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

Response to Consultation

4 November 2020
CMA8resp

Contents

1. Introduction and summary

1.1 The Competition and Markets Authority (CMA)[1] has set out in published guidance general information on its practices and processes in connection with 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 It superseded previous guidance issued by the CMA's predecessor, the Office of Fair Trading (OFT).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]

1.5 Since the Current Guidance was published, there have been a number of developments relevant to the CMA's CA98 procedures.

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[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 CA98.

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

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 (then Chair of the CMA), to the Secretary of State for BEIS in 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

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[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.

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 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.

1.10 Having done so, the CMA commenced a consultation which ran from 5 August to 10 September 2020 (the Consultation) on proposed changes to the Current Guidance. As part of the Consultation, the CMA published a consultation document which explained the proposed changes ('the Consultation Document'), as well as a draft revised version of the Current Guidance showing the proposed changes ('the Draft Revised Guidance'). The Draft Revised Guidance retained unaltered the CMA's guidance on the circumstances in which it may be appropriate to accept commitments under section 31A CA98 ('Commitments Guidance'), which had previously been incorporated into the Current Guidance.[7]

1.11 These proposed changes in the Draft Revised Guidance are highlighted in the table below.

Subject matter	Summary of main proposal(s)
Opening a formal investigation	Increased transparency at case opening
Information handing	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 ('SO')
Right to reply	Clarification of the process relating to cross disclosure of parties' written (or oral) representations on an SO.

[7] Section 31D CA98.

Right to reply	Clarification of the process relating to disclosure of directors' representations on an SO.
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

1.12 The Consultation Document set out one general question on which respondents' views were sought:

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

1.13 The CMA received 6 responses to the Consultation.[8] This document summarises the comments received in response to the proposed amendments in the Draft Revised Guidance, and the CMA's views thereon. It does not seek to address every point raised. Non-confidential versions of all submissions are available on the consultation page.

1.14 The CMA published its final revised version of CMA8 ('the Revised Guidance') on 4 November and it took effect on that date. Since the Commitments Guidance is unchanged from when it was approved for publication by the Secretary of State on 14 January 2019, it has been re-issued unaltered by incorporation into the Revised Guidance.[9] The changes made to Revised Guidance in view of the responses to the Consultation are discussed below.

[8] The list of respondents is set out in Chapter 3.

[9] See paragraphs 10.17-10.20 of the Revised Guidance for the re-issued Commitments Guidance.

2. Issues raised by the consultation and our response

2.1 The respondents' views on the issues in the Consultation are set out below in the same order as in the Consultation Document, along with the CMA's views on them.

Opening a formal investigation – increased transparency at case opening

2.2 In the Consultation, the CMA proposed 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 ('EA02').

2.3 The CMA recognises the importance of confidentiality for leniency applicants and the Draft Revised Guidance therefore stated that the CMA will not mention in a case-opening 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.*[10]

Summary of responses

2.4 Respondents expressed concern about this proposed approach to transparency in CA98 cases, suggesting that it could cause the businesses in question potential reputational harm, especially since the threshold for opening a CA98 investigation was a low one and CA98 cases can take some time. Four out of six respondents did not consider that the CMA's reasons for identifying the parties at case opening outweighed these considerations. While acknowledging the CMA's powers under section 25A of CA98, [11] they suggested that there was already sufficient transparency in the CMA's case-opening announcements. In their view, the existing level of transparency already, among other things, allows consumers and others to provide

[10] See for example, footnote 83 of OFT1495.

[11] Section 25A of CA98 allows a discretion to the CMA to publish a notice where it decides to conduct an investigation, meaning where the CMA has reasonable grounds for suspecting a relevant infringement. This notice may (a) state the CMA's decision to conduct an investigation, (b) indicate the legal basis of the investigation, (c) summarise the matter being investigated, (d) identify any undertaking whose activities are being investigated as part of the investigation, (e) identify the market which is or was affected by the matter being investigated.

information to the CMA which might assist in the investigation. Comments were also made that the CMA has alternative means at its disposal to achieve its transparency aims – such as the CMA subsequently naming a party that had identified itself as being a party to the investigation.

2.5 One respondent noted that the CMA did not intend to mention in a case-opening announcement whether a party to the alleged infringement had applied for leniency. They suggested that this would put such parties in a very difficult position. A company's employees, shareholders, customers, suppliers and other business partners would become aware that the company is under investigation, but in circumstances where they cannot be informed about the company cooperating with the authority (and the potential mitigation of any penalty that might be imposed). It was suggested that this was a reason for the CMA retaining its current practice of not normally naming parties in the case-opening announcement, other than in exceptional circumstances.

2.6 Two respondents suggested if the CMA were to adopt the proposed policy of normally naming parties at case opening, then the CMA should give a party sufficient notice of the CMA's intended announcement. They also suggested that where the CMA ultimately decides not to issue an infringement decision – whether because it concludes that there is no infringement or because it decides to close its investigation on administrative grounds – the CMA should issue an announcement which makes expressly clear that there has been no infringement finding and that the parties are no longer under investigation.

The CMA's views

2.7 The CMA has considered the concerns expressed and is mindful of balancing the public interest in transparency with the legitimate interests of businesses under investigation in a CA98 case.

2.8 The CMA remains of the view that the public interest in transparency means that the CMA should normally publish the names of parties under CA98 investigation in case-opening announcements, other than in exceptional circumstances. The public is entitled to be alerted to the parties under investigation, but with a clear indication from the CMA that there should be no assumption that there has been an infringement of competition law. Moreover, parties in a sector that are not under investigation should also be protected from unwarranted public speculation that they might be under investigation.

2.9 Such exceptional circumstances are likely to include where naming the parties might prejudice a CMA investigation (for example, by revealing the scope of the investigation and thereby 'tipping-off' other parties to the suspected infringement before the CMA has been able to secure evidence in the hands of

those other parties) or an investigation by one of its enforcement partners. The CMA's decision to name parties will still be made on a case-by-case basis and is subject to applicable data protection law and the provisions of Part 9 of the EA02.

2.10 Section 25A(1) of CA98 clearly envisages the CMA being transparent in a notice of a CA98 investigation as to the identity of the parties under investigation. The CMA's proposed approach in the Draft Revised Guidance simply means that the CMA's normal practice will now be to include all the information in its notice of investigation that is envisaged by section 25A(1) of CA98.

2.11 In relation to the necessity of issuing an announcement which makes expressly clear that there has been no infringement finding and that the parties are no longer under investigation, footnote 25 of the Draft Revised Guidance provides that where the CMA has published a notice identifying a party under investigation and subsequently decides to terminate the investigation without making an infringement decision, it will publish a notice stating that the party's activities are no longer being investigated. This is consistent with the requirement of section 25A(4) of CA98.

2.12 In terms of providing advance notice to a party of the CMA's intended announcement naming that party, the CMA will have regard to the principles set out in paragraphs 11.10-11.14 of the Revised Guidance and paragraph 3.18 of CMA6 *Transparency and Disclosure: Statement of the CMA's Policy and Approach*, while also taking into the account the need to avoid prejudicing the CMA investigation.

2.13 As regards the comments made by one respondent regarding the approach to leniency applicants, paragraph 5.8 of the Draft Revised Guidance (which has been carried over to the Revised Guidance) provides that save where a party has done so itself with the consent of the CMA, the CMA will not mention publicly at the opening of an investigation whether any party to the suspected infringement had applied for leniency. In the CMA's view, this appropriately balances the ability of the leniency applicant to seek the CMA's consent to disclose the fact that it is a leniency applicant, with the CMA's policy, as set out in its leniency guidance OFT1495 Applications for Leniency and No-action in Cartel Cases, that the fact that an undertaking has applied for leniency will not normally be revealed to other undertakings until the SO has been issued (see, for example, footnote 83 of OFT1495). Moreover, as stated above, decisions on naming parties at case opening will in any event be taken on a case by case basis, and the CMA will consider any concerns that a leniency applicant may raise.

2.14 The Revised Guidance therefore adopts unchanged the approach to transparency proposed in the Draft Revised Guidance. However, this transparency approach will not be applied retrospectively to any case-opening announcements that were made prior to the date of publication of the Revised Guidance.

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

2.15 Paragraphs 11.16 to 11.30 of the Current Guidance explain the CMA's procedures for giving addressees of an SO the opportunity to inspect the documents on the CMA's file ('access to file') in a CA98 investigation.

2.16 The Draft Revised Guidance reflects the CMA's further experience with access to file since the Current Guidance was published. Specifically, the CMA clarifies 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 SO (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 seek to use a confidentiality ring[12] (as explained in paragraphs 11.27 to 11.34 of the Draft Revised Guidance).

2.17 The CMA also clarified in the Draft Revised Guidance its approach to access to file in interim measures cases. Paragraph 8.9 of the Draft Revised Guidance 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.

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[12] 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).

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2.18 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 had 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.

2.19 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 an SO. 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.

Summary of responses

Respect for rights of defence when providing access to file

2.20 Five respondents expressed concerns about the CMA's proposed further clarifications on access to file in the Draft Revised Guidance. The following points were raised:

(a) Resource savings and improvements to efficiency should not come at the cost of undertakings' rights of defence.

(b) It is not for CMA to balance the parties' rights of defence against the disclosure of confidential information and that there should always be a presumption in favour of disclosure.

(c) It is not for the CMA to decide which documents are exculpatory or relevant to a party's defence and therefore ought to be disclosed.

(d) The quasi-criminal nature of the CMA's investigations and common law principles mean that a party has a right to know the case against it and the evidence on which it is based and the CMA may not advance contentions or adduce evidence of which a party is kept in ignorance.

(e) As an administrative body, the CMA has a duty of candour in its proceedings, and competition cases such as those under CA98 can only be

understood – and it follows, challenged or responded to – when the detail is revealed.

(f) Undertakings are placed in a disadvantaged position in comparison to the CMA, which holds the file.

(g) The information in non-key documents (meaning those documents not referred to in the SO) are often most relevant to the defence.

(h) As a result of the above points, the CMA should be generous with requests for the disclosure of additional documents to preserve rights of defence. However, the CMA's proposals ran contrary to, or risked undermining, this principle.

(i) The CMA should allow parties to make representations on how access to file will be effected.

Use of confidentiality rings

2.21 Following on from these more general comments, two respondents in principle supported the increased use of the confidentiality rings. Five respondents, including the two who were in principle supportive of the increased use of confidential rings, nevertheless expressed concern about the CMA's proposed option of providing the non-key documents to legal advisers in a confidentiality ring, so that the legal adviser can then request non-confidential versions of those documents for inspection. They submitted the following points:

(a) The use of confidentiality rings as proposed would prevent parties from having access to the whole evidential picture at the time the SO is issued.

(b) This made it difficult to seek instructions from clients and to provide advice, which caused delays.

(c) The CMA's proposals for the confidentiality ring option instead served simply to shift the burden of identifying relevant docs to parties' external advisers.

(d) It was difficult to determine the relevance of documents in relation to other documents on the file or their context from the index of non-key documents. This could result in broader requests for disclosure.

(e) The use of confidentiality rings was onerous due to the obligations placed on lawyers and law firms and created additional work, resulting in increased expense for clients.

(f) The CMA should clarify the circumstances in which in-house legal advisers will be admitted to a confidentiality ring.

Handling confidentiality representations

2.22 Four respondents commented and/or made suggestions in light of the CMA's proposal 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. They submitted the following points:

(a) It was important for parties to have more than one opportunity to make confidentiality representations on documents in the CMA's file. A document which may initially not be confidential can later become so in lengthy investigations. It was suggested that the CMA should at least share with the relevant party a version of what it is intending to disclose, so that the party had a final chance to review. This was especially important for smaller parties with limited legal representation.

(b) It was suggested that confidentiality rings should be used only for genuinely sensitive material. It was not appropriate to place all non-key documents in a confidentiality ring.

(c) Most documents in CA98 investigations belong to parties under investigation and therefore there should be less concern about strategically sensitive information belonging to third parties in them.

(d) It would be important for the schedule listing non-key documents on the CMA's file to provide sufficient detail to enable the recipient to assess the relevance of such documents.

(e) More guidance is needed on how the CMA will assess requests for further disclosure of documents.

(f) The CMA should seek confidentiality representations on all documents provided to the CMA for inclusion on its case file from the outset, and not once they are requested for inspection from a confidentiality ring.

(g) There should be a presumption that at least parties' advisors are entitled to unredacted copies of key documents on 'External Eyes Only' basis.

2.23 One respondent suggested that if the proposed changes were to proceed, then time allowed for parties' representations on the SO (and any Draft Penalty Statement) should not start to run until all disclosure requests have been dealt with, including requests for redactions to be lifted and/or for the documents to be removed from a confidentiality ring.

Access to file in interim measures

2.24 There was support for the proposals for access to file in interim measures cases. However, it was suggested that the CMA clarify the level of detail to be included in the schedule of non-key documents, as well on the criteria which must be met for a business to satisfy the CMA that additional disclosure is necessary. One respondent also suggested that the CMA add the italicised words, as follows, to the relevant sentence in paragraph 8.9 of the Draft Revised Guidance: 'The CMA will not normally provide access to documents on the CMA's file that relate to the suspected infringement of the Chapter I or Chapter II prohibitions at the interim measures stage.'

The CMA's views

Respect for rights of defence when providing access to file

2.25 The CMA will always respect rights of the defence when providing access to the file. The Revised Guidance makes it clear that the course taken for providing access to the file will always be discussed with the parties and is aimed at creating efficiencies for everyone given the very large numbers of documents on the file. It is in the public interest, and in the interests of parties, that investigations should not be unduly prolonged and that time and cost savings, consistent with the parties' rights of defence, should be sought. This should also reduce the burden on the parties as a result of confidentiality representations needing to be sought.

Use of confidentiality rings

2.26 The CMA remains of the view that in appropriate cases, and following discussion with the party, the use of a confidentiality ring as explained in paragraphs 11.27 to 11.34 of the Draft Revised Guidance can be a fair way of enabling the CMA to discharge its obligations under Rule 6 of the CMA Rules[13] and respect rights of the defence, while creating efficiencies for both the CMA and the parties to an investigation by reducing the need for confidentiality representations, therefore assisting with progressing the investigation. The use of confidentiality rings in this way simply means that the CMA can focus its resources in the period leading up to the issue of an SO on preparing non-confidential versions of key documents that are cited in an SO, allowing a party's legal advisers to inspect the remaining documents on the case file, in order to identify a possibly smaller subset of such documents for inspection by

[13] The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 ('CMA Rules')

their client which will then need to be produced in non-confidential form. There is no issue under this approach of a party not being able to inspect documents which it is otherwise entitled to inspect. Furthermore, legal advisers will be provided with a schedule of the documents in the confidentiality ring to assist in their consideration. Moreover, before issuing the SO and any accompanying Draft Penalty Statement, the CMA will discuss with the businesses under investigation the process envisaged for giving access to the CMA's file and will take into account the views of the business in question. The CMA will discuss with the business in question whether the use of a confidentiality ring or the provision of a schedule containing a detailed list of the documents on the CMA's file is, in the circumstances of the case, the most appropriate approach to access to file.

2.27 The CMA will always set reasonable deadlines for the submission of representations on the SO and any Draft Penalty Statement, having regard to rights of the defence.

2.28 Whether an in-house legal adviser should be admitted to a confidentiality ring will necessarily involve a case by case assessment. In doing so, some of the factors to which the CMA might have regard include whether the in-house legal adviser is a member of a professional legal body in the UK and can offer suitable professional undertakings in respect of the confidentiality ring, as well as if they have other roles in the business in question (such as whether they are also a director or company secretary of the business or in some other position which could make it problematic for them to have access to the information in the confidentiality ring, including commercially sensitive information of other businesses).

Handling confidentiality representations

2.29 The CMA remains of the view that the approach proposed in paragraph 7.10 of Draft Revised Guidance to seeking representations on confidentiality is appropriate, and that the CMA can reasonably assume that no confidentiality is being claimed in respect of the information where a party makes no confidentiality representations, within the deadline set.

Access to file in interim measures

2.30 With respect to access to file in interim measures cases, the CMA has at paragraph 8.9 of the Revised Guidance added the words '[a]t the interim measures stage' to the sentence in question (see paragraph 2.24 above) to make clear that this applies only to interim measures cases.

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

2.31 The Current Guidance provides that, once any written and oral representations made in relation to the SO 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.[14] The Draft Penalty Statement will set out the key aspects relevant to the calculation of the penalty that the CMA would impose on that party in the event of an infringement decision, based on the information available to the CMA at the time and in accordance with the 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.[15] Parties are offered the opportunity to comment on the Draft Penalty Statement in writing and via an oral hearing (by telephone or video conference).[16]

2.32 The CMA proposed in the Draft Revised Guidance 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 SO is sent to that undertaking (see paragraphs 11.15 to 11.19 of the Draft Revised Guidance). The content of the Draft Penalty Statement would remain the same as is provided for in the Current Guidance. The Senior Responsible Officer (SRO) who decided to issue the SO would also be responsible for deciding whether to issue a Draft Penalty Statement. The CDG would 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.

Summary of responses

2.33 One respondent outright opposed the proposal and four respondents could see potential efficiencies arising from the proposal to send the Draft Penalty Statement at the same time as the SO. It was noted, for example, that that the Draft Penalty Statement and SO were closely linked documents, and that this proposal could enable the parties to take the penalty information into account when responding to the SO.

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[14] See paragraph 12.29 of the Current Guidance.
[15] See paragraph 12.30 of the Current Guidance.
[16] See paragraph 12.31 of the Current Guidance.

2.34 However, all six respondents raised questions about how the proposal would be implemented.

Potential inefficiencies

2.35 Three respondents flagged that the process could be less efficient if, having regard to the representations on the SO or subsequent document such as a letter of facts, it would be necessary to reissue a Draft Penalty Statement.

Deadline to provide representations

2.36 All respondents suggested that the maximum 12-week deadline proposed for providing representations on both the SO and Draft Penalty Statement was insufficient.

2.37 One respondent suggested that a minimum period of 16 weeks would be necessary for parties to provide representation on both the SO and Draft Penalty Statement.

2.38 The same respondent suggested that it was not appropriate for the CMA to state that extensions to the deadline would only be granted in exceptional circumstances.

Prejudgment and confirmation bias

2.39 Three respondents flagged the need to ensure that there was no prejudgment or confirmation bias with respect to any subsequent penalties decision made by the CDG.

2.40 One respondent stated that a Draft Penalty Statement issued by the SRO at the same time as the SO will be an unfiltered reflection of the CMA's case without any ability to take into account the parties' views.

Public reference to the amount of any proposed penalty

2.41 One respondent expressed concern about the confidentiality of Draft Penalty Statements, including suggesting that the CMA should clarify that it will never include reference to the amount of any proposed penalty in its public announcement about the issue of a SO, other than in settled cases as this could lead to reputational and financial harm and create potential regulatory reporting obligations for some businesses.

The CMA's views

Potential inefficiencies

2.42 The CMA does not consider that sending a Draft Penalty Statement at the same time as the SO will give rise to inefficiencies. Rather, the CMA considers that it will yield the efficiencies mentioned in paragraph 1.35 of the Consultation. These include the fact that the preparation of representations on the SO and the Draft Penalty Statement will now be done at the same phase of the process, with the need only to provide a single set of written representations, and there being only a single hearing on liability and penalty. Moreover, the single set of representations can freely draw together arguments on, for example, the characterisation and seriousness of the alleged infringing activity. Paragraph 13.5 of Draft Revised Guidance is clear that if a financial penalty is being imposed, the infringement decision will explain how the CDG decided upon the appropriate level of penalty, having taken into account the CMA's statutory obligations[17] and the parties' written and oral representations on the Draft Penalty Statement.

2.43 The CMA moreover does not consider that sending the Draft Penalty Statement at the same time as the SO in any way signifies that the CMA has pre-judged the case or raises the risk of confirmation bias. The CDG will have had no involvement in the decisions to issue the SO and Draft Penalty Statement and it is independent of the SRO, who is the CMA staff member responsible for those decisions. In accordance with Rule 3(2) of the CMA Rules, the CDG makes 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. The CDG is not bound to impose the penalty proposed in the Draft Penalty Statement and, as noted above, will take into the account the representations of the parties in reaching its own decision(s) as to whether there has been an infringement and, if so, whether to impose a penalty and at what level.

Deadline to provide representations

2.44 In terms of the time to reply to both an SO and Draft Penalty Statement, the CMA considers that up to 12 weeks is reasonable, and that it is appropriate to refer to this period in the Revised Guidance in order to provide clarity about the length of time a party will have to respond to the SO and Draft Penalty Statement. The CMA also considers that an up to 12-week period to respond to the SO and Draft Penalty Statement is also reasonable having regard to

[17] Section 36(7A) of CA98.

international comparators.[18] In order not to delay investigations, extensions to the time for submitting written representations on the SO and Draft Penalty Statement will be given only where there are particularly compelling reasons for doing so, and should not be regarded as normal practice.[19]

Public reference to the amount of any proposed penalty

2.45 The CMA has clarified in the Revised Guidance that it will not include reference to the amount of any proposed penalty in its public announcement about the issue of an SO, other than in respect of SOs issued to parties that have settled with the CMA. The Revised Guidance otherwise takes the same approach in the Draft Revised Guidance with respect to the DPS, which is to say that any DPS will be sent at the same time as the SO.

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

2.46 The Current Guidance states that in a multi-party case, the CMA will not cross-disclose the written (or oral) representations on an SO between the addressees of an SO.[20] 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 130 of the Current Guidance. One of these is 'where the CMA considers it necessary for rights of defence' to do so.

2.47 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 an SO. The CMA referred 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.

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[18] For example, the European Commission's *Antitrust Manual of Procedures* provides at Chapter 11, paragraph 51: 'the parties have a right to at least a period of four weeks to reply to the SO but that a longer period (normally, a period of 2 months, although this may be longer or shorter depending on the circumstances of the case) will be granted, taking into account *inter alia* the size and complexity of the file and/or whether the addressee of the SO making the request has had prior access to the information, and/or any other objective obstacles faced by the addressee of the SO.'

[19] See paragraph 12.3 of the Revised Guidance. Concerns or complaints about deadlines within which to provide representations on an SO and DPS are matters that can be raised with the SRO for review and ultimately the Procedural Officer.

[20] See paragraph 12.5 of the Current Guidance.

Summary of responses

2.48 One respondent suggested that paragraph 12.11 of the Draft Revised Guidance should be amended to provide that all parties under investigation will have access to non-confidential versions of each other's representations.

2.49 One respondent submitted that the line between 'genuinely new evidence' and 'arguments of fact or law or evidence which have already been disclosed to the addressees' will not always be clear-cut and the CMA should err on the side of caution in making this assessment.

2.50 The same respondent suggested that the CMA should clarify that, if any parties have settled or entered into a settlement or leniency agreement, any representations that the party makes on manifest factual inaccuracies should be disclosed to other addressees.

The CMA's views

2.51 In the Revised Guidance, the CMA has not taken forward the suggestion of providing that all parties under investigation will have access to non-confidential versions of each other's representations. This is because the CMA remains of the view that it is not generally necessary for the parties' rights of defence to cross-disclose representations between the addressees of an SO. Addressees will all have the same opportunity to advance arguments of fact or law or provide evidence in response to the SO on the basis of the material on the CMA's file, and will also be given a reasonable opportunity to inspect any genuinely new evidence that other parties may submit. Where there is more than one addressee of an SO, the CMA will therefore not cross-disclose the written (or oral) representations made by an addressee to each of the other addressees, other than in the exceptional circumstances discussed (such as where doing so is necessary for rights of the defence).

2.52 With respect to the representations made on manifest or material factual inaccuracies by (respectively) a settling or a leniency party, the CMA notes that these would be disclosable (subject to confidentiality considerations) to other addressees if they fall into the category of 'genuinely new evidence' as set in footnote 141 of Draft Revised Guidance. This footnote therefore has been carried over to the Revised Guidance unchanged. The CMA will make its assessment of what constitutes 'genuinely new evidence' having regard to the importance of respecting the rights of the defence.

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

2.53 Where appropriate, the CMA may seek to disqualify directors of infringing undertakings, under the provisions of the Company Directors Disqualification Act 1986 ('CDDA').

2.54 The CMA 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 SO to third parties who are current or former directors of an addressee of the SO, 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 SO. 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.

2.55 In view of this, the CMA proposed to amend paragraphs 12.7 and 12.11 of the Draft Revised Guidance to clarify that any such representations by a director will be disclosed to the addressees of the SO only exceptionally, such as where the CMA considers it necessary to do so for rights of defence of an addressee of the SO.

Summary of responses

2.56 Three respondents suggested that the CMA should as a matter of course provide addressees of SOs with the representations made by directors to whom a non-confidential SO has been provided, considering that this was necessary for rights of the defence. Directors, it was suggested, may have information not available to their company or other addressees, since they are or were the directing minds of the businesses under investigation. One respondent suggested that that directors' representations should at least be disclosed to the legal advisors of the other addressees of the SO, so that those legal advisers can assess whether matters have been raised which are relevant to their clients' rights of defence.

2.57 Referring to paragraph 12.11 of the Draft Revised Guidance, one respondent suggested the CMA set out a non-exhaustive list of these 'exceptional circumstances', so that parties have an idea of whether they are likely to be granted access to the representations of such directors.

2.58 A respondent also suggested that the CMA should clarify how it will determine when directors are given an opportunity to make representations. A respondent said that in their view, the current High Court disqualification process is inadequate for a director to contest infringement findings and it was important for former directors to have an opportunity to make representations on the SO and these to be taken into account when making a final infringement decision.

2.59 A respondent suggested that former directors were likely to require access to the file in order to be able to make their representations. It was also suggested that it would be more efficient if directors were asked to make representations at the same time as addressees of the SO, and that CDO proceedings should not commence unless the CMA has received representations on the substance of the alleged infringement from the director concerned, during the administrative phase of CA98 proceedings.

2.60 One respondent suggested that the proposal to provide third parties who are current or former directors of an addressee of the SO with an opportunity to submit written representations on a non-confidential version of the SO could create tension with a leniency applicant, given their obligation to secure cooperation and inform the CMA if one of its employees or cooperating former employees is providing information inconsistent with the content of the leniency application. That said, they acknowledged that in practice this risk may not be great, given that as long as the entity is a leniency applicant that is in due course awarded some form of leniency, then a co-operating director should not be subject to disqualification.

2.61 Nevertheless, the same respondent suggested that in circumstances where a director or former director of a leniency applicant is approached in this way, the CMA should either (i) allow the employer fully to brief the director as to the company's leniency application (notwithstanding confidentiality obligations attaching to the leniency process) and to see what representations have been made, or (ii) accept that, to the extent those representations run contrary to the leniency application, that cannot be held against the leniency applicant as representing a lack of co-operation with the CMA.

2.62 On a related point, the same respondent was of the view that it would be appropriate for the CMA to acknowledge in the Revised Guidance that there can be a time lag between a director or former director providing written or oral representations to the CMA, and a leniency applicant receiving the official record of those representations. In such circumstances, they suggested that in instances where the leniency applicant may wish to submit clarifications or comments to the CMA regarding those director representations, for the purposes of meeting its obligation for co-operation as a leniency applicant,

appropriate leeway needed to be granted to the leniency applicant as to the timing of such clarifications and comments.

The CMA's views

2.63 The CMA remains of the view that the representations of such directors ought not to be disclosed as a matter of course to the addressees of an SO or to their legal advisers. This is for confidentiality reasons, since as noted in paragraph 2.54 above, 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.

2.64 Moreover, it is not automatically the case that such representations will contain information that could be exculpatory for an addressee of an SO or otherwise assist the addressees' defence. Furthermore, footnote 145 of the Draft Revised Guidance, which has been retained in the Revised Guidance, provides a non-exhaustive list of examples of the exceptional circumstances in which directors' representations may be disclosed to the addressees of an SO. This includes where the CMA considers it necessary for rights of defence of an addressee to disclose genuinely new relevant evidence (as opposed to arguments of fact or law) included in the representations of the director, or where doing so assists the CMA in clarifying a substantive factual, legal or economic issue. The CMA in the Revised Guidance has added text to this footnote to make it clear that these examples apply to situations where, in the particular circumstances, the need to disclose such information outweighs the relevant confidentiality concerns that arise.

2.65 More generally, the CMA's approach to CDOs is explained in the guidance document CMA102 Guidance on Disqualification Orders. The CMA does not accept that the current High Court disqualification process is inadequate for a director to contest CA98 infringement findings. It is not appropriate to have detailed discussion of the conduct of CDO investigations in the Revised Guidance in addition to what is discussed in CMA102, not least since proceedings under the CDDA and CA98 are separate.

2.66 With regard to representations made by directors of leniency applicants, as the respondent noted, the CMA's current policy is that CDOs will not be pursued against the current or former directors of leniency applicants, provided that the director in question maintains complete and continuous co-operation with the CMA's investigation and, in the case of a former director, the director has not been removed from office or otherwise ceased to act as a director as a result of his or her involvement in the breach of competition law. It is therefore only in rare and exceptional circumstances that the CMA would expect to receive representations on the SO for the purpose of a CDO investigation from the

directors or former directors of a leniency applicant. Moreover, since the CMA has dedicated guidance on immunity and leniency (OFT1495), the CMA does not consider it appropriate to include in the Revised Guidance detailed discussion of how it will engage with leniency applicants whose directors may become the subject of a CDO investigation and provide representations on the SO for the purpose of that investigation, which in any event would depend on the specific circumstances of the case.

Settlement – clarification of the CMA's practices

2.67 Since the Current Guidance was published, the CMA has gained further experience of the settlement of cases, including some 'hybrid' settlements (which are settlements in which one or some, but not all, of the parties under investigation admit to the alleged infringement and agree to settle with the CMA). [21]

2.68 Given this further experience, the CMA proposed to make some clarifications to the Settlement chapter (Chapter 14) in the Draft Revised Guidance. The CMA in footnote 172 clarified that, in the event of a hybrid settlement, offers to settle must still be approved by the CMA's Case and Policy Committee.

2.69 The CMA also added text in the Draft Revised Guidance in relation to the situation where a party offers to settle after an SO 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 in paragraph 14.7 of the Current Guidance).

Summary of responses

2.70 While being generally supportive of CMA's proposals about the discussion of settlement, some respondents did however object to the CMA's requirement for a settling party in post-SO settlements to withdraw any representations contesting liability that it might previously have made. These included suggestions that any admission of liability as a requirement of the settlement proceedings is given in return for a discount on penalty and swift resolution of the proceedings and that settlement may be driven by commercial

[21] See, for example, paragraph 14.13 of the Current Guidance.

considerations, meaning (it was suggested) that any admission of liability was not necessarily inconsistent with representations made on the SO.

2.71 Some respondents said that the CMA is required to have regard to all of an addressee's representations on the SO when deciding whether to proceed to an infringement decision and, as part of that process, the CMA should be required to justify why it disagrees with any representations or evidence which are contrary to its own findings. It was also suggested that observations on facts, and conclusions that may be drawn from them, may be relevant to rights of defence of other addressees to the SO and the previously made representations of the settling party are likely to be relevant to the CMA's assessment of the settlement penalty.

2.72 One respondent said that it is unclear when the withdrawal request will be made and that, if this was made prior to a settlement being finalised, this would raise significant concerns.

2.73 Others encouraged the CMA to provide further clarification and examples of what would constitute representations relating to 'manifest factual inaccuracies' that the post-SO settling party would not be required formally to withdraw as a condition of settlement. They suggested that this would include representations as to the scope or duration of the infringement set out in the SO (which would in practice be key elements to be agreed as part of the settlement process), but they welcomed further clarification in this regard.

The CMA's view

2.74 The requirement to withdraw pre-settlement representations contesting liability in a post-SO settlement case reflects the CMA's recent practice in such circumstances. It is an important element of the admission of liability required for settlement. Moreover, there is no requirement for the CMA in a settlement decision to justify why it disagrees with a party's previously-provided representations. A settlement admission of liability is voluntarily made by a party in respect of the facts and law found by the CMA in the SO (subject to corrections for manifest factual inaccuracies), notwithstanding any earlier submissions a party may have made. Moreover, the CMA also does not need to consider a party's reasons for settling with the CMA. The CMA will therefore not agree to settle with a party which seeks to require the CMA to justify why it disagrees with the party's previously made representations on liability.

2.75 Moreover, a settling party will be able to make limited representations on the draft penalty calculation within a specified time frame as part of the settlement discussions, provided that these are not inconsistent with its admission of

liability. The requirement to withdraw the previously made representations, other than on manifest factual inaccuracies, does not undermine this.

2.76 With regard to the possibility of previously made representations being cross-disclosed to other parties, this is only likely to be an issue in hybrid settlements, and such representations will be treated in the manner set out in paragraph 12.6 of the Revised Guidance.

2.77 The CMA does not consider it helpful in the Revised Guidance to provide examples of what would constitute representations relating to 'manifest factual inaccuracies', that a party offering to settle post-SO would not be required formally to withdraw as a condition of settlement. These will depend entirely on the specific circumstances of the case and the representations made. Such matters can be addressed in the settlement discussions between the party and the CMA.

2.78 However, the CMA has clarified in paragraph 14.21 of the Revised Guidance that the settling party will be required, in the letter containing the confirmation from the party that it has accepted the requirements of the settlement procedure, to state that it formally withdraws its previously made representations on the SO.

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

2.79 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.

2.80 The Procedural Officer is independent of CMA investigations, and independent of the case teams and decision makers in those investigations. The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively.

2.81 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, in relation to the following:

- deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the SO or Supplementary SO

- requests for confidentiality redactions of information in documents on the CMA's case file, in an SO or in the final decision
- requests for the 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; and
- other significant procedural issues that may arise during the course of an investigation.[22]

2.82 The Current Guidance states that the Procedural Officer is not able to review CMA decisions on the scope of requests for information or other decisions relating to the substance of a case.

2.83 The Draft Revised Guidance in 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 in the Draft Revised Guidance reflected more closely the wording of Rule 8 of the CMA Rules, which establishes the Procedural Officer's role in handling procedural complaints 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 clarified that the Procedural Officer's remit includes procedural complaints relating to the Draft Penalty Statement.

Summary of responses

2.84 While the clarification of the role of the Procedural Officer was generally welcomed, a number of respondents suggested that there was the risk of an undue narrowing the scope of the Procedural Officer's role.

2.85 For example, respondents expressed concern about the addition of a new reference to 'significant procedural complaints' in paragraph 15.4 of the Draft Revised Guidance and the deletion of the bullet point 'other significant procedural issues that may arise during the course of an investigation'. Concerns were expressed by some respondents that this unduly narrowed the Procedural Officer's role and that it introduced an additional threshold for the consideration of procedural complaints. One respondent commented that although revision to the wording introducing the list of bullet points may have been intended to be illustrative it might be read instead as a narrowing of the

[22] See paragraph 15.4 of the Current Guidance.

scope. Another respondent commented that paragraph 15.4 of the Draft Revised Guidance could suggest that the Procedural Officer was limited to considering the significant procedural issues listed in that paragraph, which was contrary to what had been suggested in the Consultation.

The CMA's views

2.86 The CMA notes that the guidance on the Procedural Officer's role in the Draft Revised Guidance among other things reflects more closely the wording of Rule 8 of the CMA Rules. This Rule sets out the role of the Procedural Officer in dealing with procedural complaints in CA98 cases and uses the term 'significant procedural complaint' in setting out the nature of procedural complaints that the Procedural Officer is to consider. The CMA has therefore retained the use of this wording in the Revised Guidance. The CMA does not consider that this represents a narrowing of the Procedural Officer's role, but rather provides greater clarity of that role by relating it more clearly to the Rule 8 of the CMA rules.

Guidance on commitments and other aspects of the Draft Revised Guidance

Use of remote meeting technology in compulsory interviews

2.87 The CMA updated paragraph 6.15 of the Draft Revised Guidance to provide that the CMA may indicate in a section 26A C98 notice that questions in a compulsory interview under that section are to be answered via a videolink or similar technology.

References to Solicitors Regulation Authority guidance

2.88 Furthermore, the CMA in Chapter 6 of the Draft Revised Guidance 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 the Consultation that guidance had been withdrawn from the Solicitors Regulation Authority's webpage.

Attendance of businesspeople at oral hearings

2.89 With regard to oral hearings, the CMA stated in paragraph 12.14 of the Draft Revised Guidance that, although 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 CDG would also expect to hear from them in the presentation of the addressee's oral

representations. This is because in practice CDGs find that the attendance of such businesspeople at oral hearings can be of great assistance.

Clarifications about the relationship between CDDA investigations and settlement

2.90 The CMA also proposed 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 against, or seek disqualification undertakings from, the directors of a business that is under investigation for a breach of competition law, including where it is a settling business, but that the exercise of this discretion will not be a part of the settlement procedure under the CA98. The CMA 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 made these clarifications having regard to its experience with CDDA investigations in settlement cases. [23]

EU Exit

2.91 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 Agreement. [24]

2.92 This Consultation concluded approximately three months before the end of the Transition Period. Therefore, although the Draft Revised Guidance when adopted as Revised Guidance was intended to apply for a limited time during the Transition Period, it will be mainly applying after the end of the Transition

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[23] See paragraph 15.4 of the Current Guidance.
[24] See paragraph 15.4 of the Current Guidance.

Period. In view of this, the CMA removed references to EU law in the Draft Revised Guidance. However, the CMA 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.

2.93 Pending the outcome of future relationship negotiations between the UK and the EU, the CMA in the Consultation did not 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 clarified that Chapter 16 of the Draft Revised Guidance should read as being of application only during the remainder of the Transition Period. The CMA will be reviewing its guidance in light of the legislative developments.

Commitments Guidance

2.94 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.

2.95 Chapter 10 of the Current Guidance at paragraphs 10.17 to 10.20 incorporates the Commitments Guidance.

2.96 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.

2.97 Having reviewed the CMA's experience in relation to the acceptance of commitments under the CA98, the CMA did not propose to make any alterations to the text of the Commitments Guidance or any other parts of CMA8 that relate to the text of the Commitments Guidance.

Summary of responses

Use of remote meeting technology in compulsory interviews

2.98 Some respondents also made some suggestions with respect to how the CMA should conduct remote interviews, suggesting for example that there be

transparency as to the attendees of the interview and their role, that interviewees should be entitled to take breaks (including to consult their legal representative), and that there should be a maximum time limit for such interviews.

References to Solicitors Regulation Authority guidance

2.99 Although supportive of the proposal to remove footnote references to the Solicitors Regulation Authority's Guidance on Employer's Solicitors Attending Health and Safety Executive Interviews with Employees, one respondent commented that in the Revised Guidance it would be appropriate to maintain some reference to the issue, even though the assessment was for the individual and the legal adviser involved.

Attendance of businesspeople at oral hearings

2.100 Some respondents commented on the role of businesspeople being involved in oral hearings. For example, they suggested that the CMA should take into account the fact that businesspeople are not legal experts. Other commentators further suggested that individuals may not wish to prejudice their own rights of defence if they are at risk of CDOs and that oral hearings should not be an opportunity for further evidence gathering by cross-examination of attendees and that attendance of business representatives should not allow the business to prejudice its position.

EU Exit

2.101 Some parties queried the purpose of the proposed amendments at paragraph 16.1 of the Draft Revised Guidance, in view of the fact that the Transition Period is only in place for just over three more months. They suggested, for example, that the CMA should clarify whether this guidance will then be subject to the specific terms of any withdrawal deal reached with the EU, and/or whether this specific paragraph will become obsolete if no deal is reached.

Commitments Guidance

2.102 No respondents objected to the CMA's proposal to re-issue the existing Commitments Guidance in the Revised Guidance.

Other suggestions

2.103 One respondent made a suggestion on other aspects of the Draft Revised Guidance. They encouraged the CMA to include in its guidance more detail on how it collects and handles electronic data during its inspections.

The CMA's views

Use of remote meeting technology in compulsory interviews

2.104 The CMA has considered the suggestions on the conduct of remote interviews but does not consider that they necessitate any additional text in the Revised Guidance. The conduct of interviews – and remote interviews – is a matter for case teams to discuss with the attendees and their legal advisers on a case-by-case basis. The CMA nevertheless agrees that it is beneficial to ensure there is transparency as to the attendees of a remote interview and their roles prior to the interview taking place. It also agrees that interviewees in a remote interview should be allowed reasonable breaks (including to consult their legal representative as appropriate). While the CMA will aim to limit remote interviews to a reasonable duration, it does not consider it appropriate or necessary to set a standard maximum time for such interviews, as what is reasonable will vary according to the circumstances of the case.

References to Solicitors Regulation Authority guidance

2.105 In the absence of specific relevant guidance such as Solicitors Regulation Authority's Guidance on Employer's Solicitors Attending Health and Safety Executive Interviews with Employees, the CMA does not consider it appropriate to refer in CMA8 to potential conflicts of interest where the same solicitor proposes to act for both the employer and the employee in respect of a section 26A interview. This is a matter between the solicitor and their client(s). The deleted text noted that the CMA would refer the individual and solicitor to Solicitors Regulation Authority guidance. This was because that specific guidance might have been of assistance to them in that situation. However, should the Solicitors Regulation Authority publish new, specific guidance (similar to the one removed from their website) that the CMA considers may be of assistance in a situation in which a legal adviser proposes to act for both the individual and the undertaking under investigation, the CMA may where appropriate refer the individual and solicitor to such guidance.

Attendance of businesspeople at oral hearings

2.106 For the purposes of clarity, in the Revised Guidance the CMA has referred to the attendance at oral hearings of 'staff or directors' of the addressee's business, instead of 'representatives', the term used in the Draft Revised Guidance.

2.107 The CMA wishes to be clear that the non-attendance of staff of directors of an addressee's business at oral hearings does not in any way prejudice the

position of an addressee. Whether or not staff or directors of an addressee's business attend the oral hearing is a matter for each addressee to decide. The CMA recognises that such businesspeople are often not legal experts, and may be less familiar or comfortable than their advisers in presenting in the circumstances of an oral hearing. However, the CMA's experience is that having matters relating to, for example, an addressee's business and the market conditions of the relevant industry explained by staff or directors from the business (rather than external legal advisers or economic advisers) can assist the CDG in better understanding the representations being made.

EU Exit

2.108 Having regard to the comments on paragraph 16.1 of the Draft Revised Guidance on the Transition Period, the CMA has clarified that Chapter 16 of the Revised Guidance (which has been carried over from the Draft Revised Guidance) will not apply after the end of the Transition Period. Moreover, we have added a footnote reference in the Revised Guidance to the Guidance on the functions of the CMA after the end of the Transition Period for which the CMA has launched a consultation running until 30 October 2020, the final version of which will come into effect on 31 December 2020. This guidance is designed to explain how EU Exit will affect the powers and processes of the CMA for, among other things, CA98 enforcement after the end of the Transition Period. The guidance also explains how the CMA will approach the 'transitional provisions' contained in the Withdrawal Agreement, insofar as they relate to the UK competition regime.

Commitments Guidance

2.109 Having regard to the scheme and purpose of section 31D CA98, the CMA has re-issued the unaltered Commitments Guidance, with the Revised Guidance being used as the vehicle for doing so.

Clarification relating to interim measures

2.110 Although not included in the Consultation, the CMA has made a small clarification in paragraph 8.27 of the Revised Guidance in respect of the publication of interim measures directions, in order more closely to reflect the relevant provision in the CMA Rules.

Other suggestions

2.111 Finally, the CMA has considered the suggestion to include in its guidance more detail on how it collects and handles electronic data during its inspections. The

CMA considers that the Revised Guidance is clear as to the CMA's general approach to information handling in CA98 cases, however that information has been obtained. Moreover, the Consultation merely proposed specific and incremental changes at this time to the Current Guidance. The CMA has therefore not made further changes in the Revised Guidance, other than those already discussed in this Response to the Consultation. The CMA has nevertheless noted the suggestion made.

3. List of Respondents

- Ashurst
- Baker McKenzie
- Bristows
- Competition Law Committee of the City of London Law Society
- Herbert Smith Freehills
- Linklaters