

## **Ensuring finality in settlement cases – Proposed amendments to the Guidance on the CMA’s investigations procedure in Competition Act 1998 cases – Consultation**

### **Background to consultation**

1. This is a consultation on amendments to the Settlement chapter in the CMA’s Guidance on the CMA’s investigation procedures in Competition Act 1998 (CA98) cases (CMA8).<sup>1</sup>
2. The operation of a settlement process and the decision as to whether to settle CA98 cases is at the discretion of the CMA.<sup>2</sup> The CMA is not obliged to settle any CA98 case it brings, but will consider requests to settle by parties under investigation in cases where the evidential standard for giving notice of its proposed infringement decision is met and typically in circumstances where settlement is likely to achieve procedural efficiencies and resource savings.<sup>3</sup>
3. The purpose of the proposed changes is to increase the prospects of any settlement yielding procedural efficiencies and resource savings. The proposed changes will help to ensure that any settlement normally brings finality to the investigation and cannot easily be re-opened by the settling party subsequently appealing against the infringement decision (thereby undoing the settlement it had agreed). The proposed changes seek to achieve this by setting out that the CMA will only agree to settlement if the party agrees that it will not subsequently appeal<sup>4</sup> against the decision, including any financial penalty imposed.
4. The CMA’s proposed amendments are informed by the recent (unsuccessful) appeal to the Competition Appeal Tribunal against a decision of the CMA following a settlement procedure.<sup>5</sup> The CMA considers the proposed approach to be in the interest of ensuring that settlements normally achieve finality in CA98 cases, as they are intended to do, in the interests of efficient and effective CA98 enforcement and of making the best use of public resources.
5. The CMA notes that the government is currently consulting on proposed options and changes to the settlement process in CA98 cases.<sup>6</sup> These proposals relate to wider potential legislative changes and do not relate to this proposed change

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<sup>1</sup> CMA8, Guidance on the CMA’s investigation procedures in Competition Act 1998 cases, November 2020, available at: <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases>.

<sup>2</sup> CMA8, paragraph 14.5.

<sup>3</sup> CMA8, paragraphs 14.4 and 14.6.

<sup>4</sup> Including any judicial review challenge of the decision.

<sup>5</sup> *Roland (U.K.) Limited and Another v Competition and Markets Authority* [2021] CAT 8.

<sup>6</sup> [Reforming competition and consumer policy - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy).

to the CMA's settlement policy in CMA8, which can be taken forward without any change to primary or secondary legislation.

6. The text of the proposed amendments to the Settlement chapter of CMA8 can be found in the Annex to this document.

## Rationale for changes

7. Settlement is the process by which a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the CMA's investigation. If so, the CMA will impose a reduced penalty on the business.<sup>7</sup>
8. Settlement, in appropriate cases, allows the CMA to achieve efficiencies through a streamlined administrative procedure, resulting in earlier adoption of any infringement decision and/or resource savings.<sup>8</sup> The CMA considers that an aspect of these resource savings comes from the CMA not being required to defend an appeal to the Competition Appeal Tribunal.
9. CMA8 currently contemplates that, if the settling business appeals against the decision, it will no longer benefit from the settlement discount.<sup>9</sup> The fact that the settling business may lose the benefit of discount, i.e. be held to its agreement with the CMA, if it appeals the decision, was recently confirmed by the Competition Appeal Tribunal.<sup>10</sup>
10. It is the CMA's view, as also expressed by the Competition Appeal Tribunal,<sup>11</sup> that *"if a settling party could retain the benefit of a settlement discount despite appealing the infringement decision, the settlement process would be undermined. Businesses would enter settlement agreements not with a view to bringing finality to an investigation, but as a means of achieving an undeserved reduction in their penalty prior to an appeal aimed at achieving an even greater reduction. CMA staff who had worked on the case in question and assigned to other cases on settlement being reached would need to be taken off the other cases and redeployed to the case on appeal"*.
11. The CMA welcomes the Competition Appeal Tribunal's clear judgment that an appeal deprives the appealing party of the benefit of its discount for penalties arising out of the settlement. However, the CMA does not consider that removing the discount is, in and of itself, sufficient to ensure that a settlement is in the public interest. When a settling party appeals against the CMA's decision the CMA still has to defend what it had assumed was a settled case, tying up resources and diverting CMA staff from progressing new cases. The CMA therefore considers that (alongside the other settlement conditions) it should also be a condition of the CMA agreeing to enter into settlement with the business concerned that the business agrees not to appeal against the CMA's decision, including any financial penalty in that decision. That is, settling businesses must confirm they will not challenge or appeal against the infringement decision to the

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<sup>7</sup> CMA8, paragraph 14.1.

<sup>8</sup> CMA8, paragraph 14.2.

<sup>9</sup> CMA8, paragraph 14.8, 4<sup>th</sup> bullet point.

<sup>10</sup> *Roland (U.K.) Limited and Another v Competition and Markets Authority* [2021] CAT 8, paragraph 143.

<sup>11</sup> *Roland (U.K.) Limited and Another v Competition and Markets Authority* [2021] CAT 8, paragraph 139.

Competition Appeal Tribunal.<sup>12</sup>

12. According to established case law, an agreement to waive a right to a fair and public hearing can be valid when it is voluntary, informed and unequivocal.<sup>13</sup> The request of such an agreement is in line with the CMA's settlement process, which is voluntary as parties are not obliged to settle or even enter into any settlement discussions, even where these are offered by the CMA. Likewise, the CMA is not obliged to settle or even enter into any settlement discussions, even where the parties under investigation offer to settle.<sup>14</sup> Both sides are also free to withdraw from settlement discussions at any time during the settlement procedure.<sup>15</sup>
13. In addition, in order for the settlement in CA98 cases to be concluded, an admission of liability needs to be clear and unequivocal.<sup>16</sup> This means that parties that enter into settlement are advised on the implications of this process and can make an informed decision on whether to settle. They also have ample opportunity and time to consider the basis of the CMA's case and penalty carefully and adequately before concluding the settlement process.<sup>17</sup> The CMA's settlement process allows parties to consider all the necessary elements of settling, including parties having opportunity to seek legal advice, and the CMA will continue to ensure that this is the case.
14. The purpose of the CMA's settlement policy is procedural efficiency, providing certainty for both the CMA and businesses. Parties agreeing not to appeal, as part of the conditions of settlement, is a proportionate measure to ensure this certainty and maintain the benefits of having such a policy.

### **Invitation to comment**

15. The CMA welcomes your comments on the proposed changes.
16. Comments should be sent by 28 September 2021 to [CA98proceduresguidance@cma.gov.uk](mailto:CA98proceduresguidance@cma.gov.uk).

### **Statement about how the CMA uses information and personal data that is supplied in consultation responses**

17. Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation, namely the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
18. The CMA will process this personal data for the purposes of its work. Such processing is necessary for the performance of the CMA's functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that the CMA properly consults on the draft

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<sup>12</sup> CMA8, paragraph 14.8.

<sup>13</sup> *McGowan v B* [2011] UKSC 54 at [15]-[54] and *David Cameron Millar v Procurator Fiscal (Scotland)* [2001] UKPC D4 at [33].

<sup>14</sup> CMA8, paragraph 14.5.

<sup>15</sup> CMA8, paragraph 14.9.

<sup>16</sup> CMA8, paragraph 14.7.

<sup>17</sup> *Ibid.*

Addendum.

19. For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact the CMA, details of the CMA's Data Protection Officer, and how long the CMA retains personal data, see the CMA's [Privacy Notice](#).
20. The CMA's use of information and personal data is also subject to Part 9 of the Enterprise Act 2002 (EA02). The CMA may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, the CMA will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in its opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
21. Information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, the CMA will take fully into consideration any representations made by you in support of confidentiality. The CMA will also be mindful of its responsibilities under the data protection legislation referred to above and under Part 9 of the EA02.
22. If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

### **Next steps**

23. The CMA will publish in due course the final outcome of this consultation, taking into account the comments received in response to it.

## ANNEX

### Proposed amendments to Chapters 14 and 15 of CMA8

1. This Annex sets out the amendments to Chapters 14 and 15 of the CMA's Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), shown in underline and ~~strikethrough~~ text.
2. The CMA proposes that paragraphs 14.8 and 14.9 of CMA8 should read as follows:
  - 14.8 In addition, in order to achieve the CMA's objective of resolving the case efficiently, ~~a settling businesses~~ must confirm that ~~they-it~~ accepts that:
    - there will be a streamlined administrative process for the remainder of the investigation. This would normally include streamlined access to file arrangements, no Draft Penalty Statement, no written representations on the Statement of Objections or any Supplementary Statement of Objections (except in relation to manifest factual inaccuracies), no oral hearings after settlement has been reached and no Case Decision Group being appointed;<sup>168</sup>
    - there will be an infringement decision against the settling business (except in the circumstances set out in paragraph 14.27);
    - ~~unless the settling party itself successfully appeals the infringement decision,~~ the decision will remain final and binding as against it, even if another addressee of the infringement decision successfully appeals it;
    - ~~it will not challenge or appeal against the infringement decision to the Competition Appeal Tribunal if the settling business appeals the decision, it will no longer benefit from the settlement discount (see further paragraph 14.30 below). The CMA will remain free to use the admissions made by the settling business and any documents, information or witness evidence provided by the settling business;~~ and
    - there are likely to be specific requirements that relate to the circumstances of the case and the stage which it has reached. For example, the settling business may be required to make some of its employees or officers available for interview and to provide additional witness statements where the circumstances of a case demand it. The settling business is likely also to be required to confirm that it will use its best endeavours to ensure that employees or officers (who may have provided witness statements during the investigation) appear as witnesses on behalf of the CMA's case, should another addressee of the eventual infringement decision appeal any infringement decision to the Competition Appeal Tribunal.
  - 14.9 A settling business may withdraw from settlement discussions at any time before confirming in writing<sup>169</sup> its acceptance of the requirements for settlement (including its admission). The settling business's decision to settle should be based on its full awareness of the requirements of settlement and

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<sup>168</sup> Following settlement the SRO would generally remain the decision-maker on the case. The SRO would consult the Case and Policy Committee on his/her proposed decision.

<sup>169</sup> Although, as set out in paragraph Annexe(s)14.19, it may be possible for a business to confirm its acceptance orally.

the consequences of settling. The settling business should satisfy itself, and will be taken to have satisfied itself, as to the following:

- that, having seen the key evidence on which the CMA is relying, it is prepared to admit to the infringement by reference to the Summary Statement of Facts<sup>170</sup> or draft Statement of Objections or Statement of Objections (where the settlement occurs after issue of the Statement of Objections), including the nature, scope and duration of the infringement;
- the maximum level of penalty to be imposed; ~~and~~
- the implications of settling, including the minimum requirements of settlement listed in paragraphs 14.7 and 14.8 above, **including that it will not challenge or appeal the infringement decision** and;
- that (except in the circumstances set out in paragraph 14.27) an infringement decision will be issued which may be relied on by third parties to bring follow-on damages actions.

3. The CMA proposes that paragraph 14.30 of CMA8 is deleted.

~~14.30 The settlement discount set out in the infringement decision will no longer apply if a settling business appeals the infringement decision to the Competition Appeal Tribunal. The Competition Appeal Tribunal has full jurisdiction to review the appropriate level of penalty.~~

4. The CMA proposes to insert in paragraph 15.13 the following footnote:

15.13 Addressees of the CMA's appealable decisions and third parties with a sufficient interest in appealable decisions have a right to appeal them to the Competition Appeal Tribunal. Appealable decisions include decisions as to whether there has been a competition law infringement, interim measures decisions and decisions on the imposition of, or the amount of, a penalty.<sup>192</sup>

Footnote 192: Section 46 and section 47 of the CA98. **Except for settling businesses which have accepted that they will not appeal the decision to the Competition Appeal Tribunal, see paragraph 14.8.**

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<sup>170</sup> For the purposes of settlement discussions initiated before a Statement of Objections is issued, a Summary Statement of Facts sets out the key evidence and facts upon which the CMA relies to support its provisional view that there has been an infringement of competition law. The Summary Statement of Facts together with the key documents relied upon in the Summary Statement of Facts are presented to a business interested in settling, to enable it to consider its position regarding a possible settlement.