

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

Summary of Responses to the Consultation

CMA8conrep



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1. Introduction

Background

- 1.1 The CMA is committed to providing guidance for businesses and their advisers on the procedures used by the CMA in the exercise of its investigation and enforcement powers under the Competition Act 1998 ('the CA98'). It has previously published [Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8](#) ('the Current CMA8'), which provides guidance on the approach and procedures used by the CMA in the exercise of its investigation and enforcement powers under CA98. The Current CMA8 was last updated in January 2022.
- 1.2 The CMA consulted from July 2024 to 13 September 2024 on a number of proposed amendments to the Current CMA8, in draft *CMA8 Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8* ('the Draft CMA8'), along with a consultation document which explained the proposed amendments.¹
- 1.3 The Draft CMA8 reflected changes to CA98 to be introduced by the Digital Markets, Competition and Consumers Act 2024 ('the DMCCA24'), as well as other changes made to reflect current CMA practice and developments in CMA policy, including in relation to settlement.
- 1.4 The CMA consulted from 2 July 2024 to 13 September 2024 on the proposed changes to the Draft CMA8 ('the Consultation'). The CMA received eight responses to the consultation, seven of which were from private practice law firms and one was from a stakeholder organisation. The CMA thanks respondents for their comments.

Purpose of this document

- 1.5 This document is a summary of the CMA's response to the feedback received on the Consultation, and explains the key changes that the CMA has made to the Draft CMA8 as a result. The CMA has published the final version of CMA8 alongside this document, which will take effect from 1st January 2025.
- 1.6 This document is not intended to be a comprehensive record of all views expressed in response to the Consultation, nor to be a comprehensive response to all individual views, however it does set out the general views

¹ [Consultation document \(publishing.service.gov.uk\)](#).

received and the most pertinent. Furthermore, some respondents suggested minor corrections and technical drafting improvements, many of which have been reflected in the final version of CMA8, but which are not recorded in this document. Non-confidential versions of all responses to the Consultation are available on the consultation webpage.

2. Summary of responses to the Consultation

Introduction

- 2.1 The CMA has reviewed the Consultation responses alongside its preparations for implementing the new process to reflect on what, if any, further revisions are required to the Current Guidance. These further revisions are explained below.
- 2.2 Overall, respondents welcomed the CMA's updates to the Draft CMA8 to reflect the changes to CA98 made by the DMCCA24, as well as to provide clarity on certain aspects of current CMA practice. However, respondents also requested that the CMA provide further clarity and detail on some of the proposed updates.
- 2.3 Further detail on the respondents' views is set out below.

The duty to preserve documents relevant to investigations

Summary of Responses

- 2.4 Seven respondents made submissions on the duty to preserve documents relevant to investigations ('the Duty') to be introduced in section 25B of the CA98. Generally, the responses all raised concerns about the scope of the Duty and requested further detail and clarification within CMA8 on the circumstances in which the Duty will apply, with some respondents also asking for specific examples to be included.
- 2.5 The concerns about the scope of the Duty raised a few distinct issues, which are outlined below.

The level of knowledge or suspicion required to trigger the Duty

- 2.6 Most respondents submitted that the Draft CMA8 did not provide a sufficient explanation of the level of knowledge or suspicion of an actual or potential CMA investigation that is required to trigger the Duty, or when the CMA might infer such subjective knowledge or suspicion. The respondents therefore requested further clarity on this point and/or practical examples.
- 2.7 Five respondents expressly referred to examples given in the Explanatory Notes to the DMCCA24 and suggested they be included in CMA8. However, one respondent suggested that the examples in the Explanatory Notes relating to awareness that a customer has reported their suspicions of price fixing and to members of an anti-competitive agreement being "tipped off" that

a member of the agreement has blown the whistle to the CMA are not particularly helpful in clarifying when a person's subjective knowledge should lead them to suspect that a CMA investigation is likely. One respondent suggested that the example scenario 6 set out in the Draft CMA8 (*Administrative Penalties: Statement of Policy*) should also be included rather than being cross-referred to at footnote 32.

- 2.8 Two respondents requested further clarity on when a person should know or suspect that the CMA is assisting or is likely to assist an overseas regulator.
- 2.9 One respondent requested that the CMA confirm whether the approach to document preservation set out in paragraphs 5.11 and 5.12 of the Draft CMA8 also applies where a person knows or suspects the CMA "is likely to carry out an investigation."

The 'person' to whom the Duty applies

- 2.10 Five respondents requested further clarity or consistency in CMA8 when referring to the "person" to whom the Duty applies.
- 2.11 One respondent noted that paragraph 5.12 of the Draft CMA8 used the terms "business" and "person" interchangeably and suggested the CMA use "person" throughout as per statute.
- 2.12 Another respondent suggested the use of the term "person" in paragraph 5.12 of the CMA8 meant that it is unclear when an undertaking might be fixed with the knowledge/suspicion of its employees, and the CMA should make clear that knowledge and suspicion must vest at an appropriately senior level within the relevant undertaking.
- 2.13 Another respondent suggested that the CMA provide further clarity in CMA8 on whether or how the Duty "might apply differently to an individual directly implicated in potentially problematic conduct compared to the organisation for which they work" and the point in time from which they would be categorised by the CMA as such.

The types of documents which fall within the Duty

- 2.14 Three respondents submitted that the CMA's reference to "documents containing background information" in paragraph 5.10 of the Draft CMA8 was too broad and could capture a very wide category of documents.
- 2.15 One respondent suggested that the reference should be limited to refer only to documents about the product or geographic markets relevant to the subject

matter of the investigation, which contain internal or external analysis, and which relate to the time period under investigation.

- 2.16 Another respondent stated that the CMA's view that relevant documents are those "connected to the subject matter of the investigation" could be interpreted too extensively and that CMA8 should stick more closely to the wording of the statutory provisions.
- 2.17 One respondent also requested that the CMA provide further examples of the types of documents that would be considered relevant to an investigation in CMA8.
- 2.18 Five respondents also raised concerns over the suggestion in paragraph 5.11 of the Draft CMA8 that "as a matter of good practice" a "broad view" of relevant documents should be taken, saying it was unclear whether this was merely a suggested approach or something that is necessary to comply with the Duty and, in any event, noting the practical burdens this approach would place on business' document retention practices.
- 2.19 One respondent suggested that the CMA should clarify that the "good practice" suggested in CMA8 is not a minimum threshold and that the CMA will consider whether efforts comply with the Duty were reasonable and proportionate in all the circumstances when considering whether the Duty had been breached and/or whether there is a reasonable excuse for any breach.
- 2.20 One respondent also queried whether the CMA was suggesting that documents relevant to areas which are "initially adjacent" to the investigation could fall within the scope of the Duty.
- 2.21 One respondent argued that it would not be "appropriate or proportionate" to require such documents to be preserved since the CMA's investigatory powers only apply where documents or information are relevant to the investigation currently underway.
- 2.22 Two respondents argued that it would only be reasonable to expect such documents to be preserved after the CMA has communicated a change in the scope of the investigation as referred to in footnote 31 of the Draft CMA8.
- 2.23 One respondent suggested that such documents should only be preserved if it was "reasonably foreseeable" that the area they relate to would come within the scope of the investigation.
- 2.24 Another respondent proposed that parties should agree document retention/destruction policies on a case-by-case basis, "taking account of

factors such as the nature of the alleged infringement and the market concerned”, rather than applying a “blanket policy.”

The length of time for which the Duty will apply

- 2.25 One respondent suggested that CMA8 should explain when the Duty to preserve documents will come to an end in circumstances where no investigation has actually been opened by the CMA.

Technical points

- 2.26 One respondent suggested that CMA8 should include reference to section 25B(3) CA98, which provides that “the reference to concealing a document includes a reference to destroying the means of reproducing information recorded otherwise than in legible form.”
- 2.27 One respondent argued that CMA8 should expressly state that the document preservation obligations under the CA98 supersede any other legislative requirements to delete data, in particular the "right to erasure" under section 47 of the Data Protection Act 2018.

The CMA's Views

- 2.28 The CMA understands respondents' desire for additional clarity on when the duty to preserve information may arise, along with the persons and documents covered by that duty. It has already sought to provide guidance on these areas where practicable. Nevertheless, in response to the feedback received, the CMA has included some additional examples and clarifications in paragraphs 5.9 to 5.13 of the final version of CMA8. In particular:
- Paragraphs 5.10 and 5.11 now provide additional guidance on when the CMA may infer from the circumstances that a person will know or suspect that it is carrying out, or is likely to carry out, an investigation under the CA98 and include some further illustrative examples of when the duty might apply. These examples, and the associated footnotes, also provide further illustration of the types of circumstances in which the “person” to whom the duty applies may be an individual and/or a business.
 - Paragraph 5.12 has been amended to provide clearer guidance on when the CMA may consider documents to be relevant to an investigation under the CA98 and how changes to the scope of an investigation may impact on the application of the preservation duty in practice.

- Paragraph 5.13 has been amended to distinguish more clearly between the CMA’s recommended good practice to ensure compliance with the duty (including advice on role of document retention policies) from the additional guidance now included in paragraphs 5.10 to 5.12 regarding the scope of the duty. The CMA has also clarified the text to make clear that this approach should also apply where a person knows or suspects the CMA “is likely to carry out” an investigation.
- 2.29 However, in general questions regarding when the duty arises, how long it lasts for, and the persons and documents covered by it, will be highly case specific and the CMA has reiterated this at paragraphs 5.10 to 5.12 of the final version of CMA8 with respect to whether a person knows that the duty arises. Given that fact-specificity, the CMA considers that it would not be appropriate to provide further detailed guidance on these issues (beyond the additions noted above) as this may inappropriately circumscribe the duty beyond the limits already set out in the Act.
- 2.30 The CMA notes the request to include a specific reference to the interpretive provision in section 25B(3) of the CA98 regarding the concealment of documents. However, footnote 29 of the Draft CMA8 already contains a general cross reference to the underlying statutory provisions in section 25B of the CA98 and the CMA does not consider it necessary set these out in further detail on the face of the guidance. The CMA also does not consider it appropriate to provide specific guidance in CMA8 on how other legislative obligations to delete data arising outside of the CA98 should be interpreted and applied.

Service and the extraterritorial effect of notices

Summary of Responses

- 2.31 Five respondents made submissions on written information requests, primarily relating to the new provisions in section 44B CA98 on the extraterritorial application of s.26 notices and the effect of the Court of Appeal’s (‘CoA’) judgment in *CMA vs BMW AG*.
- 2.32 Three respondents commented specifically on the wording in the final sentence of paragraph 6.2 of the Draft CMA8 on the effect of the CoA judgment.
- 2.33 One respondent stated that the CMA should reconsider the statement that section 26 notices have extraterritorial effect generally, even in relation to third parties which are not being investigated by the CMA and have no UK connection.

- 2.34 One respondent expressly disagreed that the CoA judgment had such broad effect, arguing that such an interpretation would render the new s.44B redundant, contrary to the intention of Parliament, and that the CMA should clarify that it will not send section 26 notices to third parties that are not the subject of an investigation (and not part of any undertaking that is under investigation) unless the “UK connection” conditions of s.44B(5) are met.
- 2.35 Another respondent argued that paragraph 6.2 of the Draft CMA8 “goes further than the powers adopted by Parliament in the DMCC Act” and thereby “attempt[s] to circumvent the intention of the legislator by referring to the Court of Appeal’s judgment in *CMA vs BMW*.” Furthermore, the respondent claimed that it would be “premature” to rely on the CoA’s judgment given that the Competition Appeal Tribunal adopted a different interpretation of section 26 in its judgment in *CMA vs BMW AG* (2023), and *CMA vs BMW AG* is currently on appeal to the Supreme Court.
- 2.36 One respondent submitted that, where a section 26 notice is served on a person outside the UK, there is a greater risk that that person may not be aware of the extent of the undertaking to which they belong, which could lead to the undertaking facing sanctions for non-compliance. The CMA should therefore make clear in CMA8 that it will use its best endeavours to ensure the relevant undertaking is informed of the notice.
- 2.37 Two respondents suggested that the specific points in the Draft CMA8 derived from the CoA judgment should be more clearly identified (in particular, the proposition in footnote 35 of the Draft CMA8 that where a section 26 notice is addressed to an “undertaking”, the requirement to comply applies to the undertaking as a whole and not just the legal entity to which the notice is served) and CMA8 should expressly state that these are the subject to appeal to the UK Supreme Court to assist stakeholders.
- 2.38 Two respondents suggested that the new provisions in s.44B CA98 should be more clearly described and explained in CMA8. Their specific suggestions are outlined below.

Specific suggestions

- 2.39 One respondent suggested that s.44B(2)(a), which provides for a section 26 notice to be given to a person outside the U.K., should be expressly referred to in a new footnote. The respondent also requested that the circumstances in which a section 26 notice may be given to a person outside the U.K. contained in section 44B(3), and the test for a “UK connection” contained in s.44B(5), should be set out in CMA8. They also argued that any guidance on section 44B CA98 should align with the guidance on section 109B of the

Enterprise Act 2002 ('EA02') in draft CMA2 (*Mergers: Guidance on the CMA's jurisdiction and procedure*) relating to the extraterritorial effect of section 109 EA02 notices, given that the provisions mirror each other.

- 2.40 Another respondent argued that CMA8 should make clear that the condition of "carrying on business in the UK" in section 44(B)(5)(d) of the CA98 will be interpreted consistently with the judgments of the CoA and the Competition Appeal Tribunal (CAT) in *Akzo Nobel v. Competition Commission*, such that exporting goods or services from abroad to customers in the UK does not, on its own, suffice to "carry on business in the UK". The respondent also made a similar point in relation to CMA's proposed amendments to CMA108.

The CMA's Views

- 2.41 The CMA notes the differing views expressed by respondents regarding the scope and effect of the CoA judgment and the relationship between the CMA's existing powers as found by the CoA and the new express provisions on the extra-territorial application of section 26 notices in s.44B of the CA98 (to be inserted by the DMCCA24). However, the CMA's view on the effect of the CoA judgment remains as stated in the final sentence of paragraph 6.2. The CMA recognises that, at the current point in time, the CoA judgment remains subject to appeal (as made clear in footnote 39 of the Draft CMA8). The CMA will, if necessary, review the guidance on written information requests contained in CMA8 once the outcome of the appeal is known to determine if any changes are appropriate.
- 2.42 Furthermore, the CMA disagrees that its position would render the new s.44B redundant, contrary to the intention of Parliament. As noted in footnote 38 of the Draft CMA8, s.44B(7) of the CA98 makes clear that nothing in the new section 44B is to be taken to limit any other power of the CMA to give a notice under section 26 to a person outside the United Kingdom. Paragraph 865 of the Explanatory Notes to the DMCCA24 further explains that s.44B(7) makes provision so that to the extent that the CMA has a broader power, absent this section, to gather information extra-territorially under section 26 of the Competition Act 1998, section 44B does not limit such power. The CMA, therefore, considers that its position is consistent with Parliamentary intent.
- 2.43 In light of its view on the effect of the CoA judgment, the CMA does not consider it necessary at this stage to include further guidance in CMA8 on the application of the UK connection test in s.44B(5) (including the circumstances in which a person will be considered to be carrying on business in the United Kingdom).

- 2.44 In response to the suggestion that the CMA should confirm that will use its best endeavours to ensure the relevant undertaking is informed of any section 26 notice served on a person outside the UK, the CMA has provided additional clarification in footnote 36 to explain that, when serving a section 26 notice which is addressed to an ‘undertaking’, the CMA will take such steps as it considers necessary or appropriate to serve notice on the undertaking. This approach will also apply where the relevant entities which comprise the undertaking are outside the United Kingdom.

The power to interview any individual (irrespective of whether they have a connection to a business under investigation)

Summary of Responses

- 2.45 Four respondents made submissions related to this topic that raised a variety of issues outlined below.
- 2.46 One respondent argued that CMA8 should set out the factors that the CMA will consider in order to accept that a person has a reasonable excuse for failing to comply with the formal notice to answer the CMA's questions where they have no connection to business which is under investigation.
- 2.47 One respondent suggested that CMA8 could set out further explanation as to when the CMA can exercise the power to interview an individual without a connection to a business under investigation and in what circumstances the CMA envisages using this new power with illustrative examples.
- 2.48 One respondent argued that CMA8 should also explicitly refer to the right of the individual in question to obtain proper legal representation before an interview, not only to have a legal adviser present during the interview, both in respect of individuals with a current connection to the business, and those without.
- 2.49 One respondent stated that the Draft CMA8 provided little information about when transcripts or recordings of such interviews would be made available to the undertaking subject to the investigation, which may be necessary for that undertaking to vindicate its rights of defence.
- 2.50 One respondent requested further clarity on the circumstances in which the CMA may interview an individual without a current connection to a party under investigation.

The CMA's Views

- 2.51 The CMA has considered the points raised by respondents on this topic but does not consider that any further substantive changes to CMA8 are required as a result.
- 2.52 The power to interview any individual (irrespective of whether they have a connection to a business under investigation) is a new power in the context of CA98 investigations and, as such, the CMA has not yet developed a body of practice which could be drawn on to provide helpful examples of when the power might be used. The CMA considers that the guidance provides an appropriate level of detail on this point without constraining the potential future use of this new power as its practice of using it during investigations develops.
- 2.53 As to when a person without a connection to a business under investigation might have a 'reasonable excuse' for failing to comply with a formal notice to answer questions, paragraph 6.16 and footnote 48 of the Draft CMA8 cross-refers to CMA4 (Administrative Penalties: Statement of Policy on the CMA's Approach) which contains general guidance on what might constitute a 'reasonable excuse' for non-compliance with investigatory requirements. The CMA does not consider that there is any need to provide further specific guidance in CMA8 on the approach it would take to assessing whether an excuse is 'reasonable' in this context.
- 2.54 Guidance on the presence of legal advisers during interviews is currently contained in paragraph 6.22 of the Draft CMA8. The CMA considers that this properly reflects the underlying legal framework (in particular rule 4(3) of the CA98 rules) and is applicable to both individuals with a connection to the business, and those without.
- 2.55 The Draft CMA8 sets out, in footnote 54, the circumstances in which the CMA will provide a transcript or note of an interview to an undertaking with whom the interviewee has a current or former connection for the purpose of seeking confidentiality representations. In the case of transcript or notes of interviews with individuals with no current or former connection to an undertaking under investigation, general guidance on inspection of the file and treatment of confidential information is contained at paragraphs 11.21 to 11.34 of CMA8.

Enhanced power of production during an inspection in relation to information in electronic form which is accessible from the premises

Summary of Responses

- 2.56 Five respondents made submissions related to this topic. These were primarily in relation to the CMA's enhanced powers to require the production of electronic material and how these powers will be used in practice, but also included more general points concerning the handling of privileged communications and the CMA's powers under Part 2 of the Criminal Justice and Police Act 2001 (CJPA). The main substantive and technical points are outlined below.
- 2.57 Two respondents submitted that paragraph 6.36 of the Draft CMA8, which states the CMA has the power to require the production of electronic material that is not related to a matter relevant to the investigation, exceeds the CMA's powers set out in section 28(2)(f) and 28A(2)(f) of the CA98.
- 2.58 One respondent queried the accuracy of the wording in paragraph 6.35 of the Draft CMA8 (which refers to electronic material accessible from the premises that, having been produced, "will be on the premises") given that in certain circumstances, where the electronic material to be produced is of a large size, it may be transferred digitally to a CMA server by agreement for efficiency.
- 2.59 Four respondents requested further detail on the measures and processes the CMA will adopt when exercising its enhanced powers of production, in particular:
- on the measures/processes the CMA will adopt to ensure that privileged documents and documents outside the scope remain protected;
 - on how the CMA will take away electronic information that has been produced; and
 - on how the CMA will address the possibility of shared devices being used at domestic premises in the context of its new powers to seize and sift at domestic premises.
- 2.60 One respondent suggested that paragraph 6.48 of CMA8, regarding the return of information that the CMA does not consider relevant for the purposes of its investigation or is duplicated, should refer to the deletion (rather than return) of material that was provided to the CMA in an electronic format.

Privileged communications

- 2.61 Four respondents made submissions related to this section of the Draft CMA8, primarily asking for further detail on the CMA's processes for protecting privileged material and the scope of the CMA's "seize and sift" powers. The main substantive suggestions are outlined below.
- 2.62 One respondent suggested that CMA8 should set out in paragraph 7.1 what processes the CMA will have in place to seek to protect privileged material.
- 2.63 One respondent stated that paragraph 7.1 of CMA8 should make clear that, where the CMA exercises powers under Part 2 of the Criminal Justice and Police Act 2001 to require the production of documents which may include privileged materials, the CMA will not review such material unless the party under investigation and its lawyers have first had the opportunity to remove and redact any privileged communications from the combined materials.
- 2.64 Two respondents argued that CMA8 should be amended to expand on the relevance of the CMA's powers under Part 2 of the Criminal Justice and Police Act 2001. One respondent stated that CMA8 should specifically refer to the limited sections of the Act which explicitly allow the CMA to obtain legally privileged information.

The CMA's Views

- 2.65 The CMA considers that paragraph 6.36 of the Draft CMA8 properly reflects the scope of the CMA's powers set out in section 28(2)(f) and 28A(2)(f) of the CA98. In particular, the CMA notes that section 122(3) and (6) of the DMCCA24 will remove the requirement for material produced under those powers to relate to any matter relevant to the investigation. The CMA has, however, made some amendments in paragraphs 6.35 and 6.36 to ensure their accuracy by reflecting the language of the underlying statutory provisions more closely. The CMA has also noted at paragraph 6.48 that, in the case of information which is stored in any electronic form, the 'return' of information may mean its deletion.
- 2.66 The CMA understands respondents' desire for additional clarity on the measures and processes the CMA will adopt when taking away electronic material which has been required to be produced in both business and domestic contexts and, more broadly, on the CMA's approach to handling privileged communications when exercising its powers under the CA98 or Part 2 of the Criminal Justice and Police Act 2001. Specific arrangements will depend on the circumstances of the inspection and the nature of the material in question. The CMA does, and will continue to, provide information to parties

on these arrangements (including the handling of material which potentially contains privileged communications, its determination and isolation). In practice, such information is best provided at or shortly after the CMA exercises its formal powers of inspection, taking into account the specificities of the situation and the nature of the material in question. However, in response to the feedback received, the CMA has set out in paragraphs 7.4 to 7.6 some additional guidance on the CMA's approach to protecting any privileged communications that may be contained in electronic material obtained during inspections. Assistance during an inspection, including to access information held electronically and accessible from the premises and with the separation of privileged material and non-privileged material

Summary of Responses

- 2.67 Two respondents commented on CMA's new powers to require assistance in accessing electronic material, suggesting that:
- Paragraph 6.38 of CMA8 should include further examples of the types of assistance the CMA may (or may not) reasonably require or, alternatively, to the extent that the examples already mentioned are likely to be the main types of assistance required, this should be clarified in CMA8.
 - CMA8 should clarify that such assistance can only be as a relevant officer may "reasonably require".
 - CMA8 should acknowledge that there may be instances where a person off-site may be better placed to assist the CMA in accessing electronic information (e.g. in relation to cloud storage) and, therefore, where persons on the premises do not have the technical expertise or access that the CMA requires, this will not be considered to be obstructive.

The CMA's Views

- 2.68 The CMA has considered the points raised by respondents relating to the new powers to require assistance but does not consider that any further updates to CMA8 are necessary or appropriate.
- 2.69 In relation to the power of CMA officers to require assistance from persons on the premises, the examples provided in paragraph 6.38 of the Draft CMA8 are intended to illustrate the types of assistance that might be required, but these are not intended to be exhaustive. The CMA considers that the guidance provides an appropriate level of detail on this point without constraining the potential future use of these new powers as its practice of using them during investigations develops.

- 2.70 The CMA acknowledges that any assistance required by CMA officers under these new powers must be reasonable. Footnote 76 of Draft CMA8 already cross-references the underlying statutory provisions which include this qualification.
- 2.71 The CMA considers that the question of whether a person has obstructed a CMA officer in the exercise of the new powers to require assistance would need to be considered on a case-by-case basis in light of all the facts and circumstances. It would, therefore, not be appropriate for the CMA to express a general view on the scenarios described by respondents.

Settlement in CA98 investigations

Summary of Responses

- 2.72 Five respondents made submissions on the CMA's proposal to increase the maximum settlement discounts for non-cartel conduct, to 40% pre-Statement of Objections and 25% post-Statement of Objections.
- 2.73 All respondents welcomed the CMA's proposal to increase the maximum available settlement discounts, with some commenting specifically that this might increase businesses' incentive to settle cases pre-Statement of Objections. However, one respondent argued that increasing the settlement discount cap for non-cartel conduct to 50-60% may be even more effective. By way of explanation, they highlighted that there is currently a "considerable mismatch" between the overall level of discount available to parties involved in non-cartel conduct, in that parties who may have been involved in cartel conduct have the option of applying to the CMA for leniency, with the possibility of complete immunity from financial penalties.
- 2.74 One respondent noted that the proposed settlement discounts for non-cartel conduct are aligned with the proposed maximum settlement discounts under the consumer law enforcement regime, as set out in the CMA's draft consumer enforcement guidance, and that this represented a logical decision on the CMA's part.
- 2.75 One respondent asked for explicit confirmation that Chapter II cases will also benefit from the higher settlement discount of up to 40%.
- 2.76 One respondent encouraged the CMA to keep its settlement process under review, particularly to assess whether it would be appropriate to increase the potential discounts available for cartel conduct at a future date. They also suggested that, for full transparency, CMA8 should set out in full the definition of "cartel conduct", rather than just refer to the Leniency Guidance.

The CMA's Views

- 2.77 The CMA does not consider that any further updates to the CMA's settlement policy for CA98 investigations as set out in the Draft CMA8 are required in light of the responses received.
- 2.78 The CMA does not consider it appropriate to increase the available settlement discounts for non-cartel conduct. The consultation document set out the policy reasons for increasing the discounts available for non-cartel conduct while maintaining the current levels of discount for cartel cases (see paragraphs 1.22 and 1.23 of the consultation document). The CMA considers that the settlement discounts for non-cartel conduct have been set at an appropriate level that maintains the right balance between enabling the CMA to achieve procedural efficiencies and ensuring that penalties remain sufficiently deterrent. However, the CMA intends to keep the available settlement discounts under review.
- 2.79 The CMA confirms that when it refers to settlement discounts for non-cartel conduct in paragraph 14.30 of CMA8, this includes Chapter II cases.
- 2.80 The CMA does not consider that it would be helpful to set out the definition of 'cartel conduct' separately in CMA8 as the proposed dynamic reference to paragraphs 2.2 and 2.3 of the Leniency Guidance (OFT 1495)² ensures that in each case the most up to date definition applies.
- 2.81 While the CMA is not at this stage making any changes to its settlement process for CA98 investigations as set out in CMA8, it intends to keep the settlement process under review. Moreover, as outlined in paragraph 1.16 of its consultation document, it intends to continue to apply the settlement policy in the context of individual cases in a way which maximises the benefits of settlement from the perspective of public enforcement, including achieving settlement as swiftly and efficiently as possible.

² See footnote 204 of the Draft CMA8, which states that: 'Cartel conduct' for these purposes is any conduct for which leniency is available because it meets the definition of 'cartel activity' in paragraphs 2.2 and 2.3 of the Leniency Guidance (OFT 1495) or in any updated definition in any revised Leniency Guidance that the CMA may publish.

The duty of expedition

Summary of Responses

- 2.82 Three respondents made substantive points in relation to this issue which are outlined below.
- 2.83 One respondent argued that the CMA should ensure that the duty of expedition does not unduly affect the timelines, such as those for responding to information requests, inspection of the file, responding to the Statement of Objections or the treatment of requests for extensions, as this would ultimately affect the rights of defence of the parties and the quality of the information gathered by the CMA.
- 2.84 One respondent suggested that CMA8 should explain whether the CMA will apply a measurable metric to determine whether (and to what extent) it is complying with its the duty of expedition to enable parties and practitioners to better understand the CMA's decision-making processes and offer greater certainty to parties.
- 2.85 One respondent stated that CMA8 should more thoroughly explain whether the CMA will consider the reasonableness of any procedural deadlines imposed on parties and allow for flexibility in extenuating and nuanced circumstances when applying the duty of expedition.
- 2.86 One respondent suggested that the CMA should elaborate on how its approach to taking forward CA98 investigations is likely to be impacted by this new duty of expedition compared to the CMA's previous approach.

The CMA's Views

- 2.87 The CMA has considered the points raised by respondents relating to the new duty of expedition but does not consider that any further updates to CMA8 are necessary or appropriate.
- 2.88 The new duty is described at paragraph 2.5 of the Draft CMA8 as part of the high-level overview of the legal framework that applies to CA98 investigations. Paragraph 2.5 sets out clearly the nature of the new duty (which requires the CMA to 'have regard' to the need for making a decision, or taking action, as soon as reasonably practicable) and also notes that the CMA is required to carry out its investigations and make decisions in a procedurally fair manner according to the standards of administrative law. In practice, the CMA will often need to balance various different considerations on a case-by-case basis, depending on the specific facts of the particular investigation, to ensure

that its actions and decisions comply with these duties and, therefore, it would not be feasible to set out in CMA8 any further guidance or set specific metrics about how the duty will apply in general across the CMA's investigations or about how the duty will affect its approach to taking forward CA98 cases compared to its previous approach.

Changes to the requirement for agreements, decisions and practices to be implemented in the UK

Summary of Responses

- 2.89 Two respondents made submissions in relation to this issue which are outlined below.
- 2.90 One respondent suggested that CMA8 should provide detail on how the CMA will determine whether an agreement is likely to have an "immediate, substantial and foreseeable effect on trade", including the factors that the CMA may take into account. Another respondent argued that CMA8 could articulate more precisely the meaning of "immediate, substantial and foreseeable" effects within the UK.

The CMA's Views

- 2.91 The CMA has considered the points raised by respondents on this issue but does not consider that it is appropriate to include further guidance on territorial scope of the Chapter 1 Prohibition within CMA8.
- 2.92 The amendments to the territorial scope of the Chapter 1 Prohibition which have been made by section 119 of the DMCCA24 have been reflected in paragraph 2.2 and footnote 3 as part of the high-level overview of the legal framework that applies to CA98 investigations. However, the purpose of this section in CMA8 is to set out briefly the substantive prohibitions contained in the CA98 rather than to provide detailed discussion of the substantive law since the main focus of CMA8 is on procedural matters. It would, therefore, not be appropriate to provide specific detailed guidance on the application of the Chapter 1 prohibition to agreements implemented outside the UK in CMA8.

Timing of a draft penalty statement

Summary of Responses

- 2.93 One respondent made a submission in relation to this issue.

2.94 The respondent stated, in response to the changed wording in paragraph 11.15, that it would be helpful if the CMA could indicate in which circumstances it might not issue the SO and Draft Penalty Statement together.

The CMA's Views

2.95 As set out paragraph 11.15 of the Draft CMA8, the Draft Penalty Statement will normally be provided at the same time as the Statement of Objections. Exceptions to this approach will be decided on a case-by-case basis, depending on the specific facts of the particular investigation. Therefore, the CMA does not consider it would be helpful to attempt to indicate in CMA8 the circumstances in which this might arise.

3. List of respondents

- 3.1 Herbert Smith Freehills LLP
- 3.2 Linklaters LLP
- 3.3 Allen Overy Shearman Sterling LLP
- 3.4 Clifford Chance LLP
- 3.5 Eversheds Sutherland (International) LLP
- 3.6 Freshfields Bruckhaus Deringer LLP
- 3.7 Ashurst LLP
- 3.8 City of London Law Society