

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

**CMA8**

19 December 2024

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# 1. Preface

- 1.1 The Competition and Markets Authority (CMA) has set out, in this guidance document, general information for the business and legal communities and other interested parties on the processes that the CMA follows when using its powers under the Competition Act 1998 (CA98) to investigate suspected infringements of competition law.
- 1.2 This guidance updates and supersedes the previous version last updated in January 2022.
- 1.3 This guidance should be read alongside the CMA publications [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#), [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#) and [CMA Prioritisation Principles \(CMA188\)](#), which outline the basis on which the CMA decides which cases to investigate.
- 1.4 This guidance sets out the CMA's procedures and explains how the CMA generally conducts investigations into suspected competition law infringements. This represents the CMA's practice as at the date of publication of this document. It may be revised from time to time to reflect changes in best practice or the law and the CMA's developing experience in assessing and investigating cases.
- 1.5 The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when dealing with suspected competition law infringements but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.
- 1.6 This guidance is concerned exclusively with the CMA's investigations under the CA98. It does not cover CMA investigations into individuals suspected of having committed the criminal cartel offence nor does it cover investigations under the Company Directors Disqualification Act 1986 (CDDA) for the purpose of deciding whether to make an application for a competition disqualification order (CDO).<sup>1</sup>
- 1.7 This guidance does not cover the procedures used by sectoral regulators<sup>2</sup> in their competition law investigations. Further guidance on the enforcement of

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<sup>1</sup> See [CMA's Guidance on Competition Disqualification Orders \(CMA102\)](#).

<sup>2</sup> The Office of Communications, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Utility Regulation, the Water Services Regulation Authority, the Office of Rail and Road, the Civil Aviation Authority, the Financial Conduct Authority and the Payment Systems Regulator. This list is correct as at 19 December 2024. The list may change from time to time if further sectoral regulators are given concurrent powers.

competition law by the sectoral regulators is available in the CMA guideline [Regulated Industries: Guidance on concurrent application of competition law to regulated industries \(CMA10\)](#) or from the relevant organisation's website.

- 1.8 This document incorporates the commitments made in the CMA's published guideline [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#) insofar as they apply to investigations under the CA98.
- 1.9 This guidance document also incorporates the CMA's guidance as to the circumstance in which it may be appropriate to accept commitments under section 31A of the CA98, see paragraphs 10.18 to 10.21 which constitute this guidance.

## **Statutory background**

- 1.10 Section 31D(1) of the CA98 requires the CMA to prepare and publish guidance as to the circumstances in which it may be appropriate to accept commitments. Section 31D(2) of the CA98 provides that the CMA may alter this guidance at any time. Section 31D(3) of the CA98 provides that, if the guidance is altered, the CMA must publish the guidance as altered. Under section 31D(4) of the CA98 the Secretary of State must approve any guidance on commitments before it can be published. When preparing or altering guidance on commitments, sections 31D(6) and (7) of the CA98 require the CMA to consult such persons as it considers appropriate, including the Regulators. These particular provisions apply to the CMA alone and not to the Regulators.
- 1.11 Paragraphs 10.18 to 10.21 (the Commitments Guidance) were approved by the Secretary of State as required under section 31D(4) of the CA98 on 14 January 2019, following a consultation conducted by the CMA in accordance with section 31D(6) and (7) of the CA98. The Commitments Guidance was published and came into effect on 18 January 2019. The Commitments Guidance was re-issued unaltered in this guidance on 4 November 2020, and has been in effect since 18 January 2019.
- 1.12 By virtue of section 31D(8) of the CA98, the CMA must have regard to the guidance for the time being in force when exercising its discretion to accept commitments under section 31A. A similar requirement applies to the Regulators by virtue of legislation that conferred on them concurrent powers under the CA98.
- 1.13 This guidance (other than the Commitments Guidance included in it) takes effect from 1 January 2025. See paragraph 1.11 above for the date that the re-issued Commitments Guidance entered into force.

- 1.14 The decision-making procedures set out in this guidance will apply to ongoing and future civil cases under the CA98. The CMA has published guidance on the principles to be applied in determining, in any case, whether criminal proceedings should be brought under section 188 of the Enterprise Act 2002 (the EA02). More information is available in the CMA guideline [Cartel Offence: Prosecution Guidance \(CMA9\)](#).
- 1.15 This document is not a definitive statement of, or a substitute for, the law itself and the legal tests which the CMA applies in assessing breaches of competition law are not addressed in this guidance. A range of publications on how the CMA carries out this substantive assessment is available on the [CMA's webpages](#). The CMA recommends that any person who considers that they or their business may be affected by an investigation into suspected anti-competitive practices should seek independent legal advice.
- 1.16 This guidance sets out the procedures the CMA follows within the legal framework outlined in Chapter 2. It addresses each stage of a typical investigation in turn. The key stages of an investigation into a suspected infringement and a summary of the CMA's action at these stages are set out at Figure 1.

Duration of formal investigation varies depending on the case

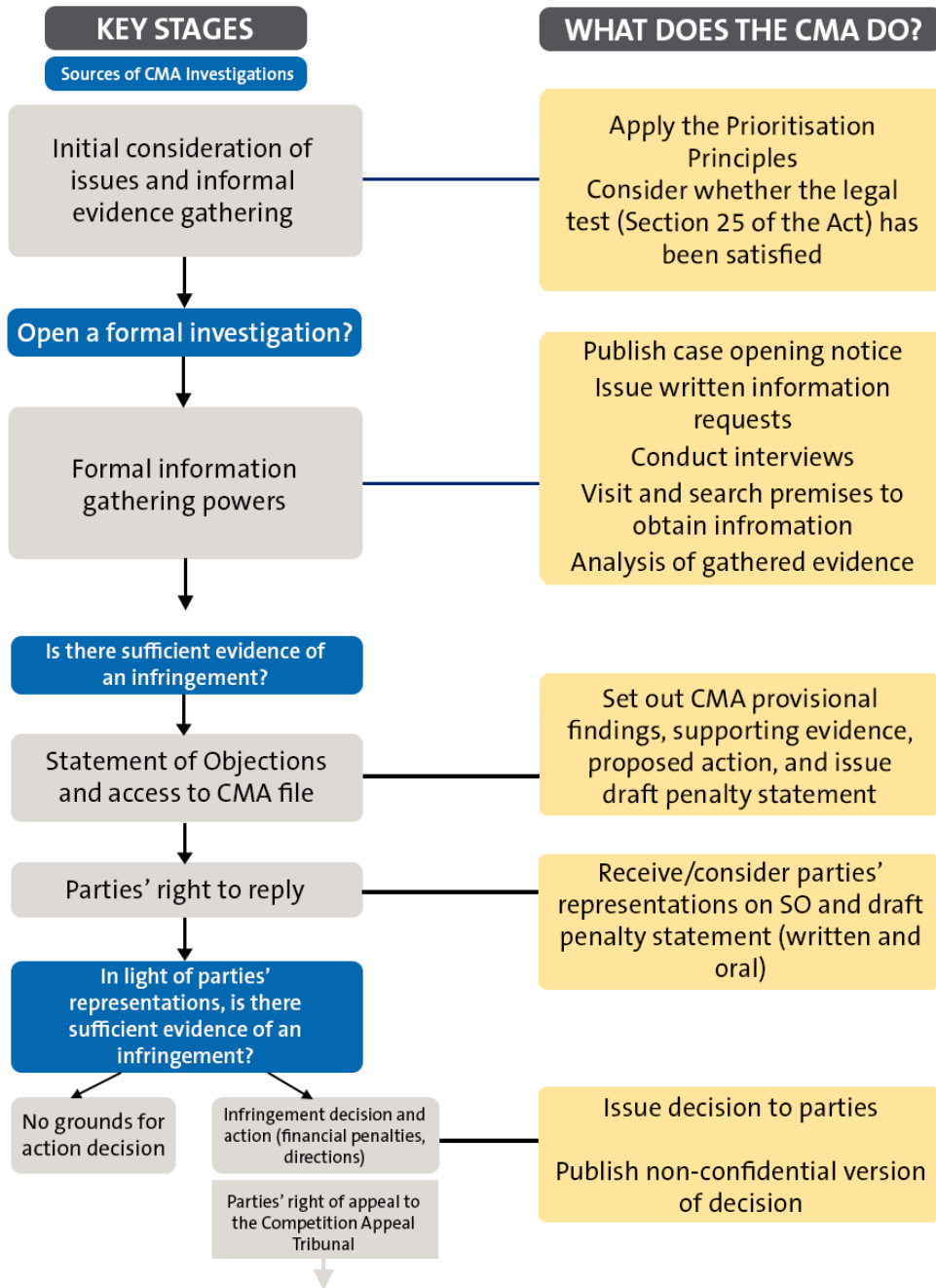


Figure 1 – Key stages in an investigation

For a description of what this chart shows, see the chart description section below.

## 2. The legal framework

- 2.1 The legal framework that applies to the investigation and enforcement of suspected civil breaches of competition law is described below.
- 2.2 The CA98 prohibits, in certain circumstances, agreements (as well as decisions of associations of undertakings and concerted practices) which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.<sup>3</sup>
- 2.3 A range of publications on how the CMA carries out this substantive assessment is available on the [CMA's webpages](#). There is more information on the laws on anti-competitive behaviour in a number of publications, including [Competing fairly in business: a short guide](#), the CMA campaign [Cheating or competing](#), [Vertical Agreements Block Exemption Order guidance](#), [Guidance on Horizontal Agreements](#), [Guidance on environmental sustainability agreements](#) and the more detailed guidance on [Agreements and Concerted Practices \(OFT401\)](#) and [Abuse of a dominant position \(OFT402\)](#).
- 2.4 In the UK, competition law is applied and enforced principally by the CMA.<sup>4</sup> The CA98 gives the CMA powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions in the CA98.
- 2.5 There are procedural rules that apply when the CMA takes investigative or enforcement action.<sup>5</sup> In addition, in making any decision, or otherwise taking action, for the purposes of any of its competition functions under Part 1 of the CA98, 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>6</sup> The obligation applies to all steps of any relevant investigatory or enforcement process.<sup>7</sup> Furthermore, the CMA is required to carry out its investigations and make decisions in a procedurally fair manner according to the standards of administrative law.<sup>8</sup>

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<sup>3</sup> Agreements, decisions and practices which are, or are intended to be, implemented in the United Kingdom fall in scope of the Chapter I prohibition in the CA98 insofar as they may affect trade within the United Kingdom. In addition, agreements, decisions and practices which are likely to have an immediate, substantial and foreseeable effect on trade within the United Kingdom are also within the scope of the Chapter I prohibition of the CA98, even when these are not implemented in the United Kingdom.

<sup>4</sup> However, certain sectoral regulators (see paragraph 1.7 above) have concurrent powers with the CMA to apply and enforce the Chapter I and Chapter II prohibitions in the CA98 within their respective regulated sectors. These sectoral regulators also have concurrent competition law powers in respect of market studies and investigations under Part 4 of the EA02.

<sup>5</sup> The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458 (the CA98 Rules).

<sup>6</sup> Section 25(5) of and Schedule 4A to the Enterprise and Regulatory Reform Act 2013.

<sup>7</sup> Schedule 4A to the Enterprise and Regulatory Reform Act 2013 lists a number of functions which are not subject to the duty of expedition. This includes certain functions under Part 1 of the Competition Act 1998 (see Schedule 4A(5)).

<sup>8</sup> See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10.



2.6 In exercising its functions, as a public body, the CMA must also ensure that it acts in a manner that is compatible with the Human Rights Act 1998.

### 3. The sources of the CMA's investigations

- 3.1 There are a variety of ways in which information can come to the CMA's attention, leading the CMA to investigate whether competition law may have been breached.
- 3.2 The CMA's own research and market intelligence may prompt the CMA to make initial enquiries into suspected anti-competitive conduct. Alternatively, evidence gathered through other CMA workstreams, such as the CMA's merger or markets functions, or use of the CMA's powers under the Regulation of Investigatory Powers Act 2000, or information received from international partners may reveal potentially anti-competitive behaviour. In these circumstances, the CMA gathers publicly available information and may write to businesses or individuals seeking further information that the CMA considers could be relevant.
- 3.3 The CMA also relies on information from external sources to bring to its attention potentially anti-competitive conduct. This could be from individuals with so called 'inside' information about a cartel<sup>9</sup> or from a complainant.

#### Cartels and leniency

- 3.4 A business which is or has been involved in a cartel<sup>10</sup> may wish to take advantage of the benefits of the CMA's leniency programme prompting them to approach the CMA with information about its operation.
- 3.5 By confessing to the CMA, a business could gain total immunity from, or a significant reduction in, any financial penalties the CMA can impose if it decides that the arrangement breaches the Chapter I prohibition.<sup>11</sup>
- 3.6 It is also a criminal offence for an individual to agree with one or more other persons to make or implement, or cause to be made or implemented, any cartel arrangements in the United Kingdom.<sup>12</sup> Cooperating current and former employees and directors of companies which obtain immunity from financial

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<sup>9</sup> The CMA operates a financial reward programme in exchange for information about the operation of a cartel, see [Cartels: policy for witnessing and reporting](#).

<sup>10</sup> A cartel is an agreement between businesses not to compete with each other. The agreement can often be verbal. Typically, illegal cartels involve cartel members agreeing on price fixing, bid rigging, output quotas or restrictions, and/or market sharing arrangements. In some cartels, more than one of these elements may be present. For the purposes of the CMA's leniency programme, price-fixing includes resale price maintenance.

<sup>11</sup> More information on how the CMA sets penalties is available: [CMA's guidance as to the appropriate amount of a penalty \(CMA73\)](#).

<sup>12</sup> Section 188 of the EA02. Section 188A of the EA02 sets out circumstances in which the cartel offence has not been committed. Section 188B of the EA02 provides statutory defences to the cartel offence. See further CMA guideline [Cartel Offence: Prosecution Guidance \(CMA9\)](#).

penalties will normally receive immunity from prosecution. Also, an individual who comes forward with information about a cartel may receive immunity from criminal prosecution.<sup>13</sup>

- 3.7 In addition, the CMA will not apply for a CDO against any current director of a company whose company has benefited from leniency.<sup>14</sup> However, the CMA may apply for an order against a director who has been removed or has otherwise ceased to act as a director of a company owing to his/her role in the breach of competition law and/or for opposing the application for leniency, or against a director who fails to co-operate with the leniency process.
- 3.8 The CMA encourages business representatives who suspect that their business has been involved in cartel activity to blow the whistle on the cartel.
- 3.9 For more information on what constitutes a cartel, see the CMA's [Applications for leniency and no-action in cartel cases \(OFT1495\)](#), [Competing fairly in business: a short guide](#), the CMA campaign [Cheating or competing](#) and the guideline [Agreements and Concerted Practices \(OFT401\)](#).

## How to apply for leniency

- 3.10 The CMA handles leniency applications in strict confidence. Applications for lenient treatment under the CMA's leniency programme should be made by calling the CMA on 020 3738 6833 in the first instance. More detailed information on the CMA's leniency programme is available in [Applications for leniency and no-action in cartel cases \(OFT1495\)](#).

## Complaints about possible breaches of competition law

- 3.11 Another way in which the CMA receives information from external sources is where an individual or a business complains to the CMA about the behaviour of another business. Complaints can be a useful and important source of information relating to potentially anti-competitive behaviour.
- 3.12 We also have an employee whistleblowing reporting tool, which is specifically for employees and ex-employees who believe their employer is breaching competition law (or consumer protection law) in some way. A link to the reporting tool as well as to guidance on whistleblowing can be found on the

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<sup>13</sup> See further the CMA's guidance on [Applications for leniency and no action in cartel cases \(OFT1495\)](#).

<sup>14</sup> In respect of the activities to which the grant of leniency relates. For further detail, see [CMA's Guidance on Competition Disqualification Orders \(CMA102\)](#).

[CMA webpages](#) together with information on what happens after a report is made.

## How to make a competition complaint

- 3.13 If an individual or a business suspects that another business is infringing competition law, they should contact the CMA.
- 3.14 Complaints about suspected cartels should be made by calling the CMA's Cartels Hotline on 020 3738 6888 or by emailing the CMA at [cartelshotline@cma.gov.uk](mailto:cartelshotline@cma.gov.uk). These complaints are handled in confidence by the CMA. Guidance on reporting a suspected cartel to the CMA is available in [Competing fairly in business: a short guide](#) and the CMA campaign [Cheating or competing](#).
- 3.15 For all other competition related complaints, the CMA should be informed via its [webpages](#) in the first instance,<sup>15</sup> which will set out the format and method for making the CMA aware of competition concerns. It is also possible to make a complaint to the CMA anonymously using a non-name-based email account, a private masked phone number, by post or via a representative (such as a trade association) or through the employee whistleblowing tool. The CMA webpages provide information on how to do so.
- 3.16 Complaints made via the CMA's webpages which appear to relate to a suspected cartel will be redirected to the Cartels Hotline. The CMA offers financial rewards of up to £250,000 (in exceptional circumstances) for information about cartel activity. See the CMA's guidance on [Rewards for information about cartels](#) for further details.

## Pre-complaint discussions

- 3.17 Where a complainant is considering investing significant resource into a complaint, it can approach the CMA with an outline in the first instance and ask for the possibility of having a pre-complaint discussion. This may be helpful to businesses in deciding whether to commit the necessary time and effort in preparing a reasoned complaint.
- 3.18 In such cases, the CMA may give an initial view as to whether the CMA would be likely to investigate the matter further if an in-depth complaint were to be made. This view would be based both on the likelihood of the complaint raising competition concerns and on the assessment of the complaint against

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<sup>15</sup> Complaints can also be made by calling the CMA on 020 3738 6000.

the [CMA Prioritisation Principles \(CMA188\)](#) to see if it falls within the CMA's casework priorities at the time (see Chapter 4 for more information on how the CMA prioritises cases). However, any view given at this stage will not commit the CMA to opening an investigation.

3.19 To be able to engage in pre-complaint discussions, the CMA would expect to receive a basic level of information submitted via its webpages from the complainant covering the key aspects of their concerns. This should include:

- the identity of the complainant and the party/ies to the suspected infringement, and their relationship to one another (for example, whether they are competitors, customers or suppliers), and
- the reasons for making the complaint, including a brief description of:
  - the product(s)/service(s) concerned;
  - the agreement or conduct the complainant believes to be anti-competitive;
  - the type of business operated by the complainant and the party/ies to the suspected infringement (for example, manufacturer, wholesaler, retailer) and an indication of their geographic scale (for example, local, national, or international); and
  - if known, the size of the market and of the parties involved (for example, market shares).

3.20 Whether the CMA engages in pre-complaint discussions will depend on the availability of CMA resources and whether the issue(s) outlined in the basic information suggest to the CMA that the case is one that would merit a prioritisation assessment by the CMA.

## **Confidentiality of complaints**

3.21 The CMA understands that individuals and businesses may want to ensure that details of their complaints are not made public. If a complainant has specific concerns about disclosure of its identity or its commercially sensitive information, it should let the CMA know at the same time as submitting its complaint. The CMA is prohibited<sup>16</sup> from disclosing certain confidential information and while the CMA is considering whether to pursue a complaint it

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<sup>16</sup> Part 9 of the EA02. However, Part 9 does permit the CMA to disclose confidential information in certain specified circumstances.

aims to keep the identity of the complainant confidential. Furthermore, as noted at paragraph 3.15 above, complainants who have particular concerns in this regard can make a complaint anonymously.

- 3.22 If the CMA decides to open a formal investigation, it may, at some point during the course of that investigation, need to reveal a complainant's identity and/or the information<sup>17</sup> supplied by it, so as to allow the business under investigation to respond properly to the information provided. The CMA will aim not to – and generally will in practice not need to – reveal a complainant's identity without their consent until a Statement of Objections is issued. Before disclosing a complainant's identity or any of their information, the CMA will contact the complainant (or its representative, as appropriate) to give it an opportunity to comment. Further information is available on the [CMA's contact webpages](#).

### **Involvement of complainants where the CMA prioritises an investigation**

- 3.23 The CMA may provide a complainant with information during an investigation. For example, a complainant may be provided with a non-confidential version of a Statement of Objections or an opportunity to comment on a draft case closure letter, where certain circumstances are met.<sup>18</sup>

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<sup>17</sup> Complaints made anonymously should therefore avoid including information that could allow the complainant's identity to be deduced.

<sup>18</sup> See, for example, paragraphs 10.3-10.6 and 12.7-12.11 below. The categories of decision for which the SRO is responsible are listed in more detail at paragraph 9.6 below.

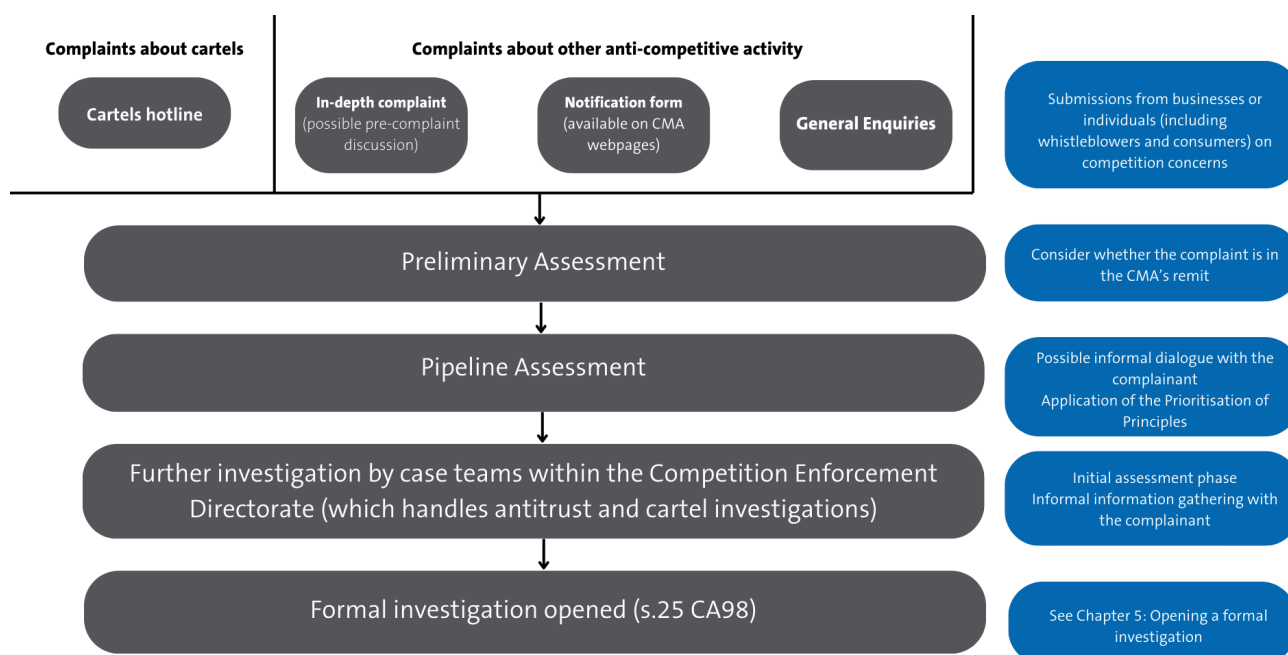
## 4. What the CMA does when it receives a complaint

- 4.1 The CMA welcomes submissions from businesses and consumers regarding competition concerns. Due to resource constraints the CMA may not be able to respond to all complaints it receives. The CMA may engage in informal dialogue with the complainant if the CMA needs to clarify any information provided to it at this stage or the CMA requires additional information. Although the CMA considers all complaints it receives, the CMA cannot formally investigate all suspected infringements of competition law. The CMA decides which cases to investigate on the basis of its [CMA Prioritisation Principles \(CMA188\)](#). These take into account the likely impact of the investigation in the form of direct or indirect benefits to consumers, the strategic significance of the case, the risks involved in taking on the case, and the resources required to carry out the investigation.
- 4.2 However, the CMA's ability to follow up on a complaint and to determine whether to open a formal investigation depends to a great extent on the timely cooperation of the complainant and the amount and quality of information they provide to the CMA. The CMA will be better able to consider a complaint that includes the information set out in paragraph 3.19 above. As noted above at paragraph 3.15, the CMA should be informed of complaints via its webpages in the first instance.
- 4.3 If the CMA decides not to prioritise a complaint at this stage, in appropriate cases it may send an advisory letter or a warning letter to the company or companies whose conduct is the subject of the complaint.<sup>19</sup> This would inform them that the CMA has been made aware of a possible breach of competition law by them and that, although the CMA is currently not minded to pursue an investigation, it may do so in future if the CMA receives further evidence of a suspected infringement or the CMA's prioritisation assessment changes.
- 4.4 Where the CMA prioritises a complaint, the case will be further investigated by a case team within the Competition Enforcement Directorate.

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<sup>19</sup> See the CMA's [Essential information for businesses: warning and advisory letters](#).

## Overview of complaints process



**Figure 2: Overview of complaints process**

For a description of what this chart shows, see the chart descriptions section, below.

### Initial assessment phase

- 4.5 Once the CMA has decided to take forward a case, the CMA may gather more information from the complainant, the company/ies under investigation, and/or third parties. This may involve sending an informal request for information, a request for clarification of information already provided in the complaint, or an invitation to meet with the CMA. Information will be requested at this stage on an informal basis, i.e. the CMA will rely on voluntary cooperation rather than using its formal powers to gather information.
- 4.6 However, it is unlikely that the CMA would gather information informally where it considers that contacting the businesses under investigation informally at this stage may prejudice the investigation, for example in the case of suspected cartels.



## 5. Opening a formal investigation

- 5.1 If a complaint is likely to progress to a formal investigation, the case is allocated:
- a designated case team within the Competition Enforcement Directorate, responsible for day-to-day running of the case, and
  - a Senior Responsible Officer (SRO), who is responsible for authorising the opening of a formal investigation and taking certain other decisions, including, where the SRO considers there is sufficient evidence, authorising the issue of a Statement of Objections and any Draft Penalty Statement(s).<sup>20</sup>
- 5.2 After the decision has been taken to open a formal investigation, the CMA will send the businesses under investigation a case initiation letter setting out brief details of the conduct that the CMA is looking into, the relevant legislation, the case-specific timetable, and key contact details for the case team such as the Assistant Director, Project Director and SRO.<sup>21</sup>
- 5.3 The receipt of a case initiation letter will often coincide with the CMA's use of its formal powers, for example, with the business also receiving a formal notice or information request. See Chapter 6 for more information on the CMA's formal powers of investigation.
- 5.4 In some cases, it will not be appropriate to issue a case initiation letter at the start of a case, as to do so may prejudice the investigation, such as prior to unannounced inspections or witness interviews. In these cases, the CMA will send out the letter as soon as possible.
- 5.5 Once a formal investigation is opened and the parties have been informed of this, the CMA will generally publish a notice of investigation on its webpages<sup>22</sup> as soon as practicable after the formal investigation has been opened and updated thereafter, as appropriate. However, the CMA will generally not publish or update any notice where doing so may prejudice the investigation

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<sup>20</sup> The categories of decision for which the SRO is responsible are listed in more detail at paragraph 9.6 below.

<sup>21</sup> See [Transparency and Disclosure Statement of the CMA's policy and approach \(CMA6\)](#).

<sup>22</sup> Section 25A of the CA98 permits the CMA to publish a notice of investigation. The CMA may also publish a section 25A notice in connection with the use of its investigatory powers to assist an overseas regulator (see paragraphs 7.29-7.57 of the guidance document [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#) which incorporates the CMA's guidance about the making and consideration of requests for investigative assistance by overseas public authorities under Part 5 of Digital Markets Competition and Consumers Act 2024 and the provision of such assistance (Overseas Investigative Assistance Guidance).

or any criminal investigation or any investigation under the CDDA for the purpose of deciding whether to make an application for a CDO.<sup>23</sup>

- 5.6 Section 25A(1) of the CA98 sets out the type of information that a notice of investigation may contain. The notice will generally include basic details of the case, such as whether the case is being investigated under the Chapter I and/or II prohibitions, a brief summary of the suspected infringement, the industry sector involved, and the identity of the businesses being investigated and may include on the case webpage an explanation of the reasons for prioritising the case. The CMA will also outline the administrative timetable for the case.<sup>24</sup> If the timetable changes during the investigation, the timetable will be updated in the notice of investigation including, where possible, reasons for the changes that have been made.
- 5.7 The CMA will normally publish the names of the parties under investigation in the notice, other than in exceptional circumstances, such as where doing so could in the CMA's view prejudice a CMA investigation or an investigation of one of the CMA's enforcement partners.<sup>25</sup> If it has not already done so when opening the investigation, the CMA will usually include parties' names in the notice of investigation at a later stage of an investigation, and if a Statement of Objections is issued.
- 5.8 In some cases, such as cartel investigations, it may not be possible to include many details of the investigation at the stage of publishing the notice of investigation, as to do so might prejudice the CMA's ongoing investigation. Save where a party has done so itself with the consent of the CMA, the CMA also will not mention publicly at the opening of an investigation whether any party to the suspected infringement had applied for leniency.<sup>26</sup>

## **Duty to preserve documents relevant to investigations**

- 5.9 The CA98 imposes certain duties on a person who knows or suspects that an investigation under the CA98 is being, or is likely to be, carried out by the

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<sup>23</sup> Further information on the CMA's approach to treatment and disclosure of information is available in the guidance document [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#). For information regarding investigations under the CDDA for the purpose of deciding whether to make an application for a CDO, see the [CMA's Guidance on Competition Disqualification Orders \(CMA102\)](#).

<sup>24</sup> Initially, the timetable will cover the investigative stages up to the CMA's decision on whether to issue a Statement of Objections. If the CMA issues a Statement of Objections, the timetable will be updated with indicative timing of the steps to the end of the investigation.

<sup>25</sup> Where the CMA has published a notice identifying a party under investigation and subsequently decides to terminate the investigation of that party without making an infringement decision against it, the CMA will publish a notice stating that the party's activities are no longer being investigated (see section 25A(4) of the CA98).

<sup>26</sup> See further the [CMA's guidance on Applications for leniency and no-action in cartel cases \(OFT1495\)](#).

CMA.<sup>27</sup> Such a person must not falsify, conceal, destroy or otherwise dispose of a document which the person knows or suspects is or would be relevant to the investigation (or cause or permit this to be done). The CMA may fine the person if, without reasonable excuse, they fail to comply with this requirement.<sup>28</sup>

- 5.10 Whether a person knows that the CMA is carrying out, or is likely to carry out, an investigation will be a question of fact. It will include where a person has received information directly from the CMA, such as where they have received a case initiation letter, or indirectly, such as where they have been made aware of this via another person or in some other way, such as being told about an on-site inspection or other investigative measure that has been carried out by the CMA.<sup>29</sup> In other cases, a person may not have been told that the CMA is carrying out or is likely to carry out an investigation but may have inferred it from other information, such as the conduct of others.
- 5.11 Even if a person does not have actual knowledge that the CMA is carrying out an investigation, or is likely to carry out an investigation, the duties set out in section 25B of the CA98 will also apply where they suspect that such an investigation is being, or is likely to be, carried out. Whether a person suspects that an investigation is being, or is likely to be, carried out will also be a question of fact. This may include, for example, where an employee of a business is aware that a customer of the business has reported their suspicions of anti-competitive behaviour to the CMA,<sup>30</sup> or where a party to an anti-competitive agreement is ‘tipped off’ that another party to the agreement has blown the whistle to the CMA.<sup>31</sup>
- 5.12 The CMA will regard documents as being relevant to an investigation if they relate to any matter relevant to the investigation (bearing in mind that the scope of a CMA investigation may change over time, including by expanding into areas which are adjacent to the original subject matter of the

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<sup>27</sup> Section 25B of the CA98. In addition, the duty to preserve documents applies where a person knows or suspects that the CMA is assisting, or is likely to assist, an overseas regulator in carrying out any of its functions which correspond or are similar to the relevant functions of the CMA (section 25B(1)(b) of the CA98). For assistance to overseas regulators, see paragraphs 7.29-7.57 (and in particular paragraph 7.42) of the guidance document [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#) which incorporates the CMA's guidance about the making and consideration of requests for investigative assistance by overseas public authorities under Part 5 of Digital Markets Competition and Consumers Act 2024 and the provision of such assistance (Overseas Investigative Assistance Guidance).

<sup>28</sup> Section 40ZE(1) in accordance with section 40A of the CA98. For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

<sup>29</sup> For these purposes, ‘another person’ could include an individual or a business. In the case of a person who is an individual, it could include the individual's employer or another business.

<sup>30</sup> The duty would apply in this case both to the employee and their employer.

<sup>31</sup> See also Example 6 in [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

investigation).<sup>32</sup> This will include not just documents which tend to prove or disprove that there was an infringement, but could also include documents containing background information, such as information about conditions in the market in which the suspected infringement occurred. However, this will not include documents that are clearly irrelevant to the investigation, such as those relating to a completely different and unrelated business area. The CMA will consider on a case-by-case basis whether a document is relevant to an investigation, taking account of the circumstances of the case.

- 5.13 As a matter of good practice, where a person knows or suspects that the CMA is, or is likely to be, carrying out an investigation, they should take a broad view of relevant documents for these purposes and ensure their preservation and integrity. Where a business knows or suspects that the CMA is carrying out, or is likely to carry out, a CA98 investigation, it should ensure that relevant documents are not destroyed under the business' document retention policy. For example, the CMA would expect a person to suspend routine document destruction in respect of documents which they know or suspect are or would be relevant to the investigation. A document retention policy should provide for the preservation of documents relevant to a CA98 investigation.<sup>33</sup> The CMA is unlikely to regard automatic destruction of relevant documents following a business' document retention policy as a 'reasonable excuse' for the purposes of any penalty that might be applicable for failing to comply with the duty to preserve documents relevant to an investigation.

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<sup>32</sup> In practice, the CMA will typically inform the parties to an investigation of any change in scope as soon as possible after the change has been made. Depending on the circumstances of the case, however, the CMA may consider a person to know or suspect that the scope of a CMA investigation is likely to be extended before it is communicated by the CMA, in which case documents relating to those matters would also be relevant to the investigation.

<sup>33</sup> See Example 6 in [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#) in relation to document retention.

## 6. The CMA's formal powers of investigation

### Information gathering powers

6.1 The CMA has a range of powers to obtain information to help it establish whether an infringement has been committed.<sup>34</sup> The CMA can require the production of specified documents or information, ask individuals oral questions and/or carry out interviews with individuals, enter premises without a warrant, and enter and search premises with a warrant. The entering of premises can be with or without notice.<sup>35</sup>

### Written information requests

6.2 Under section 26 of the CA98, the CMA may require 'any person', including any undertaking,<sup>36</sup> to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.<sup>37</sup> The CMA will send out formal information requests (also referred to as 'section 26 notices') in writing to obtain information that it considers relates to any matter relevant to the investigation from a range of sources such as the business/es under investigation, their competitors and customers, complainants, and suppliers. A section 26 notice may require the production of documents or information held outside the UK.<sup>38</sup> A section 26 notice may also be given to a person outside the UK in the circumstances set out in section 44B(3) of the CA98.<sup>39</sup> In addition, and as confirmed by the Court of Appeal, section 26 of the CA98 has extraterritorial effect generally,

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<sup>34</sup> Information gathered under the CMA's powers can also be used in any director disqualification proceedings the CMA brings. For further information, see the [CMA's Guidance on Competition Disqualification Orders \(CMA102\)](#).

<sup>35</sup> For the use of the CMA's powers to assist an overseas regulator, see the Overseas Investigative Assistance Guidance contained in paragraphs 7.29-7.57 of the guidance document [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#).

<sup>36</sup> Section 59(1) of the CA98 defines 'person' as including 'any undertaking'. Where a formal information notice is addressed to an 'undertaking', the requirement to comply with the notice applies to the undertaking as a whole and not just the legal entity forming part of the undertaking on which the notice is served. In particular, it will not be open to the entity to raise by way of excuse that it has no power, for example in traditional company or contract law terms, to compel the production of documents or information from other entities within the undertaking. The CMA will take such steps as it considers necessary or appropriate to serve notice on the undertaking; see also footnote 37 below.

<sup>37</sup> Such information requests may be served in the following ways: delivering it to the person to whom it is addressed; leaving it at their proper address; sending it by post to that address; or sending it by email to the person's email address. See section 44A of the CA98 and section 126 of the EA02.

<sup>38</sup> See Section 44B(2)(b) of the CA98.

<sup>39</sup> See section 44B(2)(a) of the CA98. The circumstances set out in section 44B(3) are that the person's activities are being investigated as part of an investigation under section 25 of the CA98 or that person has a UK connection (as defined in section 44B(5)).

and the expression 'any person' in section 26 includes any person with or without a territorial connection to the United Kingdom.<sup>40</sup>

- 6.3 The information request will tell the recipient what the investigation is about, specify or describe the documents and/or information that the CMA requires, and set out the offences and/or sanctions that may apply if the recipient does not comply. The request may also give details of where and when the documents and/or information must be produced.
- 6.4 Examples of the types of documents<sup>41</sup> and information the CMA may ask for include internal business reports, copies of emails and other internal data. Under this power, the CMA can ask for information that is not already written down, for example market share estimates based on knowledge or experience. The CMA can also require past or present employees of the business providing the document to explain any document that is produced. If a document cannot be produced, the CMA can require the recipient to state, to the best of their knowledge, where the document can be found.
- 6.5 The CMA may send out more than one request to the same person or company during the investigation. For example, the CMA may ask for additional information after considering material submitted in response to an earlier request.
- 6.6 The CMA will ask for documents or information which, in its opinion, are relevant to the investigation at the time the request is sent out. Any queries about the scope of an information request or the time given to respond should be raised with the case team as soon as possible.

## **Giving advance notice and using draft information requests**

- 6.7 In appropriate cases, the CMA will seek to give recipients of large information requests advance notice so that they can manage their resources accordingly.
- 6.8 In certain circumstances, where it is practical and appropriate to do so, (having regard to all the circumstances of the case and to the CMA's duty of expedition – see above at paragraph 2.5), the CMA may send the information request in draft. Whether or not the CMA decides to send a request in draft will depend on all the circumstances, including whether the case involves multiple parties, each holding the information differently and whether, owing to

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<sup>40</sup> Court of Appeal judgment of 17 January 2024 [CMA vs BMW AG \[2023\] EWCA Civ 1506](#), paragraphs 45 and 79 (under appeal). By virtue of section 44B(7) the CA98, the CMA considers that the CMA's powers as found by the Court of Appeal are not limited by section 44B of the CA98.

<sup>41</sup> The term 'document' includes 'information recorded in any form': section 59 of the CA98.

the duty of expedition, it would be inappropriate to do so.<sup>42</sup> The CMA can then take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which the information must be received. The time frame for comment on the draft will depend on the nature and scope of the request.

## Responding to a written information request

- 6.9 The written information request will also set a deadline by which the response must be received.
- 6.10 The deadline specified in the information request will depend on the nature and the amount of information that the CMA has requested. If a recipient of an information notice considers that it may not be able to comply with the deadline set, it should let the CMA know as soon as possible. Where a recipient wishes to request an extension, it should provide reasons. In deciding whether to grant an extension, the CMA will consider the reasons given by the recipient, as well as the need to minimise any delay to the investigation particularly in light of the duty of expedition.
- 6.11 Where a recipient has a complaint about the deadline set for a response to a written information request, the recipient should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the recipient may refer the matter to the Procedural Officer.<sup>43</sup>
- 6.12 The CMA expects recipients to comply fully with any information request within the given deadline. The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request.<sup>44</sup> This may be either a fixed or daily penalty, or a combination of the two, depending on what is appropriate in the circumstances.<sup>45</sup>

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<sup>42</sup> See also paragraph 4.6 of the guidance document [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#).

<sup>43</sup> See Chapter 15, Rule 8 of the CA98 Rules and [Procedural Officer: raising procedural issues in CMA cases](#) for further details.

<sup>44</sup> Any decision to impose a penalty for failure to comply with a formal information request may take into account whether the CMA had issued a draft information request and set a deadline for compliance with the final information request that reflected comments received on the draft request from that party. For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

<sup>45</sup> Section 40ZE(1) in accordance with section 40A of the CA98. Failure to comply includes failures to answer questions asked by the CMA, failures to produce documents required by the CMA, or failures to provide adequate or accurate information in response to any requirement imposed on a person under section 26, 26A, 27, 28 or 28A of the CA98. See CMA guidance document [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

- 6.13 The CMA may fine<sup>46</sup> any person who has been required to produce a document under a formal information request and has, without reasonable excuse, destroyed, falsified or concealed the document or provided false or misleading information. It is a criminal offence punishable by fine and/or imprisonment to provide false or misleading information,<sup>47</sup> or to destroy, falsify or conceal documents<sup>48</sup> (subject in each case to certain defences or conditions set out in the CA98). However, a person cannot be penalised under both the civil and criminal enforcement regimes.
- 6.14 Unless otherwise indicated, the response should be sent to the case team in electronic format. The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is detailed in Chapter 7.

## **Power to require individuals to answer questions**

- 6.15 The CMA can require an individual to answer questions on any matter relevant to the investigation after giving formal written notice. This power can be used whether or not the individual has a connection with a business which is a party to the investigation.<sup>49</sup>
- 6.16 The CMA will give a formal notice to the individual it wishes to interview, informing them that it intends to ask questions under formal powers.<sup>50</sup> The notice will explain what the CMA's investigation is about, give details of when and where the questions will be asked or the interview will take place (which could be immediately after receipt of the notice – see paragraphs 6.19 to 6.21 below), and may indicate that the interviewee is to answer the questions remotely, for example, via a videolink or similar technology. It also sets out both the possible consequences if the recipient fails, without reasonable excuse, to comply with the formal notice to answer the CMA's questions<sup>51</sup> and

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<sup>46</sup> Section 40ZE(1) in accordance with section 40A of the CA98. See [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

<sup>47</sup> Section 44 of the CA98.

<sup>48</sup> Section 43 of the CA98.

<sup>49</sup> Section 26A of the CA98.

<sup>50</sup> See footnote 37 above about how such a notice should be given.

<sup>51</sup> Section 40ZE(1) in accordance with section 40A of the CA98. For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).



the statutory limitations on the use against them of statements made in the interview.<sup>52</sup>

6.17 Where the individual the CMA wishes to interview has a current connection with the relevant undertaking at the time the formal notice is given, the CMA must also give a copy of the notice to that undertaking.<sup>53</sup> The CMA will determine whether an individual has a 'current connection with' the relevant undertaking on a case-by-case basis, taking account of the circumstances of the case.<sup>54</sup> The CMA will take such steps as are reasonable in all the circumstances to provide the notice before the interview takes place. In general, the CMA will provide a copy of a notice to a relevant undertaking at the same time as, or as soon as reasonably practicable after, giving the notice to the individual.<sup>55</sup>

6.18 Any queries about the details of an interview notice should be raised with the case team as soon as possible.

## Conduct of interviews

6.19 As indicated above, in certain circumstances the CMA may interview an individual under formal powers immediately after giving a formal notice to that person.<sup>56</sup>

6.20 This may include, for example, where the CMA considers that an individual may have information that would enable the CMA to take steps to prevent

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<sup>52</sup> Section 30A(2) and (3) of the CA98 provide that a statement obtained from an individual through the use of the CMA's formal interview powers may only be used as evidence against that individual on a prosecution for an offence in providing false or misleading information, or on a prosecution for some other offence where in giving evidence in the proceedings the individual makes a statement that is inconsistent with the statement obtained by the CMA and evidence relating to the latter statement is adduced, or a question relating to it is asked, by or on behalf of the individual.

<sup>53</sup> Section 26A(2) of the CA98.

<sup>54</sup> An individual who has a 'current connection with' a business means an individual: (a) concerned in the management or control of the business, or (b) employed by, or otherwise working for, the business. This could include current directors, partners or equivalent officers; any person exercising management functions of any sort; temporary or permanent employees, consultants, volunteers or contract staff; professional advisers or any other person advising the business; and/or officers or controllers of shareholders that exercise any degree of 'control' of the relevant business. A person does not need to receive a salary, fee, allowance, equity share, capital gain, or any other form of remuneration or payment from a business in order to have a 'current connection with' a relevant business. For these purposes, a 'director' includes any person occupying the position of director, by whatever name called. This includes a person formally appointed to a company board, as well as any person who acts as a director (a de facto director). It also includes a 'shadow director', defined as any person in accordance with whose directions or instructions the directors of a company are accustomed to act (other than advice given purely in a professional capacity).

<sup>55</sup> Section 26A(3) of the CA98 requires the CMA to 'take such steps as are reasonable in all the circumstances to comply with the requirement [to provide a copy of the interview notice at the time it is given to the individual]...before the time at which the individual is required to answer questions.' The CMA may consider that, in all the circumstances, it is not in a position to provide a copy of the formal interview notice to the relevant undertaking before conducting an interview, for example where a delay in conducting an interview may compromise the investigation or otherwise undermine the CMA's ability to exercise its functions under the CA98.

<sup>56</sup> Section 26A(1) of the CA98.

damage to a business or consumers, or where the effective conduct of the investigation means that the CMA considers it necessary to ask an individual questions about facts or documents immediately after having given a notice (which will generally be during the course of an inspection pursuant to the CMA's power to enter premises).

- 6.21 Ordinarily interviews will be recorded, but in circumstances where this is unnecessary or impracticable a contemporaneous note will be taken of the questions and the interviewee's response. The interviewee will be asked to read through and check any transcript of the recording or the questions and answers in the note and to confirm, in writing, that they are an accurate account of the interview.<sup>57</sup> Further information on the CMA's approach to handling confidential information can be found in Chapter 7. The CMA will not seek comments on accuracy and representations on confidentiality of the transcript (or note) of the interview until it is satisfied that it can do so without risk to the investigation.

### **Can a legal adviser be present?**

- 6.22 Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation. While the CMA recognises that the interview power may be used in a range of circumstances, the starting point for the CMA is that it will be generally inappropriate for a legal adviser only acting for the undertaking to be present at the interview. The CMA also considers that in certain circumstances there may be a risk that the presence at the interview of a legal adviser only acting for the business will prejudice the investigation, for example if their presence reduces the incentives on the individual being questioned to be open and honest in their account. In cases where the CMA wishes to question a person having entered into premises as described at paragraph 6.43 below, the questioning may be delayed for a reasonable time to allow the individual's legal adviser to attend.<sup>58</sup> During this time, the CMA may make this subject to certain conditions for the purpose of reducing the risk of contamination of witness evidence. Such conditions could include requesting that a CMA officer accompanies the individual in the period

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<sup>57</sup> The CMA will also send a copy of the transcript or note to any undertaking with which the individual has a 'current connection', and to which the CMA has given a copy of the formal interview notice pursuant to section 26A(2) of the CA98, to allow such undertaking(s) to make confidentiality representations to the CMA. Additionally, if appropriate, the CMA will send a copy of the transcript or note to any undertaking with which the individual has a 'former connection', to allow such undertaking to make confidentiality representations to the CMA.

<sup>58</sup> Rule 4 of the CA98 Rules.

before the interview takes place and/or suspending the individual's use of electronic devices, including telephones.

## **Power to enter premises**

- 6.23 In some cases, the CMA will visit premises to obtain information. The power the CMA uses to gain entry will depend on whether the CMA intends to inspect business premises<sup>59</sup> (such as an office or a warehouse) or domestic premises<sup>60</sup> (such as the home of an employee).
- 6.24 Under certain circumstances the CMA can enter business premises, but not domestic premises, without a warrant. Where the CMA has obtained a warrant<sup>61</sup> in advance of entry, the CMA can enter and search both business and domestic premises. These two powers (to enter premises without a warrant and to enter premises with a warrant) are explained below.
- 6.25 The occupier of the premises does not have to be suspected of having breached competition law.<sup>62</sup>
- 6.26 The CMA may fine any person who has, without reasonable excuse, obstructed a CMA officer acting in the exercise of the CMA officer's powers to enter business premises without a warrant or to enter business or domestic premises with a warrant.<sup>63</sup> It is also a criminal offence punishable by fine and/or imprisonment to obstruct intentionally a CMA officer acting in the exercise of these powers.<sup>64</sup>

## **Entering premises without a warrant<sup>65</sup>**

- 6.27 A CMA officer who is authorised by the CMA in writing to enter premises but does not have a warrant may enter business premises in connection with an

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<sup>59</sup> Business premises are defined as meaning any premises (or part of any premises) not used as a dwelling, section 27(6) of the CA98.

<sup>60</sup> Domestic premises are defined as premises (or any part of premises) used as a dwelling, and also used in connection with the affairs of an undertaking or association of undertakings, or where documents relating to the affairs of an undertaking or association of undertakings are kept, section 28A(9) of the CA98.

<sup>61</sup> From the High Court of England and Wales or Northern Ireland, the Court of Session in Scotland, or the Competition Appeal Tribunal.

<sup>62</sup> For example, the CMA could enter the premises of a supplier or a customer of the business suspected of breaching the law, so long as the CMA has taken all reasonably practicable steps to notify them in advance of the CMA's intended entry.

<sup>63</sup> Sections 27, 28, 28A, 40ZE and 40A of the CA98. See [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

<sup>64</sup> See section 42 of the CA98.

<sup>65</sup> Section 27 of the CA98.

investigation if they have given the premises' occupier at least two working days' written notice.<sup>66</sup>

- 6.28 In certain circumstances, the CMA does not have to give advance notice of entry.<sup>67</sup> For example, the CMA does not have to give advance notice if it has reasonable suspicion that the premises are, or have been, occupied by a party to an agreement that the CMA is investigating or a business whose conduct the CMA is investigating, or if a CMA authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

### **What powers does the CMA have when entering business premises without a warrant?**

- 6.29 When an inspection without a warrant is taking place, CMA officers may require any person to:

- produce any document that may be relevant to the CMA's investigation – CMA officers can take copies of, or extracts from, any document produced
- provide an explanation of any document produced, and/or
- tell the CMA where a document can be found if CMA officers consider it to be relevant to the investigation.

- 6.30 CMA officers may also require any relevant information electronically stored to be produced in a form that can be read and taken away, and they may also take steps necessary to preserve documents, including electronic material, or prevent interference with them.<sup>68</sup>

### **Entering and searching premises with a warrant<sup>69</sup>**

- 6.31 The CMA can apply to the court<sup>70</sup> for a warrant to enter and search business or domestic premises.
- 6.32 The CMA would usually seek a warrant to search premises where the CMA suspects that the information relevant to the investigation may be destroyed

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<sup>66</sup> The written notice will set out what the investigation is about and the criminal offences that may be committed if a person fails to comply.

<sup>67</sup> Section 27(3) of the CA98.

<sup>68</sup> Section 27(5) of the CA98.

<sup>69</sup> Section 28 of the CA98 in relation to business premises. Section 28A of the CA98 in relation to domestic premises.

<sup>70</sup> The High Court in England and Wales or Northern Ireland, the Court of Session in Scotland, or the Competition Appeal Tribunal.

or otherwise interfered with if the CMA requested the material via a written request. Therefore, the CMA mostly uses this power to gather information from businesses or individuals suspected of participating in a cartel.

## **What powers does the CMA have when entering premises with a warrant?**

- 6.33 Where an inspection is carried out under a warrant, CMA officers are authorised to enter premises using such force as is reasonably necessary, but only if they are prevented from entering the premises. CMA officers cannot use force against any person.
- 6.34 In addition to the CMA's powers described above, the warrant also authorises CMA officers<sup>71</sup> to search the premises for documents that appear to be of the kind covered by the warrant and take copies of or extracts from them.<sup>72</sup>
- 6.35 The search may cover offices, desks, filing cabinets, electronic devices such as computers, mobile phones and tablets, as well as any documents, on the premises. The CMA can also take away from the premises:
- original documents that appear to be covered by the warrant if the CMA thinks it is necessary to preserve the documents or prevent interference with them or where it is not reasonably practicable to take copies of them on the premises;<sup>73</sup>
  - any document, or copies of it, to determine whether it is of a kind in respect of which the warrant application was granted when it is not practicable to do so at the premises.<sup>74</sup> If the CMA considers later on that the information is outside the scope of the investigation, the CMA will return it;<sup>75</sup>
  - any relevant document, or copies of it, contained in something else where it is not practicable to separate out the relevant document at the

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<sup>71</sup> Other persons, such as IT specialists or industry experts, may also be authorised to carry out specific tasks under the supervision of authorised CMA officers.

<sup>72</sup> For business premises, section 28(2)(b) of the CA98. For domestic premises, section 28A(2)(b) of the CA98.

<sup>73</sup> For business premises, section 28(2)(c) of the CA98. For domestic premises, section 28A(2)(c) of the CA98. The CMA can only retain these documents for a maximum period of three months (section 28(7) of the CA98 in the case of business premises, section 28A(8) of the CA98 in the case of domestic premises).

<sup>74</sup> Part 2 of the Criminal Justice and Police Act 2001; see, in particular, section 50.

<sup>75</sup> However, the CMA may retain all of the material if it is not reasonably practicable to separate the relevant information from the irrelevant information without prejudicing its lawful use, for example as evidence (Part 2 of the Criminal Justice and Police Act 2001; see, in particular, section 53).

premises.<sup>76</sup> As above, the CMA will return information if the CMA considers later on that it is outside the scope of the investigation;<sup>77</sup> and/or

- copies of computer hard drives, mobile phones, mobile email devices and other electronic devices.

6.36 CMA officers also have powers to require any information which is stored in electronic form and which is accessible from the premises to be produced in a form which can be taken away and in which it is visible and legible (or from which it can readily be produced in a visible and legible form). It should be noted that this power of production will apply to any such information, not only that which the CMA officer considers relates to a matter relevant to the investigation.<sup>78</sup> The CMA officer may also take copies of, or take possession of, anything produced in accordance with this power which the CMA officer considers relates to any matter relevant to the investigation.<sup>79</sup>

6.37 The CMA officer may operate equipment on the premises for the purpose of producing information which is stored in electronic form and accessible from the premises in a form which can be taken away and which is visible and legible (or from which it can readily be produced in a visible and legible form).<sup>80</sup> For example, this power could be used to operate equipment so that electronic information can be transferred securely to CMA devices or where an undertaking or its employees cannot or will not produce the required information in such a form.

6.38 The CMA officer may require assistance from any person on the premises, including to access information held electronically and accessible from the premises (such as the provision of passwords or encryption keys and assistance with the separation of privileged and non-privileged material for production).<sup>81</sup>

6.39 At the end of the inspection, the CMA officer will provide, where practicable, a list of documents and/or extracts that have been taken.

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<sup>76</sup> Part 2 of the Criminal Justice and Police Act 2001; see, in particular, section 50.

<sup>77</sup> Part 2 of the Criminal Justice and Police Act 2001. See also footnote 75 above.

<sup>78</sup> Section 28(2)(f) and section 28A(2)(f) of the CA98.

<sup>79</sup> Section 28(2)(i) and section 28A(2)(i) of the CA98. See also the powers under Part 2 of the Criminal Justice and Police Act 2001 referred to in paragraph 6.35 above to take any document, or copies of it, to determine whether it is of a kind in respect of which the warrant application was granted when it is not practicable to do so at the premises, and to take any relevant document, or copies of it, contained in something else where it is not practicable to separate out the relevant document at the premises.

<sup>80</sup> Section 28(2)(g) and section 28A(2)(g) of the CA98.

<sup>81</sup> Section 28(2)(h) and section 28A(2)(h) of the CA98.

## **What will happen upon arrival?**

- 6.40 The CMA's authorised officers will normally arrive at the premises during normal business hours to exercise the power to enter. On entry, they will provide evidence of their identity, written authorisation by the CMA or the warrant as applicable, and a document setting out what the investigation is about and describing what criminal offences may be committed if a person fails to co-operate. A separate document will also be provided that sets out the powers of the authorised officers and the right of the occupier to request that a legal adviser is present.
- 6.41 Where the CMA has obtained a warrant, the CMA officer will produce it on entry. The warrant will list the names of the CMA officers authorised to exercise the powers under the warrant and will state what the investigation is about and describe the criminal offences that may be committed if a person fails to co-operate.
- 6.42 Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for CMA authorised officers during the inspection.

## **Can a legal adviser be present?**

- 6.43 The occupier may ask legal advisers to be present during an inspection, whether conducted with or without a warrant. If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, CMA officers may wait a reasonable time for legal advisers to arrive.<sup>82</sup>
- 6.44 During this time, the CMA may take necessary measures to prevent tampering with evidence or warning other businesses about the investigation.<sup>83</sup>

## **What if there is nobody at the premises?**

- 6.45 If there is no one at the premises when CMA officers arrive, the officers must take reasonable steps to inform the occupier that the CMA intends to enter the premises. Once the CMA has informed them, or taken such steps as it is able to inform them, the CMA must allow the occupier or their legal or other

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<sup>82</sup> Rule 4 of the CA98 Rules.

<sup>83</sup> This could include sealing filing cabinets, keeping business records in the same state and place as when CMA officers arrived, suspending external email or the making and receiving of calls, and/or allowing CMA officers to enter and remain in offices of their choosing. It may be a criminal offence to tamper with evidence protected in this way.

representative a reasonable opportunity to be present when the CMA carries out a search under the warrant.<sup>84</sup>

- 6.46 If CMA officers have not been able to give prior notice, the CMA must leave a copy of the warrant in a prominent place on the premises. If, having taken the necessary steps, the CMA has entered premises that are unoccupied, upon leaving those premises the CMA must leave them secured as effectively as they were found.<sup>85</sup>

## **Voluntary provision of information**

- 6.47 There may be circumstances under which a business may seek to provide information and documents voluntarily to the CMA. The business should discuss any voluntary provision with the case team prior to sending any material.

## **Return of information**

- 6.48 Where it considers it appropriate, the CMA may return<sup>86</sup> information it has gathered during the course of an investigation (irrespective of how that information has been obtained).<sup>87</sup> The CMA may return information where, after careful review, the CMA considers it is duplicate information or information that is outside the nature and scope of the investigation, including where information falls outside the scope of the investigation as a result of that scope having changed. Any such information that is returned will no longer form part of the CMA's investigation file.<sup>88</sup>

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<sup>84</sup> Section 29(3) of the CA98.

<sup>85</sup> For business premises, section 28(5) of the CA98. For domestic premises, section 28A(6) of the CA98.

<sup>86</sup> In relation to information which is stored in any electronic form, references to the return of information in this paragraph include deletion.

<sup>87</sup> As noted, however, the CMA may retain all of the information or materials it has gathered in the course of its investigation if it is not reasonably practicable to separate the relevant information from the irrelevant information (see Part 2 of the Criminal Justice and Police Act 2001, in particular, section 53).

<sup>88</sup> The CMA file will include all information which remains relevant to the investigation.



## 7. Limits on the CMA's powers of investigation

### Privileged communications

- 7.1 Under the CA98, the CMA is not allowed to use its powers of investigation to require anyone to produce or disclose<sup>89</sup> privileged communications. This limitation also applies to producing, or taking possession, or copies of, or extracts from, a privileged communication.<sup>90</sup> This limitation does not affect the CMA's powers under Part 2 of the Criminal Justice and Police Act 2001, which makes specific provision for the treatment of privileged communications.<sup>91</sup>
- 7.2 Privileged communications are defined in the CA98.<sup>92</sup> They include communications, or parts of such communications, between a professional legal adviser and their client for the purposes of giving or receiving legal advice, or those which are made in connection with, or in contemplation of, legal proceedings, and for the purposes of those proceedings. For example, this would cover a letter from a company's lawyer to the company advising on whether a particular agreement infringed the law.
- 7.3 During a search or an inspection, if a party considers that a communication is privileged, it should provide the CMA officer with material of such a nature as to demonstrate to the officer's satisfaction that the communication, or parts of it, for which privilege is claimed fulfils the conditions for it being privileged. If there is a dispute as to whether a communication (or parts of a communication) is privileged which cannot be resolved during the search or inspection, the CMA officer may request that it is placed in a sealed envelope or package. The CMA officer will then discuss the arrangements for the safe-keeping of any such items pending resolution of the dispute.
- 7.4 Where the CMA obtains electronic material during an inspection which may contain privileged communications,<sup>93</sup> specialist CMA staff who are operationally separate from the case team will filter the material using a set of keywords designed to isolate items which are, or may be, privileged. The CMA will invite suggestions for proposed keywords. The CMA will give the party an opportunity to make representations on any amendments made to

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<sup>89</sup> Production of privileged communications may be through providing written documents or orally (for example, during an interview).

<sup>90</sup> Section 30(1A) of the CA98.

<sup>91</sup> See in particular sections 54, 62 and 65(2) of the Criminal Justice and Police Act 2001. See also paragraph 6.35 above.

<sup>92</sup> Section 30 of the CA98.

<sup>93</sup> This may arise, for example, where the CMA exercises its powers under Part 2 of the Criminal Justice and Police Act 2001 or where a party has given consent to the CMA taking electronic material away from the site of an inspection.

the list of proposed key words but the final determination on the appropriateness of keywords will be made by the CMA. The CMA will typically reject the use of overly general keywords, such as 'privilege' or 'privileged', which risk capturing a large number of items that are not privileged.<sup>94</sup> If any keyword generates an unexpectedly large number of hits, the CMA will discuss with the party ways in which the keyword might be modified or replaced in order to remove any items that are not privileged, for example by adding a first name where a surname has generated a large number of hits.

- 7.5 Any items identified as potentially privileged will be provided to a lawyer not involved in the investigation, typically a member of CMA staff. Having first invited and considered the party's representations, that lawyer will consider whether these items are in fact privileged.
- 7.6 At the end of this process, any communication or part of a communication that is considered to be privileged will not be provided to the CMA case team. The CMA will return or delete any such privileged material unless it is not reasonably practicable to separate it from the rest of the electronic material without prejudicing its lawful use, for example as evidence. Where it is not reasonably practicable to return or delete such privileged material, it will be retained and secured on a separate computer network which is not accessible by the CMA case team.<sup>95</sup>

## **Privilege against self-incrimination**

- 7.7 When the CMA requests information or explanations, the CMA cannot force a business to provide answers that would require an admission that it has infringed the law.<sup>96</sup> The CMA can, however, ask questions about or ask for the production of any documents already in existence, or information relating to facts, such as whether a given employee attended a particular meeting.
- 7.8 The CMA is not able to advise on the circumstances in which a person can claim the privilege against self-incrimination. Anyone under investigation or who is required to provide the CMA with information should seek independent legal advice if they are in any doubt about the privilege or how it may apply to their situation.

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<sup>94</sup> Other examples of overly general keywords are 'lawyer', 'in-house / external counsel', 'legal adviser', 'law firm', 'legal team', 'legal review' or 'legal advice', which are all commonly used in non-privileged communications.

<sup>95</sup> See sections 54 and 62 of the Criminal Justice and Police Act 2001.

<sup>96</sup> Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is given effect in the United Kingdom by the Human Rights Act 1998.

## Handling confidential information

- 7.9 During the course of an investigation the CMA acquires a large volume of confidential information relating to both businesses and individuals.
- 7.10 There are strict rules under Part 9 of the EA02 and data protection law governing the use and disclosure of information obtained by the CMA during the course of an investigation. In many instances the CMA may have to redact documents the CMA proposes to disclose to remove any confidential information, for example, by blanking out parts of documents or by aggregating figures.
- 7.11 During the course of an investigation, the CMA may request confidentiality representations on the documents held on its file. Any such requests will generally provide an explanation as to the types of material the CMA considers are likely to be confidential under Part 9 of the EA02. It may also include a suggested framework according to which the information provider should detail any confidentiality representations. A deadline will be set for provision of confidentiality representations reflecting the extent of the material provided. Any request for an extension to the deadline, along with reasons for such a request, should be discussed well in advance of the deadline with the case team.
- 7.12 Representations should be provided where a person or business considers that any information they are giving the CMA, or that the CMA has acquired, is commercially sensitive or contains details of an individual's private affairs and that disclosing it might significantly harm the interests of the business or person. The CMA will not accept blanket or unsubstantiated confidentiality claims.
- 7.13 In the event that the CMA does not receive any confidentiality representations (and has not been notified that any will be provided) within the deadline stated the CMA will assume that no confidentiality is being claimed in respect of the information when deciding whether it should be disclosed.
- 7.14 The CMA may not agree with the person or business who provided it that the information in question is confidential,<sup>97</sup> or the CMA may agree that the information is confidential but consider that it is necessary to disclose the information to the parties in the investigation in order to enable them to exercise their rights of defence. In such circumstances, the CMA will give the

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<sup>97</sup> Particular types of information that the CMA is unlikely to consider to be 'confidential' includes financial information or certain other data relating to a business that is more than two years old and information that is already in the public domain or can be readily deduced from information in the public domain.

person or business that provided the information prior notice of the proposed action and will give them a reasonable opportunity to make representations. The CMA will then inform the party whether or not the CMA still intends to disclose the information, after considering all the relevant facts.

- 7.15 In some cases, the CMA may consider the use of practices such as confidentiality rings or data rooms<sup>98</sup> at access to file stage to handle the disclosure of confidential information to a limited group of persons.
- 7.16 The CMA will only use these procedures where there are identifiable benefits in doing so and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned.<sup>99</sup> In such cases, the person or business that provided the information will be informed of the CMA's proposed course of action and provided with a reasonable opportunity to comment. The CMA will then inform the person or business whether or not it still intends to use the proposed confidentiality ring and/or data room arrangement, after considering all the relevant facts.
- 7.17 Where a person or business is unhappy about the extent and/or method of disclosure, they should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the person or business may refer the matter to the Procedural Officer.<sup>100</sup>
- 7.18 Further information on the CMA's approach to the treatment and disclosure of information, including to identifying confidential information, is available in the guideline [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#).

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<sup>98</sup> In practice, the CMA is only likely to use data rooms in exceptional circumstances.

<sup>99</sup> See further detail at Chapter 11.

<sup>100</sup> See Chapter 15, Rule 8 of the CA98 Rules and [Procedural Officer: raising procedural issues in CMA cases](#) for further details.

## **8. Taking urgent action to prevent significant damage or to protect the public interest**

- 8.1 The CMA has the power<sup>101</sup> to give temporary directions (referred to as ‘interim measures’) if:
- (a) the CMA has begun, but not completed, an investigation under section 25 of the CA98; and
  - (b) the CMA considers that it is necessary for it to act as a matter of urgency for the purpose of:
    - (i) preventing significant damage to a particular person or category of person; or
    - (ii) protecting the public interest.
- 8.2 The CMA can give interim measures directions on its own initiative or in response to an application for interim measures if it considers that the conditions set out in paragraph 8.1 are met.

### **Application for interim measures**

- 8.3 Any person who considers that the alleged anti-competitive behaviour of another business is causing them significant damage may apply to the CMA to take interim measures.
- 8.4 Potential applicants should contact the case team in the first instance<sup>102</sup> to discuss the information requirements and explain the procedure. Where a person is considering applying for interim measures but the CMA has not opened an investigation in relation to a relevant alleged infringement, that person may request a pre-complaint discussion (see paragraph 3.17). When doing so, that person should indicate their potential interest in making an interim measures application and the reasons for considering such an application.
- 8.5 Applicants should provide as much information and evidence as possible to demonstrate their case for interim measures and should also indicate as precisely as possible the nature of the interim measure being sought. The

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<sup>101</sup> Section 35 of the CA98.

<sup>102</sup> In circumstances where no investigation has been opened the Senior Director, Competition Enforcement should be contacted.

application should include a declaration of truth<sup>103</sup> by the applicant, or a person authorised to act on behalf the applicant, that:

- to the best of their knowledge and belief, the information and evidence provided to the CMA in support of the application is true, correct, and complete in all material particulars; and
- they understand that it is a criminal offence under section 44 of the CA98 for a person, recklessly or knowingly, to supply to the CMA information which is false or misleading in a material particular. This includes providing such information to another person knowing that the information is to be used for the purpose of providing information to the CMA.

8.6 The applicant should at the same time submit a separate, non-confidential version of the information and evidence they have provided in support of their application and, in an annex clearly marked as confidential, set out clearly why the redacted information should be regarded as confidential. The CMA may provide this non-confidential version to the party/ies in relation to which the application for interim measures has been made to enable the application to be considered expeditiously, where necessary. More information about how the CMA handles confidential information is available at paragraphs 7.9 to 7.18 above.

8.7 Moreover, the CMA may (such as in particular, to be able to consider the interim measures application expeditiously) decide that it is appropriate for any unredacted information that the applicant considers confidential to be placed into a confidentiality ring or data room (see paragraph 8.10 below).<sup>104</sup>

## **Decision to impose interim measures**

8.8 The CMA has the discretion whether to make an interim measures direction. The SRO may provisionally decide to give an interim measures direction (a provisional decision which may follow a complaint or be on the CMA's own initiative). In this case, the CMA will write to the business to which the directions are addressed setting out the terms of the proposed directions and the reasons for giving them. The CMA will also allow them a reasonable opportunity to make representations on that provisional decision. Given the time-critical nature of the interim measures process, the time allowed may necessarily be short.

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<sup>103</sup> A template declaration of truth is provided at Annex A.

<sup>104</sup> See paragraphs 11.27 to 11.34 below for further discussion of confidentiality rings and data rooms.

- 8.9 The business to which the directions are addressed will also be allowed a reasonable opportunity to inspect documents on the CMA's file that relate to the proposed directions. 'Reasonable opportunity' for these purposes will depend upon the circumstances of the case, taking into account factors such as the urgency of the situation and the likely impact of the proposed interim measures directions on the business to which they are addressed. Given the need to act as a matter of urgency in interim measures cases, the CMA will provide only those documents relied on in the provisional decision that relate to the proposed directions the CMA considers are necessary to prevent significant damage or protect the public interest. At the interim measures stage, the CMA will not normally provide access to documents on the CMA's file that relate to the suspected infringement of the Chapter I or Chapter II prohibitions. The business to which the directions are addressed will have the opportunity to inspect such documents should the CMA issue a Statement of Objections.<sup>105</sup> However, a schedule of additional documents on the CMA's file will also be provided, with an opportunity for the business to request the disclosure of additional documents where it can satisfy the CMA that this is necessary for it to respond to the CMA's provisional decision.
- 8.10 The CMA may withhold any documents to the extent to which they contain any confidential information (or are internal documents).<sup>106</sup> The CMA considers that it may be appropriate in some circumstances to provide access to certain documents by using a confidentiality ring or data room, having regard to the considerations set out in Chapter 11 below.<sup>107</sup>
- 8.11 After taking into account any representations, and having satisfied itself as to the adequacy of the evidence it is relying upon and taking into account all the circumstances of the case, the CMA will make its final decision and inform the applicant and the business against which the order is being sought. The SRO is responsible for deciding whether to give an interim measures direction. Before taking this decision, the SRO will consult other senior CMA officials as appropriate.
- 8.12 In deciding whether the imposition of interim measures is appropriate in the relevant circumstances, the CMA will seek to ensure that:
- it imposes interim measures only where it has identified specific behaviour or conduct that it considers is causing or is likely to cause significant

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<sup>105</sup> See Chapter 11.

<sup>106</sup> See Rule 13(2) of the CA98 Rules.

<sup>107</sup> See, for example, paragraphs 11.27 to 11.34 below for further discussion of confidentiality rings and data rooms.

damage to a particular person or category of person, or is or is likely to be contrary to the public interest; and

- the particular interim measures sought prevent, limit or remedy the significant damage that the CMA has identified, and are proportionate for the purpose of preventing, limiting or remedying that significant damage.

8.13 The CMA will assess whether conduct is causing or is likely to cause significant damage with regard to the facts of the case. In particular, the CMA will assess the nature of the market(s) in question and the dynamics of competition within the market(s), the effect the conduct is having or is likely to have on a particular business or categories of businesses in the market(s), or the effect that the conduct is having or is likely to have on the public interest. The CMA will also consider the impact of making such an interim measures direction on the potential addressee of such a decision and on other parties, and the extent to which the applicant has taken reasonable action to seek to avoid or mitigate the significant damage that may arise.

8.14 Damage will be significant where a particular person or category of persons is or is likely to be restricted in their ability to compete effectively in the market(s), such that this is causing or is likely to cause significant damage to their commercial position. Damage can include actual or potential:

- financial loss to a person or class of persons (to be assessed with reference to that person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue);
- restriction on a person's or class of persons' ability to obtain supplies and/or access to customers; and
- damage to the goodwill or reputation of a person or class of persons.

8.15 Significant damage may be temporary or permanent – it does not require that the damage is irreparable, and/or that any business will or may exit the market(s) in question. The CMA will take into account the facts of the case, the nature of competition in the relevant market(s) and the potential duration of the interim measures in determining the period over which the relevant damage is to be assessed.

8.16 The CMA may also consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry, to consumers, or to competition more generally as a result of the suspected infringement. In determining whether interim measures may be appropriate in order to protect the public interest, the CMA will have particular



regard to the effect or potential effect that the relevant conduct is having, or is likely to have, on consumers or categories of consumers.

- 8.17 Possible content of interim measures could include requiring a party to:
- continue the supply of goods, services or other inputs (for example, access to essential infrastructure) where that supply is required to prevent significant damage to a person or persons in the market(s) or any associated market(s) in question, or to enable customers to obtain access to goods or services; and
  - reverse a price increase or decrease for any goods or services where that price increase or decrease has or is likely to cause significant damage to any person's or category of persons' ability to compete effectively or is likely to cause a detriment to the public.
- 8.18 Where the investigation concerns an agreement, the CMA will not seek interim measures where the CMA is satisfied that, on the balance of probabilities, the agreement meets the conditions for an individual exemption from the prohibition against anti-competitive arrangements.<sup>108</sup>
- 8.19 The SRO will assess each situation on a case-by-case basis to make a provisional decision as to whether interim measures may be appropriate in any particular scenario.
- 8.20 In most cases, interim measures will have immediate effect. However, if a person fails to comply with them without reasonable excuse, the CMA may apply to court for an order to require compliance within a specified time limit.
- 8.21 The court can require the person in default or any officer of a business responsible for the default to pay the costs of obtaining the order.
- 8.22 If the measures relate to the management or administration of a business, the court order can compel the business or any of its officers to comply with them. Failure to comply with a court order will be in contempt of court.
- 8.23 The CMA may impose a fine on a person where the CMA considers that a person has, without reasonable excuse, failed to comply with an interim measures direction.<sup>109</sup> Before taking such action, the CMA must have regard

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<sup>108</sup> Section 9(1) of the CA98.

<sup>109</sup> In accordance with sections 35A and 35B of the CA98.

to the statement of policy most recently published by it<sup>110</sup> at the time of the non-compliance.<sup>111</sup>

## Rejecting an application for interim measures

- 8.24 If the SRO provisionally decides to reject an application for interim measures, the CMA will consult the applicant before doing so by sending a provisional dismissal letter setting out the principal reasons for rejecting the application. The CMA will give them an opportunity to submit comments and/or additional information within a certain time, the length of which will depend on the case.
- 8.25 If the comments from the applicant contain confidential information, a separate non-confidential version must be submitted at the same time (see Chapter 7). The CMA may provide this non-confidential version to the business under investigation if, in the CMA's view, it would be appropriate to do so, such as where it may be relevant for the rights of defence.
- 8.26 The CMA will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided, if the SRO still decides to reject the application, the CMA will send a letter to the applicant and normally the business against which the directions are sought to inform them and give the CMA's reasons.
- 8.27 However, if the comments and/or additional information from any of these parties leads the SRO to change his/her provisional view and to decide that the CMA should make an interim measures direction, the CMA will inform the applicant and the business against which the directions are sought, and the investigation will continue in the normal way.

## Publication

- 8.28 The CMA's interim measures directions are included in the [public CA98 register](#) and will be published on the CMA webpage. The CMA may also publish them in an appropriate trade journal.

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<sup>110</sup> Under section 35C of the CA98.

<sup>111</sup> See [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

## 9. Analysis and review

- 9.1 The evidence that the CMA gathers using the powers described in Chapter 6 above is fundamental to the outcome of an investigation. Throughout an investigation, the CMA routinely reviews and analyses the information in the CMA's possession to test the factual, legal and economic arguments and to establish whether it supports or contradicts the theory/ies of competition harm.
- 9.2 In some cases, an investigation may start out by probing a particular set of circumstances that points to conduct of one type, but information may later surface which indicates the existence of another type of potentially anti-competitive behaviour or a different theory of competition harm from that advanced earlier in the investigation. Alternatively, the CMA's early analysis may suggest that a large number of businesses have been acting unlawfully but later on it emerges that the CMA only has enough evidence to warrant further investigation of some of those businesses. The CMA may also exercise its administrative discretion to focus resources on investigating a limited set of activities or businesses.

### Internal scrutiny

- 9.3 The CMA regularly scrutinises the way it handles the investigation and routinely assesses the evidence before it, to ensure that its actions and decisions are well-founded, fair and robust. This involves seeking internal advice from specialist advisers on the legal, policy and economic issues that arise throughout the investigation. In some instances, the CMA may also seek advice from external sources, such as external counsel.
- 9.4 The General Counsel and the Chief Economic Adviser are responsible for ensuring that there has been a thorough review of the robustness of the legal and the economic analysis (and of the evidence being used to support this), respectively, before a Statement of Objections and any Draft Penalty Statement are issued or a final decision on infringement is taken. This includes ensuring the decision maker(s) is/are aware of any significant risks before the decision to issue a Statement of Objections, a Draft Penalty Statement or a final infringement decision is taken.
- 9.5 The General Counsel and the Chief Economic Adviser (or their representative(s)) will attend the oral hearing on liability and penalty and may ask questions of the parties.
- 9.6 The SRO decides whether:
- there are sufficient grounds to open a formal investigation;

- there is sufficient evidence to issue a Statement of Objections;
- to close a case prior to issue of a Statement of Objections;
- to issue a Draft Penalty Statement;<sup>112</sup>
- to make an interim measures direction;<sup>113</sup>
- to accept commitments offered by a party under investigation;<sup>114</sup> and
- a case is appropriate for settlement.<sup>115</sup>

In addition to taking advice from specialist advisers as detailed above, the SRO will consult two other senior officials as appropriate at key stages of the investigation prior to issuing a Statement of Objections and any Draft Penalty Statement. The SRO will consult and where appropriate seek approval from the Case and Policy Committee<sup>116</sup> in relation to decisions on commitments and settlement.

9.7 Where a Statement of Objections is issued, a Case Decision Group<sup>117</sup> is appointed by the Case and Policy Committee to act as the decision-maker on whether, based on the facts and evidence before it, the legal test for establishing an infringement has been met and, where a Draft Penalty Statement has been issued to a party, whether a financial penalty should be imposed on that party in respect of any infringement found and the appropriate amount of that penalty. Before taking this decision, the Case Decision Group will be made aware of any significant legal risks or risks on the economic analysis (as described in paragraph 9.4), and may consult the Case and Policy Committee.

## **Sharing the CMA's early thinking and giving regular updates**

9.8 The time taken to establish the facts and whether they point to an infringement of competition law will vary from case to case depending on a range of factors such as the number of parties under investigation, the extent

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<sup>112</sup> See paragraphs 11.15 to 11.19.

<sup>113</sup> See paragraphs 8.8 to 8.27.

<sup>114</sup> See paragraphs 10.15 to 10.17.

<sup>115</sup> See paragraph 11.4. See Chapter 14.

<sup>116</sup> The Case and Policy Committee operates under delegated authority from the CMA Board. The purpose of the Case and Policy Committee includes overseeing and scrutinising the development of CMA casework, projects, decisions and policy relating to the CA98.

<sup>117</sup> See paragraph 11.35.

to which they cooperate with the CMA, and the complexity of the conduct under consideration.

- 9.9 The CMA generally provides case updates to businesses under investigation either by telephone or in writing. The CMA will also offer each party under investigation separate opportunities to speak with representatives of the case team (which may include the SRO) to ensure that they are aware of the stage the investigation has reached.<sup>118</sup> At 'state of play' meetings, which may be held by telephone or video conference, parties will be provided with further information on the nature and scope of the investigation. In particular, the CMA will inform parties of the next stages of the investigation and the likely timing of these, subject to any restrictions the CMA may have if the timing is market sensitive.<sup>119</sup> The CMA may also share the case team's provisional thinking on a case, where the investigation is sufficiently advanced (see paragraph 9.10 below).
- 9.10 The CMA will usually hold a state of play meeting once it has undertaken some investigatory steps and invite parties to a further state of play meeting before a decision is taken on whether to issue a Statement of Objections. At this further state of play meeting the CMA will be able to update parties on its provisional thinking on the case, including the key potential competition concerns identified.
- 9.11 In all cases where a Statement of Objections is issued, the CMA will provide an update, usually by telephone, to each party after it has received all parties' written and (where applicable) oral representations on the Statement of Objections and, where the CMA proposes to require a party to pay a financial penalty, on the Draft Penalty Statement. At least one member of the Case Decision Group and the case team will be on the call. The CMA will update parties on its preliminary views on how the CMA intends to proceed with the case in light of the written and oral representations that have been received.
- 9.12 In appropriate circumstances, the CMA may also have discussions with parties on other occasions. This may be where they have new information that can materially assist the CMA in taking forward the case. Parties who believe that an oral update of this kind would be useful should contact the case team in the first instance to discuss the matter.

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<sup>118</sup> On occasion, the CMA may, if the CMA considers it useful or appropriate, invite the parties under investigation to a multi-party meeting. For example, the CMA may consider offering a multi-party meeting where there are differing views on a key issue such as market definition or differing interpretations offered in respect of a key piece of evidence.

<sup>119</sup> See Chapter 15, Rule 8 of the CA98 Rules and [Procedural Officer: raising procedural issues in CMA cases](#) for further details.

- 9.13 As a matter of routine, the CMA will keep parties to the investigation informed of the anticipated case timetable and any changes to this, as well as publishing and updating this information on the relevant case page.<sup>120</sup>
- 9.14 If a party has a concern or complaint about the CMA's procedures or the handling of a case, it should contact the SRO in the first instance. If the party is unable to resolve the dispute with the SRO, certain procedural complaints may be referred to the Procedural Officer.<sup>121</sup> If a dispute falls outside the scope of the Procedural Officer's role, the CMA publication [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#) sets out the options available to pursue the complaint.

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<sup>120</sup> As to market sensitivity considerations, see [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#).

<sup>121</sup> See Chapter 5.

## 10. Investigation outcomes

10.1 CMA investigations can be resolved in a number of ways. The CMA:

- can decide to close an investigation on grounds of administrative priorities (see paragraphs 10.2 – 10.12);
- can issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement of competition law (see paragraphs 10.13 – 10.14);
- can accept commitments from a business relating to its future conduct where the CMA is satisfied that these commitments address the competition concerns (see paragraphs 10.15 – 10.30); and
- will issue a Statement of Objections where the CMA's provisional view is that the conduct under investigation amounts to an infringement of competition law and, where the CMA provisionally considers a financial penalty should be imposed on a party in respect of the alleged infringement, it will also issue a Draft Penalty Statement to that party (see Chapter 11 below). After allowing the business/es under investigation an opportunity to make representations on the Statement of Objections and any Draft Penalty Statement(s) issued (see Chapter 12 below), if the CMA still considers that they have committed an infringement, the CMA can issue an infringement decision against them and impose penalties and/or such directions as the CMA considers appropriate to bring the infringement to an end.

### **Closing investigations on the grounds of administrative priorities**

10.2 Not all of the CMA's investigations result in a finding that there has been a breach of competition law. The CMA may decide that a formal investigation no longer merits the continued allocation of resources because it no longer fits within the CMA's casework priorities and/or because the CMA does not have sufficient evidence in its possession to determine whether a breach has been committed and the CMA considers that further investigation is not warranted. The CMA may take this decision at any stage of the investigation.<sup>122</sup>

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<sup>122</sup> The SRO is responsible for deciding whether to close a case on administrative priorities grounds prior to issue of a Statement of Objections (see paragraph 9.6 for further information on the decision-making process). After any Statement of Objections has been issued, case closure decisions are the responsibility of the Case Decision Group.

- 10.3 If the CMA is considering closing an investigation on the grounds of administrative priorities, the CMA may, where it considers it appropriate, inform in writing any complainants whose complaint led to the investigation and whose interests are, in the CMA's view, directly and materially affected by the outcome of the CMA's investigation, setting out the principal reasons for not taking forward the investigation. The amount of detail given will vary according to the circumstances of each case. In more advanced investigations, the CMA is likely to give more details than in the case of complaints which have not been the subject of extensive investigation.
- 10.4 The CMA will assess whether a complainant<sup>123</sup> is directly and materially affected by the outcome of the CMA's investigation on the basis of the information it has provided to the CMA. This may include complainants who are:
- actual or potential competitors of the business or businesses under investigation who allege that the agreement or conduct under investigation restricts their ability to compete effectively;
  - customers of the business or businesses under investigation who allege that they have been harmed by the activity; and
  - a trade or consumer association that alleges that some or all of its members have been harmed by the agreement or conduct under investigation.
- 10.5 The CMA will give such complainants an opportunity to submit their comments or any additional information within a specified time frame. The time frame provided will depend on the circumstances of the case, but will generally be no longer than four weeks.
- 10.6 If that complainant's response contains confidential information, it will be asked to submit a separate non-confidential version at the same time (see Chapter 7 above on handling confidential information). The CMA may provide this to the business/es the CMA is investigating if the CMA thinks it appropriate, such as if it is likely to change the CMA's preliminary view.
- 10.7 The CMA will give a copy of its provisional closure letter to the business/es under investigation, giving them an opportunity to comment within a specified time frame.

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<sup>123</sup> Or a third party when considering requests for disclosure of a Statement of Objections.



- 10.8 The CMA will consider any comments and further evidence submitted within the specified time limit before reaching a final view on whether to close an investigation.
- 10.9 If the CMA decides to close the case, the CMA will write to any complainants whose comments it has sought in accordance with paragraphs 10.4 and 10.5 above, as well as the business/es under investigation, explaining why any additional information sent to the CMA has not led the CMA to change its view. The level of detail given will depend on the case and the nature of the additional information provided.
- 10.10 In these circumstances, the CMA may also issue a warning or advisory letter to any business under investigation to inform it that the CMA has been made aware of a possible breach of competition law by that business and that, although the CMA is currently not minded to pursue an investigation, it may do so in the future if its priorities change (for example, in response to further evidence received).<sup>124</sup>
- 10.11 The CMA will also issue a public statement linking to the case page on [www.gov.uk/cma](http://www.gov.uk/cma) and explain that the CMA has closed the case on administrative priority grounds. Where the CMA has published a notice that identifies a party whose activities are being investigated, the CMA will publish a further notice stating that the activities of the party in question are no longer being investigated.
- 10.12 If the response to the CMA's provisional closure letter leads the CMA to change its preliminary view and decide that an investigation should be continued, the CMA will inform the business/es under investigation and any complainant in question and continue the investigation in the normal way.

## **Issuing a no grounds for action decision**

- 10.13 If the CMA does not find sufficient evidence of a competition law infringement, the CMA may publish a reasoned no grounds for action decision when closing the case.<sup>125</sup>
- 10.14 In such cases, the CMA may, where it considers it appropriate, provide a non-confidential version of its proposed decision to any complainant whose complaint led to the investigation and whose interests are, in the CMA's view,

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<sup>124</sup> See paragraph 4.3 above.

<sup>125</sup> Rule 10 of the CA98 Rules.

directly and materially affected by the outcome of the CMA's investigation.<sup>126</sup> The consultation process on the proposed decision will be the same as for closure on the ground of administrative priorities.

## **Accepting commitments on future conduct**

- 10.15 If the CMA considers that the case gives rise to competition concerns, instead of continuing its investigation (which may result in the CMA issuing an infringement decision), the CMA may be prepared to accept binding promises, called 'commitments', from a business, relating to its future conduct.<sup>127</sup> The CMA must be satisfied that the commitments offered address its competition concerns. Before accepting commitments from a person, the CMA must provide the person with information about the possible consequences of failing to adhere to the commitments.<sup>128</sup>
- 10.16 Commitments may be structural or behavioural in nature, or a combination of both. For example, they may involve a business agreeing to cease or modify its conduct, terminating an arrangement, removing a particular clause from an agreement, withdrawing from a particular activity, licensing specific assets, or even divesting itself of part of its business.
- 10.17 A person whose commitments have been accepted by the CMA who fails to adhere to such commitments without reasonable excuse may be subject to a court order requiring compliance with the commitments and/or a fine imposed by the CMA.<sup>129</sup>

## **Circumstances in which it may be appropriate to accept commitments**

- 10.18 The decision to accept commitments is at the CMA's discretion.
- 10.19 The CMA is likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.

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<sup>126</sup> See paragraph 10.4 for examples of when a complainant is likely to be regarded as being 'directly and materially affected by the outcome of the CMA's investigation'.

<sup>127</sup> Section 31A of the CA98.

<sup>128</sup> Section 31A(2A) of the CA98.

<sup>129</sup> Sections 31E and 35A(1)(a) of the CA98. See also [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

10.20 The CMA is very unlikely to accept commitments in cases involving secret cartels between competitors<sup>130</sup> or a serious abuse of a dominant position.<sup>131</sup>

10.21 The CMA will not accept commitments in circumstances:

- where compliance with and the effectiveness of any commitments would be difficult to discern; and/or
- where it considers that not to complete its investigation and make a decision would undermine deterrence.

## Procedure

10.22 A business under investigation can offer commitments at any time during the investigation, until a decision on infringement is made. However, the CMA is unlikely to consider it appropriate to accept commitments at a very late stage in an investigation, such as after the CMA has considered representations on the Statement of Objections. The CMA has a broad discretion in determining which cases are suitable for commitments.

10.23 If a business would like to discuss offering commitments, it should contact the case team in the first instance. The CMA may ask, for example, at a State of Play meeting, whether the business wishes to offer commitments. If, following that contact, the CMA thinks that commitments may be appropriate, the CMA will send a summary of its competition concerns to the business<sup>132</sup> (where the case is still at pre-Statement of Objections stage). Once commitments have been offered, the CMA may discuss these with the business to see if they would be acceptable to the CMA.

10.24 If the CMA proposes to accept the commitments offered, the CMA will consult those who are likely to be affected by them and give them an opportunity to give their views within a time limit of at least 11 working days.<sup>133</sup> After receipt of the responses to this consultation, the CMA will hold a meeting with each business that offered commitments to inform them of the general nature of responses received and to indicate whether the CMA considers that changes

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<sup>130</sup> These include cartels relating to price-fixing, bid-rigging (collusive tendering), establishing output restrictions or quotas, market sharing.

<sup>131</sup> That is, those which the CMA considers are most likely by their very nature to harm competition. In relation to infringements of the Chapter II prohibition, this will typically include conduct which is inherently likely to have a particularly serious exploitative or exclusionary effect, such as excessive and predatory pricing.

<sup>132</sup> Such a summary is not a replacement for a Statement of Objections. It will set out the CMA's competition concerns and a summary of the main facts on which those concerns are based. However, it will not generally include detail of the source of the facts on which the CMA relies.

<sup>133</sup> Procedural requirements for the acceptance or variation of commitments are set out in Part 1 of Schedule 6A to the CA98.

are required to the commitments before the CMA would consider accepting them.

10.25 If the business/es offer revised commitments including significant changes, the CMA will allow another opportunity for complainants and any other third parties to express their views within a time limit of at least six working days.

10.26 The SRO is responsible for deciding whether to accept the commitments offered, having consulted with the Case and Policy Committee and other senior CMA officials as appropriate. The SRO's decision will require the approval of the Case and Policy Committee before the commitments can be formally accepted by the CMA. Once accepted, the CMA will publish the commitments on [its webpages](#).

## Decision to accept commitments

10.27 Once commitments have been accepted in respect of an agreement or conduct, the CMA may not continue its investigation, make an infringement decision or give interim measures directions in relation to the aspects of the alleged infringement addressed by the commitments, except under limited circumstances.<sup>134</sup>

10.28 However, the CMA is not prevented from taking any action in relation to competition concerns that are not addressed by the commitments it has accepted.

10.29 Where the CMA has accepted commitments it may, for the purposes of addressing its current competition concerns, accept a variation of the commitments or commitments in substitution for them.<sup>135</sup> If the CMA's current competition concerns are different from the competition concerns it identified when the commitments were accepted, when considering the appropriateness of accepting varied or substitute commitments, the CMA will take into account the considerations in paragraphs 10.18 to 10.21, above.

10.30 The CMA may consider it appropriate to release commitments where:<sup>136</sup>

- It is requested to do so by the person(s) who gave the commitments. In such cases, the CMA will generally consider it appropriate to release

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<sup>134</sup> These are listed in section 31B(4) of the CA98.

<sup>135</sup> See section 31(A)(3) of the CA98. The procedure in paragraphs 10.22 to 10.26 will also apply to any variation of commitments. Also, the procedural requirements for the acceptance or variation of commitments are set out in part 1 of Schedule 6A to the CA98.

<sup>136</sup> Pursuant to Section 31A(4)(b) of the CA98. Procedural requirements for the release of commitments are set out in part 2 of Schedule 6A to the CA98.

commitments only where it has reasonable grounds for believing that the competition concerns identified by it at the time, or their acceptance or variation, no longer arise; or

- The competition concerns identified at the time of their acceptance or variation no longer arise.

## **Issuing a Statement of Objections**

10.31 The CMA will issue a Statement of Objections where its provisional view is that the conduct under investigation amounts to an infringement. Where the CMA provisionally considers a financial penalty should be imposed on a party in respect of the alleged infringement, it will also issue a Draft Penalty Statement to that party at the same time as the Statement of Objections. See Chapter 11 for more detail on this.

## 11. Issuing the CMA's provisional findings – the Statement of Objections and Draft Penalty Statement

11.1 Following the analysis of the evidence on the investigation file, if the CMA's provisional view is that the conduct under investigation amounts to an infringement, the CMA will issue a Statement of Objections to each business it considers to be responsible for the infringement and give them an opportunity to inspect the CMA's file.<sup>137</sup> Where the CMA provisionally considers that the infringement alleged in the Statement of Objections warrants the imposition of a financial penalty, it will issue a Draft Penalty Statement to each business on which it proposes to impose such a penalty.<sup>138</sup> Each of these documents is discussed below.

### Statement of Objections

11.2 If the case involves more than one party, each party will receive a copy of the Statement of Objections. Information that is confidential will be disclosed through the Statement of Objections to other parties only if disclosure is strictly necessary in order for them to exercise their rights of defence. Before disclosing any confidential information, the CMA will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If the CMA considers that disclosure might significantly harm legitimate business interests or the interests of an individual, the CMA will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which the CMA is allowed to make the disclosure.<sup>139</sup>

11.3 Where the CMA considers that an agreement or conduct infringes the Chapter I prohibition the CMA may use its discretion to address the Statement of Objections to fewer than all the persons who are, or were, a party to that agreement or conduct.<sup>140</sup> The CMA will notify any party who is not an addressee under Rule 5(3) that a Statement of Objections has been issued and will provide a non-confidential version of the Statement of Objections, following a request by such a party, where it is deemed that it is necessary for them to review it to protect their rights of defence. The CMA will only provide access to documents on its file where it is established that access is required

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<sup>137</sup> Rule 6 of the CA98 Rules. Rules 18 and 19 set out the process for notification by the CMA of a Statement of Objections to each business it considers to be responsible for the infringement.

<sup>138</sup> Rule 11 of the CA98 Rules.

<sup>139</sup> Section 244 of the EA02.

<sup>140</sup> Rule 5(3) of the CA98 Rules.

in order for such a party to make representations on the Statement of Objections.

- 11.4 At this stage, the CMA may also invite addressees of a Statement of Objections to contact the CMA if they would like to enter into discussions on the possible settlement of the case. This settlement procedure applies where a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the investigation of that business's conduct. If so, the CMA will impose a reduced penalty on the business.
- 11.5 Businesses may wish to approach the CMA earlier on in the investigation to discuss the possibility of exploring settlement. If so, they should contact the case team in the first instance. See Chapter 14 for more information on settlement.
- 11.6 The Statement of Objections represents the CMA's provisional view and proposed next steps. It allows the businesses being accused of breaching competition law an opportunity to know the full case against them and, if they choose to do so, to respond formally in writing and orally.
- 11.7 The Statement of Objections will set out the facts and the CMA's legal and economic assessment of them which led to the provisional view that an infringement has occurred. The CMA will also set out any action it proposes to take, such as imposing financial penalties<sup>141</sup> and/or issuing directions to stop the infringement if the CMA believes it is ongoing, as well as the CMA's reasons for taking that action. Where the CMA provisionally considers that the infringement alleged in the Statement of Objections warrants the imposition of a financial penalty, it will normally at the same time issue a Draft Penalty Statement to each business on which it proposes to impose such a penalty.<sup>142</sup>
- 11.8 The CMA will generally send the Statement of Objections (together with any Draft Penalty Statement) and covering letter to recipients by secure email in PDF format.
- 11.9 It is the CMA's normal practice to publicly announce the issue of the Statement of Objections on [its webpages](#) and to make an announcement to the media, and on the Regulatory News Service where the matter is judged market sensitive.<sup>143</sup> The CMA will also update the administrative timetable on

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<sup>141</sup> More information on how the CMA sets penalties is available in the [CMA's guidance as to the appropriate amount of a penalty \(CMA73\)](#).

<sup>142</sup> Rule 11 of the CA98 Rules. See paragraphs 11.15 to 11.19 below.

<sup>143</sup> See [London Stock Exchange](#).

the case page. The CMA will not include reference to the amount of any proposed penalty in its public announcement about the issue of a Statement of Objections, other than in respect of Statements of Objections issued to parties that have settled with the CMA.<sup>144</sup>

- 11.10 The timing of the announcement and any advance notice will depend on whether there is any market sensitivity in respect of the announcement. The CMA has to balance its responsibilities concerning the control and release of market sensitive information against the objective of, as far as possible, giving directly affected parties fair and sufficient notice.
- 11.11 In both market-sensitive and non-market sensitive situations, the CMA will aim to balance an open approach with the need to ensure the orderly disclosure of information. Generally, in non-market sensitive announcements, the CMA aims to give parties advance notice of its announcement, in confidence, unless there is a compelling reason not to do so. In such situations, it may also give advance indication on its website about the expected date, but not contents, of the announcement.
- 11.12 In the case of market sensitive announcements, where appropriate, the CMA will apply the Guideline for the control and release of price sensitive information by Industry Regulators (originally published by the Financial Services Authority, the predecessor of the Financial Conduct Authority).<sup>145</sup>
- 11.13 If the date and content of the announcement is market-sensitive (for example, where nothing about the investigation has previously been announced), the CMA will not publicise the expected date on its webpages. It will notify directly affected parties in strict confidence the evening before the announcement is to be made, once relevant financial markets have closed (including, where appropriate, financial markets in other countries).
- 11.14 More details about the way in which the CMA publicly announces the issue of a Statement of Objections is available in the CMA's guideline [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#).

## **Draft Penalty Statement**

- 11.15 Where the CMA issues a Statement of Objections to a party and the CMA provisionally considers that the alleged infringement warrants the imposition of a financial penalty, the CMA will provide each party on which it proposes to

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<sup>144</sup> See also paragraph 14.36 below.

<sup>145</sup> See the [FCA website](#).



impose a penalty with a Draft Penalty Statement addressed to that party.<sup>146</sup> The Draft Penalty Statement will normally be provided at the same time as the Statement of Objections.

- 11.16 The Draft Penalty Statement will set out the key aspects<sup>147</sup> relevant to the calculation of the penalty that the CMA proposes to impose on that party, based on the information available to the CMA at the time.<sup>148</sup> It will also include a brief explanation of the CMA's reasoning for its provisional findings on each aspect of the penalty calculation.
- 11.17 Where a Draft Penalty Statement is issued to more than one party under investigation, the CMA will generally provide the parties under investigation with a non-confidential version of each party's Draft Penalty Statement. Each non-confidential version will generally be disclosed to the other parties under investigation.<sup>149</sup>
- 11.18 The CMA will normally send a party's Draft Penalty Statement in PDF format, in the same secure email in which the Statement of Objections is sent to that party.
- 11.19 As noted above at paragraph 11.9, the CMA will not include reference to the amount of any proposed penalty in its public announcement about the issue of a Statement of Objections, other than in respect of Statements of Objections issued to parties that have settled with the CMA.<sup>150</sup>

## **Who decides whether to issue a Statement of Objections and any Draft Penalty Statement?**

- 11.20 The SRO decides whether to issue a Statement of Objections as well as any Draft Penalty Statement. Before doing so, the SRO will consult the General Counsel and the Chief Economic Adviser (or their representatives) to ensure that the SRO is aware of any significant legal and economic risks that have

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<sup>146</sup> Rule 11 of the CA98 Rules.

<sup>147</sup> Including, for example, the starting point percentage, the relevant turnover figure to be used, the duration of the infringement, any uplift for specific deterrence, any aggravating/mitigating factors (and the proposed increase/decrease in the penalty for these), and any adjustment proposed for proportionality.

<sup>148</sup> Rule 11 of the CA98 Rules. For further information on how the CMA calculates a penalty, see [CMA's guidance as to the appropriate amount of a penalty \(CMA73\)](#).

<sup>149</sup> When preparing non-confidential versions of each party's Draft Penalty Statement, the case team will have regard to any confidentiality representations previously made by that party in relation to the information included in the Draft Penalty Statement. Where a party has not previously had an opportunity to make representations as to the confidentiality of information contained in the Draft Penalty Statement which relates to it, the CMA will allow the party a reasonable opportunity to do so before a non-confidential version of the Draft Penalty Statement is provided to another party to the investigation.

<sup>150</sup> And see paragraph 14.36 below.

been identified.<sup>151</sup> The SRO will also consult other senior CMA officials as appropriate.

## **Inspection of the file and treatment of confidential information**

- 11.21 At generally the same time as issuing the Statement of Objections and any Draft Penalty Statement, the CMA will also give the addressees of the Statement of Objections and any Draft Penalty Statement the opportunity to inspect the file. This is to ensure that they can properly defend themselves against the allegation of having breached competition law and have an opportunity to make representations in respect of any proposed penalty.
- 11.22 The CMA's file contains documents that relate to matters contained in the Statement of Objections and any Draft Penalty Statement, excluding certain confidential information<sup>152</sup> and CMA internal documents.<sup>153</sup>
- 11.23 The CMA allows addressees of the Statement of Objections and any Draft Penalty Statement a reasonable opportunity to inspect the CMA's file. The time given for addressees will take into consideration a number of factors including the size of the file, the nature of the documents and the access to file process being used. The CMA considers that, in general, the period of time for inspecting the file will generally be the same as that given for the provision of written representations.<sup>154</sup>
- 11.24 Prior to issuing the Statement of Objections and any accompanying Draft Penalty Statement, the CMA will discuss with the businesses under investigation the process envisaged for giving access to the CMA's file. This may be discussed as part of a State of Play meeting<sup>155</sup> and/or in writing. In all cases, the CMA will seek to ensure that the access to file process is as efficient as practicable, both for addressees of the Statement of Objections (and any Draft Penalty Statement) as well as the CMA. The CMA will consider the most appropriate process for allowing parties to have access to its case file in each case, while ensuring that parties are able to exercise their rights of defence.

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<sup>151</sup> As described further in paragraph 9.4 above.

<sup>152</sup> Under Rule 1(1) of the CA98 Rules, confidential information means 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, or information whose disclosure the CMA thinks is contrary to the public interest.

<sup>153</sup> Rule 6(2) of the CA98 Rules.

<sup>154</sup> See paragraph 12.3 below.

<sup>155</sup> See paragraphs 9.9 to 9.11 above.

11.25 In some cases, the CMA may provide each party with:

- (a) copies of the documents that are directly referred to in the Statement of Objections and any Draft Penalty Statement sent to that party; and
- (b) a schedule containing a detailed list of all the documents on the CMA's file.

These will usually be given in electronic form by secure email.<sup>156</sup>

11.26 Under this process, businesses will have a reasonable opportunity to inspect additional documents listed in the schedule upon request. The CMA will set a reasonable deadline within which the business will be able to make any such requests, on a case-by-case basis. Where a business requests additional documents from the schedule, the CMA may consider whether it is appropriate to use a confidentiality ring to facilitate further disclosure of documents on the CMA's file.<sup>157</sup>

11.27 In some cases, the CMA may discuss with a business under investigation, in advance of the Statement of Objections, the use of a confidentiality ring to facilitate the disclosure of documents not referred to in the Statement of Objections or any Draft Penalty Statement sent to that business. The use of a confidentiality ring in these circumstances would allow parties' external advisers to carry out an assessment of documents that are not directly referred to in a Statement of Objections or any Draft Penalty Statement, in order to enable those advisers to make targeted requests for the disclosure of other documents on the CMA's file to the parties. Given the large volume of documents that are often on the CMA's file, the CMA considers that the use of confidentiality rings in this way to facilitate access to file is likely to give rise to identifiable benefits in terms of efficiencies, both for addressees of the Statement of Objections (and any Draft Penalty Statement) as well as the CMA.

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<sup>156</sup> Where a business does not have the relevant electronic means to view the documents in this way the CMA will send hard copies.

<sup>157</sup> Confidentiality rings enable disclosure of specific quantitative and/or qualitative data or documents to a defined group. The group is determined on a case-by-case basis but, generally, disclosure is made to the relevant parties' external (legal and/or economic) advisers. The use of a confidentiality ring is subject to any restrictions in the Regulation (EU) 2016/679 (General Data Protection Regulation) (GDPR) and the DPA 2018 in relation to personal information. While the CMA will normally use a confidentiality ring in CA98 investigations it may, in exceptional circumstances, use a data room. This may, for example, be the case where additional enhanced security measures are appropriate because the information is considered by the CMA to be particularly sensitive. Like confidentiality rings, data rooms enable access to a specific category of confidential data or documents to a defined group and the group is also determined on a case-by-case basis. However, a data room provides access to the confidential data or documents on the CMA premises, and in so doing has the advantage of providing additional protection.

- 11.28 The CMA would envisage that a confidentiality ring may also be appropriate where the disclosure of a specific category of confidential information or data would enable a defined group to further their understanding or prepare confidential submissions on behalf of their client regarding the CMA's analysis – for example, in relation to certain (confidential) quantitative data.<sup>158</sup>
- 11.29 The use of confidentiality rings or data rooms by the CMA in this way, as means of making disclosure of confidential information only to a party's external advisers, will be restricted to when it is necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process.
- 11.30 The CMA has discretion as to whether to use confidentiality rings or data rooms in investigations under the CA98, either (i) as a means of facilitating access to file or (ii) to disclose a specific category of confidential information or data to allow a party's external advisers to further their understanding or prepare confidential submissions. The CMA will do so only where it is proportionate, there are clearly identifiable benefits, and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned. In such cases, the person or business that provided the information will be informed of the CMA's proposed course of action and provided with a reasonable opportunity to comment. The CMA will then inform the person or business whether or not it still intends to use the proposed confidentiality ring and/or data room arrangement, after considering all the relevant facts.<sup>159</sup>
- 11.31 Requests from addressees for access to file using confidentiality rings or data rooms will be considered on a case-by-case basis. 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 the risks of inadvertent disclosure through human error and information leaks.
- 11.32 Where the CMA decides on (or a party requests) the use of a confidentiality ring or data room process, the CMA will provide the relevant parties with details of how the CMA proposes this will work in practice. For example, providing copies of the proposed data room rules and the confidentiality

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<sup>158</sup> As noted above at footnote 157, the CMA will normally use a confidentiality ring in CA98 investigations, but may, in exceptional circumstances, use a data room.

<sup>159</sup> If the CMA considers, having taken into account the relevant statutory provisions, that it is necessary to make the disclosure for the purpose of facilitating the CMA's functions, it is not obliged to obtain the consent of the party to which the information relates. However, the CMA will consider a party's representations regarding the confidential nature of any information that the party has provided.

undertakings<sup>160</sup> that will be required from those who are given access to the data room or confidentiality ring.<sup>161</sup> 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).

11.33 If any party has a concern about the potential use of a confidentiality ring or data room procedure, they should raise their concerns first with the SRO and, if it is not possible to resolve the issue, with the Procedural Officer.<sup>162</sup>

11.34 It is a criminal offence, punishable by fine and/or imprisonment, for any person to whom information is disclosed by way of a confidentiality ring or data room to disclose or otherwise use the information other than for the purpose of facilitating the exercise of any of the CMA's functions under the CA98 or any other enactment.<sup>163</sup> In practical terms, this means that a person to whom information is disclosed which has not been made publicly available must not make any onward disclosure of that information.

## **Appointment of a Case Decision Group**

11.35 Once the CMA has issued a Statement of Objections, a three-member Case Decision Group is appointed by the Case and Policy Committee to be the decision-makers in the case.<sup>164</sup> The Case Decision Group is responsible for taking decisions on (a) whether to issue an infringement decision (with or without directions) or a 'no grounds for action' decision; and (b) on the appropriate amount of any penalty.<sup>165</sup> The CMA will inform the parties of the identity of the Case Decision Group members. At least one member of the Case Decision Group will be legally qualified.

11.36 The SRO will not be a member of the Case Decision Group, to ensure that the final decision is taken by officials who were not involved in the decision to issue the Statement of Objections and any Draft Penalty Statement(s).

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<sup>160</sup> See [Confidentiality ring and disclosure room undertaking templates](#).

<sup>161</sup> See Chapter 4 of the CMA's guidance document [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#) for further information on the CMA's general approach to the protection of confidential information disclosed through a confidentiality ring or data room.

<sup>162</sup> See Chapter 15, Rule 8 of the CA98 Rules and [Procedural Officer: raising procedural issues in CMA cases](#) for further details.

<sup>163</sup> Section 241(2A) and section 245 of the EA02.

<sup>164</sup> The Case Decision Group, generally comprising of members of the CMA's senior staff and, where appropriate the CMA panel, will operate under the delegated authority of the Case and Policy Committee.

<sup>165</sup> The Case Decision Group may also decide to close a case on the grounds of administrative priorities. See further paragraphs 10.2 – 10.12 above.

11.37 The case team, including the SRO, will remain in place to progress the investigation under the direction of the Case Decision Group as appropriate. The case team will remain the primary point of contact for the parties.<sup>166</sup>

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<sup>166</sup> Contact details for the case team will be included in the notice of investigation published on the CMA's webpages: [www.gov.uk/cma](http://www.gov.uk/cma).

## 12. Right to reply

### Written representations, the response to the Statement of Objections and any Draft Penalty Statement

- 12.1 When the CMA issues a Statement of Objections, the CMA will invite each addressee of the Statement of Objections (Addressee) to respond in writing, commenting on the matters referred to in the Statement of Objections.<sup>167</sup> Any Addressee to which the CMA has also issued a Draft Penalty Statement will have the opportunity to make written representations to the CMA on the proposed penalty.<sup>168</sup> However, there is no obligation to submit a response on either the Statement of Objections or any Draft Penalty Statement.
- 12.2 Where the CMA has provided a non-confidential version of the Statement of Objections to a person who is party to an agreement or conduct that the CMA considers infringes the Chapter I prohibition but who is not an Addressee,<sup>169</sup> the CMA will allow that person to make representations on the matters referred to in the non-confidential version of the Statement of Objections.
- 12.3 The deadline for submitting written representations will be specified in the Statement of Objections and any Draft Penalty Statement. The deadline will be set on a case-by-case basis having regard to the circumstances of each particular case. Such circumstances may include the volume of documentary evidence relied upon in the Statement of Objections, the particular situation of the Addressee themselves, and also whether any Draft Penalty Statement has been issued to the Addressee along with the Statement of Objections. The deadline for an Addressee to submit written representations will be no more than 12 weeks from the issue of the Statement of Objections and any Draft Penalty Statement. Any requests for an extension to the deadline should be communicated to the CMA as soon as possible, and in any event within five working days, following the receipt of the Statement of Objections and any Draft Penalty Statement, and must specify the reasons why an extension is required. In order not to delay investigations, extensions to the time for submitting written representations on the Statement of Objections and Draft Penalty Statement will be given only where there are particularly compelling reasons for doing so, and should not be regarded as normal practice.
- 12.4 Where an Addressee has a complaint about the deadline set for submitting written representations, the Addressee should raise this as soon as possible

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<sup>167</sup> Rule 6 of the CA98 Rules.

<sup>168</sup> Rule 11 of the CA98 Rules.

<sup>169</sup> See Rule 5(3) of the CA98 Rules and paragraph 11.3 above.

with the SRO. If it is not possible to resolve the dispute with the SRO, the Addressee may refer the matter to the Procedural Officer.<sup>170</sup>

- 12.5 When an Addressee submits written representations it should also provide a non-confidential version of its representations, along with an explanation which justifies why information should be treated as confidential. The CMA will not accept blanket or unsubstantiated confidentiality claims. The non-confidential version should be provided within two weeks of the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the case team.
- 12.6 Where there is more than one Addressee the CMA will not cross disclose the written (or oral) representations made by an Addressee to each of the other Addressees, other than in exceptional circumstances.<sup>171</sup>
- 12.7 The CMA may on a case-by-case basis also provide an opportunity to submit written representations on a non-confidential version of the Statement of Objections to third parties who are:
- a complainant whose complaint has led to the relevant investigation and whose interests are, in the CMA's view, directly and materially affected by the outcome of the CMA's investigation;<sup>172</sup>
  - third parties or complainants who in the CMA's view:
  - are directly and materially affected by the outcome of the CMA's investigation but have not made a complaint to the CMA about the agreement or conduct under investigation;
  - are likely materially to assist the CMA in its investigation; and
  - have requested the opportunity to comment on the Statement of Objections; or
  - current or former directors of an Addressee of the Statement of Objections, in respect of whom the CMA is carrying out an investigation under the

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<sup>170</sup> See Chapter 15, Rule 8 of the CA98 Rules and [Procedural Officer: raising procedural issues in CMA cases](#) for further details.

<sup>171</sup> For instance, where the CMA considers it necessary for rights of defence of the other Addressees to cross disclose genuinely new relevant evidence (as opposed to arguments of fact or law) included in the representations of a party, or where it assists the CMA in clarifying a substantive factual or legal or economic issue.

<sup>172</sup> See paragraph 10.4 for examples of when a complainant is likely to be regarded as being 'directly and materially affected by the outcome of the CMA's investigation'.



CDDA for the purpose of deciding whether to make an application for a CDO.

- 12.8 The CMA is only likely to regard a third party as being able materially to assist it in its investigation where it considers that third party's comments are likely to be material over and above, and that are not otherwise duplicative of, views and information that the CMA has already taken into consideration in preparing the Statement of Objections.
- 12.9 The CMA will not provide complainants or third parties with an opportunity to comment, or may only consult them to a more limited extent, in this way where doing so risks prejudicing the CMA's investigation or another case.<sup>173</sup>
- 12.10 In most cases, disclosure of a non-confidential version of the Statement of Objections will be sufficient to enable third parties to provide the CMA with informed comments and this will not generally include any annexed documents or any Draft Penalty Statements. The non-confidential version of the Statement of Objections is for the relevant complainant or third party's use only in making representations to the CMA and must not be disclosed to others. The deadline for a complainant or third party to submit written representations (along with a non-confidential version of any written representations) will be set on a case-by-case basis.
- 12.11 The non-confidential version of the written representations that have been submitted by a relevant complainant or third party will generally be disclosed to Addressee(s) to allow them an opportunity to comment. However, in the case of representations made by a current or former director of an Addressee who is the subject of an investigation under the CDDA, for confidentiality reasons<sup>174</sup> these will not be disclosed to the Addressees, other than in exceptional circumstances.<sup>175</sup>
- 12.12 The CMA will not generally allow complainants and other third parties an opportunity to comment on the Addressees' written representations, although this may be appropriate in certain circumstances.<sup>176</sup>

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<sup>173</sup> For example, a related criminal investigation or an investigation by another agency.

<sup>174</sup> The fact that the CMA is carrying out an investigation under the CDDA in respect of a particular director will not normally be public at that stage of the CMA's investigation.

<sup>175</sup> For example, where the CMA considers it necessary for the rights of defence of an Addressee to disclose genuinely new relevant evidence (as opposed to arguments of fact or law) included in the representations of the director, or where it assists the CMA in clarifying a substantive factual or legal or economic issue and, in the particular circumstances, considers that this outweighs the confidentiality concerns arising from such disclosure.

<sup>176</sup> For example, when the Addressee and a third party put forward different versions or interpretations of the same facts and it is necessary to decide which version or interpretation is more credible.

## Oral representations – the oral hearing

- 12.13 The CMA will offer all Addressees of a Statement of Objections the opportunity to attend a single oral hearing to discuss the matters set out in that Statement of Objections and any Draft Penalty Statement.<sup>177</sup>
- 12.14 The CMA encourages Addressees to take up the opportunity to attend an oral hearing and Addressees should make clear before or when submitting their written representations that they would like to do so. The Addressee can bring legal or other advisers to the oral hearing to assist in presenting its oral representations at the hearing, subject to any reasonable limits that the CMA may set in terms of the number of persons that may attend on behalf of the Addressee. While an Addressee may be accompanied by its legal or other advisers, the CMA would expect staff or directors of the Addressee's business to attend the oral hearing and the Case Decision Group would also expect to hear from them when presenting the Addressee's oral representations. Complainants and third parties will generally not be permitted to attend the Addressee's oral hearing.<sup>178</sup>
- 12.15 The oral hearing will be held after the deadline for the submission of the written representations on the Statement of Objections and any Draft Penalty Statement, allowing time for the Case Decision Group to consider the representations. The hearing will be attended by the Case Decision Group, members of the case team, the Chief Economic Adviser and the General Counsel (or their representatives). Where necessary the CMA may arrange for attendees, from the Addressee and/or the CMA, to join the oral hearing via video conferencing. The hearing will be chaired by the Procedural Officer.
- 12.16 To promote a focussed and productive meeting, the case team will ask the Addressee to give an indication, in advance, of the matters it proposes to focus on in its oral representations at the hearing. The Addressee and the case team will agree an agenda in advance of the hearing, taking into account any matters which the Case Decision Group has indicated to the case team that it wishes to cover at the oral hearing. The agenda for the hearing will include reasonable periods of time for the Addressee to make oral representations on the Statement of Objections and, if the Addressee has indicated it would like to do so, any Draft Penalty Statement. The agenda will

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<sup>177</sup> Rule 6 and Rule 11 of the CA98 Rules.

<sup>178</sup> In some cases, the CMA may decide that it is appropriate to hold a multi-party hearing, including complainants and/or other third parties. See paragraph 12.24 below.

also include a reasonable period of time for the CMA staff present to ask the Addressee questions on its representations.<sup>179</sup>

- 12.17 In the event that an agenda and associated timings are not agreed between the Addressee and the case team at least three working days prior to the hearing, the agenda will be determined by the Procedural Officer.
- 12.18 The oral hearing provides the Addressee with an opportunity to highlight directly to the Case Decision Group issues of particular importance to its case, and which have been set out in its written representations. The oral hearing may also provide a useful opportunity for the Addressee to clarify the detail set out in its written representations. As a general rule, any points raised orally by the Addressee at this stage should be limited to those already submitted to the CMA in writing.
- 12.19 During the oral hearing, the Case Decision Group and other members of CMA staff present may ask questions on the Addressees' written representations or questions of clarification. It will be helpful for the CMA, and is likely to assist the progress of the investigation, if Addressees provide full responses to these questions. However, there is no obligation to answer. It is possible to respond to questions in writing after the hearing.
- 12.20 Where an Addressee indicates that it will respond to questions in writing post-hearing, the case team will set out these questions in writing and provide a deadline for response which is appropriate in the circumstances of the case.
- 12.21 A transcript of the oral hearing will be taken and the Addressee will be asked to confirm the accuracy of the transcript and, if necessary, to identify any confidential information. The CMA will not accept blanket or unsubstantiated confidentiality claims.
- 12.22 Following the oral hearing, the Procedural Officer will report to the Case Decision Group on the fairness of the procedure followed in the investigation.<sup>180</sup>
- 12.23 If a Case Decision Group member changes after the oral hearing(s) but before the CMA issues a final decision, the new member will, as well as considering parties' written representations, review the transcript of the oral hearing(s).

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<sup>179</sup> See paragraph 12.19.

<sup>180</sup> Rule 6(6) and (7) of the CA98 Rules.

12.24 The CMA will consider multi-party oral hearings on specific issues in appropriate cases, such as where there are differing views on a key issue like market definition, or differing interpretations offered in respect of a key piece of evidence.

## **Considering representations**

12.25 The case team, the Case Decision Group, and other CMA officials including legal and economic advisers, will carefully and objectively consider all written and oral representations to appraise the case as set out in the Statement of Objections and any Draft Penalty Statements, and to assess whether the provisional findings in the Statement of Objections and any Draft Penalty Statements are supported by the evidence and the facts.

12.26 An original set of all written representations and the transcript(s) from the oral hearing(s) will be placed on the case file.

## **Letter of facts**

12.27 Where the CMA acquires new evidence at this stage which supports the objection(s) contained in the Statement of Objections or the draft penalty calculation set out in any Draft Penalty Statement and the Case Decision Group is considering relying upon it to establish that an infringement has been committed or for the purposes of determining the appropriate level of any penalty to be imposed, the CMA will put that evidence to the Addressee<sup>181</sup> in writing and give it an opportunity to respond to the new evidence.<sup>182</sup> The time frame for responding will be set according to the volume and complexity of the new evidence.

## **Supplementary Statement of Objections**

12.28 If new information received by the CMA in response to the Statement of Objections indicates that there is evidence of a different suspected infringement or there is a material change in the nature of the infringement described in the Statement of Objections,<sup>183</sup> the CMA will issue a Supplementary Statement of Objections. This will set out the new facts or changes in the nature of the infringement on which the CMA proposes to rely

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<sup>181</sup> Rule 5(3) parties will be notified that a letter of facts has been issued and may be provided with a non-confidential copy where they have established that it is necessary for their rights of defence.

<sup>182</sup> The CMA may issue multiple letters of facts.

<sup>183</sup> A Supplementary Statement of Objections will not be issued where, for example, the scope of a suspected infringement has reduced or the amount of the proposed penalty is reduced.

to establish an infringement. The Case Decision Group will be responsible for deciding whether to issue a Supplementary Statement of Objections, having consulted the case team and other CMA officials as appropriate. If the CMA proposes to impose a financial penalty in respect of the infringement alleged in the Supplementary Statement of Objections, it will, at the same time as the Supplementary Statement of Objections, issue a Draft Penalty Statement to each party on which it proposes to impose such a penalty. Whether to issue any such Draft Penalty Statement(s) in these circumstances will be a decision for the Case Decision Group.

- 12.29 The CMA will give the Addressee an opportunity to make representations on the Supplementary Statement of Objections and any Draft Penalty Statement. The CMA will set the time frame for responding after taking into account the extent of the difference in the objections raised in the first Statement of Objections compared with the Supplementary Statement of Objections and allow the Addressees an opportunity to inspect new documents on the file.<sup>184</sup> The process will be the same as that set out in Chapter 11.
- 12.30 If it appears unlikely, when issuing a Supplementary Statement of Objections, that engaging with complainants or third parties who had previously been provided with an opportunity to comment on the Statement of Objections will materially assist the investigation, the CMA may decide to consult them on a more limited basis, or not at all. This may be the case, for example, where the Supplementary Statement of Objections is very narrow in scope.

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<sup>184</sup> Rule 5(3) parties will be notified that a Supplementary Statement of Objections has been issued and may be provided with a non-confidential copy where they have established that it is necessary for their rights of defence.

## 13. The final decision

- 13.1 The Case Decision Group decides whether there is sufficient evidence to meet the legal test for establishing an infringement and, if so, the level of any financial penalty to be imposed. Prior to proceeding to issue a final decision, the Case Decision Group may consult the Case and Policy Committee on any legal, economic or policy issues arising out of the proposed decision.<sup>185</sup>
- 13.2 As noted in Chapter 10, if, having completed its consideration of the case, the Case Decision Group does not find sufficient evidence of a competition law infringement, it will close the case.<sup>186</sup> In those circumstances, the Case Decision Group may decide to publish a reasoned no grounds for action decision.

### Issue of an infringement decision

- 13.3 The CMA will issue an infringement decision to each business the CMA has found to have infringed the law.<sup>187</sup> The CMA will also provide a non-confidential version of the decision to any person who is party to an agreement or conduct that the CMA considers infringes the Chapter I prohibition but who was not an addressee of the Statement of Objections.<sup>188</sup>
- 13.4 The infringement decision will set out fully the facts on which the CMA relies to prove the infringement and the action that it is taking, and will address any material representations that have been made during the course of the investigation.

### Imposition of financial penalties

- 13.5 If a financial penalty is being imposed, the infringement decision will explain how the Case Decision Group decided upon the appropriate level of penalty, having taken into account the CMA's statutory obligations<sup>189</sup> and the parties' written and oral representations on the Draft Penalty Statement. More information on how the CMA sets penalties is available in the CMA's [Guidance as to the appropriate amount of a penalty \(CMA73\)](#).
- 13.6 The infringement decision will also specify the date before which the penalty must be paid. It is likely that payment will be required within a period of three

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<sup>185</sup> As described in paragraph 9.7 above.

<sup>186</sup> The Case Decision Group may consult the Case and Policy Committee as necessary.

<sup>187</sup> Section 36(7A) of the CA98.

<sup>188</sup> Section 31 of the CA98 and Rule 10(1) of the CA98 Rules.

<sup>189</sup> Rule 10(2) and Rule 19 of the CA98 Rules.

months from the date of the infringement decision. If the business fails to pay within the date specified (and has not brought an appeal against the imposition or amount of the penalty within the time allowed or an appeal has been heard and the penalty upheld), the CMA may commence proceedings to recover the required amount as a civil debt.

## Issuing of directions

- 13.7 The infringement decision may also give directions to bring the infringement to an end.<sup>190</sup> Directions may require the individual or business to modify or cease the conduct or agreement. This may include positive action, such as informing third parties that an infringement has been brought to an end. In some circumstances, the directions appropriate to bring an infringement to an end may be (or include) structural changes to its business.
- 13.8 Any directions will set out the facts on which the direction is based and the reasons for it.<sup>191</sup> In most cases directions will have immediate effect, although in some cases the CMA may allow a period of time for compliance.<sup>192</sup> The directions will be published on the [public register](#) maintained by the CMA.

## Announcement of the infringement decision

- 13.9 When an infringement decision is issued, the CMA will normally issue a press announcement, make an announcement on the Regulatory News Service and publish a page on [the CMA's webpages](#) which describes the case.
- 13.10 As a general rule, as described in Chapter 11, in non-market-sensitive announcements, the CMA aims to give parties advance notice of the announcement, in confidence, unless there is a compelling reason not to do so. In both market-sensitive and non-market sensitive situations, the CMA will aim to balance an open approach with the need to ensure the orderly announcement of full information.<sup>193</sup>
- 13.11 After the infringement decision and press announcement have been issued, the CMA may notify complainants whose complaint led to the investigation

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<sup>190</sup> Section 32 and 33 of the CA98.

<sup>191</sup> Rule 12 of the CA98 Rules.

<sup>192</sup> The CMA may apply to the court for an order requiring compliance with a direction within a specified time limit if a person fails to comply with it without reasonable excuse, section 34 of the CA98. The CMA may impose a fine on a person where the CMA considers that a person has, without reasonable excuse, failed to comply with a direction (in accordance with section 35B of the CA98). Before taking such action, the CMA must have regard to the statement of policy most recently published by it (under section 35C of the CA98). See [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

<sup>193</sup> For a general guide to the CMA's approach when it makes a public announcement, see [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#).

and other third parties (for example, third parties who have submitted written representations during the investigation) of the CMA's decision.

## **Confidentiality**

- 13.12 Information that is confidential will be disclosed through the infringement decision to other parties only if disclosure is strictly necessary. Before disclosing any confidential information, the CMA will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If the CMA considers that disclosure might significantly harm legitimate business interests or the interests of an individual, the CMA will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which the CMA is allowed to make the disclosure.<sup>194</sup>
- 13.13 The Addressee of the decision will have already had the opportunity to make confidentiality representations. Either shortly before or after the infringement decision has been issued, prior to publication of a non-confidential version, the CMA will usually allow the Addressee a final opportunity to make representations on information which the Addressee deems to be confidential and is contained in the decision. Any representations must be limited to confidentiality issues only and, as at the other stages in the process, the CMA will not accept blanket or unsubstantiated confidentiality claims.

## **Final publication**

- 13.14 The CMA will publish, as quickly as possible, a non-confidential version of the infringement decision on the case page on the CMA's webpages. The CMA also maintains a [public register](#) of decisions in investigations under the CA98 and the details of the case will be placed on the register.
- 13.15 The CMA may delay publication of the final decision to avoid prejudicing any criminal investigation under section 192 of the EA02 that relates to the same or similar arrangements or conduct.

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<sup>194</sup> Section 244 of the EA02.



## 14. Settlement

- 14.1 In the context of enforcement cases under the CA98, 'settlement' is the process whereby a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the CMA's investigation. If so, the CMA will impose a reduced penalty on the business.<sup>195</sup>
- 14.2 Settlement, in appropriate cases, allows the CMA to achieve efficiencies through a streamlined administrative procedure, resulting in earlier adoption of any infringement decision, and/or resource savings, including the resource savings that come from the settling party accepting that they will not challenge or appeal against the infringement decision to the Competition Appeal Tribunal, and the CMA therefore not having to defend an appeal from the settling party.
- 14.3 It is distinct from the CMA's leniency policy and the CMA's power to accept commitments under section 31A of the CA98.<sup>196</sup> The leniency policy and the use of settlements are not mutually exclusive – it is possible for a leniency applicant to settle a case under the CA98 and benefit from both leniency and settlement discounts.

### Discretionary nature of settlement

- 14.4 The CMA will consider settlement for any case falling under the Chapter I or Chapter II prohibitions under the CA98 as long as the CMA considers that the evidential standard for giving notice of its proposed infringement decision is met.
- 14.5 Whether to settle any case is at the CMA's discretion. Moreover, there is no right or obligation to settle or enter into any settlement discussions where these are offered by the CMA.
- 14.6 In determining whether a case is suitable for settlement the CMA will have regard to a number of factors. The primary factor is whether the CMA considers that the evidential standard for giving notice of its proposed infringement decision is met. The CMA will not proceed with settlement discussions unless it considers that this standard is met. The CMA will also consider other factors such as the likely procedural efficiencies and resource

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<sup>195</sup> See Rule 9 of the CA98 Rules. See also paragraph 2.1 and 2.30 of the CMA's [Guidance as to the appropriate amount of a penalty \(CMA73\)](#), which provides that the CMA will reduce penalties where a business settles.

<sup>196</sup> See, respectively, the CMA guidance [Applications for leniency and no action in cartel cases \(OFT1495\)](#) and paragraphs 10.15 to 10.30 above.

savings that can be achieved. A further factor that may be relevant is the prospect of reaching settlement in a reasonable time frame. The CMA will continue to consider throughout the settlement discussions whether procedural efficiencies and resource savings can still be achieved from settlement, for example, taking into account the number of businesses who are interested in settlement out of the total number involved in the investigation.

## **Requirements for settlement**

14.7 At a minimum, the CMA will require the settling business/es to:

- make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement. The scope of the infringement will include, as a minimum, the material facts of the infringement as well as its legal characterisation. An admission of the facts alone is not sufficient to constitute an admission of liability sufficient to form the basis of a settlement. Where appropriate the admission will also include the facts of any actual implementation of the infringement;
- cease the infringing behaviour immediately from the date that it enters into settlement discussions with the CMA, where it has not already done so. It must also refrain from engaging again in the same or similar infringing behaviour; and
- confirm it will pay a penalty set at a maximum amount.<sup>197</sup> As set out in paragraph 14.29 below, this maximum penalty – which will apply provided the business continues to follow the requirements of settlement – will reflect the application of the settlement discount to the penalty that would otherwise have been imposed. The level of settlement discount applied will reflect the particular circumstances of the case, in particular whether the case is being settled pre- or post- Statement of Objections (see paragraph 14.30 below).

14.8 In addition, in order to achieve the CMA's objective of resolving the case efficiently (which is the principal benefit of settlement), a settling business must confirm that it accepts that:

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<sup>197</sup> There may be rare cases where the CMA may settle where a penalty is not being imposed on a party, for example an immunity applicant. However, the CMA would not normally invite an immunity applicant to explore the possibility of settlement (see paragraph 14.11 below).

- there will be a streamlined administrative process for the remainder of the investigation. This would normally include streamlined access to file arrangements, no Draft Penalty Statement, no written representations on
- the Statement of Objections or any Supplementary Statement of Objections (except in relation to manifest factual inaccuracies), no oral hearings after settlement has been reached and no Case Decision Group being appointed;<sup>198</sup>
- there will be an infringement decision against the settling business (except in the circumstances set out in paragraph 14.27);
- the decision will remain final and binding as against it, even if another addressee of the infringement decision successfully appeals against the decision;
- it will not challenge or appeal against the infringement decision to the Competition Appeal Tribunal; and
- there are likely to be specific requirements that relate to the circumstances of the case and the stage which it has reached. For example, the settling business may be required to make some of its employees or officers available for interview and to provide additional witness statements where the circumstances of a case demand it. The settling business is likely also to be required to confirm that it will use its best endeavours to ensure that employees or officers (who may have provided witness statements during the investigation) appear as witnesses on behalf of the CMA's case, should another addressee of the eventual infringement decision appeal any infringement decision to the Competition Appeal Tribunal.

## **Businesses settle voluntarily**

14.9 A settling business may withdraw from settlement discussions at any time before confirming in writing<sup>199</sup> its acceptance of the requirements for settlement (including its admission). The settling business's decision to settle should be based on its full awareness of the requirements of settlement and the consequences of settling. The settling business should satisfy itself, and will be taken to have satisfied itself, as to the following:

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<sup>198</sup> Following settlement the SRO would generally remain the decision-maker on the case. The SRO would consult the Case and Policy Committee on his/her proposed decision.

<sup>199</sup> Although, as set out in paragraph 14.19, it may be possible for a business to confirm its acceptance orally.

- that, having seen the key evidence on which the CMA is relying, it is prepared to admit to the infringement by reference to the Summary Statement of Facts<sup>200</sup> or draft Statement of Objections or Statement of Objections (where the settlement occurs after issue of the Statement of Objections), including the nature, scope and duration of the infringement;
- the maximum level of penalty to be imposed;
- the implications of settling, including the minimum requirements of settlement listed in paragraphs 14.7 and 14.8 above, including that it will not challenge or appeal against the infringement decision; and
- that (except in the circumstances set out in paragraph 14.27) an infringement decision will be issued which may be relied on by third parties to bring follow-on damages actions.

## Settlement process

14.10 Settlement discussions can be initiated either before or after the Statement of Objections is issued. Businesses may wish to approach the CMA during an investigation to discuss the possibility of exploring settlement by contacting the case team. The CMA will not make any assumptions about a business' liability from the fact that it is interested in engaging in or engages in settlement discussions.

14.11 Before the CMA case team can commence settlement discussions, the SRO will be required to obtain a mandate from the CMA's Case and Policy Committee to engage in settlement discussions. If settlement may be appropriate in a specific case, all businesses involved in an investigation (except, normally, any immunity applicant<sup>201</sup>) will be invited to explore the possibility of settlement.

14.12 Settlement discussions will be subject to a set timetable. However, the timetable will be appropriate to the circumstances of the case (for example to take account of the number of businesses entering into settlement discussions) rather than fixed at a set period. The appropriate procedure will also be partly determined by the stage in the administrative process at which

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<sup>200</sup> For the purposes of settlement discussions initiated before a Statement of Objections is issued, a Summary Statement of Facts sets out the key evidence and facts upon which the CMA relies to support its provisional view that there has been an infringement of competition law. The Summary Statement of Facts together with the key documents relied upon in the Summary Statement of Facts are presented to a business interested in settling, to enable it to consider its position regarding a possible settlement.

<sup>201</sup> As for the parties who settle, an immunity applicant involved in an investigation which is settled will be asked to confirm as part of the leniency process that they accept that there will be no involvement of a Case Decision Group.

settlement discussions take place. Settlement discussions will generally be overseen by the SRO.

- 14.13 In cases where one or more of the businesses does not wish to settle, the CMA may settle with the remaining businesses.<sup>202</sup> For non-settling businesses, the CMA will revert to the usual administrative procedure.<sup>203</sup>

## Summary Statement of Facts

- 14.14 If the settlement discussions take place pre-Statement of Objections, each business that enters into settlement discussions will be presented with a Summary Statement of Facts<sup>204</sup> and will be provided with access to the key documents on which the CMA is relying as well as a list of the documents on the CMA's file. Access to specific documents can be requested, although the provision of such access will influence the CMA's ongoing assessment of the procedural efficiencies and resources savings that can be achieved from settlement.<sup>205</sup> The CMA will give the business the opportunity to provide limited representations, including identifying manifest factual inaccuracies on the Summary Statement of Facts as part of the settlement discussions. If the settling business' representations amount to a wholesale rejection of the facts of the alleged infringement as set out in the Summary Statement of Facts, the CMA will reassess whether the case remains suitable for settlement. This will be determined by the CMA on a case-by-case basis.

## Draft Penalty Calculation

- 14.15 Where settlement is being considered prior to the issue of a Statement of Objections, each business considering settlement will be presented with a draft penalty calculation which is likely to contain some aspects which will be the same for each business considering settlement, and some which will vary to reflect the relevant business' particular circumstances. The CMA will also give each business the opportunity to make limited representations on the draft penalty calculation within a specified time frame as part of settlement discussions, provided that these are not inconsistent with its admission of liability.

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<sup>202</sup> The settlements with those business will need to be approved by the CMA's Case and Policy Committee: see paragraph 14.18 below.

<sup>203</sup> Referred to as 'hybrid' cases.

<sup>204</sup> Alternatively, a draft Statement of Objections may be presented. This will depend on a number of factors, such as, the timing of the approach to settle and whether the issue of a draft Statement of Objections would provide additional procedural efficiencies and resource savings. Further references to Summary Statement of Facts should be read to include such a draft Statement of Objections, where issued for settlement purposes.

<sup>205</sup> These may be subject to confidentiality redactions where appropriate.

- 14.16 Where a party is considering settlement after receipt of the Statement of Objections and any Draft Penalty Statement, it will have the opportunity to submit limited representations on the Draft Penalty Statement within a specified time frame as part of settlement discussions, provided that these are not inconsistent with its admission of liability.
- 14.17 The CMA will not enter into negotiation or plea-bargaining during settlement discussions, for example by accepting an admission in relation to a lesser infringement in return for dropping a more serious infringement. Nor will the CMA be prepared to negotiate variations to the minimum standard requirements of the settlement procedure which will apply to all settling businesses in that investigation.

### **Approval of settlement**

- 14.18 The SRO must receive approval from the Case and Policy Committee to settle.<sup>206</sup>
- 14.19 While settlement discussions will be conducted orally, the business' acceptance of the settlement requirements, including its admission, must be confirmed in writing (with its company letterhead). However, the CMA may consider a reasoned request from the settling business to provide the confirmation that it accepts the settlement requirements (including its admission) orally. This will be recorded and transcribed.
- 14.20 If a business is settling pre-Statement of Objections, its admission will be made by reference to the infringement(s) as set out in the Summary Statement of Facts (incorporating any amendments necessitated by the representations referred to in paragraph 14.14). The business will also be given the opportunity to indicate in a concise memorandum any manifest factual inaccuracies in the Statement of Objections once it is issued to the business.<sup>207</sup>
- 14.21 Where a business is settling post-Statement of Objections the admission will be made by reference to the infringement as set out in the Statement of Objections and the business will be given the opportunity to indicate any manifest factual inaccuracies in the Statement of Objections as part of its admission. If the settling business has made representations on the Statement of Objections before settling, the CMA will require the business, in its confirmation that it has accepted the requirements of settlement (see

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<sup>206</sup> Rule 9 of the CA98 Rules.

<sup>207</sup> Where a business has received a draft Statement of Objections the CMA will normally not provide a further opportunity to indicate any manifest factual inaccuracies.

paragraph 14.19 above), formally to withdraw those representations other than to the extent that they deal with manifest factual inaccuracies, as otherwise such representations may tend to undermine the clear and unequivocal admission of liability which is an essential feature of settlement.<sup>208</sup>

- 14.22 The letter containing the confirmation from the party that it has accepted the requirements of the settlement procedure and its admission to the infringement will be placed on the CMA's file.
- 14.23 Notes of the discussions will also be put on the CMA's file but will not be disclosed to other businesses involved in the investigation<sup>209</sup> or, if the discussions break down and no settlement is reached, the Case Decision Group.<sup>210</sup> Parties must not disclose the content of settlement discussions, the fact that discussions have taken place, or any documents they have had access to during the settlement procedure to any third parties (including any other parties engaging in settlement discussions) without the prior written authorisation of the CMA.
- 14.24 If, during settlement discussions, a business provides the CMA with new documentary evidence or information relevant to the infringement, those new documents or information will be placed on the file and may be disclosed to other parties to the investigation in the usual way. The CMA may also take further investigatory steps in relation to any such new documents or information provided to it. For example, the CMA may issue formal information requests or interview individuals in relation to the new documents or information where it is appropriate to do so. The CMA will make this clear to businesses when commencing settlement discussions.
- 14.25 If settlement discussions are not successful, the case will revert to the usual administrative procedure. Any decision to issue an infringement decision and any resulting penalty will be for a Case Decision Group. This means that any penalty imposed may be different from any penalty calculation provided during settlement discussions. Subject to paragraph 14.27 below, the case will then proceed to either an infringement decision (if the case has already passed Statement of Objections stage) or to a Statement of Objections followed by an

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<sup>208</sup> See paragraph 14.7 above.

<sup>209</sup> See the disclosure provisions in Part 9 of the EA02.

<sup>210</sup> If settlement discussions take place post-Statement of Objections, the Case Decision Group will be informed that one or more businesses are exploring the possibility of settlement. This is inevitable because settlement discussions will pause the case timetable. There may also be exceptional cases where the CMA considers it appropriate for the Case Decision Group to oversee the settlement discussions and remain decision makers on the case, in which case they would already be aware of the settlement discussions.

infringement decision (if the Statement of Objections has not yet been issued).

## Issue of an infringement decision

- 14.26 If settlement discussions are successful the SRO will generally issue an infringement decision and will consult the Case and Policy Committee on his/her proposed decision.<sup>211</sup>
- 14.27 An infringement decision will be issued in every settlement case unless the CMA decides not to make an infringement finding against the settling business, for example where new exculpatory evidence comes to light after settlement but before the CMA has adopted an infringement decision. Equally, the decision (and where relevant any Statement of Objections) will substantially reflect the admission made by the settling business unless the CMA considers it necessary to include amendments or issue a Supplementary Statement of Objections, for example where new evidence comes to light (see further paragraph 14.32). The decision will also include findings of fact and law, the amount, and an explanation of, the penalty imposed on the settling business as well as a description of the key requirements of the settlement procedure. The decision may include findings of effect if appropriate to the case.

## Settlement discount

- 14.28 As part of the minimum requirements for settlement, a business must accept that it will pay a maximum penalty. This is the maximum amount of penalty that the settling business will pay if the CMA issues an infringement decision.<sup>212</sup>
- 14.29 In the infringement decision, the CMA will set out the total penalty (£X) less the specified settlement discount of (Y%), provided the settling business follows any continuing requirements of settlement, which results in the reduced penalty after settlement of (£Z) (the maximum penalty).
- 14.30 Settlement discounts will be capped at a level of 20% in relation to cartel conduct and 40% in relation to non-cartel conduct. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. The discount

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<sup>211</sup> Rule 9 of the CA98 Rules.

<sup>212</sup> The maximum penalty figure may include a reduction for cooperation that has been provided prior to settlement as a mitigating factor under step 3 of the penalty calculation (see [CMA's guidance as to the appropriate amount of a penalty \(CMA73\)](#)).



available for settlement pre-Statement of Objections will be up to 20% for cartel conduct and up to 40% for non-cartel conduct and for settlement post-Statement of Objections will be up to 10% for cartel conduct and up to 25% for non-cartel conduct.<sup>213</sup>

## **Withdrawal from the settlement procedure following settlement**

- 14.31 Following the completion of successful settlement discussions the CMA will retain the right to withdraw from the settlement procedure if the settling business does not follow the requirements for settlement. Prior to withdrawing, the CMA will notify the settling business that it considers that it is not following the requirements of settlement and will give the business the opportunity to respond.
- 14.32 If the CMA does not intend to substantially reflect a settling business' admission in either the Statement of Objections or infringement decision (for example where new evidence comes to light, as referred to in paragraph 14.27), the settling business will be given the opportunity to withdraw from the settlement procedure and the case will revert to the usual administrative procedure. In these circumstances, the settling business' admission will not be disclosed to other businesses involved in the investigation or to the Case Decision Group, where this has not already occurred (for example, to other businesses as part of access to file, see paragraph 14.19). Nor will that admission be used in evidence against any of the parties to the investigation.

## **Competition Disqualification**

- 14.33 The CMA has the discretion to decide that it will not pursue a competition disqualification order or undertakings against the directors of a business that is under investigation for a breach of competition law, including where it is a settling business. However, this will not be a part of the settlement procedure under the CA98. Where the CMA has decided not to prioritise a CDDA investigation against one or more directors of a company or not to seek their disqualification, it may make this known to the director and settling business at the time of the CA98 settlement. In some cases it may also be possible for the CMA to settle a CDDA investigation against one or more directors of a settling business by accepting competition disqualification undertakings from the director or directors concerned at the same time as the settlement of the

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<sup>213</sup> 'Cartel conduct' for these purposes is any conduct for which leniency is available because it meets the definition of 'cartel activity' in paragraphs 2.2 and 2.3 of the CMA guidance [Applications for leniency and no action in cartel cases \(OFT1495\)](#) or in any updated definition in any revised leniency guidance that the CMA may publish.

CA98 case, but where this is the case the decision to accept a disqualification undertaking will nevertheless be separate from the decision to settle the CA98 case.

## **External communications during or post settlement**

- 14.34 The CMA's standard practice is not to make a public announcement that settlement discussions are taking place, or, where discussions break down, that they have broken down. As set out in paragraph 14.23 above, parties must not disclose the content of settlement discussions or the fact that those discussions have taken place to any third parties (including any other parties engaging in settlement discussions) without the prior written authorisation of the CMA.
- 14.35 In a case involving more than one business, the CMA is likely to inform other businesses involved in the investigation that one or more businesses are exploring the possibility of settlement. This is a necessary part of the process since the CMA is committed to ensuring transparency of case timetables, and entering into discussions on possible settlement will typically pause the case timetable whilst such discussions take place. At settlement discussion stage, the CMA will not name the business or businesses that have decided to explore the possibility of settlement, although in a case involving a small number of businesses, the CMA recognises that it may be possible for the business or businesses to infer which business is considering the possibility of settlement. The CMA will make it clear to other businesses involved in the investigation that the relevant business or businesses are only exploring the possibility of settlement at this stage.
- 14.36 The CMA may announce that a business has settled with a press release, in which case the CMA's webpages will be updated. Where possible the CMA will give the settling business or businesses at least one hour's advance notice of the press release's contents before it is published.<sup>214</sup>

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<sup>214</sup> Further details of the way in which the CMA gives notice of announcements is available in the CMA's guidance document [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#).

## 15. Complaints about the CMA's investigation handling, right of appeal and reviewing the CMA's processes

### Procedural complaints process for investigations under the CA98<sup>215</sup>

- 15.1 Parties to an investigation under the CA98 have recourse to a procedural complaints process in the event that they are unhappy with certain aspects of the investigation procedure after a formal investigation under section 25 of the CA98 has been opened.<sup>216</sup>
- 15.2 The CMA has also published a guideline [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#) setting out the steps it takes to ensure the CMA's work is open and accessible. Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner when dealing with the CMA. If a party's dispute falls outside the scope of the CMA's procedural complaints process for CA98 investigations, this guideline sets out the options available to pursue the complaint.
- 15.3 Once a formal investigation has been opened, any concerns or complaints about the CMA's procedures or how investigations are handled should be made in writing to the SRO in the first instance. If a party wishes to complain to the SRO, it should set out details of its complaint and provide copies of any relevant supporting documents or correspondence.
- 15.4 If, during the course of an investigation under the CA98, a party is unable to resolve the dispute with the SRO, complaints about the procedures followed during the course of the investigation may be referred to the Procedural Officer. The Procedural Officer considers significant procedural complaints. Significant procedural complaints considered by the Procedural Office are in particular, those relating to:
- deadlines for parties to respond to information requests, submit non-confidential versions of documents or submit written representations on the Statement of Objections, Supplementary Statement of Objections or any Draft Penalty Statement;

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<sup>215</sup> The Procedural Officer can also deal with certain disputes in relation to merger investigations and market studies and investigations (see further Chapter 5 of the CMA guidance document [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#)).

<sup>216</sup> Rule 8 of the CA98 Rules.

- requests for confidentiality redactions of information in documents on the CMA's case file, in the Statement of Objections, in a Draft Penalty Statement or in the final decision;
- requests for disclosure or non-disclosure of certain documents on the CMA's case file; and
- issues relating to oral hearings, including, for example, with regard to issues such as the date of the hearing.

15.5 The Procedural Officer is independent of the investigation, the case team and the Case Decision Group.

15.6 The Procedural Officer does not have jurisdiction to review decisions on the scope of requests for information or other decisions relating to the substance of a case.<sup>217</sup> Decisions made by the Procedural Officer about complaints referred during the course of CA98 investigations, including those complaints found to fall outside the scope of the Procedural Officer's role, are published on the Procedural Officer's webpage.<sup>218</sup>

### **Process for referring a complaint to the Procedural Officer<sup>219</sup>**

15.7 If a party wishes to refer a dispute to the Procedural Officer for review, that party will need to make an application within five working days of being notified of the SRO's decision on the issue in question. A party must provide a short written summary of the issue in question and provide copies of relevant correspondence with the case team and SRO.

15.8 On receipt of a complaint reference, the Procedural Officer will provide an opportunity for the case team and the party to present their arguments to the Procedural Officer orally on the telephone or at a meeting, before issuing a short, reasoned decision either confirming the SRO's decision, or reaching a different decision in whole or in part. The Procedural Officer's decision will be binding on the case team.

15.9 The Procedural Officer will endeavour to deal with the complaint as quickly as possible, with an indicative administrative target of taking decisions in most cases within ten working days from receipt of the application. The Procedural Officer will reach a decision within 20 working days from receipt of the

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<sup>217</sup> Section 26 of the CA98 provides the CMA with the power to require documents or information.

<sup>218</sup> [Procedural Officer: raising procedural issues in CMA cases](#).

<sup>219</sup> See further Rule 8 of the CA98 Rules.

application, extendable by no more than 20 working days if there are special reasons<sup>220</sup> to do so.<sup>221</sup>

- 15.10 The Procedural Officer will carefully assess how long any extension will be and will endeavour to make only one extension where it is required. The party's cooperation will assist the Procedural Officer to make a robust and timely decision, in particular by attending meetings and/or providing information on short notice.
- 15.11 The CMA will publish the Procedural Officer's decision, or a summary of that decision, generally at the time of the decision or at the end of the case, subject to confidentiality redactions as appropriate.

### **Right of appeal to the Competition Appeal Tribunal or court**

- 15.12 The role of the Procedural Officer does not prejudice the party's rights in respect of judicial review and/or any appeal before the Competition Appeal Tribunal.
- 15.13 Addressees of the CMA's appealable decisions and third parties with a sufficient interest in appealable decisions have a right to appeal against the decision concerned to the Competition Appeal Tribunal. Appealable decisions include decisions as to whether there has been a competition law infringement, interim measures decisions and decisions on the imposition of, or the amount of, a penalty.<sup>222</sup>
- 15.14 Where the law does not provide for an appeal, an application for judicial review may be brought in certain circumstances.<sup>223</sup> Parties should seek independent legal advice on their rights in this regard.

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<sup>220</sup> For example, where complaints require the Procedural Officer to deal with large volumes of data or materials, or where the Procedural Officer receives a number of complaints within a short period of time and is unable to deal with one or more complaints within the original 20 working day period.

<sup>221</sup> See Rule 8 of the CA98 Rules.

<sup>222</sup> Section 46 and section 47 of the CA98, except for settling businesses which have accepted that they will not appeal against the decision to the Competition Appeal Tribunal, see paragraph 14.8. Unlike the appeal standard for the other types of decisions (where there is a determination on the merits), the appeal standard for interim decisions is a review which applies the same principles as would be applied by a court on an application for judicial review.

<sup>223</sup> A judicial review application may be brought before the Administrative Court of the King's Bench Division under Part 54 of the Civil Procedure Rules.

## ANNEX(ES)

### A. TEMPLATE DECLARATION OF TRUTH

This Declaration should be included with the interim measures application and be signed by an individual or individuals with authority to bind the person applying for interim measures (the Applicant):

I declare that, to the best of my knowledge and belief, the information and evidence provided to the CMA in support of the application for interim measures made by [name of the Applicant] is true, correct, and complete in all material respects.

I understand that it is a criminal offence under section 44 of the Competition Act 1998 for a person recklessly or knowingly to supply to the CMA information which is false or misleading in any material particular. This includes supplying such information to another person knowing that the information is to be used for the purpose of supplying information to the CMA.

Signed: Name: (block letters) Position: (block letters) Date:

## Chart descriptions

### Figure 1 – Key Stages of an investigation

#### Source of CMA investigations

Initial consideration of issues and informal evidence gathering. Apply the Prioritisation Principles and consider whether the legal test (section 25 of the Act) has been satisfied.

#### Open a formal investigation

Formal information gathering powers. Publish case opening notice and issue written information requests. Conduct interviews. Visit search premises to obtain information and analysis of gathered evidence.

Consider if there is sufficient evidence of an infringement and Parties' right to reply

Statement of Objections and access to CMA file. Set out CMA provisional findings, supporting evidence, proposed action, and issue draft penalty statement. Receive/consider parties' representations on SO and draft penalty statement (written and oral).

Consider if there is sufficient evidence of an infringement in light of parties' representations

At this point there will either be no grounds for action decision or an infringement decision will be issued and action will be taken (financial penalties, directions). We will publish the non-confidential version of the decision.

The parties have a right of appeal to the Competition Appeal Tribunal after we have made the decision.

Duration of formal investigation varies depending on the case.

### Figure 2 – Overview of complaint process

#### Complaints

First, we receive submissions from businesses or consumers on competition concerns. We have a specific hotline where we receive complaints about cartels. Complaints about other anti-competitive activity can be made via General Enquiries, notification form (available on CMA webpages), an in-depth complaint with possible pre-complaint discussion. We also have an employee whistleblowing service, which is specifically for employees who believe their employer is breaching competition (or consumer protection law) in some way.

#### Preliminary assessment

Consider whether the complaint is within the CMA's remit.

## Pipeline assessment

Possible informal dialogue with the complainant and application of the Prioritisation Principles.

Further investigation by case teams within the Competition Enforcement Directorate.

This is the initial assessment phase which handles antitrust and cartel investigations. Informal information gathering with the complainant begins.

Formal investigation opened (s.25 CA98)