241(3).

¹⁰ Section 242 (1).

¹¹ Section 241(2).

¹² Section 241 (4).

¹³ Section 242 (2) and (3).

¹⁴ Section 244.

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.

2.7. These three considerations apply on each occasion that the Commission is considering making information available (for example, in correspondence, at hearings, in a statement of provisional findings or a consultation document on remedies, and the final report) which is "specified information". The Act does not contain separate excision provisions addressing final reports except some cases concerning public interest considerations.¹⁵

2.8. This guidance should be read in the light of Part 9 of the Act.

3. Disclosure of information during inquiries

3.1. In the following paragraphs, guidance is provided by reference to the various types of information the Commission receives during an inquiry. When considering whether to disclose particular information and to whom, groups should have regard to the following objectives:-

- the need to make sufficient information available to main parties so that they have sufficient understanding of the case against them;
- the desirability of making sufficient information available to the public so that the public may become aware of the main issues arising in an inquiry and are in a more informed position to provide information to the group;
- the need to disclose information supplied by parties so that other interested parties are able to comment upon the information supplied and can draw to the Commission's attention inaccuracies, incomplete or misleading information and can comment on the information supplied.

3.2. In market inquiries groups will also need to consider whether or not any unpublished information from main parties should be disclosed to other main parties. They will also need to consider disclosing information received from one main party to other main parties in some merger inquiries, for example, if the inquiry is concerned with more than one anticipated merger or is a contested merger.

3.3. Paragraph 4.3 refers to the types of information commonly received and provides guidance to groups in respect of the disclosure or publication of the information. Publication should be effected by placing the information on the Commission's website. If however, the parties are unable to provide the information in electronic form, the group will need to give consideration as to whether having regard to the volume, the relevance of the information and the timescale it is appropriate to make the key points publicly available. In this circumstance, the groups should usually request the relevant party to prepare the information for publication. This issue may arise, for example, in respect of surveys prepared for or by main and third parties. If in the circumstances the group decides not to publish the information concerned, it should consider making the information available to main and third parties. Paragraph 4 refers

¹⁵ Sections 118 and 177

to the need for parties to provide non-sensitive versions of their key arguments and views.

- 3.4. In the past, main and third parties have co-operated with the Commission's information requests in the knowledge that the Commission would be sensitive to any requests for confidentiality. For example, it has often been appropriate and sufficient for the submissions to be anonymized. This guidance is not intended to alter the Commission's approach to any such requests.
- 3.5. In this paragraph are listed the main types of information received by the Commission in the course of an inquiry together with guidance to groups on their approach to each type:-

(a) Responses to Commission questionnaires

(i) Any aggregate analysis prepared by the Commission, of third party responses to Commission questionnaires should be disclosed to the main parties. Such analysis may be in the form of a stand-alone document or be material included in Commission working papers (see below). Groups should also consider whether it is appropriate to publish the aggregate analysis or whether to disclose it to selected third parties.

(ii) In most inquiries it will not be appropriate to publish main or third party responses to questionnaires. Groups should consider whether any information from the responses should be disclosed to third parties or other main parties though generally it will be inappropriate and unnecessary to disclose a response in full.

(b) Key arguments and views of main parties

Groups should publish key arguments concerning the main party's economic, financial and business analyses, its views and responses to third party comments and views (including those that may have been set out in the main party's response to the Commission's questionnaires). Groups should consider whether any additional information should be disclosed to third parties or other main parties.

(c) Key arguments and views of third parties

Key arguments and views of third parties should be published, or in cases of sensitivity made known to main and any selected third parties. When considering the form of disclosure the group should have regard to the practicality of disclosing the information as well as the three statutory considerations. For example, a group may consider it appropriate to disclose a non-sensitive version prepared by the third party or it may prepare a summary of the views it has received from all third parties (excluding, if appropriate, information that the group determines should not be disclosed). In all cases, the group should consider whether or not the identity of the third party needs to be disclosed

(d) Surveys commissioned by main and third parties

Groups should consider publishing relevant surveys or, if the group considers it inappropriate to publish in the circumstances, disclose any

such surveys to main parties and selected third parties. Groups should consider whether in the circumstances it is appropriate and practical to disclose the entire survey or an extract or summary of the survey prepared by the commissioning party. 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 Commission's inquiry.

(e) Surveys commissioned by the Commission

Information relating to these should generally be published. The group will need to consider, having regard to the three statutory considerations and the practicality of publishing the information, the form in which the information should be disclosed, for example, by way of extract or in summary. Groups should generally disclose fully the methodology used. If the information is not published, groups should consider disclosing information about the surveys to main parties and selected third parties.

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

Transcripts and attendance notes need not be published nor disclosed to a main party or third party. Groups should consider whether for the purpose of fairness any points arising should be disclosed to a main or third party.

(g) Information from a body which referred an Inquiry to the Commission

When making a reference the OFT, or the Minister or regulator who has made the reference (the "referrer"), is required by law to publish the reasons for making the reference. The referrer may also provide the Commission with additional information. Groups should consider the need to disclose any information received from the referrer to the main parties, though it is likely that key non-sensitive information will be contained in the referrer's published reasons for making a reference.

(h) Papers internal to the Commission

(i) In the course of the inquiry, the group will consider working papers prepared by the Commission staff or its consultants prior to the publication of provisional findings: for example, analyses concerning the definition of the relevant market and assessment of market power. Groups should consider disclosing extracts of these papers (generally factual material and Commission's economic and financial analyses but without opinion or conclusions and legal advice) to main parties and third parties. Any such disclosure should be made on the basis that the group has not yet reached its final decision. It is probable that some working papers will be finalised shortly before provisional findings are published and in this circumstance the group may decide not to disclose the working paper in advance of including relevant material in the provisional findings.

(ii) Generally it will be inappropriate and unnecessary to publish the group's working papers (or extracts).

4. Receipt of information and preparation of non-sensitive information

- 4.1. The Commission will in future expect parties to provide a full version of their key arguments and views and a second version of the same that excludes information that the party considers to be sensitive. Groups should request the provision of non-sensitive versions, whether or not the Commission has requested the information by the exercise of its powers to request information under section 109 of the Act.
- 4.2. All information excluded should be obvious to the group so that it may assess whether the non-sensitive version is in satisfactory form, having regard to its intention to disclose information, the purpose of such disclosure and to this guidance. Groups should ask parties to provide a means by which the extracted information may be readily identified. This could be in the form of an annotated version of the full submission or by accompanying commentary provided the latter is of sufficient detail.
- 4.3. Paragraph 3.3 notes the possibility that some documents that the group might wish to publish may not be available in electronic format. In these circumstances, groups should consider asking the party concerned to provide a suitable summary of the information contained in the document for publication or disclosure to other main or third parties. When doing so, the party should identify information that it has omitted from the summary because it considers the information to be sensitive.
- 4.4. On receipt of any non-sensitive versions of submissions or summaries of documents, groups should consider the need to make any modification to ensure adequate and appropriate disclosure for its purposes. If amended by the group by the addition of information the party regards as sensitive, the group should, if practicable, generally inform the relevant party in advance of disclosure of the modification, thus allowing the party the opportunity to explain further the party's concern, though the party is likely to have only a short time in which to respond.
- 4.5. 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 make known to the group which parts are sensitive so that the group may have regard to the three statutory considerations prior to disclosing the information to others. This is because it may not always be practicable to discuss any proposed disclosure with the person who supplied the information before the group applies the three statutory considerations. It is therefore to the advantage of the provider of the information to give sufficient explanation as to the nature of the sensitivity at the time of supplying the information. In general, the group should take the view that a party has failed to give sufficient explanation about the sensitivity of the information if the information is marked "sensitive" without further narrative. 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 by the party.
- 4.6. Groups are reminded of the opportunity provided to parties to make further representations to the Commission if they wish to dispute the proposal of a group to disclose information¹⁶. This is additional to the opportunity for

¹⁶ General Advice and Information CC4, paragraph 6.30

parties to make known their concerns to the group. Groups should 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.

5. Timing of disclosure of information

Information will inevitably be received throughout the course of the inquiry, so that it will not be possible to state in the administrative timetable when disclosure will be made. There are, however, key stages in an inquiry (for example the time of publication of the issues statement, the provisional findings and the remedies statement) and groups should endeavour to disclose information having regard to these stages. If information is disclosed during a consultation period, for example the period for the consideration of provisional findings¹⁷, the group should consider whether the period should be extended. Relevant considerations will include the nature and relevance of the information to the group's findings, the administrative and statutory timetable and issues of practicality.

Sir Derek Morris

Chairman

[Date]

¹⁷ Rule 10.5(a)

Explanatory Note

This note does not form part of the Guidance

This note and the table below are intended to assist the reader to understand whether a group, having regard to the Chairman's Guidance on Disclosure of Information in Merger and Market inquiries ("guidance"), may decide to disclose or publish any of the information it receives during the course of an inquiry. It should be read in conjunction with the guidance and in the event of conflict between the table and the guidance, the guidance prevails.

Type of Information	Publication on CC Website	Disclose to Main or one or more Third Parties	Chairman's Guidance
Third party responses to Commission questionnaires	No	✓	3.3(a)(i)&(ii)
Third party key arguments and views	✓	N/A	3.3(a)(ii)
Main party responses to Commission questionnaires	No	✓	3.3(a)(ii)
Main party key arguments and views	✓	N/A	3.3(b)
Surveys commissioned by third and main parties	✓	✓	3.3(d)
Surveys commissioned by the Commission	✓	✓	3.3(e)
Transcripts, notes of meetings and telephone conversations	No	No	3.3(f)
Information from Referrer	No	No	3.3(g)
Papers internal to Commission	No	✓	3.3(h)