

**Template pursuant to Section 3 (a) of the
ICN Framework on Competition Agency Procedures**

Competition and Markets Authority, United Kingdom

The following template is submitted by the **Competition and Markets Authority, United Kingdom** pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

Please add brief presentation/link to agency website.

The Competition and Markets Authority (CMA) is the United Kingdom’s primary competition and consumer authority. We work to promote competition for the benefit of consumers, both within and outside the UK, to ensure that consumers get a good deal when buying goods and services, and businesses operate within the law.

We do this in a number of ways:

- we investigate mergers between organisations, to make sure they do not reduce competition;
- we investigate entire markets if we think there are competition or consumer problems;
- we take action against businesses and individuals that take part in cartels or anti-competitive behaviour;
- we protect consumers from unfair trading practices;
- we encourage government and other regulators to use competition effectively on behalf of consumers.

The CMA is an independent non-ministerial department. Our work is overseen by a Board and led by the Chief Executive and senior team. Decisions on breach of the law and the imposition of penalties are made by individuals independent of case teams. We have staff in London, Edinburgh, Belfast and Cardiff.

Our website is: <http://www.gov.uk/cma>.

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

The primary competition legislation the CMA enforces is the *Competition Act 1998* (CA98). In parallel, certain UK sector regulators have concurrent CA98 powers for undertakings within their sector.¹

In addition, the CMA can investigate individuals suspected of criminal offences contrary to section 188 of the *Enterprise Act 2002* (EA02). The CMA also has jurisdiction to bring before the UK courts actions for the disqualification of directors involved in infringements by their companies of the CA98 under sections 9A-9E of the *Company Directors Disqualification Act 1986* (CDDA).

Furthermore, under the Withdrawal Agreement between the United Kingdom and the European Union, the CMA continues to have the power to apply and enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in accordance with EU Regulation 1/2003 during the Transition Period which ends on 31 December 2020.

In respect of mergers, the CMA operates the UK's merger control regime which is set out in the EA02, Enterprise and Regulatory Reform Act 2013 (ERRA) and relevant guidance².

The UK Government has adopted rules of procedure for the CMA, contained in UK secondary legislation, the *Competition and Markets Authority Competition Act 1998 Rules* (SI 2014/458) (the CMA CA98 Rules). These provide general information on the processes that the CMA follows when using its powers to investigate suspected infringements of competition law.

The CMA has issued a series of guidance documents explaining the application of its powers and procedures:

- *Guidance on the CMA's investigation procedures in Competition Act cases* (CMA8) explains the CMA's procedures for investigating suspected infringements of the Competition Act prohibitions or Article 101 or 102.
- *Transparency and disclosure - statement of CMA's policy and approach* (CMA6) sets out the CMA's policy and approach to transparency and information disclosure.
- *Cartel offence prosecution* (CMA9) explains the principles the CMA will apply in determining whether proceedings for the cartel offence should be carried out against an individual.

The CMA has also adopted a number of guidance documents issued by its predecessor organisation, the Office of Fair Trading (OFT), such as the *Leniency and no-action applications in cartel cases* (OFT1495) which explains the principles and process of applications for lenience and no-action in cartel cases.

For mergers, the CMA has published guidance documents, including *Mergers: Guidance on the CMA's jurisdiction and procedures for companies and their advisers on the procedures used by the CMA in operating the merger control regime*.³

¹ <https://www.gov.uk/government/groups/uk-competition-network>

² <https://www.gov.uk/topic/competition/mergers>.

³ Mergers - the CMA's jurisdiction and procedure: CMA2; more broadly and for other merger specific guidance, see: www.gov.uk/topic/competition/mergers

Other relevant pieces of legislation include the *Police and Criminal Evidence Act 1984 (PACE)* and the respective PACE Codes of Practice in relation to the application of the CMA's criminal powers.

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

As a public authority invested with powers to enforce the CA98, section 6(1) of the Human Rights Act 1998 makes it unlawful for the CMA to act in a manner inconsistent with the rights set out in the European Convention on Human Rights (ECHR). In competition law the right to a fair trial (Article 6(1) ECHR) is of particular significance as is Article 14(1) ECHR which prohibits discrimination on the basis of defined characteristics, including national origin. As such, UK competition law, procedural rules and policies afford persons of other jurisdictions treatment no less favourable in like circumstances. All persons and businesses are treated in the same way.

Domestic case-law also makes clear that the CMA must not discriminate against undertakings. This means both that the CMA must not treat similar situations differently and that it must not treat different situations the same, unless in either case the treatment is justified. In other words, the principle of equal treatment applies to the CMA's investigation and enforcement policies and procedural rules.

c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*

- v. *Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

All Competition laws, regulations and procedural rules that apply to investigations and enforcement proceedings in the United Kingdom, including CA98, EA02 and the CMA CA98 Rules are contained in legislation and are available online at <https://www.legislation.gov.uk/>.

In addition, the CMA has produced a number of guidance documents and other statements, clarifying or explaining the CMA's Investigations and Enforcement Proceedings (see response to Question II). These are available on the CMA's website at <https://www.gov.uk/search/guidance-and-regulation?organisations%5B%5D=competition-and-markets-authority&parent=competition-and-markets-authority>.

d) Investigative Process

- i. *Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. *Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. *Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

Civil prohibitions (CA98 investigations)

Being informed about an investigation

As set out in *Guidance on the CMA's investigation procedures in Competition Act cases (CMA 8)*, once a case is opened, the CMA will send the business under investigation a case initiation letter, which sets out brief details of the conduct/agreement being investigated, the relevant legislation, an indicative timetable for the investigation, and key contact details. The letter will also let the addressee know who the decision maker is on the case, which will usually be the Senior Responsible Officer (SRO). The CMA will not send an initiation letter where this would prejudice the CMA's investigation, for example, where it is planning an unannounced inspection of premises. In such cases, the CMA will send out a case initiation letter as soon as possible.

Opportunities for meaningful and timely engagement

The CMA aims to achieve transparency in its work by:

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

Information Requests

The CMA can only require persons to provide any document or information that it considers "relates to any matter relevant to the investigation" (section 26 CA98). Similarly, its powers to conduct inspections and to interview, which are contained in sections 27-28A and 26A CA98 respectively, are linked specifically to matters relevant to the CMA's investigation.

Consequently, the CMA's information gathering must be relevant to the competition issues under review.

Section 26 CA98 allows the CMA to require production of any document or information. It does not specify any particular timeframe within which the documents or information must be provided. However, the CMA determines reasonable deadlines for responding, depending on the nature and amount of information that the CMA has requested.

Where the CMA provides a draft information request to the party under investigation and has already discussed the timescale, an extension will only be agreed in exceptional circumstances. In all cases parties must provide reasons for requesting an extension. The CMA has a specific procedure relating to complaints about the deadline for responding to an information request.

In relation to complaints about the timescale given for responding to a section 26 notice, parties in the first instance should raise concerns with the SRO. If the complaint is not resolved satisfactorily, the matter can be referred to the CMA's Procedural Officer. The Procedural Officer will decide on specified procedural issues which include disputes about the deadline for responding to section 26 notices.

Criminal investigations (the cartel offence)

The CMA will inform any person that is the subject of a criminal investigation of that fact, as soon as practical and according to the specific needs of the investigation, which could be if

we seek to interview them or if we decide to bring proceedings against them. Interviews of the suspect are conducted under the Police and Criminal Evidence Act 1984 where the suspect will be provided with the legal basis for the investigation and the details of the conduct under investigation. At the interview the suspect has the right to remain silent, however they will also have an opportunity to raise any defence to the allegations made.

The CMA's decision to prosecute the offence is made by application of the Full Code Test as set out in the Code for Crown Prosecutors:

(www.cps.gov.uk/publications/code_for_crown_prosecutors).

The Full Code Test has two stages: (i) the evidential stage; and (ii) the public interest stage. In most cases the evidential stage must be considered before the public interest stage. A case which does not pass the evidential stage must not proceed. Where there is sufficient evidence to proceed, consideration must also be given to whether a prosecution is in the public interest. Further guidance on this is set out in paragraphs 4.1–4.24 of the Cartel offence prosecution guidance.

Once the CMA is conducting an investigation, it may:

- Require the person under investigation or any other person who it has reason to believe has relevant information to answer questions on any matter relevant to the investigation (section 193(1) EA02).*
- Require the production of documents which appear to relate to the investigation (section 193(2) EA02).*
- Seek to enter premises under a warrant (section 194 EA02).*

Mergers

The process of merger investigations under EA2002/ERRA2013 is set out in the published guidance on the CMA's jurisdiction and procedures (CMA2).

The CMA operates a voluntary merger notification regime. In cases where the merger is not voluntarily notified to the CMA, but where the CMA learns of it through another route, the CMA will consider whether to seek further information about the case by sending the acquiring party or parties an enquiry letter.

If a merger investigation is opened, the merging parties, as well as third parties (including complainants), have opportunities to engage with the CMA prior to and during the merger investigation as described in the CMA2 guidance. See also response to part h) below on procedural steps of the merger review process.

Third parties are also made aware of the merger investigations as the CMA publishes the details of the merger investigation on the case page on the CMA website. The CMA invites comments on any public merger situation under review from interested third parties by means of an invitation to comment (ITC) notice published through the Regulatory News Service and on its webpages. It also takes note of any comments that it receives.

e) **Timing of Investigations and Enforcement Proceedings**

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

The CMA is not subject to specific deadlines within which it is required to complete its investigations and enforcement proceedings. Nevertheless, it is committed to conducting investigations and enforcement proceedings within a reasonable time, taking into account the nature and complexity of each case.

For CA98 investigations that opened since 2015, the average length of the case is less than 24 months, and often much shorter.

In criminal cases the CMA aims to conduct investigations in relation to the criminal cartel offence within a reasonable time, however (subsequent) prosecutions are subject to court timetables.

Mergers

For Phase 1 merger investigations the CMA is under a statutory 40 working day limit. This period starts on the first working day that the CMA officially confirms that either: (i) the Merger Notice is complete; or (ii) for own-initiative investigations, it has received sufficient information to enable it to begin the investigation. Where possible, the CMA aims to publish decisions ahead of the 40 working day deadline and in 2019 calendar year, decisions were published on average within 37 working days.⁴

The CMA is also subject to a four-month statutory deadline for completed mergers in which to make a Phase 2 reference from whichever is earliest between when the material facts are made public, or the time the CMA is told of those facts.

The pre-notification period is on average 28 working days (2019), but for complex transactions can be six weeks or more.⁵

For Phase 2 cases, the CMA has a statutory period of 24 weeks to conduct its investigation and publish a report. This period may be extended by up to eight weeks at the CMA's discretion. In 2019, the average duration of Phase 2 investigations was 174 days (including weekends).⁶

⁴ Source: CMA own merger review statistics.

⁵ Source: CMA own merger review statistics.

⁶ Source: CMA own merger review statistics.

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.

Civil investigations (CA98 cases and mergers)

The CMA seeks to take a consistent approach with regard to the identification and treatment of confidential information (which is set out in CMA8).

During the course of an investigation the CMA acquires a large volume of confidential information relating to both businesses and individuals.

Publicly available rules, policies and guidance regarding confidential information

The rules, policies and guidance applicable to the CMA's handling of confidential information are public. Part 9 EA02 and Rules 6 and 7 of CMA Rules (further details of which are provided below) is contained within legislation such as is available on www.legislation.gov.uk.

In addition, the CMA has made public its guidance on how it treats confidential information in the course of an investigation and enforcement proceedings. This is in section 7.6 of guidance document CMA8. A further guidance document, *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)* also refers to how the CMA handles confidentiality.

Protecting confidential information from unlawful disclosure

There are strict rules under UK law (Part 9 of EA02 and in particular sections 237-247 EA 02) which prohibit the CMA from disclosing information in its possession relating to the affairs of an individual or business. Part 9 EA 02 also provide gateways which allow disclosure in defined circumstances. In many instances the CMA may have to redact documents that it proposes to disclose to remove any specified information, for example, by blanking out parts of documents or by aggregating figures.

Factors to consider before disclosing confidential information

Part 9 EA02 allows the CMA to disclose confidential information in defined circumstances known as "gateways". This includes where there is consent to disclosure (s. 239 EA02), where disclosure is necessary to allow the CMA to exercise its functions (s. 241 EA02) and where disclosure is to overseas public authorities carrying out civil or criminal enforcement (s. 243 EA02). Before making any such disclosure via a gateway, the CMA is obliged to consider both the public interest and the interests of those to whom the information relates (s. 244 EA02).

Consideration of confidentiality representations

Pursuant to Rule 6 of the CMA Rules, during the course of an investigation, the CMA may request confidentiality representations made by the parties on the documents held on its file. Representations should be provided where a person or business considers that any information they are giving the CMA, or that the CMA has acquired, is commercially sensitive or contains details of an individual's private affairs and that disclosing it might significantly harm the interests of the business or person. The CMA will not accept blanket or unsubstantiated confidentiality claims.

The CMA will comply with the provisions of Part 9 EA02 when deciding whether information is confidential and/or whether it may be appropriate to disclose information for the purposes of facilitating the exercise of the CMA's functions under CA98.

The CMA may not agree with the person or business who provided it that the information in question is confidential, or the CMA may agree that the information is confidential but consider that it is necessary to disclose the information to the parties in the investigation in order to enable them to exercise their rights of defence. In such circumstances, under Rule 7 of the CMA Rules, the CMA will give the person or business that provided the information prior notice of the proposed action and will give them a reasonable opportunity to make representations. The CMA will then inform the party whether the CMA still intends to disclose the information, after considering all the relevant facts.

Where a person or business is unhappy about the extent and/or method of disclosure, they should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the person or business may refer the matter to the Procedural Officer.

Further information on the CMA's approach to the treatment and disclosure of information, including to identifying confidential information, is available in the guideline Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6). Disclosure of information in CMA work (CC7) guidance⁷ sets out the CMA approach on disclosure of information in merger inquiries, market investigations and reviews of undertakings and orders.

Criminal investigations (the criminal cartel offence)

As a prosecuting body, the CMA (along with the Serious Fraud Office (SFO) with whom the CMA shares prosecutorial responsibility) is bound by the disclosure provisions of the Criminal Procedure and Investigations Act 1996 (CPIA) and the Attorney General's Guidelines on Disclosure 2013. The prosecutor must disclose to the defendant any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused (Duty of prosecutor to disclose, section 3, CPIA 1996).

⁷ <https://www.gov.uk/government/publications/disclosure-of-information-in-cma-work>

As with CA98 investigations, disclosure to third parties in criminal cases is also made in accordance with Part 9 of the EA02 and the CMA's Transparency and Disclosure guidance (CMA6).

Mergers

Part 9 of the EA2002 sets out the rules for treatment of information that is submitted to the CMA as part of the merger investigation, including parameters for authorised disclosure.

It is strict CMA policy to observe appropriate confidentiality in all aspects of its operation and the CMA recognises that respecting the confidentiality of confidential information provided to it is vital to the effective performance of its merger review functions. The CMA will not therefore publicly disclose such confidential information unless required to do so by law. Where parties consider that information to be published by the CMA in this regard (at either Phase 1 or Phase 2) contains confidential information, the CMA will expect the parties to identify that information and explain why it is considered to be confidential.

In the event of a disagreement with the case team as to the confidentiality of specific information relating to the parties that the CMA proposes to publish in its decision, parties should seek in the first instance to resolve the matter with the case team or – as necessary – the Mergers' Unit (MU) staff member with overall responsibility for the conduct of the investigation. If, thereafter, the parties' concerns remain unresolved, they may make representations to the CMA's dedicated Procedural Officer, who will consider those representations and reach a determination on the issue.

Further guidance is provided in the Disclosure of information in CMA work (CC7).⁸

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

The CMA has a Code of Conduct to ensure that its officials and decision-makers are objective and impartial and do not have material personal, financial or political conflicts of interest. Where individuals do have such conflicts of interest, they must be disclosed in the first instance. Failure to follow these rules will likely result in disciplinary action.

CMA decision-making is also subject to UK court review. In assessing whether there is an actual or potential bias associated with a particular decision, UK courts will ask whether a fair-minded observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased (See *Porter v Magill* [2002] 2 AC 357).

Finally, the CMA is part of the wider UK civil service such that its officials and decision makers (i.e. Board and Panel members) must comply with UK civil service codes of conduct

⁸ <https://www.gov.uk/government/publications/disclosure-of-information-in-cma-work>

such as the Principles of Public Life and the Civil Service Code, both of which require all civil servants to always act with the following values: integrity, honesty, objectivity and impartiality. These values in turn require UK civil servants to declare material personal, financial or political conflicts of interest.

A Compliance Officer within the CMA is responsible for ensuring that the CMA's policies on conflicts of interest are applied and enforced on a day-to-day basis. If an official or CMA decision maker (i.e. Board or Panel member) is in any doubt about the significance of an outside interest at any time, he or she may consult the Compliance Officer, who will advise on appropriate action.

The CMA carries out an annual audit of the conduct of the CMA's conflicts of interest policies and the results of this audit are published in its Annual Report.

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

Timely notice of breaches

As set out already in section (d) above on the investigative process, guidance document CMA 8 makes clear once a case is opened, the CMA will send the business under investigation a case initiation letter, which sets out brief details of the conduct/agreement being investigated, the relevant legislation, an indicative timetable for the investigation, and key contact details. The letter will also let the addressee know who the decision maker is on the case, which will usually be the SRO. The CMA will not send an initiation letter where this would prejudice the CMA's investigation, for example, where it is planning an unannounced inspection of premises.

Where after initiating the investigation the CMA reaches the provisional view that there was an infringement of the CA98, it will issue a Statement of Objections to each business it considers responsible for the infringement (see below).

Access to the case file

Pursuant to Rule 6(2) of the CMA Rules, if the CMA issues a Statement of Objections, it must give a relevant party a reasonable opportunity to inspect the documents in the CMA's

file that relate to the matters referred to in a notice given to that relevant party, except that the CMA may withhold any document—

- (a) to the extent that it contains confidential information; or
- (b) which is an internal document.

Allowing parties under investigation to defend themselves, including the right to be heard and to challenge and respond to evidence

Pursuant to Rule 5 of the CMA Rules, following the analysis of the evidence on the file, if the CMA's provisional view is that the conduct under investigation amounts to an infringement, the CMA will issue a Statement of Objections to each person it considers in breach and invite such parties to make representations on the Statement of Objections. The CMA will also allow such parties an opportunity to inspect the CMA's file containing evidence relevant to the CMA's case. This is the principal means by which the CMA allows parties under investigation to defend themselves, to challenge and to respond to evidence.

Pursuant to Rule 6 of the CMA Rules, a Statement of Objection must state –

- (a) the facts on which the CMA relies, the objections raised by the CMA, the action the CMA proposes and its reasons for the proposed action;
- (b) the period within which a relevant party may make written representations to the CMA identifying the information contained in the notice which that relevant party considers the CMA should treat such information as confidential information; and
- (c) the period within which a relevant party may make written representations to the CMA on the matters referred to in the notice.

Rule 6(3) of the CMA Rules also requires the CMA to offer the opportunity to attend an oral hearing in order to make oral representations to the CMA on any matter referred to in a notice.

Further explanation of the procedure followed when the CMA issues a Statement of Objection and the parties' rights of defence can be found in Chapters 11 and 12 of CMA8.

In criminal cases, if a decision is made to prosecute, the defendant will be charged or summonsed to appear before the Magistrates' Court. Proceedings are usually transferred to the Crown Court for the case to be heard before a judge and jury. At trial, the defendant will have an opportunity to defend the allegations and challenge the evidence. If convicted, the judge will decide on the appropriate sentence. Appeals from the Crown Court can be made to the Criminal Division of the Court of Appeal.

Mergers

With respect to mergers, the procedural steps are described in the CMA guidance, Mergers - the CMA's jurisdiction and procedure (CMA2). In Phase 1 mergers investigations that raise more complex or material competition issues, the merging parties have an opportunity to respond to the core arguments made by the CMA in favour of a reference. These concerns are set out in the Issues Letter, which includes only theories of harm that are genuinely of concern or of potential concern. The parties may respond to the Issues Letter

in writing and during the Issues Meeting (usually taking place between working days 25 and 35 of the merger investigation).

In Phase 2, CMA conducts analysis of evidence and produces working papers. Extracts of those papers are put back to relevant parties to check factual accuracy and to identify confidential information. Working papers (or extracts of them) are disclosed to parties as appropriate. An annotated issues statement is sent to main parties in advance of hearing with main parties (the 'main party hearing'). CMA consults main parties (and, where relevant, third parties) on draft undertakings/order.

There is no access to file process as part of the merger investigation.

The Notice of provisional findings identifies a period (of at least 21 days) in which the parties can comment on the provisional findings. Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of that Notice (and in any event, no less than seven days) so that they can be considered before response hearings. Where the CMA's provisional finding is that the merger gives rise to an SLC or may be expected to give rise to an SLC, response hearings will take place. Response hearings will generally be held with the main parties and potentially with key third parties likely to provide evidence or views useful for reaching a final decision on the competition question or on remedies. This could include potential buyers, customers or relevant economic regulators.

Appeals of merger decisions on judicial review grounds under section 120 EA2002 to the Competition Appeal Tribunal (CAT).

i) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

Legal advice during investigations and inspections

As noted above in section (b) on non-discrimination, section 6(1) of the Human Rights Act 1998 makes it unlawful for the CMA as a public authority to act in a manner inconsistent with the rights set out in the European Convention on Human Rights (ECHR). Such rights include the right of a person to a fair trial (Article 6 ECHR). In turn, this includes, amongst other things, the right of a person to be informed promptly of the case against them (Article 6(3)(a) ECHR), to have adequate time and facilities to prepare their defence (Article 6(3)(b) ECHR) and to be able to defend themselves through legal representation of their own choosing (Article 6(3)(c) ECHR).

Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation. While the CMA recognises that the interview power may be used in a range of circumstances, the starting point for the CMA is that it will generally be inappropriate for a legal adviser only acting for the undertaking to be present at the interview. The CMA also considers that in certain circumstances there may be a risk that the presence at the interview of a legal adviser only acting for the business will prejudice the investigation, for example if their presence reduces the incentives on the individual being questioned to be open and honest in their account.

Pursuant to Rule 4 of the CMA Rules, in cases where the CMA wishes to question a person having entered into premises for an inspection with or without a warrant, the questioning may be delayed for a reasonable time to allow the individual's legal adviser to attend. During this time, the CMA may make this subject to certain conditions for the purpose of reducing the risk of contamination of witness evidence. Such conditions could include requesting that a CMA officer accompanies the individual in the period before the interview takes place and/or suspending the individual's use of electronic devices, including telephones.

Privilege

Under section 30 CA98, a person does not have to produce or disclose to the CMA privileged communications.

Privileged communications are defined in that section 30 and include communications, or parts of such communications, between a professional legal adviser and their client for the purposes of giving or receiving legal advice, or those which are made in connection with, or in contemplation of, legal proceedings, and for the purposes of those proceedings. For example, this would cover a letter from a company's lawyer to the company advising on whether a particular agreement infringed the law.

If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, a CMA officer may request that the communications are placed in a sealed envelope or package. The officer will then discuss the arrangements for the safe-keeping of these items by the CMA pending resolution of the dispute.

Further guidance on privilege is contained in CMA8.

Criminal Investigations

CMA powers in criminal investigations do not extend to information and documents that are subject to legal professional privilege (section 196, EA02).

As part of the privilege against self-incrimination, a statement made by a person in response to a requirement imposed by sections 193 and 194 of the EA02 may only be used in evidence against them where, in giving evidence, they make an inconsistent statement or where they are being prosecuted under section 201(2) of the EA02 for making a false or misleading statement. (Section 197, EA02.)

Mergers

The CMA can issue requests for information ‘informally’ or using the powers provided by section 109 of the EA2002 (section 109 notice). Section 109 notice provides the CMA with a mandatory information gathering tool for ‘permitted purposes’ (including any aspect of its mergers-related functions). The CMA cannot compel the parties under these powers to provide legally privileged material.

In accordance with the CMA guidance on requests for internal documents in merger investigations (CMA100),⁹ where parties inform the CMA that privileged materials have been redacted or removed from the final production, the CMA is likely to ask the parties to describe the process used to identify and withhold privileged materials. Parties may also be requested to provide a privilege log describing the documents withheld from production (or produced in redacted form) in non-privileged terms. Merging parties are encouraged to engage with the CMA on the appropriate approach to privileged materials at an early stage of the evidence-gathering process.

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

Infringement decisions and orders

Pursuant to Rule 10(2) and Rule 19 of the CMA Rules, the CMA will issue an infringement decision to each business the CMA has found to have infringed the law. The CMA will also provide a nonconfidential version of the decision to any person who is party to an agreement or conduct that the CMA considers infringes the law but who was not an addressee of the Statement of Objections.

The infringement decision will set out fully the facts on which the CMA relies to prove the infringement and the action that it is taking, and will address any material representations that have been made during the course of the investigation.

If a financial penalty is being imposed, the infringement decision will explain how the CMA decided upon the appropriate level of penalty, having taken into account the CMA’s statutory obligations and the parties’ written and oral representations on the draft penalty

⁹ [Guidance on requests for internal documents in merger investigations \(CMA100\)](#).

statement. More information on how the CMA sets penalties is available in the *CMA's Guidance as to the appropriate amount of a penalty (CMA73)*.

The infringement decision may also give directions (in effect, orders issued by the CMA) to bring the infringement to an end. Any directions will set out the facts on which the direction is based and the reasons for it. The directions will be published on the public register maintained by the CMA.

Communicating infringement decisions

When an infringement decision is issued, the CMA will normally issue a press announcement, make an announcement on the Regulatory News Service and publish a page on the CMA's webpages which describes the case.

in non-market sensitive announcements, the CMA aims to give parties advance notice of the announcement, in confidence, unless there is a compelling reason not to do so. In both market sensitive and non-market sensitive situations, the CMA will aim to balance an open approach with the need to ensure the orderly announcement of full information.

After the infringement decision and press announcement have been issued, the CMA may notify complainants whose complaint led to the investigation and other third parties (for example, third parties who have submitted written representations during the investigation) of the CMA's decision.

Information that is confidential will be disclosed through the infringement decision to other parties only if disclosure is strictly necessary. Before disclosing any confidential information, the CMA will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If the CMA considers that disclosure might significantly harm legitimate business interests or the interests of an individual, the CMA will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which the CMA is allowed to make the disclosure.

The addressee of the decision will have already had the opportunity to make confidentiality representations. Either shortly before or after the infringement decision has been issued, prior to publication of a non-confidential version, the CMA will usually allow the addressee a final opportunity to make representations on information which the addressee deems to be confidential and is contained in the decision. Any representations must be limited to confidentiality issues only and, as at the other stages in the process, the CMA will not accept blanket or unsubstantiated confidentiality claims.

The CMA will publish, as quickly as possible, a non-confidential version of the infringement decision on the case page on the CMA's webpages. The CMA also maintains a register of decisions in investigations under the CA98 and the details of the case will be placed on the register.

Commitments decisions

If the CMA considers that the case gives rise to competition concerns, instead of continuing its investigation (which may result in the CMA issuing an infringement decision), section 31A CA98 allows the CMA to accept legally binding promises, called 'commitments', from a

business, relating to its future conduct. The CMA must be satisfied that the commitments offered address its competition concerns.

Once accepted, the CMA must publish the commitments (Schedule 6A, Pt I, paragraph 7 CA98).

Mergers

In Phase 1 mergers, the decision is notified to the merging parties and a non-confidential version is published on the CMA website (case page). Section 107 of the EA2002 requires the CMA to publish all such decisions, including decisions that a transaction is not a relevant merger situation (that is, a 'found-not-to-qualify' or FNTQ case) and clearance decisions (including *de minimis* cases).

In Phase 2, publication of provisional findings is required by guidance (CMA17) and publication of the final report is required by sections 107(2) and 39 of the EA2002. In addition, decisions on interim measures, undertakings in lieu of a reference under section 73 and final remedy undertakings or orders under section 82 or section 84 consultation requirements are also published in line with schedule 10 publication section 107 (procedural requirements for certain enforcement undertakings and orders).

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

Pursuant to section 46 CA98, parties have the right to appeal certain decisions made by the CMA to the appellate body known as the Competition Appeal Tribunal (CAT).

Decisions of the CMA appealable to the CAT include –

- (a) as to whether national or EU competition laws relating to anti-competitive agreements or abuse of a dominant position have been infringed,
- (b) as to whether to release or not release a party from legally binding commitments,
- (c) as to the imposition of any penalty or as to the amount of any such penalty.

The CAT is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy which hears and decides cases involving competition or economic regulatory issues.

Section 49 CA98 sets out that the CAT's decisions can in turn be appealed to the Court of Appeal in relation to proceedings in England and Wales, the Court of Session in relation to Scottish proceedings and the Court of Appeal of Northern Ireland, in relation to proceedings in Northern Ireland.

Where the law does not provide for an appeal at first instance, an application for judicial review may be brought before the Administrative Court of the Queen's Bench Division under Part 54 of the Civil Procedure Rules.

The right of parties under investigation to appeal a CMA's decision are further explained in CMA8, paragraphs 15.12 to 15.14.

Mergers

The merging parties and any interested third parties may apply to the Competition Appeal Tribunal (CAT) for a judicial review of a decision of the CMA or the relevant Secretary of State under section 120 of the EA2002. "Decision" is broadly defined and includes, for example, a decision to clear, refer or prohibit a transaction, or to reject a complaint in respect of a merger.

Penalties imposed by the CMA can also be appealed before the CAT.

The CAT's decision can in turn be appealed (on points of law only) to the Court of Appeal within 14 days.