# Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement: Consultation

# Response from the Competition and Markets Authority

## Introduction

1. The CMA is the UK's principal competition and consumer authority. It is an independent non-ministerial government department and its responsibilities include carrying out investigations into mergers and markets and enforcing competition and consumer law. The CMA's statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers.

2. The CMA has a role in providing information and advice to government and public authorities.[1]

3. The CMA welcomes the Government's consultation 'Swifter and simpler competition redress, regulatory appeals and competition enforcement' (the Consultation).

4. In this response to the Consultation, the CMA has focused on the proposals that are of direct relevance to the CMA's role, namely those relating to **opt-out collective actions** (Chapter 1), focusing in particular on proposals to empower the CMA to order redress in competition cases and to give further protection to Type A immunity applicants;[2] **simplifying the regulatory appeals framework** (Chapter 2); and **making Competition Act 1998 enforcement more efficient** (Chapter 3).

5. Overall, and for the reasons set out below, the CMA is supportive of the reforms that have been proposed in the Consultation that are relevant to the CMA, each of which is aligned with the CMA's 4Ps framework.[3]

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[1] Under Section 7(1) of the Enterprise Act 2002, the CMA has a function of making proposals, or giving information and advice, ''on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law).''

[2] A Type A leniency application is one made by the first applicant to report and provide evidence of a cartel, where there is no pre-existing investigation.

[3] The 4Ps are pace, predictability, proportionality and process.

6. Where relevant, we have sought to highlight where we think it would be beneficial for refining the proposals. In particular:

- **Direct redress -** The CMA supports the proposals for the CMA to be given powers to direct redress schemes as well as for there to be a presumption that an assumed level of overcharge may be used for calculating redress and for stronger safeguards against duplicative claims. The CMA considers that this package of measures will enhance the role played by public enforcement in helping to secure redress in appropriate cases through more timely and substantially less costly delivery of redress.

- **Protection for type A immunity applicants -** The CMA also backs proposals for enhanced civil-damages protection for Type A Immunity applicants (with appropriate safeguards) to further enhance the incentives for cartel reporting, which would bring more cartels to light, lead to better informed case prioritisation, and as a result increase the likelihood that victims of cartels obtain redress from other cartel participants.

- **Regulatory appeals framework -** The CMA also supports the proposals for simplifying and harmonising regulatory appeals across sectors, transferring them from the CMA to the Competition Appeal Tribunal (CAT), and replacing water redeterminations with a consistent appeals process. We consider that the overall sets of issues which are capable of being raised through an appeal process would be more efficiently resolved, and better suited for resolution, by a judicial body like the CAT, increasing the pace and proportionality of the regulatory appeals regime. The CAT's more flexible case management powers would allow it to more effectively tailor the process to the nature of the appeal grounds raised, including reaching earlier resolution on more straightforward appeals. We also support the proposals on costs, including measures - such as cost caps and intervention rights - to enable meaningful consumer participation.

- **Making Competition Act 1998 enforcement more efficient** - The CMA endorses the proposed reforms to make Competition Act 1998 (CA98) enforcement faster, more flexible and less administratively burdensome (for the CMA and for businesses), while preserving transparency, procedural fairness and parties' rights of defence. The proposals will afford the CMA greater discretion over decision-making, confidentiality and access-to-file procedures; use of streamlined settlements and modernised publication requirements; stronger confidentiality ring and director-disqualification rules; and effective penalties where turnover figures are unavailable.

## Chapter 1: Opt-out collective actions

7. The CMA has a strong interest in ensuring that the competition enforcement regime as a whole operates effectively to deter anti-competitive conduct, hold infringing parties to account and enable those harmed by breaches of competition law to obtain appropriate redress. Public and private enforcement are complementary parts of a single competition law framework, and private enforcement plays an important role in enhancing deterrence and accountability. This is important as the CMA has finite resources and, therefore, needs to prioritise cases that it believes will generate the most impact and carry the greatest strategic significance in terms of driving economic growth and improving household prosperity.

8. At the same time, the CMA recognises that opt-out collective actions can be complex, lengthy and costly, with uncertain outcomes for consumers, and that the significant growth in such claims since 2015 has implications for the wider competition enforcement system, including demand for specialist advisers and the workload of the CAT.

9. The CMA therefore welcomes the Government's proposals relating to opt-out collective actions and the opportunity to provide comment.

10. In the CMA response to DBT call for evidence on the opt-out collective actions regime the CMA recommended:

    a. **Empowering the CMA to issue directions for redress:** The CMA suggested that this could provide a more efficient, speedier and effective mechanism to determine and enforce redress in certain types of cases which could reduce or avoid the need for persons harmed by a competition law infringement to bring follow on proceedings at the CAT.

    b. **Further enhancing existing protections from liability for private damages for recipients of 'Type A' immunity:** The CMA recommended 'Type A' applicants should have full immunity from liability for damages caused by a cartel in order to create a further incentive for undertakings to report cartel activity, which could aid overall levels of detection and enforcement.

11. The CMA is pleased to see that the Government's proposals in this Consultation strongly align with these recommendations and believes that

they will increase the availability of redress to those affected by breaches of competition law and help to secure redress in appropriate cases through more timely and substantially less costly delivery of redress.

12. Stronger protection for Type A immunity applicants should not be viewed as reducing the scope for private enforcement. Strengthening incentives to report cartel activity may be expected to result in previously undetected cartels being uncovered and enable the CMA to establish infringements in relation to conduct that might otherwise have remained secret. Such infringement decisions in turn create new opportunities for redress, including by way of follow-on private actions, which would not otherwise have existed.

13. The CMA also supports several other proposals put forward in this section of the consultation as they will all play a role in helping the CMA's transformation under the 4Ps and to deliver more effective and efficient redress to consumers:

    a. **Simplifying the approach to calculating loss in redress schemes** by setting a rebuttable assumed level of overcharge to be used to calculate the appropriate overall level of redress.

    b. **Providing greater certainty of protection against duplicative damages liability** by making it explicit that schemes may include a waiver of further actions for those that accept the redress offered to them.

    c. **Ensuring the regime interacts coherently with wider regulatory action**, requiring relevant concurrent regulators to be notified of claims relating to their remit and allowing them to submit observations to the CAT where appropriate.

    d. **Taking steps to increase take-up of redress among class members** by creating a page on the CAT website that lists and provides links to live claim websites to enable class members to confirm their legitimacy.

***Q22. Do you agree that the simpler approach outlined in relation to assessing quantum is likely to make the use of redress schemes less burdensome?***

***Q23. What changes to the Competition Act 1998 (Redress Scheme) Regulations 2015 could be made to simplify requirements for redress schemes?***

***Q.24. Do you consider that the protection from duplicative damages liability outlined is sufficient to incentivise use of redress schemes where an infringement of competition law has been found?***

***Q25. Do you agree that a power for the CMA to direct the establishment of a redress scheme will encourage the use of redress schemes on a voluntary basis?***

***Q26. Do you agree that this framework could increase the likelihood of redress being made available to consumers without the need for litigation?***

***Q27. Are there other ways to incentivise the use of voluntary redress schemes?***

14. The CMA agrees that the set of proposals designed to enhance the alternative routes to redress are likely to encourage greater use of both voluntary and mandatory redress mechanisms, and increase the likelihood that consumers receive compensation without the need for litigation, which can be lengthy and costly.

*Quantum*

15. In private actions under CA98 there is already a rebuttable presumption that a cartel causes loss or damage.[4] However, there is considerable cost, complexity and uncertainty associated with calculating loss in competition cases, which may be acting as a barrier to the use of redress schemes. The CMA therefore supports the Consultation proposals for a simpler way to assess quantum by using a presumed but rebuttable level of overcharge to calculate redress.

16. Although such an approach will involve some degree of approximation in the calculation of the level of redress, the CMA considers that it could lead to fairer outcomes overall. In many cases, the practical difficulties and costs of undertaking a detailed damages assessment may mean that consumers receive no compensation at all. Where an infringement has been proven, a reasonable estimate of loss is often preferable to the risk that affected consumers will be left uncompensated due to evidential or procedural barriers. A rebuttable presumption represents a pragmatic means of achieving greater accessibility and efficiency, whilst allowing for a more detailed assessment where this is warranted.

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[4] See paragraph 13 of Schedule 8A of CA98.

17. There is precedent internationally for taking this approach. Some EU Member States have adopted rebuttable presumptions of overcharge in competition damages contexts, including presumptions of 20% in Romania[5] and 10% in Hungary and Latvia.[6] More broadly, courts across Europe have increasingly recognised the concept of a minimum level of harm in cartel cases, with a number of judicial decisions accepting a baseline overcharge where precise quantification is difficult.[7] Recent developments in EU case law appear to accept such approaches.[8]

*Protection from duplicative liability*

18. The CMA appreciates that uncertainty as to whether voluntary redress schemes will be taken into account in calculating the quantum or validity of any future private litigation can disincentivise such schemes, given the resulting concerns about duplicative liability. The CMA therefore supports the Consultation's proposals to address these concerns by making explicit (presumably in relevant legislation or as appropriate in the CAT Rules) that a) redress schemes may include a waiver of further actions for those that accept the redress offered to them and b) sums offered via a redress scheme (be it voluntary or mandatory) should be taken into account when quantifying the value of a potential claim, and this will be considered at certification.

19. That said, the CMA considers that these proposals could be further strengthened in two ways:

    a. The availability of redress through redress schemes could explicitly be required to be taken into account in the cost benefit analysis proposed in Q5 (either in CAT Rule 79(2)(b), or in statute, or both); and/or

    b. Strengthening CAT Rule 79(2)(g) to include a rebuttable presumption against certification of (parts of) collective claims that seek compensation which is available through a redress scheme.[9]

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[5] Government Emergency Ordinance No. 170/2020 (Romania).
[6] Schönherr, *How has competition law damages litigation evolved in Hungary over the past decade?* (2025); Thomas Funke, *How European Courts Estimate Cartel Damages* (ABA Antitrust Law Section, 2024).
[7] Carsten Krüger, *A 5% Overcharge as Minimum Damages for Antitrust Violations? Recent Developments in Europe* (Kluwer Competition Law Blog, 2026).
[8] See for example, Case (C-666/23) *CM and DS v Volkswagen AG*, where, at paragraph 104, the European Court of Justice said "…*the determination by a Member State of such a compensation bracket, consisting of a minimum and a maximum percentage of the purchase price, with a view to fixing the amount of adequate compensation which the purchaser of the vehicle concerned must receive, cannot, as a matter of principle, be regarded as contrary to EU law either, provided that that bracket does not lead to inadequate compensation for the loss or damage suffered by the purchaser*..."
[9] However, this rebuttable presumption should only apply to those parts of a proposed collective claim which overlap with the redress available under the redress scheme (in other words, if a collective claim seeks several categories of compensation, only one of which is covered by a redress scheme, the rebuttable presumption should only apply to the claims relating to the category of compensation covered by the redress scheme).

20. The above measures, along with those already proposed in the Consultation, would help address concerns about businesses who enter into redress schemes being at risk of paying twice for the same activity.

*Power to direct redress schemes*

21. The CMA also supports the proposed power for the CMA to direct the establishment of a redress scheme and for the CMA to accept binding undertakings and commitments to establish a redress scheme. As the CMA indicated in its Response to the Call for Evidence,[10] empowering the CMA to issue directions for redress would provide a more efficient, speedier and cost-effective mechanism to determine and enforce redress in certain types of cases (including where one or more parties have entered into a settlement agreement) than collective follow-on action.

22. While this might not have an impact on the number of stand-alone collective actions in the CAT, this proposal could nevertheless reduce or avoid the need for persons harmed by a competition law infringement to bring follow on collective proceedings in the CAT and potentially increase redress levels overall. Doing so could also result in greater legal certainty and transparency about when redress might be available in the context of public enforcement. Furthermore, this would have the benefit of avoiding duplication of public resources arising from the need for the CAT to familiarise itself with issues which have already been investigated by the CMA.

23. This proposal, combined with clearer protection from duplicative damages liability, would also strengthen incentives for businesses to engage voluntarily with redress at an earlier stage. Businesses may regard designing their own voluntary scheme as preferable to a scheme established following CMA direction.

24. The CMA notes that the Consultation refers to the concerns raised by stakeholders at the time of the regime's introduction that it may be outside the CMA's expertise to assess appropriate quantum of redress.[11] The CMA considers that the complexity involved in assessing quantum will vary from case to case. For example, in cases where the loss or damage may involve some element of pass on, the CMA recognises that assessing the appropriate level and method of redress in the CA98 context and the infringing parties' respective contributions may involve a complex range of considerations. The

[10] See paragraph 22 of that response.
[11] Paragraph 89 of the Consultation.

CMA would need to consider on a case-by-case basis whether it would be appropriate or proportionate for the CMA to order redress.[12]

25. However, the CMA envisages that there would be cases where the power to direct redress would be appropriate. This would include, for example, cases where the harm arising from a competition law infringement has directly impacted a large cohort of consumers but the harm to each individual consumer is of relatively low value, and a level of redress that is just and reasonable in all the circumstances may be relatively clear and ascertainable (such as in cases where the existence and the order of magnitude of an impact on prices - also known as a consumer overcharge - is known from the facts available to have arisen, or can reasonably be assumed to have arisen from cartel activity).

26. The CMA furthermore considers that the proposals in the Consultation discussed above for a simpler way to assess quantum, using a rebuttable presumption of a level of overcharge to calculate the overall level of redress, would further increase the effectiveness of this proposal, by reducing the cost, complexity and uncertainty associated with calculating loss in competition cases. Since this would be a rebuttable presumption, parties could make arguments if they thought the presumption was inappropriate in specific cases, which would also address concerns about over- or under-compensation, as well as any concerns about pass on that might arise in specific cases.

***Q28. Do you agree that it is necessary to intervene to support public enforcement work on cartels at this time?***

***Q29. If introduced, are there additional protections you feel are necessary to ensure that the availability of immunity from civil litigation a) isn't exploited and b) doesn't frustrate avenues to seek redress?***

***Q30. Is it sufficiently clear when it would be appropriate and possible for the CAT to set aside immunity to enable recoverability of damages?***

*Protection for Type A immunity applicants*

27. The CMA agrees that additional measures are needed to ensure that private enforcement actions complement public cartel enforcement. As the Government observed in its 2022 response to the Reforming Competition and Consumer Policy consultation, rights to compensation risk becoming abstract

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[12] See paragraph 21 of that response.

if they frustrate the public enforcement process that identifies secret cartel conduct in the first place.[13]

28. As the Consultation observes, Type A immunity applications to the CMA have fallen significantly, from an average of 21 applications per year in 2014 to 2016 to eight per year in 2022 to 2024. Although the CMA has reviewed and updated its leniency guidance to strengthen incentives to seek Type A immunity, it cannot address all potential disincentives through guidance alone. In particular, concerns about exposure to follow-on damages actions may discourage businesses from coming forward. [14] While those concerns may not be the sole explanation for the decline in applications, the CMA considers there is a strong public interest in removing avoidable disincentives to self-report cartel conduct.

29. This is important because cartels are notoriously difficult to detect. Type A immunity applicants provide the first evidence of conduct that would otherwise remain hidden. Measures that increase incentives to apply for immunity are therefore likely to strengthen cartel enforcement and increase the number of infringements identified by competition authorities.

30. Enhanced immunity protection should not be viewed as being at odds with consumer redress. In practice, private cartel claims overwhelmingly depend on prior public enforcement. The CMA's review of cartel litigation between 2020 and 2025 identified around 100 cartel claims before the CAT and High Court,[15] almost all of which were based on facts uncovered through a prior competition authority investigation or infringement decision. Only a small number related to conduct that had not previously been investigated.[16] The CMA has only identified a small handful of claims issued within this time period which relate to conduct which does not appear to have been

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[13] Reforming competition and consumer policy: government response - GOV.UK

[14] See for example:

- Global immunity, leniency activity sees little rise in 2024
- The European Commission pleads for leniency, but does it convince potential applicants? | LinkingCompetition | Blog | Insights | Linklaters
- Leniency inflation, the Damages Directive, and the decrease in cartel cases | CEPR
- Impact of Leniency Programs and Follow-on Damages on Cartel Deterrence - WP-2025-12.pdf

[15] Excluding claims which allege both Chapter I and Chapter II infringements and claims which relate to vertical agreements (but including resale price maintenance claims).

[16] Whereas the vast majority of these claims are "follow-on" claims, the CMA notes that a handful are technically standalone but relate to facts uncovered by way of a competition authority investigation (e.g. the claims concerning a potential cartel relating to salmon which is currently being investigated by the European Commission (case AT. 40606), and claims concerning multilateral interchange fees which post-date the infringement period found in the European Commission's infringement decision and/or allege a slightly expanded theory of harm, but ultimately build on the liability findings within that decision).

investigated by a competition authority[17] – most of which involved alleged resale price maintenance rather than horizontal collusion. This reflects the reality that private claimants face significant challenges in detecting and proving secret cartel conduct without the investigative powers available to competition authorities. [18]

31. It follows that the more cartel infringements are detected, the greater the likelihood that victims can obtain redress, including through follow-on litigation. Conversely, absent effective public enforcement, the prospects of obtaining redress for secret cartel conduct are likely to be very limited. Strengthening incentives for Type A immunity applications is therefore likely not only to support public enforcement, but also to expand opportunities for private redress.

32. The CMA recognises concerns raised by some stakeholders that limiting the damages liability of immunity recipients could reduce compensation available to victims. However, in most cases, compensation should remain recoverable from the remaining cartelists through the principle of joint and several liability. Furthermore, the proposed ability for the CAT or relevant court to withdraw immunity where full compensation cannot be obtained from the remaining undertakings involved in the cartel (e.g. due to insolvency) provides an important safeguard.

33. The CMA therefore considers that the proposed balance is appropriate. It would strengthen incentives for cartel reporting while preserving effective routes to compensation where needed. The CMA also considers it sufficiently clear when the CAT or court should be able to withdraw the protection, particularly given the existence of comparable provisions in the CA98 and the CMA is not aware that this provision is considered to be unclear.[19]

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[17] For example: (Claim No. 1523/7/7/22) *BSV Claims Limited v Bittylicious Limited and others* (Claim No. 1427/5/7/21) *Belle Lingerie Limited v Wacoal EMEA Ltd and Wacoal Europe Ltd*, (Claim No. 1359/5/7/20) *Rest & Play Footwear Ltd v George Rye & Sons Ltd* and (Claim No. 25/10/2023) *Up and Running (UK) Limited v Deckers UK Limited*.

[18] See for example the comments of Sir Peter Roth in his 25th Annual Burrell Lecture: The Private Enforcement of Competition Law - Reflections upon its Development, Progress and Challenges" | Competition Appeal Tribunal. Drawing on his experience in presiding as a High Court Judge in Phones 4U Ltd v EE Ltd & Ors [2023] EWHC 2826 (Ch) (10 November 2023), a standalone private action alleging a cartel in which he found no breach of competition law, he observed that '[*i*]*t is exceptionally difficult to prove a cartel by way of a private action; and any realistic prospect of doing so is likely to be phenomenally expensive*.' Claimants, he noted, are limited to requesting disclosure of documents (which may or may not exist). Sir Peter Roth said that in contrast, competition authorities have a much broader toolkit to unearth cartel conduct, including the ability to conduct dawn raids, to compel information to be provided and questions to be answered, and to obtain communications data from mobile network operators.

[19] See paragraph 15(1)(a) of Schedule 8A of CA98.

***Q31. Will it be sufficiently clear what other concurrent regulator(s) may be relevant to the claim?***

***Q32. Is this step necessary to ensure harmony between private and public enforcement action?***

***Q33. Will this step be of benefit to claims brought that have clear sector-specific elements over and above the central competition issues?***

34. The CMA agrees with the proposal to require relevant concurrent regulators to be notified of claims relating to their remit and allowing them to submit observations to the CAT where appropriate. This would help to promote coherence between private litigation and wider regulatory activity.

35. The CMA considers it will generally be clear which concurrent regulator is relevant to a particular claim based on the sector concerned and the regulator's concurrent competition functions. Requiring notification would help ensure the regulators are aware of claims involving issues within their remit and informed by their expertise, enable those regulators to decide whether to intervene.

36. The CMA agrees that this is a proportionate step to help ensure consistency between private litigation and wider regulatory activity, without displacing the CAT's role in determining competition issues.

***Q34. Will the listing of claims on the CAT website increase trust and encourage take up?***

***Q35. Are there other ways to increase trust among class members that the government should consider?***

***Q36. Are there ways to incentivise a collaborative approach between parties to maximise distribution that should be considered?***

37. The CMA supports the proposal to list claims on the CAT website and considers that it may help to increase trust and encourage take-up amongst class members.

38. The CMA would be willing to include a link to the CAT's new webpage on its website as a further measure to increase trust and encourage take-up amongst class members.

## Chapter 2: Simplifying the regulatory appeals framework

39. The CMA welcomes the Government's proposals for regulatory appeals.

40. Regulatory appeals should support robust, fair and predictable decision making by sector regulators: by holding those regulators legally accountable for their decisions and providing a mechanism to correct errors. In doing so, regulatory appeals can increase confidence in the quality of decision making and support investment in the regulated sectors.

41. However, appeals also create costs: for firms, which invest time and energy in pursuing them; and for regulators and the CMA in overseeing them. Those costs are ultimately borne by consumers, taxpayers and investors in regulated firms.

42. An effective appeals system is, therefore, one which fulfils the aims set out in paragraph 40 above as effectively as possible at a proportionate cost. Achieving this depends on a number of factors. These include the characteristics of the appeal body and the scrutiny that body is required to give to sector regulators' decisions.

43. With the above points in mind, in its response to the Independent Commission on the Water Sector Regulatory System the CMA recommended:

    (a) **A consistent appeal process**: Some decisions by sector regulators are currently subject to appeals (which scrutinise parts of regulators' decisions and decide if they were wrong). Others – including price controls in water – are subject to a 'redetermination' (in which the appellate body reconsiders the evidence and reaches its own conclusions afresh). The CMA recommended that regulators' decisions should all be subject to appeals. It explained that a consistent process would deliver better outcomes than the patchwork of different procedures which has developed over time.

    (b) **Judicially managed appeals**: The CMA recommended transferring the function of hearing regulatory appeals from the CMA to an appropriately resourced judicial body. The CMA explained that the overall set of issues which are raised through an appeal process are better suited for resolution by a judicial body.

44. The CMA supports the Government's proposals, which closely align with those recommendations, and strongly believes that the proposals will bring important benefits. These include reducing the complexity and burden of regulation, whilst maintaining rigorous scrutiny of sector regulators' decisions. They also include reducing the significant resource burdens that the

regulatory appeals framework currently imposes on the CMA. This will free up CMA resources to focus on its core competition and consumer protection functions.

***Q44. Should Regulatory Appeals be transferred to the CAT?***

***Q45. Should the CAT have jurisdiction to determine price control matters in Telecoms Appeals?***

***Q46. Would any amendments to the CAT Rules be necessary to ensure that Regulatory Appeals can be heard fairly and efficiently?***

***Q47. Should Regulatory Appeals be determined in accordance with the standard of review set out in paragraph 204(a)?***

***Q48. Should the notice of appeal set out the grounds of appeal and indicate whether the regulator's decision was based on an error of fact, an error of law, or an error in the exercise of the regulator's discretion, as set out in paragraph 204(b)?***

***Q49. Should parties be allowed to submit new evidence on appeal?***

***Q50. Should the cross-examination of witnesses be permitted, in line with the CAT Rules?***

***Q51. In case the CAT quashes the decision, should the matter be remitted to the regulator, as proposed in paragraph 204(d)?***

***Q52. Would the proposed appeal parameters set out in paragraph 204 create any barriers or challenges for the parties seeking to appeal a regulator's decision?***

***Q53. Should the new appeal replacing Water Redeterminations be overseen by the CAT in accordance with the appeal parameters set out in paragraph 204?***

***Q54. Should Water Regulatory References be converted into an appeal process overseen by the CAT in accordance with the appeal parameters set out in paragraph 204?***

***Q55. Should Energy Regulatory References be removed to simplify the order-making process and ensure greater consistency with similar powers existing for other licensable activities?***

45. The CMA has grouped questions 44 to 55 together and provides a response covering all of them. They are all about establishing a unified regulatory appeals system before the CAT, in which a common standard of review and common processes apply. The CMA strongly supports such a system. The following paragraphs set out what, in our view, is required of such a system and the benefits it would provide.

46. Building on the points summarised above, we consider that a regulatory appeals system which supports robust, fair and predictable decision making by sector regulators, holding those regulators to account and providing a mechanism to correct errors, and which does so efficiently, is one which:

(a) is simplified and consistent across the regulated sectors;

(b) allows affected parties to challenge sector regulators' decisions fairly and subjects those decisions to rigorous scrutiny;

(c) is aligned with the statutory objectives of the sector regulatory regimes;

(d) subjects sector regulators' economic analysis to expert review;

(e) provides clarity and certainty over the applicable law;

(f) improves the quality of the sector regulatory regimes and of regulators' decision-making;

(g) as well as protecting consumers' interests, mitigates uncertainty for investors (who can have confidence regulators' decisions are subject to intense scrutiny) and so encourages investment and growth; and

(h) does not involve steps and processes beyond those necessary to achieve (a) to (g) above.

47. A single regulatory appeals system, before the CAT and in which a common standard of review and common processes apply, would meet these requirements. The questions that must be determined in a regulatory appeal are, inevitably, judicial in nature. They involve balancing and assessing the evidence, arguments and advocacy of the contesting parties, before determining the applicable legal, evidential or analytical issues under challenge. The CAT has the legal, economic and technical skills and experience to determine all of these issues.

48. As to legal skills and experience, the CAT is a specialist tribunal that is well-equipped, indeed better equipped than the CMA, to determine the overall set of complex legal questions that arise in regulatory appeals, including questions of statutory interpretation, vires and the adherence by regulators to

their legal duties (as it does in other appeals before it). It will be able to resolve them with clarity and certainty.

49. As to the economic and technical skills and experience, the CAT's ordinary members bring expertise from a range of relevant disciplines, including economics and finance (and the consultation notes that the government will consider whether the CAT may need additional resources such as the appointment of more ordinary members). The CAT already hears cases that require complex economic and financial assessments. Those include competition enforcement appeals and private damages actions involving claims of excessive pricing.

50. In this connection, the President of the CAT has noted:

> '… *that [paying attention to the substance of the important economic issues in dispute in competition litigation] is something that the Tribunal is well-equipped to do. We recognise that a lot of economic evidence is informed estimation, rather than precise science. We recognise that economists will need to use assumptions and informed judgments about what analysis and which models to use. We are able to understand concepts such as statistical significance; and we understand that it is proper, in building an economic model, to explore alternatives*.'[20]

51. The CAT would hear directly from witnesses and experts as required in order fairly and proportionately to determine appeals, including hearing concurrent evidence from experts (or 'hot-tubbing'). All the evidence would be subject to detailed judicial scrutiny.

52. The CMA accordingly agrees that the CAT should have, and can where necessary be further equipped with, the expertise to decide on all questions arising in regulatory appeals, including on price control matters[21] and those that are currently the subject of the water redeterminations and water

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[20] Opening address to the Frontier Economics competition litigation discussion event, 26 May 2026: 26-05-20 Frontier competition litigation opening address.pdf

[21] Where there is a unified and consistent system of regulatory appeals before the CAT, meeting the requirements set out in this response, the CMA sees no reason to treat price control and non-price control matters (including in the telecoms sector) differently. Doing so would be contrary to the government's aims of simplification and harmonisation of regulatory appeals and would risk undermining key purposes of the appeals system: holding sector regulators to account and correcting material errors, effectively, consistently and proportionately. In a similar vein, the CMA supports the removal of its role in energy regulatory references. It agrees that doing so would simplify the relevant order-making process and result in more consistency with similar powers existing for other licensable activities.

regulatory references regimes. Such appeals coming before the CAT would continue to involve an extensive review of economic and technical evidence.

53. The CMA also agrees that applying a single consistent standard of review that subjects sector regulators' decisions to rigorous scrutiny would be a key part of a, '… *clear, effective and proportionate appeal process*.' A standard of review that requires the CAT to determine regulatory appeals applying the principles of judicial review would meet that requirement.

54. The courts have long recognised that the principles of judicial review are flexible and allow for a higher intensity review and close examination of the factual and economic evidence underpinning a price control decision. For example:

(a) *'….. in a given case the breadth of the deference to be accorded to the decision maker may vary as between different grounds of challenge. It is, however, important to recognise that, because of its expertise, it is quite possible that the CAT will be critical of relatively complex evaluations by the decision maker, even where a non-specialist court might not be. That is a necessary corollary of the CAT having been instituted as a specialist body tasked to conduct precisely that sort of exercise*.'[22]

55. Legislation providing for the CAT to determine regulatory appeals need go no further than is set out in sections 192(6) and 194A(2) and (3) of the Communications Act 2003 (the 2003 Act). That is, it should provide:

(a) for grounds of appeal on the basis that the relevant decision: (i) was based on an error of fact or was wrong in law or both; or (ii) involved an error in the regulator's exercise of a discretion;

(b) that the CAT must decide the appeal, by reference to the grounds of appeal set out in the notice of appeal, by applying the same principles as would be applied by a court on an application for judicial review; and

(c) that the CAT may:

(i) dismiss the appeal or quash all or part of the decision to which it relates; and

[22] *Cérélia Group Holdings SAS & Anor v Competition and Markets Authority* [2024] EWCA Civ 352, at paragraph 40.

(i) where it quashes all or part of that decision, remit the matter back to the relevant regulator with a direction to reconsider and make a new decision in accordance with the CAT's ruling.[23]

56. Such provision would strike a proportionate balance between: (i) subjecting regulatory decisions to an appropriate degree of scrutiny and (ii) avoiding regulators' decisions being subject to highly burdensome reviews that are close in nature to complete reappraisals of those decisions. The CMA notes that the government took a similar view when amending the relevant provisions of the 2003 Act.[24]

57. Such provision would also align with the statutory objectives of the sector regulatory regimes. Each of those regimes contains duties and objectives to which the relevant regulator must have regard when making regulatory judgements and making decisions - in other words, when exercising a discretion. Regulators would be held to account for the exercise of that discretion in line with their statutory objectives.

58. The CAT rules should continue to provide for active case management, to ensure that cases are heard justly and at proportionate cost, including by ensuring that appeals are dealt with expeditiously and fairly. The rules should also provide for the CAT to:

(a) exercise discretion about allowing and limiting the production of evidence, including the admission of new evidence,[25] and the cross-examination of witnesses (including expert evidence and expert witnesses), where that is just and proportionate;

(b) limit the length of pleadings and impose requirement for parties to set out their cases fully as early as possible, with supporting documents produced at the outset of the proceedings so far as practicable; and

(c) expedite proceedings where the circumstances of the case justify it.

59. The processes in a system of regulatory appeals heard by the CAT could be streamlined compared to the investigative and inquisitorial processes the CMA currently operates. The CMA's processes reflect its institutional set-up

[23] We note that the CMA has a power to substitute under some but not all of its regulatory appeal functions. BIST may therefore wish to consider whether, in the interests of efficiency, the CAT should also have the power to substitute in all cases where it is just and proportionate to do so.
[24] Explanatory Notes to the Digital Economy Act 2017 (paragraph 46) and 2016-05-12 appeals impact assessment (page 5).
[25] A single set of CAT rules on the admission of new evidence would be highly preferable to the complex and varying rules on new evidence in current sector legislation – see two examples from regulatory appeals that the CMA hears, in paragraph 23 of Schedule 2 to the Civil Aviation Act 2012 and section 11E(3) of the Electricity Act 1989.

and its practice in regulatory appeals. They stem from the applicable legislation, the well-established processes that were inherited when the CMA took over the Competition Commission's functions and the constraints of the CMA's statutory rules and guidance documents. They usually involve some or all of the following:

(a) teach-ins and site visits;

(b) hearings (main hearings and sometimes also clarification hearings);

(c) working papers;

(d) provisional, as well as final, determinations; and

(e) multiple rounds of submissions (not just the regulator and appellant responding to each other's cases, but also on the provisional determination and on proposed remedies).

60. An appropriately resourced CAT, operating with appropriate Rules, would not need to engage in all of these stages and processes, fairly, robustly and efficiently to determine regulatory appeals applying its judicial processes. In other words, the CAT would not determine appeals in exactly the same way, procedurally, as the CMA. It would not need to.

61. A unified regulatory appeals system embodying the above points would enable parties[26] affected by sector regulators' decisions fairly to challenge those decisions. Those parties would have a simplified, consistent and more easily navigable means of making such challenges. Furthermore, the end-to-end appeal system would be streamlined compared to the current appeal system since parties could appeal the CAT's judgment directly to the Court of Appeal.[27] Regulators' decisions would be subject to rigorous scrutiny applying a consistent standard of review in a legally certain way. This would discipline the operation of the sector regulators and the quality of the decisions they make. It would also give investors confidence that regulators' decisions were subject to suitable scrutiny, mitigating uncertainty, encouraging investment and promoting growth. Those benefits will be realised in an efficient way.

62. The CMA believes there will also be wider efficiency benefits. A transfer to the CAT of the jurisdiction to determine regulatory appeals would enable the CMA

[26] As to whom, see paragraph 70 below.

[27] Under the current system, an appeal of the CMA's determination is subject to judicial review by the High Court before it can be appealed to the Court of Appeal.

to focus its resources on its core competition and consumer protection functions.

63. The CMA has finite resources. Meeting statutory requirements to determine regulatory appeals requires it to divert key resources away from its core functions and its primary statutory duty: promoting competition for the benefit of consumers.

64. Put another way, determining such appeals (which are non-discretionary) imposes a high opportunity cost on the CMA. Its ability to intervene in markets where competition is not working, in particular, where its investigative, inquisitorial and analytical skills can better be employed, is at best delayed and at worst significantly reduced.

65. Instead, the CMA's resources and workforce (including economists, financial and business advisers, and lawyers) are diverted to an average of one to two regulatory appeals a year, and there is a tendency for such appeals to be of increasing scale and complexity. The CMA faces particular challenges in resourcing appeals during periods where there is a higher frequency of appeals or a particularly large-scale appeal. Those challenges are exacerbated by the difficulty of predicting whether and when appeals may be made to the CMA as well as the scale and scope of any such appeal (eg numbers of appellants and grounds).

66. The CMA's estimate is that, in terms of its resources, a large regulatory appeal can be equivalent to two or three CMA market studies. Those studies could deliver significant consumer benefits, which are at least delayed, if not displaced, by appeals. The CMA's estimates of the direct consumer benefits from its interventions through the markets regime exceeded £5 billion in total during the financial years 2022-2023 and 2024-2025.

67. The CMA agrees that enabling it to focus its resources on its core duty, and on other interventions that support economic growth and generate substantial benefits for consumers, would enhance its ability to deliver outputs and produce market impacts in line with the government's Strategic Steer.

68. The government's proposals for regulatory appeals have other positive effects, too. In January, the government consulted on amending the CMA's decision-making model in merger and market cases. The proposal was to introduce decision-making by CMA Board sub-committees (including the involvement of expert decision-makers akin to Panel members) in place of inquiry-group decision-making. Removing the inquiry group model as part of the transfer of regulatory appeals to the CAT would maximise the number of experts available to sit on CMA sub-committees (and avoid the unnecessary

complexity that would be caused by retaining multiple decision-making models across CMA functions).

***Q56. Should eligibility criteria be harmonised across sectors?***

***Q57. In case of harmonised eligibility criteria for Regulatory Appeals and Telecoms Appeals, should the right to appeal be granted to (i) licence holders and companies holding an appointment, and (ii) persons whose interests are materially affected by the regulator's decision and bodies or associations representing such persons, including consumer bodies?***

***Q58. Should parties be required to seek the permission of the CAT to bring an appeal?***

***Q59. Should third parties be permitted to intervene in an appeal, subject to obtaining permission from the CAT?***

***Q60. What barriers to appeal exist for consumer groups or other groups (such as environmental groups) in regulated sectors? Please specify the sector you are referring to.***

***Q61. In addition to existing CAT Rules on cost recovery, what cost arrangements or other aspects of the appeal process could help ensure fair participation by all eligible parties in Regulatory Appeals and Telecoms Appeals?***

***Q62. Should costs be capped for certain parties, such as consumer groups?***

***Q63. Should specific cost arrangements exist in relation to the costs incurred by regulators in defending their decisions?***

***Q64. We welcome any further views on how to improve the effectiveness of Regulatory Appeals.***

69. Having grouped questions 44 – 55 together above, the CMA has done the same with questions 56 – 64. It sees the former set of questions as relating to a set of core elements of a single, unified, simplified and consistent regulatory appeals system. The latter set relates to important subsidiary elements of such a system.

70. The CMA agrees that each of the following would be important elements of that system:

(a) The eligibility criteria for bringing appeals should be harmonised across regulated sectors. The right of appeal should be granted to (i) licence holders and companies holding an appointment; (ii) persons whose interests are materially affected by the regulator's decision; and (iii) bodies or associations representing those in (ii), including consumer bodies.

(b) Third parties who can demonstrate a material interest in the outcome of the appeal being able to intervene.

(c) As to consumer bodies, specifically, the CMA notes that not all appeal regimes currently give those bodies standing to appeal. The CMA's view is that, in giving such bodies standing, a unified regulatory appeals regime should include appropriate costs arrangements. Sector regulatory regimes include statutory objectives for the regulator to further consumers' interests. It is important that bodies representing those interests can protect them in the appeals regime, rather than being precluded by undue costs risks if their appeals are unsuccessful. Measures the government could take in this regard include:

    (i) Cost capping: setting a maximum amount of costs that can be recovered from a consumer body in the event of an unsuccessful appeal.

    (ii) A consumer interest duty: giving the CAT a duty to grant permission to consumer bodies to intervene in an appeal on a 'consumer interest' basis, without an exposure to costs in the event that they intervene on the losing side.

    (iii) A robust approach to costs more generally: whether or not additional steps are taken to help consumer bodies bring, or intervene in, regulatory appeals, the CMA would expect the CAT to adopt a robust approach to costs to ensure that parties bringing or defending appeals do not accumulate disproportionate costs. The CMA recommends that regulators' costs are determined by the CAT in accordance with its current approach.

(d) A permission stage: parties seeking to bring, or to intervene in, a regulatory appeal should be required to seek the CAT's permission.[28] This would encourage parties to be disciplined in their approach and to focus

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[28] As far as third party interveners are concerned, this would align with existing approaches where intervener status either exists in the statutory scheme (see for example Part 2 of Schedule 2 to the Civil Aviation Act 2012) or has been created by the CMA through rules and guidance (for an explanation of this, see Energy Licence Modification Appeals: Competition and Markets Authority Guide (CMA71), paragraph 4.13 onwards).

on the key issues materially affecting their interests. It would allow the CAT to filter out frivolous or vexatious appeals and to avoid wasting public time and money.

71. In the latter of the above connections, the CMA suggests that the government also consider introducing an explicit materiality threshold at the permission stage. There may, the CMA acknowledges, be challenges in appropriately circumscribing any such element of a permission test. The CMA suggests, nonetheless, that an assessment is made of the extent to which the CAT is able, prior to granting permission, to consider the likely materiality of the issues in a proposed appeal and exercise appropriate discretion. This may be as part of assessing whether an appeal is frivolous or as a separate criterion.

72. Each of the elements above would help ensure that there is a single, unified regulatory appeals system that enables interested and materially affected parties across regulated sectors fairly and consistently to bring, or participate in, such appeals. They would be part of a robust and efficient system for doing so.

## Chapter 3: More efficient Competition Act 1998 enforcement

73. The CMA welcomes the Government's proposals to improve the efficiency and effectiveness of CA98 enforcement.

74. The CMA wants to ensure that its competition toolkit enables investigations and enforcement action to be carried out as effectively, proportionately and efficiently as possible, whilst maintaining appropriate procedural safeguards and protecting parties' rights of defence. Efficient CA98 enforcement benefits businesses and consumers alike by enabling competition concerns to be addressed more quickly and reducing unnecessary administrative burdens for both the CMA and businesses.

75. The proposals in this section cover a range of procedural and technical reforms, including greater flexibility over decision-making arrangements, streamlining settlement procedures, modernising access-to-file and publication requirements, strengthening confidentiality ring arrangements and targeted changes to the competition disqualification and penalties regime.

76. The CMA broadly supports these proposals. Many are strongly aligned with the CMA's 4Ps framework[29] and would help to ensure that CA98 investigations and decisions are conducted in a more proportionate,

[29] Please see footnote 3 above.

predictable and efficient manner, while maintaining transparency, fairness and accountability.

77. Several of the proposals would also improve consistency across the CMA's different enforcement functions, in particular by aligning aspects of the CA98 regime more closely with the direct consumer enforcement framework introduced under the DMCCA.

78. The CMA's detailed views on the individual proposals are set out below.

***Q65. Should Rule 3 be omitted to enable the CMA in guidance to establish its decision-making model in CA98 cases?***

***Q66. Should Rules 9(2) to 9(4) be omitted to enable the CMA to establish its decision-making model in CA98 settlement cases in guidance? Note: The CMA would be required to consult on guidance setting out such decision-making processes.***

79. The CMA agrees that Rule 3[30] and Rules 9(2) and 9(4)[31] should be omitted to enable the CMA to establish its decision-making processes for both CA98 infringement and settlement cases in its procedural guidance for CA98 cases (CMA8).[32]

80. Removing these provisions would provide the CMA with greater autonomy to determine and maintain the most effective and efficient internal decision-making processes, while retaining transparency by setting out those processes in guidance. Any such guidance would be subject to public consultation.

81. The CMA notes that its direct consumer enforcement regime already operates on the basis of decision-making arrangements set out in guidance rather than legislation or procedural rules.

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[30] Rule 3 requires a separation of roles in CA98 investigations: one person is to oversee the investigation and to decide whether to issue a statement of objections, while the decision as to whether to make an infringement decision and impose any penalty for any infringement (and also as to whether to issue a supplementary statement of objections) is to be taken by at least two decision-makers who are different from the person who oversees the investigation and decides whether to issue a statement of objections and who have not been involved in the investigation.

[31] Rule 9(2) provides that a single CMA decision-maker can choose to follow a settlement procedure only if that decision is approved by at least two separate decision-makers who are different from that person. Rule 9(4) provides that if a single decision-maker has decided to follow a settlement procedure, that same person may also issue a statement of objections and make the final infringement decision in that case.
In short, Rule 9(2) requires independent approval before a single decision maker can start a settlement process, while Rule 9(4) then allows that same single decision-maker to carry the case through to the infringement decision stage.

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

82. In practice, the CMA would expect to retain a model involving multiple decision-makers for infringement and penalty decisions, other than settlement decisions. One possible approach, which would be subject to consultation before being set out in guidance, would be to adopt the SRO + 2 model. Under this model, three relevant persons[33] - one of whom would be the Senior Responsible Officer (SRO) in the case - would decide whether to make an infringement decision and impose any penalties, and whether to issue a supplementary statement of objections. The other decision makers would be relevant persons of at least equal seniority to the SRO, and who were not previously involved in the investigation.

83. The SRO would continue to be responsible for deciding whether to issue a statement of objections.

***Q67. Should Rule 7 be amended, or omitted in its entirety, to give the CMA greater flexibility to decide on a case-by-case basis when it would be appropriate to seek further views on confidentiality?***

84. The CMA's view is that Rule 7[34] should be omitted in its entirety. The current requirement to seek confidentiality representations in all relevant circumstances goes beyond the confidentiality obligations set out in Part 9 of the EA02 and can create significant administrative burdens for both the CMA and businesses that add delay to CA98 investigations. Removing Rule 7 would enable the CMA to decide on a case-by-case basis when further confidentiality representations are necessary and focus resources where there is a genuine risk of disclosure of confidential information.

85. Importantly, removing Rule 7 would not affect the statutory protections for confidential information. Any disclosure of specified information would remain subject to the safeguards contained in Part 9 of the EA02. The approach to the disclosure of information over which confidentiality has been claimed would be set out in CMA8 and the CMA would also have regard to its Transparency and Disclosure Guidance (CMA6)[35] in making such disclosure.

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[33] As under the CMA CA98 Rules, 'relevant persons' would be any of the following categories of person who has been authorised by the CMA or a concurrent regulator's Board to exercise any function under these Rules—
(a) one or more members of the CMA Board or a regulator's Board,
(b) one or more members of the CMA panel or a regulator's Panel,
(c) one or more members of staff of the CMA or a regulator,
(d) jointly by one or more of the persons mentioned in paragraph (a), (b) or (c).

[34] Rule 7 sets out the procedures for handling confidential information that has been supplied to the CMA in a CA98 investigation. It includes a requirement for the CMA, before disclosing such information where it has been identified as being confidential, to take all reasonable steps to invite the person who provided it, and any person to whom it relates, to make representations on such disclosure.

[35] Transparency and disclosure the CMA's policy and approach: CMA6

86. This approach would also be in alignment with the direct consumer enforcement regime.

***Q68. Should Rule 9 be amended to include a requirement that the settling parties must agree not to challenge or appeal the infringement decision as a condition of settlement?***

87. The CMA agrees with the proposed change to Rule 9.[36] Including an express requirement that settlement should be conditional on settling parties agreeing not to challenge or appeal the infringement decision reflects the CMA's existing policy and practice, as set out in CMA8. The proposed amendment would therefore codify an established feature of the settlement process rather than introducing a new substantive requirement.

88. A key objective of settlement is to enable cases to be resolved more quickly with fewer demands on the resources of both the CMA and the parties. The CMA considers that the amendment would help secure the efficiency benefits that a settlement is intended to deliver. The amendment would also provide greater clarity and predictability by making it clear the consequences of entering into a settlement agreement.

89. The proposed amendment would also align the Competition Act settlement framework more closely with the approach adopted under the direct consumer enforcement regime.

***Q69. Should Rule 9(5) be amended to remove the requirement to issue a SO in cases which are settled with all parties pre-SO?***

***Q70. Should Rule 9(5) be amended to specify that the SSF or draft SO provided to the settling parties constitutes a written notice for the purposes of section 31 CA98?***

90. The CMA agrees with the proposed amendments to Rule 9(5). [37] Where all parties settle before the issue of a statement of objections, requiring the CMA to issue a full statement of objections serves no useful purpose. The relevant facts, legal assessment and key elements of the proposed infringement decision will already have been set out in either a summary statement of facts

[36] Rule 9 deals with the CMA's settlement procedure in CA98 investigations. It provides for settling businesses to admit the infringement, accept an expedited administrative procedure. It also prescribes aspects of settlement decision-making and the procedural steps required before an infringement decision is issued.
[37] Rule 9(5) requires the CMA to give a settling party a statement of objections before making an infringement decision, ensuring that the party receives written notice of the proposed findings and has an opportunity to make representations, even where the settlement process began before a statement of objections was issued.

or a draft statement of objections, [38] and settling parties will have had an opportunity to review that material and make representations through the settlement process.

91. The CMA therefore considers that requiring a statement of objections in these circumstances is an unnecessary procedural step. Removing that requirement would simplify and streamline settlement cases without reducing parties' ability to understand the case against them or participate meaningfully in the settlement process.

92. The CMA also considers that specifying that providing a summary statement of facts or draft statement of objections to the settling parties would constitute written notice for the purposes of section 31 CA98 would provide clarity and legal certainty that no further statement of objections is required.

***Q71. Should there be a prescribed legal framework for confidentiality rings?***

***Q72. Should civil sanctions be available for breaches of confidentiality rings?***

***Q73. Should these sanctions be applicable to both the individual responsible and their employer?***

***Q74. Should this legal framework, and the associated civil sanctions, be applicable across the CMA's other functions such as in mergers and markets?***

93. The CMA often uses confidentiality rings as a means of making disclosure of confidential information across many of its tools, including under its CA98 and mergers functions.[39] The CMA agrees that there should be a prescribed legal framework for confidentiality rings, supported by appropriate civil sanctions, and that this framework should apply across the CMA's functions where confidentiality rings are used.

94. A prescribed legal framework would provide greater clarity and consistency regarding the operation of confidentiality rings. It would also, as the Consultation notes, make it easier for the CMA to implement such rings since it would not require the CMA to ensure that all parties agreed to the same terms and to play by the rules. It would support the effective protection of confidential information while also providing parties and their advisers with

[38] See paragraph 14.9 of CMA8.
[39] See, for example, Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8) (chapter 11) and Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2) (chapter 18) for further guidance.

appropriate access to material relevant to the exercise of their rights of defence and procedural fairness.

95. The effectiveness of a prescribed framework would depend on there being credible and proportionate consequences for non-compliance. The availability of sanctions would provide a clear deterrent against the misuse, unauthorised disclosure or improper handling of confidential information.

96. Sanctions should be capable of applying both to the individual responsible for the breach and, where appropriate, their employer. The possibility of sanctions applying to employers would create appropriate incentives for firms to implement robust internal controls, training and supervision for individuals admitted to confidentiality rings. This would help reduce the risk of breaches.

97. The CMA considers that the legal framework and associated civil sanctions should apply across its other functions where confidentiality rings are used. This would achieve consistency and ensure equivalent protection for confidential information regardless of the statutory regime under which a case is being conducted.

***Q75. Should Rule 6(2) be amended to include the same exceptions as those set out in Rule 5 of the Direct Consumer Enforcement rules?***

98. The CMA agrees that Rule 6(2) [40] should include the same exceptions for withholding access to categories of document as those set out in Rule 5 of the direct consumer enforcement rules.[41] This would promote the efficient operation of the access-to-file process by avoiding the need to review and disclose categories of material that are unlikely to assist recipients in understanding or responding to the case against them. It would also improve appropriate consistency of rules across the CMA's enforcement regimes and would make sensible and proportionate additions to the categories of documents that do not need to be provided as part of the access to file process.

[40] Rule 6(2) requires the CMA to give each addressee of a statement of objections a reasonable opportunity to inspect the documents in the CMA's file that relate to the matters raised, save that the CMA may withhold any document to the extent that it contains confidential information or is an internal document.
[41] The additional categories of documents that can be excluded under the Direct Consumer Enforcement Rules include documents to the extent that they identify an individual consumer, routine correspondence and documents provided by the respondent.

***Q76. Should Rule 6(2) be amended to specify that access to file can be granted in hard copy or by electronic means?***

99. The CMA agrees with the proposal to change Rule 6(2) to make clear that access to file can be provided either in hard copy or by electronic means.

100. This amendment reflects modern practices where documents are routinely provided and reviewed electronically. In most cases, electronic disclosure will enable access to be provided more efficiently, while continuing to preserve parties' procedural rights.

101. This approach would also be in alignment with the direct consumer enforcement regime.

***Q77. Should Rule 9 be amended to disapply access to file requirements set out in Rule 6(2) in cases where the CMA has followed settlement procedure?***

102. The CMA agrees that, where it has followed the settlement procedure, the ordinary access to file requirements in Rule 6(2) should not be applied in the same way. Indeed, under the CMA's current settlement approach, parties are already required to agree to a streamlined administrative procedure.

103. Settlement is intended to provide a more streamlined and efficient route for resolving CA98 cases. Disapplying the ordinary access to file requirements would therefore help preserve the efficiency benefits of settlement while maintaining procedural fairness through the settlement materials provided.

104. The CMA considers that its approach to access to file in settlement cases should instead be set out in guidance (CMA8). Such guidance would address various matters including streamlined access to file processes, the treatment of confidential information and confidentiality rings.

***Q78. Should Rules 13(1) and 13(2) be omitted to give the CMA more discretion on access to file in relation to interim measures, with the aim of faster decisions?***

105. The CMA agrees with this proposal. Omitting Rules 13(1) [42] and 13(2) [43] would provide the CMA with greater discretion over what access to file

[42] Rule 13(1) requires the CMA, before imposing interim measures, to give the person concerned a reasonable opportunity to inspect documents in the CMA's file relating to the proposed measures.
[43] Rule 13(2) provides that, when giving a party access to the CMA's case under Rule 13(1), the CMA may withhold any document to the extent that it contains confidential information or is an internal document.

process is appropriate in interim measures cases and support faster decision-making.

106. In the absence of these Rules, the CMA would set out its approach to access to file as guidance in CMA8 to provide clarity and certainty for businesses. Depending on the circumstances of the case, this could include disclosing a limited set of documents where necessary to enable parties concerned to make informed representations on the proposed interim measures. The 'gist' of the interim measures case to be answered would also normally be provided in the notice that the CMA must, by virtue of section 35(3) CA98, give to the person(s) on whom the interim measures are proposed to be imposed.

107. The CMA considers that this approach would maintain procedural fairness, while enabling a more proportionate and efficient process.

***Q79. Should the publication requirements under Rule 19(2)(b) be removed?***

***Q80. Should the requirement under Rule 20(2)(a), to maintain a physical copy of the CA98 Public Register at the CMA's head office, be removed to reflect modern practices?***

108. The CMA agrees that the publication requirements under Rule 19(2)(b)[44] and the requirement to maintain a physical copy of the CA98 Public Register at the CMA's head office under Rule 20(2)(a) should be removed.

109. These requirements no longer reflect modern administrative practice. Removing them would reduce unnecessary administrative burdens without diminishing the availability of information.

***Q81. Should section 9A(5)(b) CDDA86 be amended to specify that a court can have regard to the conduct of a person as a director of an overseas company for the purposes of making a CDO?***

110. The CMA agrees with the proposal to amend 9A(5)(b) CDDA86 to specify that a person's conduct as a director of an overseas company can be taken into account for the purposes of making a Competition Disqualification Order (CDO).

111. This amendment would align section 9A(5)(b) CDDA86 with section 6(1)(b) CDDA86, the latter of which explicitly refers to overseas companies (as

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[44] Rule 19(2)(b) requires the CMA to publish certain notices in the London, Edinburgh and Belfast Gazettes, in one national daily newspaper and in an appropriate trade journal if there is one.

defined in section 22(2A) of the CDDA86), and reduce the risk that relevant conduct is excluded solely because it took place in the context of such an overseas company. This would strengthen the effectiveness of the CDOs regime and support the objective of protecting the public and holding directors to account.

***Q82. Should section 9 CDDA86 be amended to clarify that a court can make a CDO against former directors?***

112. The CMA agrees that section 9 CDDA86 should be amended to clarify that a court can make a CDO against current and former company directors. As the Consultation notes, this reflects the existing approach taken by courts.

113. The proposed amendment would align section 9 CDDA86 with section 6 CDDA86 in this regard, the latter of which explicitly refers a person who is or "has been a director".[45] In doing so, it would provide greater legal certainty and strengthen the effectiveness of the competition disqualification regime by making it clear that individuals cannot avoid the possibility of disqualification simply because they have ceased to hold a directorship. Clarification would reduce the scope for procedural disputes and ensure that courts can focus on the relevant competition law conduct when determining whether a CDO is appropriate.

***Q83. Should section 9A(5)(c) be amended to clarify that the requirement not to have regard to the matters set out in Schedule 1 CDDA86 does not apply to breaches of competition law?***

114. The CMA agrees that section 9A(5)(c) should be amended to clarify that the matters set out in Schedule 1 CDDA86, to which the court must not have regard when considering a CDO, do not include other breaches of competition law, which the court is able to have regard to under section 9A(5)(b).

115. This would provide greater clarity as to the factors relevant to the competition disqualification proceedings and help ensure that courts can focus on the competition law conduct that is most relevant.

[45] See for example, section 6(1)(a) CDDA86.

***Q84. Should the CMA be able to impose a financial penalty on undertakings with no turnover, or no representative turnover, in the last business year?***

***Q85. If so, would a fixed-amount penalty cap of up to £300,000 be appropriate?***

116. The CMA agrees that it should be able to impose a financial penalty where an undertaking has no turnover, or no turnover that is representative of the undertaking's normal business activities, in the last business year. Without such a power, there is a risk that undertakings in atypical turnover situations could avoid meaningful financial penalties or even any penalty at all, creating an enforcement gap and undermining the deterrent effect of the regime.

117. An alternative fixed-amount penalty cap would provide the CMA with the ability to impose financial penalties in such atypical turnover situations, while remaining subject to the CMA's existing approach to proportionality and penalty setting. As regards the size of that fixed cap, the CMA notes that CA98 penalties are often substantial and frequently exceed £300,000. There is therefore a question as to whether a fixed cap at that level would, in many cases, be sufficient to achieve deterrence and reflect the seriousness of the infringement. That said, the CMA recognises that where a business has little or no turnover, identifying an appropriately calibrated maximum penalty higher than this may be challenging.

118. An alternative approach could be to amend the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000[46] to allow a prior, more representative business year to be taken into account, so as to achieve the same objective while maintaining a turnover-based approach to penalties. That said, this approach could have its drawbacks. First, it would be necessary to work out how a more representative year would be defined in legislation. Secondly, it would not provide a solution where an undertaking has not achieved any turnover in a suitable period prior to the CMA's decision, but that might still have considerable assets.

[46] S.I. 2000/309.