

**Competition and Markets  
Authority (CMA)**

**Competition Act 1998:  
CMA Guidance and Rules  
of Procedure for  
investigation procedures  
under the Competition Act  
1998**

**Consultation document**

September 2013

CMA8con

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Any enquiries regarding this publication should be sent to us at: CMA Transition Team on behalf of the CMA, Department for Business, Innovation and Skills, 3<sup>rd</sup> Floor, 1 Victoria Street, London SW1H 0ET, or email [cmaconsultation@bis.gsi.gov.uk](mailto:cmaconsultation@bis.gsi.gov.uk).

This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## Scope of this consultation

### Topic of this consultation

This consultation seeks views on the attached drafts:

- Rules of Procedure: Competition and Markets Authority Competition Act 1998 Rules, and
- CMA guidance document: Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases.

This consultation and the accompanying draft guidance have been drafted by the Competition and Markets Authority (CMA) Transition Team which has been appointed by the CMA Chair Designate and Chief Executive Designate, and consists of individuals from the Office of Fair Trading (OFT), the Competition Commission (CC) and elsewhere.<sup>1</sup>

The Transition Team, on behalf of the CMA and in consultation with OFT and CC proposes to issue the draft Rules of Procedure and guidance in relation to reforms to the Competition Act 1998 (CA98) investigation regime introduced by the Enterprise and Regulatory Reform Act 2013 (ERRA13), which will come into force on 1 April 2014. These documents reflect the principal administrative and legal changes to the application and enforcement of competition law under Chapter I and Chapter II of the CA98 in the United Kingdom.

The draft Rules of Procedure (to be implemented by way of secondary legislation that will be prepared by the Department of Business, Innovation and Skills) outline the CMA's functions and procedures when investigating suspected infringements of the prohibitions under Chapter I and Chapter II of the CA98 and/or Article 101 and 102 of the Treaty on the Functioning of the European Union. Subject to limited exceptions set out in Rule 1(4), these procedures apply equally to the sectoral regulators when they apply and enforce the CA98 within their respective sectors.<sup>2</sup>

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<sup>1</sup> Pending formal creation of the CMA on 1<sup>st</sup> October 2013, the OFT and CC act on behalf of the CMA through the Transition Team.

<sup>2</sup> Certain sectoral regulators have concurrent powers with the CMA to apply and enforce the Chapter 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 the date of publication of this consultation, 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 sector regulators are given concurrent powers. Further detail is available in the CMA guideline [Regulated Industries: Guidance on concurrent application of

However, the draft guidance is limited to the use by the CMA of its powers under the CA98, and does not cover the policy of the sectoral regulators with concurrent powers to apply and enforce competition law in relation to their respective responsibilities regarding the application and enforcement of Chapter I and Chapter II of the CA98 and/or Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in the United Kingdom.

## **Geographical scope**

There is no specific geographical dimension to this consultation.

## **How to respond**

We would welcome your comments on any aspect of the guidance contained in this document. In particular, your feedback is sought on the specific questions indicated in this document, and summarised at Section 5 of this document. Please respond to as many questions as you are able and provide supporting evidence for your views where appropriate.

You can respond to this consultation:

By email to [cmaconsultation@bis.gsi.gov.uk](mailto:cmaconsultation@bis.gsi.gov.uk)

By post to:

The BIS CMA Transition Team on behalf of the CMA  
(c/o Easha Lam)  
Department for Business, Innovation and Skills  
3<sup>rd</sup> Floor, Orchard 2  
1 Victoria Street  
London  
SW1H 0ET

When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Please also indicate whether you are happy for your response to be made available on the CMA's website. Further information regarding our use of data received during this consultation is provided below.

### **Enquiries**

If have any questions relating to this consultation please contact Easha Lam on the email address above or by telephone on 020 7215 2044.

### **Closing date**

Responses should be received by 5pm on 11 November 2013.

### **Next steps**

The Transition Team will consider the responses to this consultation document and make amendments to the guidance where appropriate. The CMA Board (once established) will make the decisions on the matters being consulted on and the content of the final guidance, to be published in advance of 1 April 2014.

### **Compliance with the Cabinet Office Consultation Principles**

This consultation complies with the Cabinet Office Consultation Principles. A list of the key criteria, along with a link to the full document, can be found at Annexe A.

### **Consultation period**

The deadline for responses to this consultation is eight weeks. While this represents an expedited consultation period, we note that the in-depth Government consultation exercise which led to the decision to create the CMA asked a number of questions and yielded a number of valuable responses on issues related to this consultation, which have informed the proposed approach to the draft Rules of Procedure (Competition and Markets Authority Competition Act 1998 Rules) and draft guidance (Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases). Furthermore, the timetable for the formation of the CMA requires that consultation on numerous proposed guidance documents be carried out within a very short period of time. We feel that, given these considerations, the eight week consultation period is an appropriate one to obtain responses from interested parties.

### **Feedback about this consultation**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mr John Conway  
Department for Business, Innovation and Skills  
Consultation Coordinator  
1 Victoria Street  
London  
SW1H 0ET

Telephone John on 020 7215 6402 or e-mail to: [john.conway@bis.gsi.gov.uk](mailto:john.conway@bis.gsi.gov.uk).

### **Data use statement for responses**

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the EA02. We may wish to publish or refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the EA02.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

**CMA8con**

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# 1 INTRODUCTION

## Background

### Statutory changes to the United Kingdom competition regime

- 1.1 The CMA will be established under the ERRA13 as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the CC and many of the functions of the OFT will be transferred to the CMA and these bodies abolished. The CMA's primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA will have a range of statutory powers to address problems in markets:
  - under the EA02, the CMA will be able to investigate mergers which could potentially give rise to a substantial lessening of competition and specify measures which the merging parties must take to protect competition between them while the investigation takes place
  - the EA02 will also enable the CMA to conduct market studies and investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
  - the CMA will have powers to enforce a range of consumer protection legislation (either directly or through Part 8 of the EA02) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008
  - the CMA will also take on the CC's powers and duties in relation to the conduct of appeals regarding regulatory determinations such as under section 193 of the Communications Act 2003
  - the CMA will also be able to bring criminal proceedings against individuals who are suspected of having committed the cartel offence under section 188 of the EA02, and



- finally, under the CA98 the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 1.3 The ERR13 implements a number of enhancements to these statutory powers (compared to the powers available to the CC and OFT) in order to improve the robustness of decision making, increase the speed and predictability of the CMA's activities and strengthen the UK's competition regime as a whole.<sup>3</sup>
- 1.4 The Transition Team has produced a series of draft guidance documents to assist the business and legal communities and other interested parties in their interactions with the CMA and is consulting publicly on them.

## Purpose of this consultation

### Introduction

- 1.5 The ERR13 introduces a number of changes to the CMA's powers to investigate and enforce suspected infringements of the CA98. The purpose of this document is to consult on the proposed approach to the use by the CMA of new investigation and enforcement powers under the CA98 as set out in the draft publications set out at:
- Annexe B of this consultation – draft Rules of Procedure: Competition and Markets Authority Competition Act 1998 Rules (Draft CMA CA98 Rules), and
  - Annexe C of this consultation – CMA draft guidance: Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (Draft CMA CA98 Guidance)<sup>4</sup>.
- 1.6 Details of the changes introduced by the ERR13 are also outlined in Section 2 of this consultation document.<sup>5</sup>

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<sup>3</sup> An overview of the changes is contained in Towards the CMA (CMA1), available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>4</sup> The amendments made to the OFT CA98 Procedural Guidance which are the subject of this consultation are shown in underline and ~~strikethrough~~ text in the Draft CMA CA98 Guidance.

## **Draft CMA CA98 Rules**

- 1.7 The CMA may make rules about procedural and other matters in connection with the application and enforcement of the prohibitions under Chapter I and Chapter II of the CA98 and Articles 101 and 102 of the TFEU under section 51 of the CA98. The Draft CMA CA98 Rules are published by the CMA under section 51(3) of the CA98 (and are the CMA's equivalent procedural rules as the OFT's current procedural rules<sup>6</sup>).
- 1.8 The Draft CMA CA98 Rules are designed to outline procedural rules that the CMA will follow when investigating and enforcing competition law under the CA98.<sup>7</sup> Businesses and their advisers should read them in conjunction with the Draft CMA CA98 Guidance, which provides additional detail on the CMA's proposed procedures in respect of CA98 investigations.

## **Draft CMA CA98 Guidance**

- 1.9 The Draft CMA CA98 Guidance forms part of the advice and information published under section 52 of the CA98. It is designed to provide general information and advice to companies and their advisers on the procedures used by the CMA in applying and enforcing the prohibitions under Chapter I and Chapter II of the CA98 and Articles 101 and 102 of the TFEU.
- 1.10 The Draft CMA CA98 Guidance should be read in conjunction with the Draft CMA CA98 Rules, which set out rules for CA98 procedures to which the Draft CMA CA98 Guidance relates.

## **Summary of Transition Team's proposed approach**

- 1.11 While the ERR13 introduces certain new powers in relation to the United Kingdom's antitrust enforcement regime, the statutory tests for determining whether an undertaking has infringed one or more of the prohibitions Chapter I and Chapter II of the CA98 and Article 101 and Article 102 of the TFEU are unchanged, as is the maximum financial penalty that the CMA

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<sup>5</sup> For completeness, it is noted that the Draft CMA CA98 Guidance has been drafted as assuming that the CMA has been established and is exercising its functions.

<sup>6</sup> The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 SI 2004/2751.

<sup>7</sup> Subject to limited exceptions set out in Rule 1(4), these procedures apply equally to the sectoral regulators when they apply and enforce the CA98 within their respective sectors.

may impose on an undertaking that the CMA has found to have infringed the law.

1.12 In seeking to create effective new processes and policies for implementing the new procedures and powers introduced by the ERRA13, the Transition Team has sought to build on the past experience of the OFT in applying and enforcing the prohibitions under Chapter I and Chapter II of the CA98 and Article 101 and Article 102 of the TFEU, and to implement incremental improvements to the OFT's existing practice where appropriate.

1.13 To that end, the Transition Team:

- has adopted as its starting point for both the Draft CMA CA98 Rules and the Draft CMA CA98 Guidance the existing text of:
  - The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 SI 2004/2751 (OFT CA98 Rules)
  - the OFT's detailed guidance on how the OFT conducts investigations under the CA98 (OFT CA98 Procedural Guidance)<sup>8</sup>
- proposes to update the OFT CA98 Rules and OFT CA98 Procedural Guidance to reflect:
  - the changes being introduced by the ERRA13, and
  - incremental improvements to policies and procedures which have been made by the OFT since the OFT CA98 Rules and OFT CA98 Procedural Guidance were published, or which are intended to capture the benefits of the CMA's unitary nature, and
- will not implement immediate changes to existing OFT guidance on other aspects of the antitrust investigation and enforcement regime, or the substantive assessment of whether an undertaking has infringed one or more of the prohibitions under Chapter I and Chapter II of the

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<sup>8</sup> 'A guide to the OFT's investigation procedures in competition cases' (OFT1263rev), available at: [www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/publications](http://www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/publications).

CA98 and Article 101 and Article 102 of the TFEU. The Transition Team is consulting separately (see CMA12con) on its proposal to put existing OFT guidance documents to the CMA Board (once established) for adoption.<sup>9</sup> Those adopted guidance documents will, however, be kept under review once the CMA is in operation, in the light of its developing practice and case experience.

- 1.14 Annexe A of the Draft CMA CA98 Guidance lists the existing CA98-related OFT guidance documents that the Transition Team currently proposes to put to the CMA Board (once established) for adoption.<sup>10</sup>

**Question 1:**

Do you agree with the list in Annexe A of the Draft CMA CA98 Guidance of existing CA98-related OFT guidance documents that the Transition Team proposes to put to the CMA Board for adoption?

- 1.15 The Transition Team considers that this approach ensures that the recently improved practices of the OFT are built upon, while also serving to reduce uncertainty and transition costs for parties and for the CMA.
- 1.16 The amendments made to the OFT CA98 Procedural Guidance which are the subject of this consultation are shown in underline and ~~strikethrough~~ text in the Draft CMA CA98 Guidance.

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<sup>9</sup> As those documents were published prior to the amendments introduced to the CA98 by the ERRA13, they will (if and when adopted), need to be read subject to the Draft CMA CA98 Guidance and to certain other 'global' changes introduced by the ERRA13 (for example, reading references to the OFT as referring to the CMA). See further Annexe A of the Draft CMA CA98 Guidance.

<sup>10</sup> For completeness, it is noted that Annexe A has been drafted (in common with the remainder of the Draft CMA CA98 Guidance) as assuming that the CMA has been established and that the existing OFT guidance documents listed have been adopted by the CMA Board. Notwithstanding this drafting, the list represents only the Transition Team's current proposal as to which documents will be put to the CMA Board for adoption. It (and any other references in the Draft CMA CA98 Guidance to OFT guidance documents having been adopted by the CMA) is therefore provisional and subject to change.

## Proposed extension of the Short-form Opinion trial

- 1.17 In conjunction with the preparation of the Draft CMA CA98 Guidance, the Transition Team has taken the opportunity provided by the establishment of the CMA to review the OFT's use of the Short-form Opinion (SfO) process.
- 1.18 The Transition Team proposes to recommend that the CMA Board adopt the SfO process on a trial basis, subject to certain improvements to that process. The Transition Team proposes to provide updated guidance in relation to the SfO process closer to, or shortly after, the date of transition to the CMA on 1 April 2014. The Transition Team proposes to recommend that the CMA:
- adopts as its starting point for the extended SfO trial process the current OFT guidance on how the OFT approaches SfOs (OFT Approach to SfOs)<sup>11</sup>
  - update the SfO process to reflect:
    - the institutional changes being introduced by the ERRA13, and
    - incremental improvements to policies and procedures which have been made by the OFT since the SfO process was introduced in 2010.
- 1.19 Further details on the proposed adoption of the SfO process trial by the CMA are set out in section 4 below.

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<sup>11</sup> Details of the OFT's approach to SfOs is available at: [www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions](http://www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions).

## 2 LEGAL FRAMEWORK

### Introduction

- 2.1 The 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.
- 2.2 In the UK, competition law is currently applied and enforced principally by the OFT and the CC.<sup>12</sup> From 1 April 2014, the CMA will take over competition law enforcement responsibilities from the OFT and CC and will have primary responsibility for investigating and enforcing suspected infringements of the CA98. In particular, the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 2.3 Under EU legislation,<sup>13</sup> as a 'designated national competition authority', when the CMA applies national competition law 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.
- 2.4 The CMA's powers of investigation and enforcement in respect of the prohibitions under Chapter I and Chapter II of the CA98, and Article 101 and Article 102 of the TFEU, are set out in Chapter III of Part 1 of the CA98.

### Amendments to the CMA's powers introduced by the ERRA13

- 2.5 The ERRA13 introduces a number of changes to the CMA's power to investigate and enforce the prohibitions under Chapter I and Chapter II of the CA98, and Article 101 and Article 102 of the TFEU. These amendments will

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<sup>12</sup> However, it is open to any person to bring a standalone action in the High Court for an injunction and/or damages as a result of an alleged infringement of competition law. In relation to the regulated sectors (being, as at the date of publication of this consultation, communications and postal services, gas, electricity, healthcare services, railways, air traffic and airport operation services, water and sewerage), the respective sectoral regulators have concurrent powers with the CMA to apply and enforce the legal provisions.

<sup>13</sup> Article 3 of Council Regulation (EC) No 1/2003 (OJ L1, 4.1.2003, p.1), as amended.

come into effect on 1 April 2014 and are principally implemented through amendments to relevant provisions of the CA98.

- 2.6 The amendments to the antitrust regime are set out in Chapter 3 of Part 4 of the ERRA13 which provide for strengthened powers and more robust decision-making in the enforcement of the antitrust prohibitions in the CA98, whilst providing appropriate procedural and legal safeguards to parties under investigation.
- 2.7 In particular, the ERRA13 makes the following changes to the antitrust enforcement regime:
- a. giving the CMA the power to interview individuals
  - b. replacing the current criminal sanctions for failing to comply with investigations with civil financial sanctions<sup>14</sup>
  - c. giving the CMA the express power to publish a notice of investigation, which may name a party or parties to an investigation
  - d. lowering the threshold for the CMA to impose interim measures
  - e. introducing new statutory factors to be taken into account in fixing a penalty<sup>15</sup>
  - f. expressly permitting the CMA to make rules on the following procedural matters:
    - o delegation of the CMA's functions

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<sup>14</sup> Section 40A of the CA98 provides that the CMA may impose a penalty on any person for failure to comply with any requirement imposed on a person under section 26, 26A, 27, 28 or 28A of the CA98 without reasonable excuse. It remains a criminal offence punishable by fine and/or imprisonment to provide false or misleading information to the CMA (section 44 of the CA98) or to destroy, falsify or conceal documents (section 43 of the CA98) (subject in each case to certain defences or conditions set out in 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] [currently in draft and being consulted on (CMA4)] available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>15</sup> In addition, the CMA is required to publish statutory guidance as to the appropriate amount of any penalty under Part III of the Act. In imposing any penalty, both the CMA and the CAT are required to have regard to this statutory guidance.

- oral hearings
  - procedural complaints, and
  - settlement of investigations under the CA98
- g. allowing the Competition Appeal Tribunal (CAT) to issue investigation warrants.

2.8 The Transition Team has reflected the changes summarised in points a – g of paragraph 2.7 above in the Draft CMA CA98 Rules and Draft CMA CA98 Guidance as appropriate. Section 3 of this consultation document outlines the changes in more detail, and explains how the antitrust provisions of the ERRA13 have been incorporated in the Draft CMA CA98 Rules and Draft CMA CA98 Guidance.



### 3 PROPOSED OPERATION OF ERRA13 ANTITRUST PROVISIONS

#### Introduction

- 3.1 The Draft CMA CA98 Guidance builds on the OFT's current approach to investigating suspected infringements of competition law under the CA98 (as described in the OFT CA98 Rules and OFT CA98 Procedural Guidance).
- 3.2 The Transition Team has also taken the opportunity afforded by the changes under the ERRA13 to review certain other aspects of the OFT CA98 Rules and OFT CA98 Procedural Guidance. As a result, the Transition Team proposes to implement certain clarifications to procedures and practices for investigating suspected infringements of competition law under the CA98.
- 3.3 This Chapter outlines how the Transition Team proposes to implement the changes introduced by the ERRA13 and associated clarifications to CA98 investigations and enforcement. The changes provided for in the Draft CMA CA98 Rules are set out in Section 3A, with the changes to the Draft CMA CA98 Guidance outlined in Section 3B.

#### Section 3A – summary of procedural changes in the Draft CMA CA98 Rules

- 3.4 The Transition Team has implemented the following provisions in the Draft CMA CA98 Rules to reflect the changes to the United Kingdom's antitrust regime introduced by Chapter 3 of Part 4 of the ERRA13:
- **Institutional changes** – the Draft CMA CA98 Rules reflect the transition of the competition law duties of the OFT and CC to the CMA by replacing references to the OFT and CC with references to the CMA as appropriate
  - **Delegation of functions and decision making**<sup>16</sup> – Rule 3 provides a formal basis for separation between the investigation of cases and

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<sup>16</sup> New paragraph 1A of Schedule 9 of the CA98 permits the CMA to make rules providing for the delegation of the CMA's functions to one or more persons who may be a member of the CMA Board, a member of the CMA panel, or a member of staff of the CMA. Paragraph 29 of Part 2 of Schedule 4 of the ERRA13 provides the CMA Board with the power to delegate any of its functions

decision making in respect of those cases as well as collective decision making in respect of an infringement decision

- **Power to require individuals to answer questions**<sup>17</sup> – sub-paragraph (3) of Rule 4 outlines the CMA’s approach to interviewing individuals in the context of any investigation or inspection
- **Oral hearings**<sup>18</sup> – sub-paragraphs (3) to (8) and (10) of Rule 6 introduce an enhanced oral hearing procedure including a formal requirement to offer an addressee of a notice the opportunity to attend an oral hearing<sup>19</sup>
- **Procedural complaints**<sup>20</sup> – Rule 8 sets out a formal complaints procedure, which includes providing a clear timeline for determination of a procedural complaint by the Procedural Officer, and
- **Settlement**<sup>21</sup> – Rule 9 provides for a formal settlement procedure, which includes a settlement-specific decision making procedure which means the same single relevant person may take the decision to settle as well as issue any Statement of Objections and decision.

3.5 Further detail on how the Transition Team envisages the changes described in paragraph 3.4 above will operate in practice is set out in the Draft CMA CA98 Guidance.

3.6 In addition to the amendments set out in paragraph 3.4 above, the Transition Team has taken the opportunity provided by the introduction of new

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to particular members of the Board, or to staff, or a committee. Paragraph 30 provides that the CMA Board’s power to delegate in relation to certain antitrust functions is subject to rules made under the CA98 (that is, the Draft CMA CA98 Rules).

<sup>17</sup> Section 39 of the ERR13 introduces a new section 26A of the CA98, providing the CMA with power to require individuals who have a ‘connection with a relevant undertaking...to answer questions with respect to any matter relevant to the investigation’.

<sup>18</sup> New paragraph 13A of Schedule 9 of the CA98 permits the CMA to make rules providing for the procedures for holding oral hearings as part of an investigation.

<sup>19</sup> This codifies the existing approach of the OFT.

<sup>20</sup> New paragraph 13B of Schedule 9 of the CA98 permits the CMA to make rules providing for the for dealing with procedural complaints during the course of an investigation, in particular, permitting the CMA to appoint a person who has not been involved in the investigation to consider a complaint.

<sup>21</sup> New paragraph 13C of Schedule 9 of the CA98 permits the CMA to make rules providing for an investigation settlement procedure to apply where, during an investigation, one or more persons accept that there has been an infringement of the CA98.

provisions under the ERA13 to review the OFT CA98 Rules more generally and to propose the following clarifications in the Draft CMA CA98 Rules:

- **Notice of proposed penalty** – the Draft CMA CA98 Rules include a new Rule 11, which is a formal requirement that the CMA provide any undertaking which it proposes to fine for breach of competition law under the CA98 with a draft penalty notice. This reflects the proposed approach of the CMA (which reflects the OFT’s current approach to draft penalty notices)
- **Amendment of notification requirements** – the Transition Team proposes to introduce minor clarifications to Rules 18 and 19 of the Draft CMA CA98 Rules:
  - sub-paragraph (2) of Rule 18 has been expanded to include members of government organisations in order to clarify that notification can be made to a broader body of organisations. This is intended to ensure that the CMA can accurately notify relevant parties to a case without being required to notify all parties individually (which is impractical in some cases), and
  - new sub-paragraph (1)(c) of Rule 19 distinguishes between (i) parties against whom a proposed infringement decision will be made (and who will receive a notice in accordance with the Draft CMA CA98 Rules), and (ii) other persons who are parties to agreements that infringe the Chapter I and/or Article 101 prohibitions, but who the CMA does not propose to make a finding that they have infringed the law. This provision introduces an exception to the requirement to address relevant notices to **each** party to an agreement or conduct by limiting the CMA’s obligation to provide such a notice only to those persons against whom a proposed infringement decision will be made. This will clarify that the CMA may enforce a breach of competition law against one or more – but not necessarily all – parties to an agreement. Based on the current practice of the OFT, the Transition Team envisages that the circumstances in which the CMA may wish to take enforcement action against one or some (but not all) parties to an agreement are likely to be relatively rare. This could, however, occur in respect of, for example, a vertical agreement with one

upstream party who has imposed infringing terms on a multiple number of downstream parties. The Transition Team notes that this proposal is consistent with the practice of the European Commission<sup>22</sup>

- **Identification of obsolete provisions** – the Transition Team proposes to exclude Rules 11, 15, 16 and 19 of the OFT CA98 Rules from the Draft CMA CA98 Rules because those Rules are obsolete.

**Question 2:**

Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate? Please give reasons for your views.

## **Section 3B – summary of procedural changes as set out in the Draft CMA CA98 Guidance**

### **Institutional changes**

- 3.7 The Draft CMA CA98 Guidance reflects the transition of the competition law duties of the OFT and CC to the CMA by replacing references to the OFT and CC with references to the CMA as appropriate. At the date of this consultation, the detailed organisational structure of the CMA and the specific job titles of its staff have not been finalised.<sup>23</sup> Where the Draft CMA CA98 Guidance refers to specific roles within the CMA, these references remain provisional pending the CMA Board's final decisions on these matters. For ease of comparison, the Draft CMA CA98 Guidance provisionally uses, in certain instances, the equivalent role/job title currently used by the OFT.

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<sup>22</sup> Cases F-2/36.623/36.820/37.275 – SEP et autres / Peugeot SA (2005), CaseCOMP/C-3/37.980 Souris - Topps (2004), and Case COMP/37.975 PO/Yamaha (2003).

<sup>23</sup> The final decision will be for the CMA Board, when it is constituted. A diagram showing in overview the currently proposed organisational structure of the CMA can be found in Towards the CMA (CMA1), published as part of the Tranche 1 CMA guidance consultation, available at: [www.gov.uk/cma](http://www.gov.uk/cma).

- 3.8 The Draft CMA CA98 Guidance also refers to the CAT as a judicial body authorised to issue warrants under the CA98.

### **Power to require individuals to answer questions**

- 3.9 The Transition Team recognises that compulsory interview powers are a significant new investigatory tool and will have personal and procedural implications for the individuals and undertakings concerned. The Transition Team proposes to adopt the approach outlined in paragraphs 6.18 – 6.28 of the Draft CMA CA98 Guidance when applying this new interview power.
- 3.10 The CMA will provide eligible individuals with a formal interview notice requiring them to answer questions and will also provide a notice to any undertaking with which the relevant individual has a ‘current connection’ before carrying out the interview. This ensures that companies are able to offer legal support to individuals who may be asked questions about them, and that they are aware that such questions are being asked. In limited circumstances, however (for example, in certain ‘dawn raid’ scenarios, where there is a time-critical element to an interview and a delay in conducting the interview may compromise the investigation), it may not be possible or appropriate to provide a notice prior to conducting the interview.
- 3.11 The Draft CMA CA98 Guidance also outlines how interviews will be conducted. The CMA will generally record or make contemporaneous notes of interviews and will normally provide the individual with an opportunity to confirm the accuracy of an interview transcript and make confidentiality representations. Individuals will also be able to request to have a legal adviser present in the interview and the CMA may wait a reasonable time for a legal adviser to arrive in the context of a ‘dawn raid’. The CMA will permit the individual to choose the legal adviser of the undertaking under investigation in most cases. However, the Draft CMA CA98 Guidance makes clear that, where there is a risk that the presence of an undertaking’s legal adviser in the interview may prejudice the investigation, the CMA may require the individual to choose an alternative legal adviser to represent their interests. The CMA will take a case-specific approach in determining whether the presence of the relevant undertaking’s legal adviser in an interview would risk prejudicing the investigation, having regard to those factors set out in paragraph 6.28 of the Draft CMA CA98 Guidance.

#### **Question 3:**

Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?

## **Civil enforcement of investigation powers**

- 3.12 Section 40 of the ERA13 introduces a new section 40A to the CA98, providing the CMA with the power to impose civil financial penalties on undertakings and individuals who, without reasonable excuse, fail to cooperate with the CMA's investigation. These civil enforcement powers replace the OFT's current criminal enforcement powers in relation to compliance with an investigation. The CMA's proposed approach to application of civil enforcement powers is the subject of a separate consultation and draft guidance document [Administrative Penalties: Statement of policy on the CMA's approach] (CMA4).<sup>24</sup>

## **Notice of investigation**

- 3.13 Section 42 of the ERA13 introduces a new section 25A of the CA98 providing the CMA with an express power to publish a notice of investigation. Section 25A(1) of the CA98 sets out the type of information that the notice of investigation may, in particular, contain. Section 25A(2) of the CA98 provides the CMA with an absolute privilege against defamation in respect of a notice of investigation that contains information of the type set out in section 25A(1).
- 3.14 The Transition Team proposes to adopt the approach outlined in paragraphs 5.7 – 5.10 of the Draft CMA CA98 Guidance to interpreting and applying this new notice of investigation power. In particular, the CMA will continue with the OFT's current practice of naming parties to an investigation only in appropriate circumstances. The CMA would also usually only include parties' names in the notice of investigation at a later stage of an investigation, typically if a Statement of Objections is issued.

## **New threshold for interim measures**

- 3.15 Section 43 of the ERA13 amends section 35(2)(a) of the CA98 by replacing the current test for the imposition of interim measures from 'preventing serious, irreparable damage', to 'preventing significant damage'. Paragraphs

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<sup>24</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

8.2 and 8.6 – 8.23 of the Draft CMA CA98 Guidance set out how the Transition Team envisages the CMA interpreting the revised threshold.

- 3.16 In determining when there is ‘significant damage’ to a person or group of persons, the Draft CMA CA98 Guidance provides that the CMA will have regard to the dynamics of competition in the market and the financial and practical impact of the allegedly damaging behaviour on the relevant person or persons. In contrast to the previous ‘serious, irreparable damage’ threshold, the CMA will not require that the damage would lead to a firm exiting the market. Rather, damage could be significant if it leads to financial, reputational or operational harm to a person or persons. The Draft CMA CA98 Guidance outlines the types of interim measures which may be imposed, including measures aimed at preserving the competitive position of parties in the market, for example through ensuring continued access to vital inputs or distribution channels, or requiring parties to adjust pricing levels to prevent, limit or remedy the significant damage identified.

### **Regard to new financial penalty provisions**

- 3.17 Section 44 of the ERA13 introduces a new section 36(7A) to the CA98, setting out statutory provisions to which the CMA must have regard when fixing the level of a penalty for infringement of the Chapter I or Chapter II prohibitions under the CA98, and/or Article 101 or 102 of the TFEU.<sup>25</sup>
- 3.18 The OFT’s current approach to fixing the level of a penalty complies with the statutory requirements introduced by section 44 of the ERA13. Consequently, the Transition Team proposes to adopt the OFT’s approach as outlined in the OFT guideline *OFT’s guidance as to the appropriate amount of a penalty* (OFT423)<sup>26</sup>.

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<sup>25</sup> These are: ‘...(a) the seriousness of the infringement concerned, and (b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from – (i) entering into agreements which infringe the Chapter I prohibition or the prohibition under Article 81(1), or (ii) engaging in conduct which infringes the Chapter II prohibition or the prohibition under Article 82.’

<sup>26</sup> OFT guideline ‘OFT’s guidance as to the appropriate amount of a penalty’ (OFT423) is available at: [www.of.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act](http://www.of.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act).

## Delegation of functions and decision-making

- 3.19 The OFT's decision making procedure for CA98 cases was subject to recent consultation and improvement.<sup>27</sup>
- 3.20 The OFT also introduced separation between the investigation of cases and decision making for those cases, with the introduction of collective decision making by a Case Decision Group following the issue of any Statement of Objections. The Case Decision Group makes infringement decisions, subject to formal adoption of that decision by the OFT Policy Committee. The Case Decision Group must contain three members of the OFT who are independent of the investigation.
- 3.21 The Transition Team proposes to adopt the OFT's current approach to separation of investigation and decision making, which is consistent with the separation and collective decision making requirements of Rule 3 of the Draft CMA CA98 Rules. The unitary nature of the CMA will enable any CMA Board, CMA Panel or CMA staff member to undertake an investigation or decision making role in relation to a case (noting the requirement that the Case Decision Group must be independent of the investigation). In addition, the current decision making procedure will be amended to state that, while the Case and Policy Committee of the CMA (whose remit will be similar to that of the OFT's Policy Committee) will be consulted by the Case Decision Group and will have the opportunity to provide its views on any legal, economic or policy issues arising out of that proposed decision, in contrast with current OFT practice, the Case Decision Group's decision will not need to be formally adopted by the Case and Policy Committee of the CMA (see further paragraphs 13.2, 13.3 and 13.5 of the Draft CMA CA98 Guidance).
- 3.22 Additionally, the Transition Team has taken the opportunity to build on and evolve the OFT's current internal procedures to provide senior level engagement and challenge of decisions taken by the Senior Responsible Officer (SRO).<sup>28</sup> The Draft CMA CA98 Guidance outlines that the SRO will consult two senior officials at key stages during the investigation up until the decision to issue a Statement of Objections (see paragraph 9.10 of the Draft

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<sup>27</sup> See OFT CA98 Procedural Guidance.

<sup>28</sup> This is part of overall enhancements made to decision-making structures for first phase decisions as set out in Towards the CMA (CMA1), available at: [www.gov.uk/cma](http://www.gov.uk/cma).



CMA CA98 Guidance). This will further improve the robustness and consistency of the CMA's decision-making for CA98 cases and will occur in addition to the internal scrutiny provided by the General Counsel, Chief Economic Adviser (or their representatives) and other senior CMA officials as appropriate (which is a continuation of the OFT's current practice – see paragraphs 9.4 to 9.9 of the Draft CMA CA98 Guidance).

### **Oral hearings**

- 3.23 As part of the OFT's recent consultation and improvement of its CA98 procedures, it introduced a formal oral hearing procedure (see Chapter 12 of the OFT CA98 Procedural Guidance).
- 3.24 The Transition Team proposes to adopt the OFT's current approach to oral hearings, subject to requiring expressly that the CMA offer all addressees of a Statement of Objections or Draft Penalty Statement the opportunity to attend an oral hearing, and providing that the Procedural Officer's report after the hearing will assess the fairness of the oral hearing procedure (see further paragraphs 12.11 to 12.21 and 12.36 of the Draft CMA CA98 Guidance). This is consistent with the provisions of Rule 6 of the Draft CMA CA98 Rules.

### **Procedural complaints**

- 3.25 The OFT introduced a Procedural Adjudicator trial on 21 March 2011 to determine a range of procedural issues in the course of an investigation under the CA98.<sup>29</sup> The Transition Team has reviewed the OFT's procedural complaints process and the decisions taken by the Procedural Adjudicator since the trial was introduced. The Procedural Adjudicator has provided the OFT with an efficient, swift and cost-effective means of determining procedural disputes in CA98 cases. Previously some parties to those investigations perceived that their only means of challenging an SRO's procedural decision was by way of full judicial review.

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<sup>29</sup> Further details of the Procedural Adjudicator role are available at: [www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial](http://www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial). On 16 October 2012, the OFT announced the further extension of the trial, until such time as the OFT's responsibility for competition law enforcement under the CA98 is transferred to the CMA.

- 3.26 Consequently, and in light of the general reforms introduced by the ERRA13 intended to increase further the robustness of decision making and procedural fairness of CA98 investigations and the overall timeliness of case management, the Transition Team proposes to build on the success of the OFT's Procedural Adjudicator trial in making the role permanent and clarifying the scope and role of the CMA's Procedural Officer, as outlined in Chapter 15 of the Draft CMA CA98 Guidance. The CMA Procedural Officer will be independent of the investigation, the case team and the Case Decision Group, and will have jurisdiction to consider certain procedural complaints which cannot be resolved in the first instance with the SRO (see further paragraph 15.4).
- 3.27 In order to ensure that the procedural complaints process is efficient, the Procedural Officer must make decisions within 20 working days of receipt of a complaint, subject to a maximum extension of 20 working days where there are special reasons to do so (see Rule 8(4) of the Draft CMA CA98 Rules and paragraphs 15.9 to 15.11 of the Draft CMA CA98 Guidance). In practice, the extension period is likely to be used only in limited circumstances, for example, where complaints require the Procedural Officer to deal with a large volume of data or materials (such as a complaint relating to disagreement over large volumes of redactions), 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.
- 3.28 Furthermore, in light of the recognised value of the role, the Procedural Officer will also consider disputes relating to requests for confidentiality in merger cases and market studies and investigations, which is the subject of separate consultation.<sup>30</sup> The concurrent regulators will also be able to refer procedural complaints to the CMA's Procedural Officer.<sup>31</sup>

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<sup>30</sup> The CMA's Procedural Officer can also deal with certain disputes in relation to merger cases and market studies and investigations although for Phase 1 merger cases, the procedure will only apply to disputes regarding the confidentiality of information that the CMA proposes including in published decisions (see further Chapter 5 of the CMA guideline [Transparency and disclosure: Statement of the CMA's policy and approach [currently in draft and being consulted on (CMA6)], available at: [www.gov.uk/cma](http://www.gov.uk/cma) and CMA guidelines [Mergers: guidance on the CMA's jurisdiction and procedure (CMA2)] and [Market studies and market investigations: supplemental guidance on

## Access to file process

- 3.29 The Transition Team has recently consulted on the CMA's proposed approach to transparency and disclosure, as outlined in the CMA draft guideline [Transparency and disclosure: Statement of the CMA's policy and approach] (CMA6).<sup>32</sup> The Transition Team has taken the opportunity provided by that consultation and the introduction of new provisions under section 42 of the ERRA13 to review the OFT's approach to providing access to the file in an antitrust investigation.
- 3.30 The access to file process is a resource intensive process both for parties and the OFT which can impact on the speed of an investigation. However, the use of 'confidentiality rings' and/or 'data rooms' can be an appropriate and useful means of streamlining the access to file process, thereby enhancing the efficiency of an investigation.<sup>33</sup> As a result of this review, the Draft CMA CA98 Guidance outlines certain clarifications to the OFT's current approach to the access to file process.
- 3.31 Paragraphs 11.19 to 11.26 outline the proposed approach to providing access to file, which builds on the OFT's current approach to access to file. The Draft CMA CA98 Guidance clarifies that access will not be provided to routine administrative documents (for example, correspondence setting up meetings or confirming timings for delivery of information). This is intended to reduce the number of extraneous documents made part of the access to file process, while still providing for access to information which is relevant to the CMA's assessment of a case (including inculpatory and exculpatory evidence).
- 3.32 In addition, the Draft CMA CA98 Guidance clarifies the CMA's approach to use of 'confidentiality rings' and 'data rooms' as part of the access to file

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the CMA's approach (CMA3)] [both currently in draft and being consulted on] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

<sup>31</sup> See further the CMA guideline [Regulated Industries: Guidance on concurrent application of competition law to regulated industries – currently in draft and being consulted on (CMA10con)] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

<sup>32</sup> See Chapter 5 of the CMA guideline [Transparency and disclosure: Statement of the CMA's policy and approach [currently in draft and being consulted on (CMA6)], available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>33</sup> 'Confidentiality rings' and/or 'data rooms' are primarily intended to be used during the access to file process where the parties agree, and in order to facilitate the efficient and proportionate disclosure of information identified as confidential to a limited number of advisers or other relevant individuals.

process. Where parties' agree to the use of 'confidentiality rings' or 'data rooms', those parties can be given access to key information or large volumes of information on the CMA's file through their economic advisers or legal advisers, or a limited group of individuals (see further paragraphs 11.24 to 11.25 of the Draft CMA CA98 Guidance). These clarifications are intended to increase the efficiency of investigations (by minimising potential disputes around identifying confidential information) and facilitate the use of 'confidentiality rings' or 'data rooms' where they are appropriate.

- 3.33 The CMA will only use 'confidentiality rings' or 'data rooms' where it is necessary to make disclosure of sensitive information for the purpose of facilitating the CMA's functions. They will be used when appropriate and where there appear to be identifiable benefits in doing so. At all times the CMA will treat confidential information in accordance with its duties. Paragraph 11.26 of the Draft CMA CA98 Guidance emphasises that any person to whom confidential information is disclosed (including through a 'confidentiality ring' or 'data room') must not make any onward disclosure of that information.

**Question 4:**

Do you agree with the proposed approach to use of 'confidentiality rings' and 'data rooms'?

**Settlement**

- 3.34 Responses to previous OFT consultations on procedures in competition cases<sup>34</sup> have called for greater transparency regarding settlements.<sup>35</sup> In

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<sup>34</sup> OFT1263con *A guide to the OFT's Competition Act 1998 investigation procedures, A consultation paper* August 2010 (available at: [www.of.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act/oft1263con](http://www.of.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act/oft1263con)) and OFT1263con2 *Review of the OFT's investigation procedures in competition cases* March 2012 (available at: [www.of.gov.uk/OFTwork/consultations/ca98-investigation-procedures/](http://www.of.gov.uk/OFTwork/consultations/ca98-investigation-procedures/)).

<sup>35</sup> In the context of CA98 enforcement cases, 'settlement' is the process where a business under investigation is prepared to admit that it has breached competition law and accepts that a streamlined administrative procedure will govern the remainder of the CMA's investigation of that business' conduct. In such cases, the OFT may impose a reduced penalty on the business.

light of these responses, the practical experience the OFT has now built up from past settlement cases<sup>36</sup> and the introduction of new provisions under section 42 of the ERRA13, the Transition Team considers that it would be appropriate to produce guidance on the CMA's future policy and procedures for settlements in cases under the Act.

- 3.35 Settlement allows the CMA to achieve a streamlined administrative procedure for the remainder of the investigation resulting in earlier adoption of any infringement decision and/or resource savings. Resources saved through settlement allow the CMA to maximise the impact of its work for the benefit of consumers. The Transition Team also considers that businesses which settle can also benefit from the time and resource savings of the streamlined administrative procedure as well as increased certainty regarding their exposure to the final penalty.
- 3.36 Whilst recognising the advantages of settlement, it is also vital to ensure that the proposed settlement policy coexists effectively with the CMA's leniency policy, and more broadly deterrence and the effectiveness of the competition regime overall. In this latter respect, settlement can impact positively on those who have suffered loss as a result of any infringement decision. In some cases where any infringement decision is issued earlier than would have been the case, settlement can facilitate follow-on damages actions earlier than otherwise would be the case, potentially creating an additional deterrent effect.
- 3.37 Chapter 14 of the Draft CMA CA98 Guidance sets out the proposed approach to settlement, including various measures intended to improve the speed of the investigation through the use of the settlement. The CMA retains full discretion in determining which cases are appropriate for settlement and in particular the Draft CMA CA98 Guidance sets out that the

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Settlement is distinct from other enforcement tools such as the acceptance of commitments by the OFT and the leniency policy.

<sup>36</sup> 'Exchange of Information on future fees by certain independent schools, OFT Decision CA98/05/2006, Investigation into alleged price fixing of airline passenger fuel surcharges for long haul passenger flights, OFT Decision CE/7691-06, *Dairy*, OFT Decision CA98/03/2011, *Loan Products to professional services*, OFT Decision CE8950/08, Reckitt Benckiser, OFT Decision CE8931/08, *Tobacco*, OFT Decision CA98/01/2010, all available at: [www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions](http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions). The decisions in relation to the Distribution of Mercedes Benz Commercial Vehicles case has not yet been published – see press release [www.of.gov.uk/news-and-updates/press/2013/30-13](http://www.of.gov.uk/news-and-updates/press/2013/30-13).

CMA will only settle cases where it considers that the evidential standard for giving notice of its proposed infringement decision is met (see further paragraphs 14.4 to 14.6 of the Draft CMA CA98 Guidance).

- 3.38 Furthermore the Draft CMA CA98 Guidance outlines minimum requirements for settlement, including that the settling business must admit that it has breached competition law, cease the infringing behaviour, confirm it accepts that there will be a streamlined procedure for the remainder of the investigation and confirm it will pay a maximum penalty amount. The Transition Team has considered, but rejected, the option of proceeding with settlement discussions without specifying a maximum penalty and instead referring to the settlement discount on an undisclosed penalty (which occurs for leniency applicants). The decision to reject the approach of not disclosing the proposed maximum penalty was reached primarily because failing to disclose the proposed maximum penalty would undermine some of the administrative benefits of settlement, by delaying the opportunity for the settling businesses to provide representations on a draft penalty statement until after settlement has occurred.
- 3.39 The proposed settlement procedure is set out at paragraphs 14.10 to 14.23 of the Draft CMA CA98 Guidance. In particular, the Transition Team is proposing to continue the OFT's current decision making procedures for settlements whereby the SRO generally oversees settlement discussions and decides whether to settle although, the Case and Policy Committee (currently the OFT's Policy Committee) must grant its approval for the SRO to do so. The SRO will also decide whether to issue an infringement decision, which will be formally adopted by the Case and Policy Committee. This specific procedure is allowed for in the Draft CMA CA98 Rules (Rules 9(3) and 9(4)). As part of the streamlined procedure a settling business will normally be expected to confirm that it accepts that no Case Decision Group will be appointed. To achieve the efficiencies resulting from the streamlined procedure in settlement any immunity applicant (who will not be invited to settle) will also be asked to confirm as part of the leniency process that they accept that a Case Decision Group will not be appointed where an investigation is settled. This procedure also ensures that the Case Decision Group remains impartial in respect of any failed settlement discussions. As a

consequence, notes of settlement discussions will be put on the CMA's file but will not be disclosed to other businesses involved in the investigation<sup>37</sup> or, if the discussions break down and no settlement is agreed, the Case Decision Group.<sup>38</sup>

- 3.40 Settlement discounts will be capped at a level of up to 20% for settlement prior to issue of a Statement of Objections and up to 10% for settlement after a Statement of Objections has been issued (see further paragraph 14.27 of the Draft CMA CA98 Guidance). This is intended to maintain a meaningful distinction between settlement and leniency, by preserving incentives for parties to seek leniency where appropriate (and in particular Type C leniency where discounts of up to 50% can be obtained). Moreover, given that settlement and leniency discounts can be granted cumulatively, it is important that an accumulation of Type C leniency and settlement discounts does not risk reaching penalty discount levels that are close to or equate to immunity under the CMA's leniency policy.

**Question 5:**

Is the proposed settlement procedure clear, and do you have any views on it?

**Question 6:**

Do you agree that settlement discussions should include the proposed maximum penalty the settling business should pay or would it be sufficient if the CMA only set out the settlement discount on an undisclosed penalty?

**Question 7:**

Do you agree that the proposed caps for settlement discounts at up to 20% for pre-SO settlement and up to 10% for post-SO settlement are appropriate?

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<sup>37</sup> See disclosure provisions in Part 9 of the EA02.

<sup>38</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 because settlement discussions will pause the case timetable.

## Transitional arrangements

3.41 In order to provide clarity and certainty to affected parties:

- the procedural rules set out in the Draft CMA CA98 Rules will take effect from the date on which the final CMA CA98 Rules come into force
- the approach outlined in the Draft CMA CA98 Guidance will take effect from the date on which the final CMA CA98 Rules come into force and final guidance is published, and
- the administrative penalties powers under section 40A of the CA98 (introduced by section 40 of the ERA13) will apply to CA98 investigations that are ongoing as at (or which commence on or after) 1 April 2014 but only where the relevant investigatory requirements referred to in section 40A(1) of the CA98 have been imposed after that date.<sup>39</sup>

3.42 The changes introduced by the ERA13, as they affect investigations under the CA98 and as outlined in this guidance, will apply to all ongoing and future cases from 1 April 2014.<sup>40</sup>

3.43 Whilst the policy of these transitional arrangements form part of the Transition Team's CMA Guidance consultations, the Secretary of State is responsible for incorporating the transitional arrangements in law where necessary. The legislative drafting will reflect the proposed transitional arrangements as set out in paragraph 3.41 to 3.42 above. As a general principle, it is proposed that all CMA powers and/or procedures will come into force as of 1 April 2014 and will be applied prospectively.

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<sup>39</sup> For further guidance on the CMA's proposed approach to administrative penalties, see [Administrative Penalties: Statement of policy on the CMA's approach] (CMA4), available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>40</sup> In particular, the enhanced or amended investigation and enforcement powers provided by sections 25A, 26A, 28, 28A, 30A, 35, 36, 38 and 40A will apply to all ongoing and future cases from 1 April 2014.



**Question 8:**

Do you have any comments on any of the other amendments proposed for the Draft CMA CA98 Guidance?

**Question 9:**

Do you agree with the proposed transitional arrangements, as set out in paragraphs 3.41 to 3.43 above?

## 4 PROPOSED ADOPTION OF THE SHORT-FORM OPINION PROCESS

### Introduction of the SfO process

- 4.1 In 2010, the OFT reviewed its approach to opinions under the *Modernisation* guideline (OFT442) in response to concerns raised by business and other stakeholders that some forms of beneficial collaboration were not proceeding for fear of infringing competition law.
- 4.2 Following this review, the OFT introduced a SfO process on a trial basis. SfOs were designed to provide guidance, within a prompt timetable, to businesses and their advisers on the application of competition law to prospective agreements between competitors raising novel or unresolved questions, the clarification of which would benefit a wider audience. The OFT's trial SfO process was only available for a limited number of cases per year in order to avoid a return to a notification regime.<sup>41</sup>

### Proposed adoption and extension of the SfO process

- 4.3 The Transition Team has reviewed the OFT's SfO trial as a part of the transition process and considers that SfOs should continue to be offered as a part of the CMA's practical guidance and advocacy work. The Transition Team also considers that SfOs assist the future development of competition law and policy in the UK.
- 4.4 The Transition Team has therefore proposed that the CMA Board (once established) should adopt the OFT's SfO process on a trial basis, subject to certain modifications described below, designed to extend the use of the tool and clarify the process of requesting an SfO. There is no proposed end date for the SfO trial. However, the CMA will review the SfO trial as appropriate.

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<sup>41</sup> On 1 May 2004, EC Regulation 1/2003 (the Modernisation Regulation) came into force requiring National Competition Authorities of the European Union Member States to apply and enforce Article 101 and Article 102 of the TFEU when national competition law is applied to agreements which may affect trade between Member States or to abuse prohibited by Article 102. The Modernisation Regulation also requires businesses to self-assess whether an agreement or any behaviour is compatible with Article 101 and Article 102 of the TFEU, and Chapter I and Chapter II of the CA98, rather than notify the agreements or behaviour to the National Competition Authority for clearance or exemption.

## Summary of proposed changes to the SfO process

- 4.5 The Transition Team proposes to clarify that businesses and their advisers as well as government policy advisers are able to submit a request for an SfO, subject to their agreeing to comply with the CMA's procedural requirements. The Transition Team also proposes to extend the scope of the SfO process to cover not only prospective horizontal agreements between competitors but also prospective vertical agreements between parties who do not compete with each other.
- 4.6 With regard to procedural enhancements, the Transition Team proposes that the CMA Board (once established) should adopt revised procedures in order to provide businesses and their advisers with greater clarity on the process for requesting and issuing an SfO. These will include setting out clearly the process of submitting a request for an SfO, how the CMA will prepare, issue and publish an SfO, and how the CMA will treat information that it receives in the context of SfO enquiries or requests.
- 4.7 If the Transition Team's proposal is accepted by the CMA Board, the revised or new procedures and practices will be set out in further detail closer to, or shortly after, 1 April 2014.

### **Question 10:**

Do you agree with the Transition Team's proposal to extend the availability of SfOs to prospective vertical agreements in addition to prospective horizontal agreements? Please give reasons for your view.

## 5 QUESTIONS FOR CONSULTATION

**Question 1:** Do you agree with the list in Annexe A of the Draft CMA CA98 Guidance of existing CA98-related OFT guidance documents that the Transition Team proposes to put to the CMA Board for adoption?

**Question 2:** Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate? Please give reasons for your views.

**Question 3:** Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?

**Question 4:** Do you agree with the proposed approach to use of 'confidentiality rings' and 'data rooms'?

**Question 5:** Is the proposed settlement procedure clear, and do you have any views on it?

**Question 6:** Do you agree that settlement discussions should include the proposed maximum penalty the settling business should pay or would it be sufficient if the CMA only set out the settlement discount on an undisclosed penalty?

**Question 7:** Do you agree that the proposed caps for settlement discounts at up to 20% for pre-SO settlement and up to 10% for post-SO settlement are appropriate?

**Question 8:** Do you have any comments on any of the other amendments proposed for the Draft CMA CA98 Guidance?

**Question 9:** Do you agree with the proposed transitional arrangements, as set out in paragraphs 3.41 to 3.43 above?

**Question 10:** Do you agree with the Transition Team's proposal to extend the availability of SfOs to prospective vertical agreements in addition to prospective horizontal agreements? Please give reasons for your view.

## ANNEXE(S)

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## A. CONSULTATION CRITERIA

[The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focussing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before;
- departments will need to give more thought to how they engage with and consult with those who are affected;
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy; and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

The full Cabinet Office Consultation Principles can be found on the Cabinet Office website at: [www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance](http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance)

This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

## **B. DRAFT CMA CA98 RULES**

## Competition and Markets Authority Competition Act 1998 Rules

The Competition and Markets Authority, in exercise of the powers conferred upon it by sections 51(1) and 75A(1) of and Schedule 9 to the Competition Act 1998<sup>42</sup>, makes the following Rules:

### Interpretation

1.—(1) In these Rules—

“the Act” means the Competition Act 1998;

“CMA” means the Competition and Markets Authority;

“confidential information” means—

(a) commercial information whose disclosure the CMA or a regulator thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or

(b) information relating to the private affairs of an individual whose disclosure the CMA or a regulator thinks might significantly harm the individual’s interests, or

(c) information whose disclosure the CMA or a regulator thinks is contrary to the public interest;

“infringement decision” means a decision that one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) and the prohibition in Article 102 has been infringed;

“internal document” means —

(a) a document produced by, or exchanged between, the CMA, a regulator or another public authority and which has not been produced for the purpose of public disclosure by the CMA, a regulator or another public authority, or

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<sup>42</sup> 1998 c. 41.



(b) a document produced by, or exchanged between, any person from time to time retained under a contract for services by the CMA, a regulator or another public authority and the CMA, a regulator or another public authority and which has not been produced for the purpose of public disclosure:

“notice” means a notice that the CMA is required to give to a person under any of –

(a) Rule 5,

(b) Rule 11,

(c) Rule 15(3), or

(d) Rule 16(1);

“oral hearing” means a hearing in which a relevant party may make oral representations on any matter referred to in a notice;

“Procedural Officer” means any relevant person who is required to exercise any function under Rules 6(5) and 8(1);

“public authority” includes –

(a) in the United Kingdom, a court or tribunal and any person exercising functions of a public nature, and

(b) in any country or territory outside the United Kingdom, a court or tribunal and any person or body which appears to the CMA or a regulator to be exercising functions of a public nature;

“relevant party” means a person to whom a notice is required to be given;

“relevant person” means any of the following categories of person who has been authorised by the CMA or a regulator’s Board to exercise any function under these Rules –

(a) one or more members of the CMA Board or a regulator’s Board,

(b) one or more members of the CMA panel or a regulator’s Panel,

(c) one or more members of staff of the CMA or a regulator,

(d) jointly by one or more of the persons mentioned in paragraph

(a), (b) or (c).

(2) In these Rules, any reference to:

(a) a numbered Rule is to the Rule in these Rules which is numbered;

(b) a numbered paragraph or sub-paragraph is to the paragraph or sub-paragraph which is numbered in the Rule where the reference occurs.

(3) Except where these Rules otherwise provide, expressions used in the Act which are also used in these Rules have the same meaning in these Rules as they have in section 59 of the Act.

(4) Any reference in these Rules to the CMA means the CMA or a regulator, except in –

(a) this Rule,

(b) Rule 20.

### **Application of the Rules**

**2.—**(1) Subject to paragraphs (2) and (3), these Rules apply when the CMA takes investigation or enforcement action under the Act in relation to any one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) and the prohibition in Article 102.

(2) Rule 15 and Rule 17 apply only when the CMA takes investigation or enforcement action in relation to the Chapter I prohibition or the Chapter II prohibition.

(3) Rule 16 applies only when the CMA takes investigation or enforcement action in relation to the prohibition in Article 101(1).

### **Delegation of functions**

3. – (1) There is to be a relevant person who oversees the investigation under the Act and who is to decide whether notice of a proposed infringement decision under Rule 5 is given.

(2) Subject to Rule 9(4) there is to be a separate relevant person from the relevant person referred to in paragraph (1) who decides whether any supplementary notice of a proposed infringement decision under Rule 5 is given, whether to make an infringement decision and whether to impose a penalty in accordance with Rules 10 and 11.

(3) For the purposes of paragraph (2) the relevant person must comprise at least two persons.

### **Legal advice during investigations and inspections**

4.—(1) An officer must grant a request of the occupier of premises entered by the officer to allow a reasonable time for the occupier's legal adviser to arrive at the premises before the investigation continues, if the officer –

(a) considers it reasonable in the circumstances to do so and

(b) is satisfied that such conditions as he considers it appropriate to impose in granting the occupier's request are, or will be, complied with.

(2) A person required by the CMA under section 26(6)(a)(ii) or (b) or section 65E(6)(a)(ii) or (b) of the Act to provide an oral explanation of a document or orally confirm the location of a document may be accompanied by a legal adviser.

(3) An officer must grant a request of an individual required under section 26A to answer questions to allow a reasonable time for a legal adviser to arrive before starting the interview, if the officer –

(a) considers it reasonable in the circumstances to do so, and

(b) is satisfied that such conditions as he considers it appropriate to impose in granting the individual's request are, or will be, complied with.

(4) For the purposes of paragraphs (1) and (3), “a reasonable time” means such period of time as the officer considers is reasonable in the circumstances.

(5) In this Rule, “officer” means an investigating officer within the meaning of section 27(1) or 65F(1) of the Act or a named officer of the CMA authorised by a warrant issued under section 28, 28A, 65G or 65H of the Act.

### **Statement of objections**

**5.—**(1) If the CMA proposes to make an infringement decision—

(a) the CMA must give notice of this stating which one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) and the prohibition in Article 102 the CMA considers has been infringed; and

(b) the provisions of Rule 6 are to apply.

(2) Subject to Rules 18 and 19, the notice referred to in paragraph (1)(a) must be given to each person who the CMA considers is a party to the agreement, or is engaged in conduct, which the CMA considers infringes one or more of the prohibitions mentioned in paragraph (1)(a).

### **Notices, access to file and representations**

**6.—**(1) A notice under Rule 5 must state:

(a) the facts on which the CMA relies, the objections raised by the CMA, the action the CMA proposes and its reasons for the proposed action;

(b) the period within which a relevant party may make written representations to the CMA identifying the information contained in the notice which that relevant party considers the CMA should treat as confidential information and explaining why he considers the CMA should treat such information as confidential information; and

(c) the period within which a relevant party may make written representations to the CMA on the matters referred to in the notice.

(2) The CMA must give a relevant party a reasonable opportunity to inspect the documents in the CMA’s file that relate to the matters referred to in a notice given to that relevant party, except that the CMA may withhold any document—

(a) to the extent that it contains confidential information; or

(b) which is an internal document.

(3) The CMA must offer a relevant party the opportunity to attend an oral hearing in order to make oral representations to the CMA on any matter referred to in a notice.

(4) Where the relevant party confirms that it wishes to attend an oral hearing, the CMA must give that relevant party a reasonable opportunity to attend an oral hearing to make such oral representations.

(5) The oral hearing is to be chaired by a relevant person who may be a Procedural Officer.

(6) The chairperson must not have been otherwise involved in the investigation in respect of which notice has been given.

(7) The chairperson is to prepare a report following the hearing and give that report to the persons set out in Rule 3(2) who are to decide whether to make an infringement decision.

(8) The report must:

(a) contain an assessment of the fairness of the procedure followed in holding the oral hearing; and

(b) identify any other concerns about the fairness of the procedure followed in the investigation which have been brought to the attention of the person preparing the report in that person's role as the chairperson of the oral hearing;

(9) Where, upon the expiry of the period mentioned in paragraph (1)(c), no written representations on the matters referred to in a notice given to a relevant party have been made by that relevant party, the CMA may proceed with the case in the absence of such written representations.

(10) Where the CMA has given a relevant party a reasonable opportunity to make oral representations under paragraph (3) but no oral representations have been made, the CMA may proceed with the case in the absence of such representations.

(11) Paragraph (1)(b) does not restrict the application of Rule 7(1) and (2).

## **Confidential information**

7.—(1) Where a person who has supplied information to the CMA has made representations to the CMA identifying such information as being information that the CMA should treat as confidential information and the CMA proposes to disclose such information under these Rules, the CMA must take all reasonable steps to—

(a) inform that person of the CMA's proposed action; and

(b) give that person a reasonable opportunity to make representations to the CMA on the CMA's proposed action.

(2) The CMA may at any time request a person who has supplied information to the CMA to make written representations to the CMA in respect of the information supplied—

(a) identifying the information which that person considers the CMA should treat as confidential information; or

(b) explaining why that person considers the CMA should treat the information as confidential information.

(3) If a person who has supplied information to the CMA makes written representations to the CMA in respect of the information supplied identifying the information which that person considers the CMA should treat as confidential information or explaining why he considers the CMA should treat the information as confidential information, whether or not such representations are made under this Rule, the CMA may seek from that person such further clarification as the CMA considers is needed.

(4) If the CMA requests any person to make representations or to give further clarification under this Rule, the CMA may specify the period within which such representations or further clarification should be made.

(5) For the purposes of this Rule, where, in the CMA's opinion, information supplied to the CMA by any person relates to or originates from another person, that other person may be treated as a person who has supplied the information to the CMA.

## **Procedural complaints**

**8.** – (1) Complaints about the procedures followed during the course of an investigation under the Act may be made to a Procedural Officer. The Procedural Officer is to consider a significant procedural complaint where that complaint has not been determined or settled by the relevant person overseeing the investigation to the satisfaction of a complainant.

(2) The Procedural Officer must not be otherwise involved in the investigation in question.

(3) The Procedural Officer must give notice of the decision in respect of the complaint within 20 working days.

(4) The Procedural Officer may extend the period to give notice of the decision in respect of the complaint by no more than 20 working days if the Procedural Officer considers that there are special reasons why the notice of the decision in respect of the complaint cannot be given within the period under paragraph (3).

## **Settlement**

**9.** – (1) The CMA may decide to follow a settlement procedure in respect of an investigation under the Act where a party to that investigation:

(a) admits that it has been a party to an agreement or has been engaged in conduct which infringes one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) and the prohibition in Article 102 in relation to that investigation, and

(b) agrees to an expedited administrative procedure for the remainder of the investigation.

(2) A single relevant person may only take the decision to follow a settlement procedure in respect of an investigation pursuant to paragraph (1) if a separate relevant person approves that decision.

(3) For the purposes of paragraph (2) the separate relevant person must comprise at least two persons.

(4) Where a single relevant person takes the decision to follow a settlement procedure pursuant to paragraph (1) that relevant person may also take the decision to make an infringement decision in respect of that investigation.

(5) Where the CMA decides to follow a settlement procedure pursuant to paragraph (1) the CMA must comply with Rule 5 to the extent that it has not already been complied with and Rule 10.

(6) Where the CMA decides to follow a settlement procedure pursuant to paragraph (1), the CMA may elect to impose a penalty on that party and the provisions of Rule 12(2)(a) and 12(4) are to apply.

### **Notice of decision**

**10.—**(1) Where the CMA has made an infringement decision, it must without delay

—

(a) subject to Rules 18 and 19, give notice of the infringement decision to each person to whom the CMA considers is or was a party to the agreement, or is or was engaged in conduct, stating the facts on which the CMA bases the infringement decision and the CMA's reasons for making the infringement decision; and

(b) publish the infringement decision.

(2) The CMA may delay publication of the infringement decision under paragraph (1)(b) where the CMA considers that such publication may prejudice a criminal investigation or prosecution pursuant to section 192 of the Enterprise Act 2002 relating to the same or similar agreement or conduct.

(3) Where the CMA has made a decision that there are no grounds for action in respect of—

(a) an agreement either because the conditions of the Chapter I prohibition are not met or because the agreement is excluded from the Chapter I prohibition or satisfies the conditions in section 9(1) of the Act; or

(b) an agreement either because the conditions of the prohibition in Article 101(1) are not met or because the agreement satisfies the conditions of Article 101(3); or



(c) conduct because the conditions of the Chapter II prohibition or the prohibition in Article 102 are not met;

the CMA must without delay, subject to Rules 18 and 19, give notice of the decision, to any person whom it has undertaken to inform of the decision and to any person in respect of whom the CMA or an officer has issued any notice under Rule 5, stating the facts on which the CMA bases the decision and the CMA's reasons for making the decision.

(4) Where the CMA is required to give notice of a decision under paragraph (3), it may publish the decision.

(5) In this Rule, "officer" has the same meaning as in Rule 4.

### **Notice of proposed penalty**

**11.—**(1) If the CMA proposes to require an undertaking to pay a penalty under section 36 of the Act —

(a) the CMA must give notice of this stating which one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) and the prohibition in Article 102 the CMA considers has been infringed; and

(b) the provisions of Rule 6 are to apply except for paragraph (2) of Rule 6.

(2) Subject to Rules 18 and 19, the notice in paragraph (1)(a) must be given to each person who the CMA considers is or was a party to the agreement, or is or was engaged in conduct, which the CMA considers infringes one or more of the prohibitions in the notice.

### **Directions and penalties**

**12.—**(1) Where the CMA gives a direction to a person under section 32 or 33 of the Act, it must at the same time inform that person in writing of the facts on which it bases the direction and its reasons for giving the direction.

(2) If the CMA requires an undertaking to pay a penalty under section 36 of the Act —

(a) the CMA must at the same time inform that undertaking in writing of the facts on which it bases the penalty and its reasons for requiring that undertaking to pay the penalty; and

(b) the provisions of Rules 6 and 11 are to apply to the extent that they have not already been applied.

(3) The CMA must publish directions given under section 32 or 33 of the Act.

(4) The CMA must publish penalties imposed under section 36 of the Act.

### **Interim measures**

**13.**—(1) Subject to paragraph (2), if the CMA proposes to give a direction under section 35 of the Act, it must give each person to whom it proposes to give the direction a reasonable opportunity to inspect the documents in the CMA's file relating to the proposed direction.

(2) The CMA may withhold any document—

(a) to the extent that it contains confidential information; or

(b) which is an internal document.

(3) When giving a person an opportunity to make representations under section 35(3)(b) of the Act, the CMA must specify the period within which that person may make such representations.

(4) Where the CMA gives a direction to a person under section 35 of the Act, it must at the same time inform that person in writing of the facts on which it bases the direction and its reasons for giving the direction, and it must publish the direction.

### **Election to apply a relevant prohibition to a case**

**14.**—(1) The CMA may, at any time prior to making an infringement decision, elect to apply to a case one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) and the prohibition in Article 102 (whether or not any such election has previously been made by the CMA in that case).

(2) The CMA must make an election pursuant to paragraph (1) before it may make any decision under paragraph (3).

(3) If the CMA proposes—

(a) to make a decision that one or both of the prohibition in Article 101(1) and the prohibition in Article 102 has been infringed, but in any notice given under Rule 5 the CMA has stated that it considers that only one or both of the Chapter I prohibition and the Chapter II prohibition has been infringed; or

(b) to make a decision that one or both of the Chapter I prohibition and the Chapter II prohibition has been infringed but in any notice given under Rule 5 the CMA has stated that it considers that only one or both of the prohibition in Article 101(1) and the prohibition in Article 102 has been infringed,

the provisions of Rules 5 and 6 are to apply to the extent that they have not already been applied.

(4) In paragraph (3), “any notice given under Rule 5” means any notice given under Rule 5 that has not been superseded by a subsequent notice given under Rule 5.

### **Cancellation, etc. of a parallel exemption**

**15.—**(1) The circumstances in which the CMA may exercise the powers in section 10(5)(a), 10(5)(c) and 10(5)(d) of the Act are where it finds that an agreement which benefits from a parallel exemption nevertheless has effects in the United Kingdom, or a part of it, which are incompatible with the conditions laid down in section 9(1) of the Act.

(2) The circumstances in which the CMA may exercise the powers in section 10(5)(b) of the Act are where, having previously exercised the powers in section 10(5)(a) or 10(5)(c) of the Act in respect of an agreement, the CMA finds that—

(a) as a result of a material change in circumstances since the exercise of those powers, any condition or obligation it has imposed in exercise of those powers is no longer necessary to ensure that the effects of the agreement in the United Kingdom, or a part of it, are compatible with the conditions laid down in section 9(1) of the Act; or

(b) as a result of a material change in circumstances since the exercise of those powers, or as a result of information supplied in response to a notice given under paragraph (3) being incomplete, false or misleading in a material particular, the agreement has effects in the United Kingdom, or a part of it, which are incompatible with the conditions laid down in section 9(1) of the Act.

(3) Subject to Rules 18 and 19, if (other than in the circumstances referred to in paragraph (2)(a)) the CMA proposes to exercise any of the powers in section 10(5) of the Act it shall give notice to each person who it considers is a party to the agreement and the provisions of Rule 6 are to apply.

(4) Subject to Rules 18 and 19, if the CMA proposes to exercise any of the powers in section 10(5)(b) of the Act in the circumstances referred to in paragraph (2)(a) it must consult each person who it considers is a party to the agreement.

(5) If the CMA proposes to exercise any of the powers in section 10(5) of the Act it may consult the public.

(6) If the CMA has made a decision in exercise of any of its powers in section 10(5) of the Act it must—

(a) subject to Rules 18 and 19, give notice of the decision to each person who the CMA considers is a party to the agreement, stating the facts on which it bases the decision and its reasons for the decision; and

(b) publish the decision.

### **Withdrawal of the benefit of a Commission Regulation pursuant to Article 29(2) of the EC Competition Regulation**

**16.—**(1) Subject to Rules 18 and 19, if the CMA proposes, in any particular case, to withdraw in the whole or any part of the United Kingdom the benefit of a Commission Regulation pursuant to Article 29(2) of the EC Competition Regulation, it must give notice to each person who the CMA considers is a party to the agreement, and the provisions of Rule 6 are to apply.

(2) If the CMA proposes to exercise its powers under Article 29(2) of the EC Competition Regulation it may consult the public.

(3) If the CMA has made a decision withdrawing in the whole or any part of the United Kingdom the benefit of a Commission Regulation pursuant to Article 29(2) of the EC Competition Regulation it must—

(a) subject to Rules 18 and 19, give notice of the decision to each person who the CMA considers is a party to the agreement, stating the facts on which it bases the decision and its reasons for the decision; and

(b) publish the decision.

### **Withdrawal of an exclusion**

**17.—**(1) Subject to Rules 18 and 19, if the CMA proposes to give a direction under paragraph 4 of Schedule 1 to the Act or paragraph 9 of Schedule 3 to the Act, or in accordance with an order made under section 50 of the Act, to the effect that an exclusion made by a provision specified in paragraph (2) does not apply to an agreement, it must consult each person who it considers is a party to the agreement.

(2) The provisions specified for the purposes of paragraph (1) are—

(a) paragraph 1 of Schedule 1 to the Act;

(b) paragraph 9(1) of Schedule 3 to the Act; and

(c) an order made under section 50 of the Act.

(3) The period specified for the purposes of paragraph 4(4) of Schedule 1 to the Act and paragraph 9(6) of Schedule 3 to the Act is ten working days starting with the date the notice is given.

(4) If the CMA has given a direction referred to in paragraph (1), it must publish the direction.

### **Associations of undertakings and government organisations**

**18.—**(1) Where a Rule requires the CMA to give notice of any matter to an association of undertakings the CMA is to give such notice to the director, secretary, manager or other similar officer of the association on its behalf.

(2) Where a Rule requires the CMA to give notice of any matter to each of more than twenty-

- a) members of an association of undertakings;
- b) members of a government organisation

the CMA may, instead of giving such notice to any such member, give such notice to the director, secretary, manager or other similar officer of the association or government organisation on that member's behalf.

### **Time limits and giving notice**

**19.—**(1) Where—

- (a) the CMA has taken all reasonable steps to give notice to the persons mentioned in paragraph (3) but has been unable to give such notice or in the CMA's opinion there is doubt that it has been able to give such notice;
- (b) there are no reasonable steps that can be taken by the CMA to give notice to the persons mentioned in paragraph (3), or
- (c) there are persons who are party to the agreement which the CMA considers infringes the Chapter I prohibition and/or the prohibition in Article 101(1) but the CMA does not propose to make or has not made an infringement decision against all those persons, in respect of those persons against whom it does not propose to make or has not made an infringement decision,

the CMA may, instead, take all the steps mentioned in paragraph (2).

(2) The steps mentioned for the purposes of paragraph (1) are the following—

- (a) publish a summary of the notice by means of entry in the register maintained by the CMA under Rule 20; and
- (b) cause a reference to the summary of the notice published in that register to be published in—
  - (i) the London Gazette, the Edinburgh Gazette and the Belfast Gazette;

- (ii) at least one national daily newspaper; and
  - (iii) if there is in circulation an appropriate trade journal which is published at intervals not exceeding one month, in such trade journal.
- (3) The persons mentioned for the purposes of paragraph (1) are the following—
- (a) a person under Rule 5, 10(1)(a), 10(3), 15(3), 15(6)(a), 16(1) or 16(3)(a);
  - (b) a person in order to consult him under Rule 15(4) or 17(1).
- (4) Except where paragraph (1) is applied, where these Rules allow or require notice to be given to a person, such notice is to be treated as having been given on the date on which that person receives it.
- (5) Where paragraph (1) is applied, the notice is to be treated as having been given on the date of its publication in accordance with paragraph (2).
- (6) Any notice given under these Rules must be in writing.
- (7) Where the time prescribed by these Rules for doing any act expires on a day which is not a working day, the act is in time if done at or before 5.30 p.m. on the next following working day.
- (8) Where an act done in accordance with these Rules is done on a day which is not a working day, or after 5.30 p.m. on a working day, the act is to be treated as done on the next following working day.

### **Public register**

- 20.—**(1) The CMA must maintain a register in which there must be entered—
- (a) all decisions that the CMA is required to publish under these Rules;
  - (b) all decisions published under Rule 10(4);
  - (c) all directions that the CMA is required to publish under these Rules;
  - (d) all notices that the CMA is required to publish under Rule 21(2); and

(e) all penalties that the CMA is required to publish under Rule 12(4).

(2) The register is to be open to public inspection—

(a) at the CMA's head office between 10.00 a.m. and 4.30 p.m. on every working day; and

(b) on the CMA's website.

### **Consultation**

**21.—**(1) Where the CMA, if it proposes to take action, is required to consult a person under these Rules, it must—

(a) subject to Rules 18 and 19, give notice to that person; and

(b) state in that notice the action the CMA proposes to take, its reasons for proposing such action and the period within which that person may make written representations to the CMA on these matters.

(2) Where the CMA, if it proposes to take action—

(a) is required to consult the public under these Rules; or

(b) proposes to consult the public in exercise of its discretion to do so under these Rules,

it must publish a notice stating the action it proposes to take, its reasons for proposing such action and the period within which written representations may be made to the CMA on these matters.



## C. DRAFT CMA CA98 GUIDANCE



Competition and Markets  
Authority (CMA)

Competition Act 1998:

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

[2014]

CMA8con

~~**A guide to the OFT's  
investigation procedures in  
competition cases**~~

**Guidance**

October 2012

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This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma).

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# 1 PREFACE

- 1.1 ~~We have~~[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 ~~we use~~[the CMA uses](#) when using ~~our~~[its](#) powers under the Competition Act 1998 (~~the~~[CA98](#)), as amended by the [Enterprise and Regulatory Reform Act 2013 \(ERRA13\)](#) to investigate suspected infringements of competition law. ~~It supersedes our previous quick guide on how we conduct investigations under the Act entitled *Under Investigation*<sup>1</sup> and updates the previous version of this guidance document published in March 2011. You may find it useful to read this document alongside other Office of Fair Trading (OFT) documents, including *Enforcement*,<sup>2</sup> *OFT Prioritisation Principles*,<sup>3</sup> *Powers of Investigation*,<sup>4</sup> and *Involving third parties in Competition Act investigations*.<sup>5</sup>~~
- 1.2 ~~In this~~[This](#) guidance, ~~we~~ updates and supersedes the previous 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>6</sup>
- 1.3 [This guidance should be read alongside the CMA publications Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\) \[currently in draft\]](#)<sup>7</sup>, [\[Transparency and disclosure: Statement of the CMA's policy and](#)

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<sup>1</sup> ~~OFT 426 available to download at [www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_mini\\_guides/oft426.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft426.pdf)~~

<sup>2</sup> ~~OFT 407 available to download at [www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf)~~

<sup>3</sup> ~~OFT 953 available to download at [www.offt.gov.uk/shared\\_offt/about\\_offt/oft953.pdf](http://www.offt.gov.uk/shared_offt/about_offt/oft953.pdf)~~

<sup>4</sup> ~~OFT 404 available to download at [www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft404.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft404.pdf)~~

<sup>5</sup> ~~OFT 451 available to download at [www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft451.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft451.pdf)~~

<sup>6</sup> [Publications available at: at: \[www.gov.uk/cma/\]](http://www.gov.uk/cma/).

<sup>7</sup> [\[Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\) \[currently in draft\] available at: \[www.gov.uk/cma/\]](#).

approach [currently in draft (CMA6) (CMA6 Transparency and Disclosure)]<sup>8</sup> and the CMA's [Prioritisation Principles], which outline the basis on which the CMA decides which cases to investigate.<sup>9</sup> This guidance should also be read alongside the documents listed in Annexe A, which were first published by the OFT, and have ~~set~~ been adopted by the CMA.<sup>10</sup> In particular, you may find it 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>11</sup>

~~4.21.4~~ This guidance sets out ~~our~~the CMA's procedures and ~~explained~~explains the way in which ~~we conduct~~the CMA conducts investigations into suspected competition law infringements. This ~~is our current~~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 ~~our~~the CMA's developing experience in assessing and investigating cases. Please refer to the ~~OFT~~CMA website to ensure you have the latest version of this guidance.

#### ~~Figure 1.1 Overview of OFT publications referred to in this guidance~~

~~4.31.5~~ This guidance is concerned exclusively with ~~our~~the CMA's investigations under the ~~Act~~CA98. It does not cover ~~OFT~~CMA investigations into individuals suspected of having committed the criminal cartel offence<sup>12</sup> nor does it cover ~~director~~competition disqualification order proceedings.<sup>13</sup>

<sup>8</sup> [Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) [currently in draft] available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>9</sup> CMA Prioritisation Principles – to be finalised. See paragraph 4.4.

<sup>10</sup> Annexe A describes in further detail how these publications are affected by the ERA13 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 existing guidance and this guidance, the content of this guidance will prevail.

<sup>11</sup> Publications available at: [www.gov.uk/cma](http://www.gov.uk/cma).

~~<sup>12</sup> More information on the criminal cartel offence can be found in OFT515 available to download at [www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/enterprise\\_act/off515](http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/enterprise_act/off515)~~

<sup>13</sup> More information on ~~director~~competition disqualification orders can be found in ~~OFT 510~~Director *disqualification orders in competition cases (OFT510)* available ~~to download~~ at: [www.offt.gov.uk/shared\\_offt/business\\_leaflets/enterprise\\_act/off510.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/off510.pdf)~~cma~~.

~~4.41.6~~ This guidance does not cover the procedures used by sectoral regulators<sup>14</sup> in their competition law investigations. Further guidance on ~~this~~the enforcement of competition law by the sectoral regulators is available in ~~Concurrent Application to the CMA guideline~~ [Regulated Industries: Guidance on concurrent application of competition law to regulated industries [currently in draft and being consulted on (CMA10con)]]<sup>15</sup> or from the relevant organisation's website.

~~4.51.7~~ This document incorporates the commitments made in ~~our~~the CMA's published guideline [(CMA6 Transparency Statement and Disclosure)] insofar as they apply to investigations under the ~~Act~~CA98.<sup>16</sup>

~~4.61.8~~ ~~We~~The CMA will apply this guidance flexibly. This means that ~~we~~the CMA will have regard to the guidance when ~~we deal~~dealing with suspected competition law infringements but that, when the facts of an individual case reasonably justify it, ~~we~~the CMA may adopt a different approach. For example, ~~we~~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>17</sup> in parallel ~~we are~~the CMA is also looking at whether an individual has committed a criminal cartel offence.

1.9 This guidance will take effect from ~~the date it is published.~~1 April 2014. The ~~new decision-making model~~changes introduced by the ERA13, as they affect administrative investigations under the CA98 and as outlined in this guidance, will apply to all ongoing and future cases, ~~except those in which a~~

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<sup>14</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 Regulation, Monitor and the Civil Aviation Authority. This list is correct as at ~~16 October 2012~~. ~~Monitor (the sector regulator for healthcare) will be given concurrent powers to undertake investigations under the Act at a time to be appointed: see sections 72 to 74 and section 306(4) of the Health and Social Care Act 2012.~~1 April 2014. The list may change from time to time if further sector regulators are given concurrent powers.

~~OFT 405 available to download at~~<sup>15</sup> [Regulated Industries: Guidance on concurrent application of competition law to regulated industries [currently in draft and being consulted on (CMA10con)] available at: [www.offt.gov.uk/shared\_offt/business\_leaflets/ca98\_guidelines/offt405.pdf].

~~OFT 1234 available to download at~~<sup>16</sup> CMA guideline [Transparency and disclosure: Statement of the CMA's policy and approach [currently in draft (CMA6)] (available at: www.offt.gov.uk/shared\_offt/consultations/668117/OFT1234.pdf).

<sup>17</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 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* (~~OFT 404~~OFT401) and *Public bodies and competition law* (~~OFT 1389~~OFT1389), and in relevant European case law, such as C-205/03 P *FENIN* [2006] ECR I-6295-].

~~Statement of Objections was issued prior to 18 July 2012, this being the date from 1 April 2014. The CMA has published guidance on which the decision to implement a collective decision-making model was adopted by the OFT Board. Those cases will continue under the decision-making model described~~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 previous version of CMA guideline [Cartel Offence: Prosecution Guidance] [currently in draft and being consulted on (CMA9con)].<sup>18</sup>

~~4.71.10~~The decision-making procedures set out in this guidance, published in March 2014, will apply to all ongoing and future civil cases under the CA98.

~~4.81.11~~This document is not a definitive statement of, or a substitute for, the law itself and the legal tests which we applythe CMA applies in assessing breaches of competition law are not addressed in this guidance. A range of ~~OFT~~ publications on how ~~we carry~~the CMA carries out this substantive assessment is available on the ~~OFT website.~~<sup>19</sup> ~~We recommend~~CMA website.<sup>20</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.

~~4.91.12~~This guidance sets out the procedures we followthe CMA follows within the legal framework outlined in Chapter ~~2.2.~~ It addresses each stage of a typical investigation in turn. The key stages of an investigation into a suspected infringement and a summary of ~~our~~the CMA's action at these stages are set out at Figure 1.~~21.~~

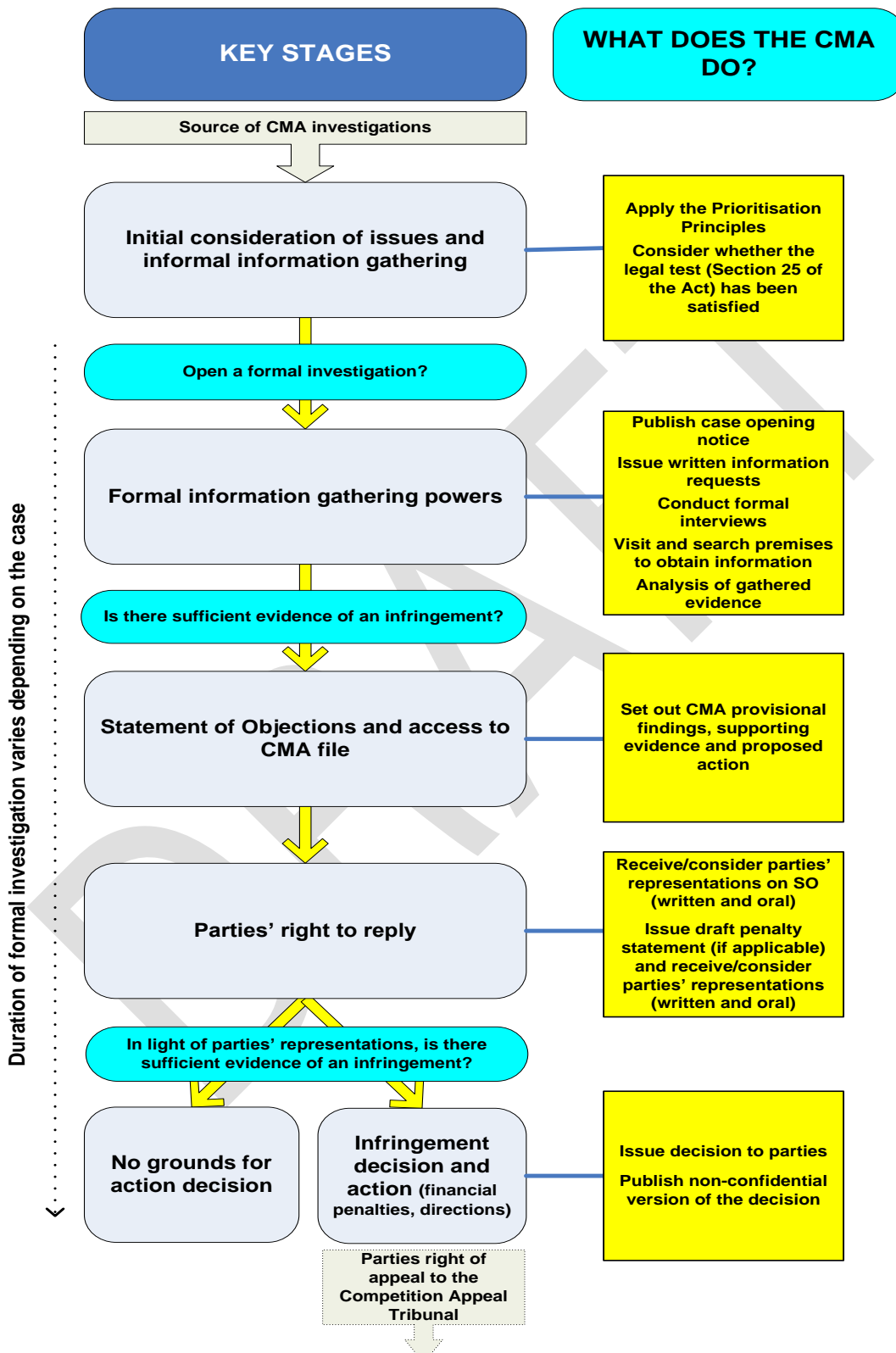
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<sup>18</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

~~<sup>19</sup> See Figure 1.1 above.~~

<sup>20</sup> See paragraph 1.3 and Annexe A.

Figure 1.21 – 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.

2.2.2 The Treaty on the Functioning of the European Union (TFEU) and the ActCA98 both prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.

2.2.3 More information on the laws on anti-competitive behaviour is available in the OFT quick guide *Competing Fairly*<sup>21</sup> (OFT447) and in the more detailed guidance on *Agreements and Concerted Practices*<sup>22</sup> (OFT401) and *Abuse of a dominant position*<sup>23</sup> (OFT402).

2.3.4 In the UK, competition law is applied and enforced principally by the OFTCMA.<sup>24</sup> The ActCA98 gives ~~us~~the CMA powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions in the ActCA98 and Articles 101 and 102 of the TFEU.<sup>25</sup>

2.4.5 Under EU legislation,<sup>26</sup> as a 'designated national competition authority', when ~~we apply~~the CMA applies national competition law either to agreements which may affect trade between Member States or to abuse

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<sup>21</sup> ~~OFT 447 available to download at [www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications](http://www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications)~~

<sup>22</sup> ~~OFT 401 available to download at [www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications](http://www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications)~~

<sup>23</sup> ~~OFT 402 Publications available to download at: [www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications](http://www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications)~~[www.gov.uk/cma](http://www.gov.uk/cma).

<sup>24</sup> ~~However, it is open to any person to bring a standalone action~~certain sectoral regulators (see paragraph 1.6 above) have concurrent powers with the CMA to apply and enforce the Chapter I and Chapter II prohibitions in the High Court for an injunction and/or damages as a resultCA98 and Articles 101 and 102 of an alleged infringement of competition law. In relation to the the TFEU within their respective regulated sectors (being. 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 16 October 20121 April 2014, communications and postal services, gas, electricity, healthcare services, railways, air traffic and airport operation services, water and sewerage), the respective sectoral. The list may change from time to time if further sector regulators have are given concurrent powers~~with the OFT to apply and enforce the legal provisions.~~

<sup>25</sup> See Chapter III (Investigation and Enforcement) of the ActCA98.

<sup>26</sup> Article 3 of Council Regulation (EC) No 1/2003 (OJ L1, 4.1.2003, p.1), as amended.

prohibited by Article 102, ~~we are~~ the CMA is also required to apply Articles 101 and 102 of the TFEU.<sup>27</sup>

~~2.5~~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 ~~Act~~ CA98 is available in the OFT guide *Modernisation*: (OFT442).<sup>28</sup>

~~2.6~~2.7 There are procedural rules that apply when ~~we take~~ the CMA takes investigative or enforcement action.<sup>29</sup> In addition, ~~we are~~ the CMA is required to carry out ~~our~~ its investigations and make decisions in a procedurally fair manner according to the standards of administrative law.<sup>30</sup>

~~2.7~~2.8 In exercising ~~our~~ its functions, as a public body, ~~we~~ the CMA must also ensure that ~~we act~~ it acts in a manner that is compatible with the Human Rights Act 1998.

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<sup>27</sup> The relevant sectoral regulators are also designated national competition authorities within their respective sectors.

<sup>28</sup> ~~OFT 442~~ Publication available ~~to download at:~~  
[www.offt.gov.uk/shared-offt/business-leaflets/ca98-guidelines/oft442.pdf]cma.

<sup>29</sup> [The Competition Act 1998 (Competition and Markets Authority's Rules) Order 20[•] SI [•]](the CA98 Rules) [currently in draft and being consulted on in CMA8con]. 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~~ Trading's Rules) Order 2004 SI 2004/2751 ~~(the OFT Rules)~~).

<sup>30</sup> See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10.



### 3 THE SOURCES OF ~~OUR~~THE CMA'S INVESTIGATIONS

#### Summary

- ~~We obtain~~The CMA obtains information about possible competition law breaches through a number of sources
  - ~~our~~ research and market intelligence, and other workstreams
  - leniency applications
  - complaints to ~~our~~the CMA's Enquiries ~~and Reporting Centre~~Unit or to ~~our~~the Cartel Hotline.
- This chapter sets out how to contact ~~us~~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 ~~us~~the CMA informally in the first instance.

3.1 There are a variety of ways in which information can come to the ~~OFT's~~CMA's attention, leading ~~us~~the CMA to investigate whether competition law may have been breached.

3.2 ~~Our~~The CMA's own research and market intelligence may prompt ~~us~~the CMA to make initial enquiries into suspected anti-competitive conduct. Alternatively, evidence gathered through ~~our~~ other CMA workstreams, such as ~~our~~the CMA's merger or markets functions, or use of ~~our~~the CMA's powers under the Regulation of Investigatory Powers Act 2000, or information received via the European Competition Network or the European Commission (Commission) may reveal potentially anti-competitive behaviour. In these circumstances, ~~we gather~~the CMA gathers publicly available information and may write to businesses or individuals seeking further information that ~~we consider~~the CMA considers could be relevant.

3.3 ~~We~~The CMA also ~~rely~~relies on information from external sources to bring to ~~our~~its attention potentially anti-competitive conduct. This could be from

individuals with so called 'inside' information about a cartel<sup>31</sup> or from a complainant.

## Cartels and leniency

- 3.4 A business which is or has been involved in a cartel<sup>32</sup> may wish to take advantage of the benefits of ~~our~~[the CMA's](#) leniency programme prompting them to approach ~~us~~[the CMA](#) with information about its operation.
- 3.5 By confessing to ~~us~~[the CMA](#), a business could gain total immunity from, or a significant reduction in, any financial penalties ~~we~~[the CMA](#) can impose if ~~we decide~~[it decides](#) that the arrangement breaches the Chapter I prohibition and/or Article 101 [of the](#) TFEU.<sup>33</sup>
- 3.6 It is also a criminal offence for an individual ~~dishonestly to engage into~~ [agree with one or more other persons to make or implement, or cause to be made or implemented, any](#) cartel arrangements in the ~~UK~~[United Kingdom](#).<sup>34</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>35</sup>
- 3.7 In addition, ~~we~~[the CMA](#) will not apply for a competition disqualification order against any current director of a company whose company has benefited from leniency.<sup>36</sup> However, ~~we~~[the CMA](#) may apply for an order against a

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<sup>31</sup> ~~We operate~~[The CMA operates](#) a financial reward programme in exchange for information about the operation of a cartel. For more information, go to: [\[www.offt.gov.uk/OFTwork/cartels-and-competition/cartels/rewards/cma\]](http://www.offt.gov.uk/OFTwork/cartels-and-competition/cartels/rewards/cma).

<sup>32</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 ~~our~~[the CMA's](#) leniency programme, price-fixing includes resale price maintenance.

<sup>33</sup> More information on how ~~we set~~[the CMA sets](#) penalties is available in Part 5 of [OFT guideline guidelines Enforcement \(OFT 407\) available to download at www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft407.pdf](#)[OFT407](#) and [GuidanceOFT's guidance as to the appropriate amount of a penalty \(OFT 423OFT423\)](#) available to download at: [\[www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft423.pdf\]](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf)[cma\]](#).

<sup>34</sup> [Section 188 of the EA02. Section 188A of the EA02 \(as amended by the ERA13\) sets out circumstances in which the cartel offence has not been committed. Section 188B of the EA02 \(as amended by the ERA13\) provides statutory defences to the cartel offence. See further CMA guideline \[Cartel Offence: Prosecution Guidance\] \[currently in draft and being consulted on \(CMA9con\)\], available at: \[www.gov.uk/cma\].](#)

<sup>35</sup> ~~Section 188 of the Enterprise Act 2002.~~<sup>35</sup> See further the [OFT guideline Applications for leniency and no action in cartel cases \(OFT1495\)](#), available at: [\[www.gov.uk/cma\]](http://www.gov.uk/cma).

<sup>36</sup> In respect of the activities to which the grant of leniency relates. For further detail, see [OFT guidance Competition Disqualification Orders \(OFT 510\) Director disqualification in competition](#)

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

3.8 ~~We encourage~~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 ~~our~~the CMA's quick guide *Cartels and the Competition Act*<sup>37</sup> (OFT435) and ~~our~~the guideline *Agreements and Concerted Practices*<sup>38</sup> (OFT401).

#### *How to apply for leniency*

3.10 ~~We handle~~The CMA handles leniency applications in strict confidence. Applications for lenient treatment under the ~~OFT's~~CMA's leniency programme should be made to the Senior Director or Director of ~~our~~the CMA's Cartels and Criminal ~~Enforcement~~ Group (CCEGCCG) in the first instance. The contact details of the relevant individuals are available on ~~our~~the CMA website.<sup>39</sup> More detailed information on ~~our~~the CMA's leniency programme is available in *Leniency in cartel cases*<sup>40</sup> and *in Leniency and no action*.<sup>41</sup>

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

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

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cases (OFT510) available to download at:

[www.of.gov.uk/shared\_of/business\_leaflets/enterprise\_act/oft510.pdf]cma].

<sup>37</sup> ~~OFT 435 available to download at~~

www.of.gov.uk/shared\_of/business\_leaflets/ca98\_mini\_guides/oft435.pdf

<sup>38</sup> ~~OFT 401~~Publications available to download at:

[www.of.gov.uk/shared\_of/business\_leaflets/ca98\_guidelines/oft401.pdf]cma].

<sup>39</sup> www.of.gov.uk/OFTwork/competition-act-and-cartels/cartels/confesswww.gov.uk/cma-

<sup>40</sup> ~~OFT 436 available to download at~~

www.of.gov.uk/shared\_of/business\_leaflets/ca98\_mini\_guides/oft436.pdf

<sup>41</sup> ~~OFT 803~~guideline Applications for leniency and no action in cartel cases (OFT1495), available to download at: [www.of.gov.uk/shared\_of/reports/comp\_policy/oft803.pdf]cma].

### *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 ~~us~~[the CMA](#).
- 3.13 Complaints about suspected cartels should be made by calling ~~our~~[the CMA's Cartel Hotline](#) on ~~0800-085-1664~~[\[to be confirmed\]](#) or by emailing ~~us~~[the CMA](#) at ~~cartelshotline@oft.gsi.gov.uk~~[\[to be confirmed\]](#). These complaints are handled in confidence by ~~CCEG~~[CCG](#). Guidance on reporting a suspected cartel to the ~~OFT~~[CMA](#) is available in the OFT quick guide *Cartels and the Competition Act*.<sup>42</sup>
- 3.14 For all other competition related complaints, please ~~call our~~[email the CMA's Enquiries and Reporting Centre \(ERC\) on 08457 22 44 99](#)~~Unit at~~ [\[to be confirmed\]](#) or ~~email us at~~[enquiries@oft.gsi.gov.uk](#)~~contact the CMA through its website~~ in the first instance. ~~We~~[The CMA](#) will be able to advise whether the matter is within ~~our~~[its](#) remit and, if it is, how to submit a complaint in writing for consideration by ~~our~~[the CMA's](#) competition experts.
- 3.15 Complaints made to ~~ERC~~[the CMA's Enquiries Unit](#) which appear to relate to a suspected cartel will be redirected to the Cartel Hotline. Similarly, complaints to the Cartel Hotline about a non-cartel competition matter will be passed to ~~ERC~~[the CMA's Research, Intelligence and Advocacy Unit](#).
- 3.16 The Annex to the OFT guideline *Involving third parties in Competition Act investigations* ([OFT451](#))<sup>43</sup> also provides guidance and further detail on the type of information that ~~we look~~[the CMA looks](#) for in a written, reasoned complaint.

### *Pre-complaint discussions*

- 3.17 The requirement for a written, reasoned complaint does not preclude complainants from approaching ~~us~~[the CMA](#) informally in the first instance. Pre-complaint discussions may be helpful to businesses in deciding whether to commit the necessary time and effort in preparing a reasoned complaint.
- 3.18 In such cases, ~~we~~[the CMA](#) will endeavour to give an initial view as to whether ~~we~~[the CMA](#) would be likely to investigate the matter further if a

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<sup>42</sup> ~~OFT 435~~[Cartels and the Competition Act \(OFT435\)](#) available ~~to download at~~: [\[www.oft.gov.uk/shared-oft/business-leaflets/ca98-mini-guides/oft435.pdfcma\]](#).

<sup>43</sup> ~~OFT 451~~[Publication](#) available ~~to download at~~: [\[www.oft.gov.uk/shared-oft/business-leaflets/ca98-guidelines/oft451.pdfcma\]](#).

formal 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 ~~our~~ [the CMA's](#) [Prioritisation Principles<sup>44</sup>] to see if it falls within ~~our~~ [the CMA's](#) casework priorities at the time (see Chapter 44 for more information on how ~~we prioritise~~ [the CMA prioritises](#) cases). However, any view given at this stage will not commit the ~~OFT~~ [CMA](#) to opening an investigation.

3.19 To be able to engage in pre-complaint discussions, ~~we~~ [the CMA](#) would expect to receive a basic level of information in writing from the complainant covering the key aspects of their concerns. This should include:

- 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)
- 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)
  - if known, the size of the market and of the parties involved (for example, market shares).

3.20 Whether ~~we engage~~ [the CMA engages](#) in pre-complaint discussions will depend on the availability of ~~our~~ [CMA](#) resources and whether the issue(s) outlined in the basic information suggest to ~~us~~ [the CMA](#) that the case is one that would merit a prioritisation assessment by ~~us~~ [the CMA](#). In cases where pre-complaint discussions are appropriate, ~~we aim~~ [the CMA aims](#) to suggest a date for the discussions within 10 working days of receiving the required information.

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<sup>44</sup> [CMA Prioritisation Principles – to be finalised.](#)

3.21 If you wish to approach ~~us~~[the CMA](#) about the possibility of a pre-complaint discussion, you should contact ~~ERC~~ [\(the CMA's Research, Intelligence and Advocacy Unit \[contact details ~~above~~ to be confirmed\]](#) in the first instance. If sending an email, please include the words 'Pre-Complaint Discussion' in the subject line of the email.

### *Confidentiality of complaints*

3.22 ~~We understand~~[The CMA understands](#) that individuals and ~~companies~~[businesses](#) may want to ensure that details of their complaints are not made public. If a complainant has specific concerns about disclosure of their identity or their commercially sensitive information, they should let ~~us~~[the CMA](#) know at the same time as submitting their complaint. ~~We are~~[The CMA is](#) prohibited<sup>45</sup> from disclosing certain confidential information and while ~~we are~~[the CMA is](#) considering whether to pursue a complaint ~~we aim~~[it aims](#) to keep the identity of the complainant confidential.

3.23 Later on, if ~~we have~~[the CMA has](#) sufficient information to carry out a formal investigation and ~~we~~[the CMA](#) provisionally ~~decide~~[decides](#) that a business under investigation has infringed the law, ~~we~~[the CMA](#) may have to reveal to them the identity of the complainant as well as the information supplied by them where the business under investigation cannot properly respond to the allegations against them in the absence of such disclosure. However, before disclosing a complainant's identity or any of their information, ~~we~~[the CMA](#) will discuss the matter with them and give them an opportunity to make representations to ~~us~~[the CMA](#).

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<sup>45</sup> ~~Rule 1(1) and 6 of the OFT Rules and~~ Part 9 of the ~~Enterprise Act 2002~~.[EA02](#). However, Part 9 does permit the ~~OFT~~[CMA](#) to disclose confidential information in certain specified circumstances.

## 4 WHAT WE DO THE CMA DOES WHEN WE RECEIVE IT RECEIVES A COMPLAINT

### Summary

- ~~We use~~ 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 ~~our~~ the CMA's groups within ~~Markets and Projects~~ the Enforcement Directorate.
- ~~We~~ The CMA typically ~~gather~~ gathers information informally at this stage (i.e. not using our formal powers of investigation).
- ~~We aim~~ The CMA aims to keep complainants informed of the progress of their complaint.

### What ~~we do~~ the CMA does when ~~we receive it~~ receives a complaint

- 4.1 With the exception of complaints about suspected cartels, all competition complaints should be submitted to ~~our~~ the CMA's Enquiries ~~and Reporting Centre (ERC)~~ Unit. Complaints received by ~~ERC~~ the CMA's Enquiries Unit about suspected cartel activity are redirected to the Cartel Hotline.
- 4.2 ~~We~~ The CMA will respond to all complaints ~~we receive~~ We aim it receives. The CMA aims to give an initial response within 10 working days of receipt in at least 90 per cent of complaints. Where a competition complaint raises more complex issues, that require longer to assess, ~~we~~ the CMA will respond within 30 working days of receipt. All complaints that ~~we receive~~ the CMA receives are given a complaint reference number.
- 4.3 If ~~ERC~~ CMA's Enquiries Unit considers that a complaint relates to possible anti-competitive behaviour (other than cartel activity), the complaint is passed to ~~our Preliminary Investigations team~~ the CMA's Research, Intelligence and Advocacy Unit. The ~~Preliminary Investigations team~~ Research, Intelligence and Advocacy Unit may engage in informal dialogue with the complainant if ~~we need~~ the CMA needs to clarify any information provided to ~~us~~ it at this stage or ~~if we require~~ the CMA requires additional information.

- 4.4 Although ~~we consider~~the CMA considers all complaints ~~we receive, we~~receives, the CMA cannot formally investigate all suspected infringements of competition law. ~~We decide~~The CMA decides which cases to investigate on the basis of ~~our~~the CMA's [Prioritisation Principles].<sup>46</sup> These take into account the likely **impact** of ~~our~~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 ~~Preliminary Investigations team~~Intelligence Unit (which is part of the Research, Intelligence and Advocacy Unit) carries out an initial assessment of whether a complaint satisfies ~~our~~the CMA's Prioritisation Principles, consulting other ~~OFT~~CMA officials as appropriate.
- 4.5 Further information on ~~our~~the CMA's Prioritisation Principles and how ~~we~~applythe CMA applies them in practice is available in the ~~OFT publication~~CMA [Prioritisation Principles].<sup>47</sup>
- 4.6 ~~We aim~~The CMA aims to keep complainants informed of the progress of their complaint and share with them ~~our~~the expected timescale for dealing with it. In all cases ~~we aim~~the CMA aims to communicate to the complainant within four months from the date of receipt of their complaint whether ~~we~~havethe CMA has decided to open a formal investigation.
- 4.7 However, ~~our~~the CMA's ability to follow up on a complaint and to determine within four months 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 ~~us with~~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. They can also assist complainants in being granted Formal Complainant status if ~~we proceed~~the CMA proceeds to a formal investigation. See Chapter 55 for more details on the process for becoming a Formal Complainant.
- 4.8 If ~~we decide~~the CMA decides not to prioritise a complaint at this stage, ~~we~~the CMA will write to the complainant to inform them of the fact. In appropriate cases, ~~we~~the CMA may send a warning letter to a company to inform them that ~~we have~~the CMA has been made aware of a possible

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<sup>46</sup> [CMA Prioritisation Principles – to be finalised.](#)

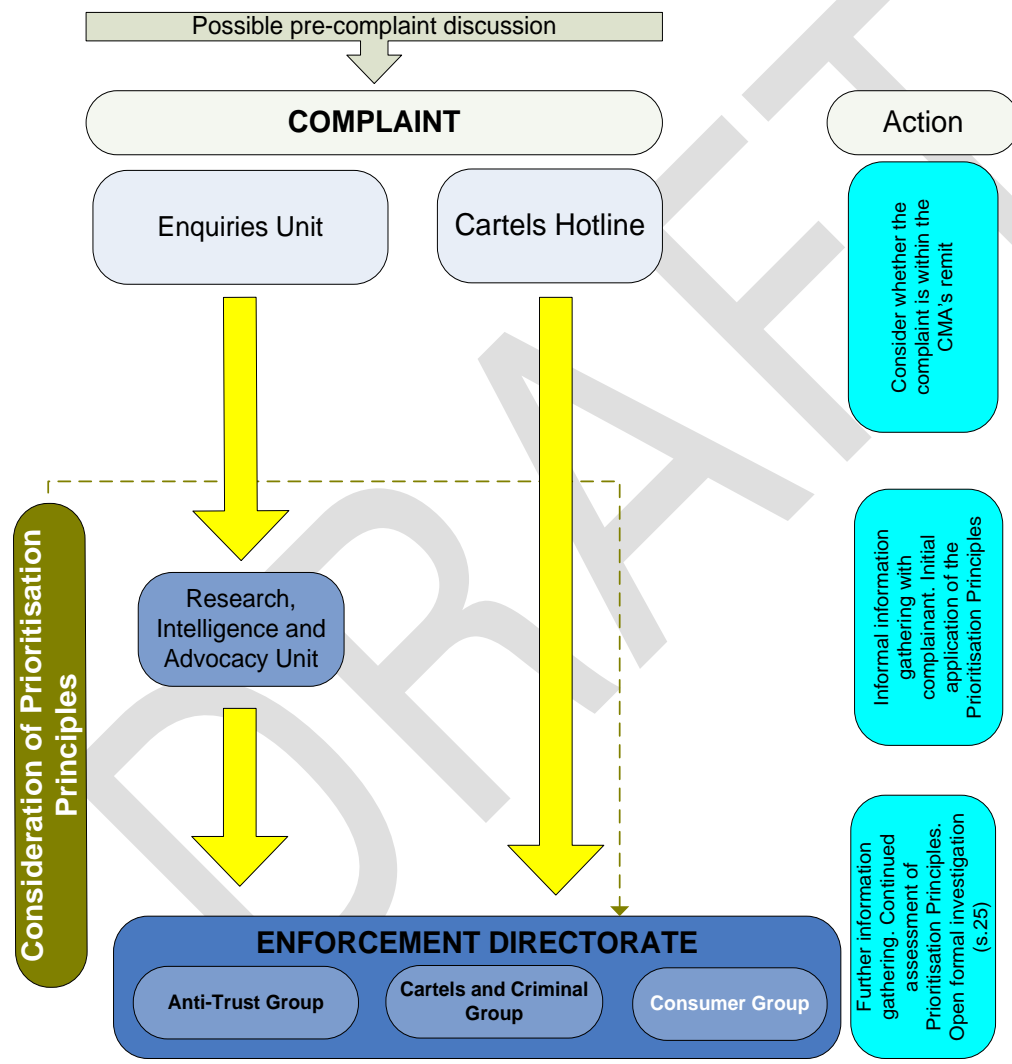
<sup>47</sup> ~~OFT 953 available to download at [www.ofc.gov.uk/OFTwork/publications/publication-categories/corporate/general/ofc953](http://www.ofc.gov.uk/OFTwork/publications/publication-categories/corporate/general/ofc953)~~



breach of competition law by them and that, although ~~we are~~ the CMA is currently not minded to pursue an investigation, ~~we~~ it may do so in future if ~~we receive~~ the CMA receives further evidence of a suspected infringement or ~~our~~ the CMA's prioritisation assessment changes.

- 4.9 Where ~~we prioritise~~ the CMA prioritises a complaint, the case will be allocated to the appropriate ~~OFT~~ CMA group for formal or further informal investigation.

**Figure 1.32 – Complaint Process**



Which part of the ~~OFT~~ CMA carries out the investigation?

- 4.10 ~~We have three~~ The CMA has two groups which carry out ~~the majority of~~ competition investigations. These are: ~~Services, Infrastructure~~ The Anti-trust Group (ATG) and ~~Public Markets (SIP); Goods and Consumer;~~ and

~~CCEG~~CCG (together referred to as the ~~Markets and Projects~~Competition Enforcement Directorate groups).<sup>48</sup> A chart showing the structure of the ~~OFT~~CMA is available on the ~~OFT~~CMA website.<sup>49</sup>

- 4.11 ~~SIP and Goods and Consumer are organised around sectors of the economy rather than by legal tools. This means that they are~~ CCG is responsible for investigating and enforcing both competition~~suspected civil cartel infringements of the CA98 and criminal cartel~~ and consumer ~~casework, and market studies. For example, SIP focuses on areas such as financial services, professional services, transport, construction, property, the creative industries, the knowledge economy, including information technology, and public markets. Goods and Consumer~~law infringements. ATG is responsible for ~~consumer goods such as food, drink, clothing, pharmaceuticals, chemicals, metals, electrical appliances and recreational goods as well as for investigating potential breaches~~investigation and enforcement of all other suspected infringements of ~~consumer law. Most cartel investigations are run by CCEG.~~the CA98.
- 4.12 However, there is flexibility in the allocation of cases between ~~our Markets and Projects~~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.
- 4.13 The processes underpinning ~~our~~CMA investigations and the tools available to ~~us~~the CMA are identical across all ~~our~~the groups.<sup>50</sup> Information on the different groups within ~~Markets and Projects~~the Enforcement Directorate is available on the ~~OFT~~CMA website.<sup>51</sup>

### Initial assessment phase

- 4.14 Once ~~we have~~the CMA has decided to take forward a case within ~~Markets and Projects, we~~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

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<sup>48</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>49</sup> [www.ofc.gov.uk/about-the-ofc/ofc-structure/structurecma](http://www.ofc.gov.uk/about-the-ofc/ofc-structure/structurecma).

<sup>50</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 ~~CCEG~~CCG in relation to investigations into suspected cartels.

<sup>51</sup> [www.ofc.gov.uk/about-the-ofc/ofc-structure/structurecma](http://www.ofc.gov.uk/about-the-ofc/ofc-structure/structurecma).

informal request for information, a request for clarification of information already provided ~~to us~~ in the complaint, or an invitation to meet with ~~us~~the CMA. In these circumstances, where ~~we are~~the CMA is not using ~~our~~its formal powers to gather information, ~~we~~the CMA will rely on voluntary cooperation.<sup>52</sup>

- 4.15 In the case of suspected cartels, however, ~~we are~~the CMA is unlikely to contact the ~~companies~~businesses under investigation informally as to do so may prejudice ~~our~~the investigation. Instead, ~~we~~the CMA typically ~~use~~ouruses its formal information gathering powers from the outset.
- 4.16 On the basis of the information ~~we have~~it has gathered at that time, if ~~we consider we have~~the CMA considers it has reasonable grounds for suspecting that competition law has been breached, ~~we~~the CMA can open a formal investigation. This allows ~~us~~the CMA to use ~~our~~its formal information gathering powers (see Chapter ~~6~~6).

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<sup>52</sup> ~~We~~The CMA can only use ~~our~~its formal information gathering powers where ~~we have~~the CMA has reasonable grounds for suspecting that competition law has been breached.

## 5 OPENING A FORMAL INVESTIGATION

### Summary

- The decision to open a formal investigation depends upon whether
  - the legal test that allows ~~us~~the CMA to use ~~our~~its formal investigation powers has been satisfied, and
  - ~~whether~~ the case continues to fall within ~~our~~the CMA's casework priorities.
- When ~~we open~~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 ~~we open~~the CMA opens a formal investigation, ~~we~~the CMA will send the ~~companies~~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.
- ~~We~~The CMA will also publish on ~~our~~its website a ~~case opening~~ notice of investigation setting out basic details of the case and a case-specific administrative timetable for the investigation.
- ~~We~~The CMA will grant Formal Complainant status, in relation to an investigation, to any person who has submitted a written, reasoned complaint to ~~us~~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 ~~our~~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, 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>53</sup>
- 5.2 For these purposes, the decision to open a formal investigation means deciding whether the legal test<sup>54</sup> which allows ~~us~~[the CMA](#) to use ~~our~~ formal investigation powers has been met and whether the case continues to fall within ~~our~~[CMA](#) casework priorities.
- 5.3 Once the decision has been taken to open a formal investigation, ~~we~~[the CMA](#) will send the businesses under investigation a case initiation letter setting out brief details of the conduct that ~~we are~~[the CMA is](#) looking into, the relevant legislation, the case-specific timetable, and key contact details for the case such as the Team Leader, Project Director and SRO.<sup>55</sup>
- 5.4 In some instances, ~~we~~[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~~6 for more information on formal information requests.
- 5.5 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 ~~our~~[the](#) investigation, such as prior to unannounced inspections or witness interviews. In these cases, ~~we~~[the CMA](#) will send out the letter as soon as possible.

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<sup>53</sup> The categories of decision for which the SRO is responsible are listed in more detail at paragraph 9.10 below.

<sup>54</sup> Under section 25 of the ~~Act~~[we](#)[CA98](#) ~~the CMA~~ may ~~use our formal~~[conduct an](#) investigation ~~powers~~ where ~~we have~~[there are](#) reasonable grounds for suspecting that competition law has been breached.

<sup>55</sup> See [\[CMA6 \[Transparency – A Statement on the OFT's approach \(OFT 1234\) and Disclosure\] \[currently in draft\]](#) (available ~~to download~~ at: [www.oft.gov.uk/shared-of/consultations/668117/OFT1234.pdf](http://www.oft.gov.uk/shared-of/consultations/668117/OFT1234.pdf)~~cma~~).

5.6 Also, it may be necessary to limit the information that ~~we give~~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.

5.7 Once a formal investigation is opened and the parties have been informed of this, ~~we will generally publish on the OFT's website<sup>56</sup> a case opening notice containing basic details of the case,<sup>57</sup> including~~the CMA will generally publish a notice of investigation on its website.<sup>58</sup> Where the CMA does publish a notice of 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 connected with that case.

5.75.8 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>59</sup> If the timetable changes during the investigation, the timetable will be updated in the ~~case opening~~notice of investigation, including reasons for the changes that have been made.

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<sup>56</sup> ~~See [www.offt.gov.uk/OFTwork/oft-current-cases](http://www.offt.gov.uk/OFTwork/oft-current-cases)~~

<sup>57</sup> ~~The case opening notice will contain basic information 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. We will not publish the names of the parties under investigation in the case opening notice other than in exceptional circumstances, such as where the parties' involvement in the OFT's investigation is already in the public domain or where parties request that the OFT name them in the case opening notice (and the OFT considers doing so to be appropriate in the circumstances); or where the OFT 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.~~

<sup>58</sup> Section 25A of the CA98 permits the CMA to publish a notice of investigation.

<sup>59</sup> Initially, the timetable will cover the investigative stages up to the ~~OFT's~~CMA's decision on whether to issue a Statement of Objections. If ~~we issue~~the CMA issues a Statement of Objections, the timetable will be updated with indicative timing of the steps to the end of the investigation.

5.9 The CMA may include the names of any business it is investigating in a notice of investigation.<sup>60</sup> The CMA would not generally expect to publish the names of the parties under investigation other than in appropriate circumstances. 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. The CMA will usually only include parties' names in the notice of investigation at a later stage of an investigation, typically if a Statement of Objections is issued.

~~5.85.10~~ 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 ~~case opening~~ notice of investigation, as to do so might prejudice the ~~OFT's~~CMA's ongoing investigation. The ~~case opening~~ notice of investigation will be updated once ~~we are~~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 [CMA6 Transparency and Disclosure].<sup>61</sup>

### **Granting Formal Complainant status**

~~5.95.12~~ ~~We~~The CMA will grant Formal Complainant status in relation to an investigation to any person who has submitted a written, reasoned complaint to ~~us~~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, ~~we~~the CMA will remind complainants who have submitted a written, reasoned complaint but who have not requested formal status that they may apply to be treated as a Formal Complainant. ~~We~~The CMA may grant Formal Complainant status to more than one complainant in an investigation.

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<sup>60</sup> Section 25A(1)(d) of the CA98.

<sup>61</sup> See [CMA 6con Transparency and Disclosure] available at: [www.gov.uk/cma](http://www.gov.uk/cma).

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

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

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

5.135.16 More information on the involvement in ~~OFT~~CMA investigations of Formal Complainants and other interested third parties is available in the OFT guideline *Involving third parties in Competition Act investigations* (~~OFT451~~OFT451).<sup>62</sup>

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<sup>62</sup> ~~OFT 451~~Involving third parties in Competition Act investigations (OFT451) available ~~to download~~ at: [www.ofc.gov.uk/shared\\_ofc/business\\_leaflets/ca98\\_guidelines/ofc451.pdfcma-](http://www.ofc.gov.uk/shared_ofc/business_leaflets/ca98_guidelines/ofc451.pdfcma-).



## 6 **OUR** THE CMA'S FORMAL POWERS OF INVESTIGATION

### Summary

- After ~~we have opened~~ a formal investigation, ~~we~~ has been opened, the CMA can use ~~our~~ formal powers to obtain information.
- ~~We~~ The CMA can issue formal information requests (section 26 notices) in writing.
- ~~We~~ The CMA can conduct formal interviews with any individual connected to a business under investigation.
- The CMA also ~~have~~ 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 ~~can be~~ is a criminal offence ~~not to comply with our~~ obstruct the CMA's information gathering process.

### Information gathering powers

- 6.1 ~~We have~~ The CMA has a range of powers to obtain information to help ~~us~~ it establish whether an infringement has been committed. ~~We~~ 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.
- 6.2 The following paragraphs give an overview of the extent of ~~our~~ the CMA's formal powers and how ~~we use them~~ 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>63</sup>

<sup>63</sup> OFT 404 Powers of investigation (OFT404) available ~~to download at:~~ [www.offt.gov.uk/shared-offt/business-leaflets/ca98-guidelines/oft404.pdf](http://www.offt.gov.uk/shared-offt/business-leaflets/ca98-guidelines/oft404.pdf) cmal.

## Written information requests

- 6.3 This is the power ~~we~~the CMA would expect to use most often to gather information during ~~our~~ investigations. ~~We~~The CMA will send out formal information requests (also referred to as section 26 notices)<sup>64</sup> in writing to obtain information 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>65</sup> It is a criminal offence punishable by ~~a~~ fine and/or imprisonment ~~not to comply with a formal information request,~~<sup>66</sup> ~~or~~ 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 ~~Act~~CA98).<sup>69</sup>
- 6.4 Under this power, ~~we~~the CMA can also ask for information that is not already written down, for example market share estimates based on knowledge or experience, and ~~we~~the CMA can also require past or present employees of the business providing the document to explain any document that is produced. Examples of the types of information ~~we~~the CMA may ask for include internal business reports, copies of emails and other internal data.
- 6.5 ~~Our~~The information request will tell the recipient what the investigation is about, specify or describe the documents and/or information that ~~we~~ requirethe CMA requires, give details of where and when they must be produced, and set out the offences and/or sanctions that may ~~be~~ committedapply if the recipient does not comply.
- 6.6 ~~We~~The CMA may send out more than one request to the same person or company during the course of ~~our~~the investigation. For example, ~~we~~the CMA

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<sup>64</sup> Section 26 of the ~~Act~~CA98 gives ~~us~~the CMA the power to require the production of information and documents when conducting a formal investigation.

<sup>65</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 failure 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] [currently in draft (CMA4)] available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>66</sup> ~~Section 42 of the Act.~~

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

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

<sup>69</sup> For more information on potential criminal penalties for failing to co-operate with ~~our~~the CMA's powers of investigation see *Powers of Investigation* (~~OFT 404~~OFT404) available ~~to download at:~~ [www.offt.gov.uk/shared-offt/business-leaflets/ca98-guidelines/oft404.pdf](http://www.offt.gov.uk/shared-offt/business-leaflets/ca98-guidelines/oft404.pdf) cma].

may ask for additional information after considering material submitted ~~to us~~ in response to an earlier request.

- 6.7 ~~We~~The CMA will ask for documents or information which, in ~~our~~its opinion, are relevant to the investigation at the time ~~we send out~~ 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 as soon as possible.

#### *Using draft information requests*

- 6.8 Where it is practical and appropriate to do so, ~~we~~the CMA will send the information request in draft.<sup>70</sup> In this way, ~~we~~the CMA can take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which ~~we must receive~~ the information: must be received. The timeframe for comment on the draft will depend on the nature and scope of the request.<sup>71</sup>

- 6.9 In certain circumstances, it would not be appropriate to send information requests in draft. ~~For~~for example, if in ~~our~~the CMA's view it would prejudice ~~our~~the investigation or if it would be inefficient because the request is for a small amount of information. ~~We~~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*

- 6.10 In appropriate cases, ~~we~~the CMA will seek to give recipients of large information requests advance notice so they can manage their resources accordingly. This is ~~our~~the CMA's usual approach.
- 6.11 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 ~~our~~the investigation. Where ~~we do~~the CMA does not give advance notice of large information requests, ~~we~~the CMA will explain why.

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<sup>70</sup> ~~See Transparency – A Statement on the OFT's approach (OFT 1234) available to download at [www.offt.gov.uk/shared\\_offt/consultations/668117/OFT1234.pdf](http://www.offt.gov.uk/shared_offt/consultations/668117/OFT1234.pdf)~~

### Setting a deadline for a response to a written information request

- 6.12 When ~~we send~~the CMA sends out a request, ~~we~~the CMA also ~~set~~sets a deadline by which ~~we must receive~~ the response must be received. If a request has been provided in draft and the timescale for response to the final request already discussed, ~~we~~the CMA will agree to an extension only in exceptional circumstances, so as to minimise any delay to ~~our~~the investigation.
- 6.13 The deadline specified in the final request will depend on the nature and the amount of information that ~~we have~~the CMA has requested. It is not possible for ~~us~~the CMA to apply uniform, set timescales for responses to information requests.
- 6.14 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 ~~Adjudicator~~Officer.<sup>72</sup>

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

- 6.15 As stated above, ~~we expect~~the CMA expects recipients to comply fully with ~~our~~any information request within the given deadline. This is especially the case where ~~we have~~the CMA has engaged with them on the scope and purpose of the request and the proposed deadline for its completion, to help them comply. The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request.<sup>73</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>74</sup> It is also a criminal offence punishable by

<sup>72</sup> See Chapter ~~14.15~~ and Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available to download at [www.gov.uk/cma](http://www.gov.uk/cma)). Further details on the Procedural ~~Adjudicator's~~Officer's role ~~is~~are available at: [~~[www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial](http://www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial)~~[www.gov.uk/cma](http://www.gov.uk/cma)].

<sup>73</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.

<sup>74</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 failure 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 CMA guideline [Administrative Penalties: Statement of policy on the CMA's approach] [currently in draft (CMA4)] available at: [www.gov.uk/cma](http://www.gov.uk/cma).

a fine and/or imprisonment ~~not to comply with a formal information request,~~<sup>75</sup> ~~or~~ to provide false or misleading information,<sup>76</sup> or to destroy ~~or~~, falsify or conceal documents<sup>77</sup> (subject in each case to certain defences or conditions set out in the Act CA98).

- 6.16 Unless otherwise indicated, the response should be sent to the Team Leader in electronic format and in hard copy. If the 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, 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 ~~we have~~the CMA has not received a non-confidential version within this deadline, ~~we~~the CMA will give one further opportunity to make confidentiality representations ~~to us~~. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, ~~we have~~the CMA has received no reply, ~~we~~the CMA will assume that no confidentiality is being claimed in respect of the information. ~~We~~The CMA will not accept blanket or unsubstantiated confidentiality claims. See Chapter ~~7~~7 on handling of confidential information.
- 6.17 In some cases, ~~we~~the CMA may return information sent to ~~us~~it in response to a request where, after careful review, ~~we consider~~the CMA considers it is duplicate information or information that is outside the nature and scope of the request.

#### Power to ~~enter premises~~ require individuals to answer questions

6.18 ~~In some cases, we will visit premises to obtain information. The power we use to gain entry will depend on whether we intend~~The CMA can require any individual who has a connection with a business which is a party to the investigation to answer questions on any matter relevant to the investigation.<sup>78</sup> Where the CMA wishes to question an individual, the CMA will provide the relevant individual with a formal notice requiring them to

<sup>75</sup> ~~See footnote 49 above.~~

<sup>76</sup> ~~See footnote 50 above~~Section 44 of the CA98.

<sup>77</sup> ~~See footnote 51 above~~Section 43 of the CA98.

<sup>78</sup> Section 26A of the CA98. This formal power was introduced by the ERRA13.

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>79</sup>

6.19 The CMA will require the individual to provide information that it believes may be relevant to the investigation, including information that is written down in documents or other materials that have been provided to or obtained by the CMA in the course of the investigation.

*Formal notice requiring an individual to answer questions*

6.20 Where the CMA wishes to question an individual under formal powers, the CMA will provide the relevant individual with a formal written notice. The CMA can only issue formal notices to individuals who have a 'connection with' an undertaking that the CMA is investigating.<sup>80</sup> This may be a current connection or a former connection, for example where the individual used to work for the undertaking under investigation.

6.21 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>81</sup>

6.22 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 interview will take place (which could be immediately on receipt of the notice – see paragraphs 6.25

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<sup>79</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] [currently in draft (CMA4)] available at: [www.gov.uk/cma].

<sup>80</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>81</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).

to 6.27 below), and set out the penalties that the CMA may impose if the recipient does not comply with the notice.

6.23 Where the individual the CMA wishes to interview has a current connection with the relevant undertaking at the time the notice is given,<sup>82</sup> the CMA must also give a copy of the notice to that undertaking.<sup>83</sup> The CMA will take such steps as are reasonable in all the circumstances to provide that notice before the interview takes place and, in general, the CMA will 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>84</sup>

6.24 Any queries about the details of an interview notice should be raised with the Team Leader or Project Director as soon as possible.

#### Conduct of interviews

6.25 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>85</sup>

6.26 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).

6.27 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 normally be asked to read through and check the transcript of the recording or the questions and answers in the note and to confirm, in writing, that they are an

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<sup>82</sup> Section 26A(6)(b) of the CA98 provides that an individual has a 'current connection with an undertaking if, at the time in question, he or she is [concerned in the management or control of the undertaking], or is [employed by or otherwise working for, the undertaking]'.

<sup>83</sup> Section 26A(2) of the CA98.

<sup>84</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 providing a copy of the formal interview notice to the relevant undertaking before conducting an interview is not practicable or appropriate 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>85</sup> Section 26A(1) of the CA98.

accurate account of the interview. The CMA will also normally ask the individual to identify any confidential information by providing clear written representations by a specified date.<sup>86</sup> The CMA will not accept blanket or unsubstantiated confidentiality claims.<sup>87</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?

6.28 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. However, the CMA will only permit a legal adviser also acting for the undertaking to be present at the interview if it is satisfied that doing so will not risk prejudicing the investigation.<sup>88</sup> In cases where the CMA wishes to question a person having entered into premises as described at paragraph 6.44 below, the questioning may be delayed for a reasonable time to allow a legal adviser to attend. During this time, the CMA may make this subject to certain conditions for the purpose of reducing risk of contamination of witness evidence.

### Power to enter premises

~~6.18~~6.29 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 (such as an office or a warehouse) or domestic premises (such as the home of an employee).<sup>89</sup>

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<sup>86</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.

<sup>87</sup> See Chapter 7 for more information on our approach to confidential information.

<sup>88</sup> In particular, the CMA will need to be satisfied that the presence of lawyers acting for the undertaking at the interview will not increase any of the following risks: (i) the destruction, falsification or concealment of evidence, (ii) the contamination of witness evidence, or (iii) the reduction of incentives for individuals being questioned to be open and honest in their accounts.

<sup>89</sup> ~~We~~The CMA also ~~have~~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, ~~we~~the CMA may assist the ~~European~~ 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* (~~OFT 404~~OFT 404) which is



**6.196.30** Under certain circumstances ~~we~~the CMA can enter business premises, but not domestic premises, without a warrant. Where ~~we have~~the CMA has obtained a warrant<sup>90</sup> in advance of entry, ~~we~~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.

**6.206.31** The occupier of the premises does not have to be suspected of having breached competition law.<sup>91</sup>

### Entering premises without a warrant<sup>92</sup>

**6.216.32** An ~~OFT~~CMA officer who is authorised by ~~us~~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.

**6.226.33** In certain circumstances, ~~we do~~the CMA does not have to give advance notice of entry.<sup>93</sup> For example, ~~we do~~the CMA does not have to give advance notice if ~~we have~~it has reasonable suspicion that the premises are, or have been, occupied by a party to an agreement that ~~we are~~the CMA is investigating or a business whose conduct ~~we are~~the CMA is investigating, or if ~~our~~a CMA authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

*What powers ~~do we~~does the CMA have when entering business premises without a warrant?*

**6.236.34** When an inspection without a warrant is taking place, ~~our~~CMA officers may require any person to:

- produce any document that may be relevant to ~~our~~the CMA's investigation – ~~our~~CMA officers can take copies of, or extracts from, any document produced
- provide an explanation of any document produced, and/or

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available ~~to download at:~~

[www.ofc.gov.uk/shared-ofc/business-leaflets/ca98-guidelines/ofc404.pdf](http://www.ofc.gov.uk/shared-ofc/business-leaflets/ca98-guidelines/ofc404.pdf)cma].

<sup>90</sup> From the High Court in England and Wales or Northern Ireland ~~or~~, the Court of Session in Scotland, or the Competition Appeal Tribunal.

<sup>91</sup> For example, ~~we~~the CMA could enter the premises of a supplier or a customer of the business suspected of breaching the law, so long as ~~we have~~the CMA has taken all reasonably practicable steps to notify them in advance of ~~our~~the CMA's intended entry.

<sup>92</sup> Section 27 of the ActCA98.

<sup>93</sup> Section 27(3) of the ActCA98.

- tell ~~us~~the CMA where a document can be found if ~~our~~CMA officers consider it is relevant to ~~our~~the investigation.

6.246.35 ~~Our~~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 or prevent interference with them.<sup>94</sup>

*Entering and searching premises with a warrant<sup>95</sup>*

6.256.36 ~~We~~The CMA can apply to the court<sup>96</sup> for a warrant to enter and search business or domestic premises.

6.266.37 ~~We~~The CMA would usually seek a warrant to search premises where ~~we suspect~~the CMA suspects that the information relevant to ~~our~~the investigation may be destroyed or otherwise interfered with if ~~we~~the CMA requested the material via a written request. Therefore, ~~we~~the CMA mostly ~~use~~uses this power to gather information from ~~companies~~businesses or individuals suspected of participating in a cartel.

*What powers ~~do we~~does the CMA have when entering premises with a warrant?*

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

6.286.39 In addition to ~~our~~the CMA's powers described above, the warrant also authorises ~~our~~CMA officers 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>97</sup>

<sup>94</sup> Section 27(5) of the ~~Act~~CA98.

<sup>95</sup> Section 28 of the ~~Act~~CA98 in relation to business premises. Section 28A of the ~~Act~~CA98 in relation to domestic premises.

<sup>96</sup> The High Court in England and Wales or Northern Ireland ~~or~~, the Court of Session in Scotland, or the Competition Appeal Tribunal.

<sup>97</sup> For business premises, section 28(2)(b) of the ~~Act~~CA98. For domestic premises, section 28A(2)(b) of the ~~Act~~CA98.

6.296.40 The search may cover offices, desks, filing cabinets, electronic devices, such as computers and phones, as well as any documents. ~~We~~The CMA can also take away from the premises:<sup>98</sup>

- original documents that appear to be covered by the warrant if ~~we think~~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 ~~our~~the investigation, when it is not practicable to do so at the premises. If ~~we consider~~the CMA considers later on that the information is outside the scope of ~~our~~the investigation, ~~we~~the CMA will return it<sup>99</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 premises. As above, ~~we~~the CMA will return information if ~~we consider~~the CMA considers later on that it is outside the scope of ~~our~~the investigation, and/or
- copies of computer hard drives, mobile phones, mobile email devices and other electronic devices.

*What will happen upon arrival?*

6.306.41 ~~Our~~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 ~~OFT~~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.

6.316.42 Where ~~we have~~the CMA has obtained a warrant, ~~we~~the CMA officer will produce it on entry. The warrant will list the names of the ~~OFT~~CMA

<sup>98</sup> For business premises, section 28(2)(c) of the ~~Act~~CA98. For domestic premises, section 28A(2)(c) of the ~~Act~~CA98. ~~The CMA~~ can only retain these documents for a maximum period of three months (for business premises, section 28(7) of the ~~Act~~CA98. For domestic premises, section ~~28(A)~~28A(8) of the ~~Act~~CA98). More information can be found in ~~OFT 404~~Powers of Investigation (OFT404) available ~~to download at:~~ [www.offt.gov.uk/shared-offt/business-leaflets/ca98-guidelines/oft404.pdf](http://www.offt.gov.uk/shared-offt/business-leaflets/ca98-guidelines/oft404.pdf) ~~cma~~.

<sup>99</sup> However, the ~~OFT~~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.

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.

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

*Can a legal adviser be present?*

**6.336.44** 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, ~~our~~CMA officers may wait a ~~short~~reasonable time for legal advisers to arrive.<sup>100</sup>

**6.346.45** During this time, ~~we~~the CMA may take necessary measures to prevent tampering with evidence or warning other ~~companies~~businesses about ~~our~~the investigation.<sup>101</sup>

*What if there is nobody at the premises?*

**6.356.46** If there is no one at the premises when ~~our~~CMA officers arrive, ~~our~~the officers must take reasonable steps to inform the occupier that ~~we intend~~the CMA intends to enter the premises. Once ~~we have~~the CMA has informed them, or taken such steps as ~~we are~~it is able to inform them, ~~we~~the CMA must allow the occupier or their legal or other representative a reasonable opportunity to be present when ~~we carry~~the CMA carries out ~~our~~a search under the warrant.<sup>102</sup>

**6.366.47** If ~~our~~CMA officers have not been able to give prior notice, ~~we~~the CMA must leave a copy of the warrant in a prominent place on the premises. If, having taken the necessary steps, ~~we have~~the CMA has entered premises

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<sup>100</sup> Rule ~~3(1)~~4 of the ~~OFT~~CMA98 Rules: [\[currently in draft and being consulted on\] \(available at: www.gov.uk/cma\)](#).

<sup>101</sup> This could include sealing filing cabinets, keeping business records in the same state and place as when ~~OFT~~CMA officers arrived, suspending external email or making and receiving calls, and/or allowing ~~our~~CMA 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>102</sup> Rule ~~3(1)~~4 of the ~~OFT~~CMA98 Rules [\[currently in draft and being consulted on\] \(available at: www.gov.uk/cma\)](#).

that are unoccupied, on leaving ~~we~~the CMA must leave them secured as effectively as ~~we~~those premises were found ~~them~~.<sup>103</sup>

### Return of information

6.48 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>104</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>105</sup>

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<sup>103</sup> For business premises, section 28(5). For domestic premises, section 28A(6) of the ~~Act~~CA98.

<sup>104</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>105</sup> The CMA 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 1.1 for information on the CMA's access to file procedure.

## 7 LIMITS ON ~~OUR~~THE CMA'S POWERS OF INVESTIGATION

### Summary

- ~~We~~The CMA cannot require the production or disclosure of privileged communications.
- ~~We~~The CMA cannot force a business to provide answers that would require an admission that they have infringed the law.
- ~~We are~~The CMA is subject to strict rules governing the extent to which ~~we are~~the CMA is permitted to disclose confidential and sensitive information.
- ~~We expect~~The CMA expects to receive a separate non-confidential version of any ~~documents~~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 ~~Act, we are~~CA98, the CMA is not allowed to use ~~our~~its powers of investigation to require anyone to produce or disclose<sup>106</sup> privileged communications.<sup>107</sup>
- 7.2 Privileged communications are defined in the ~~Act~~CA98. 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, ~~our~~a CMA officer may request that the communications are placed in a sealed envelope or package. The officer

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<sup>106</sup> Production of privileged communications may be through providing written documents or orally (for example, during an interview).

<sup>107</sup> Section 30 of the ~~Act~~CA98.

will then discuss the arrangements for safe-keeping of these items by the ~~OFT~~[CMA](#) pending resolution of the dispute.

### Privilege against self-incrimination

7.4 When ~~we request~~[the CMA requests](#) information or explanations ~~we~~[the CMA](#) cannot force a business to provide answers that would require an admission that they have infringed the law.<sup>108</sup> ~~We~~[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, ~~we are~~[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 ~~our~~ investigations ~~we acquire~~[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 ~~we are~~[the CMA is](#) permitted to disclose such information.<sup>109</sup> In many instances ~~we~~[the CMA](#) may have to redact documents ~~we propose~~[the CMA proposes](#) to disclose to remove any confidential information, for example, by blanking out parts of documents or by aggregating figures.

[7.8](#) If a person or company thinks that any information they are giving ~~us~~[the CMA](#) or ~~we have~~[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 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. ~~We~~

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<sup>108</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>109</sup> ~~Rule 6 of the OFT Rules and~~ Part 9 of the ~~Enterprise Act 2002~~[EA02](#).

~~7.87.9~~ The CMA will not accept blanket or unsubstantiated confidentiality claims. ~~The non~~Non-confidential version~~versions of documents~~ should be provided at the same time as the original ~~response~~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 ~~we have~~the CMA has not received a non-confidential version within this deadline, ~~we~~the CMA will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, ~~we have~~the CMA has received no reply, ~~we~~the CMA will assume that no confidentiality is being claimed in respect of the information.

~~7.11~~ ~~There may be occasions where we propose to disclose information identified by the person or business providing it as being confidential either to parties to the investigation or by including the information in a published decision. For example, we~~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.

~~7.107.12~~ The CMA may not agree with the person or business who provided it that the information in question is confidential<sup>110</sup> or ~~we~~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, ~~we~~the CMA will give the person or business ~~who~~that provided the information prior notice of ~~our~~the proposed action and will give them a reasonable opportunity to make representations ~~to us. We~~. The CMA will then inform the party whether or not ~~we~~the CMA still ~~intend~~intends to disclose the information, after considering all the relevant facts.

~~7.117.13~~ Where a party is informed that ~~we do~~the CMA does still intend to disclose information and the party is unhappy about this, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the

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<sup>110</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.



dispute with the SRO, the party may refer the matter to the Procedural ~~Adjudicator~~Officer.<sup>111</sup>

7.14 In some cases, ~~we~~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. ~~We are likely to do so~~

~~7.127.15~~ 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>112</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 ~~us~~. ~~We~~the CMA. The CMA will then inform the person or business whether or not ~~we~~it still ~~intend~~intends to use the proposed ‘confidentiality ring’ and/or ‘data room’ arrangement, after considering all the relevant facts.

~~7.137.16~~ Where a person or business is informed that ~~we do~~the CMA does still intend to use the ‘confidentiality ring’ and/or ‘data room’ arrangement and the person or business is unhappy about this, 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 ~~Adjudicator~~Officer.<sup>113</sup>

7.17 Further information on the CMA’s approach to the treatment and disclosure of information, including to identifying confidential information, is available in the guideline [CMA6 Transparency and Disclosure].<sup>114</sup>

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<sup>111</sup> See Chapter ~~14.15~~ and Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma]). Further details of the Procedural ~~Adjudicator~~Officer role are available at: ~~[www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/procedural-adjudicator-trialwww.gov.uk/cma]~~

<sup>112</sup> See further detail at Chapter ~~11.11~~.

<sup>113</sup> See Chapter ~~14.15~~ and Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma]). Further details of the Procedural ~~Adjudicator~~Officer role are available at: ~~[www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/procedural-adjudicator-trialwww.gov.uk/cma-]~~.

<sup>114</sup> See CMA6 [Transparency and Disclosure] [currently in draft] (available at: [www.gov.uk/cma]).

## 8 TAKING URGENT ACTION TO PREVENT **SERIOUS**SIGNIFICANT DAMAGE OR TO PROTECT THE PUBLIC INTEREST

### Summary

- ~~We~~The CMA can require a business to comply with temporary directions (interim measures) where
  - ~~we have~~the investigation has been started but not yet concluded ~~an investigation~~, and
  - ~~we consider~~the CMA considers it necessary to act urgently either to prevent ~~serious, irreparable~~significant damage to a person or category of persons, or to protect the public interest.
- In these circumstances, ~~we~~the CMA can act on ~~our~~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 ~~serious, irreparable~~significant damage may apply to ~~us~~the CMA to take interim measures.
- If a person fails to comply with the interim measures without reasonable excuse, ~~we~~the CMA would apply to court for an order to require compliance within a specified time limit.

8.1 ~~We have~~The CMA has the power<sup>115</sup> to require a business to comply with temporary directions (referred to as 'interim measures') while ~~we complete~~our~~it completes the~~ investigation.

8.2 ~~We~~The CMA may do this where ~~we have~~it has started but not yet concluded ~~our~~the investigation and ~~we consider~~the CMA considers it necessary to act urgently either to prevent ~~serious, irreparable~~significant damage to a person or category of persons, or to protect the public interest. ~~We~~The CMA will consider in appropriate cases whether interim measures would be appropriate. The CMA can act on ~~our~~its own initiative or in response to a request to do so.

<sup>115</sup> Section 35 of the ~~Act~~CA98.

- 8.3 In most cases, interim measures will have immediate effect. However, if a person fails to comply with them without reasonable excuse, ~~it is our practice to~~ the CMA may apply to court for an order to require compliance within a specified time limit.
- 8.4 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.
- 8.5 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

- 8.6 Any person who considers that the alleged anti-competitive behaviour of another business is causing them ~~serious, irreparable~~ significant damage may apply to ~~us~~ the CMA to take interim measures.
- 8.7 They should contact the designated Team Leader who is responsible for the case in the first instance. The Team Leader will be able to discuss the information requirements and explain the procedure for dealing with such requests.
- 8.8 Applicants should provide as much information and evidence as possible to demonstrate their case for interim measures and they should also indicate as precisely as possible the nature of the interim measure being sought.

### Decision to impose interim measures

- 8.9 The SRO<sup>116</sup> may provisionally decide to give an interim measures direction. ~~In this case, we~~ (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 ~~our~~ the reasons for giving them. ~~We~~ The CMA will also allow them a reasonable opportunity to make representations ~~to us~~. Given the time critical nature of the interim measures process, the time allowed may be short.
- 8.10 The business to which the directions are addressed will also be allowed to inspect documents on ~~our~~ the file that relate to the proposed directions.

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<sup>116</sup> See paragraph 5.1.5.1.

~~We~~The CMA may withhold any documents to the extent to which they contain any confidential information.

8.11 After taking into account any representations, ~~we~~the CMA will make ~~our~~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 ~~OFT~~CMA officials as appropriate.

8.12 What constitutes significant damage or conduct that is or may be causing significant damage is a question of fact and will depend upon the circumstances of each case.<sup>117</sup> In deciding whether the imposition of interim measures is appropriate in the relevant circumstances, the CMA will undertake a balancing exercise to ensure that:

- it seeks to impose interim measures only where it has identified specific behaviour or conduct that it considers is causing or will cause significant damage to a particular person or category of person, or is or will be contrary to the public interest, and
- 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.

8.13 The CMA will assess whether conduct is causing or will 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 may have on a particular business or categories of businesses in the market(s), or the effect that the conduct is having or may have on the public interest.

8.14 Damage will be significant where a particular person or category of persons is or may be restricted in their ability to compete effectively in the market(s), such that this may significantly damage their commercial position. Damage is likely to 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)

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<sup>117</sup> The significant damage must be likely to result from the alleged anti-competitive behaviour. The CMA will determine this question on the balance of probabilities based on the information available to it at the time.

- restriction on a person's or class of persons' ability to obtain supplies and/or access to customers
- damage to the goodwill or reputation of a person or class of persons.

8.15 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.

8.16 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 may have, on consumers or categories of consumers.

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

- continue supply of important 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
- reverse a price increase or decrease for any good or service where that price increase or decrease has or may cause significant damage to any person's or category of persons' ability to compete effectively, or may cause a detriment to the public
- cease supply of any good or service if the supply of that good or service is causing or may cause significant damage to consumers, competitors or competition in the market(s) in question.

8.18 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>118</sup>

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

### **Rejecting an application for interim measures**

8.128.20 If the SRO provisionally decides to reject an application for interim measures, ~~we~~the CMA will consult the applicant and any other Formal Complainants before doing so by sending a provisional dismissal letter setting out ~~our~~the principal reasons for rejecting the application. ~~We~~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.

8.138.21 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 77 on handling confidential information). ~~We~~The CMA may provide this non-confidential version to the business under investigation if ~~we think~~in the CMA's view it would be appropriate to do so, such as where it may be relevant for the rights of defence.

8.148.22 ~~We~~The CMA will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided ~~to us~~, if the SRO still decides to reject the application, ~~we~~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 ~~our~~the CMA's reasons.

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

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<sup>118</sup> Section 9(1) of the CA98 and/or Article 101(3) of the TFEU.

## Publication

~~8.168.24~~ ~~We maintain~~ The CMA maintains a register on ~~our~~ the CMA website of all interim measures directions.<sup>119</sup> ~~We~~ The CMA may also publish them in an appropriate trade journal.

~~8.178.25~~ More information on interim measures directions is available in *Enforcement*<sup>120</sup> (OFT407) and *Involving third parties in Competition Act investigations*: (OFT451).<sup>121</sup>

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<sup>119</sup> The register can be viewed at: ~~[[www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisionscma-1](http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisionscma-1)]~~

<sup>120</sup> ~~OFT 407 available to download at~~  
~~[www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf)~~

<sup>121</sup> ~~OFT 451~~ Publications available ~~to download at:~~  
~~[www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft451.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft451.pdf)~~ cma].

## 9 THE ANALYSIS AND REVIEW STAGE

### Summary

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

9.1 The evidence that ~~we gather~~the CMA gathers using ~~our~~the powers described ~~above~~in previous chapters is fundamental to the outcome of ~~our~~an investigation. In all cases, ~~we~~the CMA routinely ~~review~~reviews and ~~analyse~~analyses the information in ~~our~~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, ~~our~~the CMA's early analysis may suggest that a large number of businesses have been acting unlawfully but later on it emerges that ~~we~~the CMA only ~~have~~has enough evidence to warrant further the investigation of some of those businesses. ~~We~~The CMA may also exercise ~~our~~its administrative discretion to focus ~~our~~ resources on investigating a limited set of activities or businesses.

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

### Internal scrutiny

9.4 Throughout ~~our~~CMA competition investigations, as part of the quality assurance that ~~we adopt~~the CMA adopts in every case, ~~we~~the CMA



regularly ~~scrutinises~~scrutinises the way in which ~~we handle our~~it handles the investigation and routinely assess the evidence before ~~us~~the CMA to ensure that ~~our~~its actions and decisions are well-founded, fair and robust. This involves seeking internal advice from specialist ~~advisors~~advisers on the legal, policy and economic issues that arise. In some instances, ~~we~~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.
- 9.6 The General Counsel and the Chief ~~Economist~~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) before a Statement of Objections is issued or a final decision on infringement 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 ~~Economist~~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.
- 9.8 The General Counsel and the Chief ~~Economist~~Economic Adviser (or their representative(s)) will attend the oral hearing(s)<sup>122</sup> and may ask questions of the parties.
- 9.9 The ~~OFT-CMA Case and Policy Committee~~<sup>123</sup>, or Executive Committee (ExCo) (as appropriate) and/or the ~~OFT~~CMA Board<sup>124</sup> will receive regular

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<sup>122</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 ~~42~~.12.

<sup>123</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: \[www.gov.uk/cma\]\(http://www.gov.uk/cma\).](#)

updates from the case team on the progress of an investigation and the risks arising.

9.10 The SRO decides whether:

- there are sufficient grounds to open a formal investigation
- there is sufficient evidence to issue a Statement of Objections
- to close a case prior to issue of a Statement of Objections
- to make an interim measures direction<sup>125</sup>
- to accept commitments offered by a party under investigation<sup>126</sup>
- a case is appropriate for settlement.<sup>127</sup>

~~Before taking these decisions, and in~~ In addition to taking advice from specialist advisors as detailed above, the SRO will consult two other senior officials at key stages of the investigation (including before taking the decisions set out above) prior to issuing a Statement of Objections. The SRO will consult and where appropriate seek approval from the Case and (Policy Committee in relation to decisions on commitments and settlement) the Policy Committee<sup>128</sup> as appropriate.

9.11 Where a Statement of Objections is issued, a Case Decision Group<sup>129</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 9.59.5 to 9.79.7 above), consult the Case and Policy Committee.

<sup>124</sup> Further details of ExCo and the OFTCMA Board are available at: [\[www.eft.gov.uk/about-the-oft/oft-structure/boardcma-\]](http://www.eft.gov.uk/about-the-oft/oft-structure/boardcma-).

<sup>125</sup> See paragraphs 8.9 to 8.23.

<sup>126</sup> See paragraphs 10.15 to 10.23.

<sup>127</sup> See ~~paragraphs~~ paragraph 11.3 to. See Chapter 14, for more information on settlement.

<sup>128</sup> ~~The Policy Committee is constituted of members of the OFT's senior staff, including the Chief executive, other executive members of the OFT Board, the Chief Economist, the General Counsel and the Senior Director of Policy. Its purpose is to oversee and scrutinise the development of OFT casework, guidance, procedures and policy relating to the Act and the equivalent provisions of the TFEU.~~

<sup>129</sup> See paragraph 11.27.

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.

### Sharing ~~our~~[the CMA's](#) early thinking and giving regular updates

9.13 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 us, 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 ~~our~~[the CMA's](#) investigation is to establish which set of circumstances is more credible based on verifiable facts.

9.14 ~~We~~[The CMA](#) generally ~~provide~~[provides](#) case updates to ~~companies~~[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 ~~us~~[the CMA](#) and the parties alike.

9.15 ~~We~~[The CMA](#) will also offer each party under investigation separate opportunities to meet with representatives of the case team (including the SRO and/or Project Director) to ensure they are aware of the stage the investigation has reached.<sup>130</sup> At these 'state of play' meetings, ~~we~~[the CMA](#) will inform parties of the next stages of the investigation and the likely timing of these, subject to any restrictions ~~we~~[the CMA](#) may have if the timing is market sensitive.<sup>131</sup> ~~We~~[The CMA](#) will also, generally, share ~~our~~[its](#) provisional thinking on a case.

9.16 ~~We~~[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

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<sup>130</sup> On occasion, ~~we~~[the CMA](#) may, if ~~we consider~~[the CMA considers](#) it useful or appropriate, invite the parties under investigation to a multi-party meeting. For example, ~~we~~[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>131</sup> As to market sensitivity considerations, see ~~paragraphs 3.27-3.42 (and particularly paragraph 3.28) of~~[CMA6 Transparency – A Statement on the OFT's approach \(OFT 1234\) and Disclosure \[currently in draft\]](#) (available ~~to download at:~~  
[www.of.gov.uk/shared-of/consultations/668117/OFT1234.pdf](http://www.of.gov.uk/shared-of/consultations/668117/OFT1234.pdf)~~cma~~).

provide parties with greater transparency on the nature and scope of the investigation. ~~We~~The CMA will invite parties to a second state of play meeting before a decision is taken on whether to issue a Statement of Objections. At this meeting ~~we~~the CMA will update parties on ~~our~~its provisional thinking on the case, including the key potential competition concerns identified.

- 9.17 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, ~~we~~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 ~~our~~the CMA's provisional thinking, including the key potential competition concerns identified.
- 9.18 In all cases where a Statement of Objections is issued, ~~we~~the CMA will invite each party to a further state of play meeting after ~~we have it has~~ received all parties' written and (where applicable) oral representations on the Statement of Objections. At this meeting, which will be attended by at least one member of the Case Decision Group<sup>132</sup> and the case team, ~~we~~the CMA will update parties on ~~our~~its preliminary views on how ~~we intend~~the CMA intends to proceed with the case in light of the written and oral representations ~~we that~~ have been received.
- 9.19 In appropriate circumstances, ~~we~~the CMA may also meet with parties on other occasions. This may be where they have new information that can materially assist ~~us~~the CMA in taking forward ~~our~~the case. Parties who believe that a meeting of this kind would be useful should contact the Team Leader in the first instance to discuss the matter.
- 9.20 As a matter of routine, ~~we~~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 ~~case opening~~-notice of investigation on ~~our~~the CMA website.<sup>133</sup>
- 9.21 ~~We have published a~~The CMA's guideline [CMA6 Transparency Statement on our website, setting and Disclosure] sets out the steps ~~we take~~the CMA takes to ensure ~~our~~its work is open and accessible.<sup>134</sup> If you have a concern

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<sup>132</sup> ~~See paragraph 11.27.~~

<sup>133</sup> See Chapter ~~5.5.~~

<sup>134</sup> ~~Available at~~<sup>134</sup> See [CMA6 Transparency and Disclosure] [currently in draft]] (available at: [www.ofc.gov.uk/shared\_ofc/consultations/668117/OFT1234.pdfcma-]).

or complaint about ~~our~~ [the CMA's](#) procedures or the handling of a case, you should contact the SRO in the first instance. If you are unable to resolve the dispute with the SRO, certain procedural complaints may be referred to the Procedural ~~Adjudicator~~ [Officer](#).<sup>135</sup> If your dispute falls outside the scope of the Procedural ~~Adjudicator~~ [Officer's role](#), the [CMA publication \[CMA6 Transparency ~~Statement~~ and Disclosure\]](#) sets out the options available to you to pursue the complaint.<sup>136</sup>

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<sup>135</sup> See Chapter ~~14,15~~ and Rule 8 of the CA98 Rules [[currently in draft and being consulted on](#)] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)). Further details of the Procedural ~~Adjudicator~~ [Officer](#) role are available ~~through at:~~ [www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial](http://www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial) [www.gov.uk/cma](http://www.gov.uk/cma)].

<sup>136</sup> See [CMA6 Transparency and Disclosure] [[currently in draft](#)] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

## 10 INVESTIGATION OUTCOMES

### Summary

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

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

- ~~We~~ can decide to close ~~our~~an investigation on grounds of administrative priorities (see paragraphs 10.2 – 10.11)
- ~~We~~ can issue a decision that there are no grounds for action if ~~we have~~the CMA has not found sufficient evidence of an infringement of competition law (see paragraphs 10.12 – 10.14)
- ~~We~~ may accept commitments from a business relating to their future conduct where ~~we are~~the CMA is satisfied that these commitments fully address ~~our~~the competition concerns (see paragraphs 10.15 – 10.23)

- ~~We~~ will issue a Statement of Objections where ~~our~~the CMA's provisional view is that the conduct under investigation amounts to an infringement of competition law (see Chapter ~~11~~11 below). After allowing the business(es) under investigation an opportunity to make representations on ~~our~~the Statement of Objections (see Chapter ~~12~~12 below), if ~~we~~the CMA still ~~consider~~considers that they have committed an infringement, ~~we~~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 ~~our~~ investigations on the grounds of administrative priorities

- 10.2 Not all of ~~our~~the CMA's investigations result in a finding that there has been a breach of competition law. ~~We~~The CMA may decide that a formal investigation no longer merits the continued allocation of ~~our~~ resources because it no longer fits within ~~our~~the CMA's casework priorities and/or because ~~we do~~the CMA does not have sufficient evidence in ~~our~~its possession to determine whether a breach has been committed and ~~we~~ ~~consider~~the CMA considers that further investigation is not warranted. ~~We~~The CMA may take this decision at any stage of ~~our~~the investigation.<sup>137</sup>
- 10.3 If ~~we decide~~the CMA decides to close an investigation on the grounds of administrative priorities, ~~we~~the CMA will inform any Formal Complainants in writing, setting out ~~our~~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, ~~we are~~the CMA is likely to give more details than in the case of complaints which have not been the subject of extensive investigation.
- 10.4 ~~We~~The CMA will give Formal Complainants an opportunity to submit their comments or any additional information within a specified time frame. Generally, ~~we~~the CMA will give two to four weeks to respond. In complex cases which have been extensively investigated, ~~we~~the CMA may give longer.
- 10.5 If a Formal Complainant's response contains confidential information, they will be asked to submit a separate non-confidential version at the same time (see Chapter ~~7~~7 on handling confidential information). ~~We~~The CMA may

<sup>137</sup> The SRO is responsible for deciding whether to close a case on administrative priorities grounds prior to issue of a Statement of Objections. [\(see paragraph 9.10 for further information on the decision making process\)](#). After any Statement of Objections has been issued, case closure decisions are the responsibility of the Case Decision Group.

provide this to the business(es) ~~we are~~the CMA is investigating if ~~we think~~the CMA thinks it appropriate, such as if it is likely to change ~~our~~the CMA's preliminary view.

- 10.6 ~~We~~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 ~~We~~The CMA will consider any comments and further evidence submitted within the specified time limit before reaching a final view on whether to close ~~our~~an investigation.
- 10.8 If ~~we decide~~the CMA decides to close the case, ~~we~~the CMA will write to the Formal Complainant and the business under investigation, explaining why any additional information sent to ~~us~~the CMA has not led ~~us~~the CMA to change ~~our~~its view. The level of detail given will depend on the case and the nature of the additional information provided.
- 10.9 In these circumstances, ~~we~~the CMA may also write to the business under investigation to inform them that ~~we have~~the CMA has been made aware of a possible breach of competition law by them and that although ~~we are~~the CMA is currently not minded to pursue an investigation, ~~we~~the CMA may do so in future if ~~our~~its priorities change (for example in response to further evidence ~~we receive~~received).
- 10.10 ~~We~~The CMA will also issue a public statement linking to the relevant page on ~~our~~the CMA website and explain why ~~we have~~the CMA has closed the case on administrative priority grounds.
- 10.11 If the response to ~~our~~the CMA's provisional closure letter leads ~~us~~the CMA to change ~~our~~its preliminary view and decide that an investigation should be continued, ~~we~~the CMA will inform the company under investigation and the Formal Complainant and continue ~~our~~the investigation in the normal way.

### **Issuing a no grounds for action decision**

- 10.12 If ~~we do~~the CMA does not find sufficient evidence of a competition law infringement, ~~we~~the CMA may publish a reasoned no grounds for action decision when closing the case.<sup>138</sup>

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<sup>138</sup> Rule ~~7(3)~~10 of the ~~OFT~~CA98 Rules- [\[currently in draft and being consulted on\]](#) (available at: [www.gov.uk/cma/](http://www.gov.uk/cma/)).



10.13 In such cases, ~~we~~the CMA will provide a non-confidential version of ~~our~~its proposed decision to the Formal Complainant. The consultation process on the proposed decision will be the same as for provisional case closure letters.

10.14 Further information is available in *Involving third parties in Competition Act investigations*: [\(OFT451\)](#).<sup>139</sup>

### Accepting commitments on future conduct

10.15 If ~~we consider~~the CMA considers that the case gives rise to competition concerns, instead of making an infringement decision, ~~we~~the CMA may be prepared to accept binding promises, called 'commitments', from a business relating to their future conduct.<sup>140</sup> ~~We~~The CMA must be satisfied that the commitments offered fully address ~~our~~its competition concerns. The decision to accept commitments is at ~~our~~the CMA's discretion.

10.16 ~~We are~~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.

10.17 ~~We are~~The CMA is very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position.

10.18 A business under investigation can offer commitments at any time during the course of that investigation, until a decision on infringement is made. However, ~~we are~~the CMA is unlikely to consider it appropriate to accept commitments at a very late stage in ~~our~~an investigation, such as after ~~we have~~the CMA has considered representations on ~~our~~the Statement of Objections.

10.19 If a business would like to discuss offering commitments, they should contact the Team Leader in the first instance. If, following that contact, ~~we think~~the CMA thinks that commitments may be appropriate, ~~we~~the CMA will send a summary of ~~our~~its competition concerns to the business. Once commitments

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<sup>139</sup> [OFT 451 \*Involving third parties in Competition Act investigations\* \(OFT451\)](#) available ~~to download~~ at: [www.ofc.gov.uk/shared\\_ofc/business\\_leaflets/ca98\\_guidelines/oft451.pdf](http://www.ofc.gov.uk/shared_ofc/business_leaflets/ca98_guidelines/oft451.pdf)cma].

<sup>140</sup> Section 31A of the [Act CA98](#).

have been offered, ~~we~~the CMA may discuss them with the business to see if they would be acceptable to ~~us~~the CMA.

- 10.20 If ~~we propose~~the CMA proposes to accept the commitments offered, ~~we~~the CMA will consult those who are likely to be affected by them and give them an opportunity to give ~~us~~ their views within a time limit of at least 11 working days. After receipt of the responses to this consultation, ~~we~~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 ~~we consider~~the CMA considers that changes are required to the commitments before ~~we~~the CMA would consider accepting them.
- 10.21 If the business(es) offer revised commitments including significant changes, ~~we~~the CMA will allow another opportunity for Formal Complainants and any other interested third parties to express their views within a time limit of at least six working days.
- 10.22 The SRO is responsible for deciding whether to accept the commitments offered, having consulted with the Case and Policy Committee<sup>141</sup> and other senior ~~OFT~~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 ~~OFT~~CMA. Once accepted, ~~we~~the CMA will publish the commitments on ~~our~~the CMA website.
- 10.23 Further information on ~~our~~the CMA's approach to commitments is contained in the OFT guideline *Enforcement: (OFT407)*.<sup>142</sup>

### Issuing a Statement of Objections

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

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<sup>141</sup> ~~For a description of the Policy Committee and its role in investigations under the Act, see Chapter 9.~~

<sup>142</sup> ~~OFT 407 Enforcement (OFT407) available to download at:~~  
[www.ofc.gov.uk/shared\\_ofc/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.ofc.gov.uk/shared_ofc/business_leaflets/ca98_guidelines/oft407.pdf)~~cma].~~

## 11 ISSUING ~~our~~THE CMA'S PROVISIONAL FINDINGS – THE STATEMENT OF OBJECTIONS

### Summary

- Where ~~our~~the CMA's provisional view is that the conduct under investigation amounts to an infringement, ~~we~~the CMA will issue ~~our~~its Statement of Objections to each business ~~we consider~~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 ~~our~~the CMA's provisional view and proposed next steps. It allows the business being accused of breaching competition law an opportunity to know the full case against them and, if they choose to do so, to formally respond in writing and orally.
- ~~We give~~The CMA gives each addressee of ~~our~~a Statement of Objections an opportunity to inspect ~~our~~the investigation file.
- At this stage, ~~we~~the CMA may also invite the addressee of ~~our~~the Statement of Objections to contact ~~us~~the CMA if they 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. ~~We~~The CMA will inform those businesses of the identity of the Case Decision Group members.

- 11.1 Following the analysis of the evidence on ~~our~~the files, if ~~our~~the CMA's provisional view is that the conduct under investigation amounts to an infringement, ~~we~~the CMA will issue ~~our~~a Statement of Objections to each

business ~~we consider~~ it considers to be responsible for the infringement and give them an opportunity to inspect ~~our~~ the CMA's file.<sup>143</sup>

- 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 strictly necessary in order for them to exercise their rights of defence. Before disclosing any confidential information, ~~we~~ 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 ~~we consider~~ the CMA considers that disclosure might significantly harm legitimate business interests or the interests of an individual, ~~we~~ the CMA will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which ~~we are~~ the CMA is allowed to make the disclosure.<sup>144</sup>
- 11.3 At this stage, ~~we~~ the CMA may also invite addressees of a Statement of Objections to contact ~~us~~ the CMA if they would like to enter into discussions on the possible settlement of the case. This settlement ~~process~~ procedure applies where a business under investigation is prepared to admit that it has breached competition law and ~~to agree to~~ confirms it accepts that a streamlined administrative procedure ~~to~~ will govern the remainder of ~~our~~ the investigation of that ~~business'~~ business's conduct. ~~In return for this, we may agree to~~ If so, the CMA will impose a reduced penalty on the business. Businesses may wish to approach ~~us~~ the CMA earlier on in ~~our~~ the investigation to discuss the possibility of exploring settlement. If so, they should contact the Team Leader in the first instance. See Chapter 14 for more information on settlement.
- ~~11.4 — Consideration of the possibility of settlement will only be appropriate when we consider that the evidential standard for an infringement is met. Settlement will not be appropriate in every case and we will exercise our discretion on a case by case basis to decide whether or not it would be appropriate to offer to enter into settlement discussions. Before settlement discussions may commence, the SRO must receive approval from the Policy Committee to enter into such discussions. Any agreement in principle reached between the SRO and the business regarding possible settlement will require the approval of the Policy Committee before the settlement~~

<sup>143</sup> ~~Rule 4 of the OFT Rules.~~<sup>143</sup> Rule 6 of the CA98 Rules) [currently in draft and being consulted on] (available at: [www.gov.uk/cma]). 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.

<sup>144</sup> Section 244 of the ~~Enterprise Act 2002~~ EA02.

~~agreement can be formally entered into by the OFT and take effect. The case against the settling business will then proceed to an infringement decision following the streamlined administrative procedure agreed upon.~~

~~11.5~~11.4 The Statement of Objections represents ~~our~~the CMA's provisional view and proposed next steps. It allows the businesses being accused of breaching competition law an opportunity to know the full case against them and, if they choose to do so, to respond formally ~~respond~~ in writing and orally.

~~11.6~~11.5 The Statement of Objections will set out the facts and ~~our~~the CMA's legal and economic assessment of them which led to ~~our~~the provisional view that an infringement has occurred. ~~We~~The CMA will also set out any action ~~we propose~~it proposes to take, such as imposing financial penalties<sup>145</sup> and/or issuing directions<sup>146</sup> to stop the infringement if ~~we believe~~the CMA believes it is ongoing, and ~~our~~the CMA's reasons for taking the action.

~~11.7~~11.6 ~~It is our current practice to~~The CMA will generally send a hard copy of the Statement of Objections and covering letter to recipients by courier or recorded delivery. Typically, ~~we~~the CMA will also provide an electronic copy in pdf format.

~~11.8~~11.7 It is ~~our~~the CMA's normal practice publicly to announce the issue of the Statement of Objections on ~~our~~the CMA website and to make an announcement on the Regulatory News Service.<sup>147</sup> The CMA will also update the administrative timetable in the notice of investigation on the CMA website.<sup>148</sup>

~~11.9~~11.8 As far as possible, ~~we aim~~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.

~~11.10~~11.9 The timing of the announcement and any advance notice will depend on whether there is any market sensitivity about the announcement. ~~We have~~The CMA has to balance ~~our~~its responsibilities concerning the control

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<sup>145</sup> More information on how ~~we set~~the CMA sets penalties is available in Part 5 of OFT guideline *Enforcement (OFT 407)*, available to download at [www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf) and [OFT407](#) and see *Guidance as to the appropriate amount of a penalty (OFT 423)*, [OFT423](#), both available to download at: [\[www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft423.pdf\]](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf).

<sup>146</sup> More information on directions can be found in *Enforcement (OFT 407)*, [OFT407](#), available to download at: [\[www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft407.pdf\]](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf).

<sup>147</sup> [www.investigate.co.uk](http://www.investigate.co.uk).

<sup>148</sup> See Chapter 5.

and release of market sensitive information against ~~our~~the objective of, as far as possible, giving directly affected ~~parties~~parties' fair and sufficient notice.

~~41.11~~11.10 As a general rule, if there is no market or other sensitivity about the fact or date of the announcement, ~~we~~the CMA will be open about the date and publish the date on ~~our~~the CMA website, up to several days before the full announcement. ~~We~~The CMA will tell affected parties in advance of placing any statement on the substance of the matter on ~~our~~the CMA website. The exact notice given will depend on the circumstances of the particular case in point.

~~41.12~~11.11 Generally, in non-market sensitive announcements, ~~we aim~~the CMA aims to give parties advance sight of the content of ~~our~~its announcement, in confidence, unless there is a compelling reason not to do so.

~~41.13~~11.12 In the case of market sensitive announcements, where appropriate, ~~we~~the CMA will apply the ~~FSA's~~Financial Conduct Authority's (FCA) 'Guideline for the control and release of price sensitive information by Industry ~~Regulators.~~Regulators' (originally published by the Financial Services Authority, the predecessor of the FCA).<sup>149</sup>

~~41.14~~11.13 If there is no market or other sensitivity about the date of the announcement as opposed to the content of the announcement, ~~we~~the CMA will be open about the date and publish that date on ~~our~~the CMA website up to several days in advance of the full announcement. ~~We~~The CMA will also inform media organisations. ~~We~~The CMA will tell parties in advance of informing the media or placing any statement about the substance of the matter on ~~our~~the CMA website.

~~41.15~~11.14 If the date and content of the announcement may be market-sensitive, for example, where nothing about the investigation has previously been announced, ~~we~~the CMA will notify affected parties after financial markets have closed including, where appropriate, financial markets in other countries.

~~41.16~~11.15 In particular, if the date of the announcement is not in the public domain, ~~we~~the CMA will inform those directly affected in strict confidence the evening before issue once relevant financial markets have closed.

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<sup>149</sup> See FCA website: [http://www.fsa.gov.uk/pubs/ukla/ir\\_guidelines.pdf/](http://www.fsa.gov.uk/pubs/ukla/ir_guidelines.pdf/).

~~41.17~~11.16 More details about the way in which ~~we~~the CMA publicly ~~announce~~announces the issue of a Statement of Objections is available in ~~our~~the CMA's guideline [CMA6 Transparency ~~Statement and Disclosure~~].<sup>150</sup>

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

~~41.18~~11.17 The SRO decides whether to issue a Statement of Objections. Before doing so, the SRO will consult the General Counsel and Chief ~~Economist~~Economic Adviser (or their representatives) to ensure that the SRO is aware of any significant legal and economic risks that have been identified.<sup>151</sup> The SRO will also consult other senior ~~OFT~~CMA officials as appropriate.<sup>152</sup>

~~41.19~~11.18 The SRO will be chosen at the outset of the formal investigation and businesses under investigation will be informed of who the SRO is (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, ~~we~~the CMA will inform the businesses under investigation.

## Inspection of ~~our~~the file and treatment of confidential information

~~41.20~~11.19 At the same time as issuing the Statement of Objections, ~~we~~the CMA will also give the addressees of the Statement of Objections the opportunity to inspect ~~our~~the file. This is to ensure that they can properly defend themselves against the allegation of having breached competition law.

~~41.21~~11.20 ~~We allow~~The CMA allows addressees of the Statement of Objections a reasonable opportunity, typically six to eight weeks, to inspect copies of disclosable documents on ~~our~~the file. These are documents that relate to matters contained in the Statement of Objections, but excluding certain confidential information<sup>153</sup> and ~~OFT~~CMA internal documents.<sup>154</sup>155

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<sup>150</sup> ~~For a general guide to our approach when we make a public announcement, see~~ See [CMA6 [Transparency – A Statement on the OFT's approach (OFT 1234) and Disclosure] [currently in draft ] (available to download at: [www.of.gov.uk/shared\_of/consultations/668117/OFT1234.pdf] [cma]).

<sup>151</sup> As described further in paragraphs 9.5 to 9.7 above.

<sup>152</sup> See further paragraphs 9.4 to 9.12 for details of the CMA's internal scrutiny procedures.

<sup>153</sup> Under Rule 1(1) of the ~~OFT Rules~~CA98 Rules [currently in draft and being consulted on] confidential information means commercial information whose disclosure the ~~OFT~~CMA thinks might significantly harm the legitimate business interests of the ~~company~~undertaking to which it relates, or information relating to the private affairs of an individual whose disclosure the ~~OFT~~CMA thinks might significantly harm the individual's interests, or information whose disclosure the ~~OFT~~CMA thinks is contrary to the public interest.

<sup>154</sup> ~~Rule 5(3) of the OFT Rules.~~

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 not include routine administrative documents as part of the file. Such 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 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, ~~we~~the CMA will send hard copies. In rare circumstances, businesses can inspect the file on ~~our~~the CMA's premises.

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

11.24 ~~We~~The CMA will also consider requests for access to ~~our~~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. ~~We have~~The CMA has discretion as to whether or not to ~~agree to such requests~~use these procedures in investigations under the CA98 and ~~are~~is likely to do so only where 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 would envisage that a data room or confidentiality ring may be appropriate in the following situations:

- ~~Where we decide to use a 'confidentiality ring' or 'data room', we will provide the parties involved with details of how we propose~~The CMA may organise a 'data room' procedure where the disclosure of a limited category of confidential information or data on an 'external adviser only' basis would enable a party's legal, economic or other professional advisers 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

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<sup>155</sup> Rule 6(2) of the CA98 Rules [currently in draft and being consulted on]. Other than for formal minutes, transcripts or meeting notes which are agreed with a party, where the CMA makes an internal note of a meeting, telephone call or conversation with any party to an investigation, such notes will reflect the CMA's own interpretation of that meeting or conversation and will be considered internal documents.



data and may, where appropriate, be used to allow parties' legal advisers to carry out an assessment of a specific set of qualitative documents. Access to the data room is granted to a restricted group of persons, that is, the external legal counsel and/or the economic advisers of the party under the supervision of CMA officials. The advisers may make use of the information contained in the data room for the purpose of defending their client but may not disclose any confidential information to their client. The CMA envisages that the data room procedure would be used in cases where access to certain confidential information is essential for the party's legal and/or economic advisers to understand the CMA's analysis, and where using a data room procedure is a necessary and proportionate way of resolving this.<sup>156</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) is provided through a 'confidentiality ring' procedure. Under this procedure, the CMA's case file may be disclosed to a limited category of persons (to be determined on a case by case basis). This process may lead to the relevant persons identifying a further shortlist of the documents to which the party to the investigation would seek access (non-confidential versions). This is a 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 procedure requires the relevant parties to consent to the procedure and to waive their right to full access to the CMA's case file. Furthermore, the CMA envisages that confidentiality rings may be used in cases where access to certain confidential information is essential for the party's legal and/or economic advisers to understand the CMA's analysis, and where using a confidentiality ring is a necessary and proportionate way of resolving this.<sup>157</sup>

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<sup>156</sup> The CMA will seek consent from the relevant parties to the disclosure and use of confidential information within a data room procedure in all cases. However, the CMA has the discretion to decide that a data room procedure is a necessary and proportionate way of resolving the conflict between the confidentiality of information belonging to one party and respecting another party's rights of defence, even if a relevant party does not provide consent.

<sup>157</sup> The CMA will seek consent from the relevant parties to the disclosure and use of confidential information within a confidentiality ring in all cases. However, the CMA has the discretion to decide that a confidentiality ring is a necessary and proportionate way of resolving the conflict between

11.25 Where the CMA decides on (or a party requests) the use of a 'confidentiality ring' or 'data room' procedure, 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 that will be required from those ~~are given access to the data room.~~ who are given access to the data room.<sup>158</sup> 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>159</sup>

~~11.26 In some cases, where the parties consent, we may propose that some confidential information is disclosed on an 'external adviser only' basis. For example, in some cases a 'confidentiality ring' has been considered where there is a large volume of documents on the case file which are not being relied upon in the Statement of Objections. If the parties agree, the case team may adopt a streamlined access to file process, preparing redacted versions of the case file only for documents which are being relied upon in the Statement of Objections or have been identified as being relevant to the case. A 'confidentiality ring' on an 'external adviser only' basis is used to allow the parties' external advisers to check the remainder of the file to ensure that the case team has disclosed all relevant documents to the parties, with the case team only needing to prepare redacted versions of any additional documents identified as necessary for disclosure to the party.~~

11.26 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>160</sup> In practical terms, this means that a person to whom information is disclosed which is not made publicly available must not make any onward disclosure of that information.

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the confidentiality of information belonging to one party and respecting another party's rights of defence, even if a relevant party does not provide consent.

<sup>158</sup> See Chapter 4 of the CMA's guideline [CMA6 [Transparency and Disclosure] [currently in draft ] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)) for further information on the CMA's general approach to protection of confidential information that is disclosed through a 'confidentiality ring' or 'data room'.

<sup>159</sup> See Chapter 15 and Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available to download at [www.gov.uk/cma](http://www.gov.uk/cma)). Further details of the Procedural Officer role are available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>160</sup> Section 241(2A) and section 245 of the EA02.

## Appointment of a Case Decision Group

- 11.27 Once ~~we have~~[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. The Case Decision Group is responsible for taking decisions on (a) whether to issue an infringement decision (with or without directions) or 'no grounds for action' decision; and (b) on the appropriate amount of any penalty.<sup>161</sup>
- 11.28 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.
- 11.29 The Case Decision Group will be appointed by – and will operate under the delegated authority of – the [Case and](#) Policy Committee,<sup>162</sup> which is constituted of members of the ~~OFT's~~[CMA's](#) senior staff, ~~including the Chief Executive, other executive members of the OFT Board, the Chief Economist, the General Counsel and the Senior Director of Policy.~~
- 11.30 ~~We~~[The CMA](#) will inform the parties of the identity of the Case Decision Group members. The Case Decision Group will include at least one member of the [Case and](#) Policy Committee and at least one of its members (who may be the member of the [Case and](#) Policy Committee) will be legally qualified. [The Case Decision Group may include any senior member of staff of the CMA, any board member of the CMA and/or any member of the CMA panel.](#)<sup>163</sup>
- 11.31 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 under investigation, complainant(s) and third parties, and will relay information from those parties to the Case Decision Group as necessary.<sup>164</sup> The Case

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<sup>161</sup> The Case Decision Group may also decide to close a case on the grounds of administrative priorities. See further paragraphs 10.2 – 10.11 above.

<sup>162</sup> ~~The Policy Committee operates under delegated authority from the OFT Board. The purpose of the Policy Committee is to oversee and scrutinise the development of OFT casework, guidance, procedures and policy relating to the Act and the equivalent provisions of the TFEU.~~

<sup>163</sup> [The role of the CMA panel is set out in Schedule 4 of the ERRA13.](#)

<sup>164</sup> Contact details for the case team will be included in the ~~case opening~~ notice [of investigation](#) published on the ~~OFT's~~[CMA's](#) website [\[www.offt.gov.uk/OFTwork/off-current-casescma\]](#).

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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## 12 RIGHT TO REPLY

### 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 ~~our~~[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 ~~Economist~~[Economic Adviser](#) and General Counsel (or their representatives) will also attend.
- ~~We~~[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 continue to be supported by the evidence and the facts.
- Where, having considered any written and oral representations made ~~to us~~ on the Statement of Objections, the Case Decision Group is considering reaching an infringement decision and imposing a financial penalty on a party, ~~we~~[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 ~~we receive~~[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 ~~we propose~~[the CMA proposes](#) to rely on this information to establish an infringement, ~~we~~[it](#) will issue a Supplementary Statement of Objections.

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

- 12.1 When ~~we issue~~the CMA issues a Statement of Objections, ~~we~~the CMA will invite each addressee of the Statement of Objections (~~an~~-Addressee) to respond in writing.<sup>165</sup> However, there is no obligation to submit a response.
- 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 ~~OFT~~CMA and the legal and economic assessment set out in the Statement of Objections.
- 12.3 The deadline for submitting written representations will be specified in the Statement of Objections and will be set having regard to the circumstances of the case. 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.
- 12.4 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 ~~Adjudicator~~Officer.<sup>166</sup>
- 12.5 When an Addressee submits written representations they should also provide a non-confidential version of their representations, along with an explanation which justifies why information should be treated as confidential. ~~We~~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 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.
- 12.6 In the event that ~~we have~~the CMA has not received a non-confidential version within this deadline, ~~we~~the Addressee will ~~give~~be given one further opportunity to make confidentiality representations to ~~us~~the CMA. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, ~~we have~~the CMA has received no reply, ~~we~~the CMA

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<sup>165</sup> [Rule 6 CA98 Rules \[currently in draft and being consulted on\] \(available at: \[www.gov.uk/cma\]\).](#)

<sup>166</sup> See Chapter ~~14-15~~ and Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available at: [\[www.gov.uk/cma\]](#)). Further details of the Procedural ~~Adjudicator~~Officer role are available at: [\[www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trialwww.gov.uk/cma\]](#).

will assume that no confidentiality is being claimed in respect of the information.<sup>167</sup>

12.7 Formal Complainants and third parties who may be able materially to assist ~~our~~the CMA's assessment of a case will generally also be provided with an opportunity to submit written representations. In most cases, disclosure of a non-confidential version of the Statement of Objections will be sufficient to enable third parties to provide the ~~OFT~~CMA with informed comments and this will not generally include any annexed documents. The document is for the Formal Complainant's use only in making representations to the ~~OFT~~CMA and must not be disclosed to others. The deadline for a Formal 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 ~~we send~~the CMA sends the Statement of Objections to them.

12.8 The non-confidential version of the written representations that have been submitted by a Formal Complainant or third party will be disclosed to Addressee(s) to allow them an opportunity to comment. ~~We~~The CMA will not generally allow Formal Complainants and other third parties an opportunity to comment on the Addressees' written representations, although this may be appropriate in certain circumstances.<sup>168</sup>

12.9 In some cases, ~~we~~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.

12.10 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>169</sup>

### Oral representations – the oral hearing

12.11 ~~We encourage~~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>170</sup>

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<sup>167</sup> Rule 6(9) of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

<sup>168</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>169</sup> ~~OFT 451~~*Involving third parties in Competition Act investigations (OFT451)* available ~~to download~~ at: [www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft451.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft451.pdf)cma].

~~12.11~~ 12.12 The CMA encourages Addressees to take up the opportunity to attend an oral hearing ~~with us on the matters referred to in the Statement of Objections.~~<sup>174</sup> ~~They~~ and Addressees should make it clear in their written representations that they would like to do so. The Addressee 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 ~~OFT~~ 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>172</sup>

~~12.12~~—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.

12.13 The Case Decision Group will attend all oral hearings. The hearing will also be attended by members of the case team, the Chief ~~Economist~~ Economic Adviser (or a representative of the Chief ~~Economist~~ Economic Adviser) and the General Counsel (or a representative of the General Counsel). The hearing will be chaired by the Procedural ~~Adjudicator~~ 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 they propose to focus on in their 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 ~~OFT~~ CMA staff present to ask the Addressee questions on its representations.<sup>173</sup>

12.15 In the event that an agenda is not agreed between the Addressee and the case team at least 10 working days prior to the hearing, the agenda will be determined by the Procedural ~~Adjudicator~~ 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 their

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<sup>170</sup> Rule 6 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

~~<sup>174</sup> Rule 5(4) of the OFT Rules.~~

<sup>172</sup> In some cases, ~~we~~ 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 12.21 below.

<sup>173</sup> See paragraph 12.17.



case, and which have been set out in their written representations. The oral hearing may also provide a useful opportunity for the Addressee to clarify the detail set out in their written representations. As a general rule, any points raised orally by the Addressee at this stage should be limited to those already submitted to ~~us~~the CMA in writing.

- 12.17 During the oral hearing, the Case Decision Group and other members of ~~OFT~~CMA staff present may ask questions on the Addressees' written representations or questions of clarification. It will be helpful for the ~~OFT~~CMA, and is likely to assist the progress of the investigation, if full responses are provided to these questions but there is no obligation to answer. It is possible to respond to questions in writing after the hearing.
- 12.18 A transcript of the oral hearing will be taken and the Addressee will be asked to confirm the accuracy of the transcript and to identify any confidential information. ~~We~~The CMA will not accept blanket or unsubstantiated confidentiality claims.
- 12.19 Following the oral hearing, the Procedural ~~Adjudicator~~Officer will report to the Case Decision Group, indicating any procedural issues that have been brought to the attention of the Procedural ~~Adjudicator~~Officer during the investigation and confirming whether the parties' right to be heard has been respected, including ~~at~~an assessment of the fairness of the procedure followed in the oral hearing.<sup>174</sup>
- 12.20 If a Case Decision Group member changes after the oral hearing(s) but before ~~we issue~~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 ~~We~~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.

### Considering representations

- 12.22 In some cases, the volume of information submitted as part of the representations process can be extensive. ~~We~~The CMA will carefully and objectively consider all written and oral representations to appraise the case

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<sup>174</sup> [Rule 6\(7\) and \(8\) of the CA98 Rules \[currently in draft and being consulted on\] \(available at: \[www.gov.uk/cma\]\).](http://www.gov.uk/cma)

as set out in the Statement of Objections and to assess whether the ~~conclusions reached~~ provisional findings in the Statement of Objections continue to be supported by the evidence and the facts.

- 12.23 This will involve assessment of the representations ~~we have~~ the CMA has received, including by the case team, the Case Decision Group and, as set out below, other ~~OFT~~ CMA officials.
- 12.24 The General Counsel and the Chief ~~Economist~~ 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 ~~Economist~~ 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>175</sup>
- 12.25 As noted above,<sup>176</sup> the General Counsel and the Chief ~~Economist~~ Economic Adviser (or their representative(s)) will attend the oral hearings and may ask questions of the parties.
- 12.26 An original set of all written representations and the transcript from the oral hearing will be placed on the case file.

### **Letter of facts**

- 12.27 Where ~~we acquire~~ 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 on it to establish that an infringement has been committed, ~~we~~ the CMA will put that evidence to the Addressee in a letter and will give them an opportunity to respond to the new evidence. The timeframe for responding will depend on the volume and complexity of the new evidence. However, it will be shorter than the time to respond to the Statement of Objections.

### **Supplementary Statement of Objections**

- 12.28 If new information received by ~~us~~ the CMA in response to the Statement of Objections indicates that there is evidence of a different suspected

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<sup>175</sup> See further Chapter 9.9.

<sup>176</sup> See paragraphs 1.1 and 12.17.

infringement or there is a material change in the nature of the infringement described in the Statement of Objections, ~~we~~the CMA will issue a Supplementary Statement of Objections setting out the new set of facts on which ~~we propose~~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 ~~OFT~~CMA officials as appropriate.

12.29 ~~We~~The CMA will give the Addressee a further opportunity to respond in the same way as before. ~~We~~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 ~~them~~the Addressees an opportunity to inspect new documents on the file. The process will be the same as that set out in Chapter ~~44~~.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 If it appears ~~to us~~ unlikely that engaging with Formal Complainants or other interested third parties at this stage will materially assist ~~our~~the investigation, ~~we~~the CMA may decide to consult them on a more limited 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

12.31 Where, once any written and oral representations made ~~to us~~ 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, ~~we~~the CMA will provide that party with a draft penalty statement.<sup>177</sup> This will set out the key aspects<sup>178</sup> relevant to the calculation of the penalty that ~~we propose~~the CMA proposes to impose on that party, based on the information available to ~~us~~the CMA at the time.<sup>179</sup> The draft

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<sup>177</sup> [Rule 11 of the CA98 Rules \[currently in draft and being consulted on\] \(available at: www.gov.uk/cma\)](http://www.gov.uk/cma).

<sup>178</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>179</sup> [Rule 11 of the CA98 Rules \[currently in draft and being consulted on\] \(available at: www.gov.uk/cma\)](http://www.gov.uk/cma). For further information on how the ~~OFT~~CMA calculates the appropriate amount of a penalty, see *Guidance as to the appropriate amount of a penalty* (~~OFT 423~~OFT423) available ~~to download at:~~ [www.ofc.gov.uk/shared\\_ofc/business\\_leaflets/ca98\\_guidelines/ofc423.pdf](http://www.ofc.gov.uk/shared_ofc/business_leaflets/ca98_guidelines/ofc423.pdf) cma].

penalty statement will also include a brief explanation of the Case Decision Group's reasoning for its provisional ~~conclusion~~findings on each aspect.

- 12.32 Parties will be offered the opportunity to comment on the draft penalty statement in writing and to attend an oral hearing (in person or by telephone) with the Case Decision Group.<sup>180</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 information/evidence before the issue of the draft penalty statement. The written and oral representations process following issue of the Statement of Objections<sup>181</sup> represents parties' opportunity to make submissions to the Case Decision Group on whether an infringement has been committed.
- 12.33 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 new relevant documents (if any) on the file.<sup>182</sup> The timeframe for responding will typically be shorter than the time given to respond to the Statement of Objections.
- 12.34 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 ~~Adjudicator~~Officer.<sup>183</sup>
- 12.35 When a recipient of a draft penalty statement submits written representations on that draft penalty statement, they should also provide a non-confidential

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<sup>180</sup> ~~490~~ [Rule 6 of the CA98 Rules \[currently in draft and being consulted on\]](#) (available at: [www.gov.uk/cma](http://www.gov.uk/cma)). As with the oral hearing following the Statement of Objections, the oral hearing on the draft penalty statement will be chaired by the Procedural ~~Adjudicator~~Officer and attended by the Case Decision Group, the Chief ~~Economist~~Economic Adviser and the General Counsel (or their representatives) and members of the case team.

<sup>181</sup> As described in paragraphs 12.1 – 12.21 above.

<sup>182</sup> Including, in cases in which ~~we issue~~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 12.37 below).

<sup>183</sup> See Chapter ~~14-15~~ and Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)). Further details of the Procedural ~~Adjudicator~~Officer role are available at: ~~[www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial](http://www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial)~~[www.gov.uk/cma](http://www.gov.uk/cma).

version of their representations, along with an explanation which justifies why an item of information should be treated as confidential. ~~We~~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.

12.36 [The CMA will offer a party the opportunity to attend an oral hearing in relation to the draft penalty statement.](#)<sup>184</sup> If a party requests an oral hearing ~~on the draft penalty statement~~, that hearing will be held around 10 to 20 working days after the deadline for the submission of the written representations on the draft penalty statement.<sup>185</sup>

12.37 In cases in which draft penalty statements are issued to more than one party under investigation, ~~we~~the CMA will – in order to provide parties with transparency as to ~~our~~the CMA's application of the principle of equal treatment in ~~our~~the CMA's draft calculations<sup>186</sup> – place a non-confidential version of each party's draft penalty statement on ~~our~~the file. That non-confidential version may be inspected by the other parties under investigation.<sup>187</sup>

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<sup>184</sup> [Rule 6 of the CA98 Rules \[currently in draft and being consulted on\] \(available at: \[www.gov.uk/cma\]\(http://www.gov.uk/cma\)\)](#).

<sup>185</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>186</sup> See *Guidance as to the appropriate amount of a penalty (OFT 423)* (OFT 423) available ~~to download at:~~ [www.ofc.gov.uk/shared\\_ofc/business\\_leaflets/ca98\\_guidelines/ofc423.pdf](http://www.ofc.gov.uk/shared_ofc/business_leaflets/ca98_guidelines/ofc423.pdf) ~~cma~~ at footnote 16.

<sup>187</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, ~~we~~the CMA will allow them a reasonable opportunity to make such an assessment and to make any confidentiality claims to ~~us~~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 ~~OFT~~[CMA](#) officials as appropriate.
- ~~The Case Decision Group's decision must be formally adopted by the Policy Committee before it can be issued by the OFT.~~
- Once adopted, an infringement decision is issued to each business [the CMA has](#) found to have infringed the law.
- If the ~~CDG~~[Case Decision Group](#) does not find [sufficient](#) evidence of a competition law infringement, ~~we~~[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.

- 13.1 The issue of a decision represents the culmination of ~~our~~[the CMA's](#) investigation.
- 13.2 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.
- 13.3 Where the Case Decision Group finds the legal test to have been met, it will ~~consult~~[give](#) the [Case and](#) Policy Committee ~~to provide~~ an opportunity ~~for the Policy Committee~~ 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. ~~The Case Decision Group's final decision must be formally adopted by the Policy Committee before that decision is issued by the OFT.~~

- 13.4 ~~We~~The CMA will issue an infringement decision to each business the CMA has found to have infringed the law.<sup>188</sup>
- 13.5 As noted in Chapter ~~10~~,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. In those circumstances, the Case Decision Group may decide to publish a reasoned no grounds for action decision. The Case Decision Group will ~~consult~~give the Case and Policy Committee ~~on its proposed decision to publish such a reasoned no grounds for action decision, to provide~~ an opportunity ~~for the Policy Committee~~ 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. ~~The Case Decision Group's final no grounds for action decision must be formally adopted by the Policy Committee before that decision is issued by the OFT.~~

### Issue of an infringement decision

- 13.6 In addition to an infringement decision, ~~we~~the CMA will normally issue a press announcement, make an announcement on the Regulatory News Service and publish a page on ~~our~~the CMA website which describes the case.
- 13.7 ~~We~~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~~,11, in non-market-sensitive announcements, ~~we aim~~the CMA aims to give parties advance sight of the content of the ~~OFT's~~CMA's announcement, in confidence, unless there is a compelling reason not to do so. In both market-sensitive and non-market sensitive situations, ~~we~~the CMA will aim to balance an open approach with the need to ensure the orderly announcement of full information.<sup>189</sup>
- 13.8 The infringement decision will set out fully the facts on which ~~we rely~~the CMA relies to prove the infringement and the action that ~~we are~~it is taking, and will address any material representations that have been made during the course of ~~our~~the investigation. If a financial penalty is being imposed, the infringement decision will explain how the Case Decision Group decided

<sup>188</sup> Section 31 of the ~~Act~~CA98 and Rule ~~7~~10(1) of the ~~OFT~~CA98 Rules. ~~[currently in draft and being consulted on]~~ (available at: [\[www.gov.uk/cma/\]](http://www.gov.uk/cma/)).

<sup>189</sup> For a general guide to ~~our~~the CMA's approach when ~~we make~~it makes a public announcement, see ~~[CMA6 Transparency – A Statement on the OFT's approach (OFT 1234) and Disclosure]~~ [currently in draft ] (available ~~to download at:~~ [\[www.of.gov.uk/shared\\_of/consultations/668117/OFT1234.pdf](http://www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf)]).

upon the appropriate level of penalty, having taken into account the [CMA's statutory obligations in fixing a financial penalty](#)<sup>190</sup> and the parties' written and oral representations on the draft penalty calculation.<sup>191</sup> The infringement decision may also give directions to bring the infringement to an end.<sup>192</sup>

- 13.9 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>193</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, ~~we~~[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 ~~we consider~~[the CMA considers](#) that disclosure might significantly harm legitimate business interests or the interests of an individual, ~~we~~[the CMA](#) will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which ~~we are~~[the CMA is](#) allowed to make the disclosure.<sup>194</sup>
- 13.10 After the infringement decision and press announcement have been issued, ~~we~~[the CMA](#) will generally notify Formal Complainants and other interested third parties (for example, third parties who have submitted written representations during the investigation) of ~~our~~[the CMA's](#) decision.

## Publication

### Confidentiality

- 13.11 The addressee of the decision will already have had the opportunity to make confidentiality representations. After the infringement decision has been issued ~~we~~[the CMA](#) will allow them one final opportunity to make

<sup>190</sup> [Section 36\(7A\) of the CA98](#).

<sup>191</sup> More information on how ~~we set~~[the CMA sets](#) penalties is available in Part 5 of OFT guideline *Enforcement (OFT 407)*, available to download at [www.of.gov.uk/shared\\_of/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft407.pdf) and [OFT407](#) and see *Guidance as to the appropriate amount of a penalty (OFT 423)*, [OFT423](#) both available to download at: [\[www.of.gov.uk/shared\\_of/business\\_leaflets/ca98\\_guidelines/oft423.pdf\]](http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf).

<sup>192</sup> Section 32 and 33 of the [Act CA98](#). If a business fails to comply with ~~our~~[the CMA's](#) directions, ~~we~~[the CMA](#) may seek a court order to enforce them under section 34 of the [Act CA98](#).

<sup>193</sup> In accordance with Rule 19 of the CA98 Rules [currently in draft and being consulted on] (available at: [\[www.gov.uk/cma/\]](http://www.gov.uk/cma/)), 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 notice of that decision on the register of decisions (available available at: [\[www.gov.uk/cma/\]](http://www.gov.uk/cma/)).

<sup>194</sup> Section 244 of the [Enterprise Act 2002 EA02](#).



representations on information which they deem 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 [ourthe](#) process, [wethe 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 [ourthe](#) 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 The non-confidential version of the infringement decision and the summary will be published on the page on [ourthe CMA](#) website which describes the case. [WeThe CMA](#) also ~~maintain~~[maintains](#) a register<sup>195</sup> of decisions in investigations under the ~~Act~~[CA98](#) and the details of the case will be placed on the register.

[13.14 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>195</sup> Available at: [[www.ofc.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisionscma](http://www.ofc.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisionscma)].

## 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, which may include 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 where a business under investigation is prepared to admit that it has breached competition law and confirms 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>196</sup>

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<sup>196</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 [currently in draft and being consulted on] (available at: [www.gov.uk/cma]). See also paragraph 2.1 and 2.26 of *OFT's guidance as to the appropriate amount of a penalty* (OFT423) which provides that the CMA will reduce penalties where a business settles. The guidance is available at: [www.gov.uk/cma].

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.

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>197</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 The CMA 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 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

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<sup>197</sup> As to which, see, respectively, See further the OFT guideline *Applications for leniency and no action in cartel cases* (OFT1495) and *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).

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 timeframe.

## **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 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 behaviour , and
- confirm it will pay a penalty set at a maximum amount.<sup>198</sup> As set out in paragraph 14.25 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 14.27 below).

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

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<sup>198</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 we would not normally invite an immunity applicant to explore the possibility of settlement (see paragraph 14.11 below).

and/or through the use of a 'confidentiality ring'), no written 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>199</sup> and no Case Decision Group will be appointed<sup>200</sup>

- there will be an infringement decision against the settling business (except in the circumstances set out in paragraph 14.23)
- 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 14.26 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 to also be required to confirm that employees or officers (who may have provided witness statements during the investigation) would be prepared to 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.

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<sup>199</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 12.31 to 12.37.

<sup>200</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.

## **Businesses settle voluntarily**

14.9 There is no obligation on businesses to enter into settlement discussions or to settle. The settling business' decision to settle should be based on that business' 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>201</sup> or 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 14.23) 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 contact the Team Leader in the first instance. The 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.

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<sup>201</sup> 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.

- 14.11 Before the CMA case team can commence settlement discussions in a particular case, the SRO<sup>202</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>203</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>204</sup> It is important that settlement results in resource efficiencies and therefore, 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.
- 14.13 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 and will be provided with access to the key documents on which the CMA is relying.<sup>205</sup> For each business involved in the same investigation, there may be some aspects of the Summary Statement of Facts which will be the same as for all businesses, and some which will vary according to the business' particular alleged conduct or circumstances.
- 14.14 Each business considering settlement will also 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

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<sup>202</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 9.10.

<sup>203</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>204</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>205</sup> These may be subject to confidentiality redactions where appropriate.

appropriate to meet the CMA's penalty objectives and is proportionate in light of the settling business' particular circumstances.

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

14.16 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 admission will be made by reference to the infringement(s) as set out in the Summary Statement of Facts. The business will be given the opportunity to indicate as part of the admission any manifest factual inaccuracies in the Summary Statement of Facts. 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.

14.17 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.

14.18 Settlement discussions by their nature will be conducted orally. The CMA may consider a reasoned request from the settling business to provide the confirmation that they accept the settlement requirements (including their admission) orally. This will be recorded and transcribed at the CMA's premises and businesses will 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.

14.19 The SRO must receive approval from the Case and Policy Committee to settle.<sup>206</sup> The letter containing the confirmation from the party that it has

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<sup>206</sup> Rule 9 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).



accepted the requirements of the settlement procedure and its admission to the infringement will be placed on the CMA's file.

14.20 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>207</sup> or, if the discussions break down and no settlement is reached the Case Decision Group.<sup>208</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.

14.21 If, during settlement discussions, a business provides the CMA with new documents or information relevant to the infringement during the settlement discussions which go beyond identifying any manifest factual inaccuracies contained in the Summary Statement of Facts or Statement of Objections, the 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.

14.22 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. As set out in paragraph 14.20 above, any admissions made during failed settlement discussions would not be disclosed to other businesses involved in the investigation or the Case Decision Group. Subject to paragraph 14.23 below, the case will then proceed to either an infringement decision (if the case has already passed Statement of Objections stage) or to Statement of Objections followed by an infringement decision (if the Statement of Objections has not yet been issued). The SRO will generally issue any infringement decision and will consult the Case and Policy Committee on his/her proposed

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<sup>207</sup> See the disclosure provisions in Part 9 of the EA02.

<sup>208</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 because settlement discussions will pause the case timetable.

decision.<sup>209</sup> The Case and Policy Committee will formally adopt a final infringement decision.

14.23 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 14.29). 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**

14.24 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>210</sup>

14.25 In the infringement decision, the CMA will set out the total penalty (£X) less the specified settlement discount of (Y%), provided the settling business follows any continuing requirements of settlement, which results in the reduced penalty after settlement of (£Z) (the maximum penalty).

14.26 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.

14.27 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

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<sup>209</sup> Rule 9 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

<sup>210</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 *Guidance as to the appropriate amount of a penalty* (OFT423) available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

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>211</sup>

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

14.28 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.

14.29 If the CMA does not substantially reflect a settling business' admission either in the Statement of Objections or in its final position before taking an infringement decision (for example in the circumstances set out in paragraph 14.23), the settling business will be given the opportunity to withdraw from the settlement procedure and the case would revert to the usual administrative procedure. In these circumstances the settling business' admission would not be disclosed to other businesses involved in the investigation or the Case Decision Group or used in evidence against any of the parties to the investigation.

### **Immunity from Competition Disqualification Applications**

14.30 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>212</sup> However this will not be a standard part of the settlement procedure.

### **External communications during / post settlement**

14.31 The CMA's standard practice is not to make a public announcement that settlement discussions are taking place, or, where discussions break down,

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<sup>211</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.

<sup>212</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].

that they have broken down. As set out in paragraph 14.20 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.

14.32 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.

14.33 The CMA may announce that a business has settled with a press release in which case the CMA's website will be updated. 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 would 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.

## **14.15** COMPLAINTS ABOUT ~~OUR~~THE CMA'S INVESTIGATION HANDLING, RIGHT OF APPEAL AND REVIEWING ~~OUR~~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>213</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>214</sup>

**14.15.2** The CMA has also published a guideline [CMA6 Transparency Statement<sup>215</sup> -on our website and Disclosure] setting out the steps ~~we take~~it takes to ensure ~~our~~the CMA's work is open and accessible. Individuals,

<sup>213</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 [CMA6 [Transparency and Disclosure] [currently in draft] (available at: [www.gov.uk/cma]).

<sup>214</sup> Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma]).

<sup>215</sup> ~~See figure one in~~ *Transparency—A Statement on the OFT's approach (OFT 1234)* available to download at www.of.gov.uk/shared\_of/consultations/668117/OFT1234.pdf

businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner when dealing with ~~us~~. ~~Complaints about responses from ERC should be made to the Head of ERC in the first instance.~~ the CMA. If a party's dispute falls outside the scope of the CMA's procedural complaints process for CA98 investigations, the CMA's guideline [CMA6 Transparency and Disclosure] sets out the options available to you to pursue the complaint.<sup>216</sup>

15.3 Once a formal investigation has been opened, any concerns or complaints about ~~our~~ the CMA's procedures or how ~~we handle our investigation investigations are handled~~ should be made in writing to the SRO in the first instance. ~~If you are~~ a party wishes to complain to the SRO, you should set out details of your 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, ~~certain~~ procedural complaints that relate to the following issues may be referred to the Procedural ~~Adjudicator. Details of the 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
- requests for confidentiality redactions of information in documents on the CMA's case file, in a Statement of Objections or in a final decision
- requests for disclosure or non-disclosure of certain documents on the CMA's case file
- issues relating to oral hearings, including, for example, with regard to issues such as the date of the hearing, and
- other significant procedural issues that may arise during the course of an investigation.

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<sup>216</sup> <sup>216</sup> See CMA6 [Transparency and Disclosure] [currently in draft] (available at: [www.ofc.gov.uk/about-the-ofc/ofc-structure/governance/complaintcma](http://www.ofc.gov.uk/about-the-ofc/ofc-structure/governance/complaintcma)).

15.5 The Procedural ~~Adjudicator trial are available on our website.~~<sup>217</sup> ~~If your dispute falls outside~~ 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>218</sup>

~~Process for referring a complaint to the Procedural ~~Adjudicator trial, the Transparency Statement sets out~~ Officer~~<sup>219</sup>

15.7 If a party wishes to refer a dispute to the ~~options available to you to pursue~~ 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 ~~complaint.~~ 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 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, 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 to do so.<sup>220</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. Your cooperation will assist the Procedural Officer to make a robust and timely

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<sup>217</sup> ~~[www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial](http://www.ofc.gov.uk/about-the-ofc/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial)~~

<sup>218</sup> Section 26 of the CA98 provides the CMA with the power to require documents or information.

<sup>219</sup> See further Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

<sup>220</sup> See Rule 8 of the CA98 Rules [currently in draft and being consulted on] (available at: [www.gov.uk/cma](http://www.gov.uk/cma)).

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.

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

14.215.12 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.

14.315.13 Addressees of ~~our~~ the CMA's appealable decisions and third parties with a sufficient interest in ~~our~~ 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>221</sup>

14.415.14 Where the law does not provide for an appeal, an application for judicial review may be brought in certain circumstances.<sup>222</sup> You should seek independent legal advice on your rights in this regard.

14.515.15 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. ~~Typically, The CMA will usually share the 'lessons learnt' - are shared~~ learned with colleagues across the ~~OFT~~ CMA. This evaluation process is unrelated to the investigation process but remains an important way in which ~~we ensure~~ the CMA ensures that best practice can be applied across all ~~our~~ its investigations under the ~~Act~~ CA98.

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<sup>221</sup> Section 46 of the ~~Act~~ CA98 and section 47 of the ~~Act~~ CA98 as substituted by section 17 of the ~~Enterprise Act 2002~~ EA02.

<sup>222</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.



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## A. STATUS OF EXISTING OFT GUIDANCE

This Annexe 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>223</sup>

<u>OFT CODE</u>	<u>TITLE</u>	<u>STATUS OF DOCUMENT</u>	
		<u>Replaced/ obsolete<sup>224</sup></u>	<u>Adopted by the CMA Board<sup>225</sup></u>
<b><u>CA98 Investigations</u></b>			
<u>OFT1263rev</u>	<u>A guide to the OFT's investigations procedures in Competition Act 1998 cases</u>	<u>✓</u>	<u>=</u>
<u>OFT953</u>	<u>Prioritisation Principles</u>	<u>✓</u>	<u>=</u>
<u>OFT (April 2010)</u>	<u>Short-form opinions – the OFT's approach</u>	<u>=</u>	<u>✓</u>
<u>OFT423</u>	<u>Guidance on the appropriate amount of a penalty</u>	<u>=</u>	<u>✓</u>

<sup>223</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 [currently in draft and being consulted on (CMA10con)]] available at: [www.gov.uk/cma].

<sup>224</sup> This column identifies the existing OFT guidance documents which are replaced, or rendered obsolete, by CMA guidance or publication.

<sup>225</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 website for the most recent and applicable documents.

<u>OFT CODE</u>	<u>TITLE</u>	<u>STATUS OF DOCUMENT</u>	
		<u>Replaced/ obsolete</u> <sup>224</sup>	<u>Adopted by the CMA Board</u> <sup>225</sup>
<u>OFT401</u>	<u>Agreements and concerted practices</u>	-	✓
<u>OFT402</u>	<u>Abuse of a dominant position</u>	-	✓
<u>OFT403</u>	<u>Market definition</u>	-	✓
<u>OFT404</u>	<u>Powers of investigation</u>	-	✓
<u>OFT407</u>	<u>Enforcement</u>	-	✓
<u>OFT415</u>	<u>Assessment of market power</u>	-	✓
<u>OFT451</u>	<u>Involving third parties in Competition Act investigations</u>	-	✓
<u>OFT 1341</u>	<u>How your business can achieve compliance with competition law</u>	-	✓
<u>OFT1227</u>	<u>Drivers of compliance and non-compliance with competition law</u>	-	✓
<u>OFT442</u>	<u>Modernisation</u>	-	✓
<u>OFT419</u>	<u>Vertical agreements</u>	-	✓
<u>OFT1340</u>	<u>Company directors and competition law</u>	-	✓
<u>OFT421</u>	<u>Services of general economic interest exclusion</u>	-	✓
<u>OFT408</u>	<u>Trade associations, professional and self-regulating bodies</u>	-	✓
<u>OFT1280a</u>	<u>The application of competition law following the revocation of the Land</u>	-	✓

<u>OFT CODE</u>	<u>TITLE</u>	<u>STATUS OF DOCUMENT</u>	
		<u>Replaced/ obsolete</u> <sup>224</sup>	<u>Adopted by the CMA Board</u> <sup>225</sup>
	<u>Agreements Exclusion Order</u>		
<u>OFT1389</u>	<u>Public bodies and competition law</u>	-	✓
<u>OFT740rev</u>	<u>How competition law applies to co-operation between farming businesses: FAQs</u>	-	✓
<u>OFT1317</u>	<u>Land agreements and competition law – An overview of how competition law applies to land agreements</u>	-	✓
<u>OFT439</u>	<u>Public transport ticketing schemes block exemption</u>	-	✓
<u>OFT447</u>	<u>Competing fairly</u>	-	✓
<u>OFT1330</u>	<u>Quick guide to competition law compliance</u>	-	✓
<u>OFT1234</u>	<u>Transparency – a statement of the OFT’s approach</u>	✓	-
<b><u>Cartel Investigations (CA98 and Criminal)</u></b> <sup>226</sup>			
<u>OFT1495</u>	<u>Applications for leniency and no action in cartel cases</u>	-	✓

<sup>226</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 \[Cartel Offence: Prosecution Guidance\] \[currently in draft and being consulted on \(CMA9con\)\], available at: \[www.gov.uk/cma\].](#)

<u>OFT CODE</u>	<u>TITLE</u>	<u>STATUS OF DOCUMENT</u>	
		<u>Replaced/ obsolete</u> <sup>224</sup>	<u>Adopted by the CMA Board</u> <sup>225</sup>
<u>OFT435</u>	<u>Cartels and the Competition Act 1998 – a guide for purchasers</u>	=	✓
<u>OFT436</u>	<u>Leniency in cartel cases</u>	(✓)	=
<u>OFT 510</u>	<u>Director disqualification in competition cases</u>	=	✓
<u>OFT515</u>	<u>Powers for investigating criminal cartels</u>	(✓)	=
<u>OFT546</u>	<u>Memorandum of understanding between the OFT and the NCD, Crown Office, Scotland</u>	(✓)	=
<b><u>Miscellaneous Guidance</u></b>			
<u>OFT393</u>	<u>The Transport Acts: guidance on the competition test</u>	=	✓
<u>OFT452</u>	<u>Guidance on the application of competition law to certain aspects of the bus market following the Local Transport Act 2008</u>	=	✓

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 the CMA's website, and
  - Parties should check any contact details against those listed on the CMA's website, which will be the most up to date.