

# Transparency and Disclosure: Statement of the CMA's Policy and Approach

CMA6

19 December 2024



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## 1. Introduction

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 This Statement provides over-arching guidance which aims to set out the CMA's policy and approach to transparency and disclosure at a high level. In brief, this Statement provides an overview of:
- the aims of the CMA in relation to transparency, information requests and handling of information
  - the CMA's approach to transparency when involved in cases and projects<sup>1</sup>
  - the CMA's approach to gathering information from and disclosing information to parties
  - the CMA's approach when considering whether to disclose information to other UK public authorities, and
  - the CMA's approach when cooperating with overseas public authorities.

It also notes the CMA's obligations regarding the protection and disclosure of information under the Enterprise Act 2002 (EA02), Competition Act 1998 (CA98), Subsidy Control Act 2022 (SCA22), Digital Markets Competition and Consumers Act 2024 (DMCCA24), Freedom of Information Act 2000 (FOIA) and data protection legislation, in particular the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA 2018).

- 1.3 This Statement at paragraphs 7.29-7.57 below incorporates the CMA's guidance about the making and consideration of requests for investigative assistance by overseas public authorities under Part 5 of DMCCA24 and the provision of such assistance (Overseas Investigative Assistance Guidance).<sup>2</sup> The CMA must have regard to the Overseas Investigative Assistance Guidance when exercising its overseas investigative assistance functions under Part 5 of the DMCCA24.<sup>3</sup>

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<sup>1</sup> For ease of reference, references to a case or cases in the remainder of this document also cover the CMA's projects.

<sup>2</sup> Section 324(1) of the DMCCA24 requires the CMA to publish Overseas Investigative Assistance Guidance. Under section 324(3) of the DMCCA24, the Secretary of State must approve the Overseas Investigative Assistance Guidance before it can be published. The Secretary of State approved the Overseas Investigative Assistance Guidance on 17 December 2024.

<sup>3</sup> UK enforcers other than the CMA providing investigative assistance to overseas public authorities under those functions must also have regard to the Overseas Investigative Assistance Guidance,

- 1.4 This Statement applies to the CMA's cases under the CA98, EA02, and the consumer enforcement provisions of the DMCCA24. It is also applies to the CMA's functions under the SCA22<sup>4</sup> and in respect of its motor fuel information gathering functions under the DMCCA24.
- 1.5 More detailed guidance on transparency and disclosure as it relates to specific areas of the CMA's work, including the applicable legal provisions, is available in other CMA documents, including:<sup>5</sup>
- *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2)
  - *Markets – Substantive Assessment Guidance* (pending), *Markets Guidance – Guidance on the CMA's Procedures* (pending), and *Markets Guidance – Remedies Module* (pending);
  - *Consumer protection: enforcement guidance* (CMA58)
  - *Direct Consumer Enforcement Guidance* (CMA200) (pending)
  - *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8)
  - *Applications for leniency and no-action in cartel cases* (OFT1495), and
  - *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)).<sup>6</sup>
- 1.6 In relation to the Office for the Internal Market, *Transparency and disclosure: Statement of the OIM's policy and approach* (OIM7) applies instead of this Statement. In relation to the Subsidy Advice Unit, this Statement applies and is supplemented by the *Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit* (SAU1). In relation to the CMA's digital market competition functions under Part 1 of the DMCCA24, *Digital Markets Competition Regime Guidance* (CMA194) applies.
- 1.7 Amendments to the *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)) as a result of the changes that are outlined in this

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see section 324(5) of the DMCCA24. See paragraph 7.32 below as well as section 319(2) DMCCA24 and Schedule 5 of the Consumer Rights Act 2015 for more information about which UK enforcers can provide overseas investigative assistance under Part 5 of the DMCCA24.

<sup>4</sup> And see paragraph 1.6 below.

<sup>5</sup> In the event of apparent conflict between this guidance and the detailed guidance, the latter prevails.

<sup>6</sup> These documents are available in full on [www.gov.uk/cma](http://www.gov.uk/cma). The webpages also contain a complete list of the CMA's guidance documents.

Statement are listed in Annex A to this document.

- 1.8 This Statement reflects the views of the CMA as at 1 January 2025 and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This Statement may in due course be supplemented, revised or replaced. The CMA's webpages will always display the latest version of the Statement.
- 1.9 Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this Statement makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the law itself, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the points covered here should consider seeking legal advice.
- 1.10 The CMA will apply this Statement flexibly. This means that the CMA will have regard to the Statement when dealing with transparency and disclosure but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.

## 2. CMA aims in respect of transparency, information requests, and handling of information

### Overview

- 2.1 The CMA is committed to be open and transparent about the work it does and how it engages with those directly involved in or affected by its work, while seeking to maintain (as appropriate) the confidentiality of information it obtains in the exercise of its functions. It also aims to be reasonable when requesting and handling information. Furthermore, the CMA aims to carry out its cases with appropriate efficiency and timeliness, including by having due regard to published timetables and statutory deadlines. Moreover, in exercising the CA98, markets and mergers, and consumer enforcement functions<sup>7</sup> covered by this Statement, the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable ('the duty of expedition').<sup>8</sup>
- 2.2 The CMA aims to take a broadly consistent approach when exercising the same functions and across functions. However, for some of the CMA's functions, the procedures and approach the CMA takes in an individual case are influenced or determined by legislation. Similarly, the circumstances of a case may determine the CMA's approach in the particular instance.<sup>9</sup>

### Transparency

- 2.3 Transparency is important for a number of reasons. Transparency is a means of achieving due process and ensuring that parties directly involved in a case are treated fairly. It also enables other interested persons to engage effectively with the CMA and to contribute to its work. Ensuring fairness and impartiality with those directly involved in the CMA's work and effectively engaging with other interested persons in turn improves the effectiveness and efficiency of the CMA's work, and the quality and robustness of its decision-making.
- 2.4 Providing clear information about its cases also enhances the visibility of the CMA's work, thereby increasing its impact, predictability and accountability. Transparency further fosters closer cooperation with overseas and UK competition and consumer authorities.

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<sup>7</sup> The consumer enforcement functions in Part 3 of the DMCCA24.

<sup>8</sup> Section 25(5) of the Enterprise and Regulatory Reform Act 2013.

<sup>9</sup> In particular, the CMA acknowledges that in criminal cartel and criminal consumer investigations, the public interest may weigh in favour of maintaining confidentiality of certain information rather than disclosure. Where there are parallel criminal and civil cartel investigations, the approach taken in relation to the CA98 investigation will be informed by the approach taken in the criminal case.

2.5 The CMA aims to achieve transparency in its work by:

- ensuring the parties directly involved and other interested persons (if appropriate) are informed during the course of a case of key developments, for example by notifying them of the formal commencement of a case (unless this may prejudice the investigation), sharing developing thinking with relevant parties at appropriate stages of a case, providing indicative timetables, and identifying contacts and decision makers
- engaging with the parties directly involved at an early stage of its cases (unless doing so may prejudice the case)
- ensuring that at appropriate times during the case parties directly involved and other interested persons have an opportunity to raise their concerns and provide their views regarding a particular case
- placing announcements on [www.gov.uk/cma](http://www.gov.uk/cma) when a formal case has been opened (unless doing so may prejudice the case or would otherwise be inappropriate), and
- placing announcements on [www.gov.uk/cma](http://www.gov.uk/cma) when a case, in relation to which a formal case opening announcement has been issued, reaches particular significant milestones and when it is completed.

### **Information requests**

2.6 The CMA's cases require it to make evidence-based decisions. The receipt of information is therefore important to the quality and effectiveness of the CMA's work. When formulating and determining the scope of information requests, determining to whom to address information requests, and determining the date by which the information should be provided, the CMA will aim to be fair and reasonable in its approach and will seek to avoid imposing unnecessary burdens across all of its work. In particular it will be receptive to parties' concerns about the burdens placed on them by the CMA's requests while seeking to balance those concerns with the efficient and effective operation of the CMA. Further information relating to information requests in respect of many of its functions is provided in chapter 4.

### **Handling Information**

2.7 The CMA's commitment to transparency is provided in the context of the CMA's duty under the ERA13 to promote competition for the benefit of consumers. The CMA is also under certain statutory obligations to protect confidential information. These obligations apply to the confidentiality of information relating to individuals and businesses that comes to the CMA in connection with the exercise of its statutory functions. Restrictions on the further disclosure of information apply to the CMA and to other persons to



whom it makes disclosure. In particular a person making an unlawful disclosure commits a criminal offence.

- 2.8 Under the EA02 such specified information<sup>10</sup> may be disclosed in certain specific circumstances, generally referred to as ‘information gateways’. When handling information and considering the appropriateness of making a disclosure, the CMA will be mindful of the need to protect confidential information from unlawful disclosure.
- 2.9 Further information about the statutory provisions of the EA02, the data protection legislation and the FOIA, including the relevant considerations for the CMA before making a disclosure, is to be found in chapters 4, 6, 7 and 8. Further information about the disclosure of information in the course of cases is available in chapter 4. Further information about the disclosure of information to other UK public bodies is provided in chapter 6. Further information on how the CMA cooperates with overseas public authorities is provided in chapter 7.

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<sup>10</sup> As defined under sections 237 and 238 of the EA02.

### 3. Transparency during the course of a case

#### Preparatory work

- 3.1 Before formally opening a case, the CMA typically carries out some preparatory work. For example, it may assess market intelligence and analyse trends in aggregated complaints data. The CMA may also engage with the parties directly involved,<sup>11</sup> for example through pre-notification discussions with merging parties in merger cases or informal preliminary inquiries in markets<sup>12</sup> and CA98 cases. The CMA may also engage with other interested persons, for example through discussions with complainants or other businesses in the market concerned, when it would be helpful to the CMA's case. This enables the CMA to gather information which will inform its early thinking and, where relevant, the decision as to whether to formally open a case. It also enables the parties directly involved to understand at an early stage the potential competition or consumer concerns under consideration.
- 3.2 The CMA will not engage with parties directly involved or other interested persons before the formal case opening decision where doing so may prejudice the investigation, for example in CA98 cases prior to unannounced site visits or witness interviews. This is particularly relevant, for example, in the case of suspected cartels, where the CMA is unlikely to contact the persons under investigation until after a formal investigation has been opened, unless they are already cooperating as leniency applicants or if the party directly involved is an informant.

#### Announcing a formal case opening decision

- 3.3 For the purposes of this Statement, cases are formally opened when:

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<sup>11</sup> For the purposes of this document, 'parties directly involved' does not include complainants.

<sup>12</sup> For example, using its general review functions the CMA might engage with market participants prior to any launch of a market study (see *Markets Guidance – Guidance on the CMA's Procedures* (pending)).

- in Phase 1 merger cases, the CMA confirms by notice to the merging parties that the merger notice is satisfactory<sup>13</sup> or (where the CMA is not dealing with a merger notice) that it otherwise has sufficient information to enable it to begin its investigation<sup>14</sup>
- in Phase 2 merger cases, the CMA makes a merger reference<sup>15</sup>
- in relation to market studies, the CMA serves notice of the launch of a market study<sup>16</sup>
- in relation to market investigations, the CMA makes a market investigation reference<sup>17</sup>
- in relation to super complaints, the CMA receives the super complaint<sup>18</sup>
- in CA98 investigations, the CMA decides that the legal test in the CA98<sup>19</sup> has been met (thus allowing the CMA to use its formal investigation powers) and that the case falls within its prioritisation principles<sup>20</sup>
- in criminal cartel investigations, the CMA decides that there are reasonable grounds for suspecting that a criminal cartel offence has been committed<sup>21</sup> and that the case falls within its prioritisation principles
- in consumer civil enforcement actions, the CMA decides to launch an investigation of a case which falls within its prioritisation principles<sup>22</sup>
- in direct consumer enforcement investigations under Chapter 4 of Part 3 of the DMCCA24, the CMA decides that the relevant legal test has been met,<sup>23</sup> and that the case falls within its prioritisation principles, and
- in relation to the review of undertakings and orders in markets and

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<sup>13</sup> A merger notice must meet the requirements under section 96(2) of the EA02. Where the CMA is satisfied that these requirements are met it must give notice to that effect to the person who submitted the merger notice (section 92(2A) of the EA02).

<sup>14</sup> Under section 34ZA(3) of the EA02.

<sup>15</sup> Under section 22(1) or 33(1) of the EA02.

<sup>16</sup> Under sections 5 and 130A of the EA02.

<sup>17</sup> Under section 131(1) of the EA02.

<sup>18</sup> The super-complaint must satisfy the criteria in section 11(1) of the EA02.

<sup>19</sup> Under section 25 of the CA98, the CMA may use its formal investigation powers where it has reasonable grounds for suspecting that competition law has been infringed.

<sup>20</sup> See [CMA Prioritisation Principles - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<sup>21</sup> Under section 192(1) of the EA02.

<sup>22</sup> The CMA may take civil enforcement action in respect of consumer law under various powers, including Chapter 3, Part 3 of the DMCCA24, and Part 8 of the Enterprise Act 2002. The CMA also has other consumer enforcement powers, including criminal powers under Chapter 1 (protection from unfair trading), Part 4 DMCCA24 and civil powers under Schedule 3 of the Consumer Rights Act 2015.

<sup>23</sup> Under section 180 of the DMCCA24 CMA may conduct an investigation where it has reasonable grounds for suspecting that a person has engaged, is engaging or is likely to engage in a relevant infringement of consumer law, or a person is an accessory to such a practice. "Consumer law" for these purposes means that which is listed in Schedule 16 of the DMCCA24.

mergers cases,<sup>24</sup> the CMA launches a review of the undertakings or orders.<sup>25</sup>

- 3.4 In regulatory reference and appeal cases the CMA's involvement in the case will be on a formal footing when the reference or appeal is made. Similarly with market references, referred by a regulator or minister, the CMA's formal involvement typically commences when the reference is made, although the CMA may have had informal engagement prior to the market reference being made.
- 3.5 The CMA will usually inform the parties directly involved of the decision to formally open a case (see paragraph 3.7). This may be done during the course of otherwise regular contact between the case team and the parties directly involved, through a notice to the notifying parties in Phase 1 mergers and market studies, through a Phase 2 opening letter<sup>26</sup> in Phase 2 merger inquiries and market investigations, or through a case initiation letter in CA98 investigations and civil or direct consumer enforcement actions. However, it will not be appropriate to inform the parties directly involved (as soon as a case is opened) when doing so may prejudice an investigation. For example, in CA98 and criminal cartel investigations such information may prejudice the investigation by undermining the CMA's ability to conduct unannounced site visits or execute search warrants. In such cases, the parties directly involved will be informed of the formal case opening decision, and an announcement will be made, as soon as it is possible to do so without prejudicing the investigation. In criminal cartel cases suspects are usually made aware of the investigation when they are arrested and/or when search warrants are executed.
- 3.6 In relation to cases involving many parties, for example market studies, market investigations or certain enforcement cases, undertakings in the relevant sector will not always be informed individually of the CMA's decision before the case opening announcement is placed on [www.gov.uk/cma](http://www.gov.uk/cma). Use of the webpages in such circumstances is an efficient means of communicating with the possibly large number of parties directly involved and may be the only means when not all such parties are identified by the CMA.
- 3.7 When the parties directly involved are informed of the formal case opening decision, the CMA will also provide them with the following information:
- a brief description of the case, the relevant legislation, the industry

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<sup>24</sup> For the avoidance of doubt, this does not apply to undertakings and orders under Part 8 of the EA02 or Part 2 of the Consumer Rights Act 2015

<sup>25</sup> Sections 92(1), (2)(b) and (c), and 162(2)(b) and (c) of the EA02.

<sup>26</sup> Previously called 'First Day Letter'.

sector concerned and the CMA's reasons for starting a formal case  
The level of information may vary according to the circumstances of the case

- an indicative timetable showing the anticipated dates of key milestones,<sup>27</sup> and
- the contact details for the main CMA contacts for the case including the first point of contact for general queries and submission of information.

3.8 At this early stage or shortly afterwards, the CMA may be able to provide the parties directly involved with other information about the case, such as potential timescales for state of play meetings (for example, in Phase 1 merger cases and CA98 investigations) and the identity of the person or persons within the CMA who will be responsible for key decisions.<sup>28</sup>

3.9 In all cases other than criminal cartel and criminal consumer investigations,<sup>29</sup> the CMA will place a case opening announcement on [www.gov.uk/cma](http://www.gov.uk/cma) announcing its decision to formally begin a case except if to do so would prejudice the case or would otherwise be inappropriate. At the same time as or following the public announcement of a case opening, the CMA will also publish, if and as soon as reasonably practicable, the information referred to in paragraph 3.7. The CMA in such an announcement will normally identify the parties directly involved, unless in the circumstances it is not appropriate to do so (such as if doing so would risk prejudicing the CMA's case or that of one of the CMA's enforcement partners.).<sup>30</sup>

3.10 The CMA will review the information provided on the status of the case and consider whether it is appropriate to update the information provided to the parties directly involved or the published information. For example, it will consider the need to do so in the light of changes to the indicative, and any statutory, timetable that may change as the case progresses.

3.11 Where the CMA provides investigative assistance to an overseas public authority (see paragraphs 7.29 to 7.57 below) which is carrying out

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<sup>27</sup> At this stage in a case, there may be few key milestones – for example, in merger cases, the only milestone at this stage will be the statutory deadline for a Phase 1 review.

<sup>28</sup> Further information regarding the decision-making procedures across the CMA can be found in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) (chapter 9), *Markets Guidance – Guidance on the CMA's Procedures* (pending), *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8) (chapters 11 and 13) and *Direct Consumer Enforcement Guidance* (CMA200) (pending) referred to in paragraph 1.5.

<sup>29</sup> As noted in footnote 9, where there are parallel civil cartel investigations, the approach taken in civil cartel investigations will be informed by the approach taken in the criminal case.

<sup>30</sup> Section 180(3)(c) of the DMCCA24 provides that the CMA may publish an investigation opening notice, which among other things, may identify the persons under investigation in a consumer investigation under Chapter 4, Part 3 of the DMCCA24. Section 25A of the CA98 provides that the CMA may publish a notice of investigation that among other things identifies any undertaking whose activities are being investigated under the CA98.

functions similar to certain of the CMA's functions, the CMA may decide to publish a notice which may identify the overseas public authority concerned, summarise the relevant matter and identify the undertakings and markets concerned.<sup>31</sup> There is no obligation on the CMA to publish such a notice. Whether the CMA publishes such a notice will depend upon the circumstances of the case, including for example whether doing so could be beneficial to providing such investigative assistance (for example by encouraging sources of information to come forward), or whether doing so could prejudice the CMA's ability to provide such investigative assistance or the overseas regulator's case. The CMA will normally consult the overseas regulator if it is considering publishing such a notice.

### **Engagement with relevant parties and announcements during a case**

3.12 An important aspect of ensuring that the CMA is transparent in its work is the way it engages with relevant parties over the course of a case. The timing and manner of engagement will vary depending on the type of work involved.<sup>32</sup> When considering the manner and timing of engagement, the CMA will have regard to the need to ensure due process for both the parties directly involved and other interested persons. The CMA will also have regard to the need to conduct investigations effectively and efficiently, and the need to reach properly reasoned decisions.

3.13 The CMA must, in some cases, take certain steps to share its provisional thinking or proposed decisions. For example:

- in CA98 investigations, if it proposes to make a decision, the CMA must issue a Statement of Objections (SO) to any party suspected of a breach of the CA98<sup>33</sup>
- in relation to a provisional decision to make a market investigation reference, the CMA must consult in such a manner as it considers practicable any persons on whose interest the decision is likely to have a substantial impact and publish a notice of the proposal<sup>34</sup>
- in mergers and markets cases the CMA must consult affected parties on undertakings in lieu,<sup>35</sup> proposed final orders and undertakings, and publish its provisional findings and possible remedies in Phase 2 merger inquiries and market investigations,<sup>36</sup>

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<sup>31</sup> Section 25A(1A) of the CA98.

<sup>32</sup> Refer to the CMA guidance relating to mergers, markets, CA98, and consumer protection referred to in paragraph 1.5 for further guidance.

<sup>33</sup> Rule 5 of the Competition and Markets Authority Competition Act 1998 Rules 2014.

<sup>34</sup> Sections 131A(2) and 169(6)(a)(i) of the EA02.

<sup>35</sup> Sections 90 and Schedule 10 in respect of mergers and 155(1) of the EA02 (the CMA must publish a notice of the proposed undertakings in relation to market studies).

<sup>36</sup> Section 104(1) and (2) of the EA02.

- in civil consumer enforcement actions it would usually, before making an application for an enforcement order, engage in appropriate consultation with the party against whom the enforcement order would be made,<sup>37</sup> and
- in direct consumer enforcement investigations where the CMA has started an investigation under section 180 DMCCA24, and the CMA has reasonable grounds to believe that a person has engaged, is engaging or is likely to engage in a relevant infringement,<sup>38</sup> or is an accessory to such a practice, the CMA must give to the respondent a Provisional Infringement Notice (PIN) before making a final decision.<sup>39</sup>

3.14 Where the CMA takes any of the steps discussed in paragraph 3.13, including to share its provisional thinking or proposed decision, it will normally publish an announcement on [www.gov.uk/cma](http://www.gov.uk/cma) saying that it has done so. Other than in exceptional circumstances, such an announcement will, as relevant, include the identity of the party or parties in respect of whom such steps have been taken. The CMA would normally also make such an announcement where it makes a decision to prosecute in a criminal investigation.

3.15 The CMA is not subject to a general obligation to disclose its thinking in advance of consulting on its provisional decisions. However, the CMA will take a flexible approach to sharing its developing thinking and/or evidence with parties directly involved and (if appropriate) other interested persons prior to this, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of their case. The CMA may share its developing thinking or evidence when doing so would be helpful to the progression of the case at appropriate stages, to verify the information it has received or when it is otherwise appropriate to do so. For example, the CMA may provide to the parties directly involved and other interested persons the results of research or surveys relevant to a market study or investigation; or disclose publicly parties' key submissions in Phase 2 merger inquiries and market investigations.<sup>40</sup> The CMA may also share its developing thinking more widely through publishing the fact and/or details of such thinking, including on [www.gov.uk/cma](http://www.gov.uk/cma).

3.16 The CMA will seek to ensure that the parties directly involved are aware of the decision-making procedures which apply to their case, and the identity of the

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<sup>37</sup> Civil consumer enforcement actions may include action under chapter 3, Part 3 DMCCA24 and Part 8 EA02 and see sections 155 DMCCA24 and 214(1) of the EA02.

<sup>38</sup> For the meaning of relevant infringement see sections 148 and 181(2) of the DMCCA24.

<sup>39</sup> Section 181 of the DMCCA24.

<sup>40</sup> Further detail on the CMA's approach to disclosure in such inquiries or investigations may be found in *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)).



person or persons within the CMA who will be responsible for key decisions during the course of the case. Other interested persons are also able to contact the CMA to share their views. The CMA may also itself contact other parties to request information or seek their views on the case, where doing so would assist the CMA in exercising its functions.

### **Case closure announcements and decisions**

3.17 Publication of case closure announcements and decisions is a means of enhancing the visibility of the CMA's completed work, and of widening its impact, as well as enabling interested persons to hold the CMA to account.

3.18 On completing a case in relation to which a formal case opening announcement has been made, the CMA will publish the outcome on [www.gov.uk/cma](http://www.gov.uk/cma) and usually issue a press notice with a link to the relevant pages on [www.gov.uk/cma](http://www.gov.uk/cma). The potential outcomes that will be announced include:

- in Phase 1 merger inquiries, a clearance decision, a Found Not to Qualify Notice or the CMA deciding to make a merger reference or accept undertakings in lieu of a reference<sup>41</sup>
- in Phase 2 merger investigations, a no Substantial Lessening of Competition (SLC) decision, an SLC decision with or without remedies (including a prohibition) or cancellation of reference decision<sup>42</sup>
- in Phase 1 markets cases (that is, market studies), the CMA deciding not to make a market reference, to make a market reference or to accept undertakings in lieu of a reference<sup>43</sup>
- in a market investigation reference, a no Adverse Effects on Competition (AEC) finding, an AEC finding with or without remedies<sup>44</sup>
- in relation to super-complaints, a response stating what action, if any, the CMA proposes to take in response<sup>45</sup>
- in CA98 investigations, where the CMA's investigation is resolved through closing an investigation on administrative priorities, issuing a non- infringement decision, a decision that there are no grounds for action by the CMA, by accepting commitments from a business about their future conduct, or a final decision that particular conduct

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<sup>41</sup> Made under sections 22(2), 33(2) and 73 of the EA02. Publicity requirements in respect of these decisions are in section 107(1) of the EA02.

<sup>42</sup> Section 37(1) of the EA02.

<sup>43</sup> Made under sections 131(1) and 154(2) of the EA02. Publicity requirements in respect of these decisions are in section 172(1) of the EA02.

<sup>44</sup> Section 136(1) of the EA02.

<sup>45</sup> Section 11 of the EA02.



- amounts to an infringement of the CA98<sup>46</sup>
- in criminal cartel investigations, the outcome of a prosecution or a decision to close an investigation<sup>47</sup>
- in consumer civil enforcement actions under Chapter 3, Part 3 of the DMCCA24, the outcome of a court action (with a link to the outcome where possible), the acceptance of undertakings or a case closure decision<sup>48</sup>
- in direct consumer enforcement investigations under Chapter 4, Part 3 of the DMCCA24, the issuance of a Final Infringement Notice, accepting undertakings from a business to address the CMA's concerns, or a case closure notice<sup>49</sup>
- in reviews of undertakings and orders in markets and mergers cases,<sup>50</sup> a decision to vary, release, revoke or continue to enforce an undertaking or order,<sup>51</sup> and
- in regulatory references and appeals, the final decision on the reference or appeal.<sup>52</sup>

The level of detail published will reflect the CMA's statutory requirements and depend on the nature of the outcome, while also having regard to the CMA's transparency aims and the need to protect confidential information. In cases where a detailed decision has been issued, the CMA will publish a non-confidential version of the decision on [www.gov.uk/cma](http://www.gov.uk/cma).

## Notice of announcements

- 3.19 The CMA will in the majority of cases give the parties directly involved such advance notice as it considers fair and sufficient before making any public announcements, either during or at the end of the case. The CMA will aim to balance an open approach with the need to ensure the orderly announcement of full information.
- 3.20 It will in particular be mindful of the risk of leakage of information shared on a confidential basis with parties in advance of the CMA's public announcement.

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<sup>46</sup> Sections 31(2), 31A and 31B.

<sup>47</sup> Sections 188, 188A, 188B and 192(1) of the EA02.

<sup>48</sup> This is also relevant to consumer civil enforcement action under Part 8 of the Enterprise Act 2002, and consumer criminal enforcement under chapter 1 (protection from unfair trading) Part 4 DMCCA24 and the Consumer Protection from Unfair Trading Regulations 2008.

<sup>49</sup> Sections 182 and 185 DMCCA24.

<sup>50</sup> This does not apply to undertakings and orders under the CMA's consumer enforcement powers.

<sup>51</sup> Sections 82(2), 84(3)(b), 92(2), 159(4) and (5), 161(4)(b) and 162 of the EA02.

<sup>52</sup> Under relevant sectoral legislation. See Schedule 6 of the ERRA13 for more detail as to the amended form of the relevant provisions of sectoral regulation concerning regulatory appeals and references.

Such leakage may result in selective and/or misleading reporting in the press.

3.21 The points below are a general guide. It may be the case that the particular complexities of the issue the CMA is dealing with mean that it departs from its standard practice.

### **Market and non-market sensitive announcements**

3.22 As a general rule, in non- market-sensitive announcements, the CMA aims to give the parties directly involved advance sight of the content of the CMA's announcement, in confidence, unless there is a compelling reason not to do so. However, the CMA will not, as a matter of course, discuss the text of press releases with parties in advance of issue.

3.23 When making an announcement which contains market sensitive information, the CMA's approach will be informed by the Financial Conduct Authority's (FCA) best practice note on identifying, controlling and disclosing inside information.<sup>53</sup>

3.24 Where the CMA considers an announcement to be market-sensitive, it will:

- aim to make the announcement before relevant financial markets open and generally at 7.00 am on the date of issue
- when the announcement date is not already in the public domain, the CMA will advise those directly affected of the announcement the evening before issue once relevant financial markets have closed – this might be out of hours, in which event the CMA will have requested out of hours contact details in advance, and
- typically, including where there are multiple parties, the CMA will provide those directly involved with a confidential text of the press release and any document which is to be published alongside the press release at least one hour in advance of issue.<sup>54</sup>

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<sup>53</sup> See [Best practice note - Identifying, controlling and disclosing inside information | FCA](#).

<sup>54</sup> In respect of market investigations involving UK listed companies, parties will receive advance copies of the press release and other documents to be published at 6.00 am, one hour before their publication at 7.00 am. In respect of Phase 1 merger decisions, where one or more of the merger parties is a UK-listed company, the CMA will contact the merger parties/their advisers after the London Stock Exchange has closed on the day before publication, normally after 5.00 pm. By 7.00 am (when the London Stock Exchange opens) the following day, the decision will be announced (and any press release/summary of the decision will be published on the CMA webpages. Where the merger parties are listed companies in other jurisdictions, the CMA will, where possible, seek to avoid announcing its decision during stock exchange hours in those jurisdictions (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2)). In respect of Phase 2 merger investigations, where one or more of the merger parties is a UK-listed company, the CMA's press release; the summary of interim report; and, where relevant, the Invitation to Comment on Remedies are made available to the merger parties on an embargoed basis after the London Stock Exchange has closed on the day

## Dealing with the media when making an announcement

- 3.25 For non-market-sensitive announcements, the CMA may sometimes brief the media in advance of making a public announcement under an agreed 'embargo.' When this happens the parties and other relevant stakeholders such as trade bodies will be notified of the embargo. On occasion this may involve spokespeople giving interviews to both broadcast and print media in advance under an embargo.
- 3.26 When making a market-sensitive announcement, the CMA never discusses the content with the media beforehand. The CMA may confirm that an announcement will take place on a certain day, at a certain time, and in some cases the CMA will agree in advance to interview requests for broadcast media.
- 3.27 Where the CMA statement is not known about in advance by the media due to market sensitivity issues, and where giving broadcasting interviews is appropriate, it will be the CMA's practice to have spokespeople available in the expectation of receiving interview requests shortly after an announcement.
- 3.28 Once a market-sensitive announcement has been made, the CMA will respond to media enquiries and, where appropriate, make spokespeople available for broadcast and print interviews.

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before publication, normally after 5.00 pm. By 7.00 am (when the London Stock Exchange opens) the following day, these documents are published on the CMA webpages. Where the merger parties are listed companies in other jurisdictions, the CMA will, where possible, seek to avoid announcing its decision during stock exchange hours in those jurisdictions (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2)).

## 4. Obtaining and using information

### Requests for information

- 4.1 The CMA may request information informally or formally, depending on the circumstances. The CMA often relies upon the co-operation of third parties, including businesses and individuals, and routinely requests information on an informal basis (i.e., not using formal investigatory powers). This informal approach may be sufficient in many cases.
- 4.2 Additionally, in respect of many of the CMA's functions the CMA has formal information gathering powers.<sup>55</sup> Such powers enable the CMA to request, for example, data, documents or forecasts, or require persons to attend as witnesses to give evidence. Whether exercising informal or formal information gathering powers, the CMA's approach as set out below is similar.<sup>56</sup>
- 4.3 The CMA will make evidence-based decisions. Therefore, the availability to it of evidence and accurate information is a key factor affecting the performance of the CMA, as is the ability to conduct cases in a timely manner.<sup>57</sup> The CMA fully recognises that when making information requests this will have an impact on others, whether they are businesses, consumers or organisations. While formulating information requests, the CMA will therefore strive to avoid imposing unnecessary burdens on such persons while also considering the need for the CMA to operate efficiently and effectively.
- 4.4 The CMA seeks to address these aims by:
- considering the information that is required for the CMA's purposes
  - preparing clear and focused information requests
  - addressing requests to those best placed to provide the information
  - considering the likely timescale in which the intended recipient will be able to provide the information, and
  - considering how soon the CMA requires the information, having regard to the relevant administrative or statutory timetable of the case and the impact a delay in receiving the information may have on the quality and timeliness of the CMA's work.

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<sup>55</sup> For example, formal powers are available in mergers (see chapter 9 of *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2)), market cases (see *Markets Guidance – Guidance on the CMA's Procedures* (pending)), CA98 investigations (see chapter 6 of the *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8)), criminal cartel investigations, regulatory reference and appeal cases and in respect of consumer enforcement cases *Direct Consumer Enforcement Guidance* (CMA200) (pending).

<sup>56</sup> See relevant tool specific guidance for more details in specific areas of work.

<sup>57</sup> And note that the provisions of false or misleading information to the CMA may result in criminal prosecution or an administrative penalty: see, for example, *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4).

- 4.5 These factors may be relevant to many of the CMA's information requests, whether at the outset of a case or while the case is ongoing. The extent of engagement prior to making an information request may vary. For example, at the outset of a Phase 2 merger inquiry or market investigation the CMA will generally discuss with key parties the information they hold and the form in which they hold it. This will help to influence the preparation of the information questionnaires that are typically used in the early stage of such inquiries or investigations.
- 4.6 Where it is practicable and appropriate (having regard to all the circumstances of the case and to CMA's duty of expedition – see above at paragraph 2.1), the CMA may discuss a draft of its information requests with the intended recipients so as to enable requests to be prepared that reduce the burden on the recipients (for example, by helping to shape requests, having regard to how information is held by the relevant parties). Whether or not the CMA decides to send a request in draft will depend on all circumstances of the case, including whether the case involves multiple parties, each holding the information differently; whether the particular circumstances of the case require urgency or where the CMA is under time pressure to meet a statutory (or administrative) deadline; and whether owing to the duty of expedition it would be inappropriate to do so. The CMA will consider representations about the scope of any information request and deadline for compliance, though having regard to the duty of expedition, the expectation should be that the CMA is only likely to agree to deadline extensions where a party can provide very good reasons why it is unable to comply with the deadline.
- 4.7 The CMA will seek to set a reasonable deadline for all information requests and where draft formal requests have been issued the final request will have considered any representations on the proposed deadline. What is reasonable will depend on the circumstances of the case.
- 4.8 It is likely that during the course of a case the CMA will seek additional information. When doing so, the same factors identified in paragraphs 4.3 to 4.6 are again likely to be relevant.
- 4.9 Parties should make known any difficulties and discuss any queries raised by any information request including any difficulties in responding within the timeframe set out in a request by contacting the case team as soon as possible after receiving a request, or as soon as they become aware that they may not meet the stipulated deadline.
- 4.10 The CMA may impose administrative financial penalties for non-compliance with some of the CMA's formal information gathering powers in relation to

CA98, consumer investigations, its mergers and markets cases and in relation to its information gathering powers in respect of motor fuels.<sup>58</sup>

- 4.11 Prior to commissioning a survey as part of the information gathering process, the CMA will consult such of the parties directly involved as it considers appropriate on the draft survey design and content. The CMA may also require parties directly involved to provide information about their customers and suppliers.

### **Identifying confidential information**

- 4.12 The CMA recognises that the confidentiality of parties' information is an important consideration for those who participate in a CMA case.
- 4.13 The CMA may therefore require that, in respect of some or all information supplied, parties should make known to the case team which information they consider to be confidential, and provide sufficient explanations for their claim, for example, regarding the nature of the information, the harm that could be caused, the likelihood of harm and the magnitude of that harm. The explanations provided will be taken into account when considering whether to disclose any of the information provided. The CMA's commitment to transparency means that confidentiality claims will be rigorously assessed. Such claims should be kept to the minimum extent necessary to protect confidentiality, and the CMA will not accept blanket or unsubstantiated claims for confidentiality. Having taken into account parties' confidentiality representations, the CMA will ultimately decide whether it is appropriate to disclose the information and, if so, the manner in which that disclosure should occur (which could include disclosure via electronic means, using encryption technology).
- 4.14 Unless agreed otherwise with the CMA, when providing key or substantial submissions, parties should normally also provide a second, non-confidential version. The CMA will permit a short interval for the provision of a non-confidential version, but the exact period permitted will differ depending on the type of work and will take into account the possibility that a delay in receiving confidentiality claims may adversely affect the CMA's statutory or administrative timetable.
- 4.15 Information may be viewed as 'confidential information' if it is:

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<sup>58</sup> Detailed guidance on the CMA's approach to penalties and other sanctions is available in *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4).

- information whose disclosure the CMA thinks is contrary to the public interest
- commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
- information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual's interests.<sup>59</sup>

4.16 Whether in fact the CMA accepts that information is confidential will depend on the relevant circumstances and will therefore be assessed on a case-by-case basis. By way of indication only, the following are examples of information that the CMA will usually consider unlikely to cause harm to the person or business to whom it relates:

- information that is already in the public domain or can readily be deduced from information in the public domain, and
- financial information or other data<sup>60</sup> relating to a business which is more than two years old.

4.17 The following information will normally be considered to be confidential so that if the CMA is considering whether disclosure is appropriate, it will need to consider the manner of disclosure:

- financial information or other data<sup>61</sup> relating to a business which is less than two years old
- information which, if disclosed, may adversely affect the competitive process in the market
- information relating to the intended strategy of a business, and
- responses to surveys (in aggregate or individually), the disclosure of which could be harmful to a firm or individual or where the identity of the person providing the information should be protected.

### **Use and disclosure of information obtained by the CMA**

4.18 As a general rule, information lawfully obtained by the CMA in the exercise of its statutory functions (for example, during a case) may be used within the CMA for the purposes of facilitating the exercise of any of its statutory functions.

4.19 The CMA is subject to strict rules governing the disclosure of information to

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<sup>59</sup> See also Rule 1 of the Competition and Markets Authority Competition Act 1998 Rules 2014, which defines confidential information in the context of CA98 investigations.

<sup>60</sup> This could include, for example, parties' turnover, sales, market share data, etc.

<sup>61</sup> See footnote 60.



external parties. Part 9 of the EA02 imposes a general restriction on the disclosure of information which the CMA obtains during the exercise of any of its functions (referred to as 'specified information') to other persons.<sup>62</sup> The restriction applies to specified information which relates to the affairs of a living individual or any business of an existing undertaking. Only disclosure falling within one of the 'information gateways' (see below) is permitted.

4.20 The CMA may disclose specified information if:

- the information has on an earlier occasion been lawfully disclosed to the public (section 237(3) of the EA02)
- the CMA has a power or duty to disclose the information which exists apart from Part 9 of the EA02 (section 237(6) of the EA02)
- the CMA obtains the required consents (section 239 of the EA02)
- the disclosure is made for the purpose of facilitating the exercise by the CMA of any of its statutory functions (section 241(1) of the EA02)
- the information is disclosed to another public authority in the UK for the purpose of facilitating the exercise by that authority of its functions under the EA02 and/or the legislation set out in Schedule 15 of the EA02<sup>63</sup> (under section 241(3) of the EA02)
- the information is disclosed to any person (after the CMA satisfies itself that the disclosure is proportionate to what is sought to be achieved by it) (under section 242 of the EA02)
  - in connection with the investigation of any criminal offence in any part of the UK
  - for the purposes of any criminal proceedings there or
  - for the purpose of any decision whether to start or bring to an end such an investigation or proceedings,
- the disclosure is to facilitate both the exercise by the CMA of any of its statutory functions and the exercise by an overseas public authority of its functions (under section 243A of the EA02), or only an overseas authority's functions (under section 243B of the EA02),
- the disclosure is for a purpose permitted by a cooperation arrangement between the CMA or the UK and, respectively, an overseas public authority or another country (under section 243C of the EA02).

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<sup>62</sup> Sections 237 and 238 of the EA02.

<sup>63</sup> See chapter 6 for further detail on the application of Part 9 of the EA02 to disclosures to UK public authorities, and chapter 7 for detail on the application of Part 9 to disclosures to overseas public authorities.



- 4.21 The CMA may also disclose (under section 241A of the EA02) certain types of specified information which has been ordered by the Secretary of State to be ‘prescribed’<sup>64</sup> information to any person for the purposes of:
- actual or prospective prescribed civil proceedings in the UK or elsewhere
  - obtaining legal advice in relation to such proceedings, or
  - establishing, enforcing or defending legal rights that are or may be the subject of such proceedings.
- 4.22 The information gateways of sections 241A, 243A and 243B of the EA02 do not apply to all information received by the CMA.<sup>65</sup>
- 4.23 Where the CMA discloses information to a person there are restrictions on the further disclosure or use of the information by that person. These restrictions vary between the information gateways. It is a criminal offence to disclose information in circumstances where such disclosure is not permitted under Part 9 of the EA02, where a person contravenes a direction under section 243E of the EA02 not to do so, or where a person uses the information disclosed to him for a purpose not permitted under Part 9 of the EA02.<sup>66</sup>
- 4.24 Generally, if the CMA is considering making a disclosure for the purpose of its investigation, it will most commonly consider making the disclosure with the consent of the person to whom the information relates (for example, in the form of a waiver) or by the information gateway under section 241(1) of the EA02.

### **Considerations before making a disclosure**

- 4.25 Even when an information gateway applies, the CMA is required to have regard to the three considerations set out in section 244 of the EA02 before making a disclosure, namely:
- the need to exclude from disclosure (so far as practicable) any information whose disclosure the CMA considers to be contrary to the public interest

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<sup>64</sup> For these purposes ‘prescribed’ means prescribed by order of the Secretary of State. As at the date of publication of this Statement, the Secretary of State has issued one order prescribing certain information and proceedings for the purposes of this section (the Enterprise Act 2002 (Disclosure of Information in Civil Proceedings etc) Order 2007, SI 2007/2193).

<sup>65</sup> See section 241A(2), section 243A(2) and section 243B(2) of the EA02 respectively.

<sup>66</sup> Section 245 of the EA02.

- the need to exclude from disclosure (so far as practicable)
  - commercial information the CMA considers might significantly harm the legitimate business interests of the relevant undertakings or
  - information relating to the private affairs of an individual which the authority thinks might significantly harm that individual's interests,
- the extent to which the disclosure of information relating to the private affairs of an individual or commercial information is necessary for the purpose for which the CMA is permitted to make the disclosure.

4.26 These three considerations are applied by the CMA on a case-by-case basis when the CMA is considering disclosure of specified information. When decisions are finely balanced, the CMA will have particular regard to whether disclosed is needed to achieve due process.

### **CMA's approach to disclosure in connection with the conduct of a case**

- 4.27 The remainder of chapter 4 provides an overview of the CMA's approach to disclosure, both to parties directly involved and to others, in connection with the conduct of the CMA's cases. Chapter 4 also applies when a public authority is a party in Phase 2 references and appeals. The CMA's approach to the disclosure of specified information to other public authorities, including sectoral regulators and overseas public authorities in other circumstances, is explained in chapters 6 and 7 of this Statement.
- 4.28 If an information gateway other than the consent gateway in section 239 of the EA02 applies, and the CMA considers, having taken into account the relevant statutory considerations, that it is appropriate to make the disclosure, it is not obliged to obtain the consent of the party to whom the information relates. However, the CMA will consider a party's representations regarding the confidential nature of any information they have provided.
- 4.29 As well as complying with any relevant obligations under the applicable statutory regime, the CMA will take such steps as it considers reasonable and practicable in the circumstances of the case to seek further views on confidentiality from the party claiming confidentiality, or the party to whom the information relates, where it intends to disclose such information. Where the CMA gives advance notice of such a disclosure, the CMA may provide details of the information it proposes to disclose relevant to the person concerned, for example by way of a description, inventory or draft of the proposed disclosure. Other than when legally required to provide notice and besides the circumstances set out in chapter 6 and 7, the CMA might choose not do so if, for example, it considers that the party has already had sufficient

opportunity to submit confidentiality claims, or if the CMA has sought to protect the information to be disclosed (for example, by anonymising or aggregating data).

- 4.30 When the CMA considers it appropriate to disclose information it will consider how best to protect confidential information. For example, the CMA may redact, anonymise or aggregate confidential information, such as by providing ranges in relation to market share data.<sup>67</sup>
- 4.31 Sometimes, the CMA may use confidentiality rings or data rooms as a means of making disclosure of confidential information. For example, the CMA uses confidentiality rings when it is necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process or where there appear to be identifiable benefits in doing so.<sup>68</sup>
- 4.32 Confidentiality rings enable disclosure of specific quantitative and/or qualitative data or documents to a defined group.<sup>69</sup> 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.
- 4.33 Data rooms enable access to a specific category of confidential data or documents to a defined group. As for confidentiality rings, the group is determined on a case-by-case basis. Data rooms are typically used to provide access to data to enable parties' advisers to gain further understanding of the CMA's analysis and to confirm or challenge the CMA's findings or conclusions. They may also be used to allow advisers to carry out an assessment of a specific set of qualitative documents. 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.
- 4.34 Access to documents in a confidentiality ring or data room will be subject to confidentiality undertakings provided by the persons with access (and for employees, their employer firm). The undertakings must address, amongst other matters, how they may use the information disclosed to them and the

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<sup>67</sup> Particular procedures apply to the disclosure of information provided by would-be leniency applicants (see *Applications for leniency and no-action in cartel cases* (OFT1495), in particular chapter 7). For further guidance on disclosure in Phase 2 merger investigations and market investigations, see *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)), paragraphs 9.11-9.15.

<sup>68</sup> See, for example, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), chapter 11 for further guidance.

<sup>69</sup> Subject to any restrictions in the data protection legislation in relation to personal data.

restrictions that apply to onward disclosure. In the case of data rooms, the CMA will also require advisers to follow data room rules concerning the proper conduct of the data room, including making provision for bringing into and taking out of the data room such items as materials, notes and equipment.

- 4.35 It will be a condition of access to a confidentiality ring or data room that information reviewed by advisers is not shared with their client(s) without the CMA's prior consent. It is for advisers to satisfy themselves of the steps they are required to take under any relevant professional conduct rules to ensure that they are able to operate on this basis.
- 4.36 Requests for the use of confidentiality rings and data rooms will be considered on a case-by-case basis. The CMA has discretion as to whether to agree to such requests, and is likely to do so only where it is proportionate, there are clear benefits in doing so, and potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned. The CMA will also take into account whether it is appropriate to provide access at the time the request is made, having regard to the progress of the case, the resource implications of operating confidentiality rings and data rooms, and of risks of human error and information leaks.

## 5. Complaints and accountability

### Disputes regarding the conduct of a case

- 5.1 Parties should raise any complaints about the conduct of an ongoing CMA case with the most senior CMA contact responsible for that case, who will review the case team's actions and aim to either put things right, or give an explanation for the course of action taken by the case team.
- 5.2 If a party is not satisfied with the senior CMA contact's response, they may request a review of the handling of their complaint by:
- the Procedural Officer (PO), where the complaint concerns certain procedural disputes in CA98 investigations, and disputes relating to requests for confidentiality in merger cases and market studies and investigations <sup>70</sup>
  - the Procedural Complaints Adjudicator, where the complaint concerns certain procedural disputes in direct consumer enforcement investigations,<sup>71</sup> or
  - the General Counsel<sup>72</sup> in relation to any disputes falling outside the PO's or Procedural Complaints Adjudicator's remit.
- 5.3 This does not alter the procedures in place for submitting general complaints about the CMA or about closed cases, which should be addressed in the first instance to [general.enquiries@cma.gov.uk](mailto:general.enquiries@cma.gov.uk), who will then escalate as and when appropriate.
- 5.4 The CMA's decisions in merger cases, market studies and market investigations are subject to appeal to the Competition Appeal Tribunal (Tribunal), which will apply the same principles as would be applied by a court on an application for judicial review in dealing with the review. The CMA's decisions in CA98 investigations are subject to a full merits review by the Tribunal. In addition, parties with sufficient interest have the right to seek judicial review of administrative decisions. CMA decisions to impose administrative penalties in respect of its mergers, markets, CA98 and motor fuels are also appealable to the Tribunal.<sup>73</sup> The CMA's decisions in consumer direct enforcement investigations under Chapter 4 of Part 3 of the DMCCA24

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<sup>70</sup> In markets and mergers cases, the Procedural Officer mechanism only applies to disputes regarding the confidentiality of information that the CMA proposes to publish, including in published decisions.

<sup>71</sup> Further information on the role of the Procedural Complaints Adjudicator can be found in *Direct Consumer Enforcement Guidance* (CMA200) (pending).

<sup>72</sup> In practice, the General Counsel may delegate dealing with the complaint to the Deputy General Counsel.

<sup>73</sup> See *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4).

are subject to review by the Courts.<sup>74</sup>

## Accountability

- 5.5 The CMA is accountable to the public through Parliamentary scrutiny in Westminster and the devolved administrations, for example through inquiries by select committees.
- 5.6 A member of the public may complain to the Parliamentary and Health Service Ombudsman (PHSO)<sup>75</sup> via a Member of Parliament about the CMA's administrative actions, after seeking to resolve the complaint with the CMA. The CMA handles corporate complaints in line with the PHSO's Principles of Good Complaint Handling and UK Central Government Complaint Standards.

## Publications

- 5.7 Each financial year, the CMA will produce an Annual Plan, setting out its objectives for the year, which is laid before Parliament. The CMA is accountable to Parliament for the delivery of these objectives via the presentation of its Annual Report.
- 5.8 The CMA will aim to provide consistent information in its Annual Report,<sup>76</sup> including a summary of key case outcomes across the CMA's functions. The CMA's case finder, available at <https://www.gov.uk/cma-cases>, includes more detailed case data including the date the case was opened, a summary of the findings and/or recommendations, the date the case was closed and the time taken to complete it.
- 5.9 The CMA will also provide information in its Annual Report on its ongoing work that is in the public domain.
- 5.10 The CMA will publish an Annual Plan for each financial year, setting out its vision and high-level priorities over the financial year. Information regarding the Annual Plan will be available on [www.gov.uk/cma](http://www.gov.uk/cma).
- 5.11 The CMA is required to prepare resource accounts for each financial year, which are audited by the National Audit Office.

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<sup>74</sup> See section 202 DMCCA24. Parties may appeal to the High Court in England, Wales and Northern Ireland or the Court of Session in Scotland against a CMA decision to impose a monetary penalty, the nature or amount of that penalty, or the giving of directions. Where the DMCCA24 does not specifically provide for an appeal, an application for judicial review may be brought in certain circumstances.

<sup>75</sup> Further information is available on the Ombudsman's website at [www.ombudsman.org.uk/](http://www.ombudsman.org.uk/).

<sup>76</sup> The CMA is required, under paragraph 14 of Schedule 4 of the ERA13, to provide certain information in an annual performance report.

## 6. Disclosure to UK public authorities<sup>77</sup>

- 6.1 As explained in chapter 4, Part 9 of the EA02 imposes a general restriction on the disclosure of information which the CMA obtains during the exercise of any of its functions (referred to as ‘specified information’) to other persons. The restriction applies to specified information which relates to the affairs of a living individual or to the business of an existing undertaking. Only disclosure falling within one of the ‘information gateways’ is permitted. These restrictions apply to the exchange of information between public authorities.
- 6.2 The CMA may however disclose specified information where an information gateway exists.<sup>78</sup> The information gateways that most commonly apply when the CMA is considering disclosure to another UK public authority are:
- the CMA obtains consent (section 239 of the EA02)
  - to facilitate the CMA’s functions (section 241(1) of the EA02)
  - to facilitate the exercise of other UK public authorities’ functions under the EA02 and/or other legislation as set out in Schedule 15 of the EA02 (section 241(3) of the EA02)<sup>79</sup>
  - for the purpose of civil proceedings (section 241A of the EA02)<sup>80</sup>
  - for the purpose of criminal proceedings (section 242 of the EA02).<sup>81</sup>
- 6.3 As explained in chapter 4, there are restrictions that apply to the use and further disclosure of information disclosed under the information gateways. When information is disclosed by the CMA for the purpose of the CMA’s functions, the receiving authority may not further disclose that information without the agreement of the CMA,<sup>82</sup> and the receiving authority may only use the information for the purpose for which the CMA disclosed it.<sup>83</sup> When information is disclosed by the CMA under other information gateways (apart from section 239 of the EA02), typically the information may only be used for the purpose of the disclosure.
- 6.4 As explained in chapter 4, it is a criminal offence to disclose information in

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<sup>77</sup> The explanations in chapter 4 about making information requests and the handling of information may also be applicable to public authorities when they are treated as a party in Phase 2 merger and market references and appeals. This chapter applies when the CMA is considering disclosure of information to another UK public authority.

<sup>78</sup> The full list of information gateways is provided in paragraph 4.20 of chapter 4.

<sup>79</sup> For example, other governmental departments, Trading Standards Service and sectoral regulators.

<sup>80</sup> This gateway is not applicable in relation to information received by the CMA while exercising its merger, market and CA98 functions. Further information about this information gateway is set out in paragraphs 4.20 and 4.21.

<sup>81</sup> See also footnote 9.

<sup>82</sup> Section 241(2) of the EA02.

<sup>83</sup> Section 241(2A) of the EA02.



circumstances where such disclosure is not permitted under Part 9 of the EA02, where a person contravenes a direction under section 243E of the EA02 not to do so, or where a person uses the information disclosed to him for a purpose not permitted under Part 9 of the EA02.<sup>84</sup>

### **CMA's approach to disclosure under the information gateways**

- 6.5 Even where an information gateway is relevant, the CMA must have regard to the statutory considerations in section 244 of the EA02 (see paragraph 4.25 for more details) before deciding whether or not to disclose the information. In assessing whether the disclosure is 'necessary for the purpose'<sup>85</sup> for which the CMA is permitted to make the disclosure, the CMA will have regard to the extent to which it believes the disclosure of the information may be relevant to the receiving authority's investigation or other statutory function.
- 6.6 The CMA will therefore assess the function or purpose for which the information is required and the scope of the information requested. In this context, the CMA will require the requesting authority to provide details of the function or purpose for which the information is required and/or, if it is an information request, to specify the scope of the information request. In cases where the CMA is considering whether to disclose information on its own initiative, it will form a preliminary view on whether there is a suitable statutory gateway, although it will normally liaise with the relevant public authority to clarify the point.
- 6.7 When considering whether to disclose information under the information gateways, the CMA will take into account the sensitivity of the information and any representations received from the person to whom the information relates. In some circumstances, the CMA may consider it appropriate to restrict the information disclosed for example through anonymisation, aggregation or provision of ranges.
- 6.8 The CMA will take into account the protection of the information afforded by any restrictions that apply on the use and further disclosure of the information. In the absence of information to the contrary, and provided the Part 9 EA02 restrictions on use and further disclosure (or equivalent legislative provisions affording the same or greater protection) apply, the CMA will consider that a recipient public authority will be mindful of the need to protect any specified information passed on to it so that the risks of inappropriate use or disclosure

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<sup>84</sup> Section 245 of the EA02.

<sup>85</sup> Section 244(4) of the EA02.



are limited. The CMA will not regard the disclosure of specified information to another public authority to enable that authority to carry out its statutory functions as being contrary to the public interest. As to the obligation to protect certain information exchanged within the UK Competition Network (UKCN), see paragraph 6.15.

- 6.9 Even when an information gateway is available, there may be circumstances when the CMA will decline to provide the information to the other public authority. This might for example, be the case when overall it may be more efficient or speedier for the public authority to use their information gathering powers to gather the information themselves. Another circumstance might be when the limitations on the use or further disclosure that will apply, were the CMA to make the disclosure, would not be suitable to the public authority's purpose for requesting the information.

### **Enhanced information sharing with sectoral regulators under the ERRA13**

- 6.10 Under the ERRA13 the CMA and sectoral regulators, having concurrent CA98 powers with respect to their respective regulated sectors, are required to put into place information sharing arrangements to disclose certain kinds of information to each other in connection with concurrent CA98 cases in order to facilitate the exercise of their functions.<sup>86</sup> They are also permitted, but not required, to share information about a broader range of complaints than those where there are sufficient grounds for suspecting a CA98 infringement.<sup>87</sup> For further information about these arrangements, see *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (CMA10).

- 6.11 To give effect to the statutory requirement and in order to strengthen the collaborative framework through which sectoral regulators and the CMA will work to further the interests of UK consumers, the CMA and the sectoral regulators have established the UKCN. The UKCN brings together the CMA with the Financial Conduct Authority (FCA), the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), the Northern Ireland Authority for Utility Regulation (URegNI), the Office of Rail Regulation (ORR), the Civil Aviation Authority (CAA) and the Payment Systems Regulator (PSR). The mission of the UKCN<sup>88</sup> is to promote competition for the benefit of consumers and to prevent anticompetitive behaviour both through facilitating use of competition powers and the development of pro-competitive regulatory frameworks, as appropriate.

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<sup>86</sup> See regulation 9 of the Competition Act 1998 (Concurrency) Regulations 2004.

<sup>87</sup> See regulation 3 of the Competition Act 1998 (Concurrency) Regulations 2004.

<sup>88</sup> See the UKCN Statement of Intent.

6.12 The exchange of information between the CMA and sectoral regulators within the UKCN is subject to Part 9 of the EA02.

### **CMA's approach to giving notice**

6.13 The CMA will (subject to the circumstances described in this and the following paragraphs) usually give notice of its proposal to disclose specified information. However, in line with established case law,<sup>89</sup> it may decide that it is not appropriate to do so in some circumstances such as:

- where the giving of prior notice may hamper the CMA and/or requesting authority's investigation (for example, if the CMA or sectoral regulator are investigating a possible infringement of CA98, the subject of such an investigation may seek to destroy evidence if he or she becomes aware of the investigation)
- where information is being passed on to another UK public authority, or investigating or prosecuting authority
- the information is required as a matter of urgency, in which case the CMA will consider whether it is appropriate to inform the owner after the disclosure is made, or
- advance notice would be impracticable due to the number of persons to whom notice would otherwise need to be given in which case the CMA will consider whether it is appropriate to publish a notice on [www.gov.uk/cma](http://www.gov.uk/cma) announcing that it intends to disclose a certain class or type of information to another authority and inviting representations from interested parties.

6.14 If the CMA considers it necessary or appropriate to pass information deriving from a leniency applicant to another UK agency, such as the Serious Fraud Office (SFO), the CMA would inform the applicant or its legal adviser first. However, applicants must accept that the CMA may refer cases to the SFO and the expectation should be that such referrals will be on the basis of a full disclosure of all material in the CMA's possession.<sup>90</sup>

6.15 Having regard to the enhanced partnership working, and the responsibility of members (and observers) of the UKCN to protect any information disclosed to each other, including under Part 9 of the EA02 (or equivalent legislative provisions affording the same or greater protection apply), the CMA will generally not give the person to whom the information relates prior notice of

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<sup>89</sup> R Kent Pharmaceuticals Ltd v Serious Fraud Office, [2004] EWCA Civ 1494, 11 November 2004

<sup>90</sup> See *Applications for leniency and no-action in cartel cases* (OFT1495) for further guidance.

its proposal to make a disclosure.

- 6.16 When giving advance notice, the CMA will provide details of the information it proposes to disclose relevant to the person concerned for example by way of a description, inventory or draft of the proposed disclosure.

## 7. Cooperation with overseas public authorities

- 7.1 The CMA works with its international counterparts to promote convergence and a consistent approach to tackling anti-competitive practices, assessing multi-jurisdictional mergers and protecting consumers' interests. It may share information about its experiences and cases to assist in identifying issues of common interest and coordinating efforts, as well as comparing results and findings.
- 7.2 The CMA is a member of various international organisations, such as the Organisation for Economic Cooperation and Development (OECD), the International Competition Network (ICN), the International Consumer Protection and Enforcement Network (ICPEN) and the United Nations Conference on Trade and Development (UNCTAD), and is also a party to agreements entered into on an ad hoc basis with other overseas agencies.
- 7.3 While the CMA may freely share general information about its work and experiences with overseas public authorities,<sup>91</sup> or through international fora, the disclosure of specified information is only permissible if an information gateway is available under Part 9 of the EA02. The information gateway permitting disclosure of specified information for the purposes of facilitating the exercise by the CMA of its own statutory functions applies in relation to disclosures to overseas public authorities, as it does to UK public authorities.<sup>92</sup>
- 7.4 The CMA may also seek the necessary consents to the disclosure of information to an overseas authority.<sup>93</sup> Consent is generally sought in the form of a waiver, permitting the CMA to disclose information to another (named) authority.<sup>94</sup>

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<sup>91</sup> Meaning a person or body outside the UK which appears to the CMA to exercise functions of a public nature in the enforcement of consumer or competition legislation (sections 246A of the EA02).

<sup>92</sup> Section 241(1) of the EA02.

<sup>93</sup> Section 239 of the EA02.

<sup>94</sup> The CMA will consider the format of a waiver on a case-by-case basis, as the content will differ based on the circumstances of the case. For reference, CMA's confidentiality waiver template can be viewed here: <https://www.gov.uk/government/publications/confidentiality-waiver-template>

- 7.5 There are also specific gateways under sections 243A, 243B, and 243C of the EA02 to disclose information to overseas public authorities (see paragraphs 7.7 to 7.28 below).
- 7.6 Beyond information sharing, the CMA may also provide investigative assistance to overseas public authorities in certain circumstances (see paragraphs 7.29 to 7.57 below).

## **Disclosure of specified information to overseas public authorities**

### ***Disclosures under sections 243A and 243B of the EA02***

- 7.7 Under section 243A of the EA02, the CMA may disclose specified information to overseas public authorities<sup>95</sup> in order to facilitate both the exercise by the CMA of its statutory functions and the exercise by the overseas public authority of any function which it has relating to:
- the investigation and bringing of criminal proceedings<sup>96</sup>
  - the investigation and bringing of civil proceedings in connection with the enforcement of specified legislation,<sup>97</sup> or
  - a decision as to whether to start or bring to an end such investigations or proceedings.<sup>98</sup>
- 7.8 This gateway may for example be relevant when the CMA and an overseas partner are both investigating the same conduct or merger and wish to share information that will benefit both their investigations.
- 7.9 Under section 243B of the EA02, the CMA may also disclose specified information to overseas public authorities<sup>99</sup> solely for the purpose of facilitating the overseas public authority's functions (as those functions are described in paragraph 7.7). This may be useful for example if the overseas authority is investigating conduct or a merger that the CMA is not investigating itself but the CMA holds information that may be useful to its overseas counterpart.
- 7.10 Disclosure to overseas authorities under both sections 243A and 243B of the EA02 is not permitted where the information is obtained by the CMA in connection with the CMA's markets functions under the EA02,<sup>100</sup> and under

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<sup>95</sup> See footnote 92.

<sup>96</sup> Section 243A(1)(b)(iii) and (iv) of the EA02.

<sup>97</sup> Section 243A(1)(b)(i) and (ii) and 243A(4) of the EA02.

<sup>98</sup> Section 243A(1)(b)(v) of the EA02.

<sup>99</sup> See footnote 92.

<sup>100</sup> Section 243A(2)(b) and section 243B(2) of the EA02.

other specified legislation.<sup>101</sup>

*Use and further disclosure of information*

- 7.11 If the CMA discloses information to an overseas public authority under section 243A of the EA02 to facilitate a particular CMA function in relation to a particular matter, the overseas public authority must not use the information for any other purpose unless the CMA consents to the information being used for another purpose and that purpose is also to facilitate any of the CMA's functions.<sup>102</sup> The overseas authority must also not further disclose the information unless the CMA consents and the further disclosure facilitates any of the CMA's functions.<sup>103</sup> Consent may be given either subsequently or at the point the information is originally disclosed by the CMA to the overseas public authority.
- 7.12 If the CMA discloses information to an overseas public authority under section 243A or 243B of the EA02 to facilitate the exercise of a particular function of the overseas authority in relation to a particular matter, the overseas authority must not use the information for any other purpose unless the CMA consents to the information being used for another purpose and that purpose is also to facilitate one of the overseas authority's functions as described in paragraph 7.7.<sup>104</sup> The overseas authority must also not further disclose the information unless the CMA consents and the further disclosure facilitates any of the overseas authority's functions as described in paragraph 7.7.<sup>105</sup> Again, consent may be given either subsequently or at the point the information is originally disclosed by the CMA to the overseas public authority.
- 7.13 In deciding whether to consent to the overseas public authority using the information for a new purpose or further disclosing the information under sections 243A or 243B of the EA02, the CMA must have regard to the considerations set out in section 243F of the EA02 (see paragraphs 7.17-7.22 below) as if it were making an initial disclosure.<sup>106</sup>
- 7.14 Overseas public authorities are not prevented from using or further disclosing information provided by the CMA if they have a genuine requirement to do so under their national laws.<sup>107</sup> The CMA would expect overseas authorities to inform the CMA as soon as possible if they believe

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<sup>101</sup> Section 243A(2)(a), (c), and (d) and section 243B(2) of the EA02.

<sup>102</sup> Section 243D(2) of the EA02.

<sup>103</sup> Section 243D(3) of the EA02.

<sup>104</sup> Section 243D(5) of the EA02.

<sup>105</sup> Section 243D(6) of the EA02.

<sup>106</sup> Section 243D(7) of the EA02.

<sup>107</sup> Section 243D(8) of the EA02.

they have such a requirement so that they can discuss what steps could be taken to minimise any harm that may result from such use or disclosure.

*Directions by the Secretary of State*

7.15 The Secretary of State has the power under section 243E of the EA02 to prevent a disclosure to an overseas authority which the CMA would be permitted to make under section 243A or section 243B of the EA02 where he or she thinks it would be more appropriate for any investigation or proceedings to be carried out in the UK or another country.

7.16 The Secretary of State may not prevent a disclosure where it relates to investigative assistance provided to an overseas public authority (see paragraphs 7.29 to 7.57 below).<sup>108</sup>

*Relevant considerations relating to overseas disclosures under sections 243A and 243B*

7.17 In deciding whether to disclose information to an overseas public authority under sections 243A and 243B of the EA02, the CMA must have regard to the following factors, as set out in section 243F(2) of the EA02:

- whether the law and practice of the overseas country to whose authority disclosure would be made provides appropriate protection against self-incrimination in criminal proceedings, and
- whether the law and practice of that country provides appropriate protection for the storage and disclosure of confidential information (as defined in section 246A of the EA02)

7.18 In addition, for disclosures under section 243B of the EA02, the CMA must have regard to the following additional considerations as set out in section 243F(3) of the EA02:

- whether the matter in respect of which disclosure is sought is sufficiently serious to justify making the disclosure
- whether the disclosure would further the aims or purposes of any treaty relating in whole or in part to cooperation in matters relating to competition or consumer protection
- whether any mutual assistance arrangements apply, and
- whether the CMA would obtain similar assistance in the overseas country (reciprocity).

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<sup>108</sup> Section 243E(2A) of the EA02.

- 7.19 The CMA must also have regard to the considerations in section 244 of the EA02.
- 7.20 The CMA will balance the considerations in section 243F of the EA02 on a case-by-case basis having regard to the particular circumstances of the disclosure in question. However, the CMA considers that the disclosure of information for the purpose of bringing civil and criminal proceedings on matters relating to competition law or consumer protection, or for conducting investigations leading to these proceedings, will generally be ‘sufficiently serious’ for the purpose of section 243F(3)(a) of the EA02. Criminal proceedings covered by mutual assistance agreements to which the UK is party will also normally be deemed sufficiently serious.
- 7.21 Section 243F(4) of the EA02 states that protections are ‘appropriate’ if the relevant protection corresponds or is substantially similar to that provided in any part of the UK. Therefore, protections which are analogous to those afforded in the UK will satisfy this consideration.
- 7.22 In addition to the considerations in section 243F of the EA02, the CMA may also take into account additional considerations although it is not legally required to do so. One such consideration is the past record of an overseas public authority as regards compliance with disclosure conditions in relation to previous requests. This may be particularly relevant when there are no mutual assistance arrangements in place between the country concerned and the UK; or where it was in doubt about the adequacy of protections for the storage and disclosure of confidential information but the considerations in section 243F of the EA02 were otherwise met.

### ***Disclosures under section 243C of the EA02***

- 7.23 If the CMA or the UK has entered into a cooperation arrangement (whether legally binding or not, including memoranda of understanding) with, respectively, an overseas public authority or another country, the CMA may be able to disclose specified information to an overseas authority under section 243C of the EA02 for a purpose permitted by such cooperation arrangement.<sup>109</sup>
- 7.24 In order for this gateway to apply, the cooperation arrangement must have been designated in regulations by the Secretary of State.<sup>110</sup> Only arrangements relating to cooperation in connection with the enforcement functions mentioned in section 243A(1)(b) (as those functions are described

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<sup>109</sup> Section 243C(1) and (3) of the EA02.

<sup>110</sup> Section 243C(6) and (3) of the EA02.



in paragraph 7.7)<sup>111</sup> and providing for reciprocal assistance<sup>112</sup> may be designated by the Secretary of State. In deciding whether to designate a cooperation arrangement, the Secretary of State is required to have regard upfront to some of the considerations that the CMA would be required to have regard to when deciding whether to disclose information under sections 243A and 243B of the EA02.<sup>113</sup>

### ***CMA's approach to giving notice***

- 7.25 When the CMA intends to make a disclosure to an overseas authority, the CMA will take into account parties' representations regarding the confidential nature of any information they have provided.<sup>114</sup> Also, if appropriate, the CMA will seek to protect the information to be disclosed (for example by anonymising or aggregating data or using ranges).
- 7.26 Although not required to do so, the CMA will generally seek to give notice of a possible disclosure. When giving such advance notice, the CMA will provide details of the information it proposes to disclose relevant to the person concerned for example by way of a description, inventory or draft of the proposed disclosure.
- 7.27 However, in line with established case law,<sup>115</sup> it may decide that it is not appropriate to give notice in some circumstances, such as:
- where the giving of prior notice may hamper an investigation
  - where information is being passed on to another investigating or prosecuting authority
  - the information is required as a matter of urgency
  - it would be impracticable to do so (for example, because of the number of persons to whom notice would otherwise need to be given).
- 7.28 In these circumstances, the CMA will take into account the protection of the information afforded by any restrictions that apply on the use and further disclosure of the information.

### **Overseas Investigative Assistance Guidance: Provision of investigative assistance to overseas public authorities**

- 7.29 Subject to certain conditions being satisfied (see below), the CMA may

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<sup>111</sup> Section 243C(4) of the EA02.

<sup>112</sup> Section 243C(5) of the EA02.

<sup>113</sup> Sections 243C(7) and (8) of the EA02.

<sup>114</sup> See *Applications for leniency and no-action in cartel cases* (OFT1495), paragraphs 7.31 and 7.32 which state that disclosure of information supplied as part of an application for leniency or immunity will never take place without consent except for in the two circumstances explained.

<sup>115</sup> *R Kent Pharmaceuticals Ltd v Serious Fraud Office*, [2004] EWCA Civ 1494, 11 November 2004.

provide investigative assistance to overseas public authorities who have functions which correspond or are similar to the CMA's own functions under specified domestic competition, consumer and digital markets competition regime legislation.<sup>116</sup> Providing investigative assistance is entirely at the CMA's discretion.

- 7.30 The ability to assist with functions which 'correspond' or are 'similar' to the CMA's functions is intended to provide some flexibility in assessing the degree to which the overseas public authority's functions are comparable to those of the CMA. This is in recognition of the fact that while the precise legal nature of statutory provisions may vary between the UK and other jurisdictions, the intended purpose of the provisions and the conduct at which they are directed may be similar. Investigative assistance should be possible where this is the case.
- 7.31 The CMA is able to provide investigative assistance in both civil and criminal matters. However, there are certain differences in the frameworks applicable to the provision of investigative assistance in, respectively, civil matters and criminal matters. This is explained in more detail below.

### ***Other enforcers***

- 7.32 Those enforcers who have investigatory powers for consumer protection purposes under Schedule 5 of the Consumer Rights Act 2015 (CRA15)<sup>117</sup> may also provide investigative assistance to overseas enforcers by using those powers in connection with infringements of overseas laws which correspond to or are similar to domestic consumer protections laws.
- 7.33 The Overseas Investigative Assistance Guidance is applicable to those enforcers to the extent they provide investigative assistance. For simplicity, references to the CMA in the Overseas Investigative Assistance Guidance should be taken to include those enforcers who have investigatory powers for consumer protection purposes under Schedule 5 of the CRA15, unless the context requires otherwise. Any statements that relate purely to the CMA's own policy, practice, or experience will not apply to other enforcers.

### ***Requests for investigative assistance***

- 7.34 The CMA will consider requests for investigative assistance made by overseas public authorities exercising competition, consumer, and/or digital functions. Requests can be made by both independent authorities and authorities that are part of a government department.

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<sup>116</sup> Section 319 of the DMCCA24.

<sup>117</sup> In particular Trading Standards Services and regulators with responsibility for particular economic sectors.

7.35 In order to obtain investigative assistance, an overseas public authority must:<sup>118</sup>

- make a request in writing by email to [oiarequests@cma.gov.uk](mailto:oiarequests@cma.gov.uk) or another relevant enforcer (see paragraph 7.32)
- describe the matter for which it is seeking investigative assistance (including the relevant businesses investigated and their connection to the UK), and
- include details of any penalty or sanction that could be imposed as a result of the overseas public authority carrying out its functions.

7.36 The CMA's expectation is that overseas public authorities will consult and engage with the CMA about the nature and scope of the investigative assistance sought in advance of making a formal request as soon as they have a good sense of the nature of assistance they require. This will ensure that there is a mutual understanding of the type of information the CMA is likely to need to assess the overseas authority's request. If applicable, overseas authorities should follow the process and format for making requests as agreed under any relevant bilateral or multilateral arrangement.

7.37 Beyond the requirements included in the DMCCA24 (see paragraph 7.35), the CMA would expect all requests for investigative assistance to be accompanied by information that will allow the CMA to consider whether the statutory criteria for providing assistance are satisfied. This would typically include:

- information about the function of the overseas authority in respect of which investigative assistance is being sought
- whether the overseas authority or another authority in the jurisdiction would be able to provide corresponding or substantially similar assistance to the CMA under its domestic law
- information about what use may be made of any information disclosed to the overseas authority pursuant to the investigative assistance sought
- information about the protection of confidential information (including personal data) in the overseas authority's jurisdiction, and
- whether the request is made under the terms of any relevant bilateral or multilateral cooperation arrangement, including a 'qualifying cooperation arrangement' as defined in the DMCCA24 (see below, at paragraph 7.56)

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<sup>118</sup> Section 320(2) of the DMCCA24.

- 7.38 It would also be useful for the CMA to have an understanding of the overseas authority's preferred timing for the provision of investigative assistance, bearing in mind that the CMA is unable to commit to specific timescales as this may depend in part on the type of investigative assistance sought, including the urgency and the complexity of the request.
- 7.39 The CMA must notify the overseas public authority as to whether it will provide the investigative assistance requested and, where relevant, of any conditions imposed by the Secretary of State in relation to the provision of assistance (see paragraph 7.53).<sup>119</sup>

### ***Scope of assistance that may be provided***

- 7.40 Section 319(2) of the DMCCA24 identifies which regulators may provide assistance and which statutory powers they may use depending on the type of function carried out by the overseas public authority (e.g., merger investigation). As indicated above (see paragraph 7.32), the relevant regulator in all instances is the CMA save in relation to consumer protection law matters where both the CMA and other enforcers who have investigatory powers for consumer protection purposes under Schedule 5 of the CRA15 may provide investigative assistance.
- 7.41 The general principle applied in the statute is that, when providing investigative assistance to overseas public authorities, the CMA must use the formal information gathering powers it would normally use in respect of its own functions. Accordingly:
- if the request for investigative assistance relates to competition law matters, the CMA may exercise its powers under sections 26 to 29 of the CA98 (powers to require documents and information, to ask questions, and to enter premises)
  - if the request for investigative assistance relates to mergers, the CMA may exercise its powers under section 109 of the EA02 (powers to require documents and information and to require persons to give evidence to the CMA)
  - if the request for investigative assistance relates to the cartel offence, the CMA may exercise its powers under sections 193 and 194 of the EA02 (powers to require documents and information, to require persons to answer questions, and to enter premises)
  - if the request for investigative assistance relates to consumer protection law matters, the CMA (and other enforcers for the purposes of Schedule 5 to CRA 2015) may exercise its powers under Parts 3 and 4 of Schedule 5 to the CRA15

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<sup>119</sup> Section 323(3) of the DMCCA24.

(power to require documents and information, to enter premises, and additional specified powers, such as the power to inspect products and seize and detain goods)

- if the request for investigative assistance relates to the digital markets competition regime, the CMA may exercise its powers under any of sections 69, 71 and 79 or any of sections 72, 74 and 75 of the DMCCA24 (powers to require information, to access premises, equipment, services, information or individuals, to interview, and to enter premises).

7.42 Relevant provisions which would apply where the CMA is using its powers for a domestic investigation will also apply where those powers are exercised to assist an overseas public authority. For example, the CMA has the ability to impose administrative financial penalties for non-compliance with some of the CMA's formal information gathering powers.<sup>120</sup> Moreover, companies have a duty to preserve documents relevant to investigations when the CMA provides investigative assistance.<sup>121</sup>

7.43 Similarly, the CMA expects to apply the same relevant safeguards which would apply where the CMA is using its investigative powers for a domestic investigation where those powers are exercised to assist an overseas public authority. As an example, the CMA expects to apply the privilege against self-incrimination when the CMA exercises its powers under the CA98 to request information and explanations.<sup>122</sup> Some safeguards will apply automatically, such as the safeguards in section 30A of the CA98 (relating to the use of statements in prosecution), when the CMA exercises its CA98 investigative powers to assist an overseas public authority.

### ***Consideration of requests for investigative assistance***

7.44 The CMA may only provide investigative assistance if it considers that it is appropriate to do so.

7.45 In considering whether it is appropriate, the CMA must have regard to several factors under the DMCCA24:<sup>123</sup>

- **Whether the CMA would be able to exercise its powers in a corresponding or similar case arising in the UK.** For example, while an overseas public authority will be able to seek assistance from the CMA to gather information for the purpose of an investigation it is carrying out, it will not generally be appropriate for the CMA to provide assistance in relation to a case where the overseas public authority is taking action or imposing sanctions for non-

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<sup>120</sup> See sections 110A and 111 of the EA02 and section 40A of the CA98; see also CMA4.

<sup>121</sup> See section 25B of the CA98; see also CMA8 and CMA4.

<sup>122</sup> See CMA8. And see the [171<sup>st</sup> Practice Direction Update Amendments with Respect to Practice Direction – Application for a Warrant Under the Competition Act 1998](#).

<sup>123</sup> Section 321(2) of the DMCCA24

compliance with its investigation if the CMA's powers are not available for such purpose domestically.

- **The existence of a regulator to regulator or government to government cooperation arrangement relating in whole or in part to cooperation in matters relating to competition law, consumer protection law or digital matters.**
- **Whether the matter for which the overseas public authority is seeking investigative assistance is sufficiently serious to justify providing the assistance.** The CMA considers that the bringing of civil and/or criminal proceedings on matters relating to competition law or consumer protection law and digital matters will generally be 'sufficiently serious' to justify providing investigative assistance.

7.46 There are various circumstances where the CMA must consider that it would not be appropriate to assist an overseas public authority (and reject the request for assistance as a result):

- **An overseas authority would not provide corresponding or substantially similar assistance to the CMA in return (or, if the overseas authority itself is not able to provide corresponding or substantially similar assistance, there is no other authority in the overseas jurisdiction that could provide such assistance) unless there is an overriding public benefit to the UK in providing the assistance.**<sup>124</sup> Accordingly, the CMA will only provide investigative assistance if it considers that there is reciprocity with the jurisdiction of the overseas public authority requesting the assistance. The CMA will consider that the reciprocity requirement is met if any public authority within the overseas jurisdiction is able to provide corresponding assistance.
- **Assisting the overseas authority would be contrary to the public interest.**<sup>125</sup> This may be the case, for example, if providing investigative assistance could compromise an ongoing CMA investigation, the CMA's leniency programme or reveal the identity of informants.
- **The CMA would not be able to disclose to the overseas public authority the information it would obtain by providing the investigative assistance under any of the disclosure gateways in Part 9 of the EA02.**<sup>126</sup> This is to ensure that early consideration is given to whether information gathered could be disclosed to the overseas public authority taking into account the safeguards under the disclosure gateways of Part 9 of the EA02.
- **The CMA does not have reasonable grounds to suspect a breach of the law of the country of the overseas authority, where in a similar matter in the UK**

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<sup>124</sup> Section 321(5)(a) of the DMCCA24.

<sup>125</sup> Section 321(5)(b) of the DMCCA24.

<sup>126</sup> Section 321(7) of the DMCCA24.

**the CMA would only be able to investigate if it had reasonable grounds to suspect a breach of the law.**<sup>127</sup> In determining whether it has reasonable grounds to suspect a breach of the overseas law, the CMA is to regard as conclusive a certificate issued by the overseas public authority.<sup>128</sup>

7.47 The CMA may consider that it would not be appropriate to provide investigative assistance unless the overseas public authority undertakes to contribute towards its costs of providing the assistance.<sup>129</sup> The contribution expected from the CMA may depend in part on the type of investigative assistance sought. The CMA may be able to provide more guidance on this point as it gains experience in providing investigative assistance.

7.48 Beyond the requirements included in the DMCCA24, in considering whether it would be inclined to provide the requested investigative assistance, the CMA will also have regard to the following general factors:

- how the CMA might exercise its powers in a corresponding or similar case arising in the UK (for example, the CMA is unlikely to provide investigative assistance if it would not typically use its powers in the circumstances of the overseas investigation)
- the level and kind of resource likely to be necessary for the CMA to provide the requested investigative assistance
- the timeframe within which the overseas authority has requested that the investigative assistance be provided, and
- whether another body in the UK would be better placed to provide the requested assistance.

### ***Authorisation of the provision of investigative assistance***

7.49 The CMA must obtain the Secretary of State's authorisation before providing the investigative assistance except if the request is made under or in accordance with a 'qualifying cooperation arrangement' (see paragraph 7.56 below).<sup>130</sup>

7.50 There are two types of authorisation that the Secretary of State can provide. The Secretary of State may authorise the CMA to assist an overseas public authority in relation to one or more specific requests for assistance, or generally in respect of requests for assistance of a particular description (this includes for example requests which come in from a particular overseas public authority in relation to a specified function).<sup>131</sup> A

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<sup>127</sup> Section 321(8) of the DMCCA24.

<sup>128</sup> Section 321(9) of the DMCCA24.

<sup>129</sup> Section 321(3) of the DMCCA24.

<sup>130</sup> Section 319(1)(c) of the DMCCA24.

<sup>131</sup> Section 322(2) of the DMCCA24.



general authorisation can be withdrawn at any time.<sup>132</sup> The Secretary of State must publish all general authorisations granted, as well as notice of any withdrawal of a general authorisation.<sup>133</sup>

7.51 In considering whether to authorise the CMA to assist an overseas public authority, the Secretary of State must have regard to whether:<sup>134</sup>

- the request for assistance is made under an arrangement or agreement (other than a 'qualifying cooperation arrangement') to which the UK is party
- it would be more appropriate (i) for the CMA to exercise its powers solely on its behalf, or (ii) for functions to be exercised by another authority in the UK or in another country, and
- the CMA assisting the overseas authority would be contrary to the public interest.

7.52 When authorising the CMA to provide investigative assistance, the Secretary of State may impose conditions, including the following:<sup>135</sup>

- requiring the CMA to obtain an undertaking from the overseas public authority that any information obtained by the CMA will not be used or will only be used for specific purposes
- requiring the CMA not to use certain powers that would otherwise be available
- requiring the CMA to use certain powers only in a specific way, or
- requiring the CMA to assist the overseas public authority only in respect of specified matters.

7.53 When receiving a request from an overseas public authority, the CMA must notify the Secretary of State where it considers that it would be appropriate to provide the assistance, unless the Secretary of State has previously approved the assistance requested as part of a general authorisation (see paragraph 7.50 above)<sup>136</sup> or the request is made under a 'qualifying cooperation arrangement' (see paragraph 7.56 below).<sup>137</sup>

7.54 The CMA will agree with the Secretary of State arrangements to notify and obtain the authorisation of the Secretary of State. These arrangements will be published.

### ***Qualifying cooperation arrangements***

7.55 As indicated above, requests for investigative assistance made by an overseas public authority under or in accordance with a 'qualifying cooperation arrangement' do not

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<sup>132</sup> Section 322(3) of the DMCCA24.

<sup>133</sup> Section 322(4) of the DMCCA24.

<sup>134</sup> Section 322(5) of the DMCCA24.

<sup>135</sup> Section 322(6) and (7) of the DMCCA24.

<sup>136</sup> Section 323(1) of the DMCCA24.

<sup>137</sup> Section 323(2) of the DMCCA24.



require the authorisation of the Secretary of State.<sup>138</sup>

7.56 An arrangement will be considered to be a 'qualifying cooperation arrangement' under the DMCCA24 if it has been entered into between the United Kingdom and the country or territory of the overseas authority making the request for investigative assistance and provides for the provision of mutual assistance relating to competition law, consumer protection law, or digital matters.<sup>139</sup> This can take the form of a treaty, another type of binding agreement, or a non-binding arrangement, such as a memorandum of understanding. Memoranda of understanding between competition authorities do not meet the requirement to be a 'qualifying cooperation arrangement.'

### ***Provision of investigative assistance in criminal matters***

7.57 Whilst the CMA is able to provide investigative assistance to overseas authorities in criminal matters (for example for a criminal cartel investigation), it will only be able to consider requests made under or in accordance with a 'qualifying cooperation arrangement.'<sup>140</sup> The existence of a 'qualifying cooperation arrangement' replaces the requirement to obtain authorisation by the Secretary of State.

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<sup>138</sup> Section 319(1)(c) of the DMCCA24.

<sup>139</sup> Section 319(5) of the DMCCA24.

<sup>140</sup> Section 321(6) of the DMCCA24.

## 8. Freedom of information and data protection

### FOIA

- 8.1 The FOIA was introduced to improve the transparency and accountability of public authorities and gives anyone a general right of access to information held by public authorities such as the CMA.
- 8.2 When a person makes a request to the CMA for recorded information, the FOIA requires the CMA, subject to applicable exemptions, to (i) inform the requester whether or not it holds the requested information; and (ii) if it does, disclose the information to the requester. A request for information will be dealt with within 20 working days.<sup>141</sup>
- 8.3 There are a number of exemptions from disclosure under the FOIA of particular relevance to a request for information held by the CMA, including where disclosure would be prohibited under any statutory enactment.<sup>142</sup> Therefore, the general restriction under Part 9 EA02 on disclosing 'specified information' relating to the affairs of a living individual or the business of an existing undertaking continues to apply.
- 8.4 The CMA might also seek to rely on the law enforcement qualified exemption at section 31(1)(g) of the FOIA to withhold information if it considered its disclosure would, or would be likely to, prejudice the exercise by the CMA of its statutory functions for the purposes set out at section 31(2) of the FOIA. Section 31 of the FOIA is a qualified exemption requiring the carrying out of a public interest test to determine whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.
- 8.5 The CMA might also seek to rely on section 32 of the FOIA which provides for an absolute exemption from disclosure where the requested information is held by a public authority in a document placed in the custody of a person conducting an inquiry, for the purpose of the inquiry. For the purposes of section 32 of the FOIA, an 'inquiry' includes any inquiry or hearing held under any provision contained in, or made under, an enactment. The CMA considers that it includes, for example, the exercise of the CMA's powers in relation to Phase 2 merger and market investigations.
- 8.6 Requests for information under the FOIA should be submitted to the CMA's

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<sup>141</sup> This deadline may be extended if the CMA reasonably requires more time to consider the public interest test (section 10(3) of the FOIA).

<sup>142</sup> Section 44(1)(a) of the FOIA provides for an absolute exemption in this regard.

Information Access Team at [foiarequests@cma.gov.uk](mailto:foiarequests@cma.gov.uk). Any person not satisfied with the CMA's refusal to provide information in response to a FOIA request has the right to an internal review of the CMA's decision, and a further right to complain to the Information Commissioner's Office (ICO) if that person is not satisfied with the internal review decision.

- 8.7 The CMA is required to have a publication scheme, approved by the ICO, and to publish information covered by the scheme. More information about the FOIA generally is available on the ICO website.<sup>143</sup>

## Data protection legislation

- 8.8 The UK GDPR and DPA 2018 set out rules for processing personal data relating to living individuals (including the core data protection principles, as set out in article 5 of the UK GDPR). 'Processing' refers to practically anything you can do with personal data including collecting, recording, using or disclosing it. The principles include the need for those who process personal data to do so lawfully, fairly and transparently; this includes the need to be open with individuals about how you process their personal data.
- 8.9 The CMA is bound by the provisions of the UK GDPR and DPA 2018 when it is processing personal data. No personal data will be disclosed by the CMA unless that disclosure is compliant with the UK GDPR and DPA 2018.<sup>144</sup>
- 8.10 Particular issues arise in respect of the handling and disclosure of underlying data from surveys conducted by the CMA, or by other parties. Both the UK GDPR and DPA 2018, as mentioned, and the Code of Conduct of the Market Research Society, apply to personal data, and the latter requires the anonymity of respondents to be preserved unless they have given informed consent. If the CMA considers it necessary to disclose any of the underlying data, it must ensure that the identities of the persons who participated in the survey are protected. The CMA will consider what protection may be necessary to ensure that the identity of survey respondents is not revealed, for example using anonymisation.
- 8.11 Any person may ask the CMA whether it is processing any personal data about them and if so, to be provided with a copy of it (subject to any applicable exemptions). If not satisfied with the CMA's response, that person may complain to the ICO.
- 8.12 Guidance on how the CMA collects, uses and shares personal data at the CMA can be found in the CMA's Personal information charter.

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<sup>143</sup> [www.ico.org.uk](http://www.ico.org.uk).

<sup>144</sup> Section 237(4) EA02.



## ANNEX

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## A. Key changes to existing guidance

The following table lists those sections of the *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973 (CC7 (revised))* that are significantly amended or superseded by this Statement.

Existing guidance reference	Amendment
Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973 (CC7 (revised))	
Paragraph 9.9	Groups are reminded of the opportunity provided to parties to make further representations to the Procedural Officer if they wish to dispute the proposal of a Group to publish information that the party claims is confidential. This is additional to the opportunity for parties to make known their concerns to the Group. Groups are required to have regard to the views of the Procedural Officer if the party has made representations to him. The decision to disclose will, however, remain that of the Group.

