

# Local Authority Initiatives and Competition Law

**December 2014**

# The CMA

- On 1 April 2014, the Competition and Markets Authority (CMA) became the UK's lead competition and consumer body
- The CMA brought together the existing competition and consumer protection functions of the Office of Fair Trading (OFT) and the responsibilities of the Competition Commission
- See the [CMA homepage](#) for more information.

# Competition law

- Competition Act 1998 (CA98)
- Chapter I Prohibition CA98 applies to:
  - agreements between undertakings
  - decisions by associations of undertakings
  - concerted practiceswhich have as their object or effect the prevention, restriction or distortion of competition
- ‘Undertaking’: any form of entity engaged in economic activity, including retailers, wholesalers, distributors, suppliers and manufacturers, no matter how big or small

# Competition law

- An agreement that prevents, restricts or distorts competition may benefit from exemption (ie would not be prohibited) only where:
  - it results in economic efficiencies and consumer benefits
  - the restriction is indispensable to obtaining these benefits
  - competition is not eliminated
- The Chapter I Prohibition applies, amongst other things, to:
  - agreements to fix prices or trading conditions
  - the sharing of commercially sensitive information
- Information sharing does not need to be reciprocal and information can be shared directly or indirectly

# Competition law

- If an agreement falls foul of competition law, those involved are susceptible to:
  - measures relating to undertakings/businesses (corporate fines, private action)
  - measures relating to individuals (criminal cartel offence; director disqualifications)
- The fact that an agreement is sanctioned by Government (national or local), or that the discussion takes place in the presence of Government officials, does not prevent it from falling foul of competition law
- There is a wealth of guidance material to help businesses and officials to understand competition law

# Local authority initiatives

- Local authority initiatives aimed at delivering public policy objectives (eg social, health or environmental objectives such as tackling abuse of high strength alcohol) might seek to use:
  - mandatory measures (eg legislation, regulation or licensing action that is binding on businesses)
  - voluntary measures (eg non-mandatory participation by businesses in a local 'scheme')
  - a mixture of both
- There is no general prohibition under competition law on businesses working together, or together with their local authority, to address legitimate concerns or to deliver policy objectives
- But competition law does require, in certain circumstances, that the method of dealing with these concerns should be carefully selected to avoid restricting competition

# Local authority initiatives

- Policy-makers and local authority officials should:
  - consult existing CMA guidance (see slides 11 and 12)
  - consider the competition law implications of their proposals at an early stage
  - seek independent legal advice where necessary to assist them in their compliance self-assessments
  - remember that the Chapter I Prohibition of the CA98 covers any agreements or less formal understandings on prices or on **any other terms** affecting competition between independent businesses (including decisions on what products they stock and sell)
  - remember that agreements can be direct or indirect (including through a local authority or other third party intermediary)
  - note particularly the competition law risks that might arise were an initiative to involve:
    - co-operation or collaboration between independent businesses
    - the direct or indirect sharing of commercial information from one business to another (including information on the future commercial policies or intentions of a business, particularly future pricing intentions or strategies)
  - be aware that those competition law risks may be more likely to arise in certain circumstances, such as a meeting of retailers convened by a local authority to discuss alcohol concerns, and should act accordingly (eg by not encouraging or by challenging behaviour which could place retailers in breach of the law)

# Risk assessment

- Whether any local authority initiative risks infringing competition law will depend on the precise nature and subject matter of the initiative and how businesses interact with each other (if at all) and with the local authority
- Self-assessment needs to be done on a case-by-case basis, having regard to the precise facts and circumstances of each initiative, including how far it goes and how it is implemented
- The following slide sets out three illustrative broad scenarios and the likely competition law implications of each
- However, it is not a substitute for individual self-assessment and independent legal advice



# Three illustrative scenarios

- **Scenario One:** Businesses take their own independent commercial decisions, perhaps (partly or wholly) in response to the actions of a local authority in disseminating a public policy message, raising certain concerns and/or inviting the business to address those concerns
  - This would **not** breach the Chapter I Prohibition against anti-competitive agreements as the actions taken by each business are unilateral in nature
- **Scenario Two:** Businesses adhere to legislation, regulation or licensing controls which are legally binding on them
  - This would **not** breach the Chapter I Prohibition against anti-competitive agreements as the legal framework has removed autonomy from each business over that aspect of its commercial behaviour
- **Scenario Three:** Businesses enter into agreements and/or concerted practices with each other and/or share information on their future commercial policies or intentions, including where they are encouraged or pressurised to do so by their local authority, but are not bound to do so by legal obligations or duties
  - This **would be likely to** raise competition law concerns

# Risk ratings

## Low/no risk of the CA98 being infringed

### A local authority:

- uses legislative, regulatory or licensing powers to impose mandatory legal requirements which businesses must comply with
- disseminates to a business a public policy message, for example explaining the social impact of a retailer's sales activities, and invites that business to make unilateral commitments to address this
- seeks the views of businesses, for example through a meeting at which retailers make high-level suggestions to inform local government policy
- involves businesses in an initiative that is unlikely to impact on competition (either on price or non-price factors), for example agreeing best practice in verifying the age of customers, or in refusing to serve alcohol to drunk customers

## High risk of the CA98 being infringed

### A local authority:

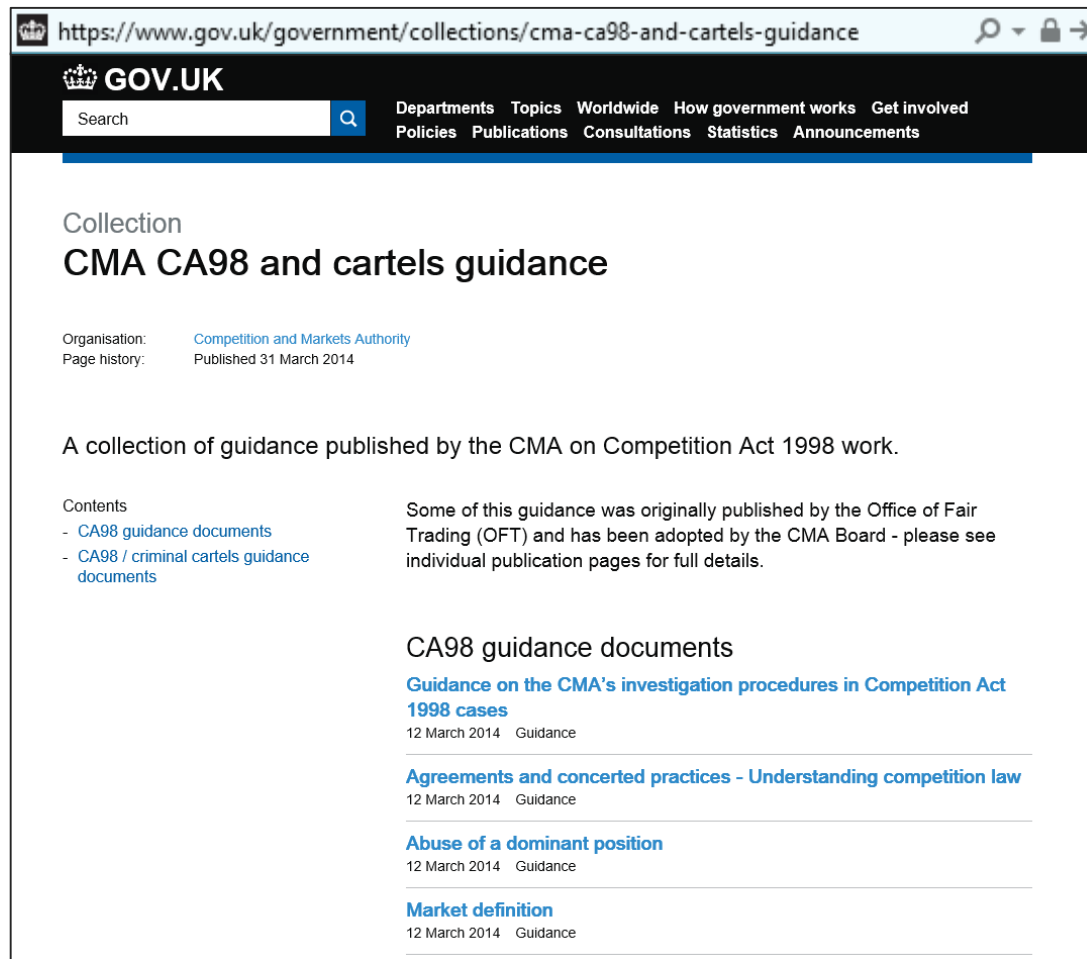
- acts as a mechanism to co-ordinate the commercial decision-making of independent businesses through non-mandatory means such that those businesses take a decision collectively, or in agreement with each other, rather than individually/unilaterally
- encourages or facilitates the sharing (directly or indirectly) of commercial information, from one business to another, including information on future commercial policies and, in particular, the future pricing intentions of a business

## The CA98 almost certainly infringed

### A local authority:

- encourages or brokers an agreement between businesses to raise/fix prices or to set minimum prices

# Existing guidance



The screenshot shows a web browser window with the URL <https://www.gov.uk/government/collections/cma-ca98-and-cartels-guidance>. The page is from GOV.UK and features a search bar and navigation links. The main content area is titled 'Collection CMA CA98 and cartels guidance' and includes metadata such as 'Organisation: Competition and Markets Authority' and 'Page history: Published 31 March 2014'. A descriptive paragraph states: 'A collection of guidance published by the CMA on Competition Act 1998 work.' Below this, there are two columns of content. The left column lists 'Contents' with links to 'CA98 guidance documents' and 'CA98 / criminal cartels guidance documents'. The right column contains a paragraph explaining that some guidance was originally published by the Office of Fair Trading (OFT) and has been adopted by the CMA Board. Below this are four entries, each with a title and a date: 'CA98 guidance documents' (12 March 2014), 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (12 March 2014), 'Agreements and concerted practices - Understanding competition law' (12 March 2014), and 'Abuse of a dominant position' (12 March 2014). A fifth entry, 'Market definition' (12 March 2014), is partially visible at the bottom.

https://www.gov.uk/government/collections/cma-ca98-and-cartels-guidance

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Collection  
**CMA CA98 and cartels guidance**

Organisation: [Competition and Markets Authority](#)  
Page history: [Published 31 March 2014](#)

A collection of guidance published by the CMA on Competition Act 1998 work.

Contents

- [CA98 guidance documents](#)
- [CA98 / criminal cartels guidance documents](#)

Some of this guidance was originally published by the Office of Fair Trading (OFT) and has been adopted by the CMA Board - please see individual publication pages for full details.

**CA98 guidance documents**

[Guidance on the CMA's investigation procedures in Competition Act 1998 cases](#)  
12 March 2014 Guidance

[Agreements and concerted practices - Understanding competition law](#)  
12 March 2014 Guidance

[Abuse of a dominant position](#)  
12 March 2014 Guidance

[Market definition](#)  
12 March 2014 Guidance

# Existing guidance

- CMA guidance on GOV.UK website:
  - [How your business can achieve compliance with competition law](#) (OFT1341)
  - [Agreements and concerted practices – understanding competition law](#) (OFT401)
  - [Government in markets](#) (OFT1113)
  - [Quick guide to competition law compliance](#) (OFT 1330)
  - [60 second summary: Limiting risk in relation to competitors' information](#) (CMA Competition Law pages – GOV.UK)
  - [Competition law risk: a short guide](#) (CMA Competition Law pages – GOV.UK)
- [BIS advice for officials](#) on competition law issues when Government encourages businesses to work together
- [OFT submission](#) to the Health Committee Inquiry into the Government's Alcohol Strategy (May 2012)