

Draft revised guidance on the CMA's investigation procedures in Competition Act 1998 cases

Consultation document

5 August 2020

CMA8

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1. About the consultation

Introduction

- 1.1 The Competition and Markets Authority (CMA)¹ has set out in published guidance general information for the business and legal communities and other interested parties on its practices and processes in connection with the its powers under the Competition Act 1998 (CA98), to investigate suspected infringements of competition law.²
- 1.2 One guidance publication, *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8) sets out the CMA's procedures and explains the way in which it conducts CA98 investigations. CMA8 was first adopted on 12 March 2014 and took effect from 1 April 2014. It superseded previous guidance issued by the CMA's predecessor, the Office of Fair Trading (OFT).
- 1.3 CMA8 was updated with effect from 18 January 2019, following a consultation process between July and August 2018 (this version of CMA8 is hereafter referred to as the 'Current Guidance'). The Current Guidance updated, improved and enhanced CA98 investigation procedures and reflected investigation and decisional practice at the time. It also incorporated guidance as to the circumstances in which it may be appropriate to accept commitments under the Competition Act 1998.
- 1.4 In the consultation document for the Current Guidance, the CMA said that it had reviewed CMA8 with the two key aims of:
 - facilitating, wherever possible, procedural efficiencies that it considered would support its aim of progressing and concluding its CA98 investigations as quickly as possible, while maintaining its commitment to due process and robust decision making, and
 - updating the guidance to reflect its current CA98 investigation and decisional practice, which has developed in light of experience gained since 2014, when CMA8 was adopted.³

¹ The CMA is the UK's economy-wide competition and consumer authority, and works to promote competition for the benefit of consumers, both within and outside the UK. Its aim is to make markets work well for consumers, businesses and the economy as a whole.

² This guidance forms part of the advice and information published by the CMA under section 52 of the CA98.

³ See [Draft Revised Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases -- Consultation Document](#) at paragraph 1.3.

- 1.5 Since the Current Guidance was published, there have been a number of developments relevant to the CMA's CA98 procedures.
- 1.6 In the Government's [5-Year Review of the Competition Regime](#), which was laid before Parliament on 18 July 2019, it was noted that there was evidence suggesting that the overall package of reforms in the Enterprise and Regulatory Reform Act 2013 (ERRA), including the creation of the CMA, improvements to CMA procedures, management and processes appeared to have contributed to an effective competition enforcement regime, even though the impact of the statutory reforms in ERRA was small. However, the Government said that notwithstanding these improvements, questions remained about whether further reforms were required to ensure that the end-to-end competition enforcement regime operated as effectively as possible to deliver robust sanctions and effective deterrence in a timely way. These challenges were, in the Government's view, likely to be magnified when the CMA took on an enhanced caseload following the UK's withdrawal from the European Union (EU), and were significant in relation to enforcement in digital markets.⁴
- 1.7 Furthermore, in March 2019 the Government-commissioned [Unlocking Digital: Report of the Digital Competition Expert Panel](#) (also known as the Furman Report) was published, which found, among other things, that existing competition tools needed to be updated to address the changing economy more effectively, and that they should enable faster action that more directly targets and remedies problematic behaviour.⁵
- 1.8 More recently, the CMA has been reflecting on competition law and consumer protection in the 2020s and, earlier this year, explained how it is changing its approach and practice in order to get closer to consumers across the UK. In doing so, the CMA has continued to consider what it can do to address some of the challenges the CMA faces without changes in the legal framework. This has included consideration of how the CMA can improve its accountability, accessibility, representativeness and responsiveness to the taxpayers it serves.⁶ Moreover, the current coronavirus (COVID-19) pandemic's impact on UK markets has increased the challenges faced by the CMA. As noted in the CMA reform proposals sent by Lord Tyrie, as chairman, to the Secretary of State for BEIS in

⁴ [Department for Business, Energy and Industrial Strategy \(BEIS\), Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013](#), July 2019.

⁵ See, for example, pages 2 and 5 of the Furman Report.

⁶ See for example, Andrea Coscelli's speech entitled '[Closer to Consumers – Competition and Consumer Protection for the 2020s](#)', published on 25 February 2020.

February 2019, 'There is always more that the CMA can do internally to speed up case preparation and progression'. These internal changes should be seen as complementary to the CMA's proposals for wider legislative change to address impediments to the effective operation of the regime.

- 1.9 Informed by these developments, and its experience of enforcing the CA98 since January 2019, the CMA has again reviewed the Current Guidance with a view to whether further incremental changes to it will help to achieve the aims set out in paragraph 1.4 above. Having done so, the CMA proposes to make the changes to the Current Guidance discussed in this consultation.
- 1.10 The draft revised text of CMA8 issued alongside this consultation paper is referred to as the Draft Revised Guidance. This consultation paper explains in detail the nature of and the reasons for the amendments to the Current Guidance that are proposed in the Draft Revised Guidance.
- 1.11 The amendments to the Current Guidance which are the subject of this consultation are shown in underline and ~~strikethrough~~ text in the Draft Revised Guidance.

Scope of the Consultation

- 1.12 This consultation seeks the views of interested parties on the CMA's proposed revisions to the Current Guidance as required by section 52(6) of the CA98.
- 1.13 The specific question on which we are seeking respondents' views is provided in the end of Chapter 1 of this consultation document.
- 1.14 The geographical scope of this consultation is primarily the UK.
- 1.15 This consultation is aimed at those who have an interest in the CMA's investigations under the CA98. In particular, it may be of interest to businesses and their legal and other advisers.

Rationale for the amendments to the Current Guidance proposed in the Draft Revised Guidance

- 1.16 As noted above in paragraph 1.8, the CMA has reviewed the Current Guidance with a view to identifying whether further changes to it will help to achieve the aims set out in paragraph 1.4 above. These are changes that do not require new legislation. Having reviewed the Current Guidance, the

CMA proposes to make the changes set out in the text of the Draft Revised Guidance, which forms part of this consultation. These changes do not preclude the need, in the CMA's view, for legislative reform in order to increase the effectiveness of the CA98 regime.

1.17 These proposed changes are listed in the following table and summarised below.

Subject matter	Summary of main proposal(s)
Opening a formal investigation	Increased transparency at case opening
Information handling	Clarification of the basis on which the CMA may seek to expedite its access to file procedure
Issuing the CMA's provisional findings	Sending the Draft Penalty Statement with the Statement of Objections
Right to reply	Clarification of the process relating to cross disclosure of parties' written (or oral) representations on a Statement of Objections
Right to reply	Clarification of the process relating to disclosure of directors' representations on a Statement of Objections
Settlement	Clarification of the CMA's practices
Complaints about the CMA's investigation handling, right of appeal and reviewing the CMA's processes	Clarification of the scope of the Procedural Officer's role

Opening a formal investigation – increased transparency at case opening

1.18 Currently, as a general principle, in all cases other than criminal cartel and criminal consumer investigations, the CMA will place a case opening announcement on www.gov.uk/cma, announcing the launch of a formal investigation unless this would prejudice the case or would otherwise be inappropriate.⁷ At the same time as or following the public announcement of a case opening, the CMA will – as explained in [Transparency and Disclosure: Statement of the CMA's Policy and Approach \(CMA6\)](#) – publish, if and as soon as reasonably practicable, the following information:

⁷ [Transparency and Disclosure: Statement of the CMA's Policy and Approach \(CMA6\)](#), para. 3.9.

- 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,
- an indicative timetable showing the anticipated dates of key milestones, and
- the contact details for the main CMA contacts for the case, including the first point of contact for general queries and the submission of information.⁸

1.19 However, CMA6 currently notes that it may not be appropriate to name the parties directly involved at this early (i.e. case-opening) stage of a case.⁹

1.20 Currently, in CA98 cases, the CMA will normally publicly identify the parties whose activities are under investigation when issuing a Statement of Objections and when issuing an infringement decision, both in the non-confidential version of the decision and in any public announcements in respect of the decision or Statement of Objections, as well as in any settlement announcement.¹⁰ However, at case opening the CMA says in the Current Guidance that it

'would not generally expect to publish the names of the parties under investigation [in a CA98 case opening announcement] other than in exceptional circumstances'.¹¹

1.21 The CMA considers that it is appropriate to amend the Current Guidance to enhance the transparency of the CMA's enforcement policy under CA98. The CMA therefore proposes to amend the Current Guidance to provide in paragraph 5.7 of the Draft Revised Guidance that the CMA will normally name parties under investigation in case-opening announcements, other than in exceptional circumstances, such as where doing so might prejudice a CMA investigation or an investigation by one of its partners, and always subject to the application of applicable data protection law and the provisions of Part 9 of the Enterprise Act 2002. The CMA recognises the importance of confidentiality for leniency applicants and the Draft Revised Guidance therefore states that the CMA will not mention in a case-opening

⁸ See para. 3.7 of CMA6.

⁹ Ibid.

¹⁰ See for example, para. 11.9 of CMA8 and para. 3.13 of CMA6.

¹¹ See CMA8 at para. 5.7. A non-exhaustive list of 'exceptional circumstances' is set out in that paragraph, and includes situations where leaving such parties unidentified could be expected to result in significant consumer detriment and/or significant harm to other businesses (including those in the same sector) and/or where the subject matter of the investigation is of widespread public concern.

announcement whether a party to the alleged infringement has applied for leniency (see paragraph 5.8 of the Draft Revised Guidance). This is consistent with the approach set out in the CMA's leniency guidance, OFT1495 *Applications for Leniency and No-action in Cartel Cases*.¹²

- 1.22 In proposing that parties should be named at the time of case opening (subject to the exceptions outlined above), the CMA notes that its statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers, and its mission is to make markets work well in the interests of consumers, businesses and the economy.¹³ This includes taking action to restore confidence in markets and show consumers that their concerns are being taken seriously by the CMA. If parties are named at case opening in CA98 cases, consumers, businesses, and members of the public more generally, who are concerned about a particular business' practices can be confident that the CMA is investigating the practices and is addressing their concerns.
- 1.23 Indeed, the CMA noted in its most recent Annual Plan that in order to achieve its goals it needs to get closer to consumers, so that it can better understand their concerns and how they are being affected by the ways in which the economy and markets are changing.¹⁴ The Annual Plan states that the CMA proposes to exercise its functions with particular regard to six strategic objectives, which include protecting consumers, including in particular those in vulnerable circumstances, and improving trust in markets.¹⁵ Safeguarding the interests of consumers and maintaining and improving public confidence in markets are areas of key strategic focus for the CMA.¹⁶ Moreover, as articulated recently by the CMA's senior leadership, the CMA intends to do more to explain the choices it makes (including making its case selection more transparent) and making the CMA more visible and vocal.¹⁷ The economic consequences of the current COVID-19 pandemic may also risk further undermining trust in markets and in order to maintain such trust, the CMA considers that it must be more transparent about the steps it is taking actively to respond to consumer concerns.

¹² See for example, footnote 83 of OFT1495.

¹³ See, for example the [CMA Annual Plan 2020/21](#)

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ See, for example the [letter of advice of 21 February 2019 from the CMA's Chairman to the Secretary of State of State for BEIS](#).

¹⁷ See footnote **Error! Bookmark not defined.** above.

- 1.24 Section 6 of the Enterprise Act 2002 provides a statutory basis for the CMA to be transparent in the exercise of its functions, by conferring on the CMA a specific function of making the public aware of the ways in which competition may benefit consumers and the economy and for the CMA to give information or advice to the public in respect of matters relating to any of its functions. Section 25A of the CA98 also provides for transparency in the CMA's CA98 enforcement, by giving the CMA the power to publish a notice of a CA98 investigation, which among other things, can identify the undertakings whose activities are being investigated as part of the investigation.¹⁸ Provided the notice of investigation complies with the requirements of section 25A of the CA98, the CMA has absolute privilege from defamation in respect of the information in the section 25A notice.¹⁹
- 1.25 Not naming parties in CA98 case opening announcements means that parties under investigation do not know whether their competitors are also under investigation, and also that interested stakeholders cannot inform the CMA if an undertaking whose conduct would also merit investigation is not being investigated. Moreover, not naming parties at an early stage of an investigation may well mean that interested stakeholders cannot at this early stage approach the CMA with any evidence they have which could assist the investigation.
- 1.26 The CMA's recent enforcement experience is that not naming parties in a CA98 case opening announcement can also create unexpected difficulties. In some CA98 cases, undertakings have unilaterally announced that they were under investigation by the CMA without specifying the subject matter. This has led to the CMA being contacted by members of the public, with the CMA being unable to confirm or comment on the subject matter of the investigation, which in turn has led to incorrect speculation or rumours as to the subject matter. Further, in some cases, it will often be clear to some third parties who and what the CMA is investigating, but not to others. This can create information asymmetries between different third parties.
- 1.27 Having regard to the above considerations and the greater need for transparency at case opening, and in particular how it relates to the CMA's overall strategy, the CMA has also added text to paragraph 5.6 of the Draft Revised Guidance to provide that a published case opening announcement may also include an explanation of the reasons for prioritising the case.

¹⁸ Section 25A(1) of CA98.

¹⁹ Section 57 of CA98 read in conjunction with section 25A(2) of CA98.

Information handling – clarification of the basis on which the CMA may seek to expedite its access to file procedure

- 1.28 Paragraphs 11.16 to 11.30 of the Current Guidance explain the CMA's procedures for giving parties who have received a Statement of Objections the opportunity to inspect the documents on the CMA's file ('access to file') in a CA98 investigation.
- 1.29 The CMA has updated the Draft Revised Guidance to draw on its further experience with access to file since the Current Guidance was published. More specifically, the CMA has clarified that when giving access to file, it will consider the most efficient and practical basis for doing so. In some cases, the CMA may follow the approach outlined in paragraph 11.25 of the Draft Revised Guidance, namely disclosing to the Addressee(s) the documents directly referred to in the Statement of Objections (and any Draft Penalty Statement issued to the Addressee) together with a schedule containing a detailed list of the documents on the CMA's file. In other cases, the CMA may use a confidentiality ring²⁰ (as explained in paragraphs 11.27 to 11.34 of the Draft Revised Guidance).
- 1.30 The CMA's experience in practice is that using a schedule or confidentiality ring for this purpose provides additional flexibility in order to identify the most efficient and practical approach to providing access to the CMA's file in a particular case, while also ensuring that a party's rights of defence are respected. Rights of defence will be respected through the process used for providing access to file being discussed with the parties under investigation, and the parties or their external advisers (where a confidentiality ring is used) will have a reasonable opportunity to make requests for further disclosure of documents on the CMA's file. The CMA considers that, given the large volume of documents that are often on the CMA's file, the use of these approaches gives rise to identifiable benefits in

²⁰ Confidentiality rings enable disclosure of specific quantitative and/or qualitative data or documents to a defined group. The group is determined on a case-by-case basis but, generally, disclosure is made to the relevant parties' external (legal and/or economic) advisers. While the CMA will normally use a confidentiality ring in CA98 investigations it may, in exceptional circumstances, use a data room. This may, for example, be the case where additional enhanced security measures are appropriate because the information is considered by the CMA to be particularly sensitive. Like confidentiality rings, data rooms enable access to a specific category of confidential data or documents to a defined group and the group is also determined on a case-by-case basis. However, a data room provides access to the confidential data or documents on the CMA premises, and in so doing has the advantage of providing additional protection. The CMA has also clarified such use of data rooms in the Draft Revised Guidance (see, for example, footnote 135 of the Draft Revised Guidance, for example).

terms of resource savings and administrative efficiencies, both for businesses and the CMA.

- 1.31 The CMA has also clarified in the Draft Revised Guidance that it will no longer give businesses a second opportunity to make confidentiality representations where none have been provided by the deadline set by the CMA (see paragraph 7.10 of the Draft Revised Guidance). The CMA expects the deadlines it sets for confidentiality representations to be respected and any requests for an extension should be discussed with the case team well in advance of that deadline.
- 1.32 The CMA has also clarified in the Draft Revised Guidance its approach to access to file in interim measures cases (see paragraph 8.9 of the Draft Revised Guidance). That paragraph explains that given the need to act as a matter of urgency in interim measures cases, the CMA will provide only those documents relied on in the provisional decision that relate to the proposed interim measures directions the CMA considers are necessary to prevent significant damage to a person (or category of persons) or to protect the public interest. The CMA will not, in respect of proposed interim measures directions, normally provide access to documents on the CMA's file that relate to the suspected infringement of the Chapter I or Chapter II prohibitions. The business to which the interim measures directions are addressed will have the opportunity to inspect such documents should the CMA issue a Statement of Objections. However, a schedule of additional documents on the CMA's file will be provided with an opportunity for the business to request the disclosure of additional documents, where it can satisfy the CMA that this is necessary for it to respond to the CMA's provisional decision.

Issuing the CMA's provisional findings – sending the Draft Penalty Statement with the Statement of Objections

- 1.33 The Current Guidance provides that once any written and oral representations made in relation to the Statement of Objections have been considered and the Case Decision Group (CDG) is considering reaching an infringement decision and imposing a financial penalty on a party, the CMA will provide that party with a Draft Penalty Statement.²¹ The Draft Penalty Statement will set out the key aspects relevant to the calculation of the penalty that the CMA proposes to impose on that party, based on the information available to the CMA at the time and in accordance with the

²¹ See paragraph 12.29 of CMA8.

[CMA's guidance as to the appropriate amount of a penalty \(CMA73\)](#). It will also include a brief explanation of the CMA CDG's reasoning for its provisional findings on each aspect of the penalty calculation.²² Parties are offered the opportunity to comment on the Draft Penalty Statement in writing and via an oral hearing (by telephone or video conference).²³

- 1.34 The CMA proposes in the Draft Revised Guidance to provide that, where the CMA provisionally considers that an undertaking has infringed either of the CA98 prohibitions and that a financial penalty should therefore be imposed on that undertaking, that undertaking's Draft Penalty Statement will be sent at the same time as the Statement of Objections is sent to that undertaking (see paragraphs 11.15 to 11.19 of the Draft Revised Guidance). The content of the Draft Penalty Statement will remain the same as is provided for in the Current Guidance. The Senior Responsible Officer (SRO) who decided to issue the Statement of Objections will also be responsible for deciding whether to issue a Draft Penalty Statement. The CDG will continue to make the decisions as to whether the relevant CA98 prohibitions have been infringed, whether to impose a penalty and, if so, the amount of the penalty.
- 1.35 In the CMA's view, which is based on its ongoing experience of penalty setting, making the change proposed in the Draft Revised Guidance is likely to yield considerable efficiencies for both the CMA and relevant parties at the post-Statement of Objections stage. The time needed for the current 'two-phase' approach to considering liability and then penalty will be greatly reduced, as much of this work would now be done at the same phase of the process. There would also only be the need for parties to provide one set of written representations on the Statement of Objections and the Draft Penalty Statement, with a single hearing on liability and penalty. The CMA considers that parties benefit from providing one set of representations where they can more freely draw together arguments on, for example, seriousness and the characterisation of the alleged infringing activity. In terms of the time necessary to address both liability and penalty in representations, this is a factor that the CMA will take into account when setting the deadline for submission of these representations.
- 1.36 In proposing this change, the CMA has also considered the penalty-setting approach of a number of other European competition authorities, as set out in their published guidance. The CMA notes that generally the approach is that parties are provided only with an explanation of the factors which are

²² See paragraph 12.30 of CMA8.

²³ See paragraph 12.31 of CMA8.

likely to be relevant to penalty-setting rather than any calculation. For example, the European Commission sets out in its Statement of Objections the essential facts and matters of law to be taken into consideration in any subsequent calculation of fines, including the seriousness and duration of the infringements, relevant turnover, and mitigating and aggravating factors. France follows a similar approach: the *Autorité de la Concurrence* communicates to the parties the legal and factual considerations relevant to penalty calculation in a report prepared by the *Autorité's* investigating officer aiming to bring together the Statement of Objections, evidence relied upon and any preliminary observations of the parties and interested third parties. In the Netherlands, the Legal Department of the Authority for Consumers & Markets (ACM) advises the ACM's Board whether to impose a fine, and if so, the level of the fine, on the basis of the Statement of Objections and the parties' representations on the legal opinion.

- 1.37 However, the mere fact that the Statement of Objections and the Draft Penalty Statement have been issued at the same time does not mean that any assumptions should be made that there will be a finding of infringement. The Statement of Objections simply expresses the CMA's provisional view on infringement. Whether there has been an infringement is a matter for the Case Decision Group, whose membership is separate from the CMA officials involved in the decision to send the Statement of Objections and Draft Penalty Statement. If the Case Decision Group, having regard to a party's representations, does not consider that a party has infringed any of the relevant CA98 prohibitions, there will be no grounds for imposing a financial penalty. Moreover, it is a matter for the Case Decision Group whether, if it considers that that any of the relevant CA98 prohibitions have indeed been infringed, to impose a financial penalty in respect of that infringement and if so, the amount of any such penalty.

Right to reply – clarification of the process relating to cross disclosure of written (or oral) representations on a Statement of Objections

- 1.38 The Current Guidance states that in a multi-party case, CMA will not cross disclose the written (or oral) representations on a Statement of Objections between the addressees of a Statement of Objections.²⁴ The Current Guidance acknowledges that there may be 'exceptional circumstances' where cross disclosure of such representations may be made by the CMA. Two instances of such 'exceptional circumstances' are set out in footnote

²⁴ See paragraph 12.5 of CMA8.

130 of the Current Guidance. One of these is ‘where the CMA considers it necessary for rights of defence’ to do so.

- 1.39 In this regard, the CMA considers that genuinely new evidence (as opposed to arguments of fact or law or evidence which has already been disclosed to the addressees) in an addressees’ written (or oral) representations may need to be cross disclosed to the other addressees of a Statement of Objections. The CMA proposes to refer to this in footnote 154 of the Draft Revised Guidance as an example when of cross disclosure might be made for rights of defence purposes.

Right to reply – clarification of the process relating to disclosure of directors’ representations on a Statement of Objections

- 1.40 Where appropriate, the CMA may seek to disqualify directors of infringing undertakings, under the provisions of the Company Directors Disqualification Act 1986 (CDDA).
- 1.41 The CMA has clarified in paragraph 12.7 of the Draft Revised Guidance that the CMA may on a case by case basis provide an opportunity to submit written representations on a non-confidential version of the Statement of Objections to third parties who are current or former directors of an Addressee of the Statement of Objections, in respect of whom the CMA is carrying out an investigation under the CDDA for the purpose of deciding whether to make an application for a Competition Disqualification Order (CDO). Save in exceptional circumstances, the CMA considers that it would not normally be appropriate to disclose the representations of these directors to the Addressees of the Statement of Objections. This is because the fact that the CMA is carrying out an investigation under the CDDA in respect of a particular director will not normally be public at that stage of the CMA’s investigation.
- 1.42 In view of this, the CMA proposes to amend paragraphs 12.7 and 12.11 of the Draft Revised Guidance to clarify that any such representations by a director will only exceptionally be disclosed to the Addressees of the Statement of Objections, such as where the CMA considers it necessary to do so for the rights of defence of an Addressee of the Statement of Objections.

Settlement – clarification of the CMA’s practices

- 1.43 Since the Current Guidance was published, the CMA has gained further experience of the settlement of cases, including with respect to ‘hybrid’

settlements (which are settlements in which not all parties to an alleged infringement agree to settle with the CMA).²⁵

- 1.44 Given this further experience, the CMA proposes to make some clarifications to the Settlement chapter (Chapter 14) in the Draft Revised Guidance. The CMA has in footnote 200 clarified that in the event of a hybrid settlement, offers to settle must still be approved by the CMA's Case and Policy Committee.
- 1.45 The CMA has also added text in the Draft Revised Guidance in relation to the situation where a party offers to settle after a Statement of Objections has been issued, stating that the CMA will require the business formally to withdraw any representations it has made on the SO save to the extent that they deal with manifest factual inaccuracies (see paragraph 14.21 of the Draft Revised Guidance). This is because such representations may otherwise tend to undermine the clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement, which is a requirement for settlement (as set out at paragraph 14.7 of the Current Guidance).

Complaints about the CMA's investigation handling, right of appeal and reviewing the CMA's processes – clarification of the scope of the Procedural Officer's role

- 1.46 The CMA's Procedural Officer role provides a way in which parties to a CA98 investigation can raise procedural issues that they have not been able to resolve with the CMA case team or the SRO responsible for the investigation.
- 1.47 The Procedural Officer is independent from CMA investigations, case teams and decision makers. The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively.
- 1.48 The Procedural Officer also chairs oral hearings with parties in CA98 investigations.
- 1.49 The Current Guidance states that the Procedural Officer determines procedural complaints in CA98 investigations that the party has not been able to resolve first with the case team and then the SRO, that relate to the following:

²⁵ See, for example, paragraph 14.13 of the Current Guidance.

- deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the Statement of Objections or Supplementary Statement of Objections
- requests for confidentiality redactions of information in documents on the CMA's case file, in a Statement of Objections or in a final decision
- requests for disclosure or non-disclosure of certain documents on the CMA's case file
- issues relating to oral hearings, including, for example, with regard to issues such as the date of the hearing
- other significant procedural issues that may arise during the course of an investigation.²⁶

1.50 The Current Guidance states that the Procedural Officer is not able to review CMA decisions beyond those listed above, for example decisions on the scope of requests for information or decisions relating to the substance of a case.

1.51 At the time of this consultation, ten Procedural Officer decisions have been published on the [CMA webpage](#).

1.52 The CMA considers that the Procedural Officer process has worked well in achieving the objective of providing an effective mechanism for the efficient resolution of procedural disputes in CA98 investigations. In order to provide additional guidance on the nature of the procedural complaints that fall within the Procedural Officer's remit and thus assist parties in deciding whether to make an application to the Procedural Officer, the CMA has, in the Draft Revised Guidance at paragraphs 15.4 and 15.6, clarified the remit of the Procedural Officer in CA98 cases. The explanation of the role of the Procedural Officer now more closely reflects the wording of Rule 8 of the CMA Rules, which establishes the Procedural Officer's complaint-handling role in CA98 cases as well as guiding parties to the Procedural Officer's previous decisions set out on the [Procedural Officer's webpage on the CMA's website](#). The Draft Revised Guidance also now clarifies that the Procedural Officer's remit includes procedural complaints relating to the Draft Penalty Statement and refers to this in addition to the Statement of Objections and Supplementary Statement of Objections in the list referred to in paragraph 1.49 above.

²⁶ See paragraph 15.4 of the Current Guidance.

Guidance on commitments and other aspects of the Draft Revised Guidance

- 1.53 The CMA has made some small editorial changes in the Draft Revised Guidance and has updated paragraph 6.15 of the Draft Revised Guidance to indicate that section 26A CA98 interviews may take place using remote meeting technology (which in turn reflects opportunities created by recent technological developments). Furthermore, the CMA in Chapter 6 of the Draft Revised Guidance has removed footnote references to the Solicitors Regulation Authority's Guidance on Employer's Solicitors Attending Health and Safety Executive Interviews with Employees, since at the time of this consultation that guidance has been withdrawn from the Solicitors Regulation Authority's webpage.
- 1.54 The CMA has also clarified at paragraph 12.3 of the Draft Revised Guidance that while any request for an extension to the deadline for the submission of written representations will be considered on its own merits, the CMA considers that extensions are only likely to be granted in exceptional circumstances.
- 1.55 With respect to oral hearings, the CMA has stated in paragraph 12.13 of the Draft Revised Guidance that while an Addressee may be accompanied by its legal or other advisers, the CMA would expect representatives of the Addressee's business to attend the oral hearing, and the Case Decision Group would also expect to hear from them when presenting the Addressee's oral representations. This is because in practice Case Decision Groups find that the attendance of such representatives at oral hearings can be of great assistance.
- 1.56 The CMA also proposes to amend paragraph 14.33 of the Current Guidance (see paragraph 14.34 of the Draft Revised Guidance), to make it clear that the CMA has the discretion to decide that it will not pursue a CDO or undertakings against the directors of a business that is under investigation for a breach of competition law, including where it is a settling business, but that this will not be a part of the settlement procedure under the CA98. The CMA has also amended this paragraph to make it clear that:
- Where the CMA has decided not to prioritise a CDDA investigation against one or more directors of a company or not to seek their disqualification, it may make this known to the director and settling business at the time of settlement.

- In some cases, it may also be possible for the CMA to settle a CDDA investigation against one or more directors of a settling business by accepting competition disqualification undertakings from the director or directors concerned at the same time as the settlement of the CA98 case. Where this is the case, the decision to accept a disqualification undertaking will nevertheless be separate from the decision to settle the CA98 case.

The CMA has made these clarifications having regard to its experience with CDDA investigations in settlement cases.²⁷

- 1.57 The UK Government [formally notified the EU on 12 June 2020](#) that the UK will neither accept nor seek any extension to the Transition Period envisaged under the UK/EU Withdrawal Agreement²⁸.
- 1.58 This consultation will conclude approximately three months before the end of the Transition Period. Therefore, although the Draft Revised Guidance is intended to apply for a limited time during the Transition Period, it will be mainly applying after the end of the Transition Period. In light of this, the CMA has removed references to EU law in the Draft Revised Guidance. However, the CMA has added footnote 4 of the Draft Revised Guidance to clarify that during the Transition Period, the CMA will continue to apply Articles 101 and/or 102 of the Treaty on Functioning of the European Union (TFEU) and existing arrangements for the discharge of the CMA's functions will remain unaffected.
- 1.59 Pending the outcome of future relationship negotiations between the UK and the EU, the CMA does not currently propose to remove Chapter 16 of the Current Guidance. Chapter 16 of the Current Guidance describes the use of the CMA's powers of investigation under CA98 for Article 101 and Article 102 TFEU investigations at the request of the European Commission or National Competition Authorities of EU Member States. However, whether, and if so to what extent the CMA will be able to continue to use its powers in this way after the end of the Transition Period may change. As such, the CMA has clarified that Chapter 16 of the Draft Revised Guidance should read as being of application only during the

²⁷ For more information about the CMA's approach to director disqualification, see the CMA's [Guidance on Competition Disqualification Orders](#) (CMA102).

²⁸ Pursuant to Article 126 of the [Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) (UK/EU Withdrawal Agreement) a transition period runs until 11 p.m. (UK time) on 31 December 2020 (the Transition Period).

remainder of the Transition Period. The CMA will be reviewing its guidance in light of the legislative developments.

- 1.60 Section 31D of the CA98 provides that CMA guidance on the circumstances in which it may be appropriate to accept commitments cannot be published without the approval of the Secretary of State.
- 1.61 Chapter 10 of the Current Guidance at paragraphs 10.17 to 10.20 incorporates the current CMA guidance as to the circumstances in which it may be appropriate to accept commitments under the CA98 (the Commitments Guidance).
- 1.62 The latest version of the Commitments Guidance was approved by the Secretary of State on 14 January 2019 and was published and came into effect on 18 January 2019, along with the Current Guidance into which it is incorporated.
- 1.63 Having reviewed the CMA's experience in relation to the acceptance of commitments under the CA98, the CMA does not propose to make any changes to the Commitments Guidance.

Question for consideration

- **Do you have any comments on the CMA's amendments to the Current Guidance proposed in the Draft Revised Guidance?**

2. Legal framework

Introduction

- 2.1 The legal framework that applies to the investigation and enforcement of suspected civil breaches of competition law is described below.
- 2.2 The CA98 prohibits, 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.²⁹ The CA98 gives the CMA powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions in the CA98.³⁰
- 2.4 There are procedural rules that apply when the CMA takes investigative or enforcement action.³¹ In addition, the CMA is required to carry out its investigations and make decisions in a procedurally fair manner according to the standards of administrative law.³² In exercising its functions, as a public body, the CMA must also ensure that it acts in a manner that is compatible with the Human Rights Act 1998.

Duty to publish guidance

- 2.5 The Current Guidance forms part of the advice and information published by the CMA under section 52 of the CA98.

²⁹ However, certain sectoral regulators have concurrent powers with the CMA to apply and enforce the Chapter I and Chapter II prohibitions in the CA98 within their respective regulated sectors. These sectoral regulators also have concurrent competition law powers in respect of market studies and investigations under Part 4 of the EA02.

³⁰ See Chapter III (Investigation and Enforcement) of the CA98. At present, the CMA and sectoral regulators with concurrent powers are also required by EU law to apply the EU competition prohibitions (Articles 101 and/or 102 of the TFEU) alongside the domestic UK prohibitions in certain cases. This will continue to be the case until the end of the Transition Period. During the Transition Period, existing arrangements for the discharge of the functions of the CMA will be largely unaffected. For further information on how EU Exit affects the CMA's powers and processes for competition law enforcement ('antitrust', including cartels), during the Transition Period, towards the end of that period, and after it ends, as well as the treatment of 'live' cases, which are those cases that are being reviewed by the European Commission or the CMA during and at the end of the Transition Period, see the [CMA's Guidance on the functions of the CMA under the Withdrawal Agreement](#).

³¹ See footnote 21 above.

³² See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10.

- 2.6 The CMA may at any time publish revised, or new advice or information,³³ as we are proposing to do with the Draft Revised Guidance under consultation.
- 2.7 The Draft Guidance constitutes advice or information relating to a matter in respect of which the concurrent regulators exercise concurrent jurisdiction and the CMA's consultation on the Draft Revised Guidance will include the concurrent regulators.³⁴

³³ Section 52(2) of the CA98.

³⁴ Section 52(7) of the CA98.

3. Consultation process

How to respond

- 3.1 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We welcome your comments on the changes to the Current Guidance that are proposed in the Draft Revised Guidance.
- 3.2 Please provide supporting evidence for your views where appropriate. We encourage you to respond to the consultation in writing (by email) using the contact details provided in paragraph 3.6 below.
- 3.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 3.4 In pursuance of our policy of openness and transparency, we will publish non-confidential version of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and explain why you regard it as sensitive at the same time (see further paragraphs 3.8 to 3.12 below).

Duration

- 3.5 The consultation will run from 5 August to 10 September 2020.

Contact details

- 3.6 Responses should be submitted by email by no later than midnight on **10 September 2020** and should be sent to:
CA98proceduresguidance@cma.gov.uk

Compliance with government consultation principles

- 3.7 In preparing this consultation, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

- 3.8 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 3.9 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the Draft Revised Guidance, before it is finalised and issued.
- 3.10 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 3.11 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to 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, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, 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, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 3.12 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 3.13 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

After the consultation

- 3.14 After the consultation, we will decide whether to make the changes proposed in the Draft Revised Guidance and whether any further changes are necessary. We will continue to engage with the concurrent regulators on the text of the Draft Revised Guidance.
- 3.15 We will publish the final version of the Draft Revised Guidance on our webpages at <http://www.gov.uk/cma>. We will also publish a summary of the responses received during the consultation. These documents will be available on our webpages and respondents will be notified when they are available.