

Competition and Markets

Transparency and disclosure: Statement of the CMA's policy and approach

Consultation document

July 2013

CMA6con

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

This publication is also available at: www.gov.uk/cma

Scope of this consultation

Topic of this consultation

This consultation seeks views on the attached draft statement (Draft Statement) which the BIS CMA Transition Team (the Transition Team) (on behalf of the Competition and Markets Authority (CMA) and in consultation with the Office of Fair Trading (OFT) and the Competition Commission (CC)) proposes to issue in order to explain its transparency aims and its approach to information gathering and disclosure during cases and projects.

This consultation and the accompanying Draft Statement have been drafted by the Transition Team which has been appointed by the CMA Chair Designate and Chief Executive Designate, and consists of individuals from the OFT, the CC and elsewhere.

Geographical scope

There is no specific geographic dimension to this consultation.

Impact assessment

Not applicable for this consultation.

Basic information

This consultation is aimed at all those who have an interest in the CMA's work. In particular, it may be of interest to businesses and their legal and other advisors, and to organisations representing consumers' interests.

How to respond

We would welcome your comments on any aspect of the Draft Statement contained in this document. Annexe A contains the specific questions on which your feedback is sought. 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: cmacconsultation@bis.gsi.gov.uk

By post to:

The BIS CMA Transition Team on behalf of the CMA

(c/o Xinru Li and Easha Lam)

Department for Business, Innovation and Skills

3rd 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 responses 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 you have any queries regarding the content of the consultation please contact Xinru Li or Easha Lam on the email address above or by telephone on 020 7215 2078 or 020 7215 2044.

Closing date

Responses should be received by 5pm on Friday, 6 September 2013.

Next steps

The Transition Team will consider the responses to this consultation document and make amendments to the Draft Statement where appropriate. The CMA Board (once established) will make the decisions on the matters being consulted on and the content of the final Statement, 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 B.

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 contents of the Draft Statement. 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

Consultation Coordinator

1 Victoria Street

London SW1H 0ET

Telephone John on 020 7215 6402 or email to: 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 Enterprise Act 2002. 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 Enterprise Act 2002.

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

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1 INTRODUCTION

Background

- 1.1 The CMA will be established under the Enterprise and Regulatory Reform Act 2013 (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 Enterprise Act 2002 (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 market 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 (CPRs)
 - the CMA will also be able to bring criminal proceedings against individuals who commit the cartel offence under the EA02,¹ and
 - finally, under the Competition Act 1998 (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 See section 188 of the EA02.

1.3 The ERRA13 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.² 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

1.4 The purpose of this document is to consult on the Draft Statement which explains the transparency aims of the CMA and provides an overview of its approach to gathering information from and disclosing information to parties during its cases and projects.³ The Draft Statement also outlines the CMA's approach when considering whether to disclose information to other UK or overseas public authorities, and its complaints handling procedures. The Draft Statement also notes the CMA's obligations under freedom of information and data protection legislation.

Status of the Draft Statement

1.5 The Draft Statement constitutes a general statement of the CMA's policy and approach to transparency and disclosure. It applies to all the CMA's cases (except where stated otherwise) and in particular to cases under the CA98 and the EA02, and consumer enforcement actions. More detailed guidance on transparency and disclosure as it relates to specific areas of the CMA's work, including the applicable legal provisions, is available in other CMA documents, including:

- CMA2con Mergers: Guidance on the CMA's jurisdiction and procedure [currently in draft and being consulted on]
- CMA3con Market Studies and Market Investigations: Supplemental guidance on the CMA's approach [currently in draft and being consulted on]

² An overview of the changes is contained in CMA1 Towards the CMA.

³ For ease of reference, references to a case or cases in the remainder of this document also cover the CMA's projects.

- [Consumer Protection: Guidance on the CMA’s approach to use of its consumer powers – to be consulted on in due course]
 - [Competition Act 1998: Guidance on the CMA’s investigation procedures – to be consulted on in due course]
 - [Competition and Markets Authority’s Competition Act 1998 Rules – to be consulted on in due course]
 - *Applications for leniency and no-action in cartel cases* (OFT1495), and
 - *Chairman’s Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Review of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7).
- 1.6 This Draft Statement supersedes *Transparency – a statement of the OFT’s approach* (OFT1234) and *Disclosure of information by the Competition Commission to other public authorities* (CC12).
- 1.7 The *Chairman’s guidance on disclosure of Information in merger and market inquiries* (CC7) will – together with other relevant existing OFT and CC guidance documents – be put to the CMA Board (once established) for adoption.⁴ 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. Annexe B of the Draft Statement lists the existing OFT and/or CC documents relating to transparency and disclosure that it is currently proposed will be put to the CMA Board for adoption.⁵

⁴ As those pre-existing documents were published prior to the amendments to the EA02 made by the ERR13, they will (if and when adopted) need to be read subject to the Draft Statement and to certain other ‘global’ changes resulting from the coming into force of the ERR13 (for example, reading references to the OFT and CC as referring in each case to the CMA). See further Annexes A and B of the Draft Statement.

⁵ For completeness, it is noted that Annexe B has been drafted (in common with the remainder of the Draft Statement) as assuming that the CMA has been established and that the existing OFT and CC 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 Statement to OFT/CC documents having been adopted by the CMA) is therefore provisional and subject to change.

2 INTRODUCTION TO THE STATEMENT

Introduction

- 2.1 It is the aim of the Transition team for the CMA to recognise the importance of being transparent in the way it works. A transparent approach ensures that those directly involved in the CMA's cases are treated fairly, and that other interested parties can engage effectively with its work. In turn this improves the effectiveness and efficiency of the CMA's work and enhances its visibility and impact.
- 2.2 The creation of the CMA as the UK's competition and markets authority presents an opportunity for the CMA to set out how it intends to be open and transparent in its work (including engagement with parties during cases and how information is handled), drawing on the work carried out by the OFT and CC in this respect. It is the aim of the Transition Team for the CMA to ensure that a clear and consistent approach to transparency and information handling is established and communicated from the outset of the new regime introduced by the ERRA13.
- 2.3 Significant progress has already been made by both the OFT and the CC in developing their approaches to transparency and information handling. The Draft Statement is primarily aimed at consolidating and regularising the practices of the two authorities in the form of a single statement of policy and practice for the CMA.
- 2.4 In summary, the Draft Statement:
- underlines the ongoing commitment of the CMA to transparency and to the adoption of best practices in all areas of its work
 - explains how, subject to any legal/statutory requirements the CMA will be open and transparent about the work it does, how long that work is likely to take, and how it will engage with those directly involved in, or otherwise affected by, its work at different stages of the process, and
 - explains how the CMA will handle the information that it holds, including in what circumstances and in what manner it will disclose information, subject to the applicable legal framework.

Scope and interaction with other guidance

- 2.5 The Draft Statement applies to the CMA's cases unless otherwise stated, in particular its cases under the CA98 and EA02, and consumer enforcement actions. Where relevant it also refers to other CMA guidance documents which provide more detail on the area in question. The Draft Statement should be read alongside the guidance that applies to specific areas of the CMA's work, and is not a substitute for that detailed guidance.

3 STRUCTURE OF THE STATEMENT

3.1 Chapter 1 of the Draft Statement is an introductory section which explains the purpose, status and scope of the document.

3.2 Chapter 2 states the CMA's commitment to transparency, explains why transparency is important and sets out how the CMA aims to achieve transparency in its work. It also explains that the CMA is under certain statutory obligations as to how it handles the information it holds, particularly where that information is confidential in nature, in order to protect that information from unlawful disclosure.

3.3 Chapter 3 explains how the CMA will engage with the main parties and other interested persons during the course of a case or project, including:

- before a case is formally opened
- when a case is formally opened
- whilst a case is ongoing, and
- when a case is completed.

3.4 Chapter 3 also explains how the CMA will comply with its obligations regarding the handling of market-sensitive information, and how it will deal with the media when making announcements.

3.5 Chapter 4 explains how the CMA will obtain and use information during its cases. This includes:

- how it will engage with parties when it requests information from them
- how it will decide upon the manner in which information is disclosed, and when it is disclosed, in individual cases
- how it will consider requests for confidential treatment, and
- how it will use confidentiality rings and data rooms.

3.6 Chapter 5 outlines the complaints procedures that apply to the CMA, and also how the CMA is accountable to the public through various forms of Parliamentary scrutiny.

- 3.7 Chapters 6 and 7 explains the circumstances in which the CMA may disclose information to other public authorities in the UK or to overseas public authorities respectively, and the factors that it will take into account in deciding whether to do so.
- 3.8 Chapter 8 explains that the CMA is required to comply with freedom of information and data protection legislation in relation to the information that it holds.
- 3.9 Annexes A and B set out in tabular form the amendments that the Draft Statement makes to existing guidance and the status of relevant existing OFT and CC guidance.
- 3.10 Annexe C summarises the restrictions on disclosure of specified information obtained by the CMA that are contained in Part 9 of the EA02.

ANNEXE(S)

A. CONSULTATION QUESTIONS

The purpose of this consultation is to obtain feedback on how the Draft Statement is presented and how clear the content is so that we can ensure its usefulness to its audience. To this end, the consultation questions are as follows:

- 1. Do you consider that the Draft Statement sets out a clear statement of the CMA's commitment to transparency and the reasons why this is important?**
- 2. Do you consider that the Draft Statement contains the right level of detail in explaining how the CMA will engage with parties and other interested persons at each stage of its cases, and the CMA's approach to handling information (including in particular confidential information)?**
- 3. Do you consider that the Draft Statement contains the right level of detail in explaining the circumstances in which the CMA may disclose information to other UK public authorities and overseas authorities?**
- 4. Do you consider that there are any aspects missing from the Draft Statement in respect of the CMA's approach to transparency and disclosure?**
- 5. Do you consider that the Draft Statement is user friendly in terms of its content and language?**
- 6. Do you have any other comments on the Draft Statement?**
- 7. Do you agree with the list in Annexe B of the Draft Statement of existing OFT and CC guidance documents related to transparency and disclosure proposed to be put to the CMA Board for adoption by the CMA?**

The format of the final Statement may be different from that of this consultation document. For example, footnotes that appear at the bottom of pages in this document may be placed in the side margins, and headings and sub-headings may appear in a different colour. If you have any formatting suggestions that will improve how the Statement is presented, please provide them in your response to this consultation.

B. 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.

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

C. DRAFT STATEMENT

Competition and Markets Authority (CMA)

Transparency and disclosure:

Statement of the CMA's policy and approach

[2014]

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1 INTRODUCTION

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 the Office of Fair Trading (OFT) were transferred to the CMA and those bodies abolished. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.

1.2 This Statement provides an overview of:

- the aims of the CMA in relation to transparency, information requests and handling of information
- the CMA's approach to transparency when involved in cases and projects¹
- the CMA's approach to gathering information from and disclosing information to parties, and
- the CMA's approach when considering whether to disclose information to other UK or overseas public authorities.

It also notes the CMA's obligations regarding the protection and disclosure of information under the Enterprise Act (EA02), Competition Act 1998 (CA98), Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998 (DPA98).

1.3 This Statement applies to the CMA's cases, except where stated to the contrary, in particular such work under the CA98, EA02 and consumer enforcement actions.

1.4 More detailed guidance on transparency and disclosure as it relates to specific areas of the CMA's work, including the applicable legal provisions, is available in other CMA documents, including:²

¹ For ease of reference, references to a case or cases in the remainder of this document also cover the CMA's projects.

² In the event of apparent conflict between this guidance and the detailed guidance, the latter prevails.

- CMA2con Mergers: Guidance on the CMA’s jurisdiction and procedure [currently in draft and being consulted on]
 - CMA3con Market Studies and Market Investigations: Supplemental guidance on the CMA’s approach [currently in draft and being consulted on]
 - [Consumer Protection: Guidance on the CMA’s approach to use of its consumer powers – to be consulted on in due course]
 - [Competition Act 1998: Guidance on the CMA’s investigation procedures – to be consulted on in due course]
 - [Competition and Markets Authority’s Competition Act 1998 Rules – to be consulted on in due course]
 - *Applications for leniency and no-action in cartel cases (OFT1495), and*
 - *Chairman’s Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Review of Undertakings and Orders accepted or made under the EA02 and Fair Trading Act 1973 (CC7).*
- 1.5 Amendments to the *Chairman’s guidance on disclosure of information in merger and market inquiries (CC7)* as a result of the changes that are outlined in this Statement are listed in Annexe A to this document.
- 1.6 This Statement supersedes *Transparency – a statement of the OFT’s approach (OFT1234)* and *Disclosure of information by the Competition Commission to other public authorities (CC12)*. The status of existing OFT and CC guidance documents directly relevant to this Statement are listed in Annexe B.
- 1.7 This Statement reflects the views of the CMA as at 1 April 2014 and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This Statement may in due course be supplemented, revised or replaced. The CMA’s website will always display the latest version of the Statement.
- 1.8 Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this Statement makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the law itself, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt

about whether they may be affected by the points covered here should consider seeking legal advice.

- 1.9 The CMA will apply this Statement flexibly. This means that the CMA will have regard to the Statement when dealing with transparency and disclosure but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.

2 CMA AIMS IN RESPECT OF TRANSPARENCY, INFORMATION REQUESTS, AND HANDLING OF INFORMATION

Overview

- 2.1 The CMA aims to be open and transparent about the work it does and how it engages with those directly involved in or affected by its work, while seeking to maintain (as appropriate) the confidentiality of information it obtains in the exercise of its functions. It also aims to be reasonable when requesting and handling information, and to protect confidential information in a manner that is appropriate in the circumstances of the case. Furthermore, the CMA aims to carry out its cases with appropriate efficiency and timeliness, including by having due regard to published timetables and statutory deadlines.
- 2.2 In regard to these aims, the CMA recognises the desirability of taking a consistent approach both when exercising the same functions and across functions. However, for some of the CMA's functions the procedures and approach it takes in an individual case are influenced or determined by legislation. Similarly the circumstances of a case may determine the CMA's approach in the particular instance.³

Transparency

- 2.3 Transparency is important for a number of reasons. Transparency is a means of achieving due process and ensuring that parties directly involved in a case are treated fairly. It also enables other interested persons to engage effectively with the CMA and to contribute to its work. Ensuring due process for those directly involved in the CMA's work and effectively engaging with other interested persons in turn improves the effectiveness and efficiency of the CMA's work, and the quality and robustness of its decision-making.
- 2.4 Providing clear information about its cases also enhances the visibility of the CMA's work, thereby increasing its impact, predictability and accountability. Transparency further fosters closer cooperation with overseas competition and consumer authorities.

³ In particular, the CMA acknowledges that in criminal cartel and criminal consumer investigations, the public interest may weigh in favour of maintaining confidentiality of information rather than disclosure. Where there are parallel criminal and civil cartel investigations, the approach taken in relation to the CA98 investigation will be informed by the approach taken in the criminal case.

2.5 The CMA aims to achieve transparency in its work by:

- ensuring the parties directly involved and other interested persons are appropriately informed during the course of a case, for example by notifying them of the formal commencement of a case, sharing developing thinking with relevant parties at appropriate stages of a case, providing indicative timetables, and identifying contacts and decision makers
- engaging with the parties directly involved at an early stage of its cases (unless doing so may prejudice the case)
- ensuring that at appropriate times during the case parties directly involved and other interested persons have an opportunity to raise their concerns and provide their views regarding a particular case
- placing announcements on its website when a formal case has been opened (unless doing so may prejudice the case or would otherwise be inappropriate), and
- placing announcements on its website when a case, in relation to which a formal case opening announcement has been issued, reaches particular significant milestones and when it is completed.

Information requests

2.6 The CMA's cases require it to make evidence based decisions. The receipt of information is therefore important to the quality and effectiveness of the CMA's work. When formulating information requests, determining to whom to address information requests, and determining the date by which the information should be provided, the CMA will aim to be reasonable in its approach. In particular it will be receptive to parties' concerns about the burdens placed on them by the CMA's requests while seeking to balance those concerns with the efficient and effective operation of the CMA. Further information relating to information requests in respect of many of its functions is provided in Chapter 4.

Handling Information

2.7 The CMA's commitment to transparency is provided in the context of the CMA's duty under the ERA13 to promote competition for the benefit of consumers. The CMA is also under certain statutory obligations to protect

confidential information. They apply to the confidentiality of information relating to individuals and businesses that comes to the CMA in connection with the exercise of its statutory functions. Restrictions on the further disclosure of information apply to the CMA and to other persons to whom it makes disclosure. In particular a person making an unlawful disclosure commits a criminal offence.

- 2.8 Under the EA02 such specified information⁴ may be disclosed in certain specific circumstances, generally referred to as ‘information gateways’. When handling information and considering the appropriateness of making a disclosure, the CMA will be mindful of the need to protect confidential information from unlawful disclosure.
- 2.9 Further information about these statutory provisions of the EA02 and the DPA98, including the relevant considerations for the CMA before making a disclosure, is to be found in Annexe C and Chapter 8 respectively. Further information about the disclosure of information in the course of cases is available in Chapter 4. Further information about the disclosure of information to other public bodies (UK and overseas) is provided in Chapters 5 and 6 respectively.

⁴ As defined under sections 237 and 238 of the EA02.

3 TRANSPARENCY DURING THE COURSE OF A CASE

Preparatory work

- 3.1 Before formally opening a case, the CMA typically carries out some preparatory work. For example, it may assess market intelligence and analyse trends in aggregate complaints data. The CMA may also engage with the parties directly involved,⁵ for example through pre-notification discussions with merging parties in merger cases or informal preliminary inquiries in markets and CA98 cases. The CMA may also engage with other interested persons, for example through discussions with complainants or other businesses in the market concerned, when it would be helpful to the CMA's case. This enables the CMA to gather information which will inform its early thinking and, where relevant, the decision as to whether to formally open a case. It also enables the parties directly involved to understand at an early stage the potential competition or consumer concerns under consideration.
- 3.2 The CMA will not engage with parties directly involved or other interested persons before the formal case opening decision where doing so may prejudice the investigation, for example prior to unannounced site visits or witness interviews. This is particularly relevant, for example, in the case of suspected cartels, where the CMA is unlikely to contact the persons under investigation until after a formal investigation has been opened, unless they are already cooperating as leniency applicants or if the party directly involved is an informant.

Announcing a formal case opening decision

- 3.3 For the purposes of this Statement, cases are formally opened when:

⁵ For the purposes of this guidance, 'parties directly involved' does not include complainants. In CA98 investigations, the CMA may provide Formal Complainants with access to the same information as available to the parties directly involved at the outset of its formal investigation. Refer to the guidance on *Involving third parties in Competition Act investigations* (OFT451) and [Competition Act 1998: Guidance on the CMA's investigation procedures – to be consulted on in due course] for further guidance on the involvement of third parties in CA98 investigations, including guidance on when complainants may be given Formal Complainant status.

- in Phase 1 merger cases, the CMA confirms by notice to the merging parties that the merger notice is satisfactory⁶ or (where the CMA is not dealing with a merger notice) that it otherwise has sufficient information to enable it to begin its investigation⁷
- in Phase 2 merger cases, the CMA makes a merger reference⁸
- in relation to market studies, the CMA serves notice of the launch of a market study⁹
- in relation to market investigations, the CMA makes a market investigation reference¹⁰
- in relation to super complaints, the CMA receives the super complaint¹¹
- in CA98 investigations, the CMA decides that the legal test in the CA98¹² has been met (thus allowing the CMA to use its formal investigation powers) and that the case falls within its prioritisation principles
- in criminal cartel investigations, the CMA decides that there are reasonable grounds for suspecting that a criminal cartel offence has been committed¹³
- in consumer enforcement actions, the CMA decides to launch an investigation of a case which falls within the CMA's prioritisation principles,¹⁴ and
- In relation to the review of undertakings and orders,¹⁵ the CMA launches a review of the undertakings or orders.¹⁶

⁶ A merger notice must meet the requirements under section 96(2) of the EA02. Where the CMA is satisfied that these requirements are met it must give notice to that effect to the person who submitted the merger notice (section 92(2A) of the EA02).

⁷ Under section 34ZA(3) of the EA02.

⁸ Under section 22(1) or 33(1) of the EA02.

⁹ Under section 5 and 130A of the EA02.

¹⁰ Under section 131(1) of the EA02.

¹¹ The super-complaint must satisfy the criteria in section 11(1) of the EA02.

¹² Under section 25 of the CA98, the CMA may use its formal investigation powers where it has reasonable grounds for suspecting that competition law has been breached.

¹³ Under section 192(1) of the EA02.

¹⁴ Under the relevant consumer protection legislation.

- 3.4 In regulatory reference and appeal cases, and market investigations on reference from a concurrent regulator, the CMA's involvement in the case will be on a formal footing when the reference or appeal is made.
- 3.5 The CMA will, except as outlined in paragraph 3.6, inform the parties directly involved of the decision to formally open a case. This may be done during the course of otherwise regular contact between the case team and the parties directly involved, through what has hitherto been called a first day letter in Phase 2 merger inquiries and market investigations, or through a case initiation letter in CA98 investigations and civil consumer enforcement actions.
- 3.6 However, it may not be appropriate to inform the parties directly involved when doing so may prejudice an investigation. For example, in CA98 and criminal cartel investigations such information may prejudice the investigation by undermining the CMA's ability to conduct unannounced site visits or execute search warrants. In such cases, the parties directly involved will be informed of the formal case opening decision, and an announcement will be made, as soon as it is possible to do so without prejudicing the investigation. In relation to market studies, undertakings in the relevant sector will not always be informed individually of the CMA's decision before the case opening announcement is placed on the CMA website. Use of the website in such circumstances is an efficient means of communicating with the possibly large number of parties directly involved and may be the only means when not all such parties are identified by the CMA.
- 3.7 When the parties directly involved are informed of the formal case opening decision, the CMA will also provide them with the following information:
- a brief description of the case, the relevant legislation, the industry sector concerned and the CMA's reasons for starting a formal case. The level of information may vary according to the circumstances of the case. It may not be appropriate to name the parties directly involved at this early stage of a case

¹⁵ This does not apply to undertakings and orders under Part 8 of the EA02 or the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).

¹⁶ Sections 92(1) and (2)(b) and (c) and 162(2)(b) and (c) of the EA02.

- an indicative timetable showing the anticipated dates of key milestones,¹⁷ and
- the contact details for the main CMA contacts for the case including specifying the first point of contact for general queries and submission of information.

3.8 At this early stage or shortly afterwards, the CMA may be able to provide the parties directly involved with other information about the case, such as potential timescales for state of play meetings (for example, in Phase 1 merger cases and CA98 investigations) and the identity of the person or persons within the CMA who will be responsible for key decisions.¹⁸

3.9 In all cases other than criminal cartel and criminal consumer investigations,¹⁹ the CMA will place a case opening announcement on its website announcing its decision to formally begin a case except if to do so would prejudice the case or would otherwise be inappropriate. At the same time as or following the public announcement of a case opening, the CMA will also publish, if and as soon as reasonably practicable, the information referred to in paragraph 3.7.

3.10 The CMA will review from time to time the information provided and consider whether it is appropriate to update the information provided to the parties directly involved or the published information. For example, it will consider the need to do so in the light of changes to the indicative and any statutory timetable that may change as the case progresses.

Engagement with relevant parties and announcements during a case

3.11 An important aspect of ensuring that the CMA is transparent in its work is the way it engages with relevant parties over the course of a case. The timing and manner of engagement will vary depending on the type of work involved.²⁰ When considering the manner and timing of engagement, the CMA will have

¹⁷ At this stage in a case, there may be few key milestones – for example, in merger cases, the only milestone at this stage will be the statutory deadline for a Phase 1 review.

¹⁸ Further information regarding the decision making procedures across the CMA can be found in the guidance relating to mergers, markets, CA98 and consumer protection referred to in paragraph 1.4.

¹⁹ As noted in footnote 3, where there are parallel civil cartel investigations, the approach taken in civil cartel investigations will be informed by the approach taken in the criminal case.

²⁰ Refer to the CMA guidance relating to mergers, markets, CA98, and consumer protection referred to in paragraph 1.4 for further guidance.

regard to the need to ensure due process for both the parties directly involved and other interested persons. The CMA will also have regard to the need to conduct investigations effectively and efficiently, and the need to reach properly reasoned decisions.

3.12 The CMA must, in some cases, take certain steps to share its provisional thinking. For example:

- in CA98 investigations, if it proposes to make a decision, the CMA must issue a Statement of Objections (SO) to any party suspected of a breach of the CA98²¹
- in relation to its provisional decision as to whether or not to make a market investigation reference, the CMA must consult any persons on whose interest the decision is likely to have substantial impact and publish a notice of the proposal²²
- in mergers and markets cases the CMA must consult affected parties on undertakings in lieu,²³ proposed final orders and undertakings,²⁴ and publish its provisional findings and possible remedies in Phase 2 merger inquiries and market investigations,²⁵ and
- in civil consumer enforcement actions it must generally (but not always), before making an application for an enforcement order, engage in appropriate consultation with the party against whom the enforcement order would be made.²⁶

3.13 In all other circumstances, the CMA will take a flexible approach to sharing its developing thinking and/or evidence with parties directly involved and other interested persons, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of their case. It may share its developing thinking or evidence when doing so would be helpful

²¹ [Rule 4] of the [Competition and Markets Authority's Competition Act 1998 Rules – to be consulted on in due course].

²² Section 131A(2) of the EA02.

²³ Sections 73 and 155(1) of the EA02 (the CMA must publish a notice of the proposed undertakings in relation to market studies).

²⁴ Rule 16 of the Competition Commission Rules of Procedure (CC Rules).

²⁵ Rules 10 and 11 of the CC Rules.

²⁶ Section 214(1) of the EA02.

to the progression of the case at appropriate stages, to verify the information it has received or when it is otherwise appropriate to do so. For example, the CMA may provide to the parties directly involved and other interested persons the results of research or surveys relevant to a market study or investigation; or disclose parties' key submissions in Phase 2 merger inquiries and market investigations.²⁷ The CMA may also share its developing thinking more widely through publishing the fact and/or details of such thinking on its website. This includes an announcement on the issuing of an SO in CA98 investigations, on making an application for an enforcement order in civil consumer enforcement actions and on a decision to prosecute in a criminal cartel investigation.

- 3.14 The CMA will seek to ensure that the parties directly involved are aware of the decision making procedures which apply to their case, and the identity of the person or persons within the CMA who will be responsible for key decisions during the course of the case. Other interested persons are also able to contact the CMA to share their views. The CMA may also itself contact other parties to request information or seek their views on the case, where doing so would assist the CMA in exercising its functions.

Case closure announcements and decisions

- 3.15 Publication of case closure announcements and decisions is a means of enhancing the visibility of the CMA's completed work, and of widening its impact, as well as enabling interested persons to hold the CMA to account.

- 3.16 On completing a case in relation to which a formal case opening announcement has been made, the CMA will publish the outcome on its website and usually issue a press notice with a link to the relevant pages on the website. The potential outcomes that will be announced are:

- in Phase 1 merger cases, a clearance decision, a Found Not to Qualify Notice or the CMA deciding to make a merger reference or accept undertakings in lieu of a reference²⁸
- in Phase 2 mergers, a clearance, prohibition or cancellation decision²⁹

²⁷ Further detail on the CMA's approach to disclosure in such inquiries or investigations may be found in *Chairman's guidance on disclosure of information in merger and market inquiries* (CC7).

²⁸ Under sections 22(2), 33(2) and 73 of the EA02. Other publicity requirements relevant to merger cases are listed in section 107 of the EA02.

- in Phase 1 and Phase 2 markets cases, the CMA's findings³⁰
- in relation to super-complaints, a response stating what action, if any, it proposes to take in response³¹
- in CA98 investigations, where the CMA's investigation is resolved through closing an investigation on administrative priorities, issuing a decision that there are no grounds for action by the CMA, by accepting commitments from a business about their future conduct, or where the CMA issues a final decision that particular conduct amounts to an infringement of the CA98³²
- in criminal cartel investigations, the outcome of a prosecution or a decision to close an investigation³³
- in consumer enforcement actions, the outcome of a court action (with a link to the decision where possible), the successful negotiation of undertakings, a conclusion that there is insufficient evidence to continue an investigation, or a case closure decision on prioritisation grounds³⁴
- in reviews of undertakings and orders,³⁵ a decision to vary, release, revoke or continue to enforce an undertaking or order,³⁶ and
- in regulatory references and appeals, the final decision on the reference or appeal.³⁷

3.17 The level of detail published will reflect statutory requirements and depend on the nature of the outcome, while also having regard to the CMA's

²⁹ Section 37(1) of the EA02.

³⁰ Under sections 5 to 8 of the EA02 and sections 183(3) to (6) of the EA02. In Phase 1 cases, this includes a decision to make a market investigation reference under section 131(1) of the EA02.

³¹ Section 11 of the EA02.

³² Sections 31(2), 31A, 31B.

³³ Sections 188, 188A, 188B and 192(1) of the EA02.

³⁴ Sections 215(1), 219(2) and 220(2) and (3) of the EA02 and other relevant consumer protection legislation.

³⁵ This does not apply to undertakings and orders under Part 8 of the EA02 or the UTCCRs.

³⁶ Sections 82(2), 84(3)(b), 92(2), 159(4) and (5), 161(4)(b) and 162 of the EA02.

³⁷ Under relevant sectoral legislation. See Schedule 6 of the ERRA13 for more detail as to the amended form of the relevant provisions of sectoral regulation concerning regulatory appeals and references.

transparency aims. In cases where a detailed decision has been issued, the CMA will publish a non-confidential version of the decision on its website. If the CMA decides to close a case on the basis of prioritisation grounds, the CMA will explain why this is the case.

Notice of announcements

- 3.18 The CMA will in the majority of cases give the parties directly involved such advance notice as it considers fair and sufficient before making any public announcements, either during or at the end of the case. The CMA will aim to balance an open approach with the need to ensure the orderly announcement of full information.
- 3.19 It will in particular be mindful of the risk of leakage of information shared on a confidential basis with parties in advance of the CMA's public announcement. Such leakage may result in selective and/or misleading reporting in the press.
- 3.20 The points below are a general guide. It may be the case that the particular complexities of the issue the CMA is dealing with mean that it departs from its standard practice.

Market and non-market sensitive announcements

- 3.21 Where there are no market or other sensitivities about the fact or date of the announcement, the CMA will be open about the date and will generally inform media organisations of this before the date. The CMA will inform the parties directly involved in advance of informing the media. As a general rule, in non-market-sensitive announcements, the CMA aims to give the parties directly involved advance sight of the content of the CMA's announcement, in confidence, unless there is a compelling reason not to do so. However, the CMA will not, as a matter of course, discuss the text of press releases with parties in advance of issue.
- 3.22 When making a market-sensitive announcement, the CMA will, when appropriate, apply the FCA's 'Guidelines for the control and release of price sensitive information by Industry Regulators' (originally published by the FSA).
- 3.23 Where the CMA considers an announcement to be market-sensitive, it will:
- aim to make the announcement before relevant financial markets open and generally at 7am on the date of issue, except in Phase 1 mergers cases and in other exceptional circumstances (for example because of

information leaking to the media or where legal proceedings are concerned)

- when the announcement date is not already in the public domain, the CMA will advise those directly affected of the announcement the evening before issue once relevant financial markets have closed – this might be out of hours, in which event the CMA will have requested out of hours contact details in advance, and
- typically, including where there are multiple parties, the CMA will provide those directly involved with a confidential text of the press release and associated public documents at least one hour in advance of issue.

Dealing with the media when making an announcement

- 3.24 For non-market-sensitive announcements, the CMA may sometimes brief the media in advance of the making a public announcement under an agreed ‘embargo’. When this happens the parties and other relevant stakeholders such as trade bodies will be notified of the embargo. On occasion this may involve spokespeople giving interviews to both broadcast and print media in advance under an embargo.
- 3.25 When making a market-sensitive announcement, the CMA never discusses the content with the media beforehand. The CMA may confirm that an announcement will take place on a certain day, at a certain time, and in some cases the CMA will agree in advance to interview requests for broadcast media.
- 3.26 Where the CMA statement is not known about in advance by the media due to market sensitivity issues, and where giving broadcasting interviews is appropriate, it will be the CMA’s practice to have spokespeople available in the expectation of receiving interview requests shortly after an announcement.
- 3.27 Once a market-sensitive announcement has been made, the CMA will respond to media enquiries and, where appropriate, make spokespeople available for broadcast and print interviews.

4 OBTAINING AND USING INFORMATION³⁸

Requests for information

- 4.1 In respect of many of the CMA's functions the CMA has formal information gathering powers.³⁹ Such powers enable the CMA to request, for example, data, documents or forecasts, or require persons to attend as witnesses to give evidence. When it does not have, or does not use, formal powers, it relies upon the co-operation of parties and requests information on an informal, voluntary, basis. In practice, even where formal information gathering powers exist, the CMA will request information on an informal basis. In either case, the CMA's approach as set out below is similar.
- 4.2 The CMA will make evidence based decisions. Therefore the availability to it of evidence and accurate information is a key factor affecting the performance of the CMA, as is the ability to conduct cases in a timely manner. The CMA fully recognises that when making information requests, this will have an impact on others, whether they are businesses, consumers or organisations. While formulating information requests, the CMA will therefore strive to avoid imposing unnecessary burdens on such persons while considering also the need for the CMA to operate efficiently.
- 4.3 The CMA seeks to address these aims by:
- considering the information that is required for the CMA's purposes
 - preparing clear and focused information requests
 - addressing requests to those best placed to provide the information
 - discussing, where practicable and appropriate, the request with the intended recipient prior to sending a request, including discussion of the information held by the recipient and the form in which it is held

³⁸ This Chapter does not apply to criminal cartel investigations, criminal consumer investigations and regulatory references and appeals cases, as the procedures in such cases differ from those described in this Chapter.

³⁹ For example, formal powers are available in mergers and market cases, CA98 investigations, criminal cartel investigations, regulatory cases and in respect of various consumer enforcement cases. See the guidance relevant to the type of work involved for further details.

- considering the likely timescale in which the intended recipient will be able to provide the information, and
 - considering how soon the CMA requires the information, having regard to the administrative or statutory timetable of the case and the impact a delay in receiving the information may have on the CMA's efficiency or quality of the CMA's work.
- 4.4 These factors may be relevant to many of the CMA's information requests, whether at the outset of a case or while the case is ongoing. The extent of engagement prior to making an information request may vary. For example, at the outset of a Phase 2 merger inquiry or market investigation the CMA will generally discuss with key parties the information they hold and the form in which they hold it. This will help to influence the preparation of the information questionnaires that are typically used in the early stage of such inquiries or investigations.
- 4.5 Where it is practicable and appropriate, the CMA will also discuss a draft of its information requests with the intended recipients so as to enable requests to be prepared that reduce burdens to the recipients (for example, by helping to shape requests, having regard to how information is held by the relevant parties). However, this approach may not always be possible, for example when the case involves multiple parties, each holding the information differently. An example of when it may not provide any advance notice of a proposed information request is prior to exercising its formal investigation powers, when it is concerned that there is a risk that the information could be destroyed.
- 4.6 The CMA will seek to set a reasonable deadline for all information requests and where draft formal requests have been issued the final request will have considered any representations on the proposed deadline.
- 4.7 It is likely that during the course of a case the CMA will seek additional information. When doing so, the same factors identified in paragraphs 4.3 to 4.6 are again likely to be relevant.
- 4.8 Parties should make known any difficulties and discuss any queries raised by any information request including any difficulties in responding within the timeframe set out in a request by contacting the case team as soon as possible after receiving a request, or as soon as they become aware that they may not meet the stipulated deadline.

- 4.9 The CMA may impose administrative financial or other penalties for non-compliance with some of the CMA's formal information gathering powers in relation to CA98 investigations, and its mergers and markets cases. Any decision to impose a penalty for failure to comply with a formal request for information may take into account (but will not depend on) whether the CMA had sent a draft request and set a deadline for compliance which took into account comments from that party.⁴⁰
- 4.10 Prior to commissioning a survey as part of the information gathering process, the CMA will consult such of the parties directly involved as it considers appropriate on the draft survey design and content. The CMA may also require parties directly involved to provide information about their customers and suppliers.

Identifying confidential information

- 4.11 The CMA recognises that the confidentiality of parties' information is an important consideration for parties who participate in a CMA case.
- 4.12 The CMA may therefore require that in respect of all information supplied, parties should make known to the case team which information they consider to be confidential, and provide sufficient explanations for their claim, for example, the nature of the information, the harm that could be caused, the likelihood of harm and magnitude of that harm. The explanations provided will be taken into account when considering whether to disclose any of the information provided (see paragraph 4.19). The CMA's commitment to transparency means that confidentiality claims will be rigorously assessed and claims should be kept to the minimum extent necessary to protect confidentiality. The CMA will not accept blanket or unsubstantiated claims for confidentiality.
- 4.13 When providing key or substantial submissions, parties should also provide a second, non-confidential version. The CMA will permit a short interval for the provision of a non-confidential version, but the exact period permitted will differ between types of work and will take into account the possibility that a

⁴⁰ Detailed guidance on the CMA's approach to penalties and other sanctions is available in Administrative Penalties: Statement of policy on the CMA's approach [currently in draft and being consulted on].

delay in receiving confidentiality claims may adversely affect the CMA's statutory or administrative timetable.

4.14 Information may be viewed as 'confidential information' if it is:

- information whose disclosure the CMA thinks is contrary to the public interest
- commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, and
- information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual's interests.⁴¹

4.15 Whether in fact the CMA accepts that information is confidential will depend on the relevant circumstances. The following are examples of information that the CMA will usually consider unlikely to cause harm to the person or business to whom it relates:

- information that is already in the public domain or can readily be deduced from information in the public domain, and
- financial information or certain other data relating to a business which is more than two years old.

4.16 The following information will normally be considered to be confidential so that if the CMA is considering whether disclosure is appropriate, it will need to consider the manner of disclosure:

- financial information or certain other data relating to a business which is less than two years old
- information which, if disclosed, would be contrary to the public interest, for example information which may adversely affect the competitive process in the market

⁴¹ Section 244(2) and (3) EA02. [Rule 1] of the [Competition and Markets Authority's Competition Act 1998 Rules – to be consulted on in due course] also defines confidential information in the context of CA98 investigations.

- information relating to the strategy (past or future) of a business, and
- responses to surveys (in aggregate or individually) the disclosure of which could be harmful to a firm or individual or where the identity of the person providing the information should be protected.

Disclosure of information obtained by the CMA

4.17 The CMA may use any information that it obtains during a case for the purposes of facilitating the exercise of any of its statutory functions.

4.18 Part 9 of the EA02 imposes a general restriction on the disclosure of information which the CMA obtains during the exercise of any of its functions (referred to as ‘specified information’) to other persons. The restriction applies beyond the duration of the case. Only disclosure falling within one of the ‘information gateways’ is permitted. Even when a gateway applies, the CMA is required to have regard to certain considerations before making a disclosure. The information gateways and the statutory considerations are described in Annexe C. The remainder of this Chapter 4 provides an overview of the CMA’s approach to disclosure to parties directly involved and others in connection with the conduct of the CMA’s case. For further information about disclosure by the CMA to other public authorities (UK or otherwise), see Chapters 6 and 7.

4.19 The CMA is not obliged to obtain the consent of the party to whom the information relates, if the CMA decides that disclosure is necessary for the purpose for which the CMA is permitted to make the disclosure. However, the CMA will consider a party’s representations regarding the confidential nature of any information they have provided.

4.20 If the CMA disagrees with a request or claim for confidentiality, or considers that it is necessary for the purpose of exercising its functions to disclose the information to other parties, the CMA will generally seek to inform the party claiming confidentiality or the party to whom the information relates of its intention to make a disclosure. Other than in CA98 investigations,⁴² the CMA may choose not to do so if it considers that the party has had sufficient opportunity to submit confidentiality claims, or if the CMA has sought to

⁴² In CA98 investigations, [Rule 6] of the [Competition and Markets Authority’s Competition Act 1998 Rules – to be consulted on in due course] requires the CMA to inform the party of an intention to make a disclosure of confidential information.

protect the information to be disclosed (for example, by anonymising or aggregating data).

- 4.21 When the CMA considers it appropriate to disclose information it will consider how best to protect confidential information. For example, the CMA may redact, anonymise or aggregate confidential information, for example by providing ranges in relation to market share data.⁴³
- 4.22 In certain circumstances, the CMA may consider it appropriate to use confidentiality rings and data rooms in respect of the disclosure of confidential information. However, having regard to the nature of the information, their use will be restricted to when it is necessary to make the disclosure for the purpose of facilitating the CMA's functions.
- 4.23 Confidentiality rings enable disclosure of specific quantitative and/or qualitative data or documents⁴⁴ to a defined group (to be determined on a case-by-case basis but, generally, the relevant parties' legal and/or economic advisers) in order to ensure due process. In CA98 investigations, the CMA may also use confidentiality rings at access to file stage to handle the disclosure of confidential information, to a defined group of persons, where there appear to be identifiable benefits in doing so.⁴⁵
- 4.24 Data rooms enable access to a specific category of confidential data or documents to a defined group (as for confidentiality rings) where the CMA consider that, for reasons of due process, disclosure is required, but due to the nature of the information, additional safeguards are appropriate. A data room provides access on the CMA premises, and in so doing has the advantage of providing additional protection.
- 4.25 Data rooms may be considered in two situations in particular:

⁴³ Particular procedures apply to the disclosure of information provided by would-be leniency applicants (see *Applications for leniency and no-action in cartel cases* (OFT1495)). For further guidance on disclosure in Phase 2 merger inquiries and market investigations, see *Chairman's guidance on disclosure of information in merger and market inquiries* (CC7).

⁴⁴ Subject to any restrictions in the DPA98 in relation to personal information.

⁴⁵ See [Competition Act 1998: Guidance on the CMA's investigation procedures – to be consulted on in due course] for further guidance on this procedure.

- to allow parties' economic advisers to carry out their own analysis of the underlying data to confirm or challenge the CMA's findings or conclusions, and
 - in exceptional circumstances, to allow parties' legal advisers to carry out an assessment of a specific set of qualitative documents.
- 4.26 In the case of both confidentiality rings and data rooms, a limited number of advisers are permitted access on behalf of each party. 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 sign data room rules, for example preventing persons entering the data room with electronic equipment, and will reserve the right to review the reports and/or notes prepared by them to ensure they do not contain any confidential information.
- 4.27 Requests for the use of confidentiality rings and data rooms will be considered on a case-by-case basis. The CMA has discretion as to whether to agree to such requests, and is likely to do so only where it is proportionate, there are clear benefits in doing so, and potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned. The CMA will also take into account whether it is appropriate to provide access at the time the request is made, having regard to the progress of the case, the resource implications of operating confidentiality rings and data rooms, and of risks of human error and information leaks.
- 4.28 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). It is for advisers to satisfy themselves of the steps they are required to take under any relevant professional conduct rules to ensure that they are able to operate on this basis.

5 COMPLAINTS AND ACCOUNTABILITY

Disputes regarding the conduct of a case

- 5.1 Parties should raise any complaints about the conduct of an ongoing CMA case with the most senior CMA contact responsible for that case, who will review the case team's actions and aim to either put things right, or give an explanation for the course of action taken by the case team.
- 5.2 If a party is not satisfied with the senior CMA contact's response, they may request a review of the handling of their complaint by:
- the Procedural Officer (PO), where the complaint concerns certain procedural disputes in CA98 investigations,⁴⁶ and disputes relating to requests for confidentiality in merger cases⁴⁷ and market studies and investigations, or
 - the General Counsel's Office (GCO) in relation to any disputes falling outside the PO's remit.
- 5.3 This does not alter the procedures in place for submitting general complaints about the CMA or about closed cases, which should be addressed in the first instance to the CMA Enquiries Unit, who will then escalate as and when appropriate.
- 5.4 The CMA's decisions in merger cases, market studies and market investigations are subject to appeal to the Competition Appeal Tribunal (Tribunal), which will apply the same principles as would be applied by a court on an application for judicial review in dealing with the review. The CMA's decisions in CA98 investigations are subject to a full merits review by the Tribunal. In addition, parties with sufficient interest have the right to seek judicial review of administrative decisions.

⁴⁶ Further information on the role of the Procedural Officer can be found in [Competition Act 1998: Guidance on the CMA's investigation procedures – to be consulted on in due course].

⁴⁷ In Phase 1 merger cases, the procedure will only apply to disputes regarding the confidentiality of information that the CMA proposes including in published decisions.

Accountability

- 5.5 The CMA is accountable to the public through Parliamentary scrutiny in Westminster and the devolved administrations, for example through inquiries by select committees.
- 5.6 A member of the public may complain to the Parliamentary and Health Service Ombudsman (Ombudsman)⁴⁸ via a Member of Parliament about the CMA's administrative actions, after seeking to resolve the complaint with the CMA. The CMA will have regard to the Ombudsman's Principles of Good Administration, which are:
- getting it right
 - being customer-focused
 - being open and accountable
 - acting fairly and proportionately
 - putting things right, and
 - seeking continuous improvement.

Publications

- 5.7 Each financial year, the CMA will produce an Annual Plan, setting out its objectives for the year, which is laid before Parliament. The CMA is accountable to Parliament for the delivery of these objectives via the presentation of its Performance Report.
- 5.8 The CMA will aim to provide consistent information in its Performance Report⁴⁹ for all closed consumer and competition enforcement cases, mergers casework, markets casework, reviews of undertakings and orders and regulatory appeals. This information will include:
- the date the case was opened

⁴⁸ Further information available on the Ombudsman's website at <http://www.ombudsman.org.uk/>.

⁴⁹ The CMA is required, under paragraph 14 of Schedule 4 of the ERR13, to provide certain information in an annual performance report.

- a summary of the findings and/or recommendations, and
 - the date the case was closed and the time taken to complete it.
- 5.9 The CMA will also provide information in its Performance Report on its ongoing work that is in the public domain.
- 5.10 The CMA will publish a Business Plan for each spending review period, setting out its vision, high-level priorities and planned expenditure over the spending review period. Information regarding the Business Plan will be available on the CMA website.
- 5.11 The CMA is required to prepare resource accounts for each financial year, which are audited by the National Audit Office.

6 DISCLOSURE TO UK PUBLIC AUTHORITIES

Disclosure of specified information to other public authorities to facilitate the exercise of the CMA's statutory functions

- 6.1 The CMA may disclose specified information⁵⁰ under Part 9 of the EA02 to other public authorities for the purpose of facilitating the exercise of the CMA's functions.⁵¹ For example, other public authorities (such as other governmental departments and sectoral regulators with specific expertise) may be consulted so that the CMA can take account of their views on the issues under consideration in a case. The receiving authority may not further disclose that information without the agreement of the CMA,⁵² and it may only use the information for the purpose for which the CMA disclosed it.⁵³
- 6.2 To facilitate the exercise of its functions, the CMA is required to put into place information sharing arrangements⁵⁴ with, and is required or permitted to disclose information to, the concurrent regulators in connection with CA98 cases relevant to their regulated sectors in order to facilitate the exercise of their functions.⁵⁵
- 6.3 Where the CMA discloses information for the purposes of exercising its functions, it will not generally give the persons to whom that information relates notice of the disclosure.

Disclosure of specified information to facilitate the exercise of another authority's functions

- 6.4 The CMA may disclose specified information to other UK public authorities, either on its own initiative or following a request from another authority, to assist such other authorities in carrying out their statutory functions under the EA02, specified enactments or specified subordinate legislation.⁵⁶ The

⁵⁰ Within the meaning of sections 237 and 238 of the EA02.

⁵¹ Section 241(1) of the EA02.

⁵² Section 241(2) of the EA02.

⁵³ Section 241(2A) of the EA02.

⁵⁴ Regulation 4(1) of the Competition Act 1998 (Concurrency) Regulations 2004.

⁵⁵ Further information on cooperation and coordination with the concurrent regulators can be found in [Regulated Industries: Guidance on concurrent application of competition law to regulated industries – to be consulted on in due course].

⁵⁶ Section 241(3) of the EA02.

receiving authority may not use the disclosed information for any purpose other than a purpose relating to its statutory functions.⁵⁷

- 6.5 The CMA may also disclose specified information to other UK public authorities under sections 241(A) and 242 of the EA02, details of which are set out in Annexe C.
- 6.6 In order to verify that there is an available gateway (as described in paragraphs 6.4 and 6.5), the CMA will assess the function or purpose for which the information is required and the scope of the information requested. In assessing whether the disclosure is 'necessary for the purpose'⁵⁸ the CMA will consider whether the information is or is very likely to become relevant to the receiving authority's investigation or other statutory function.
- 6.7 Before disclosing any specified information, the CMA will have regard to the three statutory considerations set out in section 244 of the EA02 (see Annexe C for further detail).
- 6.8 With the exception of information obtained from a leniency applicant,⁵⁹ the CMA may disclose information to UK public authorities without the consent of the person or persons to whom the information relates in order to facilitate the exercise by the receiving authority of its functions. While the CMA may decide to give the person or persons notice of an impending disclosure, it may not be appropriate to give such notice on some occasions, for example where notice would hamper the requesting authority's investigation, the information is required as a matter of urgency, or advance notice would be impracticable due to the number of persons involved. If the CMA is minded to go ahead with a proposed disclosure after receiving objections, it will seek to notify an objecting party before making the disclosure.

⁵⁷ Section 241(4) of the EA02.

⁵⁸ Section 244(4) of the EA02.

⁵⁹ The CMA will always discuss with the applicant or its legal adviser first before disclosing information from a leniency applicant to another public authority. However, the CMA could refer cases of potential serious or complex fraud, in the form of cartel behaviour, to the SFO and the expectation should be that such referrals will be on the basis of full disclosure of all materials in the CMA's possession that relates to cartels. See *Applications for leniency and no-action in cartel cases* (OFT1495) for further guidance.

7 COOPERATION WITH OVERSEAS PUBLIC AUTHORITIES

- 7.1 The CMA works with its international counterparts to promote convergence and a consistent approach to tackling anti-competitive practices, assessing multi-jurisdictional mergers and protecting consumers' interests. It may share information about its experiences and cases to assist in identifying issues of common interest and coordinating efforts, as well as comparing results and findings.
- 7.2 The CMA is a member of various international organisations, such as the Organisation for Economic Cooperation and Development, International Competition Network (ICN), European Competition Network and the EU Consumer Protection and Co-ordination Network, and is also a party to a number of bilateral agreements entered into on an ad hoc basis with other agencies.
- 7.3 While the CMA may freely share general information about its work and experiences with overseas public authorities⁶⁰ or through international fora, the disclosure of specified information is only permissible if an information gateway is available under Part 9 of the EA02. The information gateway permitting disclosure of specified information for the purposes of facilitating the exercise by the CMA of its own statutory functions applies in relation to disclosures to overseas public authorities, as it does to UK public authorities.⁶¹

Disclosure of specified information under an EU obligation

- 7.4 The CMA may disclose information to another person if the disclosure is required for the purpose of an EU obligation.⁶²
- 7.5 The CMA is obliged, under certain EU obligations, to disclose certain information it receives in the course of exercising its statutory functions to the Commission and/or other European competition authorities. The CMA will still nevertheless need to have regard to the three considerations in section 244 of the EA02 in deciding whether to disclose the specified information.

⁶⁰ Meaning a person or body outside the UK which appears to the CMA to exercise functions of a public nature in the enforcement of consumer or competition legislation (sections 243(11) and (12) of the EA02).

⁶¹ Section 241(1) of the EA02.

⁶² Section 240 of the EA02.

7.6 The EU obligations relevant to the CMA include Articles 11 and 12 of Regulation 1/2003⁶³ and paragraphs 2.2.3 and 2.3.3 of the Commission Notice on cooperation within the network of competition authorities,⁶⁴ which provide for the disclosure of information for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union, Articles 4, 9, 21 or 22 of the EU Merger Regulation,⁶⁵ and the Regulation on Consumer Protection Cooperation.⁶⁶

Disclosure of specified information to overseas public authorities other than on the basis of an EU obligation

7.7 The CMA may also disclose specified information to overseas public authorities⁶⁷ in order to facilitate:

- the investigation and bringing of criminal proceedings⁶⁸
- the investigation and bringing of civil proceedings in connection with the enforcement of specified legislation,⁶⁹ or
- a decision as to whether to start or bring to an end such investigations or proceedings.⁷⁰

Disclosure to overseas authorities for these purposes is not permitted where the information is obtained by the CMA in connection with the CMA's mergers and markets functions under the EA02,⁷¹ and under other specified legislation.⁷²

7.8 Information disclosed to an overseas public authority may be disclosed subject to the condition that it must not be further disclosed without the

⁶³ Council Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁶⁴ Commission Notice 2004/C101/03.

⁶⁵ Council Regulation (EC) No 137/2004 on the control of concentrations between undertakings.

⁶⁶ Regulation (EC) No 2006/ 2004.

⁶⁷ Authorities outside the UK which appear to the CMA to exercise functions of a public nature in relation to any of the matters listed in paragraph 7.7 (section 242(11) of the EA02).

⁶⁸ Section 243(2)(c) and (d) of the EA02.

⁶⁹ Sections 243(2)(a) and (b) and 243(12) of the EA02.

⁷⁰ Section 243(2)(e) of the EA02.

⁷¹ Section 243(3)(d) of the EA02.

⁷² Section 243(a), (b), (c) and (d) of the EA02.

agreement of the CMA.⁷³ The disclosed information may not be used by the overseas public authority for any purpose other than that for which it was first disclosed.⁷⁴

- 7.9 The Secretary of State has the power to prevent a disclosure to an overseas authority which the CMA would be permitted to make under Part 9 of the EA02 where he or she thinks it would be more appropriate for any investigation or proceedings to be carried out in the UK or another country.⁷⁵
- 7.10 In deciding whether to disclose information to an overseas public authority for the purposes listed in paragraph 7.7, the CMA will have regard to a number of other factors, including:
- whether the matter in respect of which disclosure is sought is sufficiently serious to justify making the disclosure
 - whether the law of the overseas country to whose authority disclosure would be made provides appropriate protection against self-incrimination in criminal proceedings
 - whether the law of that country provides appropriate protection for the storage and disclosure of personal data, and
 - whether any mutual assistance arrangements apply.⁷⁶
- 7.11 Whether or not an information gateway is available that would enable it to disclose specified information to overseas public authorities, the CMA may also seek the necessary consents to the disclosure of information to an overseas authority. Consent is generally sought in the form of a waiver, permitting the CMA to disclose information to another (named) authority.⁷⁷ The decision regarding whether to grant such consent is entirely at the discretion of the party whose consent is sought.

⁷³ Section 243(10)(a) of the EA02.

⁷⁴ Section 243(10)(b) of the EA02.

⁷⁵ Section 243(4) of the EA02.

⁷⁶ Section 243(6) of the EA02.

⁷⁷ The CMA will consider the format of a waiver on a case-by-case basis, as the content will differ based on the circumstances of the case. For reference, the ICN model waiver form in relation to merger cases, and the model waiver forms used by a number of other competition agencies, can be viewed here: www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf.

8 FREEDOM OF INFORMATION AND DATA PROTECTION

FOIA

- 8.1 The FOIA was introduced to improve the transparency and accountability of public bodies and gives anyone a general right of access to information held by the CMA.
- 8.2 When a person makes a request for recorded information, the FOIA requires the CMA to (i) inform the requester whether or not it holds the requested information; and (ii) if it does, it must disclose the information to the requester unless there is an applicable exemption. A request for information will be dealt with within 20 working days.⁷⁸
- 8.3 There are a number of exemptions from disclosure under the FOIA of particular relevance to a request for information held by the CMA, including where disclosure would be prohibited under any statutory enactment, including the EA02.⁷⁹ Part 9 of the EA02 therefore continues to apply.
- 8.4 The CMA might also seek to rely on the law enforcement qualified exemption at section 31(1)(g) of the FOIA to withhold information if it considered its disclosure would, or would be likely to, prejudice the exercise by the CMA of its statutory functions for the purposes set out at section 31(2) of the FOIA. Section 31 of the FOIA is a qualified exemption requiring additionally the carrying out of a public interest test to determine whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.
- 8.5 Requests for information under the FOIA should be submitted to the Information Access Team. Any person not satisfied with the CMA's refusal to provide information in response to an FOIA request has the right to an internal review of the CMA's decision, and a further right to complain to the Information Commissioner's Office (ICO) if that person is not satisfied with the internal review decision.

⁷⁸ This deadline may be extended if the CMA reasonably requests further information or is considering the public interest test (sections 10(2) and (3) of the FOIA).

⁷⁹ Section 44(1)(a) of the FOIA provides for an absolute exemption in this regard.

8.6 The CMA is required to have a publication scheme, approved by the ICO, and to publish information covered by the scheme. More information about the FOIA generally is available on the ICO website.⁸⁰

DPA98

8.7 The DPA98 sets out rules for processing personal data relating to living individuals (the data protection principles). The principles include the need for those who process personal data (that is, do anything at all with it, such as collecting, recording, using or transferring it) to be open with those whose data they process about how that personal data is used.

8.8 The CMA is bound by the provisions of the DPA98 where it is processing personal data. No personal data will be disclosed by the CMA unless that disclosure is compliant with the DPA98.

8.9 Particular issues arise in respect of the handling and disclosure of underlying data from surveys conducted by the CMA, or by other parties. Both the DPA98, as mentioned, and the Code of Conduct of the Market Research Society apply to personal data, and the latter requires the anonymity of respondents to be preserved unless they have given informed consent. If the CMA considers it necessary to disclose any of the underlying data, it must ensure that the identities of the persons who participated in the survey are protected. The CMA will consider what protection may be necessary to ensure that the identity of survey respondents is not revealed. Anonymisation is not always sufficient to prevent someone being identifiable.

8.10 Any person may ask the CMA whether it is processing any personal data about them and if so, to be provided with a copy of it. If not satisfied with the CMA's response, that person may complain to the ICO.

⁸⁰ www.ico.org.uk.

ANNEXE A – KEY CHANGES TO EXISTING GUIDANCE

The following table lists those sections of the *Chairman’s guidance on disclosure of Information in merger and market inquiries* (CC7) that are significantly amended or superseded by the changes that are outlined in this Statement.

EXISTING GUIDANCE REFERENCE	AMENDMENT
Chairman's guidance on disclosure of information in merger and market inquiries (CC7)	
Paragraph 9.9	Groups are reminded of the opportunity provided to parties to make further representations to the Chief Executive of the CC <u>Procedural Officer</u> if they wish to dispute the proposal of a Group to disclose information. This is additional to the opportunity for parties to make known their concerns to the Group. Groups are required to have regard to the views of the Chief Executive <u>Procedural Officer</u> if the party has made representations to him. The decision to disclose will, however, remain that of the Group.

ANNEXE B – STATUS OF OFT AND CC GUIDANCE DOCUMENTS

The table below indicates the status of OFT and CC guidance documents related to transparency and disclosure that had been published and were in effect prior to the transfer of their functions to the CMA on 1 April 2014. The *Chairman’s guidance on disclosure of Information in merger and market inquiries* (CC7) has been adopted by the CMA Board in order to facilitate the exercise by the CMA of its functions.

OFT/CC CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/ obsolete ⁸¹	Adopted by the CMA Board ⁸²
OFT1234	Transparency – a statement of the OFT’s approach	✓	-
CC7	Chairman’s Guidance on disclosure of information in merger and market inquiries	-	✓
CC12	Disclosure of information by the Competition Commission to other public authorities	✓	-
CC6	Competition Commission: guidance to merger reference groups, market reference groups and special reference groups	✓	-
OFT518	Overview of the Enterprise Act	✓	-

B.1 Parties should refer to the *Chairman’s guidance on disclosure of Information in merger and market inquiries* (CC7) (the adopted guidance) for further guidance on the CMA’s approach to transparency and disclosure, subject in particular to the following general limitations:

- in the case of conflict between this Statement and the adopted guidance, the adopted guidance prevails

⁸¹ OFT and CC publications listed in this column have, at the date of publication of this Statement, been replaced, or rendered obsolete, by CMA guidance or publications.

⁸² OFT and CC publications listed in this column have been adopted by the CMA Board (subject to any guidance or publications prepared by the CMA in the future).

- the original text of the adopted guidance has been retained unamended, except as indicated in Annexe A: as such, that text does not reflect or take account of developments in case law, legislation or practice, since its original publication, and
- the adopted guidance should be read subject to the following cross-cutting amendments:
 - references to the ‘OFT’ and ‘CC’ (except where referring to specific past OFT or CC practice or case law), should be read as referring to the CMA
 - certain OFT or CC departments, teams or individual roles may not be replicated in the CMA, or may be 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.

ANNEXE C – LEGAL FRAMEWORK REGARDING DISCLOSURE

C.1 This Annexe summarises the restrictions on disclosure of specified information in Part 9 of the EA02, which apply to information obtained by the CMA in exercising any of its functions (except functions relating to regulatory references and appeals). In CA98 cases, the CMA must also follow the procedural rules laid down in [the Competition and Markets Authority’s Competition Act 1998 Rules – to be consulted on in due course] in respect of specific procedures that apply to CA98 investigations. The FOIA and DPA also apply to the disclosure of information obtained by the CMA in the exercise of any of its functions (see Chapter 8 for further detail).

EA02

C.2 Part 9 of the EA02 imposes a general restriction on the disclosure of such ‘specified information’ which the CMA obtains during the exercise of its functions (except functions relating to regulatory references and appeals), which may not be disclosed during the lifetime of the individual or during the existence of the undertaking unless that disclosure is within one of the permitted gateways and the requirements of section 244 of the EA02 have been met, or the information has previously (and lawfully) been made public.⁸³ Part 9 of the EA02 does not authorise a disclosure of information which contravenes the DPA98,⁸⁴ and does not affect any power or duty to disclose information which exists outside of Part 9 of the EA02.⁸⁵

C.3 The CMA may disclose specified information if:

- a. The CMA obtains the required consents⁸⁶
- b. the disclosure is required for the purpose of a Community obligation⁸⁷
- c. the disclosure is made for the purpose of facilitating the exercise by the CMA of any statutory function⁸⁸

⁸³ Section 237(1) – (3) of the EA02.

⁸⁴ Section 237(4) of the EA02.

⁸⁵ Section 237(6) of the EA02.

⁸⁶ Section 239 of the EA02.

⁸⁷ Section 240 of the EA02.

⁸⁸ Section 241(1) of the EA02.

- d. The information is disclosed to another person in the UK or an overseas public authority for the purpose of facilitating the exercise by that authority of specified statutory functions⁸⁹ or
- e. The information is disclosed (after the CMA satisfies itself that the disclosure is proportionate to what is sought to be achieved by it):⁹⁰
 - i. In connection with the investigation of any criminal offence in any part of the UK
 - ii. for the purposes of any criminal proceedings there or
 - iii. for the purpose of any decision whether to start or bring to an end such an investigation or proceedings.

C.4 The CMA may also disclose specified information which has been ordered by the Secretary of State to be ‘prescribed’⁹¹ information to any person for the purposes of:

- a. actual or prospective prescribed civil proceedings in the UK or elsewhere
- b. obtaining legal advice in relation to such proceedings or
- c. establishing, enforcing or defending legal rights that are or may be the subject of such proceedings.⁹²

Specified information may not be disclosed for these purposes if it came to the CMA in connection with a merger, market or CA98 case.⁹³

C.5 The circumstances listed in paragraphs C.3 and C.4 are often referred to as ‘information gateways’. If any of these information gateways (or any other

⁸⁹ Section 241(3) and 243 of the EA02. Refer to Chapters 6 and 7 for further detail on the application of Part 9 of the EA02 to disclosures to UK and overseas public authorities.

⁹⁰ Section 242 of the EA02.

⁹¹ ‘Prescribed’ means prescribed by order of the Secretary of State. To date, the Secretary of State has issued one order prescribing certain information and proceedings for the purposes of this section (the Enterprise Act 2002 (Disclosure of Information in Civil Proceedings etc) Order 2007, SI 2007/2193).

⁹² Section 241A(1) of the EA02.

⁹³ Section 241A(2) of the EA02.

legal basis for disclosure) apply and before disclosing any specified information, the CMA must have regard to three considerations:⁹⁴

- a. The need to exclude from disclosure (so far as practicable) any information whose disclosure the CMA thinks is contrary to the public interest
- b. the need to exclude from disclosure (so far as practicable):
 - i. Commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates or
 - ii. information relating to the private affairs of an individual whose disclosure the CC thinks might significantly harm the individual's interests, and
- c. the extent to which the disclosure of the information in paragraph C.5(a) and (b) is necessary for the purpose for which the CMA is permitted to make a disclosure.

Restrictions on further disclosure

C.6 Where the CMA discloses information to another person for the purpose of facilitating the exercise of its statutory functions, and the information is not made available to the public, it must not be further disclosed by the recipient without the consent of the CMA,⁹⁵ and may only be used for the purpose for which it was disclosed.⁹⁶

C.7 It is a criminal offence to disclose information in circumstances where such disclosure is not permitted under Part 9 of the EA02, where it contravenes a direction not to do so, or where the information is disclosed for a purpose not permitted under the Part 9 of the EA02.⁹⁷

⁹⁴ Section 244 of the EA02.

⁹⁵ Section 241(2) of the EA02.

⁹⁶ Sections 241(2)(A) of the EA02.

⁹⁷ Section 245 of the EA02.

CMA Rules and other statutory considerations

C.8 Where the CMA proposes to disclose confidential information in a CA98 case, the CMA must follow the procedures laid down in the CMA's Rules.⁹⁸ The EA02 also contains specific provisions regarding excisions by the Secretary of State from reports concerning public interest considerations in mergers and markets cases.⁹⁹

⁹⁸ See the [Competition and Markets Authority's Competition Act 1998 Rules – to be consulted on in due course] and [Competition Act 1998: Guidance on the CMA's investigation procedures – to be consulted on in due course] for further information.

⁹⁹ Sections 118 and 177 of the EA02.