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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT

-- United Kingdom --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Introduction

1. The UK's submission for 16 February 2010 Working Party 3 roundtable discussion on procedural fairness ("UK contribution Feb 2010"), provided an overview of procedures used by the OFT for competition enforcement, mergers and market studies, and by the CC for both merger and market investigations. This paper describes the following aspects of the OFT's and CC's procedures that are raised in the call for contributions:

- Institutional design and the decision making process
- Confidentiality issues
- Request for information
- Judicial review and interim relief

2. It should be noted at the outset that due process issues cannot be discussed in isolation but need to be discussed alongside the need for quality decision making, effective and timely enforcement and efficient use of resources of the agency and parties. These factors can create tension. In addition, there is a need to balance and reconcile the rights of different persons with each other. For example, the rights of defence of the parties with parties' rights not to have confidential information disclosed.

2. OFT Transparency consultation

3. The Office of Fair Trading (OFT) recognises the importance of being transparent and of engaging effectively with parties and stakeholders. The OFT conducted a consultation in July 2009 exploring how it can become increasingly open and transparent in the way it conducts its work and engages with parties ('Transparency consultation')¹. This section provides an update on some of the commitments that OFT will make as a result of the responses it has received to this consultation, as set out in its statement published in May 2010 entitled 'Transparency: A Statement on the OFT's approach'². In addition, this section sets out:

- How the OFT engages with parties when requesting information;
- What type of information is made available to parties; and
- How the OFT ensures sound decision-making.

3. Sharing of provisional thinking in OFT competition enforcement cases and merger reviews

4. The extent to which the OFT can and does share its provisional thinking in enforcement cases and merger reviews, either with those immediately involved in the project or by publishing information on its website for wider review, is one important aspect of how transparent the OFT is as an organisation, and how it engages with those involved in its work.

5. In the OFT Transparency consultation, the OFT asked for views about the sharing of provisional thinking in competition enforcement cases. The feedback from respondents was mixed with some welcoming the sharing of provisional thinking whilst others felt that such disclosures did not sit well

¹ http://www.offt.gov.uk/shared_offt/consultations/oft1101.pdf.

² http://www.offt.gov.uk/shared_offt/consultations/668117/OFT1234.pdf.

within our procedural rules. While the OFT acknowledges the difficulties in this area it will keep an open mind about when and how it can share its provisional thinking and the OFT's case teams will consider any requests from parties or proposals from parties.

6. When undertaking projects such as market studies it has become OFT practice where possible to share research and preliminary findings.

7. In respect of OFT merger cases, case teams keep in close contact with the acquiring company throughout the life of a case. OFT's merger case teams provide informal feedback and articulate theories of harm as they arise and at the earliest possible opportunity. In addition, the OFT is willing throughout its merger reviews to engage in discussion with the parties on potential remedies on a 'without prejudice' basis. Indeed, in a number of cases such consideration has occurred as early as in pre-notification discussions.

8. The OFT case team will generally have a 'state of play' discussion with the parties around the mid point of a merger review in order to give them as detailed an indication as possible of what competition concerns (if any) are being examined and whether the case is likely to go to a 'case review meeting'.³ If a case is a candidate for reference for second phase investigation or to be remedied at the phase one stage) the OFT sends the parties an issues letter. This document articulates the OFT's concerns in writing, substantiated by evidence, and invites the parties to respond to the theories of harm set out in the paper. The parties are able to respond to the issues letter in writing and/or in person at an 'issues meeting'. This meeting, held with the case team and senior OFT Mergers staff, gives the parties the opportunity to discuss the OFT's competition concerns and to try to persuade the OFT as to why the concerns are unfounded.

4. OFT Requests for information

9. The OFT's ability to obtain relevant information and evidence has a direct bearing on the quality of its decision-making and on the timescales for completion of its work. However, the OFT is equally mindful of the burden on companies of complying with information requests and of the need to minimise that burden. The OFT's approach is set out in further detail below.

4.1 Draft information requests

10. A notice to provide information must state the subject matter and purpose for which the information is sought but it does not need to give extensive detail. In addition, it must specify or describe the documents or information, or categories of documents or information, required, and set out the nature of the offences that may be committed if a person fails to comply when the powers of investigation are exercised⁴.

11. The OFT routinely discusses the range of questions or the format of the response with parties. Following the OFT's consultation on transparency, it has made a commitment to provide formal information requests in draft where it is practical and appropriate to do so, particularly where legal rules do not lay down a different procedure.

12. The provision of formal information requests in draft in appropriate cases can have several benefits:

³ A case review meeting is held for those cases that have such potential competition concerns that render them candidates for a second phase investigation.

⁴ http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft404.pdf.

- Providing a request in draft allows the OFT to take into account comments on the scope of the information and/or documentation that it has asked for, making it easier for notice recipients to comply with the information request. Those who receive information requests can be clear of what information is of relevance to the investigation and, therefore, where they might need to look for it.
- Providing a request in draft allows the OFT to take into account comments the timeframe that we have specified for responding to the request. Then once a final request is issued the OFT can be confident in enforcing the deadline – which leads to better project planning and faster cases.

13. The timescale specified in the final request will differ according to the nature and the amount of information that the OFT has requested. It is not possible for the OFT to apply uniform, set timescales for responses to information requests. If a request has been provided in draft, and the timescale for response to the final request has been discussed, the OFT will only agree to any extension in exceptional circumstances.

14. There are of course times when sending a draft information request would be inappropriate. The OFT's key considerations in assessing whether or not it would be appropriate to provide an information request in draft are: whether or not it would prejudice the investigation to do so or, because the request is for a small amount of information, whether it would be inefficient to do so. The desire to be open and transparent must therefore be balanced against the need to avoid obstruction and evidence destruction, especially in 'hardcore' competition enforcement cases. In reality, there may therefore be a difference as to how open the OFT can be with parties depending on the nature of the case.

4.2 Advance notice of information requests

15. In appropriate cases, the OFT will seek to give recipients of significant information requests advance notice, so that they are able to manage their resources accordingly. For example, significant information requests often take some time to prepare and there may be no reason why the case team should not tell the intended recipient that they are preparing to send an information request.

16. There will however be instances where it is inappropriate to give advance notice, such as where the request is for a small amount of information, the need for the information was unexpected, or where giving notice would prejudice the investigation.

5. Confidentiality in OFT procedures

17. The OFT discloses information for many different reasons. The OFT may, for instance, disclose information:

- to assist parties under investigation to clearly understand the case against them so that they can properly defend themselves;
- to enable third parties to provide the OFT with informed input into investigations;
- where the OFT is required to publish information in relation to specific cases (for example, infringement decisions) or more generally (for example, guidance to educate business about Competition Act).

18. The OFT is sensitive to issues of confidentiality and, in particular, to the need to balance and reconcile different procedural rights with each other around the disclosure of information, for example the

need to balance parties' rights of defence with the rights of parties not to have confidential information disclosed. The following sections discuss what information the OFT may disclose, and the circumstances in which disclosure may take place.

5.1 Restrictions on what may be disclosed and in what circumstances

19. The rules on disclosure are set out in statute, under the Enterprise Act 2002 (EA02), and in the OFT Rules⁵. They serve an important purpose in ensuring that information which is provided to the OFT, whether this is done voluntarily or in response to a statutory requirement, in connection with the exercise of the OFT's functions under statute is protected from unnecessary or disproportionate disclosure. This is particularly important where the information is commercially or personally sensitive⁶.

20. The EA02 therefore sets out a general restriction on the disclosure of information that the OFT has obtained in connection with the exercise of its statutory functions ('specified information') and which is commercially or personally sensitive. For example, information on a company's latest business plan that the OFT receives from a party in connection with a merger review.

21. The general restrictions on disclosure of specified information does not apply where there is a duty to disclose⁷ or where disclosure is permitted under one of the 'gateways' set out in the EA02.

22. The gateways for disclosure which permit disclosure of specified information (but do not require it) include:

- **Disclosures for the purpose of facilitating the exercise of any of the OFT's statutory functions.** The following disclosures would facilitate the exercise of the OFT's statutory functions: the disclosure of the investigation file to parties under investigation; the disclosure of a Statement of Objections to an interested third party who will assist in testing the OFT's case before infringement decision; and the publication of a Decision.
- Disclosure of information which has previously been disclosed to the public already, provided that the previous disclosure would not now be prohibited.
- **Disclose of information where the consent of all relevant persons is given.** This means that consent must be given by: the person who provided the information, and (if different) the undertaking and/or individual to whom the information relates.
- Disclosure which is required for the purpose of fulfilling a Community obligation.
- **Disclosure for the purpose of criminal proceedings.** This means that the OFT may disclose information to any person in relation to any criminal investigation or proceedings in the UK; and decision whether to start or end a criminal investigation or proceedings.
- Disclosure of information to overseas public authorities in certain circumstances where it facilitates the exercise by that person of any functions they have. This gateway is most likely to

⁵ Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2000/293 (OFT's Rules).

⁶ Restrictions on disclosure will apply in such cases during the lifetime of the individual in question, or while the undertaking in question remains in existence.

⁷ For example, where disclosure is required by a court order. In such cases, however, it is still necessary to assess whether any of the information is confidential in nature under s.244.

be relevant where the OFT is asked to disclose information by overseas competition authorities who are investigating breaches of their domestic competition legislation.

23. In addition to the general restriction on disclosure of 'specified information', further considerations must be given before disclosing any 'confidential' information. These additional considerations are intended to provide a safeguard against the unnecessary or disproportionate disclosure of confidential information, which by its nature is likely to be particularly sensitive. The practical consequence is likely to be that if these considerations operate to prevent disclosure, confidential information will have to be redacted, or replaced by aggregated figures or ranges, before disclosure takes place.

24. In addition, it may be *against the public interest* to disclose particular information. For that reason there are additional safeguards protecting such 'confidential' information from disclosure.

5.2 Representations on disclosure and decision-making

25. It is the OFT which ultimately makes the decisions as to whether:

- information is confidential, and
- if it is, whether it should be withheld from disclosure.

26. It does not however follow that the views of the persons to whom the information relates should be ignored. Firms operating in the market will, for example, generally be better placed than OFT case teams to explain why the disclosure of particular information would be harmful to them.

27. The importance of such input to the assessment of confidentiality is recognised by the OFT Rules, which give persons providing information to the OFT an opportunity to explain the extent to which it is confidential, and which require the OFT to seek their views if it is proposing to disclose that information under the OFT Rules. Notwithstanding the above, the assessment of confidentiality must still be carried out even where the parties have made no representations about it.

28. In addition, the OFT is under a duty to consider whether any specified information is confidential even where the parties providing it (or, if different, third parties to whom the information relates) have made no representations as to its confidentiality. The assessment of confidentiality must be carried out for all specified information.

29. There are three types of confidential information:

- Commercial information whose disclosure might significantly harm legitimate business interests. Examples of information which may fall into this category include:
 - current cost information;
 - current pricing information;
 - board papers setting out future commercial strategy.
- Personal information whose disclosure might significantly harm the individual's interests. Examples of such information might include:

- employment records;
 - health records;
 - private address and contact details.
- Information whose disclosure would be contrary to the public interest. A draft defence contract obtained by the OFT from the Ministry of Defence might, for example, fall into this category, on the basis that its disclosure could give rise to issues of national security.

30. Making the decision as to whether confidential information should be disclosed is a complex assessment. By accepting that a piece of information is confidential, the OFT is accepting that disclosure of that information is likely to cause significant harm to an undertaking's business interests, to the affairs of an individual, or to the public interest. Moreover, unnecessary or disproportionate disclosure of confidential information carries a significant reputational risk for the OFT, which may in turn have an adverse impact on future investigations.

31. The OFT assesses whether it is necessary as a matter of evidence that confidential information must be disclosed for the purposes of a particular case considering, in particular:

- whether the information in question directly establishes the infringement;
- even if it does, whether there are other means of establishing the infringement to the requisite standard;
- whether the information must be disclosed to protect the rights of the defense.

32. Even where it is established that disclosure of confidential information is necessary as a matter of evidence in order to proceed with a particular case, an assessment should still be made as to whether the aim to be achieved by disclosure as a matter of broader policy outweighs the likely harm which disclosure will cause.

33. Where a person who has provided information to the OFT has identified it as confidential, and the OFT subsequently proposes to disclose that information under the OFT's Rules, the OFT must take all reasonable steps to inform that person of its proposed action, and allow them to make representations on it.

34. If a case team is proposing to disclose information which has been provided by one person but which relates to a third party, and the case team considers that it might be confidential in nature, the views of the third party in question should be sought prior to disclosure on:

- whether they consider the information to be confidential (if their views on this have not already been sought), and
- if so, whether it should be disclosed.

5.3 Penalties

35. It is a personal criminal offence (leading to the possibility of imprisonment or fine) to disclose information in breach of the provisions described above.

6. Procedural fairness vis-à-vis targets of enforcement proceedings

36. Procedural steps are undertaken by a case team formed for the purposes of a given investigation. Such steps may include gathering and analysing information and the production of any Statement of Objections or decision. Roles and responsibilities within an OFT case team include the Senior Responsible Owner, the Project Director and the Team Leader. The Senior Responsible Owner is accountable for the delivery of the case, whereas the Project Director directs the case and is the person accountable for delivery of high quality, timely output. The Team Leader leads the case team and works closely with the Project Director to support them in their role.

37. At the OFT, decisions to commence, continue or discontinue a competition investigation and decisions to approve the issue of a Statement of Objections, infringement decision or non-infringement decision are taken by the case Senior Responsible Owner, where necessary in consultation with the Chief Executive.

38. **The OFT Board:** The OFT Board can be a decision-making body in specified cases, particularly in commencing and completing projects. For example, Market Investigation References to the CC require the approval of the OFT Board. The Chairman oversees such decisions.

39. In addition, case teams can also benefit from external input into their decision-making, through a number of channels including:

40. **Executive Committee (ExCo):** ExCo is regularly consulted on projects and cases at major milestones. It is responsible for ensuring best practice in decision-making across the OFT's work. The Senior Responsible Owner can consult with ExCo when considering making key decisions. ExCo is chaired by the Chief Executive.

41. **Steering Committee:** A Steering Committee, constituted differently for case, provides guidance and consists of senior officials from across the OFT who can add value by advising the case team. While not a decision-making group, the Steering Committee supports and challenges the case team and acts as a sounding board.

42. **The Chief Economist Office** advises on the economic robustness of cases. In addition, economists in the OFT meet regularly to discuss their analyses and receive peer review.

43. **The General Counsel's Office** advises on the legal robustness of cases, and case teams. In addition to internal advice, case teams often seek the advice of external counsel or external economists on particular points arising in cases.

44. **The Policy Group** advises case teams on how to handle steps in an investigation and ensures consistency of approach between cases.

45. In addition, case teams often seek the advice of external counsel or external economists on particular points arising in cases.

46. In addition, at the OFT, all merger cases are peer reviewed by another member of the mergers team. In more complex merger cases, where an Issues Paper is sent, a formal case review meeting will follow the Issues Meeting. The case review meeting will comprise the case team, senior officials within the Mergers Group, and other officials within the OFT that have relevant sectoral experience. One person in the review group is charged with playing 'devil's advocate' in respect of any case team recommendation to ensure that the majority view is thoroughly tested.

6.1 *Judicial review*

47. Decisions by the OFT as to whether there has been a breach of the prohibitions in the Competition Act 1998 or the Treaty on the Functioning of the European Union (or imposing a penalty for breach of those prohibitions) are appealable by parties whose conduct is the subject of the decision and also, in respect of some decisions, by third parties with a sufficient interest, to the Competition Appeal Tribunal (CAT) under sections 46-47 of the Competition Act 1998.

48. The CAT must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal. The power of the CAT includes the power to:

- confirm or set aside the decision in question;
- remit the matter to the OFT;
- impose or revoke or vary the amount of any penalty;
- give such directions, or take such other steps, as the OFT itself could have given or taken; and
- make any other decision which the OFT could itself have made.

49. In respect of appeals concerning the acceptance, release, non-release or variation of commitments, the CAT must determine such appeals in accordance with judicial review principles. That is, the CAT's review must be confined to assessing whether the OFT's decision was:

- ultra vires,
- unreasonable,
- procedurally flawed or
- disproportionate.

50. In such cases, the CAT may dismiss the appeal or quash the whole or part of the decision to which it relates. Where it quashes the whole or part of that decision, remit the matter to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the CAT.

51. The Enterprise Act 2002 (by sections 120 and 179) confers the judicial review jurisdiction in relation to the OFT's merger and market investigation reference decisions on the CAT. Otherwise, the High Court (in England and Wales) and the Court of Session (in Scotland) have jurisdiction to judicially review decisions of bodies exercising public functions on the application of parties affected by or with an interest in such decisions.

52. Procedural errors have occasionally led to decisions of the OFT being quashed and/or reconsidered. For example, the CAT's judgment in *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10, where the CAT clarified the requirements of procedural fairness in respect of complainants and these requirements were taken into account when preparing OFT451.

53. Similarly, mergers procedures were modified following the CAT's judgment in *Unichem Limited v OFT* [2005] CAT 8, where the CAT quashed an OFT decision in which the OFT had not fully checked facts with a third party that pertained to that third party. Please refer to the response to question 4e above.

7. CC merger and market investigations- background

54. The CC is a decision making body applying competition tests (in the form of statutory questions).⁸ The CC does not select cases to investigate but conducts in-depth inquiries into mergers and markets referred to it, its role being characterised as a Phase II body⁹ In addition to being determinative on the competition test, it determines and implements remedies (ie. following both merger and market investigations). Investigations must be completed within a statutory timetable, only merger references are capable of cancellation in the event that the proposed merger does not proceed.

55. Some distinct features of the CC are relevant to the consideration of the CC's approach to the procedural issues as described more fully in the paras below:

- the responsibility of the CC is to investigate a case referred to it and reach a decision on the basis of the evidence before it. It is not a prosecutorial body and approaches cases on an objective de nova basis;
- the CC decides cases and publishes an indepth report (including when no adverse findings are reached);
- the decision makers are closely involved in the investigation, having first hand knowledge of the evidence and responsibility for the strategic direction of the investigation;
- parties that are the subject of a decision and many third parties have access to the decision makers at hearings (and through written submissions);
- the statutory regime and the CC's procedures establish a transparent process (the parties are aware of the issues raised by the referring body and the issues under consideration by the CC, the state of play of the investigation, the evidence submitted and analytical approach of the CC in addition to being consulted on the CC's proposed decision); and
- the CC has published both procedural and analytical guidance relevant to merger and market investigations, including guidance on disclosure.

56. Judicial scrutiny of the CC's decisions is on judicial review rather than appeal basis, to the specialist tribunal, the Competition Appeal Tribunal (CAT).

7.1 *Institutional design and the decision making process*

7.1.1 *Role of decision makers and review of evidence*

57. Decisions are made by a Group of Members which perform the functions of the CC for the particular case. The decision makers are closely involved with a case (from the point of reference, throughout the evidence gathering and decision-taking stages and until its conclusion). The Group is

⁸ For mergers, whether there is a relevant merger situation and whether the merger is expected to result in an SLC. For markets, whether there are features of the market that have an adverse effect on competition. Additionally, if the CC determines that there are adverse effects on competition, it must decide whether action should be taken by it or others by way of remedy.

⁹ The CC also acts as an appeal body in relation to various regulated industries, an area outside the scope of this paper. The majority of merger and market investigations are referred to it by the OFT although some sector regulators may make market references and the SoS has limited powers to refer public interest cases.

supported by a staff team. The involvement of the decision makers and staff are explained more fully below.

58. The Group comprises 3 to 5 Members (the minimum is 3 members) who are appointed for an individual case by the CC Chairman at the beginning of the investigation (ie when a case is referred to the CC). With the exception of the CC Chairman and the Deputy Chairman (there are presently 4) all other members of the CC are part-time and engaged by the CC as and when cases are referred to the CC and Groups are formed. Some members combine their role at the CC with academic posts while others hold public or other positions elsewhere. A distinct feature of the CC is that it is able to attract members who have high standing in their particular field of practice. In general a Group will, through the expertise of individual members, represent the economic legal, financial and business areas.

59. Throughout the investigation the parties have the ability to respond to questionnaires and CC requests for information as well as submitting further comment and evidence on their own initiative. This material is drawn to the attention of the Group, both by circulating the parties' key submissions and in the form of working papers which identify and analyse the evidence received. These are discussed at meetings with the Group and staff, such discussions shaping the analysis and ultimately informing the decision and reasoning.

60. Main parties in both merger and market investigations will have access to the decision makers at hearings arranged by the CC. Typically in a merger investigation the Group will hold a hearing with the main parties prior to publication of its provisional findings (the proposed decision) and following such publication, particularly if the Group's decision at the provisional stage is that there is an SLC. Similarly in market investigations the Group will hold hearings with the main party's prior to provisional findings and again after publication of provisional findings. Third parties may also attend hearings with the Group or staff.

7.1.2 Staff teams

61. The Group works alongside a multi-disciplinary staff team, led by an Inquiry Director (typically with a project management consultancy background or a professional in the field of legal, finance or economics). Other members of the staff team will include representatives from the CC legal, economics, business and financial divisions as well as administrators. Both staff and members are involved throughout the case, ie from the early stage at which theories of harm, requests for evidence, are discussed and decisions made as to which parties to hear from, to the later stages when evidence is required leading to the final decision take stage. There is regular contact between the staff team and the Group (mainly through meetings or teleconferences) which ensures that the Group members are aware of the evidence and also set the strategic direction of the case.

7.1.3 Independent review and external scrutiny

62. As explained, both the Group and the staff team will include economists and lawyers amongst their membership. There are a number of methods which the CC uses to ensure that evidence based quality decisions are reached.

63. The Chairman and Deputies liaise on a weekly basis. The economics division at the CC also meets weekly to discuss substantive issues arising in individual cases. This allows for issues to be addressed as they arise and for guidance to be sought or provided on all aspects of the case, not merely at the later stage when the decision is being formulated.

64. The CC also places importance on the use of Peer Review (multi-disciplinary review by CC staff economists, lawyers and where appropriate financial analysts and business team), the outcome of such

reviews being reported to and discussed with the Group and staff team. Such reviews will however be less helpful in identifying procedural deficiencies in an investigation (the ability for parties to raise procedural issues is discussed at para 17).

65. Additionally, the CC might instruct external Counsel to review the CC's decision as well as provide discreet advice on aspects of the case that arise during the investigation. Such external scrutiny is more likely in market investigations but may be used also in contentious and complex merger cases.

66. A number of practical issues affect the effectiveness of internal or external review. In the context of a fixed statutory timetable, the period allowed for review is short and fairly rigid– the reviewer's availability can affect the contribution. The review needs to be sought at a time when it is not too late for those views to be considered, and yet at a time when the Group's views are formed. In the context of a case where there is continuous engagement with parties on the evidence and analysis, this can be particularly tricky. Another issue is whether the reviewer has sight of submissions as well as the draft decision. The former is preferable since it can inform the reviewer of the issues that have been raised and so identify gaps or weaknesses in the analysis, though the review may take longer.

7.1.4 Other practices used to improve the quality of decision taking and address procedural concerns raised by parties

67. Additionally the CC has nominated a number of leading academic economists to a panel to which the CC refers for comment on individual cases. They advise the economist staff team, being used to provide external scrutiny on the theories of harm and analysis and ensure that the CC is aware of the latest developments in economic technique and theory.

68. In some cases, Groups have made use of round tables to explore issues at an early stage of the investigation to improve their understanding of the issues raised by the case. In the past it has invited industry specialists and commentators to improve the CC's understanding of a particular industry and invited leading academic economists to discuss discrete aspects of the case (e.g in the Groceries Market Investigation, it held roundtables on Local Competition and Buyer Power).

69. Procedural issues and concerns raised by parties are discussed by the party with the staff team which has the ability to escalate the issue to the Group chair and the Group if appropriate. In practice many of the issues are resolved at the staff level. For resolving disputes between parties and a Group over a proposed disclosure of information that the party concerned objects to, the CC's procedures entitle parties to bring their objections to the attention of the CC's Chief Executive for him to advise the Group. Ultimately the decision on all matters relating to a particular case is for the Group to decide, with recourse being available to the Tribunal (see paras 41 onwards).

7.2 Confidentiality issues

70. In the UK contribution Feb 2010 (see paras 107-108, 118-120 and 130) the CC described the key documents which are disclosed to the main parties and others and the extensive use made by the CC of publication on the CC website. The CC's policy on transparency recognises that transparency contributes towards the fairness of the CC's processes by main parties having a better understanding of the case against them and also aids the effectiveness of the investigation, enables interested parties (including main parties, other firms and consumers) to understand the issues the CC is considering and then to form effectively their input to the process and aids the efficiency and quality of the CC's decisions. The CC's policy as regards disclosure to parties affected by its decisions and transparency more generally is influenced by the statutory considerations which are relevant to disclosure. These are described below.

7.2.1 *Information protected by statutory restriction on disclosure*

71. The Enterprise Act 2002 (the Act) imposes a general restriction on the disclosure by the CC of “specified information”. “Specified information” is information which the CC receives in connection with its functions under the Act (or subordinate legislation).

72. The Act prohibits the CC from disclosing specified information during the lifetime of the individual or while the undertaking to whom the information relates continues in existence, unless the disclosure is permitted by the Act. However, the Act does not prevent the disclosure of any information which has on an earlier occasion been disclosed to the public provided such earlier disclosure was lawfully made. A person who discloses information in contravention to the Act commits a criminal offence (liable to a fine and/or imprisonment).

7.2.2 *Disclosure permitted by the Act*

73. There are a number of circumstances prescribed by the Act which permit disclosure including:

- with consent of the party concerned;
- if disclosure is required for the purpose of a Community obligation;
- if disclosure is made for the purpose of facilitating the exercise by the CC of its functions;
- if the information is disclosed to another person for the purpose of that person exercising any other number of prescribed functions; and
- if the information is disclosed in connection with an investigation of a criminal offence in the UK.

The first and the third of the above circumstances are most frequently used.

74. If one of these circumstance applies, the CC must have regard to three considerations before it decides to make a disclosure¹⁰:

- 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 Commission thinks might significantly harm the individual’s interests; and
- The extent to which the disclosure of the information mentioned in paras b(i) or b(ii) is necessary for the purpose for which the CC is permitted to make disclosure.

In practice the public interest consideration seldom arises¹¹.

¹⁰ Section 244.

7.2.3 *CC procedures when handling sensitive information*

75. Whenever providing information to the CC, parties are asked to indicate whether they are concerned about the sensitivity of information provided by it. While there is no formal commitment to consult the party before making a disclosure, the CC's procedures typically lead to the party having the opportunity to make representations before disclosure is made.¹² As explained at para 17, a party has the opportunity to make representations to the Chief Executive.

76. The party making a request for redaction on the basis of legitimate business interest is asked to substantiate its claim. Parties are advised to identify sensitive information at the time they submit the evidence and have further opportunities to flag the CC's use of such information as the CC prepares documents for publication on its website (i.e. submissions, working papers, provisional findings and the final report). Through experience and its knowledge of the market being investigated the CC is generally able to ascertain the strength of the claims and often also able to find an alternative means of disclosing information that would be acceptable to the person concerned. The need to find a solution would be particularly important if the CC decided that it was necessary to make a disclosure to ensure fairness.

7.2.4 *Balancing the rights of defence with the need protect confidentiality*

77. Though parties responding to an information request by the CC might seek to secure a commitment by the CC that it will not disclose the information, the CC does not give such a commitment. The CC considers it important that it should have the ability to conduct its investigation in a fair way, and make disclosure as it considers necessary.

78. In the case of particularly sensitive information (for example if the CC found validity in a claimant's concern that the information was a business secret) the CC would seek to find alternative means of conveying the nature of the evidence the CC was reviewing so that the party affected by the CC's decision might be able to comment. In the case of financial information this might entail the CC providing a range, or aggregate figures as opposed to disaggregate figures. On other occasions, providing the gist of the issue that the CC was considering may be suitable.

7.2.5 *Confidentiality rings, data rooms and restrictions against further disclosure*

79. Occasionally requests are received for confidentiality rings though this is a procedure which is available typically to a court or tribunal and is less suited to the CC. On occasions the CC has formed a type of confidentiality ring by utilising the Act which prescribes that if disclosure is made for the purpose of facilitating the CC's functions but when doing so the information is not made available to the public, the person receiving the information is prevented by the statute from making further disclosure. Parties have suggested to the CC that it might place greater reliance on this. However, in practice the CC has been concerned that to allow the party concerned the opportunity to respond, the confidentiality ring could not be confined simply to, for example, legal and economic advisers but would require the disclosure of senior management and officials within the corporation which are involved in the company's business.

¹¹ The recent challenge by SDI Sport of the CC's decision to withhold information did exceptionally involve the withholding of information that the OFT had sought to prevent from being disclosed on the basis it would jeopardise an ongoing cartel investigation. (http://www.catribunal.org.uk/files/1116_Sports_Direct_Judgment_14.12.09.pdf).

¹² Parties are invited to indicate whether information should be redacted from submissions before they are posted on the website. A party will typically have the opportunity to make representations in relation to information about it which is to be included in a CC document (e.g. working paper or proposed decision or final Report) before it is published.

80. The CC has occasionally allowed access to data rooms. For example, it did so when considering an appeal to it in relation to a periodic price setting review carried out by the water regulator which was disputed by a water company. In that context limited disclosure was allowed to the water company's advisers. In a regulated industry where firms are sole licensed providers for a defined geographic area, it is comparatively easier to address such information concerns that arise while allowing access to sensitive information.

7.2.6 Co-operation between anti-trust authorities

81. Disclosure to the OFT is permitted by the Act in either of the circumstances (a) (b) (c) or (d) described at para 21, the OFT being a named person whose competition functions are specified for the purpose of circumstances described at (d). When considering whether to make a disclosure of information to an overseas competition agency, the CC would consider the application of the circumstances described at (a), (b) or (c) of para 21. In practice, the CC has not found that the restrictions on disclosure of information and the limited circumstances in which disclosure may be made has prevented useful discussions with other agencies.

7.2.7 Public disclosure of ongoing investigations

82. Neither merger nor market investigations involve an assessment of actions against prohibited conduct or agreements so that there is little sensitivity to public disclosure of the existence of such investigations. The CC places some importance on the use of its website, in particular to disclose information to main and other interested parties and publishes submissions, working papers and proposed decisions on the website. When doing so it addresses the tension within the statutory scheme which both prohibits unlawful disclosure subject to certain information gateways and requires the CC to consult on its proposed decision and to give reasons when doing so. In practice, the CC finds that a relatively small amount of material needs to be excised.

7.3 Request for information

7.3.1 Information gathering powers and enforcement

83. The CC has information gathering powers enabling it, for the purpose of its investigation, to require persons to attend hearings and provide evidence (which may be taken on oath) and to submit documents. It does not have the power to inspect premises or carry out dawn raids.

84. These powers are enforceable by the CC if it considers that a person (main or third party) has not complied "without reasonable excuse" by the imposition of a financial penalty. In the case of a main party to a merger investigation, the CC also has power to suspend the statutory timetable (whether or not the party had reasonable excuse).

85. While the incidence of making formal requests for information has increased in recent years, there has as yet been no occasion on which the CC has sought to impose a penalty. In practice, discussions prior to making information requests (formal or informal) has led to the party and CC being able to resolve concerns (both on content of the request and timing) about information requests. However, in a relatively small number of merger cases (four since 2002) the CC has used its powers to suspend the statutory timetable in conjunction with making a formal request for information.

86. The majority of the CC's information requests are made on an informal basis, though the ability of the CC to exercise formal information powers will be a contributing factor to the high incidence of compliance.

7.3.2 *Design of information requests*

87. Requests are bespoke to the case and can take the form of a questionnaire, written request or be made orally though the possible need to frame the request formally in a notice will influence the content of the request.

88. Requests are targeted to the issues the CC is considering and will take into account likely burdens on the recipient. Particularly if the request is to a small firm that is a third party, the CC will consider how best to obtain the information without imposing unnecessary burdens (this may for example involve a staff member receiving the information in a phone call and providing a written report of the evidence for the firm to confirm as correct).

89. The CC's power to request information are wide, subject only to the fact that the CC must consider the information requested to be relevant "for the purpose of the investigation" and it may not compel information that a court could not compel (e.g. self-incriminating evidence and legally privileged information). Parties do often wish to discuss requests and the CC's procedures provide for this both before an information request is finalised (ie. before a questionnaire is sent to the parties for completion) and after a request is received. The issues most commonly raised include the relevance of the information requested, timing for production of the information, availability of the information (most commonly, they suggest that the information can more easily be produced in an alternative form) (see paras 39 to 40). Ultimately discussions with staff led to satisfactory and practical resolution. In the CC's view the open engagement often improves the quality of the information request and the suitability of the information provided.

7.3.3 *Parties' awareness of issues considered by the CC*

90. Requests for information by the CC are made in the context of the case as formulated by the referring body (such body will already have engaged with the party on the issue and published a reasoned decision for making the reference) and the issues identified by the CC in an issues statement published at an early stage of the investigation. The issues statement will incorporate the theories of harm that the CC considers is relevant and these are likely to build upon the matters raised in the CC relevant published guidance¹³.

91. The UK contribution Feb 2010 referred to the various occasions on which the CC staff and members meet with the main parties (paras 109-114). At the beginning of the investigation the staff team (including the economists and financial analysts) meet with the main parties both to discuss the overall administration of the investigation, to establish contact and also to explore with the party concerned the information that it holds and how such information is held. This initial meeting is helpful to the staff team as they begin to develop questionnaires tailored to the investigation based upon their understanding of the market, the availability of information and the theories of harm formulated by the CC following discussion with the Group.

92. At the initial meeting and subsequently the CC explores with the party the availability of information to be requested with a view to understanding factors affecting the delivery of the information once requested and to help shape the questionnaires and information requests so that they are well suited to the party (therefore avoiding unnecessary burden).

¹³ The CC has published merger guidance and market guidance.

7.3.4 *Review of information requested*

93. The evidence received following a request is reviewed by the staff team and the Group (see para 7).

7.4 *Judicial review and interim relief*

7.4.1 *Judicial review*

94. In respect of both merger and market investigations the Competition Appeal Tribunal has the power to review the decision of the CC. Challenges may be made by an interested person (which could be a third party). The jurisdiction of the Tribunal derives from the Act which provides that when determining such an application the Tribunal (which is a specialist tribunal) shall apply the same principles as would be applied by a court on an application for judicial review. Such a provision is unique in national law and the implications of the Tribunal being a specialist tribunal but applying the same principles has been the subject of judicial consideration (see paras 43 to 45). The Tribunal may dismiss the application or quash the whole or part of the decision to which it relates and where it quashes the whole or part of a decision it may refer the matter back to the CC with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal. Significantly, and in contrast to an appeal mechanism, the Tribunal may not make the decision itself.

7.4.2 *Standard of review by a specialist tribunal*

95. The intensity of review by the Tribunal has been considered in a number of judgments. The most recent judgment of the Court of Appeal (to whom judgments of the Tribunal are appealed on points of law) was in *BSkyB v CC* and *Virgin Media v CC*¹⁴. In this case the Court of Appeal considered whether the Tribunal should apply the same principles as would be applied by a court on an application for judicial review.¹⁵ BSkyB had argued that the Tribunal was obliged to apply judicial review principles with a greater intensity of review because it is a specialist tribunal body. The Court noted that it is well established that Courts apply judicial review principles in different ways according to the subject matter under consideration and that there are some cases in which Courts apply greater intensity of review than in others.

96. The Court of Appeal referred to an earlier decision¹⁶ in which it had observed that the spectrum of approaches on judicial review principles ranged from at one end, a “low intensity” of review, applied to cases involving issues “depending essentially on political judgment” where the Court would not intervene outside of “the extremes of bad faith, improper motive or manifest of absurdity” and, at the other end of the spectrum, decisions infringing fundamental rights where unreasonableness is not equated with “absurdity” or “perversity” and a “lower” threshold of unreasonableness is used, namely whether a reasonable decision maker, on the material before it, could conclude that the relevant interference was justifiable.

97. As to the use of a specialist court, the Court of Appeal found in BSkyB that the Tribunal was to apply the normal principles of judicial review and to apply its own specialised knowledge and experience to enable it to perform its task with a better understanding and more efficiently. However, the possession of

¹⁴ [2010] EWCA Civ 2, Judgment 21 January 2010.

¹⁵ The principles were recently confirmed by the CAT in *Stagecoach Group PLC v Competition Commission* [2010] CAT 14 Judgment 21 May 2010.

¹⁶ *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142.

that knowledge and experience did not in any way alter the nature of the task. Accordingly the Court of Appeal rejected this aspect of B SkyB's application.

7.4.3 *Timing of challenges*

98. Applications for judicial review must be made within, in the case of merger investigations, 4 weeks of the decision which the applicant wishes to challenge and, in the case of market investigations within a maximum 2 month period. As is indicated by the speed with which the Tribunal responded to the application for interim relief in respect of Morrisons (see para 50) the Tribunal is capable of responding rapidly dependent on the circumstances. Similarly in the case of *Sports Direct International v CC*, the Tribunal was able to consider and give judgment during the course of the investigation. Notably, it made oral judgment on the day of the hearing handing down a written judgment shortly afterwards. Unless specifically directed by the CAT, the Act provides that the CC's decision that is the subject of the challenge is not suspended. In practice, the CC will suspend final implementation of affected remedies dependant upon the outcome of the challenge (and subsequent appeal), putting in place interim measures if appropriate.

99. To date the majority of applications made to the Tribunal have been following the CC's publication of its report on the case referred to it. However, on one occasion the the application was made during the investigation.

100. In *Sports Direct International v Competition Commission*¹⁷ Sports Direct, a main party in a merger investigation sought an order from the Tribunal to quash the decision of the CC not to disclose certain information which had been redacted by it in working papers. The case management conference and hearing were heard while the investigation was ongoing. The Tribunal considered whether the CC's decision was capable of review as contemplated by the Act or whether the challenge was premature. The redactions had been made to working papers produced by the CC and at the time the application was lodged the CC had not taken even a provisional decision on the merits of the acquisition.

101. At the main hearing the Tribunal considered the question of pre-maturity prior to the substantive issues and found that the application for review was not premature. The Tribunal, having reviewed the principles of judicial review generally, considered the legislation (ie the Act) noting that "context is everything". The Tribunal considered that there were three elements to an application under the statutory provision enabling judicial review in the context of merger investigations (section 120 of the Act). Those elements are (i) "any person aggrieved" by (ii) "a decision of the CC" (iii) "in connection with a merger reference". The Tribunal found that all these elements were met and that the fact that the merger investigation was still at a pre-provisional stage did not mean that Sports Direct should be required to wait for the publication of the CC's provisional finding before it could make a challenge. The Tribunal stated that the CC must act fairly to the parties affected by the carrying out of their inquisitional function. The Tribunal was influenced by the fact that Sports Direct was to attend a hearing with the CC and that questions would be asked of it without it having full knowledge of the underlying material or issues forming provisional propositions. The Tribunal stated that it was persuaded that at least potentially Sports Direct was adversely affected by the suggested findings of facts and conclusions contained in working papers and that real injustice could have resulted from the CC's decision to withhold material information and/or analysis supporting those findings. The Tribunal did not go on to consider whether in fact the decision to withhold the information was unfair, because the CC chose to withdraw its decision once the CAT had found that the application was not premature.

¹⁷ [2009] CAT 32, judgment of 14 December 2009.

7.4.4 *Interim relief*

102. In *WM Morrisons Supermarkets PLC v the CC*¹⁸ Morrisons made an *ex parte* application for interim relief to the Tribunal in respect of the CC's decision to approve another competitor grocery retailer (Sainsbury) as the purchaser of a site for a supermarket that the CC had required Tesco to divest following a merger investigation.¹⁹ The CC's Order made in April 2009 set out the process for disposal of the site to a purchaser approved by the CC. In accordance with the Order and following the receipt of bids, the CC gave Tesco the choice of which of the bids to accept. Tesco elected to accept Sainsbury's bid and the CC subsequently wrote stating that Sainsbury had been approved as the purchaser and directing Tesco to proceed with the exchange of contracts for the sale of the freehold site. Tesco and Sainsbury exchanged contracts on 23 November 2009 with a view to completion on 7 December. Morrison's application was lodged on 3 December 2009 and the Tribunal sat the same day (until 7.00pm) it having had the opportunity to see a draft of the application lodged with it on 2 December. The Tribunal decided that interim relief to suspend the CC's decision was not appropriate and the application was refused.

103. In reaching its judgment the Tribunal acknowledged that the draft application suggested that there was likely to be a ground of challenge which was properly arguable. As such it was necessary to consider whether in the absence of interim relief and on the basis that Morrisons were to succeed in this challenge, Morrisons would suffer loss or damage for which damages would not be an adequate remedy.

104. The Tribunal noted that in the absence of interim relief being given it was probable that the sale would be completed and that this might affect the usefulness of Morrisons' substantive challenge. The Tribunal acknowledged that predicting what would happen if Morrisons was granted interim relief and then won the case was extremely speculative. However, the Tribunal assumed in Morrisons' favour that there may be some loss to Morrisons which would not be recoverable in the absence of interim relief. As part of its decision the Tribunal also acknowledged that the preparedness of Morrisons to offer cross-undertakings to other parties which would be likely to compensate them for losses they might suffer through the delay pending the resolution of the substantive application did militate in favour of the Tribunal granting interim relief.

105. The Tribunal took into account the fact that Morrisons had delayed in seeking interim relief and in doing so had allowed Tesco and Sainsbury to alter their position by entering into a legally binding contract for the sale of the site. Morrisons was fully aware that unless Tesco and Sainsbury were notified at the earliest opportunity they would almost certainly change their position by exchanging contracts for sale.

106. In considering whether or not to grant relief the Tribunal also considered the consequences both of making an order and not making an order for interim relief on competition. However, in either case, the Tribunal did not consider this factor to be determinative. Without prejudging the substantive issue in a potential challenge, the Tribunal noted that the CC had after careful inquiry found an SLC and decided that divestiture was an appropriate remedy. The Tribunal noted that the CC's decision in this respect had not been challenged nor that Morrisons was suggesting that acquisition by Sainsbury would render the SLC worse than before. On this basis the Tribunal did not consider that it would be detrimental to competition if it did not make an order for interim relief.

¹⁸ [2009] CAT 33, judgment of 4 December 2009.

¹⁹ Report published November 2007. Order requiring divestment made April 2009 (<http://www.competition-commission.org.uk/inquiries/ref2007/tesco/index.htm>).