

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

Summary of responses to the consultation

© Crown copyright 2014

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence](http://www.nationalarchives.gov.uk/doc/open-government-licence) or write to the Information Policy Team, The National Archives, Kew, Richmond, Surrey, TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk)

Any enquiries regarding this publication should be sent to us at: Policy, Precedent and Procedures Unit, Competition and Markets Authority, Victoria House, 37 Southampton Row, London, WC1B 4AD or by email to [guidance@cma.gsi.gov.uk](mailto:guidance@cma.gsi.gov.uk).

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

## Table of contents

	<i>Page</i>
1 Introduction and summary .....	4
2 Documents for adoption.....	8
3 Amendments to the Rules.....	9
4 Interviewing witnesses.....	14
5 Use of confidentiality rings and data rooms .....	19
6 Settlement Procedure .....	22
7 Inclusion of the proposed maximum penalty in settlement discussions .....	27
8 Settlement discount caps.....	28
9 Other amendments .....	30
10 Transitional arrangements .....	37
11 Availability of short-form opinions .....	39
ANNEXE(S).....	41
A List of respondents to the consultation on the draft Guidance .....	42

## 1 Introduction and summary

### Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) 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 Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT) were transferred to the CMA and those bodies abolished. The CMA's primary duty is to seek to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The ERRA13 introduces a number of changes to the power to investigate and enforce suspected infringements of the prohibitions under Chapters I and II of the Competition Act 1998 (CA98) and/or Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). These amendments provide for strengthened powers and more robust decision-making in the enforcement of the prohibitions. They will come into effect on 1 April 2014 and are principally implemented through amendments to relevant provisions of the CA98.
- 1.3 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. *Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998* (CMA8con) (the Draft Rules and the Draft Guidance), was one of a number of draft guidance documents published for public consultation on 17 September 2013<sup>1</sup>. The consultation (the Consultation) on these documents closed on 11 November 2013.
- 1.4 The Draft Guidance details the approach followed and procedure used by the CMA in the exercise of its investigation and enforcement powers under the CA98. The Draft Rules set out the procedural rules to which the Draft Guidance relates. The Draft Guidance implemented the new powers and procedures introduced by the ERRA13 and sought to build on the past successes of the OFT and to implement improvements where appropriate. It was decided that the existing OFT procedural guidance document would be adopted as the starting point for the Draft Guidance by amending it

---

<sup>1</sup> These documents are available at: [www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-2](http://www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-2).

where required to reflect procedural changes, developments in case law and experience and incremental improvements to policies and procedures in order to provide guidance on the CMA's investigation and enforcement powers and procedures under the CA98.

## **Key changes**

- 1.5 The key changes to the antitrust enforcement regime introduced by the ERRA13 and reflected in the Draft Guidance and Draft Rules were:
- a. the CMA is given the power to interview individuals
  - b. the current criminal sanctions for failing to comply with investigations are replaced with civil financial sanctions
  - c. the CMA is given the express power to publish a notice of investigation, which may name a party or parties to an investigation
  - d. there is a lower threshold for the CMA to impose interim measures
  - e. new statutory factors to be taken into account in fixing a penalty are introduced
  - f. the CMA is expressly permitted to make rules on the following procedural matters:
    - o delegation of the CMA's functions
    - o oral hearings
    - o procedural complaints, and
    - o settlement of investigations under the CA98
  - g. the Competition Appeals Tribunal (CAT) is permitted to issue investigation warrants.

## **Purpose of this document**

- 1.6 The consultation document accompanying the Draft Rules and Guidance (the Consultation Document) sets out a series of specific questions on which views of respondents were sought. This document sets out a summary of the responses received to the each of those questions, and the CMA's views on those responses.

1.7 In parallel with the Consultation, the Department for Business, Innovation and Skills (BIS) consulted on draft secondary legislation on the CMA's exercise of its investigation and enforcement functions<sup>2</sup>. Although referred to in this document, the proposed secondary legislation fell outside the scope of the Consultation Document. BIS is publishing a separate response to its consultation.

## Responses to the Consultation

1.8 23 written consultation responses referring to the Consultation Document were received.<sup>3</sup> The Draft Guidance was also discussed at a launch event for the CMA draft guidance on 1 October 2013 attended by members of the legal, academic and business communities.

## Consultation questions

1.9 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised and the CMA's views on them set out.

Question		Chapter
Q1.	Do you agree with the list in Annexe A of the Draft CMA CA98 Guidance of existing CA98-related OFT guidance documents proposed to put to the CMA Board for adoption?	2
Q2.	Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate?	3
Q3.	Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?	4
Q4.	Do you agree with the proposed approach to the use of confidentiality rings and data rooms?	5

---

<sup>2</sup> Available at [www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation](http://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation)

<sup>3</sup> In total, written responses to the Consultation were received from 29 organisations. Annexe A lists the 23 organisations that provided responses relating to the Consultation Document on the Draft Guidance and Draft Rules.

Q5.	Is the proposed settlement procedure clear and do you have any views on it?	6
Q6.	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?	7
Q7.	Do you agree that settlement discussions at up to 20% for pre-SO settlement and up to 10% for post-SO settlement are appropriate?	8
Q8.	Do you have any comments on any of the other amendments proposed for the Draft CMA CA98 Guidance?	9
Q9.	Do you agree with the proposed transitional arrangements, as set out in paragraphs 3.41 to 3.43?	10
Q10.	Do you agree with the Transition Team's proposal to extend the availability of Short-form Opinions (SfOs) to prospective vertical agreements in addition to prospective horizontal agreements? Please give reasons for your view.	11

1.10 This document should be read in conjunction with the Consultation Document and cross refers to relevant sections of the Consultation Document throughout. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available at [www.gov.uk/cma](http://www.gov.uk/cma). Nor is this Summary of Responses a definitive statement of the CMA's policy or procedures in relation to the exercise of its CA98 investigation and enforcement functions. Parties seeking guidance on those procedures should refer to the final published version of *Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998* (CMA8) (the Final Guidance), also available at [www.gov.uk/cma](http://www.gov.uk/cma).

## 2 Documents for adoption

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

- 2.1 The CMA sought respondents' views on the draft list of existing OFT guidance documents proposed to be put to the CMA board for adoption.

### Summary of responses

- 2.2 The majority of respondents agreed with the list of guidance documents proposed for adoption, although one respondent questioned whether OFT397: *The OFT and the bus industry* was to be adopted or would become obsolete.
- 2.3 Some respondents raised concerns regarding the fact that the CMA intends to retain adopted guidance documents without amending their contents and, therefore, without reflecting the changes implemented by the ERRA13 or the Final Guidance and/or CMA CA98 Rules, with the result that some of the documents would contain inaccurate information.

### The CMA's views

- 2.4 The list set out in Annexe A of the Final Guidance clarifies that OFT397: *The OFT and the bus industry* has now been adopted by the CMA board alongside the other guidance documents in that list.
- 2.5 The CMA is mindful of the need to minimise the risk of any confusion arising from the continued existence of guidance documents which do not take account of the creation of the CMA or the other changes to the CA98 investigation and enforcement regime introduced by the ERRA13.
- 2.6 The CMA will therefore seek, when making such documents available at [www.gov.uk/cma](http://www.gov.uk/cma), to state clearly the basis on which those documents should be read (including adding 'health warnings' to those documents where appropriate).



### 3 Amendments to the Rules

<b>Question 2: Do you consider that the proposed amendments to the Draft CMA CA98 Rules are clear and appropriate?</b>
--

3.1 The CMA sought respondents' views on the amendments to the Draft Rules, proposed both in light of the introduction of new provisions under the ERRA13 and following a more general review of the OFT CA98 Rules.

#### Summary of responses

3.2 A number of respondents felt that, in general, the proposed amendments were clear and appropriate, and one respondent welcomed in particular the introduction of a formal settlement procedure as provided for in Rule 9 of the Draft Rules.

3.3 Other respondents, however, expressed concerns as to the clarity of the drafting used in the Draft Rules, in particular referring to the list of definitions in Rule 1 and the manner in which certain terms (such as 'relevant person') are defined and applied.

#### *Delegation of functions*

3.4 A number of comments were received in respect of the manner in which the Draft Rules delegate decision-making, the composition of the relevant decision-making bodies (in particular the relevant persons under Rule 3(1) and 3(2)) and the extent to which the individuals comprising such bodies should have had any involvement in the investigation.

#### *Legal advice during interviews and inspections*

3.5 A large number of respondents commented on the provisions set out in Rule 4 as to the presence of legal advisers during the use of the CMA's powers of investigation and inspection. In particular, one respondent queried why the Draft Rules draw a distinction in this respect between questions asked under sections 26A and 26(6) of the CA98. Other respondents sought clarification as to when it would be reasonable (or not) for the CMA to wait for legal advisers to arrive before commencing an inspection or asking questions under section 26A of the CA98 and the conditions that might be imposed in connection therewith. One respondent also noted that Rule 4 did not make reference to the CMA using its powers under section 26A of the CA98 in the course of a dawn raid.

### *Other procedural rights and oral hearings*

- 3.6 Numerous comments were received in relation to the provisions dealing with parties' procedural rights, including those in respect of oral hearings and the role of the Procedural Officer. Some respondents suggested that oral hearings should always be chaired by a Procedural Officer. Another respondent proposed that the role of Procedural Officer should be a permanent rather than a floating one. It was also suggested that the 20-working day period provided for in the Rules for the determination of procedural complaints might be too long. A number of comments were also received as to the extent to which a relevant person, acting as Procedural Officer, would be considered to be involved in an investigation and as to the inclusion of a significance threshold for the consideration of complaints by the Procedural Officer.

### *Notices and decisions*

- 3.7 Two respondents expressed concerns regarding the CMA's ability, under Rule 19, to dispense with the usual notice provisions for parties to infringing agreements against whom the CMA does not propose to make an infringement decision. They requested that the CMA provide for adequate protection of such parties' rights of defence given the potential legal consequences for them of an infringement decision (notwithstanding that that decision is not addressed to them).
- 3.8 Two respondents also queried which notices and decisions are to be published in the public register to be maintained by the CMA pursuant to Rule 20.

### *Other comments*

- 3.9 A number of other isolated comments received from respondents requested that the Rules set out in greater detail the procedure to be followed by the CMA when conducting investigations under the CA98, including in respect of: the timetable for certain procedural steps; restrictions on access to file; and the persons to be present at oral hearings.

## **The CMA's views**

### *Delegation of functions*

- 3.10 The CMA has opted to retain the approach to decision-making set out in the Draft Rules to allow the CMA, as well as the concurrent regulators, a certain

degree of flexibility in determining who oversees an investigation and the composition of the body that makes the final infringement decision. This will enable the CMA and the concurrent regulators to determine what constitutes the best use of their resources, depending on the circumstances of the case as well as the most appropriate use of the expertise and experience of the individuals fulfilling these roles. The Final Guidance provides further detail on the role and identity of decision makers in relation to CA98 investigations conducted by the CMA at paragraphs 11.30 to 11.34, which also takes advantage of the flexibility in resourcing afforded by the unitary nature of the CMA.

#### *Legal advice during interviews and inspections*

- 3.11 Subject to the development of the CMA's practice in this regard, the CMA is of the view that it may be appropriate, in the circumstances of a given case, to make use of its interview powers under section 26A of the CA98 in the course of dawn raids. Rule 4(3) clarifies that the CMA may wait a reasonable time for an individual's legal adviser to arrive where that individual is given notice immediately before the interview, as in the context of a dawn raid. This reflects the similar considerations in Rule 4 which apply when the CMA requires the immediate provision of documents or information including explanations of documents during an inspection of premises. However, Rule 4(3) specifically applies to the individual's legal adviser in recognition of the fact that it may not be appropriate for this to be the same legal adviser as that of the occupier of the premises under Rule 4(1), or who attends where there is an oral explanation of a document under Rule 4(2). Further detail on this issue is provided in the Final Guidance at paragraph 6.18 onwards.
- 3.12 Having reflected on respondents' comments, the CMA has also opted to retain the definition of 'reasonable time' set out in Rule 4(4), given the need for CMA officers to be able to make decisions in this regard during the course of investigations in light of the circumstances of the case. The CMA's views as regards the presence of legal advisers in interviews under section 26A of the CA98 are set out in greater detail in section 4 below.

#### *Procedural rights and oral hearings*

- 3.13 The CMA has amended the Rules to reflect that oral hearings will always be chaired by a Procedural Officer. However, it has retained the role of Procedural Officer in the Rules as a floating one that may be filled by any relevant person. This allows the CMA, as well as sectoral regulators carrying

out investigations under the CA98, the flexibility to determine the most appropriate person in light of the resources available.<sup>4</sup>

- 3.14 In light of respondents' comments, the CMA has amended the Rules to clarify that a relevant person will not be prevented from chairing an oral hearing where they have already acted as Procedural Officer in determining a procedural complaint, and vice versa. This reflects the intention of the relevant provisions of the ERRA13.
- 3.15 The CMA does not consider it appropriate to amend the 20-working day period for the determination of complaints by the Procedural Officer. As made clear in the Final Guidance, this is a maximum time limit (subject to the possibility of an extension if there are special reasons) and the CMA will aim to deal with such complaints in no more than ten working days in most cases.

#### *Notices and decisions*

- 3.16 The CMA has amended the provisions relating to the CMA's ability to address infringement decisions to some parties to infringing agreements or conduct and not to others, in order to provide a greater degree of clarity. The CMA's views as to the procedural rights that might be afforded to such parties are set out in section 9 below.
- 3.17 In light of comments received, the CMA has amended Rule 20 to reflect that the CMA will maintain a public register of all decisions and notices relating to the CA98 required by the CMA Rules, whether published by the CMA or a sectoral regulator.

#### *Other comments*

- 3.18 The CMA has carefully considered other comments received from respondents relating to the clarity of the language used in the Draft Rules and has made amendments to the drafting where appropriate.
- 3.19 However, the CMA does not consider it appropriate for the Rules to set out in any greater detail the precise procedural steps (including, in particular, the timing of such steps) to be followed by the CMA as such details will depend on the circumstances of each case. Further details as to how such procedural requirements will be met in practice by the CMA are set out in the

---

<sup>4</sup> See paragraphs 9.17 - 9.18 below for further information on the role of the Procedural Officer.

Final Guidance in order to allow the CMA to develop its practice in this regard.

## 4 Interviewing witnesses

<b>Question 3: Do you consider that the proposed approach to interviewing witnesses is clear and appropriate?</b>
---

4.1 The CMA sought respondents' views on the proposed approach to the new power to interview individuals.

### Summary of responses

4.2 A significant number of comments were received in response to this question and the majority of respondents expressed concerns with aspects of the proposed approach. Furthermore, clarification was sought that section 26A would not be used in respect of individuals where there are reasonable grounds to suggest involvement in a criminal cartel offence.

4.3 A number of respondents expressed concern that paragraph 6.21 of the Draft Guidance gave the CMA too much discretion as to which individuals are to be treated as having a 'connection with' the relevant business, in particular, where these are professional advisers to the business.

4.4 A general concern was also expressed as regards use of these interview powers during dawn raids. Respondents were concerned that individuals would not be given adequate time to prepare and to seek legal advice in advance of compulsory interviews. Further, certain respondents requested clarification that the CMA would allow reasonable notice of at least a number of days (or, in the context of a dawn raid, at least a number of hours) to be given to interviewees. Clarification was also sought of the conditions imposed during a dawn raid whilst waiting for legal advisers to arrive.

4.5 Similarly, as regards the giving of notice, comments were received expressing concern and requesting further guidance on the circumstances in which the CMA would either not provide a copy of the formal notice to the business to which an interviewee has a '*current connection*' until after the interview, or would not do so at all to those business(s) who had formerly employed the interviewee during the relevant period(s). Further guidance was also sought on the content of the formal notice and the procedure to be followed by the CMA in issuing it.

4.6 Various respondents commented on the conduct of compulsory interviews, expressing, among other things, the view that:

- a formal recording should be considered necessary in all cases

- interviewees should always be asked to check their transcript, and if there are circumstances in which the CMA envisages exceptions to this, further guidance should be provided by the CMA setting them out
- guidance should be provided regarding the timeframe for checking the transcript and for making confidentiality representations
- where a business' legal adviser was not present, the business should be provided with the transcript at the earliest opportunity after the interview, and
- in addition to the confidentiality claims made by the individual, the business under investigation should be allowed to make confidentiality representations, and access to file should not be permitted before the relevant business(es) have had the opportunity to make confidentiality representations and have those representations taken into account.

#### *Presence of a legal adviser*

- 4.7 The guidance concerning the presence of a legal adviser at interview elicited a large number of comments. The majority of respondents felt that the business' legal adviser (whether or not also acting for the individual) should be present at the interview unless there are real risks that this will prejudice the investigation. In particular, respondents suggested that the presence of a business' legal advisor would ensure that the business' privilege against self-incrimination is protected; querying also in this respect when statements obtained in section 26A interviews might be used against the interviewee, their colleagues or the business. Furthermore, specific guidance was requested as to the circumstances justifying exclusion of a business' legal adviser.
- 4.8 The view was also expressed that while there may be circumstances in which the interests of an individual and the business under investigation are not aligned, leading to a potential conflict of interests, this is a matter of the professional ethics by which legal advisers are bound and, accordingly, not one for the CMA to determine.
- 4.9 Respondents also generally expressed concern that it would be inappropriate for the CMA to restrict an individual's choice of legal representation by excluding the business's legal adviser, and highlighted that the CA98 already contains mechanisms that can be used to sanction legal advisers who deliberately obstruct questioning.

## The CMA's views

- 4.10 The CMA notes respondents' concerns about the use of information obtained through the use of the CMA's formal interview powers and, in light of these comments, the CMA has clarified that the notice of interview will refer to the statutory limitations on the use of statements against the individual being interviewed. In particular, such information may only be used as evidence against an individual in relation to a prosecution for the provision of false or misleading information or in relation to any other prosecution where the individual makes a statement that is inconsistent with that provided to the CMA.<sup>5</sup> This would preclude the use of evidence obtained in an interview under section 26A of the CA98 in any related criminal proceedings against that individual for an offence under section 188 of the Enterprise Act 2002, unless, in the proceedings, that individual makes a statement inconsistent with that evidence and evidence relating to it is adduced, or a question relating to it is asked, by that individual or on his behalf.
- 4.11 The CMA has considered carefully the comments received relating to the indicative list of individuals who may be treated as having a '*connection with*' a business. However, the CMA does not consider it appropriate to provide an exhaustive list anticipating all potential scenarios (in particular considering that it has not yet had the opportunity to exercise this new power in practice). Rather, the Final Guidance lists by way of illustration the likely categories of persons that may be considered for interview depending on the specific circumstances of the case.
- 4.12 As highlighted in section 3 of this summary, the CMA is of the view that it may be appropriate, in the circumstances of a given case, to make use of its interview powers under section 26A of the CA98 in the course of dawn raids. Where this is the case, the Final Guidance provides that the questioning may be delayed for a reasonable time to allow for an individual's legal adviser to attend and the CMA has given examples in the Final Guidance of the conditions that the CMA may impose whilst waiting for that legal adviser to arrive.
- 4.13 The CMA acknowledges the concerns raised regarding the provision of notice of an interview, in particular that the CMA does not commit to provide the notice to a business with which the individual being questioned has a

---

<sup>5</sup> Section 30A of the ERRA13.



former connection. In this respect, the CMA wishes to highlight that there is a requirement under section 26A CA98 for the CMA to provide notice to businesses with a current connection to the interviewee in order for that business to provide legal support to the individuals who may be asked questions (see paragraph 318 of the Explanatory Notes to the ERA13). This requirement under section 26A goes beyond what is required under CA98 for other investigative steps (including in relation to interviews where the interviewee no longer has a current connection with the business). The Final Guidance clarifies that the CMA will take reasonable steps to provide notice to the business before the interview takes place. However, the CMA does not consider it appropriate to delay the interview if, after having taken these steps, notice has not been given and the CMA considers that a delay may compromise the investigation. The CMA considers that the level of guidance as to the procedure to be followed in issuing a notice under section 26A of the CA98 is appropriate.

- 4.14 The CMA has considered carefully respondents' views as to the conduct of interviews and has sought to clarify the Final Guidance where possible. However, the CMA does not consider it appropriate at this time to provide any additional detail beyond that included in the Final Guidance as the approach to be taken will depend on the circumstances of the individual case. The CMA will nevertheless keep under consideration whether further Guidance on the conduct of interviews and the procedure to be followed is appropriate as it gains greater practical experience of conducting interviews under this new power.
- 4.15 The CMA notes respondents' concerns relating to the identification by businesses (whether with a current or former connection to the interviewee) of confidential information in the transcript. The CMA has amended the Final Guidance at footnote 72 to clarify that businesses with a current connection will normally be asked to make confidentiality representations on any transcript, as will businesses with a former connection if appropriate. However, as noted in the Final Guidance, this will be at the point where there is no prejudice to the investigation.

#### *Presence of a legal adviser*

- 4.16 The CMA has carefully considered the comments from respondents on the guidance concerning the presence of a legal adviser at interview. The CMA is also mindful of the Solicitors Regulation Authority's (SRA) guidance

concerning employers' solicitors attending Health and Safety Executive (HSE) interviews with employees<sup>6</sup>. This guidance considers whether it is ethically appropriate for solicitors who act for an employer to be present at the HSE inspector's interview of an employee and states that investigations by other similar authorities may give rise to similar considerations. The CMA recognises that individuals may choose to be represented by a legal adviser who is also acting for the business under investigation; the Final Guidance clarifies that in those circumstances the CMA will refer the individual and the legal adviser to that SRA guidance and to the consideration to be given by the solicitor to the risk of a conflict of interest arising, in particular in relation to the duty of disclosure and the duty of confidentiality.

- 4.17 The CMA has also amended the Final Guidance to clarify that the CMA recognises that the interview power may be used in a range of circumstances, but that the starting point will be that it will be generally inappropriate for a legal adviser acting only for the business to be present at the interview. This includes the circumstances set out in the Final Guidance and referred to in the SRA's guidance on HSE interviews (referred to in paragraph 4.16 above) where there is a risk that the presence at the interview of a legal adviser only acting for the business will reduce the incentives on the individual being questioned to be open and honest in their account. The CMA does not agree with the view expressed by a number of respondents that the business' privilege against self-incrimination is necessarily engaged merely by virtue of the fact that one of its employees is being interviewed.
- 4.18 The CMA has considered carefully all other comments received, but does not consider it appropriate at this time to provide further detail in the Final Guidance. However, the CMA will consider whether further guidance is appropriate once it has greater experience of conducting interviews under this new power.

---

<sup>6</sup> SRA Guidance on Employer's solicitors attending HSE interviews with employees (17 March 2006 – revised 5 February 2014) available at [www.sra.org.uk](http://www.sra.org.uk).

## 5 Use of ‘confidentiality rings’ and ‘data rooms’

<b>Question 4: Do you agree with the proposed approach to the use of ‘confidentiality rings’ and ‘data rooms’?</b>
--

- 5.1 The CMA sought respondents’ views on the proposed approach to the use of confidentiality rings and data rooms.

### Summary of responses

- 5.2 Whilst a number of respondents agreed with the CMA’s proposed approach to the use of data rooms and confidentiality rings, they also made comments and requested clarification on the conditions of, and procedure for, their operation.
- 5.3 Respondents expressed concern regarding the CMA’s discretion to impose these measures and the potential effect on parties’ rights of defence; accordingly, it was requested that their use be subject to the parties’ consent. Respondents highlighted instances of problems arising where authorities sought to impose rather than agree the terms of access to confidential information.
- 5.4 Specifically in relation to data rooms, various respondents cautioned against their use on the basis that they are relatively restrictive, more costly, less productive and less efficient than disclosure via standard access. In particular, it was pointed out that they have been the subject of controversy in the past as advisers granted access are unable to engage effectively with their clients regarding submissions or reports prepared on their behalf using the data in the data room. A number of respondents also made reference to the case of *BMI v Competition Commission* [2013] CAT 24 and requested that the guidance explicitly acknowledge the CMA’s compliance with that judgment’s principles, in particular the use of safeguards to prevent unduly wide access to information and disclosure of confidential information against the owner’s express wishes.
- 5.5 Certain respondents also felt that specified decision makers within the business should be permitted access (which would be consistent with practice by the CAT), with certain safeguards and on a case-by-case basis.

### The CMA’s views

- 5.6 The CMA has carefully considered respondents’ comments in relation to the use of confidentiality rings and data rooms. Consistent with its approach

in *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6) (the Transparency and Disclosure Statement), the CMA may consider it appropriate to use confidentiality rings and data rooms to disclose certain information where it recognises the need for such disclosure to be effected in a restrictive manner.<sup>7</sup> As set out in the Final Guidance (at paragraph 11.27) the CMA will only use confidentiality rings purely for the purpose of expediting access to file with the consent of the parties.

- 5.7 As the CMA has clarified in the Final Guidance, a defined group, generally legal and economic advisers, may have access to specific quantitative and/or qualitative data or documents to enable parties' advisers to gain further understanding of the CMA's analysis and to confirm or challenge the CMA's findings or conclusions. This group will be determined on a case-by-case basis.
- 5.8 In relation to several respondents' request to include more detail on the specific workings of confidentiality rings and data rooms, the CMA has already provided information in the Transparency and Disclosure Statement<sup>8</sup> on the use of these procedures in addition to that in the Final Guidance. However, given that, at the date of publication of the Final Guidance, a number of legal appeals relevant to the treatment of confidential information are pending, the CMA does not consider it would be appropriate to issue more detailed guidance.
- 5.9 The CMA has clarified that access to documents in a confidentiality ring or data room will be subject to confidentiality undertakings provided by the persons with access, which address how they may use the information disclosed to them and the restrictions that apply to onward disclosure. In the case of data rooms, the CMA will also require advisers to follow data room rules concerning the proper conduct of the data room, including making provision for bringing into and taking out of the data room items such as materials, notes and equipment.
- 5.10 Further, the CMA highlights to respondents that it will be a condition of access to a confidentiality ring or data room that information reviewed by advisers is not shared with their client(s). Thus, it is for advisers to satisfy themselves of the steps they are required to take under any relevant

---

<sup>7</sup> Paragraph 4.29 of the Transparency and Disclosure Statement.

<sup>8</sup> See section 4 of the Transparency and Disclosure Statement.

professional conduct rules to ensure that they are able to operate on this basis.

## 6 Settlement Procedure

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

- 6.1 The CMA sought respondents' views on the proposed settlement procedure.

### Summary of responses

- 6.2 The majority of respondents broadly agreed with the proposals in the Draft Guidance. In addition, comments were received from a number of respondents covering a range of discrete issues.

### *Suitability for settlement*

- 6.3 Some respondents sought further guidance as to when the CMA will consider a case to be suitable for settlement (including where only some parties to an investigation wish to settle). It was also requested that the Final Guidance provide an indication as to when the CMA envisages informing the businesses under investigation that it considers a case to be so suitable.

### *Requirements for settlement*

- 6.4 A number of respondents commented on the requirements to be imposed on businesses as part of any settlement process and questioned their appropriateness, including the requirement for settling businesses to:
- commit to providing witnesses in the event of the CMA's infringement decision being appealed
  - agree to a streamlined administrative procedure with more limited access to file, and
  - accept that the decision will remain final and binding, unless the settling business itself appeals the infringement decision.

### *Settlement process*

- 6.5 Some respondents suggested that the CMA should be more open to settlement discussions covering the contents of the Summary Statement of Facts (including the precise scope and duration of the infringement) and the

CMA's views as to the key elements of the penalty. One respondent also queried whether the CMA's proposal to accept representations on 'manifest factual inaccuracies' rather than 'material factual inaccuracies' signifies a departure from the OFT's approach in respect of this procedural step.

- 6.6 A number of comments were received in respect of when the CMA or a business may withdraw from the settlement process, and what the consequences of such withdrawal might be.
- 6.7 One respondent suggested that, contrary to the approach in the Draft Guidance, a Case Decision Group should normally be appointed in order to decide whether to accept a settlement.
- 6.8 Several respondents also commented on the approach in the Draft Guidance to the confidentiality of settlement discussions and documents provided to the CMA during such discussions. Such comments focussed in particular on:
- what the Case Decision Group will be told about the existence of settlement discussions
  - when information acquired during settlement discussions might be disclosed to other parties to an investigation, and
  - whether materials acquired during settlement discussions should be disclosed to private litigants.

#### *Other comments*

- 6.9 Other comments received from respondents related to, among other things, the clarity of the drafting used in various parts of section 14 of the Draft Guidance; further detail was also sought on certain aspects of the procedure to be followed by the CMA.

### **CMA's views**

#### *Suitability for settlement*

- 6.10 The CMA considers that the Final Guidance gives a clear indication of the factors that will feed into its assessment of a case's suitability for settlement. In particular the Final Guidance lists examples of factors affecting the likelihood of resource savings being realised through settlement (notably savings are unlikely to be realised if an investigation

involves a large number of parties of which only a small number are interested in settlement). In any event, the assessment must be carried out on a case-by-case basis and it is not possible for the CMA to give specific examples of cases that are suitable for settlement (or not). Where the CMA considers that a case might be suitable for settlement, it will provide an indication of that fact at a point appropriate to the case, which could be after issuing the Statement of Objections or even earlier in a state of play meeting. As set out in the Final Guidance this could also follow an initial approach from the parties.

### *Requirements for settlement*

- 6.11 The CMA notes the comments made by respondents in this regard and wishes to reiterate that, as made clear in the Final Guidance: (i) settlement is an entirely voluntary process; and (ii) businesses do not have a right to settle in a given case. It is therefore for businesses to decide whether they wish to accept the CMA's requirements for settlement. Furthermore, a settling business remains free to appeal an infringement decision if it considers that it is not supported by the evidence.
- 6.12 It is important that the settlement procedure results in resource savings for the CMA and that parties accept that a streamlined administrative procedure will apply. However, as made clear in the Final Guidance, this does not preclude the CMA taking further investigative steps where appropriate in relation to new documents or information provided to it during the course of settlement discussions. Furthermore, the Final Guidance recognises that the CMA may choose not to make an infringement finding against a settling business where new exculpatory evidence comes to light after settlement. Additionally, the Final Guidance has been amended to clarify that, under the streamlined access to file procedure, settling parties will be able to request access to specific documents in the CMA's case file.

### *Settlement process*

- 6.13 Having carefully considered the comments received, the CMA has decided to amend the Final Guidance to recognise that it may be appropriate during settlement discussions to allow limited representations from settling businesses on the Summary Statement of Facts. It is important however that considering such representations does not prevent the CMA from realising the resource savings it expects to achieve when deciding that a case is suitable for settlement and so the CMA will set an appropriate



timeframe for considering these representations. If the settling business' representations are considered by the CMA to amount to a wholesale rejection of the facts of the alleged infringement as set out in the Summary Statement of Facts, the CMA will reassess whether, in light of those representations, the case remains suitable for settlement. The CMA has also clarified that parties may also make limited representations on the draft penalty calculation provided as part of pre- and post-Statement of Objections settlement discussions as long as these are not inconsistent with the business' admission of liability to be made in respect of the infringement set out in the Summary Statement of Facts or Statement of Objections. The CMA also wishes to confirm that the change in nomenclature from 'material' to 'manifest' factual inaccuracies was adopted in order to better reflect current practice; it does not signify a change in the way that this part of the settlement process will be approached.

- 6.14 After careful consideration, the CMA has also decided to retain the approach whereby a proposed infringement decision or Statement of Objections must substantially reflect the admission given by the settling business. Non-material departures from the precise wording of admissions may be required where the CMA engages in settlement discussions with a number of businesses.
- 6.15 The CMA also wishes to confirm that, as stated in the Final Guidance, where settlement discussions are initiated after a Statement of Objections is issued, the Case Decision Group must be informed of that fact, given the effect such discussions have on the case timetable. Case Decision Groups will not be informed of the identity of the parties (although this may be readily apparent, depending on the number of parties to the investigation).
- 6.16 As to the treatment of information or documents disclosed by businesses during settlement discussions, the CMA has clarified in the Final Guidance that new documentary evidence or information relating to the suspected infringement will be placed on the CMA's case file and will be disclosed to other parties to the investigation, subject to confidentiality considerations. Furthermore, the CMA will have regard to its statutory obligations regarding any onward disclosure to other parties, for example private litigants, in the normal way; in this regard the CMA is conscious of the potential impact of the *Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for*

*infringements of the competition law provisions of the Member States and of the European Union.*<sup>9</sup>

- 6.17 Finally, the CMA notes that, during the course of its 2012 review of investigation procedures in competition cases, after careful consideration and in line with a number of comments, the OFT determined that the Case Decision Group should not be responsible for discussing or agreeing settlements with parties. The CMA has decided to retain this approach, whilst recognising in the Final Guidance that there may be exceptional circumstances which merit a departure from this approach.

*Other comments*

- 6.18 The CMA has carefully considered the other comments received from respondents; where appropriate it has sought to provide additional clarification in the Final Guidance.

---

<sup>9</sup> 2013/0185 (COD).

## 7 Inclusion of the proposed maximum penalty in settlement discussions

**Question 6: Do you agree that the 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?**

- 7.1 The CMA sought respondents' views on the proposal to disclose within settlement discussions the proposed maximum penalty a settling business should pay.

### Summary of responses

- 7.2 A total of twelve respondents expressed their agreement with this proposal, although, amongst the other comments received, it was suggested that the CMA should require firms to agree a minimum as well as a maximum penalty.

### The CMA's views

- 7.3 In light of the broad support from respondents for the proposal to disclose within settlement discussions the maximum penalty a settling business should pay, the CMA has decided to retain this approach in the Final Guidance.
- 7.4 The CMA has carefully considered the suggestion by one respondent that the CMA should require firms to agree a minimum as well as a maximum penalty, but does not consider that this would be appropriate given the need to reflect the resource savings achieved in settling a particular case at a particular stage in the investigation.
- 7.5 The CMA also wishes to make clear that, as part of any settlement discussions, the CMA will indicate the level of settlement discount it intends to apply, as well as the proposed maximum penalty the settling party should pay.

## 8 Settlement discount caps

**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?**

- 8.1 The CMA sought respondents' views on the proposal to set settlement discounts at up to 20% for pre-SO settlement and up to 10% for post-SO settlement.

### Summary of responses

- 8.2 The majority of respondents were in favour of the proposed caps and considered them appropriate.
- 8.3 However, some respondents suggested that the caps were either too low, or too rigid (suggesting that the CMA should retain the discretion to offer discounts of more than 20%). Concerns were also raised that, absent further guidance, the use of caps rather than fixed discounts involves a degree of uncertainty that could disincentivise settlement, particularly as discounts of less than 10% are unlikely to be very attractive to businesses.
- 8.4 Another respondent was of the view that the CMA offering discounts of up to 20% might lead to parties deciding to settle on a commercial basis, rather than on the merits of the case. One respondent also queried whether offering settlement discounts of up to 20% risked reducing the deterrent effect of enforcement.

### The CMA's views

- 8.5 The CMA notes that the majority of respondents submitted that the proposed caps for settlement discounts were appropriate, and accordingly has decided to adopt the proposed approach in the Final Guidance.
- 8.6 With regard to the level of the caps, 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.

- 8.7 The CMA has carefully considered the comments that fixed discounts would give greater certainty to parties, but on balance considers that it is more important that the settlement discount reflect the circumstances of each case, including the resource savings specific to each settlement.
- 8.8 As to the concern that parties will decide to settle on a commercial basis rather than on the merits of the case, the CMA considers that the implications of settlement for parties are made sufficiently clear in the Final Guidance (for example, at paragraph 14.9). The Final Guidance also states (at paragraph 14.10) that the CMA will only consider cases for settlement where the evidential standard for giving notice of a proposed infringement decision is met.
- 8.9 Regarding the concern that settlement discounts of up to 20% may risk reducing the deterrent effect of enforcement, the CMA considers that settlement can impact positively on deterrence and the effectiveness of the competition regime, in particular by releasing resources earlier to pursue other cases. In some cases where any infringement decision is issued earlier than would have been the case, settlement can also facilitate follow-on damages actions, potentially creating an additional deterrent effect. The amount of any settlement discount will depend on the circumstances of the case, and in light of parties' responses to question 7 the CMA does not consider that the maximum discount should be lower than 20%.

## 9 Other amendments

<b>Question 8: Do you have any comments on any of the other amendments proposed for the Draft CMA CA98 Guidance?</b>
--

- 9.1 The CMA sought respondents' views more generally on any of the other proposed amendments to the Draft Guidance.

### Summary of responses

- 9.2 A large number of responses were received to this question, covering a broad range of issues.

#### *Decision-making*

- 9.3 A number of respondents requested that there be at least some degree of involvement of CMA panel members in investigations under the CA98 – whether in the investigation phase or through routine or mandatory inclusion of one or more panel members in Case Decision Groups – in order to make use of panel members' expertise and experience and protect against possible confirmation bias.

#### *Role of the Procedural Officer*

- 9.4 Some respondents requested that the scope of the Procedural Officer's remit be expanded from that envisaged in the Draft Guidance to include issues such as the scope of information requests, decisions to hold state of play meetings or settlement discussions and making observations on any matter arising out of proceedings under the CA98, including matters relating to the CMA's substantive assessment of the case.
- 9.5 One respondent also suggested that the Procedural Officer should, rather than being a CMA staff or panel member, be a person wholly external from the CMA, more in the mould of the European Commission's Hearing Officer.

#### *Notices of investigation*

- 9.6 A significant number of respondents expressed concerns regarding the CMA's proposal to name parties in notices of investigation in certain circumstances. In particular, respondents:

- queried whether the CMA envisaged a departure from current OFT practice, which states that parties will only be named in ‘*exceptional*’ circumstances
- requested that the CMA provide parties with advance notice if they are to be named in notices of investigation
- expressed concern at the fact that the Draft Guidance does not acknowledge the need to take into account the damage that might potentially be caused to named parties, and
- contended that ‘significant public speculation’ was an inadequate ground for naming a party in a notice of investigation.

### *Interim Measures*

- 9.7 Numerous respondents commented on the provisions in the Draft Guidance setting out the CMA’s approach to the imposition of interim measures, particularly in light of the new, lower threshold for the imposition of such measures introduced by the ERA13.
- 9.8 One respondent cautioned against the CMA interfering unduly with businesses’ freedom to determine their commercial strategies in the absence of an infringement decision, whilst another requested further guidance as to the process the CMA will follow and the manner in which it will exercise its discretion to impose interim measures, particularly in light of the Competition Appeal Tribunal’s case law.<sup>10</sup>
- 9.9 Two respondents also suggested that the decision to impose interim measures should require authorisation either from the CMA’s Case and Policy Committee or a specially-appointed interim measures Case Decision Group.
- 9.10 Some respondents sought greater clarity in the Final Guidance as to the manner in which the statutory test under section 35 of the CA98 will be applied by the CMA, including in particular the likelihood of significant damage resulting from the conduct under consideration (highlighting the inconsistency in the language used in the Draft Guidance in this respect). The respondents requested further guidance as to when the CMA would consider damage to be ‘significant’.

---

<sup>10</sup> London Metal Exchange v the Office of Fair Trading [2006] CAT 19.

- 9.11 Respondents also suggested that the Final Guidance should specifically refer to the need for the CMA to conduct a balancing exercise, taking account of the potential harm to the addressee of any proposed interim measures, and should also take account of whether the harm in question could be adequately compensated by damages.

*Exclusion of internal and administrative documents from the file*

- 9.12 Several respondents queried whether it was appropriate for the CMA to classify notes of meetings and conversations with third parties as internal documents and therefore exclude them from the case file. Respondents also cautioned against excluding all routine administrative documents from the file (such as correspondence setting up meetings) as, although not substantive, such documents might have significance insofar as they relate to the conduct of the investigation.

*Oral hearings*

- 9.13 A number of comments were received in respect of the conduct of oral hearings. In particular, respondents suggested that:
- parties should be able to ask questions of the case team during oral hearings in order to exercise their rights of defence and gain a proper understanding of the CMA's case
  - it was unclear whether oral hearings would always be chaired by the CMA's Procedural Officer in light of the relevant provisions in the Draft Rules, and
  - before the hearing, the CMA should provide an indication of the key outstanding areas of concern and, following the hearing, the Procedural Officer's report should be made available to the relevant business.

*Non-addressee parties to infringing agreements*

- 9.14 One respondent welcomed the clarification that the CMA may in certain circumstances issue infringement decisions against some parties to an infringing agreement but not others. However, it was requested that such parties be afforded appropriate opportunities to exercise their rights to be heard in light of the potential consequences for them of the issuing of an infringement decision (notwithstanding that that decision is not addressed to them).



### *Other comments*

- 9.15 A number of comments were received in respect of the treatment of unneeded information and the handling of confidentiality claims. Other, isolated comments focussed on the merits of particular aspects of the CMA's procedure or sought further clarification on these, including the timing of state of play meetings and commitments discussions and the role of the Senior Responsible Officer. A number of comments were also received in relation to unamended elements of guidance that were not the subject of the Consultation.

### **The CMA's views**

#### *Decision-making*

- 9.16 Having carefully considered the comments received, the CMA is of the view that it would not be appropriate for the involvement of CMA panel members to be mandated in all CMA investigations under the CA98, in particular via their inclusion in Case Decision Groups. The CMA is mindful of the need for it to retain a sufficient degree of flexibility in constituting Case Decision Groups in light of the expertise, experience and availability of relevant persons. In this respect, the Final Guidance has also been amended to reflect the fact that Case Decision Groups no longer need to include at least one member of the CMA's Case and Policy Committee. Rather, the CMA considers that the possibility of involving CMA panel or board members or other CMA senior staff will provide appropriate senior involvement. The CMA will however keep its processes in this regard under review.

#### *Role of the Procedural Officer*

- 9.17 The CMA notes the suggestion that the remit of the Procedural Officer be expanded to include other matters, including those relating to substantive issues. Similar suggestions were received at the time of the review of the OFT's investigation procedures in competition cases, when views were sought on the Procedural Adjudicator trial. Following that consultation, and on continuing the trial, the OFT considered that it would not be appropriate for the Procedural Adjudicator's remit to be expanded beyond purely procedural issues. Both the OFT and respondents to that consultation had felt that the scope of the role provided an effective method for swiftly resolving disputes. Given that the Procedural Adjudicator trial, formed the model for the proposals now adopted in respect of the CMA's Procedural

Officer's role in CA98 cases, the CMA is not minded to amend the Procedural Officer's remit at this time.<sup>11</sup>

- 9.18 Likewise, the experience and response to the Procedural Adjudicator trial suggests that it is unnecessary for the effective functioning of the role for the Procedural Officer to be a person wholly external to the CMA rather than a CMA staff, board or panel member who has not been involved in the investigation in question. The CMA will however keep under review the functioning of the Procedural Officer role. Consideration will be given to expanding the Procedural Officer's remit if the CMA's practical experience suggests that to do so would materially assist the efficient administration of investigations under the CA98.

#### *Notices of investigation*

- 9.19 In light of the comments received from respondents, the CMA has decided to revert to the wording used in the OFT's procedural guidance, namely that parties will only be named in notices of investigation in 'exceptional' rather than 'appropriate' circumstances. It is not the CMA's intention to name parties in notices more frequently than was the case in OFT investigations; the amended wording was adopted in the Draft Guidance only because it was considered to more accurately reflect the fact that the CMA will evaluate in each case whether naming parties would be 'appropriate' (not to suggest that it would be appropriate in more cases than in current OFT practice).
- 9.20 The CMA also wishes to confirm that it is mindful of the potential for reputational harm to named parties; this is reflected by the fact that its default position is that parties should not be named in case opening notices unless genuinely necessary. Consequently, it is not expected that, as suggested by some respondents, the CMA would routinely name parties in notices purely in response to press speculation. The CMA is also of the view that it may not be appropriate for parties to be given advance notice of being publicly named as such notice could prejudice an ongoing investigation.

---

<sup>11</sup> The CMA notes that the OFT's Procedural Adjudicator role has been extended in relation to the Procedural Officer's role in respect of other CMA functions. The Procedural Officer will also handle complaints concerning disputes relating to requests for confidentiality of information that the CMA proposes to publish in mergers cases and in market studies and investigations. Such disputes were not within the remit of the OFT's Procedural Adjudicator.

### *Interim Measures*

- 9.21 In light of comments received from respondents, the CMA has amended the Final Guidance to clarify at what point it will regard the test for the imposition of interim measures as having been met. However, the CMA is at present unable to provide further guidance as to when damage will be considered to be 'significant' for these purposes and will need to develop its practice in this regard on a case-by-case basis.
- 9.22 As the Final Guidance makes clear, the CMA will only impose interim measures if it considers it proportionate to do so; an assessment which will necessarily take into account the severity of the measures sought (although it will not involve weighing the damage being suffered by the applicant against the cost to the addressee of the requested measures). The CMA also notes that the removal of the requirement that damage be 'irreparable' indicates that it need not be incapable of redress through, amongst other things, a later award of damages, in order for the test under section 35 of the CA98 to be satisfied.
- 9.23 The CMA has carefully considered the comments received in regard to the appropriate decision-making process for the imposition of interim measures and is of the view that the process outlined in the Draft Guidance is appropriate and has retained this in the Final Guidance. The Senior Responsible Officer will consult with two other senior CMA officials before imposing interim measures, which will provide for adequate oversight without impeding the CMA's ability to respond with sufficient speed if necessary.

### *Exclusion of internal and administrative documents from the file*

- 9.24 In light of the comments received from respondents, the CMA has decided not to routinely treat notes of meetings and conversations with third parties as internal documents. The CMA has concluded that concerns raised by respondents regarding access to potentially exculpatory material could not be addressed without losing the anticipated resource savings that prompted the CMA's proposals in this regard.
- 9.25 Likewise, routine administrative documents will not be excluded from the case file as a matter of course, except where the particular characteristics of an investigation (for example, the number of businesses involved) suggest that to do so would result in significant resource savings. In such instances, the CMA will instead provide a schedule listing such documents

and grant parties access to individual documents or categories of documents upon request.

#### *Oral hearings*

- 9.26 The CMA can confirm that oral hearings will always be chaired by the Procedural Officer appointed by the CMA to that role; any flexibility in this regard in the Draft Rules is a reflection of the fact that the Rules also apply to the sectoral regulators, as explained in section 3 above.
- 9.27 The CMA also notes that detailed consideration was given to the oral hearings process in the OFT's 2012 review of investigation procedures in competition cases, including, amongst other things, the question of the appropriate degree of 'interactivity' of such hearings. The CMA is of the view that the balance struck by the OFT following that consultation was appropriate, but it will keep its processes in this regard under review.

#### *Non-addressee parties to infringing agreements*

- 9.28 The CMA notes the concerns raised as to the opportunities to be heard that will be afforded to non-addressee parties to infringing agreements. The degree of involvement in investigations for such parties is likely to vary depending on a number of factors, including the nature of the infringing conduct and the number of parties to the relevant infringing agreement(s). However, the CMA does not preclude providing such parties with a non-confidential version of the relevant Statement of Objections and allowing them to make representations on its contents.

#### *Other comments*

- 9.29 The CMA has carefully considered the other comments received from respondents; where appropriate it has sought to provide additional clarification in the Final Guidance.

## 10 Transitional arrangements

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

- 10.1 The CMA sought respondents' views on the proposed transitional arrangements, set out in paragraphs 3.41 to 3.43 of the Consultation Document.

### Summary of responses

- 10.2 Five respondents agreed outright with the proposals and two other respondents agreed in principle, subject to comments. In particular, one respondent suggested that the CMA's power to impose procedural fines should not apply to ongoing investigations; only those that first met the threshold in section 25 of the CA98 after 1 April 2014. Another considered that compulsory interview powers should only be applied in cases initiated after 1 April 2014, or where no Statement of Objections has been issued as at that date, on the grounds that case teams would be incentivised to delay the progress of ongoing investigations in order to avail themselves of the possibility of compulsory interviews from 1 April 2014.
- 10.3 One respondent queried whether the approach set out in the Final Guidance would apply from the date of publication of the Final Guidance or from 1 April 2014.

### The CMA's views

- 10.4 Given the broad support from respondents for the CMA's proposed transitional arrangements, the CMA considers it appropriate to retain these. The overview of the CMA's proposed approach in paragraphs 3.41 to 3.43 of the Consultation document is reflected in a separate document, *Transitional Arrangements: Guidance on the CMA's proposed approach – Part 2* (CMA14part2) along with transitional arrangements related to other CMA functions, and published on [www.gov.uk/cma](http://www.gov.uk/cma).
- 10.5 CMA case teams will explain to parties to CA98 cases that will be ongoing on 1 April 2014 how these transitional arrangements will apply in the parties' case.
- 10.6 The CMA has noted and carefully considered the suggestion from two respondents that compulsory interview powers and the power to impose procedural fines should not apply to all ongoing cases from 1 April 2014.

These powers relate, however, to specific instances that could arise only after 1 April 2014 (that is, when the CMA provides an individual with an interview notice under section 26A of the CA98, or when the CMA issues an investigatory requirement to which the power under section 40A of the CA98 to impose procedural fines applies). The CMA therefore considers it appropriate that such powers should apply to ongoing cases from 1 April 2014. As regards the specific comment by one respondent, the CMA does not consider that there is a material risk that case teams would be incentivised to delay the progress of ongoing investigations.

- 10.7 The Final Guidance also clarifies that the approach it sets out will apply from 1 April 2014, not from the time of publication.

## 11 Availability of short-form opinions

**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**

- 11.1 The CMA sought respondents’ views on the proposal to extend the availability of SfOs to prospective vertical agreements in addition to prospective horizontal agreements.

### Summary of responses

- 11.2 Ten respondents welcomed the proposal and expressed their support without reservation. Two further respondents agreed in principle, but commented that the SfO process has only been tested in practice a small number of times and the CMA should therefore consider whether the procedure should be further amended to make it more attractive to businesses. One further respondent submitted that the process should be adopted on a permanent rather than a trial basis, as the process has already been available for over three years, and that the CMA should run a separate consultation on any ‘*procedural enhancements*’ that it proposes to the process prior to implementing them.

### The CMA’s views

- 11.3 Given the broad support for the proposal to extend the availability of SfOs to prospective vertical agreements, the CMA has decided to implement this proposal. It is anticipated that updated guidance relating to SfOs will be published shortly after, 1 April 2014 and will be available on [www.gov.uk/cma](http://www.gov.uk/cma). Once published this new guidance will replace *Short-form Opinions – the OFT’s Approach* (OFT, April 2010).
- 11.4 The CMA has carefully considered the suggestion that further amendments may make the SfO process more attractive to businesses, but has decided that the increase in scope to cover prospective vertical agreements is sufficient for the time being. As noted in the Consultation Document, the CMA will review the SfO trial as appropriate. As to the small number of published SfOs to date, this in part reflects the very specific purpose of the SfO process to clarify novel or unresolved questions for the benefit of a wider audience.

- 11.5 With regard to the comment that the CMA should adopt the SfO process on a permanent basis while consulting on procedural enhancements, the CMA has decided after careful consideration that the process (including enhancements) should be adopted on a trial basis, as proposed in the Consultation Document. Adopting the enhanced SfO process on a trial basis does not preclude external stakeholders from offering feedback on this process, and will enable the CMA and parties to develop further practical experience before the CMA determines whether to adopt the SfO process on a permanent basis and, if so, whether any procedural enhancements may be appropriate.



## ANNEXE(S)

---

## **A LIST OF RESPONDENTS TO THE CONSULTATION ON THE DRAFT GUIDANCE**

- Pinsent Masons LLP
- Hogan Lovells International LLP
- Dickson Minto W.S.
- The City of London Law Society Competition Law Committee
- Bird & Bird LLP
- Simmons & Simmons LLP
- Herbert Smith Freehills LLP
- The General Council of the Bar of England and Wales
- Berwin Leighton Paisner
- GC100
- The Economic and Social Research Council Centre for Competition Policy, University of East Anglia
- Freshfields Bruckhaus Deringer LLP
- Linklaters LLP
- The Civil Aviation Authority
- Allen & Overy LLP
- Ofgem
- Clifford Chance LLP
- Ashurst LLP
- Brown Rudnick LLP
- Baker & McKenzie LLP

- Edwards Wildman Palmer LLP
- [confidential]
- [confidential]