

Revised guidance on the CMA's investigation procedures in Competition Act 1998 cases

Response to Consultation

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1. Introduction and summary

Introduction

- 1.1 The Competition and Markets Authority (CMA)¹ has set out in published guidance general information on its practices and processes in connection with its powers under the Competition Act 1998 (CA98) to investigate suspected infringements of competition law.²
- 1.2 *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8) sets out the CMA's procedures and explains the way in which it conducts CA98 investigations. CMA8 took effect from 1 April 2014. It superseded guidance issued by its predecessor, the Office of Fair Trading (OFT). In this document, this existing text of CMA8 is referred to as the "Current Guidance".
- 1.3 There have been no updates to the Current Guidance since it took effect. In the four years since then the CMA has had significant experience of applying the Current Guidance in practice and has gained knowledge of where there is scope for improvement or enhancement of CA98 investigation procedures and where amendment of the Current Guidance might better reflect current investigation and decisional practice.
- 1.4 Therefore, on 21 June 2018, the CMA commenced a six-week consultation on proposed changes to the Current Guidance. The CMA published a consultation document which discussed the proposed changes (the Consultation Document) as well as a draft revised version of the Current Guidance showing the proposed changes (the Draft Revised Guidance). The Draft Revised Guidance also incorporated an updated version of the CMA's guidance on the circumstances in which it may be appropriate to accept commitments under section 31A CA98 (Commitments Guidance), which had previously been set out in a standalone document.³
- 1.5 The Consultation Document set out eight questions on which respondents' views were sought:

¹ The CMA is the UK's economy-wide competition and consumer authority, and works to promote competition for the benefit of consumers, both within and outside the UK. Its aim is to make markets work well for consumers, businesses and the economy as a whole.

² This guidance forms part of the advice and information published by the CMA under section 52 of the CA98.

³ Section 31D CA98.

Question 1: Do you agree with the proposed changes to the guidance on complaint handling (described in Chapter 3)? Please give reasons for your views.

Question 2: Do you agree with the proposed changes to the guidance on information handling (described in Chapter 4)? Please give reasons for your views.

Question 3: Do you agree with the proposed changes to the guidance on interim measures (described in Chapter 5)? Please give reasons for your views.

Question 4: Do you agree with the proposed changes to the guidance on engagement with the parties (described in Chapter 6)? Please give reasons for your views.

Question 5: Do you agree with the proposed changes to the guidance on commitments (described in Chapter 7)? Please give reasons for your views.

Question 6: Do you agree with the other proposed changes to the guidance? Please give reasons for your views.

Question 7: Are there other aspects of our CA98 investigation procedures where you think further changes could be made to enhance the efficiency of our investigations or improve certainty for businesses? Please explain which aspects and why.

Question 8: Are there other aspects of the guidance which you consider could be streamlined or simplified? Please explain which aspects and why.

- 1.6 We received eight responses to the consultation⁴. This document summarises the key views submitted in response to the consultation questions, and the CMA's views thereon. Non-confidential versions of all submissions are available on the consultation page.
- 1.7 The CMA published its final revised version of CMA8 (the Final Guidance) on 18 January 2019, following approval by the Secretary of State of the Commitments Guidance) as required by s.31D CA98. On the same day, the guidance documents OFT404 *Powers of Investigation* and OFT407 *Enforcement* were withdrawn, as they have been superseded by the Final Guidance.

⁴ The list of respondents is set out in Chapter 3

2. Issues raised by the consultation and our response

- 2.1 The respondents' views on the questions 1 to 5 are set out in order below. The remaining questions (6 to 8) have been considered together and a summary of the responses on those questions is set out at paragraphs 2.61-2.63 below.

Guidance on complaint handling

- 2.2 The consultation proposed certain changes to the CMA's approach to complaint handling under CA98.

Formal complainant status

- 2.3 As stated in the Consultation Document, experience shows that Formal Complainant status has been infrequently requested by complainants, strongly suggesting that the status is not seen as an essential, or even a desirable, part of making a complaint to the CMA.
- 2.4 The Draft Revised Guidance therefore omitted references to Formal Complainant status and set out a single, common system for dealing with CA98 complaints, based on, among other things, the extent to which the CMA considered that the complainant would be able to add further value to its investigation.

Summary of responses

- 2.5 Two respondents welcomed this amendment, agreeing that removing a two-tier system for complaint handling would simplify procedures and bring them more in line with other authorities.
- 2.6 Two other respondents raised concerns that the removal of the Formal Complainant status would dilute the rights of complainants. Two respondents questioned why this amendment was necessary.

The CMA's views

- 2.7 The CMA has carefully considered respondents' comments. The CMA does not consider that the removal of Formal Complainant status will adversely affect the way that complainants are treated. On the contrary, the CMA considers that it provides more clarity and certainty for complainants. The CMA will assess on a case by case basis whether and, if so, the extent to which, it will involve complainants and other third parties in CA98 investigations. In doing so, it will of course have regard to and act in accordance with applicable case law precedent.

2.8 It has therefore retained this approach to complaint handling, including the withdrawal of Formal Complainant status, in the Final Guidance.

How to make complaints to the CMA

2.9 The Draft Revised Guidance provided updated information on how to make CA98 complaints to the CMA, including new information on how to make complaints to the CMA anonymously.

Summary of responses

2.10 One respondent welcomed the proposed changes to complaint handling in this regard and noted that the clarifications set out in the Draft Revised Guidance were helpful to potential complainants.

2.11 Another respondent suggested that the CMA should limit disclosure of the substance of complaints, as necessary, to protect the identity of complainants and to avoid discouraging complainants.

2.12 Some respondents asked for further clarity as to when complainants may be involved in a CMA investigation, including if and when during the investigation they would be provided with information.

The CMA's views

2.13 The CMA recognises the concerns that a complainant may have about the disclosure of its identity or commercially sensitive information. However, in the CMA's view, the Draft Revised Guidance, at paragraphs 3.20 to 3.21, clearly sets out the steps that the CMA will take in handling complaints and protecting anonymity and shows that the CMA takes protection of complainants seriously. It has therefore retained this approach in the Final Guidance.

2.14 As regards the involvement of complainants in CMA investigations, the CMA has inserted cross references in paragraph 3.22 of the Final Guidance to relevant text elsewhere in the guidance, as one respondent had suggested, in order to clarify the circumstances where a complainant may be provided with a non-confidential version of a Statement of Objections or the opportunity to comment on a draft case closure letter.

Guidance on information handling

2.15 The Consultation Document explained the principal changes to the Current Guidance relating to the handling of information received during an

investigation, including in relation to access to the file and the disclosure of confidential information.

Access to file

2.16 The Draft Revised Guidance set out the CMA's updated, streamlined approach to access to the file, which the CMA considers provides significant procedural efficiencies and resource savings for parties and the CMA whilst fully preserving the parties' rights of defence. As the Consultation Document noted, this streamlined approach reflects current CMA practice in many cases.

Summary of responses

2.17 With respect to the proposals for streamlined access to the file, the responses covered the following issues:

- *Timeframe to inspect the file*

One respondent raised concern that any requests for additional documents under the streamlined access to file process would not be factored into the timeframe set for the inspection of the file and that doing so risked undermining fundamental principles of equality of arms that access to the file is intended to guarantee.

- *Streamlined access to file limits rights of defence*

Several respondents raised concerns that the provision of only the documents relied upon in the Statement of Objections may not capture all relevant documents, in particularly exculpatory documents. They said that for rights of defence purposes, parties should be provided with all relevant documents in the file.

- *The need for a choice of approach to access to file*

A number of responses suggested that parties should be offered the choice of the procedure (streamlined process or full access to the file) and that this should happen well in advance of issuing the Statement of Objections.

- *The request for additional documents under the streamlined process*

Several respondents considered that parties should be allowed to request additional documents without the need for an explanation and that reference to deadlines for such a request should be removed.

2.18 Comments were also made in relation to the use of confidentiality rings/data rooms. One respondent welcomed the consideration of the use of data rooms and confidentiality rings to expedite access to confidential information. Some respondents asked for further clarity on the scope of a confidentiality ring, with another respondent requesting that the default position should be that material will be disclosed on an unredacted basis within the confidentiality ring.

The CMA's views

2.19 The CMA has carefully considered the respondents' concerns regarding streamlined access to the file. The CMA does not consider that a streamlined approach to access to file restricts or changes the parties' right under Rule 6(2) of the CMA Rules⁵ to inspect any disclosable document on the CMA's case file. Moreover, as set out in the Draft Revised Guidance, the CMA will discuss with the parties the appropriate approach envisaged for access to file in a case, prior to issuing the Statement of Objections.

2.20 The CMA's proposal that parties indicate why they are requesting access to non-key documents was not intended to suggest that such a request might be refused. As some respondents had inferred that it did do so, and in order to avoid such an implication, the CMA has removed references to parties being required to indicate why such documents are being requested. The Final Guidance also clarifies that parties will be told this in advance of the Statement of Objections being issued.

2.21 The CMA will set a reasonable deadline within which such a request may be made, on a case by case basis.

2.22 The CMA also acknowledges the comments requesting clarity on the operation of confidentiality rings. The Revised Draft Guidance stated that the CMA will provide the parties with the details of how the CMA proposes that the confidentiality ring will work in practice. Given that this will be assessed on a case-by-case basis, the CMA does not consider appropriate to provide further detail in this regard in the Final Guidance.

Confidential information

2.23 The Draft Revised Guidance set out the CMA's consideration of the handling of confidential information at the three stages of the CA98 investigation: pre-Statement of Objections, post-Statement of Objections and Post-Decision (see

⁵ The Competition and Markets Authority's Competition Act 1998 Rules, contained in the Schedule to The Competition Act (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458).

for example, paragraphs 3.20-3.21, 7.6-7.16, 11.17-11.31, 13.13-13.14 of the Draft Revised Guidance) .

Summary of responses

- 2.24 A number of respondents appreciated the removal of the request that parties provide non-confidential versions of information or documents at the same time they are submitted. There was also support for greater flexibility and case-by-case determination of appropriate deadlines, although some respondents sought clarity over when the CMA will request confidentiality representations.
- 2.25 A few respondents provided comments on the provision and timing of non-confidential version of parties' written representations to the Statement of Objections and confidentiality representations on the final decision.

The CMA's views

- 2.26 The CMA welcomes the support for the changes to the approach for the handling of confidential information. In terms of the requests for further clarity, given the type and volume of confidential information differs between cases, the CMA does not consider it practicable or appropriate to be more prescriptive in this regard in the Final Guidance.
- 2.27 In terms of the timing for the provision of a non-confidential version of written representations, the CMA accepts that some respondents to a Statement of Objections may wish to focus on preparing their substantive representations before preparing a non-confidential version of their responses. The CMA, however, considers that a further two weeks beyond the deadline for submission of written representations is sufficient if a respondent wishes to sequence its work in this way.
- 2.28 Regarding the timing for making confidentiality representations on the final decision, the CMA does not consider it appropriate for there to be a default period within which a party may provide confidentiality representations. It is in the public interest for the CMA to publish final CA98 decisions as quickly as possible. In some cases, any confidential information in a final decision may be readily redactable. The CMA therefore considers that it is more effective to set the relevant reasonable deadline on a case by case basis.

Guidance on interim measures

- 2.29 The Consultation Document explained the principal updates to the CMA's approach to the giving of interim measures directions.

Summary of responses

- 2.30 The responses provided were positive about the proposed updates to the CMA's approach. A few respondents noted that while a declaration of truth is appropriate, the CMA must still test fully the evidence with both the applicant and the parties subject to the application.
- 2.31 One respondent noted that the requirement of a non-confidential version of information and evidence submitted at the same time may delay applications and suggested additional time in which to provide the non-confidential version of the application, such as 48 hours.
- 2.32 A few respondents suggested that, as a rule, all documents on the file should be provided to addressees of interim measures. Some respondents suggested that the CMA should commit to provide parties on whom interim measures are proposed to be imposed with a level of disclosure more closely aligned to that in interim injunction proceedings in England and Wales. One respondent stated that an opportunity to provide oral representations should be given where the CMA was proposing to impose interim measures.

The CMA's views

- 2.33 The CMA has noted respondents' comments in relation to the procedures for interim measures. The CMA emphasises the importance of dealing with applications expeditiously, given the intrinsic urgency of situations where interim measures are appropriate. This was therefore reflected in the Draft Revised Guidance in relation to issues such as the timing of the provision of the non-confidential version of the interim measures application and supporting evidence, limiting representations to written ones only as well as generally applying a streamlined approach to access to the file. Regarding the latter, the Draft Revised Guidance stated that undertakings on whom interim measures are proposed to be imposed can request further documents and that a confidentiality ring or data room may be used in certain circumstances, reflecting, among other things, the likely urgency involved. More generally, the CMA considers that providing streamlined access to the file is compliant with Rule 13(1) of the CMA Rules, just as it is with Rule 6(2) of the CMA Rules.
- 2.34 In terms of the disclosure of documents, the CMA complies with the requirements set out in Part 9 of the Enterprise Act 2002. The CMA does not consider it appropriate in the Final Guidance to provide further details on the treatment of commercially sensitive information in relation to interim measures, as the treatment of commercially sensitive information is discussed elsewhere in the Final Guidance (see, for example, paragraphs 3.20-3.21 and 7.6-7.16 of the Draft Revised Guidance).

2.35 The CMA therefore has not made any changes to the discussion of interim measures in the Final Guidance.

Guidance on engagement with the parties

2.36 The Consultation Document explained the principal changes to the Current Guidance relating to arrangements for parties under investigation to exercise their right to make representations, in writing and/or at oral hearings as well as the CMA's engagement with parties, complainants and other third parties, during investigations.

Oral hearing on the draft penalty statement

2.37 The Draft Revised Guidance set out proposed amendments around oral hearings on draft penalty statements, intended to ensure that current arrangements are conducted as efficiently as possible.⁶

Summary of responses

2.38 A small number of respondents stated that the option to attend an oral hearing face to face should be retained, particularly in cases where the CMA proposes to impose a fine in novel cases or where the approach to penalties does not reflect past precedent. One respondent also felt that it was important for the full Case Decision Group to attend.

The CMA's views

2.39 In the CMA's experience, requests for oral hearings on draft penalty statements have been made infrequently.

2.40 The CMA moreover believes that the proposed approach strikes an appropriate balance: it respects parties' right to attend make oral representations if they wish (as required by Rule 6 of the CA98 Rules), while ensuring that any such hearings are as efficient and streamlined as possible. The CMA has therefore retained the approach of offering the opportunity to attend an oral hearing on the draft penalty statement via telephone or video conference, with the same attendees as set out in paragraph 12.30 of the Draft Revised Guidance. Any

⁶ These included providing that oral hearings on draft penalty statements will be conducted by telephone or video conference, clarification of who from the CMA will attend such hearings and the removal of indicative timings as to how long after submission of written representations these hearings will ordinarily be held.

member(s) of the Case Decision Group not attending the hearing will be provided with a transcript of the hearing.

Deadlines for responding

2.41 The Draft Revised Guidance set out the CMA's approach to setting deadlines for responses to information requests as well as the provision of written representations on Statement of Objections. It also made clarifications in relation to the issue of a Supplementary Statement of Objections.

Summary of responses

2.42 A small number of respondents commented on the requests for extension to the deadline for submitting written representations, suggesting that a more general approach of 'as soon as possible' should be used rather than the proposed approach of 'at the time the deadline is set'.

2.43 Two respondents suggested that the removal of the minimum indicative timeframe for providing written representations could result in uncertainty for the parties and impose an excessive burden on parties if a short timeframe is given for reply.

2.44 One respondent did not consider that the distinction between a letter of facts and a Supplementary Statement of Objections was clear. Another suggested that additional third parties may meet the criteria for consultation in relation to a Supplementary Statement of Objections and reference should be made to this.

The CMA's views

2.45 The CMA appreciates that parties may wish to have some time to gauge whether they need to request an extension to the deadline for providing written representations. The CMA has therefore amended the wording of paragraph 12.2 in the Final Guidance so that requests for an extension to the deadline for making written representations should normally be made as soon as possible and in any event within five working days of the issue of the Statement of Objections. In the CMA's view, this gives a party a reasonable timeframe within which to consider the Statement of Objections and assess whether it considers it needs such an extension.

2.46 The CMA acknowledges that having an indicative minimum timeframe within which to provide written representations can provide some certainty for parties. The CMA, however, considers that this is outweighed by the benefits to all concerned of there being the flexibility to set a reasonable deadline for the submission of written representations on a case-by-case basis.

2.47 The CMA also considers that the Draft Revised Guidance was clear as to how a Supplementary Statement of Objections differs from a letter of facts. In addition, it would be unlikely for a new third party to be identified at this stage in the investigation, meaning that it is not necessary for there to be explicit discussion of when Supplementary Statements of Objections may be sent to additional third parties. The CMA, therefore, does not propose to make any further changes in this regard to the Final Guidance. Should this situation nevertheless arise, the CMA would follow the same approach with respect to a Supplementary Statement of Objections as it does with respect to the possibility of providing a Statement of Objections to third parties.

State of play meetings

2.48 The Draft Revised Guidance contained clarifications to ensure that case practice in relation to engagement with the parties was accurately described.

Summary of responses

2.49 One respondent welcomed the fact that the CMA is open to organising state of play meetings by phone or video conference to keep costs and inconvenience to a minimum for parties.

2.50 A few respondents sought clarity on the sharing of the case team's provisional thinking, such as what will be discussed in state of play meetings. One suggested that the case team should, after a state of play meeting, provide the party with a written statement on the scope of the investigation.

The CMA's views

2.51 The CMA does not consider it appropriate or necessary for the case team to provide a written statement on the scope of the investigation to the party following any oral update on the progress of the case.

2.52 The CMA nevertheless agrees that it would be helpful to provide further clarity on issues such as what may be discussed in state of play meetings. The relevant paragraphs (paragraphs 9.9 and 9.10) in the Final Guidance have been amended to make the position clearer.

Involvement of complainants and third parties in investigations

2.53 The Draft Revised Guidance discussed how complainants (given the proposed removal of Formal Complainant status) and other third parties may be involved at various stages of an investigation.

Summary of responses

- 2.54 A respondent agreed with the CMA's decision to provide more transparency on the types of complainants who will be consulted, as well as the principal reasoning given, prior to closing an investigation.
- 2.55 A few respondents raised concerns about third parties' ability to be involved in CA98 investigations, including around the requirement to demonstrate that they were 'materially affected' by the outcome of the CMA's investigation.

The CMA's views

- 2.56 The CMA has noted the points raised by the respondents, but considers that that Draft Revised Guidance has not changed the CMA's approach to the treatment of third parties. The CMA considers that the term 'materially affected' covers both positively and negatively affected. The CMA recognises the value and assistance that third parties bring to CMA's investigations and this is reflected in both the Draft Revised Guidance and the Final Guidance.

Guidance on commitments

- 2.57 The Consultation Document explained the content on commitments that CMA had included in the Draft Revised Guidance, which constitutes the CMA's updated Commitments Guidance.

Summary of responses

- 2.58 Positive comments were received from respondents in relation to the CMA's approach to adopting reasoned decisions in accepting commitments.
- 2.59 A few respondents suggested that further details were needed as to when commitments will be accepted, in particular in relation to behavioural commitments and limiting their use to only clear-cut cases.

The CMA's views

- 2.60 The CMA welcomes the support for its approach to commitments. As regards the request for further details on its approach to commitments, the CMA considers that it is not appropriate to be more prescriptive. The CMA notes however that the Commitments Guidance in the Final Guidance does already set out the circumstances in which the CMA is unlikely to accept commitments.

Other proposed changes to the Guidance

2.61 The Consultation Document also requested comments on other proposed changes to the Current Guidance. The responses covered a range of points, in particular on the CMA's formal powers of investigation and settlement.

The CMA's views

2.62 Many of the responses suggested that the CMA should provide further detail on certain procedural points, such as the timing for when irrelevant material may be returned. However, given the varying nature and scope of CA98 investigations, the CMA considers that its procedural guidance should provide flexibility for a case-by-case determination, and therefore takes the view that it is not practicable or necessarily instructive to provide further detail or specificity in the Final Guidance in relation to many of the points made.

2.63 In light of some of the responses, the CMA has nevertheless made some changes in the Final Guidance for clarity, including amendments to paragraphs 16.5 and 16.10 on the enforcement of Article 101 and Article 102 of the Treaty on the Functioning of the European Union.

3. List of Respondents

- American Bar Association – Section of Antitrust Law and Section of International Law
- Baker McKenzie
- Bristows
- City of London Law Society Competition Law Committee
- Clifford Chance
- Freshfields
- Joint Working Party of the Bars and Law Societies of the United Kingdom
- Law Society of Scotland