

Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8

Consultation document

2 August 2024

CMA8con



© Crown copyright 2024

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gov.uk.

Contents

	<i>Page</i>
1. Introduction and Background	3
2. Scope of the consultation.....	8
3. Consultation process	9

1. Introduction and Background

- 1.1 The CMA is committed to providing guidance for businesses and their advisers on the procedures used by the CMA in the exercise of its investigation and enforcement powers under the Competition Act 1998 (the CA98).
- 1.2 The guidance document CMA8 *Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8* ('the Current CMA8') provides guidance on the approach and procedures used by the CMA in the exercise of its investigation and enforcement powers under the CA98. The Current CMA8, was published in 2020 (and updated in December 2021 and January 2022).
- 1.3 The CMA has considered whether the Current CMA8 should be updated both in view of the Digital Markets, Competition and Consumers Act 2024 (the DMCCA24) and other developments.
- 1.4 The CMA has concluded that in general the procedures used by the CMA in the exercise of its investigation and enforcement powers under the CA98 as set out in the Current CMA8 remain fit for purpose.
- 1.5 However, the CMA considers that parts of the Current CMA8 require updating to reflect developments in CMA practice and policy, as well as legislative developments since 2022, and in particular the DMCCA24. In addition, there are a few paragraphs that need minor amendments or clarifications, as explained further below.
- 1.6 The CMA has therefore prepared the draft *CMA8 Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8* (the Draft CMA8), which is the subject of this consultation.

The Draft CMA8

- 1.7 The new text in the Draft CMA8 (in comparison to the Current CMA8) largely relates to changes introduced by the DMCCA24. The main changes are outlined in paragraph 1.10 below.
- 1.8 Changes have also been made to give effect to proposed changes to the CMA's settlement policy and to the timing of draft penalty statements. These are discussed in paragraphs 1.13 to 1.23 and 1.11 below respectively. As explained in paragraph 1.12 below, the Draft CMA8 also includes a consequential change to reflect an amendment to the European Union

(Withdrawal) Act 2018 made by the Retained EU Law (Revocation and Reform) Act 2023 (the REUL(RR)A23).

- 1.9 The Draft CMA8 has also been updated to reflect current CMA practice and a number of less significant developments in CMA policy. We have also identified an incorrect cross-reference that requires updating¹ and a paragraph that requires clarification,² as well as a change in name of the CMA Enforcement Directorate that needs to be reflected. These changes are shown in the track-changes version of the Draft CMA8 and should be self-explanatory. They are not therefore set out further in this document.

Changes pursuant to the DMCCA24

- 1.10 The main changes to the Current CMA8 and the new text in the Draft CMA8 relate to changes made by the DMCCA24, including:
- (a) changes to the requirement for agreements, decisions and practices to be implemented in the UK;³
 - (b) the duty to preserve documents relevant to investigations;⁴
 - (c) service and the extraterritorial effect of notices;⁵
 - (d) the duty of expedition;⁶
 - (e) administrative penalties;⁷
 - (f) investigative assistance;⁸
 - (g) the power to interview any individual (irrespective of whether they have a connection to a business under investigation);⁹
 - (h) enhanced power of production during an inspection in relation to information in electronic form which is accessible from the premises;¹⁰

¹ See paragraph 14.27 of the Draft CMA8.

² See paragraph 10.17 of the Draft CMA8.

³ See section 119 of the DMCCA24 and footnote 3 of the Draft CMA8.

⁴ See section 121 of the DMCCA24 and paragraphs 5.9 – 5.12 of the Draft CMA8.

⁵ See section 144 and Schedule 13 of the DMCCA24 and paragraph 6.2 of the Draft CMA8.

⁶ See section 327 of the DMCCA24 and paragraphs 2.5, 6.8 and 6.10 of the Draft CMA8.

⁷ See, for example, paragraphs 5.9, 6.13, 6.26, 8.23 and 10.17 of the Draft CMA8.

⁸ See, for example, footnote 24 of the Draft CMA8.

⁹ See section 142 of the DMCCA24 and paragraph 6.2 of the Draft CMA8.

¹⁰ See sections 122 and 141 of the DMCCA24 and paragraphs 6.36—6.38 of the Draft CMA8.

- (i) assistance during an inspection, including to access information held electronically and accessible from the premises and with the separation of privileged material and non-privileged material;¹¹ and
- (j) the appeal standard in interim measures cases.¹²

Timing of a draft penalty statement

1.11 Paragraph 11.15 of the Draft CMA8 now provides that the draft penalty statement will ‘normally’ be provided at the same time as the statement of objections, so allowing in appropriate cases for the draft penalty statement to be issued after the statement of objections. This has been changed to reflect CMA practice.

Changes pursuant to the REUL(RR)A23

1.12 The REUL(RR)A23 amended the European Union (Withdrawal) Act 2018 to provide in section 5(A4) that no general principle of EU law is part of domestic law after the end of 2023. The Draft CMA8 makes a consequential change to paragraph 11.17.¹³

Settlement in CA98 investigations

1.13 Settlement is the process by which a business under investigation is prepared to admit that it has breached competition law and confirms, amongst other requirements, that it accepts that a streamlined administrative procedure will govern the remainder of the CMA’s investigation. Where a business agrees to settle a case, the CMA will impose a reduced penalty on the business. Settlement, in appropriate cases, allows the CMA to achieve efficiencies. The CMA’s settlement policy for CA98 investigations is set out in CMA8.

1.14 The operation of a settlement process and the decision as to whether to settle a CA98 case is at the discretion of the CMA. The CMA is not obliged to settle any CA98 case it brings, but will consider requests to settle by parties under investigation in cases where the CMA considers that the evidential standard for giving notice of a proposed infringement decision is met, settlement is likely to achieve procedural efficiencies and resource savings, and there is a prospect of reaching settlement in a reasonable time frame.

¹¹ See sections 122 and 141 of the DMCCA24 and paragraph 6.38 of the Draft CMA8.

¹² See section 124 of the DMCCA24 and footnote 218 of the Draft CMA8.

¹³ The CMA is also aiming in due course to make a similar consequential change to the *CMA’s guidance as to the appropriate amount of a penalty*: CMA73.

- 1.15 The CMA has carried out a review of the settlement policy, to ensure it is contributing as effectively as possible to its CA98 enforcement activities. The CMA has considered the scope for increasing the efficiencies which are achieved through settlement, including agreeing settlement with businesses earlier in investigations where possible. The CMA has also considered whether the incentives offered for settlement are appropriate and ensure that settlement is being achieved in cases where it will help to facilitate effective enforcement across the CMA's portfolio of cases.
- 1.16 The CMA is consulting on two proposed specific changes to CMA8 in respect of the settlement process following this review. In addition to these changes to CMA8, the CMA will continue to apply the settlement policy in the context of individual cases in a way which maximises the benefits of settlement from the perspective of public enforcement, including achieving settlement as swiftly and efficiently as possible.

Resource savings

- 1.17 In December 2021, the CMA amended CMA8 to introduce a requirement that the settling business confirms that it accepts that it will not challenge or appeal the infringement decision to the Competition Appeal Tribunal. When the CMA consulted on this change, it explained that an aspect of the resource savings from settlement comes 'from the CMA not being required to defend an appeal to the Competition Appeal Tribunal'.
- 1.18 We now propose to amend CMA8 so that it reflects that the resources saved from settling parties accepting that they will not appeal against the infringement decision form part of the overall resource savings the CMA achieves through settlement, and therefore, may form part of the rationale for settling a particular case. The proposed change is reflected in paragraph 14.2 of the Draft CMA8.

Settlement discounts

- 1.19 Where a business enters into settlement, the CMA will impose a reduced penalty on the business. The reduced penalty will be calculated as a percentage discount on the penalty which would otherwise be payable.
- 1.20 Under the CMA's current guidance:
- (a) a discount of up to 20% may be granted for a business which settles before a statement of objections: and
 - (b) a discount of up to 10% may be granted for a business which settles after a statement of objections has been issued.

- 1.21 The CMA is proposing to retain these maximum discounts for cases involving cartel conduct.¹⁴ For cases involving other, non-cartel, conduct, we are proposing to increase the potential discounts available. Specifically, we are proposing to amend CMA8 so that:
- (a) a discount of up to 40% may be granted for a business which settles before a statement of objections; and
 - (b) a discount of up to 25% may be granted for a business which settles after a statement of objections has been issued.
- 1.22 Increasing the potential discounts will mean the CMA can offer stronger incentives for businesses to settle cases involving non-cartel conduct. The flexibility to secure settlement in more cases will enable the CMA to use its resources to maximum effect across its enforcement portfolio as a whole, while still ensuring a sufficient level of deterrence in individual cases.
- 1.23 In respect of cartel conduct, the CMA proposes to retain the existing caps on the discount available for settlement: 20% for settlement pre-statement of objections and 10% for settlement post-statement of objections. Retaining the existing discount levels in relation to cartel conduct reflects the fact that discounts for settlement in such cases are in addition to any discounts that the parties may qualify for under the CMA's leniency policy, and the need to preserve incentives for businesses to apply for leniency.

Track changes text

- 1.24 For ease of reference, the CMA has provided a track-changes version of the Draft CMA8 showing the key changes made in comparison to the Current CMA8 as well as a clean version of the Draft CMA8.

¹⁴ 'Cartel conduct' for these purposes is any conduct for which leniency is available because it meets the definition of 'cartel activity' in paragraphs 2.2 and 2.3 of the Leniency Guidance (OFT 1495) or in any updated definition in any revised Leniency Guidance that the CMA may publish.

2. Scope of the consultation

- 2.1 This consultation seeks the views of interested parties on the Draft CMA8. As noted at paragraph 1.24 above, it is accompanied by a track changes version of the Draft CMA8 showing the changes made in comparison to the Current CMA8.
- 2.2 After the consultation initiated by this consultation document, the CMA will prepare the final version of CMA8, taking into account the feedback received as part of this consultation.
- 2.3 The final version of CMA8 will take effect from the date of its publication.

3. Consultation process

How to respond

- 3.1 The CMA is publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments on the Draft CMA8.
- 3.2 The CMA encourages you to respond to the consultation in writing (by email) using the contact details provided in paragraph 3.5 below. Please provide supporting evidence or examples for your views where possible.
- 3.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 3.4 In accordance with the CMA's policy of openness and transparency, the CMA will publish non-confidential versions of responses on its webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on the CMA's webpages which omits that material and which explains why you regard it as sensitive.

Duration

- 3.5 The consultation will run for six weeks. Responses should be submitted by email by 11.59pm on 13 September 2024 and should be sent to:
cma8draft@cma.gov.uk

Compliance with government consultation principles

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

Statement about how the CMA will use information and personal data that is supplied in consultation responses

- 3.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and

the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

- 3.8 The CMA is processing this personal data for the purposes of its work. This processing is necessary for the performance of its functions and is carried out in the public interest, in order to take consultation responses into account.
- 3.9 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 the CMA retains personal data, see the CMA's Privacy Notice.
- 3.10 The CMA's use of all information and personal data that it receives is also subject to Part 9 of the Enterprise Act 2002 (EA02). The CMA may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, the CMA 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 the CMA's opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 3.11 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, if you have made any representations about the confidentiality of any information contained in your response, the CMA will take such representations into consideration. The CMA will also be mindful of its responsibilities under the data protection legislation referred to above and under Part 9 of the EA02.
- 3.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

Next steps

- 3.13 After the consultation and consideration of the responses received, the CMA will publish the final CMA8 on its webpages at <http://www.gov.uk/cma>. The CMA will also publish non-confidential versions of the responses received during the consultation. These documents will be available on the CMA's webpages and respondents will be notified when they are available.