

# Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases

Draft for consultation

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# 1 Preface

- 1.1 The Competition and Markets Authority (CMA) has set out, in this guidance document, general information for the business and legal communities and other interested parties on the processes that the CMA uses when using its powers under the Competition Act 1998 (CA98), as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13) to investigate suspected infringements of competition law.
- 1.2 This guidance updates and supersedes the previous ~~version issued in March 2014, detailed guidance of the Office of Fair Trading (OFT) on how the OFT conducted investigations under the CA98, entitled *A Guide to the OFT's Investigation Procedures in Competition Cases (OFT1263rev) (OFT's Procedural Guidance)*.~~<sup>1</sup>
- 1.3 This guidance should be read alongside the CMA publications *Administrative Penalties: Statement of policy on the CMA's approach (CMA4)*,<sup>2</sup> *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*<sup>3</sup> and *Prioritisation principles for the CMA (CMA16)*, which outline the basis on which the CMA decides which cases to investigate.<sup>4</sup> ~~This guidance should also be read alongside the documents listed in Annex A, which were first published by the OFT, and have been adopted by the CMA.~~<sup>5</sup> In particular, it may be useful to read this document alongside other OFT documents, including *Enforcement (OFT407)*, *Powers of Investigation (OFT404)*, and *Involving third parties in Competition Act investigations (OFT451)*.<sup>6</sup>
- 1.4 This guidance sets out the CMA's procedures and explains ~~the way in which~~how the CMA generally conducts investigations into suspected competition law infringements. This represents the CMA's practice as at the date of publication of this document. It may be revised from time to time to reflect changes in best practice or the law and the CMA's developing

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<sup>1</sup>— Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>2</sup>— Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>3</sup>— Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>4</sup>— Available at: [www.gov.uk/cma](http://www.gov.uk/cma). See further paragraph 4.2.

<sup>5</sup>— Annex A describes in further detail how these publications are affected by the ERRA13 and indicates which existing and related guidance documents have been adopted by the CMA Board. To the extent that any conflict arises between the content of such any pre-existing guidance and this guidance, the content of this guidance will prevail.

<sup>6</sup>— Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

experience in assessing and investigating cases. ~~Please refer to [www.gov.uk/cma](http://www.gov.uk/cma) to ensure you have the latest version of this guidance.~~

~~1.5~~ The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when dealing with suspected competition law infringements but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.

~~4.51.6~~ This guidance is concerned exclusively with the CMA's investigations under the CA98. It does not cover CMA investigations into individuals suspected of having committed the criminal cartel offence nor does it cover competition disqualification order proceedings.<sup>7</sup>

~~4.61.7~~ This guidance does not cover the procedures used by sectoral regulators<sup>8</sup> in their competition law investigations. Further guidance on the enforcement of competition law by the sectoral regulators is available in the CMA guideline *[Regulated Industries: Guidance on concurrent application of competition law to regulated industries \(CMA10\)](#)*<sup>9</sup> or from the relevant organisation's website.

~~4.71.8~~ This document incorporates the commitments made in the CMA's published guideline *[Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#)* insofar as they apply to investigations under the CA98.<sup>10</sup>

~~1.9~~ ~~The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when dealing with suspected competition law infringements but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.~~ ~~For example, the CMA may adopt a different approach in circumstances where, at the same time as conducting an investigation into a suspected competition law breach by a business,<sup>11</sup> in parallel, the CMA is also looking at whether an individual has committed a criminal cartel offence.~~

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<sup>7</sup> ~~More information on competition disqualification orders can be found in~~ See *[Director disqualification orders in competition cases \(OFT510\)](#)*, available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>8</sup> The Office of Communications, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Utility Regulation, the Water Services Regulation Authority, the Office of Rail and Road Regulation, NHS Improvement, Monitor, and the Civil Aviation Authority, *[the Financial Conduct Authority and the Payment Systems Regulator](#)*. This list is correct as at ~~1 April 2014~~ 1 June 2018. The list may change from time to time if further sectoral regulators are given concurrent powers; ~~it is anticipated that the Financial Conduct Authority will exercise such powers from April 2015.~~

<sup>9</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>10</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>11</sup> ~~The relevant provisions of competition law apply to agreements between, and conduct by, 'undertakings'. In this guidance the word 'business' should be understood to include all forms of undertaking. An undertaking means any natural or legal person carrying on commercial or economic activities relating to goods or~~

1.10 This guidance document also incorporates the CMA's guidance as to the circumstance in which it may be appropriate to accept commitments under section 31A of the CA98, see paragraphs 10.17 to 10.20 which constitute this guidance.

### Statutory background

1.11 Section 31D(1) of the CA98 requires the CMA to prepare and publish guidance as to the circumstances in which it may be appropriate to accept commitments. Section 31D(2) of the CA98 provides that the CMA may alter this guidance at any time. Section 31D(3) of the CA98 provides that, if the guidance is altered, the CMA must publish the guidance as altered. Under section 31D(4) of the CA98 the Secretary of State must approve any guidance on commitments before it can be published. When preparing or altering guidance on commitments, sections 31D(6) and (7) of the CA98 require the CMA to consult such persons as it considers appropriate, including the Regulators. These particular provisions apply to the CMA alone and not to the Regulators.

1.12 Paragraphs 10.17 to 10.20 were approved by the Secretary of State as required under section 31D(4) of the CA98 on [INSERT DATE]. It was published and came into effect on [INSERT DATE]. Before finalising this revised guidance, the CMA conducted a consultation in accordance with section 31D(6) and (7) of the CA98.

4.81.13 By virtue of section 31D(8) of the CA98, the CMA must have regard to the guidance for the time being in force when exercising its discretion to accept commitments under section 31A. A similar requirement applies to the Regulators by virtue of legislation that conferred on them concurrent powers under the CA98.

4.91.14 This guidance, including the statutory commitments guidance, will take effect from 1 April 2014 [INSERT DATE]. The changes introduced by the ERRA13, as they affect administrative investigations under the CA98 and as outlined in this guidance, will apply to all ongoing and future cases from 1 April 2014 [INSERT DATE]. The CMA has published guidance on the principles to be applied in determining, in any case, whether criminal proceedings should

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~~services, irrespective of legal status. For example, a sole trader, partnership, company or a group of companies can each be an undertaking. Further guidance on the meaning of 'undertaking' can be found in OFT guidance *Agreements and concerted practices* (OFT401) and *Public bodies and competition law* (OFT1389), and in relevant European case law, such as C-205/03 P FENIN [2006] ECR I-6295.~~

~~be brought under section 188 of the EA02 (as amended by the ERRA13). More information is available in the CMA guideline.<sup>12</sup>~~

~~4.101.15~~ The decision-making procedures set out in this guidance will apply to ~~all~~ ongoing and future civil cases under the CA98. The CMA has published guidance on the principles to be applied in determining, in any case, whether criminal proceedings should be brought under section 188 of the EA02 (as amended by the ERRA13). More information is available in the CMA guideline *Cartel Offence: Prosecution Guidance (CMA9)*.

~~4.111.16~~ This document is not a definitive statement of, or a substitute for, the law itself and the legal tests which the CMA applies in assessing breaches of competition law are not addressed in this guidance. A range of publications on how the CMA carries out this substantive assessment is available ~~at~~ [www.gov.uk/cma](http://www.gov.uk/cma) on the CMA's webpages.<sup>13</sup> The CMA recommends that any person who considers that they or their business may be affected by an investigation into suspected anti-competitive practices should seek independent legal advice.

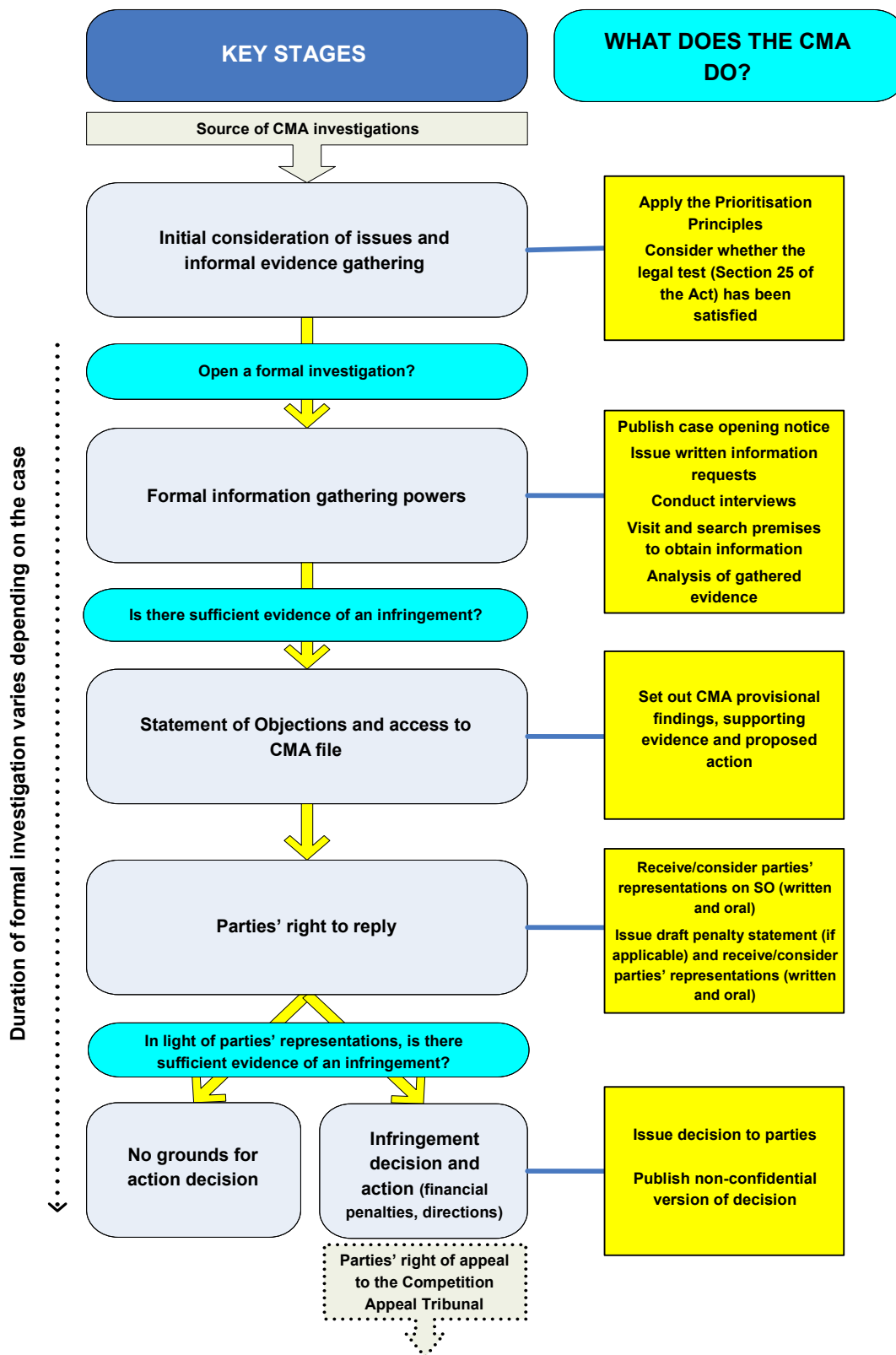
~~4.121.17~~ This guidance sets out the procedures the CMA follows within the legal framework outlined in Chapter 2. It addresses each stage of a typical investigation in turn. The key stages of an investigation into a suspected infringement and a summary of the CMA's action at these stages are set out at Figure 1.1.

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<sup>12</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>13</sup> See paragraph 1.3 and Annex A.

Figure 1.1 – Key stages in an investigation





## 2 The legal framework

- 2.1 The legal framework that applies to the investigation and enforcement of suspected civil breaches of competition law is described below.
- 2.2 The Treaty on the Functioning of the European Union (TFEU) and the CA98 both prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.
- 2.3 More information on the laws on anti-competitive behaviour is available in the ~~OFT~~ quick guide [Competing Fairly \(OFT447\)](#) and in the more detailed guidance on [Agreements and Concerted Practices \(OFT401\)](#) and [Abuse of a dominant position \(OFT402\)](#).<sup>14</sup>
- 2.4 In the UK, competition law is applied and enforced principally by the CMA.<sup>15</sup> The CA98 gives the CMA powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions in the CA98 and Articles 101 and 102 of the TFEU.<sup>16</sup>
- 2.5 Under EU legislation,<sup>17</sup> as a 'designated national competition authority', when the CMA applies national competition law either to agreements which may affect trade between Member States or to abuse prohibited by Article 102, the CMA is also required to apply Articles 101 and 102 of the TFEU.<sup>18</sup>
- 2.6 Further information on the framework for applying Articles 101 and 102 of the TFEU and the interaction with the Chapter I and Chapter II Prohibitions in the CA98 is available in the ~~OFT~~ guide [Modernisation \(OFT442\)](#).<sup>19</sup>

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<sup>14</sup> ~~Available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

<sup>15</sup> However, certain sectoral regulators (see paragraph 1.7 above) have concurrent powers with the CMA to apply and enforce the Chapter I and Chapter II prohibitions in the CA98 and Articles 101 and 102 of the TFEU within their respective regulated sectors. These sectoral regulators also have concurrent competition law powers in respect of market studies and investigations under Part 4 of the EA02. ~~The regulated sectors are, as at 1 April 2014, communications and postal services, gas, electricity, healthcare services, railways, air traffic and airport operation services, water and sewerage. The list may change from time to time if further sectoral regulators are given concurrent powers.~~

<sup>16</sup> See Chapter III (Investigation and Enforcement) of the CA98.

<sup>17</sup> Article 3 of Council Regulation (EC) No 1/2003 (OJ L1, 4.1.2003, p.1), as amended.

<sup>18</sup> The relevant sectoral regulators are also designated national competition authorities within their respective sectors.

<sup>19</sup> ~~Publication available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

- 2.7 There are procedural rules that apply when the CMA takes investigative or enforcement action.<sup>20</sup> In addition, the CMA is required to carry out its investigations and make decisions in a procedurally fair manner according to the standards of administrative law.<sup>21</sup>
- 2.8 In exercising its functions, as a public body, the CMA must also ensure that it acts in a manner that is compatible with the Human Rights Act 1998.

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<sup>20</sup> The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458 (the CA98 Rules). ~~The CA98 Rules replace the previous procedural rules that applied to OFT investigations under the CA98 (The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 SI 2004/2751).~~

<sup>21</sup> See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10.

### 3 The sources of the CMA's investigations

#### Summary

- The CMA obtains information about possible competition law breaches through a number of sources:
  - Research and market intelligence and other workstreams
  - Leniency applications
  - Complaints via [www.gov.uk/cma](http://www.gov.uk/cma) or to the Cartel Hotline
- This chapter sets out how to contact the CMA to apply for leniency or to complain about a suspected cartel or other potential competition law breach.
- In some cases, complainants can approach the CMA informally in the first instance.

- 3.1 There are a variety of ways in which information can come to the CMA's attention, leading the CMA to investigate whether competition law may have been breached.
- 3.2 The CMA's own research and market intelligence may prompt the CMA to make initial enquiries into suspected anti-competitive conduct. Alternatively, evidence gathered through other CMA workstreams, such as the CMA's merger or markets functions, or use of the CMA's powers under the Regulation of Investigatory Powers Act 2000, or information received via the European Competition Network or the European Commission (the Commission) may reveal potentially anti-competitive behaviour. In these circumstances, the CMA gathers publicly available information and may write to businesses or individuals seeking further information that the CMA considers could be relevant.

3.3 The CMA also relies on information from external sources to bring to its attention potentially anti-competitive conduct. This could be from individuals with so called 'inside' information about a cartel<sup>22</sup> or from a complainant.

### Cartels and leniency

3.4 A business which is or has been involved in a cartel<sup>23</sup> may wish to take advantage of the benefits of the CMA's leniency programme prompting them to approach the CMA with information about its operation.

3.5 By confessing to the CMA, a business could gain total immunity from, or a significant reduction in, any financial penalties the CMA can impose if it decides that the arrangement breaches the Chapter I prohibition and/or Article 101 of the TFEU.<sup>24</sup>

3.6 It is also a criminal offence for an individual to agree with one or more other persons to make or implement, or cause to be made or implemented, any cartel arrangements in the United Kingdom.<sup>25</sup> Cooperating current and former employees and directors of companies which obtain immunity from financial penalties will normally receive immunity from prosecution. Also, an individual who comes forward with information about a cartel may receive immunity from criminal prosecution.<sup>26</sup>

3.7 In addition, the CMA will not apply for a competition disqualification order against any current director of a company whose company has benefited from leniency.<sup>27</sup> However, the CMA may apply for an order against a director who has been removed or has otherwise ceased to act as a director of a company owing to his role in the breach of competition law and/or for

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<sup>22</sup> The CMA operates a financial reward programme in exchange for information about the operation of a cartel. [see Cartels: policy for witnessing and reports](#). For more information, go to: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>23</sup> A cartel is an agreement between businesses not to compete with each other. The agreement can often be verbal. Typically, illegal cartels involve cartel members agreeing on price fixing, bid rigging, output quotas or restrictions, and/or market sharing arrangements. In some cartels, more than one of these elements may be present. For the purposes of the CMA's leniency programme, price-fixing includes resale price maintenance.

<sup>24</sup> More information on how the CMA sets penalties is available: [in Part 5 of OFT guidelines Enforcement \(OFT407\) and OFT's CMA's guidance as to the appropriate amount of a penalty \(OFT423CMA73\)](#) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>25</sup> Section 188 of the EA02. Section 188A of the EA02 (as amended by the ERRA13) sets out circumstances in which the cartel offence has not been committed. Section 188B of the EA02 (as amended by the ERRA13) provides statutory defences to the cartel offence. See further CMA guideline [Cartel Offence: Prosecution Guidance \(CMA9\)](#) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>26</sup> See further the [OFT-CMA's guideline Applications for leniency and no action in cartel cases \(OFT1495\)](#) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>27</sup> In respect of the activities to which the grant of leniency relates. For further detail, see [OFT-CMA guidance Director disqualification in competition cases \(OFT510\)](#) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

opposing the application for leniency, or against a director who fails to co-operate with the leniency process.

- 3.8 The CMA encourages business representatives who suspect that their business has been involved in cartel activity to blow the whistle on the cartel.
- 3.9 For more information on what constitutes a cartel, see the CMA's quick guide [Cartels and the Competition Act \(OFT435\)](#) and the guideline [Agreements and Concerted Practices \(OFT401\)](#).<sup>28</sup>

#### *How to apply for leniency*

- 3.10 The CMA handles leniency applications in strict confidence. Applications for lenient treatment under the CMA's leniency programme should be made to the Senior Director or Director of ~~Cartels the CMA's Cartels and Criminal Group (CCG)~~ in the first instance. ~~The contact details of the relevant individuals are available at [www.gov.uk/cma](http://www.gov.uk/cma).~~ More detailed information on the CMA's leniency programme is available in [Applications for leniency and no-action in cartel cases \(OFT1495\)](#).<sup>29</sup>

#### **Complaints about possible breaches of competition law**

- 3.11 Another way in which the CMA receives information from external sources is where an individual or a business complains to the CMA about the behaviour of another business. Complaints can be a useful and important source of information relating to potentially anti-competitive behaviour.

#### *How to make a competition complaint*

- 3.12 If an individual or a business suspects that another business is infringing competition law, they should contact the CMA.
- 3.13 Complaints about suspected cartels should be made by calling the CMA's Cartel Hotline on [0800 085 1664](tel:08000851664) or [020 3738 6888](tel:02037386888) or by emailing the CMA at [cartelshotline@cma.gsi.gov.uk](mailto:cartelshotline@cma.gsi.gov.uk). These complaints are handled in confidence by [the CMACG](#). Guidance on reporting a suspected cartel to the CMA is available in the ~~OFT~~ quick guide [Cartels and the Competition Act \(OFT435\)](#).<sup>30</sup>

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<sup>28</sup>— Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>29</sup>— Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>30</sup>— Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

- 3.14 For all other competition related complaints, the CMA should be informed via its [webpages](#) in the first instance,<sup>31</sup> which will set out the format and method for making the CMA aware of competition concerns. It is also possible to make a complaint to the CMA anonymously using a non-name-based email account, a private masked phone number, by post or via a representative (such as a trade association). The CMA webpages provide information on how to do so.
- 3.15 Complaints made via the CMA's webpages which appear to relate to a suspected cartel will be redirected to the Cartel Hotline.<sup>32</sup> ~~The Annex to the OFT guideline *Involving third parties in Competition Act investigations* (OFT451)<sup>33</sup> also provides guidance and further detail on the type of information that the CMA looks for in a written, reasoned complaint.~~

#### *Pre-complaint discussions*

- 3.16 Where a complainant is considering investing significant resource into a complaint, it can approach the CMA with an outline in the first instance and ask for the possibility of having a pre-complaint discussion. This may be helpful to businesses in deciding whether to commit the necessary time and effort in preparing a reasoned complaint.
- 3.17 In such cases, the CMA ~~will endeavour to~~ may give an initial view as to whether the CMA would be likely to investigate the matter further if an in-depth complaint were to be made. This view would be based both on the likelihood of the complaint raising competition concerns and on the assessment of the complaint against the CMA's *Prioritisation Principles*<sup>34</sup> to see if it falls within the CMA's casework priorities at the time (see Chapter 4 for more information on how the CMA prioritises cases). However, any view given at this stage will not commit the CMA to opening an investigation.
- 3.18 To be able to engage in pre-complaint discussions, the CMA would expect to receive a basic level of information submitted via ~~the online forms~~ webpages from the complainant covering the key aspects of their concerns. This should include:

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<sup>31</sup> Complaints can also be made by calling the CMA on 020 3738 6000

<sup>32</sup> The CMA offers financial rewards of up to £100,000 (in exceptional circumstances) for information about cartel activity. See the CMA's Informant reward policy for further details.

<sup>33</sup> ~~Available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

<sup>34</sup> ~~*Prioritisation principles for the CMA (CMA16)* available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

- the identity of the complainant and the party/ies to the suspected infringement, and their relationship to one another (for example, whether they are competitors, customers or suppliers), and
- the reasons for making the complaint, including a brief description of:
  - the product(s)/service(s) concerned
  - the agreement or conduct the complainant believes to be anti-competitive
  - the type of business operated by the complainant and the party/ies to the suspected infringement (for example, manufacturer, wholesaler, retailer) and an indication of their geographic scale (for example, local, national, or international), and
  - if known, the size of the market and of the parties involved (for example, market shares).

3.19 Whether the CMA engages in pre-complaint discussions will depend on the availability of CMA resources and whether the issue(s) outlined in the basic information suggest to the CMA that the case is one that would merit a prioritisation assessment by the CMA.

### Confidentiality of complaints

3.20 The CMA understands that individuals and businesses may want to ensure that details of their complaints are not made public. If a complainant has specific concerns about disclosure of its identity or its commercially sensitive information, it should let the CMA know at the same time as submitting its complaint. The CMA is prohibited<sup>35</sup> from disclosing certain confidential information and while the CMA is considering whether to pursue a complaint it aims to keep the identity of the complainant confidential. Furthermore, as noted at paragraph 3.14 above, complainants who have particular concerns in this regard can make a complaint anonymously.

3.21 ~~Later on, if the CMA has sufficient information to carry out~~decides to open a formal investigation, ~~it may, at some point during the course of that investigation, need to~~ and the CMA provisionally decides that a business under investigation has infringed the law, ~~the CMA may have to~~ reveal to the

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<sup>35</sup> Part 9 of the EA02. However, Part 9 does permit the CMA to disclose confidential information in certain specified circumstances.

~~business the a complainant's identity of the complainant as well as and/or the information<sup>36</sup> supplied by it, so as to allow the business under investigation to respond properly to the information provided. The CMA will aim not to – and generally will in practice not need to – reveal a complainant's identity without their consent until a Statement of Objections is issued. where the business under investigation cannot properly respond to the allegations against it in the absence of such disclosure. However, b~~Before disclosing a complainant's identity or any of their information, the CMA will ~~discuss~~ contact the complainant (or its representative, as appropriate) matter with it and to give it an opportunity to make representations to the CMA comment. Further information is available on the CMA's webpages.

### **Involvement of complainants where the CMA prioritises an investigation**

3.213.22 The CMA may provide a complainant with information during an investigation. For example, a complainant may be provided with a non-confidential version of a Statement of Objections or an opportunity to comment on a draft case closure letter, where certain circumstances are met.

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<sup>36</sup> Complaints made anonymously should therefore avoid including information that could allow the complainant's identity to be deduced



## 4 What the CMA does when it receives a complaint

### Summary

- ~~The CMA uses published Prioritisation Principles to decide which complaints to take forward to the Initial Assessment Phase.~~
- ~~Prioritised cases will be allocated to one of the CMA's groups within the Enforcement Directorate.~~
- ~~The CMA typically gathers information informally at this stage (that is, not using our formal powers of investigation).~~

### What the CMA does when it receives a complaint

4.1 ~~With the exception of complaints about suspected cartels,<sup>37</sup> all competition complaints should be submitted in the format set out on the CMA's webpages.~~

4.24.1 ~~The CMA welcomes submissions from businesses and consumers ~~on~~ regarding competition concerns. Due to resource constraints the CMA may not be able to respond to all complaints it receives. The CMA's Pipeline and Intelligence Unit may engage in informal dialogue with the complainant if the CMA needs to clarify any information provided to it at this stage or the CMA requires additional information. Although the CMA considers all complaints it receives, the CMA cannot formally investigate all suspected infringements of competition law. The CMA decides which cases to investigate on the basis of ~~the principles laid out in its publication~~ Prioritisation principles for the CMA (CAM16).<sup>38</sup> These take into account the likely impact of the investigation in the form of direct or indirect benefits to consumers, the strategic significance of the case, the risks involved in taking on the case, and the resources required to carry out the investigation. ~~The Pipeline and Intelligence Unit (which is part of the Research, Intelligence and Advocacy Unit) carries out an initial assessment of whether a complaint satisfies the CMA's Prioritisation Principles, consulting other CMA officials as appropriate.~~~~

<sup>37</sup> ~~Which should be reported using either of the methods detailed in paragraph 3.13 above.~~

<sup>38</sup> ~~Prioritisation principles for the CMA (CMA16) available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

~~4.3 Further information on the CMA's Prioritisation Principles and how the CMA applies them in practice is available in the CMA publication *Prioritisation principles for the CMA (CMA16)*.<sup>39</sup>~~

~~4.44.2 However, the CMA's ability to follow up on a complaint and to determine whether to open a formal investigation depends to a great extent on the timely cooperation of the complainant and the amount and quality of information they provide to the CMA. Well structured written complaints supported by evidence are likely to proceed more rapidly to a prioritisation assessment and, if they are prioritised, to an investigation The CMA will be better able to consider a complaint that includes the information set out in paragraph 3.18 above. As noted above at paragraph 3.14, the CMA should be informed of complaints via its webpages in the first instance. They can also assist complainants in being granted Formal Complainant status if the CMA proceeds to a formal investigation. See Chapter 5 for more details on the process for becoming a Formal Complainant.~~

~~4.54.3 If the CMA decides not to prioritise a complaint at this stage, in appropriate cases it may send an advisory letter or a warning letter to the company or companies whose conduct is the subject of the complaint.<sup>40</sup> This would inform them that the CMA has been made aware of a possible breach of competition law by them and that, although the CMA is currently not minded to pursue an investigation, it may do so in future if the CMA receives further evidence of a suspected infringement or the CMA's prioritisation assessment changes.~~

~~4.64.4 Where the CMA prioritises a complaint, the case will be allocated to the appropriate CMA group area of the Enforcement Directorate for formal or further informal investigation.<sup>41</sup>~~

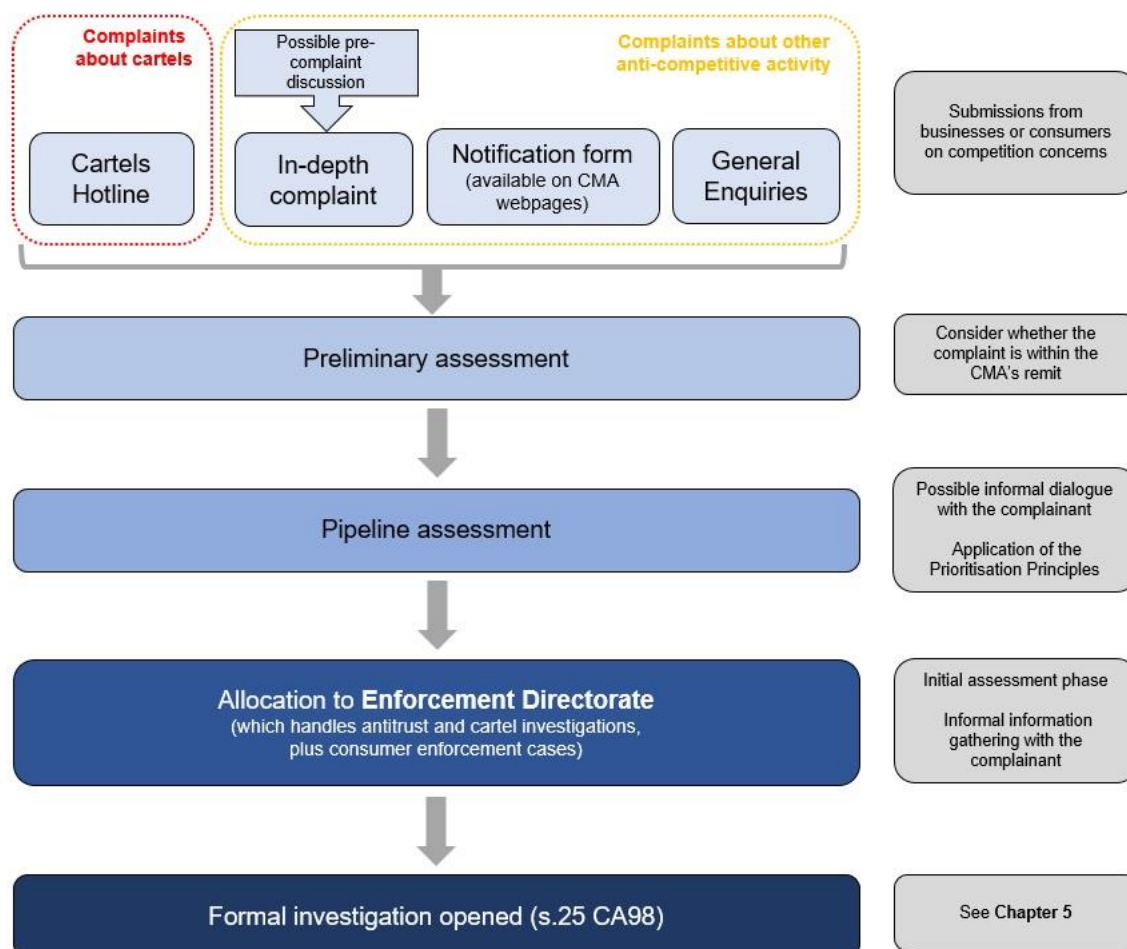
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<sup>39</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>40</sup> See the CMA's *Essential information for businesses: warning and advisory letters*.

<sup>41</sup> In some cases, members of the Enforcement Directorate may be involved in considering the complaint.

## Overview of process



### Which part of the CMA carries out the investigation?

4.7 — The CMA has two groups which carry out competition investigations. These are: The Anti-Trust Group (ATG) and CCG (together referred to as the Competition Enforcement Directorate groups).<sup>42</sup> A chart showing the structure of the CMA is available at [www.gov.uk/cma](http://www.gov.uk/cma).<sup>43</sup>

4.8 — CCG is responsible for investigating and enforcing both suspected civil cartel infringements of the CA98 and criminal cartel and consumer law infringements. The ATG is responsible for investigation and enforcement of all other suspected infringements of the CA98.

<sup>42</sup>—The CMA's Enforcement Directorate also contains the Consumer Group, which is responsible for enforcing consumer law. The Consumer Group does not carry out competition investigations and is not referred to further in this guidance document.

<sup>43</sup>—[www.gov.uk/cma](http://www.gov.uk/cma).

~~However, there is flexibility in the allocation of cases between the CMA's Enforcement Directorate groups. This means that a case that falls into the area covered by one group may be allocated to another group where that group is better placed to carry out the investigation, for instance, where it has more available resources at the time.~~

~~4.94.5 The processes underpinning the CMA's CA98 investigations and the tools available to the CMA are identical across all the groups.<sup>44</sup> Information on the different groups within the Enforcement Directorate is available at [www.gov.uk/cma](http://www.gov.uk/cma).~~

## Initial assessment phase

~~4.104.6 Once the CMA has decided to take forward a case within the Enforcement Directorate, the CMA may gather more information from the complainant, the company/ies under investigation, and/or third parties on an informal basis. This may involve sending an informal request for information, a request for clarification of information already provided in the complaint, or an invitation to meet with the CMA. Information will be requested at this stage on an informal basis, i.e. the CMA will rely on voluntary cooperation rather than ~~In these circumstances, where the CMA is not using its formal powers to gather information, the CMA will rely on voluntary cooperation.~~~~

~~4.114.7 In the case of suspected cartels, however, it is unlikely that the CMA would gather information informally, where it considers that contacting is unlikely to contact the businesses under investigation informally as to do so at this stage may prejudice the investigation, for example in the case of suspected cartels. Instead, the CMA typically uses its formal information-gathering powers from the outset.~~

~~4.12 On the basis of the information it has gathered at that time, if the CMA considers it has reasonable grounds for suspecting that competition law has been breached<sup>45</sup>, the CMA can open a formal investigation. This allows the CMA to use its formal information-gathering powers (see Chapter 6).~~

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<sup>44</sup> ~~However, any covert surveillance or handling of covert human intelligence sources under the Regulation of Investigatory Powers Act 2000 will only be carried out by CCG in relation to investigations into suspected cartels.~~

<sup>45</sup> ~~Or, in the case of an agreement, that the relevant prohibition would be breached were the agreement not to benefit from an individual exemption, or should any applicable block or parallel exemption be capable of being cancelled or withdrawn by the CMA Section 25 of the CA98.~~

## 5 Opening a formal investigation

### Summary

- ~~• The decision to open a formal investigation depends upon whether:
  - ~~— the legal test that allows the CMA to use its formal investigation powers has been satisfied, and~~
  - ~~— the case continues to fall within the CMA's casework priorities.~~~~
- ~~• When the CMA opens a formal investigation, the case is allocated a Team Leader, a Project Director and a Senior Responsible Officer.~~
- ~~• In appropriate cases, when the CMA opens a formal investigation, the CMA will send the businesses under investigation a case initiation letter including contact details for key members of the case team including the Senior Responsible Officer, who will decide whether to issue a Statement of Objections in the case.~~
- ~~• The CMA will also publish on its webpages a notice of investigation setting out basic details of the case and a case-specific administrative timetable for the investigation.~~
- ~~• The CMA will grant Formal Complainant status, in relation to an investigation, to any person who has submitted a written, reasoned complaint to the CMA, who requests Formal Complainant status, and whose interests are, or are likely to be, materially affected by the subject matter of the complaint.~~
- ~~• Formal Complainants have the opportunity to become involved at key stages of the CMA's investigation.~~

5.1 If a complaint is likely to progress to a formal investigation, the case is allocated:

- a designated Team Leader~~case team~~, who leads the case team and is responsible for day-to-day running of the case
- ~~a Project Director, who directs the case and is accountable for delivery of high quality timely output, and~~
- a Senior Responsible Officer (SRO), who is responsible for authorising the opening of a formal investigation and taking certain other decisions,

including, where the SRO considers there is sufficient evidence, authorising the issue of a Statement of Objections.<sup>46</sup>

~~5.2 For these purposes, the decision to open a formal investigation means deciding whether the legal test<sup>47</sup> which allows the CMA to use formal investigation powers has been met and whether the case continues to fall within CMA casework priorities.~~

~~5.35.2~~ Once-After the decision has been taken to open a formal investigation, the CMA will send the businesses under investigation a case initiation letter setting out brief details of the conduct that the CMA is looking into, the relevant legislation, the case-specific timetable, and key contact details for the case team such as the ~~Team Leader~~Assistant Project Director, Project Director and SRO.<sup>48</sup>

~~5.45.3~~ The receipt of a case initiation letter will often coincide with the CMA's use of its formal powers, for example, with the business also receiving a formal notice or information request. In some instances, the CMA will send out a formal information request at the same time as sending the case initiation letter or the information request may form part of the case initiation letter. See Chapter 6 for more information on the CMA's formal powers of investigation~~information requests.~~

~~5.55.4~~ In some cases, it will not be appropriate to issue a case initiation letter at the start of a case, as to do so may prejudice the investigation, such as prior to unannounced inspections or witness interviews. In these cases, the CMA will send out the letter as soon as possible.

~~5.6 Also, it may be necessary to limit the information that the CMA gives in the case initiation letter, for example, to protect the identity of a whistleblower in a suspected cartel investigation, or the identity of a complainant where there are good reasons for doing so.~~

~~5.75.5~~ Once a formal investigation is opened and the parties have been informed of this, the CMA will generally publish a notice of investigation on www.gov.uk/cmait~~s webpages.~~<sup>49</sup> ~~Where the CMA does publish a notice of~~

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<sup>46</sup> The categories of decision for which the SRO is responsible are listed in more detail at paragraph 9.6 below.

<sup>47</sup> ~~Under section 25 of the CA98 the CMA may conduct an investigation where there are reasonable grounds for suspecting that competition law has been breached (or, in the case of an agreement, that the relevant prohibition would be breached were the agreement not to benefit from an individual exemption or should any applicable block or parallel exemption be capable of being cancelled or withdrawn by the CMA).~~

<sup>48</sup> See Transparency and Disclosure Statement of the CMA's policy and approach (CMA6), available at: www.gov.uk/cma.

<sup>49</sup> Section 25A of the CA98 permits the CMA to publish a notice of investigation.

~~investigation, it will generally be published~~ as soon as practicable after the formal investigation has been opened and updated thereafter, as appropriate. However, the CMA ~~may publish or update a notice of investigation at any time following commencement of a formal investigation, but~~ will generally not publish or update any notice where doing so may prejudice the investigation ~~–~~ or any criminal investigation or any company disqualification order investigation – connected with that case.<sup>50</sup>

~~5.85.6~~ Section 25A(1) of the CA98 sets out the type of information that a notice of investigation may contain. The notice will generally include basic details of the case, such as whether the case is being investigated under the Chapter I and/or II prohibitions, a brief summary of the suspected infringement, and the industry sector involved. The CMA will also outline the administrative timetable for the case.<sup>51</sup> If the timetable changes during the investigation, the timetable will be updated in the notice of investigation, including, where possible, reasons for the changes that have been made.

~~5.95.7~~ ~~The CMA may include the names of any businesses it is investigating in a notice of investigation.~~<sup>52</sup> The CMA would not generally expect to publish the names of the parties under investigation in the notice at this stage other than in exceptional circumstances, such as where: ~~This may include, for example, situations where the parties' involvement in the CMA's investigation is already in the public domain or subject to significant public speculation (and the CMA considers it appropriate to publish details of the parties in the circumstances); where a party requests that the CMA name them in the notice of investigation (and the CMA considers doing so to be appropriate in the circumstances); or where the CMA considers that the level of potential harm to consumers or other businesses (including businesses in the same sector not involved in the investigation) from parties remaining unidentified is such as to justify disclosure.~~

- leaving such parties unidentified could be expected to result in significant consumer detriment and/or significant harm to other businesses (including those in the same sector)

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<sup>50</sup> Further information on the CMA's approach to treatment and disclosure of information is available in the guideline *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*. For information regarding the CDO investigations, see the [CDO guidance page](#).

<sup>51</sup> Initially, the timetable will cover the investigative stages up to the CMA's decision on whether to issue a Statement of Objections. If the CMA issues a Statement of Objections, the timetable will be updated with indicative timing of the steps to the end of the investigation.

~~<sup>52</sup> Section 25A(1)(d) of the CA98.~~

- the party's involvement in a CMA investigation is already in the public domain or is the subject of significant public speculation
- the subject matter of the investigation is of widespread public concern
- a party has requested that it be named by the CMA
- doing so is necessary to ensure that the case is progressed effectively, or
- such enforcement action is associated with similar action being undertaken by one or more other competition enforcement agencies, whether in the United Kingdom or elsewhere.

The CMA will usually ~~only~~ include parties' names in the notice of investigation at a later stage of an investigation, ~~typically and~~ if a Statement of Objections is issued.

~~5.105.8~~ In some cases, such as cartel investigations, it will not be possible to include many details of the investigation at the stage of publishing the notice of investigation, as to do so might prejudice the CMA's ongoing investigation. ~~The notice of investigation will be updated once the CMA is able to provide further details of the investigation without risking prejudicing the investigation.~~

~~5.11~~ Further information on the CMA's approach to treatment and disclosure of information is available in the guideline *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*.<sup>53</sup>

### **Granting Formal Complainant status**

~~5.12~~ The CMA will grant Formal Complainant status in relation to an investigation to any person who has submitted a written, reasoned complaint to the CMA, who requests Formal Complainant status, and whose interests are, or are likely to be, materially affected by the subject matter of the complaint. Typically, the CMA will remind complainants who have submitted a written, reasoned complaint but who have not requested Formal Complainant status that they may apply to be treated as a Formal Complainant. The CMA may grant Formal Complainant status to more than one complainant in an investigation.

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<sup>53</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).



~~5.13—The principal advantage of acquiring this status is that Formal Complainants have the opportunity to become involved at key stages of the investigation.~~

~~5.14—For example, the CMA will consider providing Formal Complainants with access to the same information available to businesses under investigation at the outset of a formal investigation. This will depend on the circumstances of the individual case. Where the CMA does provide such information, the Formal Complainant is under a legal obligation to respect its confidentiality. Later on, the CMA will also invite Formal Complainants to comment, usually in writing, on the provisional findings in the Statement of Objections through a structured process, before the investigation is concluded. See Chapter 12 for more detail on this.~~

~~5.15—Other interested third parties who are not Formal Complainants may also have an opportunity to become involved in the investigation. For example, the CMA may consider inviting them to comment on the Statement of Objections where the CMA considers that it would be appropriate to do so.~~

~~5.165.9 More information on the involvement in CMA investigations of Formal Complainants and other interested third parties is available in the OFT guideline *Involving third parties in Competition Act investigations* (OFT451).<sup>54</sup>~~

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<sup>54</sup>—Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## 6 The CMA's formal powers of investigation

### Summary

- ~~After a formal investigation has been opened, the CMA can use formal powers to obtain information.~~
- ~~The CMA can issue formal information requests (section 26 notices) in writing.~~
- ~~The CMA can conduct formal interviews with any individual connected to a business under investigation.~~
- ~~The CMA also has the power to enter, and in some instances to search, business and domestic premises.~~
- ~~The CMA may fine any business or individual who does not comply with its information gathering powers.~~
- ~~It is a criminal offence to obstruct the CMA's information gathering process.~~

### Information gathering powers

6.1 The CMA has a range of powers to obtain information to help it establish whether an infringement has been committed.<sup>55</sup> The CMA can require the production of specified documents or information, ask individuals oral questions and/or carry out interviews with individuals, enter premises without a warrant, and enter and search premises with a warrant. The entering of premises can be with or without notice.<sup>56</sup>

~~The following paragraphs give an overview of the extent of the CMA's formal powers and how they are used. More detailed guidance on other aspects of the CMA's formal powers is available in the OFT guideline *Powers of Investigation* (OFT404).<sup>57</sup>~~

<sup>55</sup> Information gathered under the CMA's powers can also be used in any director disqualification proceedings the CMA brings. For further information, see *Directors disqualification orders in competition cases* (OFT510).

<sup>56</sup> The CMA also has powers to gather information to assist other authorities in relation to their investigations into suspected competition infringements in other parts of the European Union. For example, the CMA may assist the Commission in obtaining information in relation to its investigations into suspected infringements of Articles 101 and 102 of the TFEU. For further information see Chapter 16 below.

<sup>57</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## Written information requests

6.2 ~~This is the power the CMA would expect to use most often to gather information during investigations.~~ The CMA will send out formal information requests (also referred to as section 26 notices)<sup>58</sup> in writing to obtain information that it considers relates to any matter relevant to this investigation from a range of sources such as the business/es under investigation, their competitors and customers, complainants, and suppliers. ~~The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request.<sup>59</sup> It is a criminal offence punishable by fine and/or imprisonment to provide false or misleading information,<sup>60</sup> or to destroy, falsify or conceal documents<sup>61</sup> (subject in each case to certain defences or conditions set out in the CA98).<sup>62</sup>~~

6.3 The information request will tell the recipient what the investigation is about, specify or describe the documents and/or information that the CMA requires, give details of where and when they must be produced, and set out the offences and/or sanctions that may apply if the recipient does not comply. The request may also give details of where and when the documents and/or information must be produced.

6.36.4 Examples of the types of documents<sup>63</sup> and information the CMA may ask for include internal business reports, copies of emails and other internal data. Under this power, the CMA can ~~also~~ ask for information that is not already written down, for example market share estimates based on knowledge or experience, ~~and~~ Ithe CMA can also require past or present employees of the business providing the document to explain any document that is produced. If a document cannot be produced, the CMA can require the recipient to state, to the best of their knowledge, where the document can be found. ~~Examples of the types of information the CMA may ask for include internal business reports, copies of emails and other internal data.~~

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<sup>58</sup> Section 26 of the CA98 gives the CMA the power to require the production of information and documents when conducting a formal investigation.

~~<sup>59</sup> Section 40A of the CA98. Failure to comply includes failures to answer questions asked by the CMA, failures to produce documents required by the CMA, or failures to provide adequate or accurate information in response to any requirement imposed on a person under section 26, 26A, 27, 28 or 28A of the CA98. For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see *Administrative Penalties: Statement of policy on the CMA's approach (CMA4)* available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

~~<sup>60</sup> Section 44 of the CA98.~~

~~<sup>61</sup> Section 43 of the CA98.~~

~~<sup>62</sup> For more information on potential criminal penalties for failing to co-operate with the CMA's powers of investigation see *Powers of Investigation (OFT404)* available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

~~<sup>63</sup> The term 'document' includes 'information recorded in any form', section 59 of CA98.~~

~~6.41.1 The information request will tell the recipient what the investigation is about, specify or describe the documents and/or information that the CMA requires, give details of where and when they must be produced, and set out the offences and/or sanctions that may apply if the recipient does not comply.~~

6.5 The CMA may send out more than one request to the same person or company during ~~the course of~~ the investigation. For example, the CMA may ask for additional information after considering material submitted in response to an earlier request.

6.6 The CMA will ask for documents or information which, in its opinion, are relevant to the investigation at the time the request is sent out. Any queries about the scope of an information request or the time given to respond should be raised with the ~~Team Leader or Project Director~~case team as soon as possible.

### **Giving advance notice and Using draft information requests**

~~6.7 In appropriate cases, the CMA will seek to give recipients of large information requests advance notice so that they can manage their resources accordingly. This is the CMA's usual approach.~~

~~6.76.8~~ In certain circumstances, Wwhere it is practical and appropriate to do so, the CMA will~~may~~ send the information request in draft. ~~In this way, T~~the CMA can then take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which the information must be received. The time frame for comment on the draft will depend on the nature and scope of the request.

~~6.86.9 In certain circumstances, it would not be appropriate to send information requests in draft, for example, if in the CMA's view it would prejudice the investigation or if it would be inefficient because the request is for a small amount of information. The CMA will assess each case on its facts to determine whether it would be appropriate to use a draft information request.~~

### **Advance notice of the issue of written information requests**

~~6.91.1 In appropriate cases, the CMA will seek to give recipients of large information requests advance notice so that they can manage their resources accordingly. This is the CMA's usual approach.~~

6.10 ~~However, in other circumstances, it may be 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. Where the CMA does not give advance notice of large information requests, it will explain why.~~

### ~~Setting a deadline for a response~~ **Responding to a written information request**

- 6.11 ~~The written information request will~~ When the CMA sends out a request, the CMA also sets a deadline by which the response must be received. If a request has been provided in draft and the timescale for response to the final request already discussed, the CMA will agree to an extension only in exceptional circumstances, so as to minimise any delay to the investigation.
- 6.12 The deadline specified in the final information request will depend on the nature and the amount of information that the CMA has requested. If a request has been provided in draft and the timescale for response to the final request already discussed, the CMA will only agree to an extension only in exceptional circumstances, so as to minimise any delay to the investigation. In all circumstances, recipients must provide reasons for requesting an extension to the deadline set for response. It is not possible for the CMA to apply uniform, set timescales for responses to information requests.
- 6.13 Where a recipient has a complaint about the deadline set for a response to a written information request, the recipient should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the recipient may refer the matter to the Procedural Officer.<sup>64</sup>

### ~~Responding to CMA written information requests~~

- 6.14 ~~As stated above, T~~ the CMA expects recipients to comply fully with any information request within the given deadline. This is especially the case where the CMA has engaged with them on the scope and purpose of the request and the proposed deadline for its completion, in order to help them comply. The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request.<sup>65</sup> This may be either a fixed or daily penalty, or a combination of the two, depending on what is appropriate in the circumstances.<sup>66</sup> It is also a criminal offence punishable by fine and/or

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<sup>64</sup> See Chapter 15 and Rule 8 of the CA98 Rules. See Procedural Officer: raising procedural issues in CMA cases, for further details, on the Procedural Officer's role are available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>65</sup> Any decision to impose a penalty for failure to comply with a formal information request may take into account whether the CMA had issued a draft information request and set a deadline for compliance with the final information request that reflected comments received on the draft request from that party. For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see Administrative Penalties: Statement of policy on the CMA's approach (CMA4) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>66</sup> Section 40A of the CA98. Failure to comply includes failures to answer questions asked by the CMA, failures to produce documents required by the CMA, or failures to provide adequate or accurate information in

imprisonment to provide false or misleading information,<sup>67</sup> or to destroy, falsify or conceal documents<sup>68</sup> (subject in each case to certain defences or conditions set out in the CA98).

6.15 Unless otherwise indicated, the response should be sent to the **Team Leader** case team in electronic format ~~and in hard copy~~. The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is detailed in Chapter 7. ~~a separate non-confidential version along with an explanation which justifies why certain information should be treated as confidential should be submitted at the same time and in any event no later than four weeks from the date of submitting the original response. Any extensions to this deadline should be agreed with the Team Leader in advance of the deadline. In the event that the CMA has not received a non-confidential version within this deadline, the CMA will give one further opportunity to make confidentiality representations. The time frame for responding in this case will be set by the Team Leader. If, after this second opportunity, the CMA has received no reply, the CMA will assume that no confidentiality is being claimed in respect of the information. The CMA will not accept blanket or unsubstantiated confidentiality claims. See Chapter 7 on the handling of confidential information.~~

~~In some cases, the CMA may return information sent to it in response to a request where, after careful review, the CMA considers it is duplicate information or information that is outside the nature and scope of the request.~~

## Power to require individuals to answer questions

6.16 The CMA can require any individual who has a 'connection with'<sup>69</sup> a business which is a party to the investigation to answer questions on any matter relevant to the investigation after giving formal written notice.<sup>70</sup> This may be a current connection or a former connection, for example where the

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response to any requirement imposed on a person under section 26, 26A, 27, 28 or 28A of the CA98. ~~For more information on potential financial penalties for failing to comply with the CMA's powers of investigation~~ See CMA guideline Administrative Penalties: Statement of policy on the CMA's approach (CMA4) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>67</sup> Section 44 of the CA98.

<sup>68</sup> Section 43 of the CA98.

<sup>69</sup> Section 26A(6) of the CA98 describes the meaning of 'connection with' an undertaking, being an individual who 'is or was (i) concerned in the management or control of the undertaking, or (ii) employed by, or otherwise working for, the undertaking'.

<sup>70</sup> Section 26A of the CA98. This ~~formal~~ power was introduced by the ERRA13.

individual used to work for the undertaking under investigation. The CMA will determine whether an individual has a 'connection with' the relevant undertaking on a case-by-case basis, taking account of the circumstances of the case.<sup>71</sup>

6.166.17 The CMA will give a formal notice to the person it wishes to interview, informing them that it intends to ask questions under formal powers.- The notice will explain what the CMA's -investigation is about, give details of when and where the questions will be asked or the interview will take place (which could be immediately after on receipt of the notice – see paragraphs 6.20 to 6.22 below). -It also and sets out both the penalties that the CMA may impose if the recipient fails, without reasonable excuse, does not to comply with the formal notice to answer the CMA's questions<sup>72</sup> and the statutory limitations on the use against them of statements made in the interview.<sup>73</sup>~~Where the CMA wishes to question an individual, the CMA will provide the relevant individual with a formal notice requiring them to answer questions at a specified place and time or immediately on receipt of the notice. The CMA can fine any person who fails, without reasonable excuse, to comply with a formal notice to answer the CMA's questions.~~<sup>74</sup>

### **Formal notice requiring an individual to answer questions**

~~Where the CMA wishes to question an individual under formal powers, the CMA will provide the relevant individual with a formal written notice. The~~

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<sup>71</sup> An individual who has a 'connection with' a business could include current or former directors, partners or equivalent officers; any person exercising management functions of any sort; temporary or permanent employees, consultants, volunteers or contract staff; professional advisers or any other person who has advised the business; and/or officers or controllers of shareholders that exercise or have exercised any degree of 'control' of the relevant business. A person does not need to have received a salary, fee, allowance, equity share, capital gain, or any other form of remuneration or payment from a business in order to have a 'connection with' a relevant business. For these purposes, a 'director' includes any person occupying the position of director, by whatever name called. This includes a person formally appointed to a company board, as well as any person who assumes to act as a director (a de facto director). It also includes a 'shadow director', defined as any person in accordance with whose directions or instructions the directors of a company are accustomed to act (other than advice given purely in a professional capacity).

<sup>72</sup> Section 40A of the CA98. For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see *Administrative Penalties: Statement of policy on the CMA's approach (CMA4)*.

<sup>73</sup> Section 30A(2) and (3) of the CA98 provide that a statement obtained from an individual through the use of the CMA's formal interview powers may only be used as evidence against that individual on a prosecution for an offence in providing false or misleading information, or on a prosecution for some other offence where in giving evidence in the proceedings the individual makes a statement that is inconsistent with the statement obtained by the CMA and evidence relating to the latter statement is adduced, or a question relating to it is asked, by or on behalf of the individual.

<sup>74</sup> Section 40A of the CA98. For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see *Administrative Penalties: Statement of policy on the CMA's approach (CMA4)* available at: [www.gov.uk/cma](http://www.gov.uk/cma).

~~CMA can only issue formal notices to individuals who have a 'connection with' an undertaking that the CMA is investigating.<sup>75</sup> This may be a current connection or a former connection, for example where the individual used to work for the undertaking under investigation.~~

~~6.171.1 The CMA will determine whether an individual has a 'connection with' the relevant undertaking on a case by case basis, taking account of the circumstances of the case.<sup>76</sup>~~

~~The CMA will give a formal notice to the person it wishes to interview informing them that it intends to ask questions under formal powers. The notice will explain what the CMA's investigation is about, give details of when and where the questions will be asked or the interview will take place (which could be immediately on receipt of the notice — see paragraphs 6.24 to 6.26 below), and set out both the penalties that the CMA may impose if the recipient does not comply with the notice and the statutory limitations on the use against them of statements made in the interview.<sup>77</sup>~~

6.18 Where the individual the CMA wishes to interview has a current connection with the relevant undertaking at the time the formal notice is given,<sup>78</sup> the CMA must also give a copy of the notice to that undertaking.<sup>79</sup> The CMA will take such steps as are reasonable in all the circumstances to provide the notice before the interview takes place, and, in general, the CMA will

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<sup>75</sup>—Section 26A(6) of the CA98 describes the meaning of 'connection with' an undertaking, being an individual who 'is or was (i) concerned in the management or control of the undertaking, or (ii) employed by, or otherwise working for, the undertaking'.

<sup>76</sup>—An individual who has a 'connection with' a business could include current or former directors, partners or equivalent officers; any person exercising management functions of any sort; temporary or permanent employees, consultants, volunteers or contract staff; professional advisers or any other person who has advised the business; and/or officers or controllers of shareholders that exercise or have exercised any degree of 'control' of the relevant business. A person does not need to have received a salary, fee, allowance, equity share, capital gain, or any other form of remuneration or payment from a business in order to have a 'connection with' a relevant business. For these purposes, a 'director' includes any person occupying the position of director, by whatever name called. This includes a person formally appointed to a company board, as well as any person who assumes to act as a director (a de facto director). It also includes a 'shadow director', defined as any person in accordance with whose directions or instructions the directors of a company are accustomed to act (other than advice given purely in a professional capacity).

<sup>77</sup>—Section 30A(2) and (3) of the CA98 provide that a statement obtained from an individual through the use of the CMA's formal interview powers may only be used as evidence against that individual on a prosecution for an offence in providing false or misleading information, or on a prosecution for some other offence where in giving evidence in the proceedings the individual makes a statement that is inconsistent with the statement obtained by the CMA and evidence relating to the latter statement is adduced, or a question relating to it is asked, by or on behalf of the individual.

<sup>78</sup> See footnote 6970 above.

<sup>79</sup> Section 26A(2) of the CA98.



provide a copy of a notice to a relevant undertaking at the same time as, or as soon as reasonably practicable after, giving the notice to the individual.<sup>80</sup>

- 6.19 Any queries about the details of an interview notice should be raised with the ~~Team Leader or Project Director~~ case team as soon as possible.

## Conduct of interviews

- 6.20 As indicated above, in certain circumstances the CMA may interview an individual under formal powers immediately after giving a formal notice to that person.<sup>81</sup>
- 6.21 This may include, for example, where the CMA considers that an individual may have information that would enable the CMA to take steps to prevent damage to a business or consumers, or where the effective conduct of the investigation means that the CMA considers it necessary to ask an individual questions about facts or documents immediately after having given a notice (which will generally be during the course of an inspection pursuant to the CMA's power to enter premises).
- 6.22 Ordinarily interviews will be recorded, but in circumstances where this is unnecessary or impracticable a contemporaneous note will be taken of the questions and the interviewee's response. The interviewee will be asked to read through and check any transcript of the recording or the questions and answers in the note and to confirm, in writing, that they are an accurate account of the interview.<sup>82</sup> ~~Further information on the CMA's approach to handling confidential information can be found in Chapter 7. The CMA will also normally ask the individual to identify any confidential information by providing clear written representations by a specified date.~~<sup>83</sup> ~~The CMA will~~

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<sup>80</sup> Section 26A(3) of the CA98 requires the CMA to 'take such steps as are reasonable in all the circumstances to comply with the requirement [to provide a copy of the interview notice at the time it is given to the individual]...before the time at which the individual is required to answer questions.' The CMA may consider that, in all the circumstances, it is not in a position to provide a copy of the formal interview notice to the relevant undertaking before conducting an interview, for example where a delay in conducting an interview may compromise the investigation or otherwise undermine the CMA's ability to exercise its functions under the CA98.

<sup>81</sup> Section 26A(1) of the CA98.

<sup>82</sup> ~~The CMA will also send a copy of the transcript or note to any undertaking with which the individual has a 'current connection', and to which the CMA has given a copy of the formal interview notice pursuant to section 26A(2) of the CA98, to allow such undertaking(s) to make confidentiality representations to the CMA. Additionally, if appropriate, the CMA will send a copy of the transcript or note to any undertaking with which the individual has a 'former connection', to allow such undertaking to make confidentiality representations to the CMA.~~

<sup>83</sup> ~~The CMA will also send a copy of the transcript or note to any undertaking with which the individual has a 'current connection', and to which the CMA has given a copy of the formal interview notice pursuant to section~~

~~not accept blanket or unsubstantiated confidentiality claims.<sup>84</sup> If no such representations are received by the specified date, the CMA will assume that the individual does not wish to make any claims regarding confidentiality.~~  
The CMA will not seek comments on accuracy and representations on confidentiality of the transcript (or note) of the interview until it is satisfied that it can do so without risk to the investigation.

## Can a legal adviser be present?

6.23 Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation.<sup>85</sup> While the CMA recognises that the interview power may be used in a range of circumstances, the starting point for the CMA is that it will be generally inappropriate for a legal adviser only acting for the undertaking to be present at the interview.<sup>86</sup> The CMA also considers that in certain circumstances there may be a risk that the presence at the interview of a legal adviser only acting for the business will prejudice the investigation, for example if their presence reduces the incentives on the individual being questioned to be open and honest in their account. In cases where the CMA wishes to question a person having entered into premises as described at paragraph 6.40 below, the questioning may be delayed for a reasonable time to allow the individual's legal adviser to attend.<sup>87</sup> During this time, the CMA may make this subject to certain conditions for the purpose of reducing the risk of contamination of witness evidence. Such conditions could include requesting that a CMA officer accompanies the individual in the period before the

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~~26A(2) of the CA98, to allow such undertaking(s) to make confidentiality representations to the CMA. Additionally, if appropriate, the CMA will send a copy of the transcript or note to any undertaking with which the individual has a 'former connection', to allow such undertaking to make confidentiality representations to the CMA.~~

~~<sup>84</sup> See Chapter 7 for more information on our approach to confidential information.~~

<sup>85</sup> In these circumstances the CMA will refer the individual and the legal adviser to the [Solicitors Regulation Authority's Guidance](#) on Employer's solicitors attending Health and Safety Executive interviews with employees ('the Guidance') (17 March 2006 – revised 5 February 2014) ~~available at [www.sra.org.uk](http://www.sra.org.uk)~~. The Guidance states that if a solicitor is asked to act for both the employer and the employee, the solicitor should give careful consideration before deciding whether to accept instructions due to the risk of a conflict of interest (see section 2). It also states that investigations by other similar authorities may give rise to similar considerations (see section 9).

<sup>86</sup> This includes the reasons set out in the ~~[Solicitors Regulation Authority's Guidance on HSE interviews](#)~~[Guidance](#) (referred to in the preceding footnote), which identifies the precautions to be taken by a solicitor acting for the employer only, but considers that it is difficult to justify the employer's solicitor accompanying the employee to the interview (see section 5). It also highlights the public interest concerns if the presence of the employer's solicitor inhibits the employee from making a full and proper disclosure of the facts (see section 5).

<sup>87</sup> Rule 4 of the CA98 Rules.

interview takes place and/or suspending the individual's use of electronic devices, including telephones.

## Power to enter premises

- 6.24 In some cases, the CMA will visit premises to obtain information. The power the CMA uses to gain entry will depend on whether the CMA intends to inspect business premises<sup>88</sup> (such as an office or a warehouse) or domestic premises<sup>89</sup> (such as the home of an employee).<sup>90</sup>
- 6.25 Under certain circumstances the CMA can enter business premises, but not domestic premises, without a warrant. Where the CMA has obtained a warrant<sup>91</sup> in advance of entry, the CMA can enter and search both business and domestic premises. These two powers (to enter premises without a warrant and to enter premises with a warrant) are explained below.
- 6.26 The occupier of the premises does not have to be suspected of having breached competition law.<sup>92</sup>

## Entering premises without a warrant<sup>93</sup>

- 6.27 A CMA officer who is authorised by the CMA in writing to enter premises but does not have a warrant may enter business premises in connection with an investigation if they have given the premises' occupier at least two working days' written notice.<sup>94</sup>

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<sup>88</sup> Business premises are defined as meaning any premises (or part of any premises) not used as a dwelling, section 27(6) of the CA98.

<sup>89</sup> Domestic premises are defined as premises (or any part of premises) used as a dwelling, and also used in connection with the affairs of an undertaking or association of undertakings, or where documents relating to the affairs of an undertaking or association of undertakings are kept, section 28A(9) of the CA98.

<sup>90</sup> ~~The CMA also has powers to gather information to assist other authorities in relation to their investigations into suspected competition infringements in other parts of the European Union. For example, the CMA may assist the Commission in obtaining information in relation to its investigations into suspected infringements of Articles 101 and 102 of the TFEU. More information on these powers can be found in *Powers of Investigation (OFT404)* which is available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

<sup>91</sup> From the High Court of England and Wales or Northern Ireland, the Court of Session in Scotland, or the Competition Appeal Tribunal.

<sup>92</sup> For example, the CMA could enter the premises of a supplier or a customer of the business suspected of breaching the law, so long as the CMA has taken all reasonably practicable steps to notify them in advance of the CMA's intended entry.

<sup>93</sup> Section 27 of the CA98.

<sup>94</sup> The written notice will set out what the investigation is about and the criminal offences that may be committed if a person fails to comply.

6.28 In certain circumstances, the CMA does not have to give advance notice of entry.<sup>95</sup> For example, the CMA does not have to give advance notice if it has reasonable suspicion that the premises are, or have been, occupied by a party to an agreement that the CMA is investigating or a business whose conduct the CMA is investigating, or if a CMA authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

### **What powers does the CMA have when entering business premises without a warrant?**

6.29 When an inspection without a warrant is taking place, CMA officers may require any person to:

- produce any document that may be relevant to the CMA's investigation – CMA officers can take copies of, or extracts from, any document produced
- provide an explanation of any document produced, and/or
- tell the CMA where a document can be found if CMA officers consider it to be relevant to the investigation.

6.30 CMA officers may also require any relevant information electronically stored to be produced in a form that can be read and taken away, and they may also take steps necessary to preserve documents, including electronic material, -or prevent interference with them.<sup>96</sup>

### **Entering and searching premises with a warrant<sup>97</sup>**

6.31 The CMA can apply to the court<sup>98</sup> for a warrant to enter and search business or domestic premises.

6.32 The CMA would usually seek a warrant to search premises where the CMA suspects that the information relevant to the investigation may be destroyed or otherwise interfered with if the CMA requested the material via a written

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<sup>95</sup> Section 27(3) of the CA98.

<sup>96</sup> Section 27(5) of the CA98.

<sup>97</sup> Section 28 of the CA98 in relation to business premises. Section 28A of the CA98 in relation to domestic premises.

<sup>98</sup> The High Court in England and Wales or Northern Ireland, the Court of Session in Scotland, or the Competition Appeal Tribunal.

request. Therefore, the CMA mostly uses this power to gather information from businesses or individuals suspected of participating in a cartel.

### What powers does the CMA have when entering premises with a warrant?

6.33 Where an inspection is carried out under a warrant, CMA officers are authorised to enter premises using such force as is reasonably necessary, but only if they are prevented from entering the premises. CMA officers cannot use force against any person.

6.34 In addition to the CMA's powers described above, the warrant also authorises CMA officers<sup>99</sup> to search the premises for documents that appear to be of the kind covered by the warrant and take copies of or extracts from them.<sup>100</sup>

6.35 The search may cover offices, desks, filing cabinets, electronic devices such as computers, mobile phones and tablets ~~and phones~~, as well as any documents, on the premises. The CMA can also take away from the premises:<sup>101</sup>

- original documents that appear to be covered by the warrant if the CMA thinks it is necessary to preserve the documents or prevent interference with them or where it is not reasonably practicable to take copies of them on the premises
- any document, or copies of it, to determine whether it is relevant to the investigation, when it is not practicable to do so at the premises. If the CMA considers later on that the information is outside the scope of the investigation, the CMA will return it<sup>102</sup>
- any relevant document, or copies of it, contained in something else where it is not practicable to separate out the relevant document at the

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<sup>99</sup> Other persons, such as IT specialists or industry experts, may also be authorised to carry out specific tasks under the supervision of authorised CMA officers.

<sup>100</sup> For business premises, section 28(2)(b) of the CA98. For domestic premises, section 28A(2)(b) of the CA98.

<sup>101</sup> For business premises, section 28(2)(c) of the CA98. For domestic premises, section 28A(2)(c) of the CA98. The CMA can only retain these documents for a maximum period of three months (for business premises, section 28(7) of the CA98. For domestic premises, section 28A(8) of the CA98). More information can be found in Powers of Investigation (OFT404) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>102</sup> However, the CMA may retain all of the material if it is not reasonably practicable to separate the relevant information from the irrelevant information without prejudicing its lawful use, for example as evidence.

premises. As above, the CMA will return information if the CMA considers later on that it is outside the scope of the investigation, and/or

- copies of computer hard drives, mobile phones, mobile email devices and other electronic devices.

6.36 At the end of the inspection, the CMA officer will provide, where practicable, a list of documents and/or extracts that have been taken.

### **What will happen upon arrival?**

6.37 The CMA's authorised officers will normally arrive at the premises during office hours. On entry, they will provide evidence of their identity, written authorisation by the CMA, and a document setting out what the investigation is about and describing what criminal offences may be committed if a person fails to co-operate. A separate document will also be provided that sets out the powers of the authorised officers and the right of the occupier to request that a legal adviser is present.

6.38 Where the CMA has obtained a warrant, the CMA officer will produce it on entry. The warrant will list the names of the CMA officers authorised to exercise the powers under the warrant and will state what the investigation is about and describe the criminal offences that may be committed if a person fails to co-operate.

6.39 Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for CMA authorised officers during the inspection.

### **Can a legal adviser be present?**

6.40 The occupier may ask legal advisers to be present during an inspection, whether conducted with or without a warrant. If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, CMA officers may wait a reasonable time for legal advisers to arrive.<sup>103</sup>

6.41 During this time, the CMA may take necessary measures to prevent tampering with evidence or warning other businesses about the investigation.<sup>104</sup>

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<sup>103</sup> Rule 4 of the CA98 Rules.

<sup>104</sup> This could include sealing filing cabinets, keeping business records in the same state and place as when CMA officers arrived, suspending external email or the making and receiving of calls, and/or allowing CMA

## What if there is nobody at the premises?

6.42 If there is no one at the premises when CMA officers arrive, the officers must take reasonable steps to inform the occupier that the CMA intends to enter the premises. Once the CMA has informed them, or taken such steps as it is able to inform them, the CMA must allow the occupier or their legal or other representative a reasonable opportunity to be present when the CMA carries out a search under the warrant.<sup>105</sup>

6.43 If CMA officers have not been able to give prior notice, the CMA must leave a copy of the warrant in a prominent place on the premises. If, having taken the necessary steps, the CMA has entered premises that are unoccupied, upon leaving those premises the CMA must leave them secured as effectively as they were found.<sup>106</sup>

## Voluntary provision of information

6.436.44 There may be circumstances under which a business may seek to provide information and documents voluntarily to the CMA. The business should discuss any voluntary provision with the case team prior to sending any material.

## Return of information

6.446.45 Where it considers it appropriate, the CMA may return information it has gathered during the course of an investigation (irrespective of how that information has been obtained).<sup>107</sup> The CMA may return information where, after careful review, the CMA considers it is duplicate information or information that is outside the nature and scope of the investigation, including where information falls outside the scope of the investigation as a result of that scope having changed. Any such information that is returned will no longer form part of the CMA's investigation file.<sup>108</sup>

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officers to enter and remain in offices of their choosing. It may be a criminal offence to tamper with evidence protected in this way.

<sup>105</sup> Rule 4 of the CA98 Rules.

<sup>106</sup> For business premises, section 28(5). For domestic premises, section 28A(6) of the CA98.

<sup>107</sup> As noted, however, the CMA may retain all of the information or materials it has gathered in the course of its investigation if it is not reasonably practicable to separate the relevant information from the irrelevant information.

<sup>108</sup> The CMA file will include all information which remains relevant to the investigation. ~~In the event that the CMA issues a Statement of Objections in relation to the investigation, parties will be able to access the CMA's investigation file, which contains those documents which relate to the matters set out in the Statement of Objections. See further Chapter 11 for information about the Statement of Objections and paragraphs 11.19 to 11.29 for information on the CMA's access to file procedure.~~

## 7 Limits on the CMA's powers of investigation

### Summary

- ~~• The CMA cannot require the production or disclosure of privileged communications.~~
- ~~• The CMA cannot force a business to provide answers that would require an admission that it has infringed the law.~~
- ~~• The CMA is subject to strict rules governing the extent to which the CMA is permitted to disclose confidential and sensitive information.~~
- ~~• The CMA expects to receive a separate non-confidential version of any document or materials containing sensitive or otherwise confidential information, along with a clear explanation as to why the redacted information should be considered confidential.~~

### Privileged communications

- 7.1 Under the CA98, the CMA is not allowed to use its powers of investigation to require anyone to produce or disclose<sup>109</sup> privileged communications.
- 7.2 Privileged communications are defined in the CA98.<sup>110</sup> They include communications, or parts of such communications, between a professional legal adviser and their client for the purposes of giving or receiving legal advice, or those which are made in connection with, or in contemplation of, legal proceedings, and for the purposes of those proceedings. For example, this would cover a letter from a company's lawyer to the company advising on whether a particular agreement infringed the law.
- 7.3 If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, a CMA officer may request that the communications are placed in a sealed envelope or package. The officer will then discuss the arrangements for the safe-keeping of these items by the CMA pending resolution of the dispute.

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<sup>109</sup> Production of privileged communications may be through providing written documents or orally (for example, during an interview).

<sup>110</sup> Section 30 of the CA98.



## Privilege against self-incrimination

- 7.4 When the CMA requests information or explanations, the CMA cannot force a business to provide answers that would require an admission that it has infringed the law.<sup>111</sup> The CMA can, however, ask questions about or ask for the production of any documents already in existence, or information relating to facts, such as whether a given employee attended a particular meeting.
- 7.5 The law on privilege is complicated. As investigators of a possible infringement, the CMA is not able to advise on the circumstances in which a person can claim privilege. Anyone in any doubt about how it applies in practice should seek independent legal advice.

## Handling confidential information

- 7.6 During the course of an investigations the CMA acquires a large volume of confidential information relating to both businesses and individuals.
- 7.7 There are strict rules governing the extent to which the CMA is permitted to disclose such information.<sup>112</sup> In many instances the CMA may have to redact documents the CMA proposes to disclose to remove any confidential information, for example, by blanking out parts of documents or by aggregating figures.
- 7.8 During the course of an investigation, the CMA may request confidentiality representations on the documents held on its file. Any such requests will generally provide an explanation as to the types of material the CMA considers are likely to be confidential under Part 9 of the EA02. It may also include a suggested framework according to which the information provider should detail any confidentiality representations. A deadline will be set for provision of confidentiality representations reflecting the extent of the material provided. Any request for an extension to the deadline, along with reasons for such a request, should be discussed well in advance of the deadline with the case team.
- 7.8.9 Representations should be provided where if a person or ~~company~~ business ~~thinks~~ considers that any information they are giving the CMA, or that the CMA has acquired, is commercially sensitive or contains details of an individual's private affairs and that disclosing it might significantly harm the

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<sup>111</sup> Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is given effect in the United Kingdom by the Human Rights Act 1998.

<sup>112</sup> Part 9 of the EA02.

interests of the business or person, ~~they should submit a separate non-confidential version of the information and, in an annexe clearly marked as confidential, set out clearly why the redacted information should be considered confidential.~~ The CMA will not accept blanket or unsubstantiated confidentiality claims.

~~The CMA will not accept blanket or unsubstantiated confidentiality claims. Non-confidential versions of documents should be provided at the same time as the original document and in any event no later than four weeks from the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the Team Leader.~~

7.97.10 In the event that the CMA does not receive any confidentiality representations (and has not been notified that none will be provided) ~~has not received a non-confidential version~~ within the ~~is~~ deadline stated, the CMA will generally give one further opportunity to make confidentiality representations. ~~The time frame for responding in this case will be set by the Team Leader.~~ If, after this second opportunity, the CMA has received no reply, the CMA will assume that no confidentiality is being claimed in respect of the information.

7.107.11 The CMA will comply with the provisions of Part 9 of the EA02 when deciding whether information is confidential and/or whether it may be appropriate to disclose information for the purposes of facilitating the exercise of the CMA's functions under the CA98.

7.117.12 The CMA may not agree with the person or business who provided it that the information in question is confidential,<sup>113</sup> or the CMA may agree that the information is confidential but consider that it is necessary to disclose the information ~~either~~ to the parties in the investigation in order to enable them to exercise their rights of defence ~~or in a published decision~~. In such circumstances, the CMA will give the person or business that provided the information prior notice of the proposed action and will give them a reasonable opportunity to make representations. The CMA will then inform the party whether or not the CMA still intends to disclose the information, after considering all the relevant facts.

~~7.12 Where a party is informed that the CMA does still intend to disclose information and the party is unhappy about this, the party should raise this~~

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<sup>113</sup> Particular types of information that the CMA is unlikely to consider to be 'confidential' includes financial information or certain other data relating to a business that is more than two years old and information that is already in the public domain or can be readily deduced from information in the public domain.

~~as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Officer.~~<sup>144</sup>

- 7.13 In some cases, the CMA may consider the use of practices such as confidentiality rings or data rooms at access to file stage to handle the disclosure of confidential information to a limited group of persons.
- 7.14 The CMA will only use these procedures where there are identifiable benefits in doing so and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned.<sup>115</sup> In such cases, the person or business that provided the information will be informed of the proposal and provided with a reasonable opportunity to ~~make representations to the CMA~~comment on the proposal. The CMA will then inform the person or business whether or not it still intends to use the proposed confidentiality ring and/or data room arrangement, after considering all the relevant facts.
- 7.15 Where a person or business is unhappy about the extent and/or method of disclosure~~informed that the CMA does still intend to use the confidentiality ring and/or data room arrangement and the person or business is unhappy about this~~, ~~they~~the person or business should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the person or business may refer the matter to the Procedural Officer.<sup>116</sup>
- 7.16 Further information on the CMA's approach to the treatment and disclosure of information, including to identifying confidential information, is available in the guideline Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6).<sup>147</sup>

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~~<sup>144</sup> See Chapter 15 and Rule 8 of the CA98 Rules. See the CMA's webpage, raising procedural issues in CMA cases, for further details of the Procedural Officer role are available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

~~<sup>115</sup> See further detail at Chapter 11.~~

~~<sup>116</sup> See Chapter 15 and Rule 8 of the CA98 Rules. See the CMA's webpage, raising procedural issues in CMA cases, for further details. Further details of the Procedural Officer role are available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

~~<sup>147</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

## 8 Taking urgent action to prevent significant damage or to protect the public interest

### Summary

- ~~The CMA can require a business to comply with temporary directions (interim measures) where:~~
  - ~~— the investigation has been started but not yet concluded, and~~
  - ~~— the CMA considers it necessary to act urgently either to prevent significant damage to a person or category of persons, or to protect the public interest.~~
- ~~In these circumstances, the CMA can act on its own initiative or in response to a request to do so.~~
- ~~Any person who considers that the alleged anti-competitive behaviour of another business is causing them significant damage may apply to the CMA to take interim measures.~~
- ~~If a person fails to comply with the interim measures without reasonable excuse, the CMA would apply to court for an order to require compliance within a specified time limit.~~

8.1 The CMA has the power<sup>118</sup> to ~~require a business to comply with~~give temporary directions (referred to as 'interim measures') ~~if while it completes the investigation.;~~

a) -the CMA has begun, but not completed, an investigation under section 25 of the CA98; and

b) the CMA considers that it is necessary for it to act as a matter of urgency for the purpose of:

i. preventing significant damage to a particular person or category of person; or

ii. protecting the public interest.

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<sup>118</sup> Section 35 of the CA98.

8.2 ~~The CMA may do this where it has started but not yet concluded the investigation and the CMA considers it necessary to act urgently either to prevent significant damage to a person or category of persons, or to protect the public interest. The CMA will consider in appropriate cases whether interim measures would be appropriate. The CMA can give interim measures directions ~~act~~ on its own initiative or in response to an application for interim measures request to do so if it considers that the conditions set out in paragraph 8.1 are met.~~

~~8.31.1 In most cases, interim measures will have immediate effect. However, if a person fails to comply with them without reasonable excuse, the CMA may apply to court for an order to require compliance within a specified time limit.~~

~~8.41.1 The court can require the person in default or any officer of a business responsible for the default to pay the costs of obtaining the order.~~

~~8.51.1 If the measures relate to the management or administration of a business, the court order can compel the business or any of its officers to comply with them. Failure to comply with a court order will be in contempt of court.~~

## Application for interim measures

8.3 Any person who considers that the alleged anti-competitive behaviour of another business is causing them significant damage may apply to the CMA to take interim measures.

8.68.4 ~~They~~ Potential applicants should contact the ~~designated Team Leader who is responsible for the case~~ case team in the first instance.<sup>119</sup> ~~The Team Leader will be able~~ to discuss the information requirements and explain the procedure ~~for dealing with such requests. Where a person is considering applying for interim measures but the CMA has not opened an investigation in relation to a relevant alleged infringement, that person may request a pre-complaint discussion (see paragraph 3.16). When doing so, that person should indicate their potential interest in making an interim measures application and the reasons for considering such an application.~~

8.5 Applicants should provide as much information and evidence as possible to demonstrate their case for interim measures and should also indicate as precisely as possible the nature of the interim measure being sought. The

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<sup>119</sup> In circumstances, where no investigation has been opened, the Senior Director, Antitrust should be contacted.

application should include a declaration of truth<sup>120</sup> by the applicant, or a person authorised to act on behalf the applicant, that:

- to the best of their knowledge and belief, the information and evidence provided to the CMA in support of the application is true, correct, and complete in all material particulars; and
- they understand that it is a criminal offence under section 44 of the CA98 for a person, recklessly or knowingly, to supply to the CMA information which is false or misleading in a material particular. This includes providing such information to another person knowing that the information is to be used for the purpose of providing information to the CMA.

8.6 The applicant should at the same time submit a separate, non-confidential version of the information and evidence they have provided in support of their application and, in an annex clearly marked as confidential, set out clearly why the redacted information should be regarded as confidential. The CMA may provide this non-confidential version to the party/ies in relation to which the application for interim measures has been made to enable the application to be considered expeditiously, where necessary. More information about how the CMA handles confidential information is available at paragraphs 7.6—7.16 above.

8.7 Moreover, the CMA may (such as in particular, to be able to consider the interim measures application expeditiously) decide that is appropriate for any unredacted information that the applicant considers confidential to be placed into a confidentiality ring or data room (see paragraph 8.10 below).<sup>121</sup>

## **Decision to impose interim measures**

8.8 The CMA has the discretion whether to make an interim measures direction. The SRO<sup>122</sup> may provisionally decide to give an interim measures direction (a provisional decision which may follow a complaint or be on the CMA's own initiative). In this case, the CMA will write to the business to which the directions are addressed setting out the terms of the proposed directions and the reasons for giving them. The CMA will also allow them a reasonable

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<sup>120</sup> A template declaration of truth is provided at Annex A.

<sup>121</sup> See paragraphs 11.23 to 11.31 below for further discussion of confidentiality rings and data rooms.

<sup>122</sup> See paragraph 5.1.

opportunity to make representations. Given the time-critical nature of the interim measures process, the time allowed may necessarily be short.

8.9 The business to which the directions are addressed will also be allowed ~~to a~~ reasonable opportunity to inspect documents on the CMA's file that relate to the proposed directions. 'Reasonable opportunity' for these purposes will depend upon the circumstances of the case, taking into account factors such as the urgency of the situation and the likely impact of the proposed interim measures directions on the business to which they are addressed. The CMA will typically provide only those documents which are relied on in the proposed directions, due to the need to act as a matter of urgency for the purpose of preventing significant damage to a particular person or category of person or protecting the public interest. A schedule of additional documents on the CMA's file will be provided with an opportunity for the business to request documents where necessary for its rights of defence.

8-98.10 The CMA may withhold any documents to the extent to which they contain any confidential information (or are internal documents)<sup>123</sup>. The CMA considers that it may be appropriate in some circumstances to provide access to certain documents by using a confidentiality ring or data room, having regard to the considerations set out in Chapter 11 below.<sup>124</sup>

8-108.11 After taking into account any representations, and having satisfied itself as to the adequacy of the evidence it is relying upon and taking into account all the circumstances of the case, the CMA will make its final decision and inform the applicant and ~~any Formal Complainants and~~ the business against which the order is being sought. The SRO is responsible for deciding whether to give an interim measures direction. Before taking this decision, the SRO will consult other senior CMA officials as appropriate.

8-118.12 In deciding whether the imposition of- interim measures is appropriate in the relevant circumstances, the CMA will seek to ensure that:

- it imposes interim measures only where it has identified specific behaviour or conduct that it considers is causing or is likely to cause significant damage to a particular person or category of person, or is or is likely to be contrary to the public interest;<sup>124</sup> and

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<sup>123</sup> See Rule 13(2) of the CA98 Rules.

<sup>124</sup> See, for example, paragraphs 11.23 to 11.31 below for further discussion of confidentiality rings and data rooms.

- the particular interim measures sought prevent, limit or remedy the significant damage that the CMA has identified, and are proportionate for the purpose of preventing, limiting or remedying that significant damage.

8.128.13 The CMA will assess whether conduct is causing or is likely to cause significant damage with regard to the facts of the case. In particular, the CMA will assess the nature of the market(s) in question and the dynamics of competition within the market(s), the effect the conduct is having or is likely to have on a particular business or categories of businesses in the market(s), or the effect that the conduct is having or is likely to have on the public interest. The CMA will also consider the impact of making such an interim measures direction on the potential addressee of such a decision and on other parties, and the extent to which the applicant has taken reasonable action to seek to avoid or mitigate the significant damage that may arise.

8.138.14 Damage will be significant where a particular person or category of persons is or is likely to be restricted in their ability to compete effectively in the market(s), such that this is causing or is likely to cause significant damage to their commercial position. Damage can include actual or potential:

- financial loss to a person or class of persons (to be assessed with reference to that person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue);
- restriction on a person's or class of persons' ability to obtain supplies and/or access to customers; and
- damage to the goodwill or reputation of a person or class of persons.

8.148.15 Significant damage may be temporary or permanent – it does not require that the damage is irreparable, and/or that any business will or may exit the market(s) in question. The CMA will take into account the facts of the case, the nature of competition in the relevant market(s) and the potential duration of the interim measures in determining the period over which the relevant damage is to be assessed.

8.158.16 The CMA may also consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry, to consumers, or to competition more generally as a result of the suspected infringement. In determining whether interim measures may be appropriate in order to protect the public interest, the CMA will have particular regard to the effect or potential effect that the relevant



conduct is having, or is likely to have, on consumers or categories of consumers.

8.168.17 Possible content of interim measures could include requiring a party to:

- continue the supply of goods, services or other inputs (for example, access to essential infrastructure) where that supply is required to prevent significant damage to a person or persons in the market(s) or any associated market(s) in question, or to enable customers to obtain access to goods or services; ~~;~~ and
- reverse a price increase or decrease for any good or service where that price increase or decrease has or is likely to cause significant damage to any person's or category of persons' ability to compete effectively, or is likely to cause a detriment to the public.

8.178.18 Where the investigation concerns an agreement, the CMA will not seek interim measures where the CMA is satisfied that, on the balance of probabilities, the agreement meets the conditions for an individual exemption from the prohibition against anti-competitive arrangements.<sup>125</sup>

8.19 The SRO will assess each situation on a case-by-case basis to make a provisional decision as to whether interim measures may be appropriate in any particular scenario.

8.20 In most cases, interim measures will have immediate effect. However, if a person fails to comply with them without reasonable excuse, the CMA may apply to court for an order to require compliance within a specified time limit.

8.21 The court can require the person in default or any officer of a business responsible for the default to pay the costs of obtaining the order.

8.22 If the measures relate to the management or administration of a business, the court order can compel the business or any of its officers to comply with them. Failure to comply with a court order will be in contempt of court.

## Rejecting an application for interim measures

8.188.23 If the SRO provisionally decides to reject an application for interim measures, the CMA will consult the applicant ~~and any other Formal Complainants~~ before doing so by sending a provisional dismissal letter

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<sup>125</sup> Section 9(1) of the CA98 and/or Article 101(3) of the TFEU.

setting out the principal reasons for rejecting the application. The CMA will give them an opportunity to submit comments and/or additional information within a certain time, the length of which will depend on the case.

~~8.198.24~~ If the comments from the applicant ~~or Formal Complainant~~ contain confidential information, a separate non-confidential version must be submitted at the same time (see Chapter 7 on handling confidential information). The CMA may provide this non-confidential version to the business under investigation if, in the CMA's view, it would be appropriate to do so, such as where it may be relevant for the rights of defence.

~~8.208.25~~ The CMA will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided, if the SRO still decides to reject the application, the CMA will send a letter to the applicant ~~and any other Formal Complainants~~ and normally the business against which the directions are sought to inform them and give the CMA's reasons.

~~8.218.26~~ However, if the comments and/or additional information from any of these parties leads the SRO to change his/her provisional view and to decide that the CMA should make an interim measures direction, the CMA will inform the applicant, ~~any other Formal Complainants~~, and the business against which the directions are sought, and the investigation will continue in the normal way.

## Publication

~~8.228.27~~ The CMA's interim measures directions are included in the public CA98 register at [www.gov.uk/cma](http://www.gov.uk/cma).<sup>126</sup> and would generally expect to publish a summary of any such directions on its webpage. The CMA may also publish them in an appropriate trade journal.

~~8.238.28~~ ~~More information on interim measures directions is available in *Enforcement (OFT407) and Involving third parties in Competition Act investigations (OFT451)*.~~<sup>127</sup>

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<sup>126</sup> ~~The register can be viewed at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

<sup>127</sup> ~~Available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

## 9 The ~~a~~Analysis and review stage

### Summary

- ~~• Regular review and scrutiny are a key part of the investigation process. Senior officials and advisers, both internal and external, can perform this function.~~
- ~~• The CMA provides case updates to keep parties informed.~~
- ~~• The CMA offers parties the opportunity to meet with the case team at state of play meetings.~~

9.1 The evidence that the CMA gathers using the powers described in [Chapter 6](#) ~~previous chapters~~ is fundamental to the outcome of an investigation. ~~Throughout an investigation, in all cases,~~ the CMA routinely reviews and analyses the information in the CMA's possession to test the factual, legal and economic arguments and to establish whether it supports or contradicts the theory/ies of competition harm.

9.2 In some cases, an investigation may start out by probing a particular set of circumstances that points to conduct of one type, but information may later surface which indicates the existence of another type of potentially anti-competitive behaviour or a different theory of competition harm from that advanced earlier in the investigation. Alternatively, the CMA's early analysis may suggest that a large number of businesses have been acting unlawfully but later on it emerges that the CMA only has enough evidence to warrant further investigation of some of those businesses. The CMA may also exercise its administrative discretion to focus resources on investigating a limited set of activities or businesses.

~~9.3 The analysis and review stage therefore forms an essential part of the CMA investigation process. In addition to carrying out their own analysis, CMA case teams seek input from other areas of the CMA to assist them.~~

### Internal scrutiny

~~9.49.3 Throughout CMA competition investigations, as part of the quality assurance that the CMA adopts in every case, the CMA regularly scrutinises the way in which it handles the investigation and routinely assesses the evidence before it, to ensure that its actions and decisions are well-founded, fair and~~

robust. This involves seeking internal advice from specialist advisers on the legal, policy and economic issues that arise throughout the investigation. In some instances, the CMA may also seek advice from external sources, such as external counsel.

~~9.5 — In particular, to provide a further internal check and balance before a Statement of Objections is issued or a final decision on infringement is taken, specialised lawyers and economists from outside the case team analyse and review the relevant facts and key underlying evidence, and highlight to the case team and the relevant decision maker(s) the legal and/or economic risks associated with the proposed course of action.~~

9.69.4 The General Counsel and the Chief Economic Adviser are responsible for ensuring that there has been a thorough review of the robustness of, ~~respectively,~~ the legal and the economic analysis (and of the evidence being used to support this), respectively, before a Statement of Objections is issued or a final decision on infringement is taken. This includes ensuring the decision maker(s) is/are aware of any significant risks before the decision to issue a Statement of Objections or a final infringement decision is taken.

~~9.7 — The General Counsel is also responsible for ensuring that the relevant decision maker(s) is/are aware of any significant legal risks before the decision to issue a Statement of Objections or a final decision on infringement is taken. The Chief Economic Adviser is similarly also responsible for ensuring that the relevant decision maker(s) is/are aware of any significant risks on the economic analysis before the decision to issue a Statement of Objections or a final decision on infringement is taken.~~

9.89.5 The General Counsel and the Chief Economic Adviser (or their representative(s)) will attend the oral hearing(s) on liability<sup>128</sup> and may ask questions of the parties.

~~9.9 — The CMA Case and Policy Committee,<sup>129</sup> or Executive Committee (ExCo) (as appropriate) and/or the CMA Board<sup>130</sup> will receive regular updates from the case team on the progress of an investigation and the risks arising.~~

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<sup>128</sup> Including both the oral hearing on liability following the issue of a Statement of Objections and the oral hearing on penalty following the issue of a draft penalty statement. See further Chapter 12.

<sup>129</sup> The Case and Policy Committee operates under delegated authority from the CMA Board. The purpose of the Case and Policy Committee includes overseeing and scrutinising the development of CMA casework, projects, decisions and policy relating to the CA98 and the equivalent provisions of the TFEU. Further details on the Case and Policy Committee are available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>130</sup> Further details of ExCo and the CMA Board are available at: [www.gov.uk/cma](http://www.gov.uk/cma).

#### 9.109.6 The SRO decides whether:

- there are sufficient grounds to open a formal investigation;<sup>131</sup>
- there is sufficient evidence to issue a Statement of Objections;<sup>132</sup>
- to close a case prior to issue of a Statement of Objections;<sup>133</sup>
- to make an interim measures direction;<sup>131</sup>
- to accept commitments offered by a party under investigation;<sup>132</sup> and
- a case is appropriate for settlement.<sup>133</sup>

In addition to taking advice from specialist advisors as detailed above, the SRO will consult two other senior officials as appropriate at key stages of the investigation prior to issuing a Statement of Objections. The SRO will consult and where appropriate seek approval from the Case and Policy Committee<sup>134</sup> in relation to decisions on commitments and settlement.

9.119.7 Where a Statement of Objections is issued, a Case Decision Group<sup>135</sup> is appointed by the Case and Policy Committee to act as the decision-maker on whether, based on the facts and evidence before it, the legal test for establishing an infringement has been met. Before taking this decision, the Case Decision Group will, ~~in addition to being~~ made aware of any significant legal risks or risks on the economic analysis (as described in paragraph 9.41.1 to 1.1 above), and may consult the Case and Policy Committee.

~~9.12 — When consulted by the Case Decision Group, the Case and Policy Committee's role is not to advise the Case Decision Group on the strength of the evidence in the case, but to provide the Case Decision Group with its views on any policy, legal or economic issues arising out of the Case Decision Group's proposed decision.~~

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<sup>131</sup> See paragraphs 8.8 to 8.26.

<sup>132</sup> See paragraphs 10.15 to 10.16.

<sup>133</sup> See paragraph 11.4. See Chapter 14 for more information on settlement.

<sup>134</sup> The Case and Policy Committee operates under delegated authority from the CMA Board. The purpose of the Case and Policy Committee includes overseeing and scrutinising the development of CMA casework, projects, decisions and policy relating to the CA98 and the equivalent provisions of the TFEU.

<sup>135</sup> See paragraph 11.32.

## Sharing the CMA's early thinking and giving regular updates

9.139.8 The time taken to establish the facts and whether they point to an infringement of competition law will vary from case to case depending on a range of factors such as, ~~for example,~~ the number of parties under investigation, the extent to which they cooperate with the CMA, and the complexity of the conduct under consideration. ~~In many cases, the facts advanced by one party will directly contradict those put forward by another party. The purpose of the CMA's investigation is to establish which set of circumstances is more credible based on verifiable facts.~~

The CMA generally provides case updates to businesses under investigation ~~and Formal Complainants~~ either by telephone or in writing. ~~These are often the most efficient and effective ways of sharing information on case progress for the CMA and the parties alike.~~

9.149.9 The CMA will also offer each party under investigation separate opportunities to ~~meet~~ speak with representatives of the case team (~~which may including include~~ the SRO ~~and/or Project Director~~) to ensure that they are aware of the stage the investigation has reached.<sup>136</sup> At ~~these~~ 'state of play' meetings, which may be held by telephone or video conference, ~~This meeting will provide parties will be provided with greater transparency~~ further information on the nature and scope of the investigation. In particular, the CMA will inform parties of the next stages of the investigation and the likely timing of these, subject to any restrictions the CMA may have if the timing is market sensitive.<sup>137</sup> The CMA ~~will~~ may also, ~~generally,~~ share ~~its the case team's~~ provisional thinking on a case.

9.159.10 ~~The CMA will invite a party to a first state of play meeting once the case has been formally opened. This will cover the anticipated scope of the investigation, next stages and the proposed timetable. This meeting will provide parties with greater transparency on the nature and scope of the investigation.~~ The CMA will usually hold a state of play meeting once it has undertaken some investigatory steps and invite parties to a ~~second~~ further state of play meeting before a decision is taken on whether to issue a Statement of Objections. At this meeting the CMA will be able to update

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<sup>136</sup> On occasion, the CMA may, if the CMA considers it useful or appropriate, invite the parties under investigation to a multi-party meeting. For example, the CMA may consider offering a multi-party meeting where there are differing views on a key issue such as market definition or differing interpretations offered in respect of a key piece of evidence.

<sup>137</sup> As to market sensitivity considerations, see *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*, available at: [www.gov.uk/cma](http://www.gov.uk/cma).

parties on its provisional thinking on the case, including the key potential competition concerns identified.

~~9.169.11~~ ~~In some cases it may not be appropriate to hold a state of play meeting at the outset of the investigation where this may prejudice the ongoing investigation. However, in such cases, the CMA will offer a state of play meeting to each party before the decision is taken on whether or not to issue a Statement of Objections, to update them on the CMA's provisional thinking, including the key potential competition concerns identified.~~

9.179.12 In all cases where a Statement of Objections is issued, the CMA will ~~invite each party to a further state of play meeting~~provide an update, usually by telephone, to each party after it has received all parties' written and (where applicable) oral representations on the Statement of Objections. ~~At this meeting, which will be attended by A~~at least one member of the Case Decision Group and the case team will be on the call. ~~T~~The CMA will update parties on its preliminary views on how the CMA intends to proceed with the case in light of the written and oral representations that have been received.

9.189.13 In appropriate circumstances, the CMA may also ~~meet~~have discussions with parties on other occasions. This may be where they have new information that can materially assist the CMA in taking forward the case. Parties who believe that an oral update meeting of this kind would be useful should contact the ~~Team Leader~~case team in the first instance to discuss the matter.

9.199.14 As a matter of routine, the CMA will keep parties to the investigation informed of the anticipated case timetable and any changes to this, as well as publishing and updating this information ~~in the notice of investigation on~~ [www.gov.uk/cma](http://www.gov.uk/cma) on the relevant case page.<sup>138</sup>

9.209.15 ~~The CMA's guideline *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)* sets out the steps the CMA takes to ensure its work is open and accessible.~~<sup>139</sup> If a party has a concern or complaint about the CMA's procedures or the handling of a case, it should contact the SRO in the first instance. If the party is unable to resolve the dispute with the SRO, certain procedural complaints may be referred to the Procedural Officer.<sup>140</sup> If a dispute falls outside the scope of the Procedural

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<sup>138</sup> See Chapter 5.

<sup>139</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>140</sup> See Chapter 15 and Rule 8 of the CA98 Rules. See Procedural Officer: raising procedural issues in CMA cases, for further details, of the Procedural Officer role are available at: [www.gov.uk/cma](http://www.gov.uk/cma).

Officer's role, the CMA publication *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)* sets out the options available to pursue the complaint.<sup>144</sup>

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<sup>144</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).



## 10 Investigation outcomes

### Summary

- ~~• There are a number of ways in which an investigation can be resolved.~~
  - ~~— The CMA can close its investigation on the grounds of administrative priorities.~~
  - ~~— In these circumstances, the CMA may also write to businesses explaining that, although the CMA is not currently pursuing a formal investigation, it has concerns about their conduct.~~
  - ~~— The CMA can issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement.~~
  - ~~— The CMA can accept commitments from a business about its future conduct.~~
  - ~~— The CMA will issue a Statement of Objections where its provisional view is that the conduct under investigation amounts to an infringement.~~
  - ~~— After issuing a Statement of Objections and receiving the parties' representations, the CMA can issue a final decision that the conduct amounts to an infringement.~~

### 10.1 CMA investigations can be resolved in a number of ways. The CMA:

- can decide to close an investigation on grounds of administrative priorities (see paragraphs 10.2 – 10.12);
- can issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement of competition law (see paragraphs 10.13 – 10.14);
- can accept commitments from a business relating to its future conduct where the CMA is satisfied that these commitments **fully** address the competition concerns (see paragraphs 10.15 – 10.29); and
- will issue a Statement of Objections where the CMA's provisional view is that the conduct under investigation amounts to an infringement of competition law (see Chapter 11 below). After allowing the business/es under investigation an opportunity to make representations on the Statement of Objections (see Chapter 12 below), if the CMA still considers that they have committed an infringement, the CMA can issue

an infringement decision against them and impose fines and/or directions to bring to an end any ongoing anti-competitive conduct.

### Closing investigations on the grounds of administrative priorities

10.2 Not all of the CMA's investigations result in a finding that there has been a breach of competition law. The CMA may decide that a formal investigation no longer merits the continued allocation of resources because it no longer fits within the CMA's casework priorities and/or because the CMA does not have sufficient evidence in its possession to determine whether a breach has been committed and the CMA considers that further investigation is not warranted. The CMA may take this decision at any stage of the investigation.<sup>142</sup>

10.3 If the CMA ~~is considering closing~~~~decides to close~~ an investigation on the grounds of administrative priorities, the CMA ~~will~~may, where it considers it appropriate, inform in writing any ~~Formal~~Complainants whose complaint led to the investigation and whose interests are, in the CMA's view, directly and materially affected by the outcome of the CMA's investigation~~in writing~~, setting out the principal reasons for not taking forward the investigation. The amount of detail given will vary according to the circumstances of each case. In more advanced investigations, the CMA is likely to give more details than in the case of complaints which have not been the subject of extensive investigation.

10.310.4 The CMA will assess whether a complainant<sup>143</sup> is 'directly and materially affected by the outcome of the CMA's investigation' on the basis of the information is has provided to the CMA. This may include complainants who are:

- actual or potential competitors of the business or businesses under investigation who allege that the agreement or conduct under investigation restricts their ability to compete effectively;
- customers of the business or businesses under investigation who allege that they have been harmed by the activity; and

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<sup>142</sup> The SRO is responsible for deciding whether to close a case on administrative priorities grounds prior to issue of a Statement of Objections (see paragraph 9.6 for further information on the decision making process). After any Statement of Objections has been issued, case closure decisions are the responsibility of the Case Decision Group.

<sup>143</sup> Or a third party when considering requests for disclosure of a Statement of Objections.

- a trade or consumer association that alleges that some or all of its members have been harmed by the agreement or conduct under investigation.

~~10.4~~10.5 The CMA will give such Formal Cc complainants an opportunity to submit their comments or any additional information within a specified time frame. The time frame provided will depend on the circumstances of the case, but will generally be no longer than four weeks. Generally, the CMA will give two to four weeks to respond. In complex cases which have been extensively investigated, the CMA may give longer.

~~10.5~~10.6 If that a Formal Cc complainant's response contains confidential information, it will be asked to submit a separate non-confidential version at the same time (see Chapter 7 on handling confidential information). The CMA may provide this to the business/es the CMA is investigating if the CMA thinks it appropriate, such as if it is likely to change the CMA's preliminary view.

~~10.6~~10.7 The CMA will also give a copy of the provisional closure letter to the business/es under investigation, giving them an opportunity to comment within the same time frame.

~~10.7~~10.8 The CMA will consider any comments and further evidence submitted within the specified time limit before reaching a final view on whether to close an investigation.

~~10.8~~10.9 If the CMA decides to close the case, the CMA will write to ~~the Formal Complainant and~~ any complainants whose comments it has sought in accordance with paragraphs 10.4 and 10.5 above, as well as the business under investigation, explaining why any additional information sent to the CMA has not led the CMA to change its view. The level of detail given will depend on the case and the nature of the additional information provided.

~~10.9~~10.10 In these circumstances, the CMA may also ~~write~~ issue a warning or advisory letter to the business under investigation to inform it that the CMA has been made aware of a possible breach of competition law by that business and that, although the CMA is currently not minded to pursue an investigation, it may do so in the future if its priorities change (for example, in response to further evidence received).<sup>144</sup>

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<sup>144</sup> See paragraph 4.3 above.

~~10.10~~10.11 The CMA will also issue a public statement linking to the relevant case page on [www.gov.uk/cma](http://www.gov.uk/cma) and explain why the CMA has closed the case on administrative priority grounds.

~~10.11~~10.12 If the response to the CMA's provisional closure letter leads the CMA to change its preliminary view and decide that an investigation should be continued, the CMA will inform the company under investigation and the Formal C complainant in question and continue the investigation in the normal way.

### Issuing a no grounds for action decision

~~10.12~~10.13 If the CMA does not find sufficient evidence of a competition law infringement, the CMA may publish a reasoned no grounds for action decision when closing the case.<sup>145</sup>

~~10.13~~10.14 In such cases, the CMA will may, where it considers it appropriate, provide a non-confidential version of its proposed decision to the Formal any C complainant whose complaint led to the investigation and whose interests are, in the CMA's view, directly and materially affected by the outcome of the CMA's investigation.<sup>146</sup> The consultation process on the proposed decision will be the same as for provisional case closure lettersclosure on the ground of administrative priorities.

~~10.14~~ Further information is available in *Involving third parties in Competition Act investigations* (OFT451).<sup>147</sup>

### Accepting commitments on future conduct

~~10.15~~ If the CMA considers that the case gives rise to competition concerns, instead of making continuing its investigation (which may result in the CMA issuing an infringement decision), the CMA may be prepared to accept binding promises, called 'commitments', from a business, relating to its future conduct.<sup>148</sup> The CMA must be satisfied that the commitments offered fully address its competition concerns. The decision to accept commitments is at the CMA's discretion.

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<sup>145</sup> Rule 10 of the CA98 Rules.

<sup>146</sup> See paragraph 10.4 for examples of when a complainant is likely to be regarded as being "directly and materially affected by the outcome of the CMA's investigation".

<sup>147</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>148</sup> Section 31A of the CA98.

~~40.15~~10.16 Commitments may be structural or behavioural in nature, or a combination of both. For example, they may involve a business agreeing to cease or modify its conduct, terminating an arrangement, removing a particular clause from an agreement, withdrawing from a particular activity, licensing specific assets, or even divesting itself of part of its business.

#### Circumstances in which it may be appropriate to accept commitments

10.17 The decision to accept commitments is at the CMA's discretion.

~~40.16~~10.18 The CMA is likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be **fully**-addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.

10.19 The CMA is very unlikely to accept commitments in cases involving secret cartels between competitors<sup>149</sup> -or a serious abuse of a dominant position.<sup>150</sup>

10.20 The CMA will not accept commitments in circumstances:

- where compliance with and the effectiveness of any binding commitments would be difficult to discern; and/or
- where it considers that not to complete its investigation and make a decision would undermine deterrence.

#### Procedure

~~40.17~~10.21 A business under investigation can offer commitments at any time during the ~~course of that~~ investigation, until a decision on infringement is made. However, the CMA is unlikely to consider it appropriate to accept commitments at a very late stage in an investigation, such as after the CMA has considered representations on the Statement of Objections. The CMA has a broad discretion in determining which cases are suitable for commitments.

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<sup>149</sup> These include cartels relating to price-fixing, bid-rigging (collusive tendering), establishing output restrictions or quotas, market sharing.

<sup>150</sup> That is, those which the CMA considers are most likely by their very nature to harm competition. In relation to infringements of the Chapter II prohibition and/or Article 102, this will typically include conduct which is inherently likely to have a particularly serious exploitative or exclusionary effect, such as excessive and predatory pricing.

~~40.18~~10.22 If a business would like to discuss offering commitments, it should contact the ~~Team Leader~~case team in the first instance. The CMA may ask, for example, at a State of Play meeting, whether the business wishes to offer commitments.<sup>151</sup> If, following that contact, the CMA thinks that commitments may be appropriate, the CMA will send a summary of its competition concerns to the business<sup>152</sup> (where the case is still at pre-SO stage). Once commitments have been offered, the CMA may discuss ~~them~~these with the business to see if they would be acceptable to the CMA.

~~40.19~~10.23 If the CMA proposes to accept the commitments offered, the CMA will consult those who are likely to be affected by them and give them an opportunity to give their views within a time limit of at least 11 working days.<sup>153</sup> After receipt of the responses to this consultation, the CMA will hold a meeting with each business that offered commitments to inform them of the general nature of responses received and to indicate whether the CMA considers that changes are required to the commitments before the CMA would consider accepting them.

~~40.20~~10.24 If the business/es offer revised commitments including significant changes, the CMA will allow another opportunity for ~~Formal C~~complainants and any other ~~interested~~ third parties to express their views within a time limit of at least six working days.

~~40.21~~10.25 The SRO is responsible for deciding whether to accept the commitments offered, having consulted with the Case and Policy Committee and other senior CMA officials as appropriate. The SRO's decision will require the approval of the Case and Policy Committee before the commitments can be formally accepted by the CMA. Once accepted, the CMA will publish the commitments on [www.gov.uk/cma/its webpages](http://www.gov.uk/cma/its-webpages).

### Decision to accept commitments

10.26 Once commitments have been accepted in respect of an agreement or conduct, the CMA may not continue its investigation, make an infringement decision or give interim measures directions in relation to the aspects of the

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<sup>151</sup> The business is under no obligation to do so and this is without prejudice to the outcome of the investigation

<sup>152</sup> Such a summary is not a replacement for a statement of objections. It will set out the CMA's competition concerns and a summary of the main facts on which those concerns are based. However, it will not generally include detail of the source of the facts on which the CMA relies.

<sup>153</sup> Procedural requirements for the acceptance or variation of commitments are set out in part 1 of Schedule 6A to the CA98.

alleged infringement addressed by the commitments, except under limited circumstances.<sup>154</sup>

10.27 However, the CMA is not prevented from taking any action in relation to competition concerns that are not addressed by the commitments it has accepted.

10.28 Where the CMA has accepted commitments it may, for the purposes of addressing its current competition concerns, accept a variation of the commitments or commitments in substitution for them.<sup>155</sup> If the CMA's current competition concerns are different from the competition concerns it identified when the commitments were accepted, when considering the appropriateness of accepting varied or substitute commitments, the CMA will take into account the considerations in paragraphs 10.17 to 10.20, above.

10.2210.29 The CMA may consider it appropriate to release commitments where.<sup>156</sup>

- It is requested to do so by the person(s) who gave the commitments. In such cases, the CMA will generally consider it appropriate to release commitments only where it has reasonable grounds for believing that the competition concerns identified by it at the time or their acceptance or variation no longer arise; or
- The competition concerns identified at the time of their acceptance or variation no longer arise.

10.23—Further information on the CMA's approach to commitments is contained in the OFT guideline *Enforcement (OFT407).*<sup>157</sup>

## **Issuing a Statement of Objections**

10.2410.30 The CMA will issue a Statement of Objections where its provisional view is that the conduct under investigation amounts to an infringement. See Chapter 11 for more detail on this.

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<sup>154</sup> These are listed in section 31B(4) of the CA98.

<sup>155</sup> See section 31(A)(3) of the CA98. The procedure in paragraphs 10.21 to 10.25 will also apply to any variation of commitments. Also, the procedural requirements for the acceptance or variation of commitments are set out in part 1 of Schedule 6A to the CA98.

<sup>156</sup> Pursuant to Section 31A(4)(b) of the CA98. Procedural requirements for the release of commitments are set out in part 2 of Schedule 6A to the CA98.

<sup>157</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## 11 Issuing the CMA's provisional findings – the Statement of Objections

### Summary

- ~~Where the CMA's provisional view is that the conduct under investigation amounts to an infringement, the CMA will issue its Statement of Objections to each business the CMA considers to be responsible for the infringement.~~
- ~~The SRO is responsible for the decision to issue a Statement of Objections.~~
- ~~The Statement of Objections represents the CMA's provisional view and proposed next steps. It allows the business accused of a breach of competition law an opportunity to know the full case against it and, if it chooses to do so, to formally respond in writing and orally.~~
- ~~The CMA gives each addressee of a Statement of Objections an opportunity to inspect the investigation file.~~
- ~~At this stage, the CMA may also invite the addressee of the Statement of Objections to contact the CMA if it would like to enter into discussions on possible settlement of the case.~~
- ~~A Case Decision Group will be appointed to be the final decision-makers on whether or not the business/es under investigation have infringed competition law. The CMA will inform those businesses of the identity of the Case Decision Group members.~~

11.1 Following the analysis of the evidence on the files, if the CMA's provisional view is that the conduct under investigation amounts to an infringement, the CMA will issue a Statement of Objections to each business it considers to be responsible for the infringement and give them an opportunity to inspect the CMA's file.<sup>158</sup>

~~11.1~~

11.2 If the case involves more than one party, each party will receive a copy of the Statement of Objections. Information that is confidential will be disclosed through the Statement of Objections to other parties only if disclosure is

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<sup>158</sup> Rule 6 of the CA98 Rules. Rules 18 and 19 set out the process for notification by the CMA of a Statement of Objections to each business it considers to be responsible for the infringement.



strictly necessary in order for them to exercise their rights of defence. Before disclosing any confidential information, the CMA will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If the CMA considers that disclosure might significantly harm legitimate business interests or the interests of an individual, the CMA will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which the CMA is allowed to make the disclosure.<sup>159</sup>

11.3 Where the CMA considers that an agreement or conduct infringes the Chapter I prohibition or the prohibition in Article 101(1) TFEU the CMA may use its discretion to address the Statement of Objections to fewer than all the persons who are, or were, a party to that agreement or conduct.<sup>160</sup> The CMA will notify any party who is not an addressee under Rule 5(3) that a Statement of Objections has been issued and will provide a non-confidential version of the Statement of Objections, following a request by such a party, where it is deemed that it is necessary for them to review it to protect their rights of defence. The CMA will only provide access to documents on its file where it is established that access is required in order for such a party to make representations on the Statement of Objections.

11.4 At this stage, the CMA may also invite addressees of a Statement of Objections to contact the CMA if they would like to enter into discussions on the possible settlement of the case. This settlement procedure applies where 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 investigation of that business's conduct. If so, the CMA will impose a reduced penalty on the business.

11.211.5 Businesses may wish to approach the CMA earlier on in the investigation to discuss the possibility of exploring settlement. If so, they should contact the Team Leader case team in the first instance. See Chapter 14 for more information on settlement.

11.311.6 The Statement of Objections represents the CMA's provisional view and proposed next steps. It allows the businesses being accused of

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<sup>159</sup> Section 244 of the EA02.

<sup>160</sup> Rule 5(3) of the CA98 Rules.

breaching competition law an opportunity to know the full case against them and, if they choose to do so, to respond formally in writing and orally.

~~41.411.7~~ The Statement of Objections will set out the facts and the CMA's legal and economic assessment of them which led to the provisional view that an infringement has occurred. The CMA will also set out any action it proposes to take, such as imposing financial penalties<sup>161</sup> and/or issuing directions<sup>162</sup> to stop the infringement if the CMA believes it is ongoing, as well as the CMA's reasons for taking that action.

~~41.511.8~~ The CMA will generally send ~~a hard copy of~~ the Statement of Objections and covering letter to recipients by ~~courier or recorded delivery~~secure email. ~~Typically, the CMA will also provide an electronic copy in PDF format.~~

~~41.611.9~~ It is the CMA's normal practice to publicly announce the issue of the Statement of Objections on [www.gov.uk/cmait](http://www.gov.uk/cmait) webpages and to make an announcement to the media, and on the Regulatory News Service where the matter is judged market sensitive.<sup>163</sup> The CMA will also update the administrative timetable ~~in the notice of investigation on~~on the case page.<sup>164</sup>

~~11.7~~ ~~As far as possible, the CMA aims to give the directly affected parties fair and sufficient notice, as well as advance sight of announcement documents, to enable them to prepare their response.~~

~~41.811.10~~ The timing of the announcement and any advance notice will depend on whether there is any market sensitivity in respect of the announcement. The CMA has to balance its responsibilities concerning the control and release of market sensitive information against the objective of, as far as possible, giving directly affected parties fair and sufficient notice.

~~41.911.11~~ In both market-sensitive and non-market sensitive situations, the CMA will aim to balance an open approach with the need to ensure the orderly disclosure of information. Generally, in non-market sensitive announcements, the CMA aims to give parties advance sight of the content~~notice~~ of its announcement, in confidence, unless there is a compelling reason not to do so. ~~As a general rule, if there is no market or~~

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<sup>161</sup> More information on how the CMA sets penalties is available in ~~Part 5 of OFT guideline Enforcement (OFT407) and see the CMA's Guidance as to the appropriate amount of a penalty (CMA73)~~ both available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>162</sup> ~~More information on directions can be found in Enforcement (OFT407) available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

<sup>163</sup> [www.investegate.co.uk](http://www.investegate.co.uk) See London Stock Exchange.

<sup>164</sup> ~~See Chapter 5.~~

~~other sensitivity about the fact or date of the announcement, the CMA will be open about the date and publish it on [www.gov.uk/cma](http://www.gov.uk/cma) up to several days before the full announcement. The CMA will tell affected parties in advance of placing any statement on the substance of the matter on [www.gov.uk/cma](http://www.gov.uk/cma). The exact notice given will depend on the circumstances of the particular case in point. In such situations, it may also give advance indication on its website about the expected date, but not contents, of the announcement.~~

~~11.1011.12 Generally, in non-market sensitive announcements, the CMA aims to give parties advance sight of the content of its announcement, in confidence, unless there is a compelling reason not to do so.~~

11.1111.13 In the case of market sensitive announcements, where appropriate, the CMA will apply the ~~Financial Conduct Authority's (FCA) Guideline for the control and release of price sensitive information by Industry Regulators~~ (originally published by the Financial Services Authority, the predecessor of the Financial Conduct Authority).<sup>165</sup>

~~11.12 If there is no market or other sensitivity about the date of the announcement as opposed to the content of the announcement, the CMA will be open about the date and publish that date on [www.gov.uk/cma](http://www.gov.uk/cma) up to several days in advance of the full announcement. The CMA will also inform media organisations. The CMA will tell parties in advance of informing the media or placing any statement about the substance of the matter on [www.gov.uk/cma](http://www.gov.uk/cma).~~

11.1311.14 If the date and content of the announcement ~~may be~~ is market-sensitive, (for example, where nothing about the investigation has previously been announced), the CMA will not publicise the expected date on its webpages. It will notify directly affected parties in strict confidence the evening before the announcement is to be made, after once relevant financial markets have closed, (including, where appropriate, financial markets in other countries).

~~11.14 In particular, if the date of the announcement is not in the public domain, the CMA will inform those directly affected in strict confidence the evening before issue once relevant financial markets have closed.~~

11.15 More details about the way in which the CMA publicly announces the issue of a Statement of Objections is available in the CMA's guideline

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<sup>165</sup> See the FCA website, [:-www.fca.org.uk/-](http://www.fca.org.uk/)

## Who decides whether to issue a Statement of Objections?

11.16 The SRO decides whether to issue a Statement of Objections. Before doing so, the SRO will consult the General Counsel and Chief Economic Adviser (or their representatives) to ensure that the SRO is aware of any significant legal and economic risks that have been identified.<sup>167</sup> The SRO will also consult other senior CMA officials as appropriate.<sup>168</sup>

~~11.17 The SRO will be chosen at the outset of the formal investigation and businesses under investigation will be informed of the identity of the SRO (along with details of the other key members of the case team). If, later on, it is necessary to allocate a new SRO to the case, the CMA will inform the businesses under investigation.~~

## Inspection of the file and treatment of confidential information

~~11.18~~11.17 At generally the same time as issuing the Statement of Objections, the CMA will also give the addressees of the Statement of Objections the opportunity to inspect the file. This is to ensure that they can properly defend themselves against the allegation of having breached competition law.

~~11.18 The CMA allows addressees of the Statement of Objections a reasonable opportunity, typically six to eight weeks, to inspect copies of disclosable documents on the file. These are~~The CMA's file contains documents that relate to matters contained in the Statement of Objections, excluding certain confidential information<sup>169</sup> and CMA internal documents.<sup>170</sup>

11.19 Prior to issuing the Statement of Objections, the CMA will discuss with the businesses under investigation the process envisaged for giving access to

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<sup>166</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>167</sup> As described further in paragraphs 9.49.5 to 9.7 above.

<sup>168</sup> See further paragraphs 9.4 to 9.12 for details of the CMA's internal scrutiny procedures.

<sup>169</sup> Under Rule 1(1) of the CA98 Rules, confidential information means commercial information whose disclosure the CMA 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 CMA thinks might significantly harm the individual's interests, or information whose disclosure the CMA thinks is contrary to the public interest.

<sup>170</sup> Rule 6(2) of the CA98 Rules.

the CMA's file. This may be discussed as part of a State of Play meeting<sup>171</sup> and/or in writing.

11.20 The CMA allows addressees of the Statement of Objections a reasonable opportunity, typically six to eight weeks, to inspect copies of disclosable documents on the CMA's file. The time given for addressees will take into consideration a number of factors including the size of the file, the nature of the documents and the access to file process being used. The CMA considers that, in general, the period of time for inspecting the file will generally be the same as that given for the provision of written representations.<sup>172</sup>

11.21 In order to ensure that the access to file process is as efficient as practicable, both for addressees of the Statement of Objections and the CMA, the CMA will typically provide:

- a) copies of the documents that are directly referred to in the Statement of Objections; and
- b) a schedule containing a detailed list of all the documents on the CMA's file. These will usually be given in electronic form by secure email.<sup>173</sup>

~~the CMA may, if appropriate, exclude routine administrative documents from the file and instead list those documents in a schedule, allowing businesses to access specific documents upon request. Routine administrative documents will generally include, for example, correspondence setting up meetings or confirming timings for delivery of information, or other such documents which do not relate to the substance of the matters set out in a Statement of Objections.~~

11.22 Businesses will have a reasonable opportunity to inspect additional documents listed in the schedule upon a request indicating why the document(s) are being requested. The CMA will set a deadline within which the business will be able to make any such requests. Where a business requests additional documents, the CMA may consider the use of a confidentiality ring and/or data room to facilitate disclosure. This process would generally only be done with the consent of the relevant parties.

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<sup>171</sup> See paragraphs 9.9 to 9.12 above.

<sup>172</sup> See paragraph 12.2 below.

<sup>173</sup> Where a business does not have the relevant electronic means to view the documents in this way the CMA will send hard copies.

~~11.22 Access to file is usually given by supplying the file in electronic form on a DVD, or by other suitable electronic means. Where a business does not have the relevant electronic means to view the documents in this way, or if there is only a very small number of documents, the CMA will send hard copies. In rare circumstances, businesses can inspect the file on the CMA's premises.~~

~~11.23 In addition to sending copies of disclosable documents, the CMA will also send a separate schedule of external documents, which lists all documents held in the CMA file other than CMA internal documents.~~

### Other processes for inspecting the file / Confidentiality rings and data rooms

11.23 The CMA will also consider requests from addressees for access to the file by other methods, for example, by using confidentiality rings or data rooms. Such requests will be considered on a case-by-case basis.

11.24 The CMA has discretion as to whether or not to use these procedures processes in investigations under the CA98 and is likely to do so only where it is proportionate, there are clearly identifiable benefits in doing so and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned. The CMA will also take into account whether it is appropriate to provide access at the time the request is made, having regard to the progress of the case, the resource implications of operating confidentiality rings and data rooms, and the risks of inadvertent disclosure through human error and information leaks.

11.25 Confidentiality rings enable disclosure of specific quantitative and/or qualitative data or documents to a defined group.<sup>174</sup> The group is determined on a case-by-case basis but, generally, disclosure is made to the relevant parties' external (legal and/or economic) advisers.

11.26 Data rooms enable access to a specific category of confidential data or documents to a defined group. ~~As for confidentiality rings, t~~The group is also determined on a case-by-case basis. A data room provides access to the confidential data or documents on the CMA premises, and in so doing has the advantage of providing additional protection.

~~11.26~~11.27 The CMA will generally use confidentiality rings rather than data rooms in CA98 investigations. Additional enhanced security measures may,

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<sup>174</sup> Subject to any restrictions in the DPA 2018 in relation to personal information.

however, be taken where information is considered by the CMA to be particularly sensitive.

11.28 The CMA would envisage that a confidentiality ring or data room or confidentiality ring may be appropriate ~~in the following situations.~~ where the disclosure of a specific category of confidential information or data would enable a defined group to further their understanding or prepare confidential submissions on behalf of their client regarding the CMA's analysis. This procedure is typically used for the disclosure of (confidential) quantitative data and may, where appropriate, be used to allow parties' legal advisers to carry out an assessment of a specific set of qualitative documents.

~~11.27~~11.29 The CMA envisages that the confidentiality ring or data room ~~process~~procedure would be used in these circumstances where it is necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process.<sup>175</sup>

~~The CMA may organise a confidentiality ring or data room procedure where the disclosure of a specific category of confidential information or data would enable a defined group to further their understanding or prepare confidential submissions on behalf of their client regarding the CMA's analysis. This procedure is typically used for the disclosure of (confidential) quantitative data and may, where appropriate, be used to allow parties' legal advisers to carry out an assessment of a specific set of qualitative documents. The CMA envisages that the confidentiality ring or data room procedure would be used in these circumstances where it is necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process.~~<sup>176</sup>

~~In some cases (particularly where there is a large volume of documents on the CMA's case file), the CMA may propose or parties may request that access to the CMA's case file (or part of the file, such as documents not referred to in the Statement of Objections) be provided through a confidentiality ring procedure. This process may lead to the identification of a further shortlist of the documents to which the party to the investigation would seek access (non-confidential versions). This is a~~

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<sup>175</sup> ~~The CMA will seek consent from the relevant parties to the disclosure and use of confidential information within a data room or confidentiality ring procedure in all cases. However, the CMA has the discretion to decide that a confidentiality ring or data room procedure is a necessary way of disclosing information for the purpose of facilitating its functions, even if a relevant party does not provide consent.~~

<sup>176</sup> ~~The CMA will seek consent from the relevant parties to the disclosure and use of confidential information within a data room or confidentiality ring procedure in all cases. However, the CMA has the discretion to decide that a data room or confidentiality ring procedure is a necessary way of disclosing information for the purpose of facilitating its functions, even if a relevant party does not provide consent.~~

~~way of expediting the access to file process where there is a large volume of documents on the CMA's case file, particularly where there is a large volume of documents that are not key documents referred to in the Statement of Objections. This use of a confidentiality ring procedure in these circumstances requires the relevant parties to consent to the procedure and to waive their right to full access to the CMA's case file.~~

~~11.28~~11.30 Where the CMA decides on (or a party requests) the use of a confidentiality ring or data room ~~procedure~~process, the CMA will provide the relevant parties with details of how the CMA proposes this will work in practice. ~~For example through~~ providing copies of the proposed data room rules and the confidentiality undertakings<sup>177</sup> that will be required from those who are given access to the data room or confidentiality ring.<sup>178</sup> It will be a condition of access to a confidentiality ring or data room that information reviewed by advisers is not shared with their client(s). If any party has a concern about the potential use of a confidentiality ring or data room procedure, they should raise their concerns first with the SRO and, if it is not possible to resolve the issue, with the Procedural Officer.<sup>179</sup>

~~11.29~~11.31 It is a criminal offence, punishable by fine and/or imprisonment, for any person to whom information is disclosed by way of a confidentiality ring or data room to disclose or otherwise use the information other than for the purpose of facilitating the exercise of any of the CMA's functions under the CA98 or any other enactment.<sup>180</sup> In practical terms, this means that a person to whom information is disclosed which ~~is not~~has not been made publicly available must not make any onward disclosure of that information.

## Appointment of a Case Decision Group

~~11.30~~11.32 Once the CMA has issued a Statement of Objections, a three-member Case Decision Group is appointed by the Case and Policy Committee to be the decision-makers in the case.<sup>181</sup> The Case Decision Group is responsible for taking decisions on (a) whether to issue an infringement decision (with or without directions) or a 'no grounds for action' decision; and (b) on the

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<sup>177</sup> See *Confidentiality ring and disclosure room undertaking templates*.

<sup>178</sup> See Chapter 4 of the CMA's guideline *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)* available at: [www.gov.uk/cma](http://www.gov.uk/cma) for further information on the CMA's general approach to the protection of confidential information disclosed through a confidentiality ring or data room.

<sup>179</sup> See Chapter 15 and Rule 8 of the CA98 Rules. See *Procedural Officer: raising procedural issues in CMA cases*, for further details of the Procedural Officer role are available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>180</sup> Section 241(2A) and section 245 of the EA02.

<sup>181</sup> *The Case Decision Group, generally comprising of members of the CMA's senior staff and, where appropriate the CMA panel, will operate under the delegated authority of the Case and Policy Committee.*



appropriate amount of any penalty.<sup>182</sup> The CMA will inform the parties of the identity of the Case Decision Group members. The Case Decision Group may include any senior CMA staff or board member and/or any member of the CMA panel.<sup>183</sup> At least one member of the Case Decision Group will be legally qualified.

~~11.31~~11.33 The SRO will not be a member of the Case Decision Group, to ensure that the final decision is taken by officials who were not involved in the decision to issue the Statement of Objections.

~~11.32~~ ~~The Case Decision Group will be appointed by and will operate under the delegated authority of the Case and Policy Committee, which comprises members of the CMA's senior staff and, where appropriate, the CMA panel.~~

~~11.331.1~~ ~~The CMA will inform the parties of the identity of the Case Decision Group members. The Case Decision Group may include any senior CMA staff or board member and/or any member of the CMA panel.~~<sup>184</sup> ~~At least one member of the Case Decision Group will be legally qualified.~~

11.34 The case team, including the SRO, will remain in place to progress the investigation under the direction of the Case Decision Group as appropriate. The case team will remain the primary point of contact for the parties.<sup>185</sup> ~~under investigation, complainant(s) and third parties, and will relay information from those parties to the Case Decision Group as necessary.~~<sup>186</sup> ~~The Case Decision Group should therefore not be contacted directly by those parties or their representatives outside of any oral hearing or state-of-play meeting.~~

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<sup>182</sup> The Case Decision Group may also decide to close a case on the grounds of administrative priorities. See further paragraphs 10.2 – 10.12 above.

~~<sup>183</sup> The role of the CMA panel is set out in Schedule 4 of the ERR13.~~

~~<sup>184</sup> The role of the CMA panel is set out in Schedule 4 of the ERR13.~~

<sup>185</sup> Contact details for the case team will be included in the notice of investigation published on the CMA's webpages: [www.gov.uk/cma](http://www.gov.uk/cma).

~~<sup>186</sup> Contact details for the case team will be included in the notice of investigation published on the CMA's webpages: [www.gov.uk/cma](http://www.gov.uk/cma).~~

### Summary

- Recipients of the Statement of Objections have an opportunity to respond to it.
- Formal Complainants and third parties who may be able materially to assist the CMA's assessment of a case will generally also be provided with an opportunity to comment.
- The Case Decision Group will review the Statement of Objections, the parties' written representations and the key underlying evidence. They will attend all oral hearings. The Chief Economic Adviser and General Counsel (or their representatives) will also attend.
- The CMA will carefully and objectively consider all written and oral representations to appraise the case as set out in the Statement of Objections and to assess whether the conclusions reached in the Statement of Objections are supported by the evidence and the facts.
- Where, having considered any written and oral representations made on the Statement of Objections, the Case Decision Group is considering reaching an infringement decision and imposing a financial penalty on a party, the CMA will give that party the opportunity to comment in writing and orally on a draft penalty statement before a final decision on infringement and the appropriate penalty is taken.
- If the CMA receives new information in response to the Statement of Objections which indicates evidence of a different alleged infringement or a material change in the nature of the infringement, and the CMA proposes to rely on this information to establish an infringement, it will issue a Supplementary Statement of Objections.

### Written representations – the response to the Statement of Objections

- 12.1 When the CMA issues a Statement of Objections, the CMA will invite each addressee of the Statement of Objections (Addressee) to respond in writing, commenting on the matters referred to in the Statement of Objections.<sup>187</sup> However, there is no obligation to submit a response. Where the CMA has provided a non-confidential version of the Statement of Objections to a person who is party to an agreement or conduct that the CMA considers infringes the Chapter I prohibition or the prohibition in Article 101(1) TFEU

<sup>187</sup> Rule 6 of the CA98 Rules.

but who is not an addressee of the Statement of Objections,<sup>188</sup> the CMA will allow that person to make representations on the matters referred to in the non-confidential version of the Statement of Objections.

~~12.2 Written representations provide an opportunity to comment on the matters referred to in the Statement of Objections. This may involve comments regarding the facts relied on by the CMA and the legal and economic assessment set out in the Statement of Objections.~~

~~12.3~~12.2 The deadline for submitting written representations will be specified in the Statement of Objections and will be set on a case-by-case basis having regard to the circumstances of each particular the case. Such circumstances may include the volume of documentary evidence relied upon in the Statement of Objections and the particular situation of the Addressee themselves. ~~Usually~~ The deadline for an Addressee to submit written representations will be at least 40 working days, and no more than 12 weeks, from the issue of the Statement of Objections. Any requests for an extension to the deadline should be communicated to the CMA at the time the deadline is set and must specify the reasons why an extension is required.

~~12.4~~12.3 Where an Addressee has a complaint about the deadline set for submitting written representations, the Addressee should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the Addressee may refer the matter to the Procedural Officer.<sup>189</sup>

12.4 When an Addressee submits written representations it should also provide a non-confidential version of it representations, along with an explanation which justifies why information should be treated as confidential. The CMA will not accept blanket or unsubstantiated confidentiality claims. The non-confidential version should be provided ~~at the same time as the original response and in any event no later than~~ within four two weeks ~~from of~~ the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the ~~Team Leader~~case team.

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<sup>188</sup> See Rule 5(3) of the CA98 Rules and paragraph 11.3 above.

<sup>189</sup> See Chapter 15 and Rule 8 of the CA98 Rules. See Procedural Officer: raising procedural issues in CMA cases, for further details, of the Procedural Officer role are available at: [www.gov.uk/cma](http://www.gov.uk/cma).

12.5 Where there are multiple Addressees the CMA will not cross disclose the written (or oral) representations made by an Addressee to each of the other Addressees, other than in exceptional circumstances.<sup>190</sup>

~~12.6 In the event that the CMA has not received a non-confidential version within this deadline, the Addressee will be given one further opportunity to make confidentiality representations to the CMA. The time frame for responding in this case will be set by the Team Leader. If, after this second opportunity, the CMA has received no reply, the CMA will assume that no confidentiality is being claimed in respect of the information.~~<sup>191</sup>

~~12.7~~12.6 Formal Complainants and third parties who may be able to materially assist the CMA's assessment of a case will generally also be provided with an opportunity to submit written representations. The CMA may also provide an opportunity to submit written representations on a non-confidential version of the Statement of Objections to third parties who are:

- a complainant whose complaint has led to the relevant investigation and whose interests are, in the CMA's view, directly and materially affected by the outcome of the CMA's investigation;<sup>192</sup> and
- third parties or complainants who in the CMA's view:
  - are directly and materially affected by the outcome of the CMA's investigation but have not made a complaint to the CMA about agreement or conduct under investigation;
  - are likely materially to assist the CMA in its investigation; and
  - have requested the opportunity to comment on the Statement of Objections.

12.7 The CMA is only likely to regard a third party as being able materially to assist it in its investigation where it considers that third party's comments are likely to be material over and above, and that are not otherwise duplicative of, views and information that the CMA has already taken into consideration in preparing the Statement of Objections.

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<sup>190</sup> For instance, where the CMA considers it necessary for rights of defence of the other Addressees or where it assists the CMA in clarifying a substantive factual or legal or economic issue.

~~<sup>191</sup> Rule 6(9) of the CA98 Rules.~~

<sup>192</sup> See paragraph 10.4 for examples of when a complainant is likely to be regarded as being "directly and materially affected by the outcome of the CMA's investigation".

12.8 The CMA will not provide complainants or third parties with an opportunity to comment, or may only consult them to a more limited extent, in this way where doing so risks prejudicing the CMA's investigation or another case.<sup>193</sup>

~~12.8~~12.9 In most cases, disclosure of a non-confidential version of the Statement of Objections will be sufficient to enable third parties to provide the CMA with informed comments and this will not generally include any annexed documents. The document is for the ~~Formal~~ Relevant complainant or third party's use only in making representations to the CMA and must not be disclosed to others. The deadline for a ~~Formal C~~ complainant or third party to submit written representations (along with a non-confidential version) will be ~~between 20 to 30 working days from the date on which the CMA sends the Statement of Objections to them~~ set on a case-by-case basis.

~~12.9~~12.10 The non-confidential version of the written representations that have been submitted by a relevant ~~Formal C~~ complainant or third party will be disclosed to Addressee(s) to allow them an opportunity to comment. The CMA will not generally allow ~~Formal C~~ complainants and other third parties an opportunity to comment on the Addressees' written representations, although this may be appropriate in certain circumstances.<sup>194</sup>

~~12.10 In some cases, the CMA may decide to consult Formal Complainants and third parties to a more limited extent, or not at all, for instance in cartel cases where there is a risk of prejudice to a related criminal investigation.~~

~~Further information on the involvement of Formal Complainants and interested third parties at the Statement of Objections stage is available in *Involving third parties in Competition Act investigations (OFT451)*.~~<sup>195</sup>

## Oral representations – the oral hearing

12.11 The CMA will offer all Addressees of a Statement of Objections the opportunity to attend an oral hearing to discuss the matters set out in that Statement of Objections.<sup>196</sup>

12.12 The CMA encourages Addressees to take up the opportunity to attend an oral hearing and Addressees should make clear before or when submitting ~~in~~ their written representations that they would like to do so. The Addressee

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<sup>193</sup> For example, a related criminal investigation or an investigation by another agency.

<sup>194</sup> For example, when the Addressee and a third party put forward different versions or interpretations of the same facts and it is necessary to decide which version or interpretation is more credible.

<sup>195</sup> ~~Available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

<sup>196</sup> Rule 6 of the CA98 Rules.

can bring legal or other advisers to the oral hearing to assist in presenting its oral representations at the hearing, subject to any reasonable limits that the CMA may set in terms of the number of persons that may attend on behalf of the Addressee. ~~Formal~~ Complainants and ~~other interested~~ third parties will generally not be permitted to attend the Addressee's oral hearing.<sup>197</sup>

- 12.13 The oral hearing will ~~usually~~ be held ~~around 20 to 30 working days~~ after the deadline for the submission of the written representations on the Statement of Objections allowing time for the Case Decision Group to consider the representations. The hearing will be attended by the Case Decision Group, ~~will attend all oral hearings. The hearing will also be attended by~~ members of the case team, the Chief Economic Adviser ~~(or a representative of the Chief Economic Adviser)~~ and the General Counsel (or at their representatives ~~of the General Counsel~~). Where necessary the CMA may arrange for attendees, from the Addressee and/or the CMA, to join the oral hearing via video conferencing. The hearing will be chaired by the Procedural Officer.
- 12.14 To promote a focused and productive meeting, the case team will ask the Addressee to give an indication, in advance, of the matters it proposes to focus on in its oral representations at the hearing. The Addressee and the case team will agree an agenda in advance of the hearing, taking into account any matters which the Case Decision Group has indicated to the case team that it wishes to cover at the oral hearing. The agenda for the hearing will include reasonable periods of time for the Addressee to make oral representations and for the CMA staff present to ask the Addressee questions on its representations.<sup>198</sup>
- 12.15 In the event that an agenda items and associated timings are ~~is~~ not agreed between the Addressee and the case team ~~at least ten working days at least three working days~~ prior to the hearing, the agenda will be determined by the Procedural Officer.
- 12.16 The oral hearing provides the Addressee with an opportunity to highlight to the Case Decision Group directly issues of particular importance to its case, and which have been set out in its written representations. The oral hearing may also provide a useful opportunity for the Addressee to clarify the detail set out in its written representations. As a general rule, any points raised

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<sup>197</sup> In some cases, the CMA may decide that it is appropriate to hold a multi-party hearing, including ~~Formal~~ Complainants and/or other ~~interested~~ third parties. See paragraph 12.22 below.

<sup>198</sup> See paragraph 12.17.

orally by the Addressee at this stage should be limited to those already submitted to the CMA in writing.

12.17 During the oral hearing, the Case Decision Group and other members of CMA staff present may ask questions on the Addressees' written representations or questions of clarification. It will be helpful for the CMA, and is likely to assist the progress of the investigation, if Addressees provide full responses ~~are provided~~ to these questions. However, there is no obligation to answer. It is possible to respond to questions in writing after the hearing.

~~12.17~~12.18 Where an Addressee indicates that it will respond to questions in writing post-hearing, the case team will set out these questions in writing and provide a deadline for response which is appropriate in the circumstances of the case.

~~12.18~~12.19 A transcript of the oral hearing will be taken and the Addressee will be asked to confirm the accuracy of the transcript and, if necessary, to identify any confidential information. The CMA will not accept blanket or unsubstantiated confidentiality claims.

~~12.19~~12.20 Following the oral hearing, the Procedural Officer will report to the Case Decision Group, ~~indicating any procedural issues that have been brought to the attention of the Procedural Officer during the investigation and confirming whether the parties' right to be heard has been respected, including an assessment of on~~ the fairness of the procedure followed in the ~~oral hearing~~investigation.<sup>199</sup>

~~12.20~~12.21 If a Case Decision Group member changes after the oral hearing(s) but before the CMA issues a final decision, the new member will, as well as considering parties' written representations, review the transcript of the oral hearing(s).

~~12.21~~12.22 The CMA will consider multi-party oral hearings on specific issues in appropriate cases, such as where there are differing views on a key issue like market definition, or differing interpretations offered in respect of a key piece of evidence.

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<sup>199</sup> Rule 6(~~76~~) and (~~87~~) of the CA98 Rules.

## Considering representations

~~12.22~~12.23 ~~In some cases, the volume of information submitted as part of the representations process can be extensive. The case team, the Case Decision Group and, other CMA officials, including legal and economic advisers~~CMA ~~will carefully and objectively consider all written and oral representations to appraise the case as set out in the Statement of Objections and to assess whether the provisional findings in the Statement of Objections are supported by the evidence and the facts.~~

~~12.23~~ ~~This will involve assessment of the representations the CMA has received, including by the case team, the Case Decision Group and, as set out below, other CMA officials.~~<sup>200</sup>

~~12.24~~ ~~The General Counsel and the Chief Economic Adviser are responsible for ensuring that there has been a thorough review of the robustness of, respectively, the legal and the economic analysis (and of the evidence being used to support this) by specialised lawyers and economists from outside the case team before the Case Decision Group decides whether or not to issue an infringement decision. The General Counsel and the Chief Economic Adviser are also responsible for ensuring that the Case Decision Group are aware of any significant risks on the legal or economic analysis before the decision is taken.~~<sup>201</sup>

~~12.25~~ ~~As noted above,~~<sup>202</sup> ~~the General Counsel and the Chief Economic Adviser (or their representative(s)) will attend the oral hearings and may ask questions of the parties.~~

~~12.26~~12.24 ~~An original set of all written representations and the transcript(s) from the oral hearing will be placed on the case file.~~

## Letter of facts

~~12.27~~12.25 ~~Where the CMA acquires new evidence at this stage which supports the objection(s) contained in the Statement of Objections and the Case Decision Group~~ proposes to rely~~s~~ considering relying upon it to establish that an infringement has been committed, the CMA will put that evidence to

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<sup>200</sup> ~~The General Counsel and Chief Economic Adviser are responsible for ensuring that a legal and economic review has been undertaken. See further Chapter 9.~~

<sup>201</sup> ~~See further Chapter 9.~~

<sup>202</sup> ~~See paragraphs 12.13 and 12.17.~~



the Addressee<sup>203</sup> in a letterwriting and give it an opportunity to respond to the new evidence.<sup>204</sup> The time frame for responding will ~~depend be set according on to~~ the volume and complexity of the new evidence. ~~However, it will be shorter than the time given to respond to the Statement of Objections.~~

## Supplementary Statement of Objections

~~12.28~~12.26 If new information received by the CMA in response to the Statement of Objections indicates that there is evidence of a different suspected infringement or there is a material change in the nature of the infringement described in the Statement of Objections,<sup>205</sup> the CMA will issue a Supplementary Statement of Objections. This will setting out the new ~~set~~ of facts or changes in the nature of the infringement on which the CMA proposes to rely to establish an infringement. The Case Decision Group will be responsible for deciding whether to issue a Supplementary Statement of Objections, having consulted the case team and other CMA officials as appropriate.

~~12.29~~12.27 The CMA will give the Addressee an  further opportunity to ~~respond in the same way as before~~make representations on the Supplementary Statement of Objections. The CMA will set the time frame for responding after taking into account the extent of the difference in the objections raised in the first Statement of Objections compared with the Supplementary Statement of Objections and allow the Addressees an opportunity to inspect new documents on the file.<sup>206</sup> The process will be the same as that set out in Chapter 11. ~~The time frame for responding to a Supplementary Statement of Objections will almost always be shorter than the time given to respond to the original Statement of Objections.~~

~~12.30~~12.28 If it appears unlikely, when issuing a Supplementary Statement of Objections, that engaging with ~~Formal C~~complainants or ~~other interested~~ third parties who had previously been provided with an opportunity to comment on the Statement of Objections at this stage will materially assist the investigation, the CMA may decide to consult them on a more limited

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<sup>203</sup> Rule 5(3) parties will be notified that a letter of facts has been issued and may be provided with a non-confidential copy where they have established that it is necessary for their rights of defence.

<sup>204</sup> The CMA may issue multiple letters of facts.

<sup>205</sup> A Supplementary Statement of Objections will not be issued where, for example, the scope of an suspected infringement has reduced.

<sup>206</sup> Rule 5(3) parties will be notified that a Supplementary Statement of Objections has been issued and may be provided with a non-confidential copy where they have established that it is necessary for their rights of defence.

basis, or not at all. This may be the case, for example, where the Supplementary Statement of Objections is very narrow in scope.

### **Draft Penalty Statement – written and oral representations**

12.29 Where, once any written and oral representations made on the Statement of Objections have been considered, the Case Decision Group is considering reaching an infringement decision and imposing a financial penalty on a party, the CMA will provide that party with a draft penalty statement.<sup>207</sup>

Depending on the written and oral representations received, this may be quite shortly after the oral hearing.

12.31 12.30 ~~The draft penalty statement~~ This will set out the key aspects<sup>208</sup> relevant to the calculation of the penalty that the CMA proposes to impose on that party, based on the information available to the CMA at the time.<sup>209</sup> ~~The draft penalty statement~~ It will also include a brief explanation of the Case Decision Group's reasoning for its provisional findings on each aspect of the penalty calculation.

12.32 12.31 Parties will be offered the opportunity to comment on the draft penalty statement in writing and ~~to attend via~~ an oral hearing (~~in person or~~ by telephone or video conference).<sup>210</sup> The oral hearing will be chaired by the Procedural Officer and attended by the Chair of with the Case Decision Group, members of the case team and representatives of the General Counsel and the Chief Economic Adviser. Any member of the Case Decision Group, not in attendance, will be provided with the transcript of the hearing.<sup>211</sup> If a party chooses to make written ~~representations~~ or oral representations ~~at a hearing~~, these ~~representations~~ should relate only to the draft penalty calculation in the draft penalty statement. ~~∴ The~~ Case Decision Group will not consider further representations at this stage on whether an infringement has been committed, other than in exceptional cases such as where the party is able to demonstrate that it was unable to provide the

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<sup>207</sup> Rule 11 of the CA98 Rules.

<sup>208</sup> Including, for example, the starting point percentage, the relevant turnover figure to be used, the duration of the infringement, any uplift for specific deterrence, any aggravating/mitigating factors (and the proposed increase/decrease in the penalty for these), and any adjustment proposed for proportionality.

<sup>209</sup> Rule 11 of the CA98 Rules. For further information on how the CMA calculates ~~the appropriate amount of a~~ penalty, see CMA's Guidance as to the appropriate amount of a penalty (CMA73) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>210</sup> Rule 6 of the CA98 Rules.

<sup>211</sup> ~~Rule 6 of the CA98 Rules. As with the oral hearing following the Statement of Objections, the oral hearing on the draft penalty statement will be chaired by the Procedural Officer and attended by the Case Decision Group, the Chief Economic Adviser and the General Counsel (or their representatives) and members of the case team.~~

information/evidence before the issue of the draft penalty statement. The written and oral representations process following issue of the Statement of Objections, described in paragraphs 12.1 – 12.22 above<sup>212</sup> represents parties' opportunity to make submissions to the Case Decision Group on whether an infringement has been committed.

~~12.33~~12.32 The deadline for submitting written representations on the draft penalty calculation will be specified in the draft penalty statement. The deadline will be set having regard to the circumstances of the case and will allow for the opportunity to inspect any new relevant documents on the file.<sup>213</sup> ~~The time frame for responding will typically be shorter than the time given to respond to the Statement of Objections. Any requests for an extension to the deadline must specify the reasons for such a request.~~

~~12.34~~12.33 Where a party has a complaint about the deadline set for submitting written representations on the draft penalty statement, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Officer.<sup>214</sup>

~~12.35~~12.34 When a recipient of a draft penalty statement submits written representations on that draft penalty statement, it should also provide a non-confidential version of its representations, along with an explanation which justifies why an item of information should be treated as confidential. The CMA will not accept blanket or unsubstantiated confidentiality claims. The non-confidential version should be provided at the same time as the original response and in any event no later than two weeks from the date of submitting the original response. Any extension to this deadline should be agreed in advance ~~of the deadline~~ with the ~~Team Leader~~case team.

~~12.36~~12.35 As set out above, ~~the~~ CMA will offer a party the opportunity to attend an oral hearing in relation to the draft penalty statement.<sup>215</sup> ~~If a party requests an oral hearing, that hearing~~The hearing, if requested, will be ~~held conducted (by telephone or video conference) around ten to 20 working days~~ after the deadline for the submission of the written representations on the

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<sup>212</sup> ~~As described in paragraphs 12.1 – 12.24 above.~~

<sup>213</sup> Including, in cases in which the CMA issues draft penalty statements to several parties, non-confidential versions of the draft penalty statement issued to each of those parties (see paragraph 12.36 below).

<sup>214</sup> See Chapter 15 and Rule 8 of the CA98 Rules. Further details of the Procedural Officer role are available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>215</sup> Rule 6 of the CA98 Rules.

draft penalty statement allowing time for the Case Decision Group to consider such representations.<sup>246</sup>

~~12.37~~12.36 ~~In cases in which~~ Where draft penalty statements are issued to more than one party under investigation, the CMA will – in order to provide parties with transparency as to the CMA’s application of the principle of equal treatment in the CMA’s draft calculations<sup>217</sup> – place a non-confidential version of each party’s draft penalty statement on the file. ~~That~~ Each non-confidential version will generally be disclosed to ~~may be inspected by~~ the other parties under investigation.<sup>218</sup>

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<sup>246</sup> ~~The procedure for an oral hearing on the draft penalty statement is the same as for oral hearings following issue of a Statement of Objections (see paragraphs 12.11 to 12.21 above).~~

<sup>217</sup> See CMA’s Guidance as to the appropriate amount of a penalty (CMA73), available at [www.gov.uk/cma](http://www.gov.uk/cma), at footnote 16.

<sup>218</sup> The case team will prepare non-confidential versions of each party’s draft penalty statement, based on any confidentiality representations previously made by that party in relation to the information included in the draft penalty statement. Where the draft penalty statement contains information regarding a party, which that party has not had a previous opportunity to assess for confidentiality, the CMA will allow it a reasonable opportunity to make such an assessment and to make any confidentiality claims to the CMA, before the non-confidential version of the draft penalty statement is placed on the file.

## 13 The final decision

### Summary

- ~~The Case Decision Group is responsible for deciding whether the legal test for establishing an infringement is met and, where appropriate, the level of financial penalty to be imposed, having consulted the Case and Policy Committee and other senior CMA officials as appropriate.~~
- ~~Once adopted, an infringement decision is issued to each business the CMA has found to have infringed the law.~~
- ~~If the Case Decision Group does not find sufficient evidence of a competition law infringement, the CMA may publish a reasoned decision explaining why there are no grounds for further action.~~
- ~~A final opportunity will be given to the addressee of the decision to make confidentiality representations.~~
- ~~The non-confidential version of the decision and the summary will be published on the CMA webpages.~~

~~13.1 The issue of a decision represents the culmination of the CMA's investigation.~~

~~13.2~~ 13.1 The Case Decision Group decides whether there is sufficient evidence to meet the legal test for establishing an infringement and, if so, the level of any financial penalty to be imposed. Prior to proceeding to issue a final decision, the Case Decision Group may consult the Case and Policy Committee on any legal, economic or policy issues arising out of the proposed decision.<sup>219</sup>

~~13.3 Where the Case Decision Group finds the legal test to have been met, it will give the Case and Policy Committee an opportunity to provide its views on any legal, economic or policy issues arising out of that proposed decision. Having considered the views expressed, the Case Decision Group will then proceed to its final decision.~~

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<sup>219</sup> As described in paragraph 9.7 above.

~~13.413.2 The CMA will issue an infringement decision to each business the CMA has found to have infringed the law.<sup>220</sup>~~

~~13.513.3 As noted in Chapter 10, if, having completed its consideration of the case, the Case Decision Group does not find sufficient evidence of a competition law infringement, it will close the case.<sup>221</sup> In those circumstances, the Case Decision Group may decide to publish a reasoned no grounds for action decision. The Case Decision Group will give the Case and Policy Committee an opportunity to provide its views on any legal, economic or policy issues arising out of that proposed decision. Having considered the views expressed, the Case Decision Group will then proceed to its final decision.~~

### Issue of an infringement decision

~~13.613.4 The CMA will issue an infringement decision to each business the CMA has found to have infringed the law.<sup>222</sup> If the case involves more than one party, each party that is an addressee of the Statement of Objections will receive a copy of the decision.<sup>223</sup> In addition to an infringement decision, the CMA will normally issue a press announcement, make an announcement on the Regulatory News Service and publish a page on [www.gov.uk/cma](http://www.gov.uk/cma) which describes the case. The CMA will also provide a non-confidential version of the decision to any person who is party to an agreement or conduct that the CMA considers infringes the Chapter I prohibition or the prohibition in Article 101(1) TFEU but who was not an addressee of the Statement of Objections.<sup>224</sup>~~

~~13.7 The CMA will inform the addressee(s) before the issue of the infringement decision, and the announcement of the decision. As a general rule, as described in Chapter 11, in non-market sensitive announcements, the CMA aims to give parties advance sight of the content of the CMA's announcement, in confidence, unless there is a compelling reason not to do so. In both market sensitive and non-market sensitive situations, the CMA~~

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<sup>220</sup> ~~Section 31 of the CA98 and Rule 10(1) of the CA98 Rules.~~

<sup>221</sup> ~~The Case Decision Group may consult the Case and Policy Committee as necessary.~~

<sup>222</sup> ~~Section 31 of the CA98 and Rule 10(1) of the CA98 Rules.~~

<sup>223</sup> ~~In accordance with Rule 19 of the CA98 Rules, where an undertaking is a party to an agreement that is the subject of a CMA decision but is not an addressee of the Statement of Objections, the CMA will fulfil its obligation to notify such parties by issuing a press release that the decision has been issued, and taking steps to publish a summary of that decision on the public register and a reference to such summary in certain newspapers and journals as specified in Rule 19 of the CA98 Rules.~~

<sup>224</sup> ~~Rule 10(2) and Rule 19 of the CA98 Rules.~~

~~will aim to balance an open approach with the need to ensure the orderly announcement of full information.<sup>225</sup>~~

~~13.8~~13.5 The infringement decision will set out fully the facts on which the CMA relies to prove the infringement and the action that it is taking, and will address any material representations that have been made during the course of the investigation.

### Imposition of financial penalties

13.6 If a financial penalty is being imposed, the infringement decision will explain how the Case Decision Group decided upon the appropriate level of penalty, having taken into account the CMA's statutory obligations ~~in fixing a financial penalty~~<sup>226</sup> and the parties' written and oral representations on the draft penalty ~~calculation statement.~~<sup>227</sup> More information on how the CMA sets penalties is available in the CMA's *Guidance as to the appropriate amount of a penalty* (CMA73).

13.7 The infringement decision will also specify the date before which the penalty must be paid. It is likely that payment will be required within a period of three months from the date of the infringement decision. If the business fails to pay within the date specified (and has not brought an appeal against the imposition or amount of the penalty within the time allowed or an appeal has been heard and the penalty upheld), the CMA may commence proceedings to recover the required amount as a civil debt.

### Issuing of directions

13.8 The infringement decision may also give directions to bring the infringement to an end.<sup>228</sup> Directions may require the individual or business to modify or cease the conduct or agreement. This may include positive action, such as informing third parties that an infringement has been brought to an end. In some circumstances, the directions appropriate to bring an infringement to end may be (or include) structural changes to its business.

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<sup>225</sup> ~~For a general guide to the CMA's approach when it makes a public announcement, see *Transparency and Disclosure: Statement of the CMA's policy and approach* (CMA6) available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

<sup>226</sup> Section 36(7A) of the CA98.

<sup>227</sup> ~~More information on how the CMA sets penalties is available in Part 5 of OFT guideline *Enforcement* (OFT407) and see also *Guidance as to the appropriate amount of a penalty* (OFT423) both available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~

<sup>228</sup> Section 32 and 33 of the CA98. ~~If a business fails to comply with the CMA's directions, the CMA may seek a court order to enforce them under section 34 of the CA98.~~

13.9 Any directions will set out the facts on which the direction is based and the reasons for it.<sup>229</sup> In most cases directions will have immediate effect, although in some cases, the CMA may allow a period of time for compliance.<sup>230</sup> The directions will be published on the public register maintained by the CMA.

### Announcement of the infringement decision

~~13.10 If the case involves more than one party, each party that is an addressee of the Statement of Objections will receive a copy of the decision.<sup>231</sup>~~ When an infringement decision is issued, the CMA will normally issue a press announcement, make an announcement on the Regulatory News Service and publish a page on the CMA's webpages which describes the case.

~~13.913.11 As a general rule, as described in Chapter 11, in non-market-sensitive announcements, the CMA aims to give parties advance sight of the content notice of the CMA's announcement, in confidence, unless there is a compelling reason not to do so. In both market-sensitive and non-market sensitive situations, the CMA will aim to balance an open approach with the need to ensure the orderly announcement of full information.<sup>232</sup> Information that is confidential will be disclosed through the infringement decision to other parties only if disclosure is strictly necessary. Before disclosing any confidential information, the CMA will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If the CMA considers that disclosure might significantly harm legitimate business interests or the interests of an individual, the CMA will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which the CMA is allowed to make the disclosure.<sup>233</sup>~~

~~13.1013.12~~ After the infringement decision and press announcement have been issued, the CMA will generally may notify Formal C complainants whose

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<sup>229</sup> Rule 12 of the CA98 Rules.

<sup>230</sup> The CMA may apply to the court for an order requiring compliance with a direction within a specified time limit if a person fails to comply with it without reasonable excuse, section 34 of the CA98.

<sup>231</sup> In accordance with Rule 19 of the CA98 Rules, where an undertaking is a party to an agreement that is the subject of a CMA decision but is not an addressee of the Statement of Objections, the CMA will fulfil its obligation to notify such parties by issuing a press release that the decision has been issued, and taking steps to publish a summary of that decision on the register of decisions (available at: [www.gov.uk/cma](http://www.gov.uk/cma)) and a reference to such summary in certain newspapers and journals as specified in Rule 19 of the CMA Rules.

<sup>232</sup> For a general guide to the CMA's approach when it makes a public announcement, see *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*.

<sup>233</sup> Section 244 of the EA02.



complaint led to the investigation and other ~~interested~~ third parties (for example, third parties who have submitted written representations during the investigation) of the CMA's decision.

## Confidentiality

~~13.13~~ Information that is confidential will be disclosed through the infringement decision to other parties only if disclosure is strictly necessary. Before disclosing any confidential information, the CMA will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If the CMA considers that disclosure might significantly harm legitimate business interests or the interests of an individual, the CMA will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which the CMA is allowed to make the disclosure.<sup>234</sup>

~~13.11~~13.14 The addressee of the decision will have already had the opportunity to make confidentiality representations. Either shortly before or Aafter the infringement decision has been issued, prior to publication of a non-confidential version, the CMA will usually allow the addressee ~~one a~~ final opportunity to make representations on information which the addressee deems to be confidential and is contained in the decision. ~~The deadline for this final set of representations will normally be four weeks from the date of the issue of the decision.~~ Any representations must be limited to confidentiality issues only and, as at the other stages in the process, the CMA will not accept blanket or unsubstantiated confidentiality claims.

## Summary

~~13.12~~—A summary of the infringement decision will also be prepared. This will ~~provide a brief overview of the investigation (for example, the date on which the Statement of Objections was issued and other key milestones in the investigation) and the infringement decision (for example, the nature of the infringement, the parties involved and the overall financial penalty).~~

## Final publication

~~13.13~~13.15 The CMA will publish, as quickly as possible, a non-confidential version of the infringement decision and the summary will be published on the case page on [www.gov.uk/cma](http://www.gov.uk/cma) the CMA's webpages, which describes the case.

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<sup>234</sup> Section 244 of the EA02.

The CMA also maintains a register<sup>235</sup> of decisions in investigations under the CA98 and the details of the case will be placed on the register.

~~13.14~~13.16 The CMA may delay publication of the final decision to avoid prejudicing any criminal investigation under section 192 of the EA02 that relates to the same or similar arrangements or conduct.

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<sup>235</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## 14 Settlement

### Summary

- ~~The CMA may consider settlement for any CA98 case, provided the evidential standard for giving notice of its proposed infringement decision is met.~~
- ~~Settlement is a voluntary process in which a settling business must admit that it has breached competition law and accept that a streamlined administrative process will apply for the remainder of the investigation.~~
- ~~The SRO will generally lead settlement discussions on behalf of the CMA. The Case and Policy Committee must provide approval for the SRO to engage in settlement discussions and to settle.~~
- ~~An infringement decision will be issued in every settlement case unless the CMA decides not to make an infringement finding against the settling business.~~
- ~~The CMA may impose a financial penalty on any settling business, including a settlement discount. This will be capped at 20% for settlement pre-Statement of Objections and 10% for settlement post-Statement of Objections.~~

14.1 In the context of enforcement cases under the CA98, 'settlement' is the process whereby 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 ~~of that business' conduct~~. If so, the CMA will impose a reduced penalty on the business.<sup>236</sup>

14.2 Settlement, in appropriate cases, ~~facilitates the CMA's enforcement work as a whole. It~~ allows the CMA to achieve efficiencies through ~~the adoption of~~ a streamlined administrative procedure, resulting in earlier adoption of any infringement decision, and/or resource savings.

<sup>236</sup> ~~In the past, settlement has sometimes been referred to as 'early resolution'. The CMA is now using the term 'settlements'. This term is also used by other competition authorities such as the European Commission. See Rule 9 of the CA98 Rules. See also paragraph 2.1 and 2.30 of the [OFT's CMA's Guidance as to the appropriate amount of a penalty \(CMA73\)](#), which provides that the CMA will reduce penalties where a business settles. ~~The guidance is available at: [www.gov.uk/cma](http://www.gov.uk/cma).~~~~

14.3 It is distinct from the CMA's leniency policy and the CMA's power to accept commitments under section 31A of the CA98.<sup>237</sup> The leniency policy and the use of settlements are not mutually exclusive – it is possible for a leniency applicant to settle a case under the CA98 and benefit from both leniency and settlement discounts.

### Discretionary nature of settlement

14.4 The CMA will consider settlement for any case falling under the Chapter I or Chapter II prohibitions under the CA98 (or Article 101(1) or 102 of the TFEU) as long as the CMA considers that the evidential standard for giving notice of its proposed infringement decision is met.

14.5 ~~Whether to settle any case is at the CMA's retains broad discretion in determining which cases to settle. This includes the discretion whether to explore interest in settlement discussions, whether to continue or withdraw from settlement discussions and whether to settle at all. Businesses do not have a right to settle in a given case. Also, businesses are not under any~~  
Moreover, there is no right or obligation to settle or enter into any settlement discussions where these are offered by the CMA. ~~Settling is a voluntary decision made by businesses involved in an investigation. See further paragraph 14.9 below.~~

14.6 In determining whether a case is suitable for settlement the CMA will have regard to a number of factors. The primary factor is whether the CMA considers that the evidential standard for giving notice of its proposed infringement decision is met. The CMA will not proceed with settlement discussions unless it considers that this standard is met. The CMA will also consider other factors such as the likely procedural efficiencies and resource savings that can be achieved. ~~When assessing the likelihood of resource savings the CMA will take into account factors such as the stage in the case at which settlement is reached, whether it would result in a shortening of the case timetable and a reduction in case team resources, the number of businesses involved in the investigation and the number potentially interested in settlement, and the number of alleged infringements in the case.~~ A further factor that may be relevant is the prospect of reaching settlement in a reasonable time frame. The CMA will continue to consider throughout the settlement discussions whether procedural efficiencies and resource savings can still be achieved from settlement, for example, taking

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<sup>237</sup> See, respectively, the ~~OFT CMA~~ guidelines *Applications for leniency and no action in cartel cases (OFT1495)* and ~~paragraphs 10.15 to 10.29 above~~ *Enforcement (OFT407)* incorporating the CMA's guidance as to the circumstances in which it may be appropriate to accept commitments, both available at: [www.gov.uk/cma](http://www.gov.uk/cma).

into account the number of businesses who are interested in settlement out of the total number involved in the investigation.

## Requirements for settlement

14.7 At a minimum, the CMA will require the settling business/es to:

- make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement. The scope of the infringement will include, as a minimum, the material facts of the infringement as well as ~~the its legal characterisation of the infringement.~~ An admission of the facts alone is not sufficient to constitute an admission of liability sufficient to form the basis of a settlement. Where appropriate the admission will also include the facts of any actual implementation of the infringement;
- cease the infringing behaviour immediately from the date that it enters into settlement discussions with the CMA, where it has not already done so. ~~It must also refrain from engaging again in the same or similar infringing behaviour;~~ and
- confirm it will pay a penalty set at a maximum amount.<sup>238</sup> As set out in paragraph 14.29 below, this maximum penalty – which will apply provided the business continues to follow the requirements of settlement – will reflect the application of the settlement discount to the penalty that would otherwise have been imposed. The level of settlement discount applied will reflect the particular circumstances of the case, in particular whether the case is being settled pre- or post- Statement of Objections (see paragraph 14.31 below).

14.8 In addition, in order to achieve the CMA's objective of resolving the case efficiently, settling businesses must confirm that they accept that:

- there will be a streamlined administrative process for the remainder of the investigation, ~~which enables the CMA to adopt an infringement decision sooner and/or with less resource than would otherwise be the case.~~ This would normally include streamlined access to file arrangements ~~(for example through access to key documents only and/or through the use of a confidentiality ring),~~ no written

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<sup>238</sup> There may be rare cases where the CMA may settle where a penalty is not being imposed on a party, for example an immunity applicant. However, the CMA would not normally invite an immunity applicant to explore the possibility of settlement (see paragraph 14.11 below).

representations on the Statement of Objections or any Supplementary Statement of Objections (except in relation to manifest factual inaccuracies), no oral hearings, no separate draft penalty statement after settlement has been reached<sup>239</sup> and no Case Decision Group being appointed.<sup>240</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;
- 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 **specific** 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. ~~This could be necessary to assess further evidence provided and/or submissions made by other businesses which are parties to the case.~~ 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.

## Businesses settle voluntarily

14.9 ~~There is no obligation on businesses to enter into settlement discussions or to settle.~~ A settling business may withdraw from settlement discussions at

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<sup>239</sup> The process for providing a separate draft penalty statement where there is no settlement and the Case Decision Group is minded to reach an infringement decision and impose a financial penalty on a party is described at paragraphs 12.29 to 12.36.

<sup>240</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 ~~and the Case and Policy Committee would formally adopt the final infringement decision.~~

any time before confirming in writing<sup>241</sup> its acceptance of the requirements for settlement (including its admission). ~~Businesses should, however, have regard to the fact that the CMA will only consider a case suitable for settlement if the settling business displays – and continues to display – a commitment to engaging in a constructive dialogue with the CMA with a view to settling. Furthermore, t~~The settling business' decision to settle should be based on ~~that business'its~~ full awareness of the requirements of settlement and 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>242</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 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.

## Settlement process

14.10 Settlement discussions can be initiated either before or after the Statement of Objections is issued. ~~In some cases it may be clear well before the Statement of Objections is prepared that the evidential standard for giving notice of a proposed infringement decision is met. As set out above, the CMA will exercise its discretion to decide when settlement is appropriate and will only enter into settlement discussions where it considers that that standard is met.~~ Businesses may wish to approach the CMA during an investigation to discuss the possibility of exploring settlement ~~and if so, they should~~by contacting ing the ~~Team Leader~~case team ~~in the first instance~~. The

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<sup>241</sup> Although, as set out in paragraph 14.18, it may be possible for a business to confirm its acceptance orally.

<sup>242</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.

CMA will not make any assumptions about a business' liability from the fact that it is interested in engaging in or engages in settlement discussions.

14.11 Before the CMA case team can commence settlement discussions ~~in a particular case~~, the SRO<sup>243</sup> will be required to obtain a mandate from the CMA's Case and Policy Committee to engage in settlement discussions. If settlement may be appropriate in a specific case, all businesses involved in an investigation (except, normally, any immunity applicant<sup>244</sup>) will be invited to explore the possibility of settlement.

~~14.12 Following the Case and Policy Committee's consent to engage in settlement discussions, those settlement discussions will generally be overseen by the SRO.<sup>245</sup> It is important that settlement results in resource efficiencies and therefore, s~~Settlement discussions will be subject to a set timetable. However, the timetable will be appropriate to the circumstances of the case (for example to take account of the number of businesses entering into settlement discussions) rather than fixed at a set period ~~for all settlements~~. The appropriate procedure will also be partly determined by the stage in the administrative process at which settlement discussions take place.  
Settlement discussions will generally be overseen by the SRO.

~~14.12~~14.13 In cases where one or more of the businesses does not wish to settle, the CMA may settle with the remaining businesses. For non-settling businesses, the CMA will revert to the usual administrative procedure.<sup>246</sup>

### Summary Statement of Facts

14.14 If the settlement discussions take place pre-Statement of Objections, each business that enters into settlement discussions will be presented with a Summary Statement of Facts<sup>247</sup> and will be provided with access to the key documents on which the CMA is relying as well as a list of the documents on

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~~<sup>243</sup> The SRO is responsible for authorising the opening of a formal investigation and taking certain other decisions including, where the SRO considers that there is sufficient evidence, authorising the issue of a Statement of Objections. See further paragraphs 5.1 and 9.6.~~

~~<sup>244</sup> As for the parties who settle, an immunity applicant involved in an investigation which is settled will be asked to confirm as part of the leniency process that they accept that there will be no involvement of a Case Decision Group.~~

~~<sup>245</sup> As part of the streamlined procedure parties will confirm that they accept there will be no involvement of a Case Decision Group unless in an exceptional case where the CMA considers it appropriate for the Case Decision Group to oversee the settlement discussions and remain decision makers on the case.~~

~~<sup>246</sup> Referred to as 'hybrid' cases.~~

~~<sup>247</sup> Alternatively, a draft Statement of Objections may be presented. This will depend on a number of factors, such as, the timing of the approach to settle and whether the issue of a draft Statement of Objections would provide additional procedural efficiencies and resource savings. Further references to Summary Statement of Facts should be read to include such a draft Statement of Objections, where issued for settlement purposes.~~



the CMA's file. Access to specific documents can be requested, although the provision of such access will influence the CMA's ongoing assessment of the procedural efficiencies and resources savings that can be achieved from settlement.<sup>248</sup> ~~Each business considering settlement will be presented with a Summary Statement of Facts, which is likely to contain some aspects which will be the same for each business considering settlement and some which will vary to reflect the relevant business' particular circumstances.~~ The CMA will give the business the opportunity to provide limited representations, including identifying manifest factual inaccuracies on the Summary Statement of Facts as part of the settlement discussions. ~~The CMA will seek to preserve the resource efficiencies resulting from settlement when setting a time frame for the parties to make any representations on the Summary Statement of Facts.~~ If the settling business' representations amount to a wholesale rejection of the facts of the alleged infringement as set out in the Summary Statement of Facts, the CMA will reassess whether, ~~in light of those representations,~~ the case remains suitable for settlement. This will be determined by the CMA on a case-by-case basis.

### Draft Penalty Calculation

~~14.13~~ 14.15 Each business considering settlement will be presented with a draft penalty calculation which again is likely to contain some aspects which will be the same for each business considering settlement and some which will vary to reflect the relevant business' particular circumstances. ~~This is necessary to ensure that the draft penalty calculation for each business considering settlement reflects the penalty that the CMA considers to be appropriate to meet the CMA's penalty objectives and is proportionate in light of the settling business' particular circumstances.~~ The CMA will also give ~~the~~ each business the opportunity to make limited representations on the draft penalty calculation within a specified time frame as part of settlement discussions, provided that these are not inconsistent with ~~the business's~~ its admission of liability ~~to be made in respect of the infringement set out in the Summary Statement of Facts or Statement of Objections.~~

14.16 The CMA will not enter into negotiation or plea-bargaining during settlement discussions, for example by accepting an admission in relation to a lesser infringement in return for dropping a more serious infringement. Nor will the CMA be prepared to negotiate variations to the minimum standard

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<sup>248</sup> These may be subject to confidentiality redactions where appropriate.

requirements of the settlement procedure which will apply to all settling businesses in that investigation.

### **Approval of settlement**

14.17 The SRO must receive approval from the Case and Policy Committee to settle.<sup>249</sup>

14.18 While Ssettlement discussions will be conducted orally, although the settling business' acceptance of the settlement requirements, including its admission, must be confirmed in writing (with its company letterhead). However, the CMA may consider a reasoned request from the settling business to provide the confirmation that it accepts the settlement requirements (including its admission) orally. This will be recorded and transcribed.

~~14.14~~14.19 ~~If the business is willing to settle on the basis of the requirements of the settlement procedure covered in settlement discussions with the CMA, it will confirm in a letter (with its company letterhead) its acceptance of those requirements which includes its admission.~~ If a business is settling pre-Statement of Objections ~~the, its~~ admission will be made by reference to the infringement(s) as set out in the Summary Statement of Facts (incorporating any amendments necessitated by the representations referred to in paragraph 14.14~~14.13~~). The business will also be given the opportunity to indicate in a concise memorandum any manifest factual inaccuracies in the Statement of Objections once it is issued to the business.<sup>250</sup>

~~14.15~~14.20 Where a business is settling post-Statement of Objections the admission will be made by reference to the infringement as set out in the Statement of Objections and the business will be given the opportunity to indicate any manifest factual inaccuracies in the Statement of Objections as part of its admission.

~~14.16~~14.21 ~~Settlement discussions will be conducted orally, although the settling business' acceptance of the settlement requirements, including its admission, must be confirmed in writing. However, the CMA may consider a reasoned request from the settling business to provide the confirmation that it accepts the settlement requirements (including its admission) orally. This will be recorded and transcribed at the CMA's premises and businesses will~~

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<sup>249</sup> Rule 9 of the CA98 Rules.

<sup>250</sup> Where a business has received a draft Statement of Objections the CMA will normally not provide a further opportunity to indicate any manifest factual inaccuracies.

~~be granted the opportunity to check the technical accuracy of the recording and to correct the substance of their oral confirmation of the settlement requirements and the accuracy of the transcript as soon as reasonably practicable.~~

~~14.17~~14.22 ~~The SRO must receive approval from the Case and Policy Committee to settle.~~<sup>251</sup> The letter containing the confirmation from the party that it has accepted the requirements of the settlement procedure and its admission to the infringement will be placed on the CMA's file.

~~14.18~~14.23 Notes of the discussions will also be put on the CMA's file but will not be disclosed to other businesses involved in the investigation<sup>252</sup> or, if the discussions break down and no settlement is reached, the Case Decision Group.<sup>253</sup> Parties must not disclose the content of settlement discussions, the fact that discussions have taken place, or any documents they have had access to during the settlement procedure to any third parties (including any other parties engaging in settlement discussions) without the prior written authorisation of the CMA.

~~14.19~~14.24 If, during settlement discussions, a business provides the CMA with new documentary evidence or information relevant to the infringement, those new documents or information will be placed on the file and may be disclosed to other parties to the investigation in the usual way. The CMA may also take further investigatory steps in relation to any such new documents or information provided to it. For example, the CMA may issue formal information requests or interview individuals in relation to the new documents or information where it is appropriate to do so. The CMA will make this clear to businesses when commencing settlement discussions.

14.25 If settlement discussions are not successful, the case will revert to the usual administrative procedure, ~~without the streamlining and other measures that were considered in the settlement discussions.~~ Any decision to issue an infringement decision and any resulting penalty will be for a Case Decision Group. This means that any penalty imposed may be different from any penalty calculation provided during settlement discussions. As set out in paragraph 14.20 above, any admissions made during failed settlement

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<sup>251</sup> ~~Rule 9 of the CA98 Rules.~~

<sup>252</sup> See the disclosure provisions in Part 9 of the EA02.

<sup>253</sup> If settlement discussions take place post-Statement of Objections, the Case Decision Group will be informed that one or more businesses are exploring the possibility of settlement. This is inevitable because settlement discussions will pause the case timetable. There may also be exceptional cases where the CMA considers it appropriate for the Case Decision Group to oversee the settlement discussions and remain decision makers on the case, in which case they would already be aware of the settlement discussions.

~~discussions will not be disclosed to other businesses involved in the investigation or the Case Decision Group.~~ Subject to paragraph 14.27 below, the case will then proceed to either an infringement decision (if the case has already passed Statement of Objections stage) or to a Statement of Objections followed by an infringement decision (if the Statement of Objections has not yet been issued).

### **Issue of an infringement decision**

~~14.20~~14.26 If settlement discussions are successful the SRO will generally issue an infringement decision and will consult the Case and Policy Committee on his/her proposed decision.<sup>254</sup> ~~The Case and Policy Committee will formally adopt a final infringement decision.~~

~~14.21~~14.27 An infringement decision will be issued in every settlement case unless the CMA decides not to make an infringement finding against the settling business, for example where new exculpatory evidence comes to light after settlement but before the CMA has adopted an infringement decision. Equally, the decision (and where relevant any Statement of Objections) will substantially reflect the admission made by the settling business unless the CMA considers it necessary to include amendments or issue a Supplementary Statement of Objections, for example where new evidence comes to light (see further paragraph 14.33). The decision will also include findings of fact and law, the amount, and an explanation of, the penalty imposed on the settling business as well as a description of the key requirements of the settlement procedure. The decision may include findings of effect if appropriate to the case.

### **Settlement discount**

~~14.22~~14.28 As part of the minimum requirements for settlement, a business must accept that it will pay a maximum penalty. This is the maximum amount of penalty that the settling business will pay if the CMA issues an infringement decision.<sup>255</sup>

~~14.23~~14.29 In the infringement decision, the CMA will set out the total penalty (£X) less the specified settlement discount of (Y%), provided the settling business

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<sup>254</sup> Rule 9 of the CA98 Rules.

<sup>255</sup> The maximum penalty figure may include a reduction for cooperation that has been provided prior to settlement as a mitigating factor under step 3 of the penalty calculation (see [CMA's Guidance as to the appropriate amount of a penalty \(CMA73\)](#), available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

follows any continuing requirements of settlement, which results in the reduced penalty after settlement of (£Z) (the maximum penalty).

~~14.24~~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.

~~14.25~~14.31 Settlement discounts will be capped at a level of 20%. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. The discount available for settlement pre-Statement of Objections will be up to 20% and ~~that available~~ for settlement post-Statement of Objections will be up to 10%.<sup>256</sup> ~~The discount may be less than 20% for pre-Statement of Objections settlement and less than 10% for post-Statement of Objections settlement. The CMA will determine the appropriate level of discount having regard to the circumstances of the case.~~

### **Withdrawal from the settlement procedure following settlement**

~~14.26~~14.32 Following the completion of successful settlement discussions the CMA will retain the right to withdraw from the settlement procedure if the settling business does not follow the requirements for settlement. Prior to withdrawing, the CMA will notify the settling business that it considers that it is not following the requirements of settlement and will give the business the opportunity to respond.

~~14.27~~14.33 If the CMA does not intend to substantially reflect a settling business' admission in either the Statement of Objections or infringement decision (for example where new evidence comes to light, as referred to in paragraph 14.27), the settling business will be given the opportunity to withdraw from the settlement procedure and the case will revert to the usual administrative procedure. In these circumstances, the settling business' admission will not be disclosed to other businesses involved in the investigation or to the Case Decision Group, where this has not already occurred (for example, to other businesses as part of access to file, see paragraph 14.19). Nor will that admission be used in evidence against any of the parties to the investigation.

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<sup>256</sup> ~~The discount may be less than 20% for pre-Statement of Objections settlement and less than 10% for post-Statement of Objections settlement. The CMA will determine the appropriate level of discount having regard to the circumstances of the case.~~

## Immunity from Competition Disqualification Applications

~~14.28~~14.34 The CMA has the discretion to decide that it will not pursue a competition disqualification order or undertakings against the directors of the settling business.<sup>257</sup> However, this will not be a standard part of the settlement procedure.

### External communications during/post settlement

~~14.29~~14.35 The CMA's standard practice is not to make a public announcement that settlement discussions are taking place, or, where discussions break down, that they have broken down. As set out in paragraph 14.23 above, parties must not disclose the content of settlement discussions or the fact that those discussions have taken place to any third parties (including any other parties engaging in settlement discussions) without the prior written authorisation of the CMA.

~~14.30~~14.36 In a case involving more than one business, the CMA is likely to inform other businesses involved in the investigation that one or more businesses are exploring the possibility of settlement. This is a necessary part of the process since the CMA is committed to ensuring transparency of case timetables, and entering into discussions on possible settlement will typically pause the case timetable whilst such discussions take place. At settlement discussion stage, the CMA will not name the business or businesses that have decided to explore the possibility of settlement, although in a case involving a small number of businesses, the CMA recognises that it may be possible for the business or businesses to infer which business is considering the possibility of settlement. The CMA will make it clear to other businesses involved in the investigation that the relevant business or businesses are only exploring the possibility of settlement at this stage.

~~14.31~~14.37 The CMA may announce that a business has settled with a press release, in which case the CMA's webpages will be updated. Where possible the CMA will give the settling business or businesses at least one hour's advance notice of the press release's contents before it is published ~~on~~

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<sup>257</sup> Under the Company Directors Disqualification Act 1986 as amended by the EA02, the CMA may apply to the court for an order disqualifying a director from, amongst other things, being involved in the management of a company (a Competition Disqualification Order). The court must award a Competition Disqualification Order if it is satisfied that there has been a breach of UK or EU competition law (involving a company of which the individual was a director), and the director's conduct in connection with that breach makes him or her unfit to be concerned in the management of a company. See further [Director disqualification in competition cases \(OFT510\)](#) and [Company directors and competition law \(OFT1340\)](#); both available at: [www.gov.uk/cma](http://www.gov.uk/cma).

~~www.gov.uk/cma.<sup>258</sup> When settlement is reached pre-Statement of Objections, the CMA continues with its usual practice of issuing a press statement when the Statement of Objections is issued. This will refer to the settlement reached with the settling business or businesses. It is the CMA's usual practice to issue a press statement when the infringement decision is adopted, which would also refer to the settlement reached with the settling business or businesses.~~

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<sup>258</sup> Further details of the way in which the CMA gives notice of announcements is available in the CMA's Guideline *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*, available at: ~~www.gov.uk/cma.~~

## 15 Complaints about the CMA's investigation handling, right of appeal and reviewing the CMA's processes

### Summary

- ~~Parties may complain to the SRO if they are unhappy about any aspect of an investigation procedure.~~
- ~~If the complaint is not satisfactorily resolved by the SRO, the party may refer certain procedural complaints to the Procedural Officer.~~
- ~~The Procedural Officer will review the written and oral evidence provided and will make a decision in relation to a complaint within a specified period.~~
- ~~The Procedural Officer's decision will be binding on the case team.~~
- ~~The role of the Procedural Officer does not prejudice the party's rights in respect of judicial review and/or any appeal before the Competition Appeal Tribunal.~~

### Procedural complaints process for investigations under the CA98<sup>259</sup>

- 15.1 Parties to an investigation under the CA98 have recourse to a procedural complaints process in the event that they are unhappy with certain aspects of the investigation procedure after a formal investigation under section 25 of the CA98 has been opened ~~(see paragraph 15.4 for a description of the types of procedural complaints which the Procedural Officer can determine)~~.<sup>260</sup>
- 15.2 The CMA has also published a guideline *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*<sup>264</sup> setting out the steps it takes to ensure the CMA's work is open and accessible. Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner when dealing with the CMA. If a party's dispute falls outside the scope of the CMA's procedural complaints process for CA98 investigations, ~~the~~ this CMA's guideline *Transparency and*

<sup>259</sup> The Procedural Officer can also deal with certain disputes in relation to merger investigations and market studies and investigations (see further Chapter 5 of the CMA guideline *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)* available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

<sup>260</sup> Rule 8 of the CA98 Rules.

<sup>264</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).



~~Disclosure: Statement of the CMA's policy and approach (CMA6)~~ sets out the options available to pursue the complaint.<sup>262</sup>

- 15.3 Once a formal investigation has been opened, any concerns or complaints about the CMA's procedures or how investigations are handled should be made in writing to the SRO in the first instance. If a party wishes to complain to the SRO, it should set out details of its complaint and provide copies of any relevant supporting documents or correspondence.
- 15.4 If, during the course of an investigation under the CA98, a party is unable to resolve the dispute with the SRO, procedural complaints that relate to the following issues may be referred to the Procedural Officer:
- deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the Statement of Objections or Supplementary Statement of Objections;<sup>1</sup>
  - requests for confidentiality redactions of information in documents on the CMA's case file, in a Statement of Objections or in a final decision;<sup>1</sup>
  - requests for disclosure or non-disclosure of certain documents on the CMA's case file;<sup>1</sup>
  - issues relating to oral hearings, including, for example, with regard to issues such as the date of the hearing;<sup>1,7</sup> and
  - other significant procedural issues that may arise during the course of an investigation.
- 15.5 The Procedural Officer is independent of the investigation, the case team and the Case Decision Group.
- 15.6 The Procedural Officer does not have jurisdiction to review decisions on the scope of requests for information or other decisions relating to the substance of a case.<sup>263</sup>

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<sup>262</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>263</sup> Section 26 of the CA98 provides the CMA with the power to require documents or information.

## Process for referring a complaint to the Procedural Officer<sup>264</sup>

- 15.7 If a party wishes to refer a dispute to the Procedural Officer for review, that party will need to make an application ~~as soon as possible and, in any event,~~ within five working days of being notified of the SRO's decision on the issue in question. A party must provide a short written summary of the issue in question and provide copies of relevant correspondence with the case team and SRO.
- 15.8 On receipt of a complaint reference, the Procedural Officer will provide an opportunity for ~~each of~~ the case team and the party to present their arguments to the Procedural Officer orally on the telephone or at a meeting, before issuing a short, reasoned decision either confirming the SRO's decision, or reaching a different decision in whole or in part. The Procedural Officer's decision will be binding on the case team.
- 15.9 The Procedural Officer will endeavour to deal with the complaint as quickly as possible, with an indicative administrative target of taking decisions in most cases within ten working days from receipt of the application. ~~In any event, t~~The Procedural Officer will reach a decision within 20 working days from receipt of the application, extendable by no more than 20 working days if there are special reasons<sup>265</sup> to do so.<sup>266</sup>
- 15.10 The Procedural Officer will carefully assess how long any extension will be and will endeavour to make only one extension where it is required. The party's cooperation will assist the Procedural Officer to make a robust and timely decision, in particular by attending meetings and/or providing information on short notice.
- 15.11 The CMA will publish the Procedural Officer's decision, or a summary of that decision, generally at the time of the decision or at the end of the case, subject to confidentiality redactions as appropriate.

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<sup>264</sup> See further Rule 8 of the CA98 Rules.

<sup>265</sup> For example, where complaints require the Procedural Officer to deal with large volumes of data or materials, or where the Procedural Officer receives a number of complaints within a short period of time and is unable to deal with one or more complaints within the original 20 working day period.

<sup>266</sup> See Rule 8 of the CA98 Rules.

## Right of appeal to the Competition Appeal Tribunal or court

- 15.12 The role of the Procedural Officer does not prejudice the party's rights in respect of judicial review and/or any appeal before the Competition Appeal Tribunal.
- 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>267</sup>
- 15.14 Where the law does not provide for an appeal, an application for judicial review may be brought in certain circumstances.<sup>268</sup> Parties should seek independent legal advice on their rights in this regard.
- ~~15.15 Following the completion of an investigation, case teams routinely evaluate the investigation process undertaken to determine what went well and how things may be improved for other ongoing and future cases. The CMA will usually share the 'lessons learned' with colleagues across the CMA. This evaluation process is unrelated to the investigation process but remains an important way in which the CMA ensures that best practice can be applied across all its investigations under the CA98.~~

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<sup>267</sup> Section 46 of the CA98 and section 47 of the CA98 as substituted by section 17 of the EA02.

<sup>268</sup> A judicial review application may be brought before the Administrative Court of the Queen's Bench Division under Part 54 of the Civil Procedure Rules.

## **16 Application and enforcement of Articles 101 and 102**

16.1 The CMA can use its powers of investigation and enforcement under CA98 for Article 101 and Article 102 investigations. The CMA may also investigate at the request of the European Commission or National Competition Authorities of EU Member States (NCAs).

### **Powers to assist with European Commission investigations**

16.2 Part 2 of CA98 and the EC Regulation 1/2003 (the Modernisation Regulation)<sup>269</sup> together provide the CMA<sup>270</sup> with powers to assist the European Commission to undertake investigations relating to Article 101 and Article 102.

16.3 The CMA may actively participate in European Commission investigations relating to Article 101 or Article 102 in three ways:

- the European Commission may request that the CMA carry out an inspection of business premises on its behalf;
- the CMA may be required to assist the European Commission when it carries out an inspection of business premises in the United Kingdom; and
- the CMA may be required to assist the European Commission when it carries out an inspection of non-business premises in the United Kingdom.

### **Inspections on behalf of the European Commission**

16.4 When the CMA is carrying out an inspection of business premises on behalf of the European Commission, the CMA officers will have been given an authorisation<sup>271</sup> under CA98 which has the effect of providing them with the powers of an official authorised by the European Commission.<sup>272</sup>

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<sup>269</sup> Council Regulation (EC) No 1/2003 of 16 December 2002, *OJ L 1, 4.1.2003*, p. 1-25.

<sup>270</sup> These powers are not available to the Regulators. They may, however, participate in inspections carried out by the CMA on behalf of the European Commission if the industry being investigated falls within their area of expertise.

<sup>271</sup> The authorisation will identify the officers, the subject matter and purpose of the investigation and draw attention to the penalties which an undertaking may incur in connection with the inspection under the relevant provision of Community law. Article 23(1)(c) (fines) and Article 24(1)(e) (periodic penalty payments) of the Modernisation Regulation.

<sup>272</sup> Section 62B(1) of CA98.

16.5 This means that the CMA officers will possess further powers that are not available when the CMA investigates suspected infringements of Article 101 or Article 102 on itself. Primarily, in addition to asking employees for explanations of documents, CMA officers can ask for facts relating to the subject matter and purpose of the inspection.<sup>273</sup>

16.6 The CMA may obtain a warrant where an inspection of business premises which it is carrying out on behalf of the European Commission is being, or is likely to be, obstructed.<sup>274</sup> The warrant obtained must indicate the subject matter and purpose of the investigation and the nature of the offence for obstruction.<sup>275</sup>

### **Assisting with European Commission inspections**

16.7 When assisting the European Commission with an inspection of business premises, CMA officers have the same powers as an official authorised by the European Commission.<sup>276</sup>

16.8 When assisting the European Commission with an inspection of non-business premises, the CMA must obtain a warrant before any inspection can be carried out. The CMA officers, in addition to being able to do anything which the warrant authorises them to do, will have the same powers as an official authorised by the European Commission.<sup>277</sup>

### **Privileged information**

16.9 Where an inspection is being conducted by the CMA on behalf of the European Commission (under sections 62B and/or 63 of CA98), the United Kingdom rules on legal professional privilege will apply.<sup>278</sup>

16.10 When assisting the European Commission with an inspection, the range of documents that can benefit from legal professional privilege is narrower than when the CMA is investigating suspected infringements of Article 101 or Article 102 on its own behalf or on behalf of another NCA.

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<sup>273</sup> Article 20(2)(e) of the Modernisation Regulation.

<sup>274</sup> Section 63 of the CA98.

<sup>275</sup> A person will be guilty of an offence if they intentionally obstruct any person in the exercise of their powers under a warrant issued in relation to a European Commission investigation relating to Article 101 or 102. The sanction is a fine of up to the statutory maximum on summary conviction or an unlimited fine and/or a maximum of two years' imprisonment on conviction on indictment.

<sup>276</sup> Article 20(5) of the Modernisation Regulation.

<sup>277</sup> Article 21(4) of the Modernisation Regulation.

<sup>278</sup> Section 65A of CA98.

- 16.11 The European Court of Justice has recognised that correspondence between a client and an external legal adviser, entitled to practice in one of the Member States, is subject to legal professional privilege where: (i) the correspondence follows the initiation of proceedings by the European Commission and concerns the defence of the client; or (ii) the correspondence existed before the initiation of proceedings but is closely linked with the subject matter of the proceedings.
- 16.12 Correspondence between a client and an external legal adviser who is not entitled to practise in one of the Member States or between a client and an in-house legal adviser (unless the in-house legal adviser is simply reporting the legal advice of an external legal adviser) is not recognised by the European Courts as being protected by legal professional privilege under European Union law.<sup>279</sup>
- 16.13 Where an inspection is being conducted to assist the European Commission, legal professional privilege can be claimed only for documents that fall within the category of correspondence that the European Court of Justice has recognised as being subject to legal professional privilege. In order to claim legal professional privilege for certain documents during an inspection the occupier must make a case to the European Commission demonstrating why the documents are covered by legal professional privilege.

### **Power to assist National Competition Authorities of EU Member States**

- 16.14 Under Part 2A of CA98, the CMA may carry out an inspection or other fact-finding measure<sup>280</sup> in the United Kingdom on behalf of an NCA in order to assist it in establishing whether there has been an infringement of Article 101 or 102.<sup>281</sup>
- 16.15 Part 2A provides the CMA with similar powers of investigation to those it uses to investigate suspected infringements of Article 101 and 102 under Part I of the Act. This means that, where there are reasonable grounds to suspect an infringement, the CMA will have the power to:
- require the production of specified documents and information;<sup>282</sup>

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<sup>279</sup> Case 155/79 AM & S Europe v Commission [1982] ECR 1575, 1982 [CMLR] 264.

<sup>280</sup> These powers are not available to the Regulators. They may, however, participate in inspections carried out by the CMA on behalf of other NCAs if the industry being investigated falls within their area of expertise.

<sup>281</sup> Section 65D of CA98.

<sup>282</sup> Section 65E of CA98.

- enter business premises without a warrant;<sup>283</sup> and

- enter and search business or domestic premises with a warrant.<sup>284</sup>

16.16 Although NCAs of other Member States do not have any formal powers of investigation within the United Kingdom, NCAs officers may be authorised to accompany, and participate under the supervision of, authorised CMA officers on an inspection where the CMA uses its power to enter premises under a warrant.<sup>285</sup>

16.17 These powers of investigation are subject to the same restrictions concerning legal professional privilege and self-incrimination in relation to investigations under Part I of the CA98.

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<sup>283</sup> Section 65F of CA98.

<sup>284</sup> Sections 65G and 65H of CA98.

<sup>285</sup> Section 65G(4) and 65H(4) of CA98.

## ANNEXE(S)

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## **A. TEMPLATE DECLARATION OF TRUTH**

This Declaration should be included with the interim measures application and be signed by an individual or individuals with authority to bind the person applying for interim measures (the Applicant):

*I declare that, to the best of my knowledge and belief, the information and evidence provided to the CMA in support of the application for interim measures made by [name of the Applicant] is true, correct, and complete in all material respects.*

*I understand that it is a criminal offence under section 44 of the Competition Act 1998 (CA98) for a person recklessly or knowingly to supply to the CMA information which is false or misleading in any material particular. This includes supplying such information to another person knowing that the information is to be used for the purpose of supplying information to the CMA.*

*Signed:*

*Name: (block letters)*

*Position: (block letters)*

*Date:*

## A: STATUS OF EXISTING OFT GUIDANCE

This Annex outlines the status of existing OFT guidance documents that relate to particular aspects of investigations under the CA98. In order to facilitate transition to the revised antitrust regime, and to minimise disruption to parties and the CMA, the CMA has adopted certain guidance documents that were previously published by the OFT, as set out in the table below (adopted guidance).<sup>286</sup>

OFT CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>287</sup>	Adopted by the CMA Board <sup>288</sup>
<b>CA98 Investigations</b>			
OFT1263rev	A guide to the OFT's investigations procedures in Competition Act 1998 cases	✓	-
OFT953	Prioritisation Principles	✓	-
OFT (April 2010)	Short form opinions — the OFT's approach	-	✓
OFT423	Guidance on the appropriate amount of a penalty	-	✓
OFT401	Agreements and concerted practices	-	✓
OFT402	Abuse of a dominant position	-	✓
OFT403	Market definition	-	✓
OFT404	Powers of investigation	-	✓
OFT407	Enforcement	-	✓

<sup>286</sup> The table has not set out any consequential changes to those existing guidance documents that cover concurrent enforcement in specific sectors: *The application of competition law in the telecommunications sector* (OFT417), *The application of competition law in the water and sewerage sectors* (OFT422), *Application in the energy sector* (OFT428), *Application to services relating to railways* (OFT430) and *Application to the Northern Ireland energy sectors* (OFT437) (OFT regulated sector guidance). Further information on the application of competition law by the CMA and the relevant sector regulators in the regulated sectors is available in the CMA guideline *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (CMA10) available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>287</sup> This column identifies the existing OFT guidance documents which are obsolete and/or will be replaced and superseded by new CMA guidance or a new CMA publication.

<sup>288</sup> This column identifies the existing OFT guidance documents which have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future) but need to be read in light of the applicable CMA guidance. In particular, the nomenclature, procedural changes, substantive legal changes and any specific 'health warnings' set out in CMA guidance should be taken into account when reading the existing OFT guidance document in question. Documents may be replaced or superseded by future documents produced by the CMA. Always check the CMA's webpages for the most recent and applicable documents.

OFT CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>287</sup>	Adopted by the CMA Board <sup>288</sup>
OFT415	Assessment of market power	-	✓
OFT451	Involving third parties in Competition Act investigations	-	✓
OFT 1341	How your business can achieve compliance with competition law	-	✓
OFT1227	Drivers of compliance and non-compliance with competition law	-	✓
OFT442	Modernisation	-	✓
OFT419	Vertical agreements	-	✓
OFT1340	Company directors and competition law	-	✓
OFT421	Services of general economic interest exclusion	-	✓
OFT408	Trade associations, professional and self-regulating bodies	-	✓
OFT1280a	The application of competition law following the revocation of the Land Agreements Exclusion Order	-	✓
OFT1389	Public bodies and competition law	-	✓
OFT740rev	How competition law applies to co-operation between farming businesses: FAQs	-	✓
OFT1317	Land agreements and competition law — An overview of how competition law applies to land agreements	-	✓
OFT439	Public transport ticketing schemes block exemption	-	✓
OFT447	Competing fairly	-	✓
OFT1330	Quick guide to competition law compliance	-	✓
OFT1234	Transparency — a statement of the OFT's approach	✓	-
<b>Cartel Investigations (CA98 and Criminal)<sup>289</sup></b>			

<sup>289</sup> References to the 'dishonesty' element of the criminal cartel offence should be read in light of the revisions to the criminal cartel offence introduced by the ERRA, in particular in relation to the specific transitional arrangements for the new cartel offence under section 188 of the EA02 (as amended by the ERRA13). The CMA has published guidance on the principles to be applied in determining, in any case, whether criminal proceedings should be brought under section 190 of the EA02 (as amended by the ERRA13). More information is available in the CMA guideline *Cartel Offence: Prosecution Guidance* (CMA9), available at: [www.gov.uk/cma](http://www.gov.uk/cma).

OFT CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>287</sup>	Adopted by the CMA Board <sup>288</sup>
OFT1495	Applications for leniency and no action in cartel cases	-	✓
OFT1495b	Quick Guide to Cartels and Leniency for Businesses		✓
OFT1495i	Quick Guide to Cartels and Leniency for Individuals		✓
OFT435	Cartels and the Competition Act 1998— a guide for purchasers	-	✓
OFT436	Leniency in cartel cases	✓	-
OFT 510	Director disqualification in competition cases	-	✓
OFT515	Powers for investigating criminal cartels	✓	-
OFT546	Memorandum of understanding between the OFT and the NCD, Crown Office, Scotland		✓
<b>Miscellaneous Guidance</b>			
OFT393	The Transport Acts: guidance on the competition test	-	✓
OFT452	Guidance on the application of competition law to certain aspects of the bus market following the Local Transport Act 2008	-	✓
OFT1113	Government in Markets	-	✓
OFT1520	Quick guide to private litigation in competition cases	-	✓
OFT397	The OFT and the bus industry	-	✓
OFT430	Application to services relating to railways	-	✓

Parties should therefore refer to the adopted guidance for additional guidance on how the CMA will investigate and analyse suspected infringements of the prohibitions under Chapter I and Chapter II and/or Article 101 and Article 102 of the TFEU, subject in particular to the following general limitations:

- all references in the adopted guidance to issues of legal assessment and procedure in investigations under the CA98 must be read in the light of this CMA Guidance
- in the case of conflict between this Guidance and the adopted guidance, this CMA Guidance prevails

- ~~references in the adopted guidance to 'OFT Rules', 'Rules of Procedure' or equivalent should be read as referring to the CA98 Rules but note that in the case of any conflict between the Article numbers or content of the CA98 Rules and the previous OFT Rules, the CA98 Rules prevail~~
- ~~the original text of the adopted guidance has been retained unamended: as such, that text does not reflect or take account of developments in case law, legislation or practice since its original publication, and~~
- ~~all OFT (and Competition Commission) guidance documents adopted by the CMA Board should be read subject to the following cross-cutting amendments:~~
  - ~~references to the 'OFT' (or Competition Commission) (except where referring to specific past OFT (or Competition Commission) practice or case law), should be read as referring to the CMA~~
  - ~~references to the substantive powers of investigation or assessment of the approach to applying legal powers (for example, the approach to publishing notices of investigation, interim measures or penalties for non-cooperation with an investigation under the CA98), should be read in light of this CMA Guidance~~
  - ~~references to articles of the EC Treaty should be read as referring to the equivalent articles of the TFEU~~
  - ~~certain OFT departments, teams or individual roles may not be replicated in the CMA, or may have been renamed. A copy of the CMA's organisational chart is available on [www.gov.uk/cma](http://www.gov.uk/cma), and~~
  - ~~parties should check any contact details against those listed on [www.gov.uk/cma](http://www.gov.uk/cma), which will be the most up to date.~~