

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

Consultation document

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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), as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13), 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 adopted on 12 March 2014 and took effect from 1 April 2014. It superseded previous guidance issued by its predecessor, the Office of Fair Trading (OFT).
- 1.3 There have been no updates made to CMA8 since it took effect. In the four years since then the CMA has had significant experience of applying the guidance in practice and has gained knowledge of where there is scope for improvement or enhancement of CA98 investigation procedures and where amendment of the CMA8 guidance might better reflect current investigation and decisional practice. We therefore have taken the opportunity to review CMA8 with a view to:
- facilitating, wherever possible, procedural efficiencies that we consider will support our aim of progressing and concluding our CA98 investigations as quickly as possible, while maintaining our commitment to due process and robust decision making
 - updating the guidance to reflect our current CA98 investigation and decisional practice, which has developed in light of experience gained since 2014, when CMA8 was adopted.
- 1.4 In this consultation paper, the existing text of CMA8 is referred to as the Current Guidance. The draft revised test 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

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.

amendments to the Current Guidance that are proposed in the Draft Revised Guidance.

- 1.5 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 this consultation

- 1.6 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.
- 1.7 The specific questions on which we are seeking respondents' views are provided in Chapter 8 of this consultation document.
- 1.8 The geographical scope of this consultation is primarily the UK.
- 1.9 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

- 1.10 Our review of the Current Guidance has not identified a need for significant change or overhaul to the fundamental processes, the key case milestones or the decision-making arrangements of our CA98 investigations. Further, we are not aware of significant concerns from external stakeholders regarding the CMA's existing CA98 procedural practice.
- 1.11 The changes to the Current Guidance proposed in the Draft Revised Guidance and explained in this consultation document largely reflect the two related purposes discussed in paragraph 1.3 above. We have also simplified and clarified the Current Guidance at certain points. Together, it is hoped that the proposed changes will increase transparency and promote greater certainty for businesses and other interested parties on our CA98 procedures.
- 1.12 The revisions proposed in the Draft Revised Guidance, will support the CMA's goal of delivering effective CA98 enforcement. Enforcement action plays a central role in the CMA's work to secure compliance with competition law and, in turn, enables markets to work better, to the overall benefit of the economy and our society.

- 1.13 There has been a marked increase in the CMA's competition law enforcement activity in recent years. In each of 2016 and 2017 we launched 11 new CA98 investigations, which is 60% higher than the annual average between 2010 and 2015. Further, in 2017 we issued nine CA98 decision comprising six infringement decisions, two commitments decisions and one no grounds for action decision.
- 1.14 Moreover, our Annual Plan 2018/19 states: 'we will build on our progress in taking forward a higher volume of cases, and doing so as efficiently and quickly as possible, without compromising fairness and rigour'.³ In 2017/18 we increased our annual target for launching CA98 investigations, from four to six. We are further increasing this target for 2018/19, to ten new investigations. We also commit in our Annual Plan to continuing to improve processes and to challenge our ways of working to decrease the time taken to conclude CA98 investigations against a rolling three-year average benchmark.⁴ We will do so while retaining high procedural standards and analytical rigour, ensuring that our decisions are well-reasoned, robust and take account of all relevant considerations.
- 1.15 With the UK's exit from the EU, and the anticipated increase in the CMA's competition law enforcement caseload as a result, it is all the more important that we review our procedures and processes in this way. As a rough estimate, we think that EU exit might result in us taking on an additional five to seven complex cartel/antitrust cases per year.
- 1.16 It is against this wider context of a continued increase in and reduction in the time taken to conclude of our competition law enforcement activity (as well as our general duty to carry out our work efficiently and effectively and make the best possible use of our limited resources) that we reviewed the Current Guidance and now seek stakeholders' views on the changes proposed in the Draft Revised Guidance. We believe that these changes will achieve procedural efficiency savings and simplifications, as well as enhancing clarity and certainty for businesses.
- 1.17 In summary, the more substantial changes are as follows:

³ See paragraph 2.6 of our Annual Plan 2018/19, available at: <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2018-to-2019>

⁴ See paragraph 2.34 of our Annual Plan 2018/19.

Subject matter	Summary of main proposal(s)	Relevant Chapter in this consultation document
Complaint handling	<p>Formal Complainant status: We propose to have a single approach for complainants and consequently to cease the practice of granting Formal Complainant status to certain complainants.</p> <p>How to make complaints to the CMA: We update the guidance to reflect current processes for complainants to contact the CMA and ways in which they can make complaints anonymously.</p>	Chapter 3
Information handling	<p>Access to file: We propose to adopt as the normal approach a form of streamlined access to file whereby parties are provided with the key documents referred to in the Statement of Objections without limiting the right of parties to request access to some or all of the non-key documents on the file.</p> <p>Confidential information: We update the guidance to reflect current practice around the submission of representations on the confidentiality of information provided to us.</p>	Chapter 4
Interim measures	We propose to include material from our guidance on the enforcement of competition law (OFT407), which we propose to withdraw, and make clarifications regarding the process for applying for interim measures and arrangements for access to the CMA’s file relating to the proposed interim measures direction.	Chapter 5
Engagement with the parties	Oral hearing on draft penalty statement: We propose certain amendments around oral hearings on draft penalty statements, to ensure	Chapter 6

Subject matter	Summary of main proposal(s)	Relevant Chapter in this consultation document
	<p>that these arrangements are as efficient as possible.</p> <p>Deadlines for responding: We propose greater flexibility around the setting of appropriate deadlines (for example, around responding to information requests or providing written representations on a Statement of Objections), depending on the circumstances of each case.</p> <p>State of play meetings: We clarify arrangements for state of play meetings, reflecting current case practice.</p> <p>Involvement of complainants and third parties in investigations: We propose amendments to reflect how complainants (given the proposed removal of Formal Complainant status) and other third parties may be involved at various stages of an investigation.</p>	
Commitments	We propose to incorporate material from OFT407, which we propose to withdraw, and make clarifications regarding the acceptance of commitments from a business relating to its future conduct.	Chapter 7

1.18 In developing these proposals, we have been careful not to compromise the rigour or procedural fairness of our investigations. We are concerned to ensure that parties’ rights of defence remain respected, while seeking to be as agile and efficient as possible in the delivery of our investigations.

1.19 We propose to withdraw our existing guidance on our powers of investigation (OFT404) and the enforcement of competition law (OFT407). We have therefore incorporated material from OFT404 and OFT407 into the Draft Revised Guidance (including in the new Chapter 16 which contains

procedural information on the CMA's application and enforcement of Articles 102 and 102 TFEU).

- 1.20 We have also made changes to reflect the withdrawal, in August 2015, of our former guidance on involving third parties in competition investigations (OFT451), and omitted Annex A of the Current Guidance which showed the status of OFT guidance at the time the Current Guidance was adopted in 2014.⁵
- 1.21 We have also made other less substantial changes throughout the Draft Revised Guidance, including to:
- accurately reflect current case practice
 - better reflect the underlying law
 - streamline the guidance, for example by omitting superfluous references to internal organisational aspects, removing repetition, and relocating text so that points appear in the most relevant Chapter of the guidance
 - update references to external organisations such as the concurrent regulators
 - clarify points or simplify the drafting
- 1.22 We welcome stakeholder engagement and feedback on our proposals. We also welcome views on whether there are other opportunities for making procedural efficiency savings and/or streamlining the Current Guidance that we may have missed.

Structure of this consultation document

- 1.23 This consultation document focuses on the five subject matter areas, and the main proposals for each, summarised in the table above. We explain the rationale for the principal proposed changes in Chapters 3 to 7.

⁵ We have updated references to our other published guidance, including: informant rewards policy; Procedural Officer: raising procedural issues in CMA cases; agreements and concerted practices (OFT401); abuse of a dominant position (OFT402); cartels (OFT435); the prosecution of the cartel offence (CMA9); competition law modernisation, including the application of EC Regulation 1/2003 and the UK's legal exception regime (OFT442); business advice on competing fairly (OFT447); director disqualification (OFT510); applications for leniency and no-action in cartel cases (OFT1495); administrative penalties (CMA4); transparency and disclosure (CMA6); regulated industries and the concurrent application of competition law (CMA10); the CMA's prioritisation principles (CMA16); and the appropriate amount of a penalty (CMA73).

1.24 In Chapter 8 we set out the consultation questions which we invite respondents to think about.

Consultation process

- 1.25 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.
- 1.26 Please provide supporting evidence for your views where appropriate. We encourage you to respond to the consultation in writing (by email or alternatively by letter) using the contact details provided at paragraph 1.31 below.
- 1.27 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 responding on behalf of an organisation, please make it clear who you are representing and, where applicable, how the views of the members of the organisation were assembled.
- 1.28 In accordance with its policy of openness and transparency, the CMA will publish non-confidential versions of responses on the CMA's webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication on the CMA's webpages and explain why you regard the excluded information as confidential (see further paragraphs 1.33 to 1.36 below).

Duration

1.29 The consultation will run for six weeks, from 21 June 2018 to 2 August 2018.

Contact details

1.30 Responses should be submitted by post or email, by no later than 5pm on 2 August 2018, and should be sent to:

CA98 Procedures Guidance Team
Policy and International
Competition and Markets Authority
6th Floor
Victoria House
37 Southampton Row
London WC1B 4AD

Email: CA98proceduresguidance@cma.gsi.gov.uk

Compliance with government consultation principles

1.31 In consulting, 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.

1.32 The consultation period is six weeks. We consider that this is appropriate in light of the limited extent of the proposed changes.

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

1.33 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. We are processing this personal data for the purposes of our work. This work relates to preparing and publishing general advice and information about the enforcement of the competition law under section 52 of the CA98, and keeping such advice and information under review. This processing is necessary for the performance of our functions and is carried out in the public interest in order to ensure that we properly consult on the Draft Revised Guidance before it is finalised and issued. 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 Personal Information Charter at www.gov.uk/government/organisations/competition-and-markets-authority/about/personal-information-charter.

- 1.34 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.
- 1.35 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 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 the Enterprise Act 2002.
- 1.36 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

- 1.37 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.
- 1.38 We will publish the final version of the Draft Revised Guidance on our webpages at 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.

The UK's exit from the EU

- 1.39 The CMA also has powers to apply and enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) alongside the European Commission. These two provisions are similar to the Chapter I prohibition and the Chapter II prohibition under the CA98. The main difference between the UK and the EU provisions is the geographic scope of the effect on trade. Articles 101 and 102 of the TFEU only apply to agreements and conduct which may affect trade between Member States.⁶ The Chapter I and Chapter II prohibitions apply to agreements and conduct which may affect trade within the UK.
- 1.40 Consequently, the Current Guidance contains certain references to EU competition law and EU institutions. It is likely there will be some further textual amendment needed following the UK's exit from the EU. However, given that the full terms of the UK's exit have yet to be finally agreed, we do not consider it appropriate at this time to make changes to the Current Guidance in relation to EU exit. In any event, we consider that the extent of references to EU competition law and EU institutions in the Current Guidance is limited.

Review of regime

- 1.41 We note that section 46 of the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) required the Secretary of State, by April 2019, to 'review the operation of [Part I of the CA98, i.e. the enforcement provisions]' and 'publish a report on the outcome of the review', to be laid before Parliament.
- 1.42 The ERRA 2013 review process is separate from our review of the Current Guidance and this consultation on the Draft Revised Guidance.

⁶ The case law of the European Court has interpreted the phrase 'may affect trade between Member States' broadly.

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 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.⁷ 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.⁸
- 2.4 Under EU legislation,⁹ as a 'designated national competition authority', when the CMA applies national competition law either 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.¹⁰
- 2.5 There are procedural rules that apply when the CMA takes investigative or enforcement action.¹¹ 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.¹²
- 2.6 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.

⁷ However, certain sectoral regulators have concurrent powers with the CMA to apply and enforce the Chapter I and Chapter II prohibitions in the CA98 and Articles 101 and 102 of the TFEU 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.

⁸ See Chapter III (Investigation and Enforcement) of the CA98.

⁹ Article 3 of Council Regulation (EC) No 1/2003 (OJ L1, 4.1.2003, p.1), as amended.

¹⁰ The relevant sectoral regulators are also designated national competition authorities within their respective sectors.

¹¹ The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458 (the CA98 Rules).

¹² See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10.

Duty to publish guidance

- 2.7 The Current Guidance forms part of the advice and information published by the CMA under section 52 of the CA98.
- 2.8 The CMA may at any time publish revised, or new advice or information,¹³ as we are proposing to do with the Draft Revised Guidance under consultation.
- 2.9 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.¹⁴

Secretary of State approval

- 2.10 Chapter 10 of the Current Guidance looks at the outcomes of our investigations and includes references to accepting commitments from parties on their future conduct.
- 2.11 We propose to withdraw our former guidance on the enforcement of competition law (OFT407), the contents of which (including in relation to commitments) overlapped with, and in part was duplicated in, the Current Guidance. As necessary, we have incorporated in the Draft Revised Guidance aspects of OFT407 not covered elsewhere.
- 2.12 Under section 31D of the CA98, our guidance on the circumstances in which it may be appropriate to accept commitments cannot be published without the approval of the Secretary of State.
- 2.13 Accordingly, after we have considered the responses to this consultation on the Draft Revised Guidance and made any necessary changes, we will also consult with, and seek approval to publish from, the Secretary of State on that part of Chapter 10 which concerns the circumstances in which it may be appropriate to accept commitments.

¹³ Section 52(2) of the CA98.

¹⁴ Section 52(7) of the CA98.

3. Guidance on complaint handling

- 3.1 In this Chapter, we explain the principal changes to the Current Guidance we are proposing that relate to the handling of complaints about suspected cartels or other potentially anti-competitive activity.

Formal Complainant status

- 3.2 The Current Guidance (mainly paragraphs 5.12 to 5.16) sets out guidance on the granting of Formal Complainant status, in relation to an investigation, to any person who has submitted a written, reasoned complaint to the CMA, who requests Formal Complainant status, and whose interests are, or are likely to be, materially affected by the subject matter of the complaint. The Current Guidance also says that Formal Complainants have the opportunity to become involved at key stages of the investigation.
- 3.3 In essence, the approach taken in the Current Guidance suggests a ‘two-tier’ complainant system whereby there are ‘standard’ complainants and those who apply for Formal Complainant status and subsequently have a greater involvement in the process. There is no statutory basis for such a ‘two-tier’ approach to complainants.
- 3.4 Our review of our CA98 procedures has also shown that Formal Complainant status has been infrequently requested by complainants, strongly suggesting that the status is not seen as an essential, or even a desirable, part of making a complaint to the CMA. Further, we do not consider that the removal of Formal Complainant status would result in a material diminution in the way that complainants are treated.
- 3.5 None of the national competition authorities we liaised with adopt a similar distinction between formal and standard complainants.
- 3.6 The changes we propose in the Draft Revised Guidance are intended to simplify our complaints procedures, and to more accurately reflect current CMA practice in handling complaints, by omitting references to Formal Complainants and having only a single common system for dealing with complaints. This would remove uncertainty for businesses and case teams, save resources where work might otherwise have been generated by having the ‘two-tier’ system, and bring the CMA into line with the practice of international counterparts.
- 3.7 In addition to the changes we have proposed around the removal of Formal Complainant status in Chapter 5 of the Draft Revised Guidance, there are consequential amendments in Chapters 4, 8, 9, 10, 12 and 13.

How to make complaints to the CMA

- 3.8 The Current Guidance (paragraphs 3.13 and 3.14) explains how to inform the CMA of a competition complaint.
- 3.9 In the Draft Revised Guidance, we have updated the information on the channels through which complainants can contact us, and added information on how to make complaints anonymously.¹⁵
- 3.10 We also note that, if we decide to open a formal investigation, we may, at some point during the course of that investigation, need to reveal a complainant's identity and/or the information supplied by it, so as to allow the business under investigation to respond properly to the information provided. We will aim not to – and, in practice, generally will not need to – reveal a complainant's identity without their consent until a Statement of Objections is issued. Before disclosing a complainant's identity or any of their information, the CMA will contact the complainant (or its representative, as appropriate) to give an opportunity to comment.

¹⁵ We have also included a reference to our informant reward policy. We offer financial rewards of up to £100,000 (in exceptional circumstances) for information about cartel activity.

4. Guidance on information handling

- 4.1 In this Chapter, we explain the principal changes to the Current Guidance we are proposing that relate to the handling of information received during an investigation, including around the disclosure of confidential information.

Access to file

- 4.2 Access to the CMA's file is given pursuant to Rule 6 of the CA98 Rules, which provides that parties must be given a 'reasonable opportunity to inspect the documents in the CMA's file that relate to the matters referred to in the [Statement of Objections]'.
- 4.3 Current case practice is for case teams to consider and often use a streamlined approach to access to file where the parties are provided with: (i) those documents the contents of which are relied upon or referred to in the Statement of Objections, often referred to as the 'key documents' and (ii) a detailed schedule listing all disclosable documents (whether key or non-key) on the case file. In some cases non-key documents are provided to the parties' legal representatives in a confidentiality ring, where parties can subsequently request disclosure of further documents.
- 4.4 These approaches are not expressly referred to in the Current Guidance (or in the CMA's Transparency and Disclosure Statement (CMA6)). They can allow for significant efficiencies where used. Across a range of CA98 cases, varying in size and complexity, key documents have constituted around 5% to 15% of the case file. Preparing and disclosing the full case file can involve considerable time and resources, for both the parties under investigation and the CMA, yet the majority of documents on the case file provide no benefit to either side.
- 4.5 Streamlined access to file can therefore provide a substantial time and resource saving for all parties given the significant reduction (over 85%) in the number of documents to be disclosed. We estimate that a streamlined process can reduce the length of the process up to the issuing of the Statement of Objections by at least one or two months, and free up CMA resource.
- 4.6 A streamlined approach to access to file does not change the nature of the case or the parties' right to inspect any disclosable document on that file (as per Rule 6 of the CA98 Rules). Full access to all key and non-key documents would, if requested, be provided (subject to normal confidentiality constraints), although an option in such a situation would be to make use of confidentiality rings. Case experience has shown, however, that in cases where streamlined

access to file was agreed with the parties, and those parties did take up the opportunity to request additional documents, their requests were limited. The approach, therefore, still yielded time and resource savings compared to an approach where all of the disclosable case file was provided on the CMA's own initiative.

4.7 Given the potentially significant time and resource savings, we consider that such streamlined access to file, which fully preserves the parties' rights of defence, should be the normal or typical mode of disclosure. The Draft Revised Guidance describes an approach which we consider strikes the right balance. In summary:

- Prior to issuing the Statement of Objections, the CMA will discuss with the businesses under investigation the process envisaged for giving access to the CMA's file. This may be discussed as part of a state of play meeting, or in writing.
- Addressees of the Statement of Objections will have a reasonable opportunity to inspect the file. The time given to do so will take into consideration a number of factors including the size of the file, the nature of the documents and the access to file process being used. Generally, the time period for inspecting the file will coincide with that given for the provision of written representations.
- Typically, we will provide addressees with those documents that are directly referred to in the Statement of Objections, together with a schedule containing a detailed list of all the documents on the CMA's file. These will usually be given in electronic form by secure email.
- Addressees will have an opportunity to inspect additional documents listed in the schedule upon request indicating why the documents are being requested. We will set a deadline in which such requests for further documents can be made.
- Where a business requests further documents, we may consider the use of a confidentiality ring and/or data room in order to facilitate disclosure.

4.8 Within the process described above, the parties will clearly be told – at the relevant time(s) that they may request access to some or all of the non-key documents on the file (and listed in the schedule), and that such access would be granted, subject to normal confidentiality protections.

- 4.9 In developing the above proposed process, we have had regard to the practice of other national competition authorities, including the European Commission.
- 4.10 The above approach is reflected in changes proposed in Chapter 11 of the Draft Revised Guidance.

Confidential information

- 4.11 Chapters 7, 12 and 13 of the Current Guidance contain guidance on various aspects of the CMA's approach to the handling of confidential information. We have reconsidered the Current Guidance on these points.

Pre-Statement of Objections

- 4.12 Chapter 7 (paragraphs 7.8 to 7.10) of the Current Guidance sets out that non-confidential versions of information or documents are to be provided to us at the same time the confidential information or documents are provided. In the light of case experience, we consider that it is often not practicable for parties to provide a non-confidential version of information or documents upfront, since they may know little about the nature and scope of the investigation and what information the CMA might rely on. Requiring early confidentiality representations in this way might therefore create unnecessary burdens on the parties under investigation and the CMA.
- 4.13 To allow for greater flexibility and a case-by-case determination on when best to obtain confidentiality representations (including situations where the CMA might wish to assess the confidentiality of the information and documents in its possession first before seeking the views of the parties), we have modified the Draft Revised Guidance to remove the requirement to provide non-confidential versions at the same time the original information and documents are provided. We now say that, during the course of an investigation, we may request confidentiality representations. In doing so, we will set a deadline for the representations to be provided.
- 4.14 Where we do not receive any representations within the deadline, we will generally give one further opportunity for representations to be made. In the absence of such representations, we will then assume that no confidentiality is being claimed.

Post-Statement of Objections

- 4.15 Chapter 12 (paragraphs 12.5 and 12.6) of the Current Guidance explains that the non-confidential version of written representations on the Statement of

Objections should be provided at the same time as the original response and in any event no later than four weeks from the date of submitting the original response. Further, we state, in the event that the CMA has not received a non-confidential version within this deadline, the addressee of the Statement of Objections will be given one further opportunity to make confidentiality representations.

- 4.16 We recognise that some respondents to a Statement of Objections may wish to focus on their substantive representations before preparing a non-confidential version of their responses. However, we consider that a maximum of two further weeks beyond the deadline for submission of written representations is sufficient if a respondent wishes to sequence its work in this way. We have amended the Draft Revised Guidance accordingly.
- 4.17 Paragraph 12.37 of the Current Guidance Says that where draft penalty statements are issued to multiple parties, non-confidential versions will be placed on the file and may be inspected by the other parties. We have clarified in the Draft Revised Guidance that each non-confidential version will generally be disclosed to the other parties under investigation.

Post-Decision

- 4.18 Chapter 13 (paragraphs 13.9 and 13.11) addresses confidentiality in the context of the publication of an infringement decision.
- 4.19 We wish to publish, as soon as possible, a non-confidential version of the infringement decision on the case page on the CMA's webpages. In respect of the preparation of this non-confidential version, the addressees of the decision will have one further opportunity to make representations on the confidentiality of information contained in the decision. The Current Guidance says that the deadline for such representations will normally be four weeks for the date of the issue of the decision. We consider that gathering these representations could potentially be done earlier and we wish to retain flexibility to do so in appropriate cases. Accordingly, we have amended the Draft Revised Guidance to note that these representations will be gathered either shortly before or after the infringement decision is issued to the addressee.

5. Guidance on interim measures

- 5.1 In this Chapter, we explain the principal changes to the Current Guidance we are proposing that relate to the giving of temporary directions (interim measures) in certain circumstances.
- 5.2 Chapter 8 (paragraphs 8.1 and 8.2) of the Current Guidance explain the circumstances in which the CMA has the power to issue interim measures.
- 5.3 In the Draft Revised Guidance, we have included material from OFT407 (which we are proposing to withdraw) and made clarifications.
- 5.4 We have added text on the kinds of relevant considerations we will have regard to before exercising our discretion to make an interim measures direction. We have also clarified that we may not issue interim measures if we are investigating an agreement and a person has adduced evidence to us in connection with the investigation that satisfies us on the balance of probabilities that the agreement would satisfy the relevant conditions for exemption.
- 5.5 Paragraph 8.8 of the Current Guidance explains that applicants should provide as much information and evidence as possible to demonstrate their case for interim measure, and indicate the nature of the interim measure sought. In the Draft Revised Guidance, we have included further information on what an applicant should do, including providing a written declaration that what they submit to us is true, correct and complete. We have also added, as an annex to the Draft Revised Guidance, a template declaration of truth. We consider that such a declaration will help us to progress an interim measures application more expeditiously, as we can have some assurance that the statement is made with an honest belief as to the accuracy of the information provided with the application, which in turn means that the we might need to make less use of our compulsory powers in respect of such information.
- 5.6 We also add guidance on the provision of non-confidential versions of the information and evidence submitted by the applicant, and note that it may be necessary to provide these non-confidential versions to the parties in relation to which the application for interm measures has been made. We also note that it may be necessary for unredacted information that the applicant considers confidential to be placed into a confidentiality ring or data room.
- 5.7 Paragraph 8.10 of the Current Guidance explains that the business to which an interim measures direction is addressed will be given an opportunity to inspect the CMA's file relating to the proposed direction.

- 5.8 In the Draft Revised Guidance, we have clarified that the business will be given a reasonable opportunity to inspect documents on our file (in accordance with Rule 13 of the CA98 Rules). We have explained that what we consider is a reasonable opportunity for this purpose will depend on the circumstances of the case, taking into account such factors as the urgency of the situation and the likely impact of the proposed interim measures. We also expand on the nature of the access to the file that will be given. In view of the nature of interim measures and the urgency of taking action to prevent significant damage to a particular person or category of person, or to protect the public interest, we will typically only provide those documents which are relied on in the proposed interim measures direction. Additionally, we will provide a schedule of additional documents on our file with an opportunity for the business to request documents where it is necessary for their rights of defence.
- 5.9 We have also clarified that we may withhold confidential information or internal documents from disclosure (as per Rule 6(2) of the CA98 Rules). We note also that there may be circumstances in which it is appropriate to provide access to certain documents by using a confidentiality ring or data room.
- 5.10 We discuss access to the CMA's file more generally, and proposed changes to the Current Guidance in respect of access to file arrangements, in Chapter 4 of this consultation document.

6. Guidance on engagement with the parties

6.1 In this Chapter, we explain the principal changes to the Current Guidance we are proposing that relate to arrangements for parties under investigation to exercise their right to reply, in writing and/or at oral hearings, and to how we engage with them, as well as complainants and other third parties, during our investigations.

Oral hearing on the draft penalty statement

6.2 A number of the changes proposed in the Draft Revised Guidance and summarised in this Chapter reflect our desire to ensure that, following the issue of a Statement of Objections, an investigation can progress towards a conclusion as expeditiously as possible, while respecting the parties' right to reply.

6.3 As part of the process of reviewing the Current Guidance (and in particular paragraphs 12.32 to 12.36), we gave thought to a further change around oral hearings on draft penalty statements. We consider that it may be somewhat artificial to have two separate oral hearings: one regarding representations on the Statement of Objections and one regarding representations on the draft penalty statement. Having two hearings can potentially introduce unnecessarily delay into the process, for example where a party may elect not to make oral representations on the draft penalty statement but where case teams have made preparations or planned for the eventuality that one were requested.

6.4 Our experience suggests that there may be limited value from oral hearings on draft penalty statements in circumstances where, for example, written representations are likely to be short and targeted at specific points and where the likelihood for questions from the Case Decision Group is low. An oral hearing might add little to what written representations contain. In practice, requests for oral hearings on draft penalty statements have been made infrequently. The majority of parties provided with a draft penalty statement have decided not to avail themselves of the opportunity for an oral hearing.

6.5 With these points in mind, we propose certain amendments around oral hearings on draft penalty statements which are intended to ensure that current arrangements are as efficient as possible. We consider that:

- such oral hearings should be conducted by telephone or video conference rather than held in person to facilitate scheduling (for example, where parties are based overseas) and reduce costs

- the minimum composition of the oral hearing be as follows: the Procedural Officer (Chair), the Chair of the Case Decision Group, members of the case team, the General Counsel and the Chief Economic Adviser (or their representatives)¹⁶
- an oral hearing, if requested, should take place after the deadline for the submission of written representations on the draft penalty statement, allowing time for the Case Decision Group to consider those representations (and we propose to remove the reference in the guidance to the hearing taking place to 20 working days after the deadline for written representations).

6.6 As noted above, we consider that, in practice, parties will often consider that providing written representations on a draft penalty statement will be sufficient. Where the Case Decision Group has further questions, it may ask these in writing. To the extent that a party does request an oral hearing on the draft penalty statement, we believe that the approach described above provides such an opportunity, as required by Rule 6 of the CA98 Rules, while ensuring that such hearings, where requested, are as efficient and streamlined as possible.

Deadlines for responding

6.7 Paragraphs 6.12 and 6.13 of the Current Guidance explain the CMA's approach to setting a deadline for a response to a written information request. In the Draft Revised Guidance, we have clarified that a recipient of an information request must provide reasons for requesting an extension to the deadline set for response.

6.8 Paragraph 12.3 of the Current Guidance explains that the deadline for providing written representations on a Statement of Objections will depend on the circumstances of the case but will usually be at least 40 working days and not more than 12 weeks. We have reconsidered the guidance on this point. The period given for written representations will be set on a case-by-case basis having regard to circumstances including, for example, the volume of documentary evidence relied upon in the Statement of Objections and the particular circumstances of the addressee. Given that there may be circumstances in which 40 working days is longer than is necessary and appropriate for parties to properly exercise their right to reply, we propose to remove the suggestion that there is a predictable minimum bound on the

¹⁶ Any member of the Case Decision Group not in attendance will be provided with a transcript of the hearing.

appropriate window for written representations. We have amended the Draft Revised Guidance accordingly.

- 6.9 We have also noted that any requests for an extension to the deadline for written representations on a Statement of Objections should be communicated to the CMA at the time the deadline is set, and must specify the reasons why an extension is required.¹⁷
- 6.10 Paragraph 12.27 of the Current Guidance describes the process whereby new evidence supporting the objection(s) set out in the Statement of Objections will be put to the addressee in a letter of facts so they have an opportunity to respond. We have made minor clarifications in the Draft Revised Guidance to explain that this process will take place where the Case Decision Group is considering relying upon the new evidence to establish an infringement and that we will set a time frame for responding to a letter of facts according to the volume and complexity of that new evidence.
- 6.11 Paragraphs 12.28 and 12.29 of the Current Guidance describe the process whereby the CMA will issue a Supplementary Statement of Objections where new information is received in response to a Statement of Objections that indicates there is evidence of a different suspected infringement or there is a material change in the nature of the infringement. In the Draft Revised Guidance, we have clarified that the Supplementary Statement of Objections will set out the new set of facts or changes in the nature of the infringement on which the CMA proposes to rely. We have noted that a Supplementary Statement of Objections will not be issued where, for example, the scope of a suspected infringement has reduced.
- 6.12 We have also clarified that the time frame for responding to a Supplementary Statement of Objections will depend on the extent of the matters addressed. We have omitted the comparison to the length of time given to respond to the original Statement of Objections, since we do not think this is a very relevant comparator.¹⁸

State of play meetings

- 6.13 Paragraphs 9.15 to 9.18 of the Current Guidance describe the ‘state of play’ meetings between the CMA and the parties under investigation.

¹⁷ Similarly, we have clarified in the Draft Revised Guidance that any requests for an extension in the context of written representations on a draft penalty statement must specify the reasons why an extension is required.

¹⁸ Similarly, in respect of the time frame for providing written representations on a draft penalty statement, we have omitted the comparison to the length of time given to respond to the Statement of Objections.

6.14 In the Draft Revised Guidance, we have made various clarifications to ensure that case practice is accurately described. We note that:

- we will generally provide case updates to businesses under investigation either by telephone or in writing
- we will also offer each party an opportunity to speak with representatives of the case team to ensure that they are aware of the stage the investigation has reached
- at ‘state of play’ meetings, which may be held by telephone or video conference, parties will be provided with further information on the nature and scope of the investigation
- we may share the case team’s provisional thinking on a case at a state of play meeting
- usually, we will hold a state of play meeting once we have undertaken some investigatory steps, and invite parties to a further state of play meeting before a decision is taken on whether to issue a Statement of Objections
- in all cases where a Statement of Objections is issued, we will provide an update, usually by telephone, to each party after we have received all parties’ representation
- we may provide updates to parties on other occasions.

Involvement of complainants and third parties in investigations

6.15 We have made certain amendments in the Draft Revised Guidance to set out details on how complainants (given the proposed removal of Formal Complainant status) and other third parties may be involved at various stages of an investigation.

6.16 Paragraphs 10.2 to 10.11 of the Current Guidance refer to the steps the CMA will take where an investigation is to be closed on the basis of administrative priorities. In respect of cases that we are considering closing on basis of administrative priorities or no grounds for action, we have amended the Draft Revised Guidance to say that we may inform in writing any complainants whose complaint led to the investigation and whose interests are directly and materially affected by the outcome of our case. We also set out how we will consider whether a complainant is directly and materially affected.

- 6.17 We set out that such complainants will be given an opportunity to submit comments or additional information (generally in a period not exceeding four weeks).
- 6.18 Paragraphs 12.7 to 12.10, 12.12 and 12.30 of the Current Guidance refer to arrangements for giving complainants and third parties who may be able to materially assist the CMA's assessment of a case an opportunity to submit written representations in response to a Statement of Objections.
- 6.19 We have amended the Draft Revised Guidance to to reflect that we may provide an opportunity to submit representations on a non-confidential version of the Statement of Objections to a complainant whose complaint has led to the investigation and whose interests are directly and materially affected by the outcome of the case, or to third parties or complainants who are directly and materially affected by the outcome of the case as well as being likely materially to assist the investigation and have requested the opportunity to comment on the Statement of Objections.
- 6.20 We also note that we will not provide complainants or third parties with an opportunity to comment where doing so risks prejudice to the case or a related investigation.
- 6.21 We consider that the deadline for complainants or third parties to provide their written representations on a non-confidential version of the Statement of Objections should be set on a case-by-case basis. We have amended the Draft Revised Guidance accordingly.

7. Guidance on commitments

- 7.1 In this Chapter, we explain the principal changes to the Current Guidance we are proposing that relate to accepting commitments from a business relating to its future conduct.
- 7.2 We are proposing to withdraw our former guidance on the enforcement of competition law (OFT407) which incorporated guidance as to the circumstances in which it may be appropriate to accept commitments. We have therefore included aspects of the OFT407 within Chapter 10 of the Draft Revised Guidance which, going forward, will represent the CMA's statutory guidance on commitments for the purposes of section 31D of the CA98: that is, paragraphs 10.17 to 10.20 of the Draft Revised Guidance.
- 7.3 We have also included in Chapter 10 of the Draft Revised Guidance further material taken from OFT407, including text explaining:
- that commitments may be structural or behavioural in nature, or a combination of both
 - that the CMA may ask, for example at a state of play meeting, whether the business wishes to offer commitments
 - what happens after the CMA has accepted commitments
- 7.4 We have also made some further amendments in Chapter 10, including to clarify that commitments can be agreed at any time, not only after a Statement of Objections has been issued, and that we can accept them where we are satisfied that they address our competition concerns.

8. Consultation questions

Question 1: Do you agree with the proposed changes to the Current Guidance on complaint handling (described in Chapter 3)? Please give reasons for your views.

Question 2: Do you agree with the proposed changes to the Current Guidance on information handling (described in Chapter 4)? Please give reasons for your views.

Question 3: Do you agree with the proposed changes to the Current Guidance on interim measures (described in Chapter 5)? Please give reasons for your views.

Question 4: Do you agree with the proposed changes to the Current Guidance on engagement with the parties (described in Chapter 6)? Please give reasons for your views.

Question 5: Do you agree with the proposed changes to the Current Guidance on commitments (described in Chapter 7)? Please give reasons for your views.

Question 6: Do you agree with the other proposed changes to the Current Guidance. Please give reasons for your views.

Question 7: Are there other aspects of our CA98 investigation procedures where you think further changes could be made to enhance the efficiency of our investigations or improve certainty for businesses? Please explain which aspects and why.

Question 8: Are there other aspects of the Current Guidance which you consider could be streamlined or simplified? Please explain which aspects and why.