

# Guidance on the CMA's approach to Short-form Opinions

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

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# 1 Introduction

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the CMA as the UK's competition and consumer authority. The CMA has taken on the functions of the Competition Commission (CC) and the competition as well as many of the consumer functions of the Office of Fair Trading (OFT). The CMA gained its full functions and powers on 1 April 2014, when the OFT and CC were abolished.
- 1.2 In 2010, the OFT introduced a Short-form Opinion (SfO) process on a trial basis to provide guidance, within a prompt timetable, to businesses and their advisers on the application of competition law to prospective agreements between competitors raising novel or unresolved questions, the clarification of which would benefit a wider audience.<sup>1</sup> The OFT's trial SfO process was only available for a limited number of cases per year in order to maintain the principle that businesses should self-assess the compliance of their agreements with competition law, rather than notify them for clearance or exemption by competition authorities.
- 1.3 Having considered the policy and procedures of the SfO process, the CMA believes that it constitutes a valuable tool to assist businesses in complying with competition law. Furthermore, in combination with the CMA's other powers and procedures, the SfO process may also assist in the development of competition policy and practice in the UK.
- 1.4 The CMA has therefore decided to adopt the OFT's SfO process on a trial basis as well as extending the scope of the SfO process to cover not only prospective horizontal agreements between competitors but also prospective vertical agreements between parties operating at different levels of the supply chain for the purposes of the agreement. The CMA's SfO trial process will continue to be available for only a limited number of cases per year. When determining whether to issue a SfO, the CMA will have regard to its prioritisation principles,<sup>2</sup> as well as the criteria detailed in section 4 of this guidance. As also detailed in this guidance, as part of its trial process, the

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<sup>1</sup> On 1 May 2004, EC Regulation 1/2003 (the Modernisation Regulation) came into force requiring national competition authorities and national courts of the European Union Member States to apply Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) when national competition law is applied to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States or to abuse prohibited by Article 102. Furthermore, as a result of the Modernisation Regulation and consequent changes to the Act, businesses now self-assess whether an agreement or any behaviour is compatible with Article 101 and Article 102 of the TFEU and Chapter I and Chapter II of the Competition Act 1998 rather than notify the agreement or behaviour for clearance or exemption by the relevant competition authority.

<sup>2</sup> *Prioritisation principles for the CMA* (CMA16), available at: [www.gov.uk/cma](http://www.gov.uk/cma).

CMA envisages engaging with sectoral regulators as appropriate where an application for a SfO relates to a regulated sector.<sup>3</sup>

- 1.5 The CMA has not proposed an end date for the SfO trial. However, the CMA will review the trial as appropriate. Any such review will determine whether the SfO process achieves its objectives and is an efficient use of the CMA's resources, and whether or not the SfO process should be continued as a trial, adopted permanently, withdrawn, or amended.
- 1.6 This guidance document sets out general information on the procedure that the CMA expects to follow during the trial when exercising its discretion to provide a SfO in relation to the potential compatibility of certain agreements with the Chapter I prohibition of the Competition Act 1998 (CA98) and/or Article 101 of the TFEU. It is primarily aimed at the business and legal communities and Government policy advisers, as well as other interested parties.
- 1.7 The CMA will apply this guidance flexibly. This means that the CMA will have regard to this guidance when it engages with parties in relation to requests for SfOs, but that, when the facts of an individual request reasonably justify it, the CMA may adopt a different approach.
- 1.8 This guidance supersedes the previous guidance of the Office of Fair Trading (OFT) regarding SfOs entitled *Short-form Opinions – the OFT's Approach*.
- 1.9 This guidance is concerned exclusively with the CMA's approach to SfOs. It does not cover the CMA's approach to other types of Opinion. Further information in relation to the CMA's approach to Opinions other than SfOs may be found on the CMA's website and in the *CMA Competition Law Modernisation* guideline (OFT442).<sup>4</sup>
- 1.10 This guidance will take effect from the date it is published and the approach to SfOs outlined in this guidance will apply to all new SfO requests from that date. It may be revised from time to time to reflect changes in best practice or the law and the CMA's developing experience in relation to the SfO process. Please refer to the CMA's webpages to ensure you have the latest version of this guidance.
- 1.11 This document is not a definitive statement of, or a substitute for, the law itself and the legal tests applied by the CMA when assessing potential breaches of competition law are not addressed in this guidance. A range of publications on

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<sup>3</sup> The regulated sectors being, as at 1 April 2014, communications and postal services, gas, electricity, healthcare services, railways, air traffic and airport operation services, water and sewerage.

<sup>4</sup> Available at: [www.gov.uk/cma](http://www.gov.uk/cma).

how the CMA carries out this substantive assessment is available on the CMA's webpages.<sup>5</sup>

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<sup>5</sup> [www.gov.uk/cma](http://www.gov.uk/cma).

## 2 The legal framework

- 2.1 The legal framework that applies to the investigation and enforcement of suspected breaches of competition law is described below.
- 2.2 The TFEU and the CA98 both prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.
- 2.3 In the UK, competition law is applied and enforced principally by the CMA.<sup>6</sup> The CA98 gives the CMA powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions in the CA98 and Articles 101 and 102 of the TFEU.<sup>7</sup>
- 2.4 Under EU legislation,<sup>8</sup> as a 'designated national competition authority', when the CMA applies national competition law to agreements which may affect trade between Member States or to abuse prohibited by Article 102, the CMA is also required to apply Articles 101 and 102 of the TFEU.
- 2.5 The CMA may also provide an Opinion on whether any agreement and/or conduct may prevent, restrict or distort competition. Further information on the CMA's approach to Opinions (other than under the Sfo trial), in addition to the framework for applying Articles 101 and 102 and the interaction with the Chapter I and Chapter II prohibitions in the CA98, is available in the CMA guideline *Competition Law Modernisation (OFT442)*.<sup>9</sup>

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<sup>6</sup> However, it is open to any person to bring a standalone action in the High Court for an injunction and/or damages as a result of an alleged infringement of competition law. In relation to the regulated sectors, the respective sectoral regulators have concurrent powers with the CMA to apply and enforce the legal provisions.

<sup>7</sup> See Chapter III (Investigation and Enforcement) of the CA98.

<sup>8</sup> Article 3 of the Modernisation Regulation, as amended.

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

### 3 The purpose of the SfO process

- 3.1 The SfO process is designed to be short and flexible, resulting in a published SfO within an envisaged timeframe of two to three months following receipt of a formal request.
- 3.2 Under the SfO process, the CMA provides guidance in response to specific questions asked by the requesting parties in order to facilitate their self-assessment of the compatibility of the proposed agreement with the relevant provisions of the Chapter I prohibition in the CA98 and/or Article 101 of the TFEU. A SfO will not reach any definitive conclusions on the application of the Chapter I prohibition in the CA98 and/or Article 101.
- 3.3 Any SfO issued by the CMA will be issued in response to a reasoned request made by the relevant parties. The request must consist of a joint statement of facts submitted by the parties, which provides details of the prospective agreement, their assessment of how the criteria for the issue of a SfO are met and the novel and unresolved questions on which guidance is sought. The process of submitting a request for a SfO is set out in more detail in section 5 below.
- 3.4 A SfO is a non-binding opinion of the CMA. Issued SfOs will not be binding on the CMA in any subsequent assessment of the same or similar issues or conduct by the CMA, although the CMA will have regard to its SfOs when carrying out any such assessment.
- 3.5 SfOs cannot prejudice the assessment of the same question by the European Commission, the Courts of the European Union, the Competition Appeal Tribunal or any UK court. SfOs will not be binding on other national competition authorities having the power to apply the Chapter I prohibition in the CA98 and/or Article 101 of the TFEU.



## 4 When a SfO may be available

- 4.1 The CMA will consider requests for the issue of SfOs from parties to a prospective agreement and their advisers as well as from Government departments.
- 4.2 Parties may request a SfO in relation to a proposed agreement or other form of cooperation, either between:
- competitors (a horizontal agreement), or
  - undertakings<sup>10</sup> operating, for the purposes of the agreement, at different levels of the supply chain (a vertical agreement).
- 4.3 The proposed horizontal or vertical agreement must meet all of the conditions set out in paragraphs 4.4 and 4.5 below.
- 4.4 The proposed agreement to which the SfO request relates must:
- be prospective, rather than already implemented<sup>11</sup> and reasonably in contemplation rather than purely hypothetical,
  - raise novel or unresolved questions about the application of the Chapter I prohibition in the CA98 and/or Article 101 of the TFEU, clarification of which would benefit a wider audience, and
  - have a material link to the United Kingdom.
- 4.5 In addition, the parties to the proposed agreement must be prepared to engage in pre-request discussions with the CMA regarding the scope of the request and factors relevant to the CMA's prioritisation criteria.<sup>12</sup> If the CMA decides to prioritise the SfO request, parties must then:

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<sup>10</sup> The relevant provisions of competition law apply to agreements between and conduct by 'undertakings'. An undertaking means any natural or legal person carrying on commercial or economic activities relating to goods or services irrespective of legal status. For example, a sole trader, partnership, company or group of companies can each be an undertaking. Further guidance on the meaning of undertaking can be found in CMA guidance *Agreements and concerted practices* (OFT 401) and *Public bodies and competition law* (OFT 1389) and in relevant European case law such as C-205/03 P FENIN [2006] ECR I-6295).

<sup>11</sup> The parties must not have already entered into their proposed agreement at the time the SfO is sought and must not begin to do so until they have received the opinion and used it to assess the compliance of their proposed agreement with competition law.

<sup>12</sup> See *Prioritisation principles for the CMA* (CMA16), available at: [www.gov.uk/cma](http://www.gov.uk/cma).

- continue to engage in pre-request discussions with the CMA in order to provide a joint statement of facts on which the SfO will be based, and
- agree to the publication of non-confidential versions of the joint Statement of Facts and the SfO for the benefit of a wider audience.

4.6 In order to determine whether the proposed agreement raises novel or unresolved questions, the clarification of which would benefit a wider audience, the CMA will consider whether:

- there already exists sufficient precedent in EU or UK case law, or decisions, practice or previously published opinions or guidance given by the European Commission's competition services, the OFT or the CMA to answer the question posed, and
- there is a need for a published SfO; for example, where there is a precedent or guidance but it is unclear how this should be applied to the specific facts or circumstances surrounding the proposed agreement.

4.7 The CMA will not consider that the proposed agreement raises novel or unresolved questions where:

- the questions raised by the parties are identical or similar to issues raised in a case pending before a Court of the European Union or the European Commission,
- the proposed agreement to which the request refers is subject to proceedings pending before a Member State court or national competition authority, or
- the European Commission or another national competition authority is already considering a request for an Opinion in respect of the proposed agreement which is the subject of the request made to the CMA.

## 5 Process for requesting a SfO

### Initial enquiries

- 5.1 Parties considering making a request for a SfO should approach the CMA informally in the first instance to establish the best way to proceed, by contacting the dedicated SfO contact address: [sfo@cma.gsi.gov.uk](mailto:sfo@cma.gsi.gov.uk). Enquiries sent to this address will be directed to an appropriate member of the directorate within the CMA responsible for dealing with SfO requests.
- 5.2 When contacting the CMA in respect of a potential SfO request, parties should ensure that they provide sufficient information to enable the CMA to engage constructively in relation to their initial enquiry. In particular, parties will be expected to provide the following information as part of their initial enquiry:
- the parties to, and the markets affected by, the proposed agreement
  - the background to and commercial rationale for the proposed agreement
  - a description of the likely effect of the proposed agreement on competition within the relevant market(s)
  - an assessment of how the proposed agreement meets each of the CMA's criteria for the issue of a SfO, and
  - a preliminary outline of the novel or unresolved questions that the CMA is asked to address in the SfO.
- 5.3 Parties who are unsure of the scope of the guidance that the CMA may be able to provide in a SfO, or who are unsure of the level of detail to provide during an initial enquiry regarding a possible SfO, should contact the CMA on the contact address at paragraph 5.1 above.

### Pre-request discussions

- 5.4 The CMA will contact the parties to engage in discussions prior to the submission of a formal request for a SfO, the purpose of which will be to identify the principal factual, legal and economic issues which are relevant to the questions on which the parties are requesting guidance. These discussions are intended to provide the CMA with sufficient information to decide whether to prioritise the request for a SfO, as well as clarifying the data required from the parties in the joint statement of facts in order to prepare and issue a SfO within the envisaged timeframe. During the pre-

request discussions, the CMA will also consider whether preparing a SfO would be an appropriate use of the CMA's resources in accordance with the CMA's prioritisation principles.<sup>13</sup>

- 5.5 The CMA will engage openly and constructively with the parties during pre-request discussions and will expect the parties to do the same. The specific focus of pre-request discussions will depend heavily on the particular circumstances of each proposed agreement.
- 5.6 The CMA will also notify the relevant sectoral regulator if the initial enquiry relates to a regulated sector<sup>14</sup> and may discuss the matter with that regulator as appropriate.
- 5.7 There is no prescribed form for a joint statement of facts. However, it should include the background information outlined in paragraph 5.2 above.
- 5.8 Depending on the complexity of the market involved, the anticipated effect of the proposed agreement, or the specific questions on which the parties are seeking guidance, the preparation of the draft joint statement of facts may also include discussions as to the supporting evidence which it may be necessary for the parties to provide in order for the CMA to prepare a SfO. This may be particularly relevant for SfO requests relating to vertical agreements.
- 5.9 It is in the parties' interests to engage fully with the CMA and to prepare a draft joint statement of facts that is accurate, complete and not misleading. This will maximise the relevance of the guidance that the CMA will give in the SfO for the purpose of the parties' future self-assessment of the proposed agreement. This is because the CMA's SfO process will not involve the CMA verifying that the information in the joint statement of facts is correct. The CMA will provide guidance in the SfO on the assumption that the information in the joint statement of facts is accurate, complete and not misleading. Therefore, the utility and robustness of the guidance for the parties will be diminished if it is not.
- 5.10 The CMA will not be able to assess a formal request for a SfO unless it has sufficient information to do so. Pre-request discussions will therefore

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<sup>13</sup> *Prioritisation principles for the CMA* (CMA16), available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>14</sup> From 1 April 2014, the following sectoral regulators have certain concurrent powers to enforce competition law within their respective sectors in the United Kingdom: Ofwat; Ofgem; the Northern Ireland Authority for Utility Regulation; the Office of Rail Regulation; the Civil Aviation Authority; Ofcom; and Monitor. Further information on concurrent competition law enforcement in the regulated sectors is available in the CMA guideline *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (CMA10).

continue until such information is provided and the parties have finalised their joint statement of facts. The CMA will however be mindful, when conducting such discussions, of the purpose of the SfO process, namely to provide guidance within a prompt timetable. The CMA will inform the parties as soon as practicable if it does not consider that the prospective agreement(s) and/or questions raised meet the conditions for a SfO, or if in the CMA's view preparing a SfO would not be an appropriate use of resources in line with the CMA's prioritisation principles.<sup>15</sup>

### **Submitting a request for a SfO**

- 5.11 When the CMA has sufficient information to proceed with the SfO, it will invite the parties to make a formal request for a SfO by submitting their joint statement of facts to the CMA. The joint statement of facts should be signed by the parties.
- 5.12 Where the parties' joint statement of facts contains confidential information, the parties should provide a separate non-confidential version at the same time, along with an explanation which clearly identifies the information that they consider to be confidential together with a written explanation as to why they consider that the CMA should treat this information as confidential.<sup>16</sup>
- 5.13 Part 9 of the Enterprise Act 2002 (EA02) governs the disclosure of information (including confidential information) which the CMA receives in the course of the exercise by it of its statutory functions. The CMA will follow the provisions of Part 9 when handling information provided by the parties during the SfO process and will only disclose information identified as confidential in accordance with the provisions of Part 9.<sup>17</sup>

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<sup>15</sup> *Prioritisation principles for the CMA* (CMA16), available at: [www.gov.uk/cma](http://www.gov.uk/cma).

<sup>16</sup> The CMA will not accept blanket or unsubstantiated confidentiality claims. Parties should also be aware that one of the requirements of the SfO process is that the CMA publishes a non-confidential version of the SfO for the benefit of a wider audience.

<sup>17</sup> For further information on the CMA's approach to confidential information, see the CMA guideline *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6).

## 6 How the CMA will prepare a SfO

- 6.1 Following receipt of a request for a SfO, the senior CMA staff member responsible for the preparation of the SfO will review the information provided and will work towards issuing a SfO within the envisaged timeframe of two to three months from receipt of the request.
- 6.2 In preparing the SfO, that senior CMA staff member will consult with other senior officials of the CMA as appropriate. This may include any member of the CMA's Board, Panel or staff.
- 6.3 The CMA expects the parties to cooperate with it throughout this process, in particular by engaging in further discussions with the senior CMA staff member responsible for that request and/or other members of the CMA as appropriate.
- 6.4 The CMA may seek to clarify the information provided to it or further develop its understanding of the market or the nature of the proposed agreement with the parties and/or with an appropriate industry regulator, Government body, non-statutory authority or other appropriate entity.<sup>18</sup>
- 6.5 The CMA will typically engage with the relevant sectoral regulator where the SfO request relates to a regulated sector, and may discuss the request with other sectoral regulators (including through the UK Competition Network), the European Commission and other members of the European Competition Network.<sup>19</sup> The CMA may request comments from these other authorities and discuss the substance of the request with them in any appropriate forum. The CMA will have regard to its Guideline, *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6) in respect of any exchange of information between the CMA, sectoral regulators, the European Commission and other members of the European Competition Network.
- 6.6 In the event that the CMA identifies competition issues which fall outside the scope of the parties' request but which may nevertheless constitute novel or unresolved questions, the clarification of which would benefit a wider

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<sup>18</sup> The CMA will not disclose any confidential information received other than in accordance with Part 9 of the EA02.

<sup>19</sup> The European Competition Network was established by the European Commission and national competition authorities under the Modernisation Regulation to facilitate close co-operation between national competition authorities of the European Union and the European Commission in order to ensure consistent application of European Union competition law.

audience, the CMA will discuss these with the parties and will seek to include brief guidance on these in the SfO.

- 6.7 In the event that competition concerns regarding aspects of the proposed agreement are identified in the preparation of the SfO, the CMA will raise these with the parties. The CMA will engage with them, for example to identify minor amendments which could be made to the proposed agreement which would remove the CMA's concerns.

### **Issue and publication**

- 6.8 Before issuing a SfO, the senior CMA staff member responsible for the SfO will consult the Case and Policy Committee of the CMA. The SfO will be issued to the parties within an anticipated time frame of two to three months from the date of the parties' formal request for a SfO.
- 6.9 The parties will be notified of the CMA's intention to issue a SfO in advance, and will be provided with an embargoed copy of the CMA's press release.
- 6.10 A non-confidential version of each issued SfO will be published on the CMA's webpages. Where the publication of a SfO makes public the parties' proposed agreement for the first time, the CMA will consider whether the publication of the SfO should be treated as a market-sensitive announcement within the meaning of the CMA's guideline, *Transparency and disclosure: Statement of the CMA's policy and approach (CMA6)* and in accordance with the Financial Conduct Authority's Guidelines for the control and release of price sensitive information by Industry Regulators (originally published by the Financial Services Authority).

### **Own-initiative analysis of information**

- 6.11 The CMA may decide to draw on any novel or unresolved competition law issues it has identified during the exercise of its functions (including in the context of a SfO enquiry) to:
- produce, on its own initiative, general guidance on the application of competition law where it would benefit a wider audience, or
  - undertake an investigation on its own initiative where there are reasonable grounds for suspecting the existence of matters in respect of which it can exercise any of its powers under the CA98 or EA02.
- 6.12 Any information provided by the parties as part of a request for a SfO is protected by Part 9 of the EA02 (which imposes a general restriction on the disclosure of information obtained by the CMA during the exercise of any of

its functions) and is subject to the CMA's guideline, *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6). The SfO will not bind the subsequent assessment of the same or similar issues or conduct by the CMA, although the CMA will have regard to its SfO when carrying out any such assessment.