

# Transparency and disclosure: Statement of the CMA's policy and approach

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This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## Contents

	<i>Page</i>
1. Introduction .....	1
2. CMA aims in respect of transparency, information requests, and handling of information.....	3
3. Transparency during the course of a case.....	6
4. Obtaining and using information .....	16
5. Complaints and accountability .....	25
6. Disclosure to UK public authorities .....	28
7. Cooperation with overseas public authorities.....	33
8. Freedom of information and data protection .....	39
ANNEXES .....	41
A. Key changes to existing guidance .....	42
B. Status of OFT and CC guidance documents .....	43

## 1. Introduction

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and the Office of Fair Trading (OFT) were transferred to the CMA and those bodies abolished. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 This Statement constitutes an umbrella document guidance which aims to set out the CMA's policy and approach to transparency and disclosure at a high level. In brief, this Statement provides an overview of:
- the aims of the CMA in relation to transparency, information requests and handling of information
  - the CMA's approach to transparency when involved in cases and projects<sup>1</sup>
  - the CMA's approach to gathering information from and disclosing information to parties, and
  - the CMA's approach when considering whether to disclose information to other UK or overseas public authorities.

It also notes the CMA's obligations regarding the protection and disclosure of information under the Enterprise Act 2002 (EA02), Competition Act 1998 (CA98), Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998 (DPA98).

- 1.3 This Statement applies to the CMA's cases, except where stated to the contrary, in particular such work under the CA98, EA02 and consumer enforcement actions.
- 1.4 More detailed guidance on transparency and disclosure as it relates to specific areas of the CMA's work, including the applicable legal provisions, is available in other CMA documents, including:<sup>2</sup>
- *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*

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

<sup>2</sup> In the event of apparent conflict between this guidance and the detailed guidance, the latter prevails.

- *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3)
- *Consumer Protection: Guidance on the CMA's approach to use of its consumer powers* (CMA7)
- *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8)
- *Applications for leniency and no-action in cartel cases* (OFT1495), and
- *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised))<sup>3</sup>.

1.5 Amendments to the *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)) as a result of the changes that are outlined in this Statement are listed in Annexe A to this document.

1.6 This Statement reflects the views of the CMA as at 1 April 2014 and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This Statement may in due course be supplemented, revised or replaced. The CMA's webpages will always display the latest version of the Statement.

1.7 Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this Statement makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the law itself, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the points covered here should consider seeking legal advice.

1.8 The CMA will apply this Statement flexibly. This means that the CMA will have regard to the Statement when dealing with transparency and disclosure but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.

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<sup>3</sup> These documents are available in full on [www.gov.uk/cma](http://www.gov.uk/cma). The webpages also contains a complete list of the CMA's guidance documents.

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

### Overview

- 2.1 The CMA is committed to its aims to be open and transparent about the work it does and how it engages with those directly involved in or affected by its work, while seeking to maintain (as appropriate) the confidentiality of information it obtains in the exercise of its functions. It also aims to be reasonable when requesting and handling information, and to protect confidential information in a manner that is appropriate in the circumstances of the case. Furthermore, the CMA aims to carry out its cases with appropriate efficiency and timeliness, including by having due regard to published timetables and statutory deadlines.
- 2.2 In regard to these aims, the CMA recognises the desirability of taking a consistent approach both when exercising the same functions and across functions. However, for some of the CMA's functions, the procedures and approach the CMA takes in an individual case are influenced or determined by legislation. Similarly the circumstances of a case may determine the CMA's approach in the particular instance.<sup>4</sup>

### Transparency

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

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<sup>4</sup> In particular, the CMA acknowledges that in criminal cartel and criminal consumer investigations, the public interest may weigh in favour of maintaining confidentiality of information rather than disclosure. Where there are parallel criminal and civil cartel investigations, the approach taken in relation to the CA98 investigation will be informed by the approach taken in the criminal case.

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

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

### **Information requests**

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

### **Handling Information**

2.7 The CMA's commitment to transparency is provided in the context of the CMA's duty under the ERA13 to promote competition for the benefit of consumers. The CMA is also under certain statutory obligations to protect confidential information. These obligations apply to the confidentiality of

information relating to individuals and businesses that comes to the CMA in connection with the exercise of its statutory functions. Restrictions on the further disclosure of information apply to the CMA and to other persons to whom it makes disclosure. In particular a person making an unlawful disclosure commits a criminal offence.

2.8 Under the EA02 such specified information<sup>5</sup> may be disclosed in certain specific circumstances, generally referred to as ‘information gateways’. When handling information and considering the appropriateness of making a disclosure, the CMA will be mindful of the need to protect confidential information from unlawful disclosure.

2.9 Further information about these statutory provisions of the EA02 and the DPA98, including the relevant considerations for the CMA before making a disclosure, is to be found in chapters 4, 6, 7 and 8. Further information about the disclosure of information in the course of cases is available in chapter 4. Further information about the disclosure of information to other public bodies (UK and overseas) is provided in chapters 6 and 7 respectively.

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<sup>5</sup> As defined under sections 237 and 238 of the EA02.



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

#### Preparatory work

- 3.1 Before formally opening a case, the CMA typically carries out some preparatory work. For example, it may assess market intelligence and analyse trends in aggregated complaints data. The CMA may also engage with the parties directly involved,<sup>6</sup> for example through pre-notification discussions with merging parties in merger cases or informal preliminary inquiries in markets<sup>7</sup> and CA98 cases. The CMA may also engage with other interested persons, for example through discussions with complainants or other businesses in the market concerned, when it would be helpful to the CMA's case. This enables the CMA to gather information which will inform its early thinking and, where relevant, the decision as to whether to formally open a case. It also enables the parties directly involved to understand at an early stage the potential competition or consumer concerns under consideration.
- 3.2 The CMA will not engage with parties directly involved or other interested persons before the formal case opening decision where doing so may prejudice the investigation, for example in CA98 cases prior to unannounced site visits or witness interviews. This is particularly relevant, for example, in the case of suspected cartels, where the CMA is unlikely to contact the persons under investigation until after a formal investigation has been opened, unless they are already cooperating as leniency applicants or if the party directly involved is an informant.

#### Announcing a formal case opening decision

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

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<sup>6</sup> For the purposes of this document, 'parties directly involved' does not include complainants. In CA98 investigations, the CMA may provide Formal Complainants with access to the same information as available to the parties directly involved at the outset of its formal investigation. Refer to the guidance on *Involving third parties in Competition Act investigations* (OFT451) and *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8) for further guidance on the involvement of third parties in CA98 investigations, including guidance on when complainants may be given Formal Complainant status.

<sup>7</sup> For example, using its general review functions the CMA might engage with market participants prior to any launch of a market study (see *Market Studies and Market Investigation: Supplemental guidance on the CMA's approach* (CMA3)).

- in Phase 1 merger cases, the CMA confirms by notice to the merging parties that the merger notice is satisfactory<sup>8</sup> or (where the CMA is not dealing with a merger notice) that it otherwise has sufficient information to enable it to begin its investigation<sup>9</sup>
- in Phase 2 merger cases, the CMA makes a merger reference<sup>10</sup>
- in relation to market studies, the CMA serves notice of the launch of a market study<sup>11</sup>
- in relation to market investigations, the CMA makes a market investigation reference<sup>12</sup>
- in relation to super complaints, the CMA receives the super complaint<sup>13</sup>
- in CA98 investigations, the CMA decides that the legal test in the CA98<sup>14</sup> has been met (thus allowing the CMA to use its formal investigation powers) and that the case falls within its prioritisation principles
- in criminal cartel investigations, the CMA decides that there are reasonable grounds for suspecting that a criminal cartel offence has been committed<sup>15</sup> and that the case falls within its prioritisation principles
- in consumer enforcement actions, the CMA decides to launch an investigation of a case which falls within its prioritisation principles,<sup>16</sup> and
- in relation to the review of undertakings and orders,<sup>17</sup> the CMA launches a review of the undertakings or orders.<sup>18</sup>

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<sup>8</sup> A merger notice must meet the requirements under section 96(2) of the EA02. Where the CMA is satisfied that these requirements are met it must give notice to that effect to the person who submitted the merger notice (section 92(2A) of the EA02).

<sup>9</sup> Under section 34ZA(3) of the EA02.

<sup>10</sup> Under section 22(1) or 33(1) of the EA02.

<sup>11</sup> Under section 5 and 130A of the EA02.

<sup>12</sup> Under section 131(1) of the EA02.

<sup>13</sup> The super-complaint must satisfy the criteria in section 11(1) of the EA02.

<sup>14</sup> Under section 25 of the CA98, the CMA may use its formal investigation powers where it has reasonable grounds for suspecting that competition law has been breached.

<sup>15</sup> Under section 192(1) of the EA02.

<sup>16</sup> Under the relevant consumer protection legislation.

- 3.4 In regulatory reference and appeal cases the CMA's involvement in the case will be on a formal footing when the reference or appeal is made. Similarly with market references, referred by a regulator or minister, the CMA's formal involvement commences when the reference is made. On other occasions the CMA may work with concurrent regulators on a pre-launch or market study prior to the market reference being made.
- 3.5 The CMA will, usually inform the parties directly involved of the decision to formally open a case (see paragraph 3.7). This may be done during the course of otherwise regular contact between the case team and the parties directly involved, through a notice to the notifying parties in Phase 1 mergers and market studies, through a Phase 2 opening letter<sup>19</sup> in Phase 2 merger inquiries and market investigations, or through a case initiation letter in CA98 investigations and civil consumer enforcement actions. However, it will not be appropriate to inform the parties directly involved (as soon as a case is opened) when doing so may prejudice an investigation. For example, in CA98 and cartel investigations such information may prejudice the investigation by undermining the CMA's ability to conduct unannounced site visits or execute search warrants. In such cases, the parties directly involved will be informed of the formal case opening decision, and an announcement will be made, as soon as it is possible to do so without prejudicing the investigation. In cartel cases suspects are usually made aware of the investigation when they are arrested and/or when search warrants are executed.
- 3.6 In relation to cases involving many parties, for example market studies, market investigations or certain consumer cases, undertakings in the relevant sector will not always be informed individually of the CMA's decision before the case opening announcement is placed on [www.gov.uk/cma](http://www.gov.uk/cma). Use of the webpages in such circumstances is an efficient means of communicating with the possibly large number of parties directly involved and may be the only means when not all such parties are identified by the CMA.
- 3.7 When the parties directly involved are informed of the formal case opening decision, the CMA will also provide them with the following information:
- a brief description of the case, the relevant legislation, the industry sector concerned and the CMA's reasons for starting a formal case. The level of

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<sup>17</sup> This does not apply to undertakings and orders under Part 8 of the EA02 or the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).

<sup>18</sup> Sections 92(1) and (2)(b) and (c) and 162(2)(b) and (c) of the EA02.

<sup>19</sup> Previously called 'First Day Letter'.

information may vary according to the circumstances of the case. It may not be appropriate to name the parties directly involved at this early stage of a case

- an indicative timetable showing the anticipated dates of key milestones,<sup>20</sup> and
- the contact details for the main CMA contacts for the case including the first point of contact for general queries and submission of information.

3.8 At this early stage or shortly afterwards, the CMA may be able to provide the parties directly involved with other information about the case, such as potential timescales for state of play meetings (for example, in Phase 1 merger cases and CA98 investigations) and the identity of the person or persons within the CMA who will be responsible for key decisions.<sup>21</sup>

3.9 In all cases other than criminal cartel and criminal consumer investigations,<sup>22</sup> the CMA will place a case opening announcement on [www.gov.uk/cma](http://www.gov.uk/cma) announcing its decision to formally begin a case except if to do so would prejudice the case or would otherwise be inappropriate. At the same time as or following the public announcement of a case opening, the CMA will also publish, if and as soon as reasonably practicable, the information referred to in paragraph 3.7.

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

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<sup>20</sup> At this stage in a case, there may be few key milestones – for example, in merger cases, the only milestone at this stage will be the statutory deadline for a Phase 1 review.

<sup>21</sup> Further information regarding the decision making procedures across the CMA can be found in the *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) (chapter 7), *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3) (chapter 1), *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8) (chapters 11 and 13) and *Consumer Protection: Guidance on the CMA's approach to use of its consumer powers* (CMA7) (for detail on CMA's approach to compliance and enforcement of consumer protection law, see chapter 5), referred to in paragraph 1.4.

<sup>22</sup> As noted in footnote 4, where there are parallel civil cartel investigations, the approach taken in civil cartel investigations will be informed by the approach taken in the criminal case.

## Engagement with relevant parties and announcements during a case

3.11 An important aspect of ensuring that the CMA is transparent in its work is the way it engages with relevant parties over the course of a case. The timing and manner of engagement will vary depending on the type of work involved.<sup>23</sup>

When considering the manner and timing of engagement, the CMA will have regard to the need to ensure due process for both the parties directly involved and other interested persons. The CMA will also have regard to the need to conduct investigations effectively and efficiently, and the need to reach properly reasoned decisions.

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

- in CA98 investigations, if it proposes to make a decision, the CMA must issue a Statement of Objections (SO) to any party suspected of a breach of the CA98<sup>24</sup>
- in relation to a provisional decision to make a market investigation reference, the CMA must consult in such a manner as it considers practicable any persons on whose interest the decision is likely to have substantial impact and publish a notice of the proposal<sup>25</sup>
- in mergers and markets cases the CMA must consult affected parties on undertakings in lieu,<sup>26</sup> proposed final orders and undertakings, and publish its provisional findings and possible remedies in Phase 2 merger inquiries and market investigations,<sup>27</sup> and
- in civil consumer enforcement actions it must generally (but not always), before making an application for an enforcement order, engage in appropriate consultation with the party against whom the enforcement order would be made.<sup>28</sup>

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<sup>23</sup> Refer to the CMA guidance relating to mergers, markets, CA98, and consumer protection referred to in paragraph 1.4 for further guidance.

<sup>24</sup> Rule 4 of the Competition and Markets Authority Competition Act 1998 Rules 2014.

<sup>25</sup> Section 131A(2) and 169(6)(a)(i) of the EA02.

<sup>26</sup> Sections 90 and Schedule 10 in respect of mergers and 155(1) of the EA02 (the CMA must publish a notice of the proposed undertakings in relation to market studies).

<sup>27</sup> Section 104(1) and (2) of the EA02.

<sup>28</sup> Section 214(1) of the EA02.

- 3.13 The CMA is not subject to a general obligation to disclose its thinking in advance of consulting on its provisional decisions. However, the CMA will take a flexible approach to sharing its developing thinking and/or evidence with parties directly involved and (if appropriate) other interested persons prior to this, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of their case. The CMA may share its developing thinking or evidence when doing so would be helpful to the progression of the case at appropriate stages, to verify the information it has received or when it is otherwise appropriate to do so. For example, the CMA may provide to the parties directly involved and other interested persons the results of research or surveys relevant to a market study or investigation; or disclose publicly parties' key submissions in Phase 2 merger inquiries and market investigations.<sup>29</sup> The CMA may also share its developing thinking more widely through publishing the fact and/or details of such thinking, including on [www.gov.uk/cma](http://www.gov.uk/cma). This includes an announcement on the issuing of an SO in CA98 investigations, on making an application for an enforcement order in civil consumer enforcement actions and on a decision to prosecute in a criminal investigation in appropriate cases.
- 3.14 The CMA will seek to ensure that the parties directly involved are aware of the decision making procedures which apply to their case, and the identity of the person or persons within the CMA who will be responsible for key decisions during the course of the case. Other interested persons are also able to contact the CMA to share their views. The CMA may also itself contact other parties to request information or seek their views on the case, where doing so would assist the CMA in exercising its functions.

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

- 3.15 Publication of case closure announcements and decisions is a means of enhancing the visibility of the CMA's completed work, and of widening its impact, as well as enabling interested persons to hold the CMA to account.
- 3.16 On completing a case in relation to which a formal case opening announcement has been made, the CMA will publish the outcome on [www.gov.uk/cma](http://www.gov.uk/cma) and usually issue a press notice with a link to the relevant

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<sup>29</sup> Further detail on the CMA's approach to disclosure in such inquiries or investigations may be found in *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)).

pages on [www.gov.uk/cma](http://www.gov.uk/cma). The potential outcomes that will be announced include:

- in Phase 1 merger cases, a clearance decision, a Found Not to Qualify Notice or the CMA deciding to make a merger reference or accept undertakings in lieu of a reference<sup>30</sup>
- in Phase 2 merger case, a no Substantial Lessening of Competition (SLC) decision, an SLC with or without remedies (including a prohibition) or cancellation of reference decision<sup>31</sup>
- in Phase 1 markets cases (that is, market studies), the CMA deciding not to make a market reference, to make a market reference or to accept undertakings in lieu of a reference<sup>32</sup>
- in Phase 2 markets cases, a no Adverse Effects on Competition (AEC) finding, an AEC finding with or without remedies<sup>33</sup>
- in relation to super-complaints, a response stating what action, if any, it proposes to take in response<sup>34</sup>
- in CA98 investigations, where the CMA's investigation is resolved through closing an investigation on administrative priorities, issuing a non-infringement decision, a decision that there are no grounds for action by the CMA, by accepting commitments from a business about their future conduct, or a final decision that particular conduct amounts to an infringement of the CA98<sup>35</sup>
- in criminal investigations, the outcome of a prosecution or a decision to close an investigation<sup>36</sup>

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<sup>30</sup> Made under sections 22(2), 33(2) and 73 of the EA02. Publicity requirements in respect of these decisions are in section 107(1) of the EA02.

<sup>31</sup> Section 37(1) of the EA02.

<sup>32</sup> Made under sections 131(1) and 154(2) of the EA02. Publicity requirements in respect of these decisions are in section 172(1) of the EA02.

<sup>33</sup> Section 136(1) of the EA02.

<sup>34</sup> Section 11 of the EA02.

<sup>35</sup> Sections 31(2), 31A and 31B.

<sup>36</sup> Sections 188, 188A, 188B and 192(1) of the EA02.

- in consumer enforcement actions, the outcome of a court action (with a link to the decision where possible), the successful negotiation of undertakings, a conclusion that there is insufficient evidence to continue an investigation, or a case closure decision on prioritisation grounds<sup>37</sup>
- in reviews of undertakings and orders,<sup>38</sup> a decision to vary, release, revoke or continue to enforce an undertaking or order,<sup>39</sup> and
- in regulatory references and appeals, the final decision on the reference or appeal.<sup>40</sup>

3.17 The level of detail published will reflect the CMA's statutory requirements and depend on the nature of the outcome, while also having regard to the CMA's transparency aims and the need to protect confidential information. In cases where a detailed decision has been issued, the CMA will publish a non-confidential version of the decision on [www.gov.uk/cma](http://www.gov.uk/cma). For those cases in relation to which a formal case opening announcement has been made, if the CMA decides to close a case on the basis of prioritisation grounds, the CMA will explain why this is the case.

### **Notice of announcements**

3.18 The CMA will in the majority of cases give the parties directly involved such advance notice as it considers fair and sufficient before making any public announcements, either during or at the end of the case. The CMA will aim to balance an open approach with the need to ensure the orderly announcement of full information.

3.19 It will in particular be mindful of the risk of leakage of information shared on a confidential basis with parties in advance of the CMA's public announcement. Such leakage may result in selective and/or misleading reporting in the press.

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<sup>37</sup> Sections 215(1), 219(2) and 220(2) and (3) of the EA02 and other relevant consumer protection legislation.

<sup>38</sup> This does not apply to undertakings and orders under Part 8 of the EA02 or the UTCCRs.

<sup>39</sup> Sections 82(2), 84(3)(b), 92(2), 159(4) and (5), 161(4)(b) and 162 of the EA02.

<sup>40</sup> Under relevant sectoral legislation. See Schedule 6 of the ERRA13 for more detail as to the amended form of the relevant provisions of sectoral regulation concerning regulatory appeals and references.



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

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

3.21 Where there are no market or other sensitivities about the fact or date of the announcement, the CMA will be open about the date and will generally inform media organisations of this before the date. The CMA will inform the parties directly involved in advance of informing the media. As a general rule, in non-market-sensitive announcements, the CMA aims to give the parties directly involved advance sight of the content of the CMA's announcement, in confidence, unless there is a compelling reason not to do so. However, the CMA will not, as a matter of course, discuss the text of press releases with parties in advance of issue.

3.22 When making a market-sensitive announcement, the CMA will, when appropriate, apply the Financial Conduct Authority's (FCA) 'Guidelines for the control and release of price sensitive information by Industry Regulators' (originally published by the Financial Services Authority (FSA)).

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

- aim to make the announcement before relevant financial markets open and generally at 7am on the date of issue, except in Phase 1 mergers cases and in other exceptional circumstances (for example because of information leaking to the media or where legal proceedings are concerned)
- when the announcement date is not already in the public domain, the CMA will advise those directly affected of the announcement the evening before issue once relevant financial markets have closed – this might be out of hours, in which event the CMA will have requested out of hours contact details in advance, and
- typically, including where there are multiple parties, the CMA will provide those directly involved with a confidential text of the press release and any document which is to be published alongside the press release at least one hour in advance of issue.

### **Dealing with the media when making an announcement**

3.24 For non-market-sensitive announcements, the CMA may sometimes brief the media in advance of the making a public announcement under an agreed

'embargo'. When this happens the parties and other relevant stakeholders such as trade bodies will be notified of the embargo. On occasion this may involve spokespeople giving interviews to both broadcast and print media in advance under an embargo.

- 3.25 When making a market-sensitive announcement, the CMA never discusses the content with the media beforehand. The CMA may confirm that an announcement will take place on a certain day, at a certain time, and in some cases the CMA will agree in advance to interview requests for broadcast media.
- 3.26 Where the CMA statement is not known about in advance by the media due to market sensitivity issues, and where giving broadcasting interviews is appropriate, it will be the CMA's practice to have spokespeople available in the expectation of receiving interview requests shortly after an announcement.
- 3.27 Once a market-sensitive announcement has been made, the CMA will respond to media enquiries and, where appropriate, make spokespeople available for broadcast and print interviews.

## 4. Obtaining and using information

### Requests for information

- 4.1 In respect of many of the CMA's functions the CMA has formal information gathering powers.<sup>41</sup> Such powers enable the CMA to request, for example, data, documents or forecasts, or require persons to attend as witnesses to give evidence. When it does not have, or does not use, formal powers, it relies upon the co-operation of parties and requests information on an informal, voluntary, basis. In practice, even where formal information gathering powers exist, the CMA will often request information on an informal basis. In either case, the CMA's approach as set out below is similar.<sup>42</sup>
- 4.2 The CMA will make evidence based decisions. Therefore the availability to it of evidence and accurate information is a key factor affecting the performance of the CMA, as is the ability to conduct cases in a timely manner. The CMA fully recognises that when making information requests, this will have an impact on others, whether they are businesses, consumers or organisations. While formulating information requests, the CMA will therefore strive to avoid imposing unnecessary burdens on such persons while considering also the need for the CMA to operate efficiently and effectively.
- 4.3 The CMA seeks to address these aims by:
- considering the information that is required for the CMA's purposes
  - preparing clear and focused information requests
  - addressing requests to those best placed to provide the information
  - discussing, where practicable and appropriate, the request with the intended recipient prior to sending a request, including discussion of the information held by the recipient and the form in which it is held

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<sup>41</sup> For example, formal powers are available in mergers (see chapter 7 of *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2)), market cases (see *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3): chapter 2 for market studies, chapter 3 for market investigation references and chapter 4 for remedies), CA98 investigations (see chapter 6 of the *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8)), criminal cartel investigations, regulatory reference and appeal cases and in respect of various consumer enforcement cases (see *Consumer Protection: Guidance on the CMA's approach to use of its consumer powers* (CMA7), chapters 6 and 7 on investigatory powers).

<sup>42</sup> See relevant tool specific guidance for more details in specific areas of work.

- considering the likely timescale in which the intended recipient will be able to provide the information, and
  - considering how soon the CMA requires the information, having regard to the administrative or statutory timetable of the case and the impact a delay in receiving the information may have on the CMA's efficiency or quality of the CMA's work.
- 4.4 These factors may be relevant to many of the CMA's information requests, whether at the outset of a case or while the case is ongoing. The extent of engagement prior to making an information request may vary. For example, at the outset of a Phase 2 merger inquiry or market investigation the CMA will generally discuss with key parties the information they hold and the form in which they hold it. This will help to influence the preparation of the information questionnaires that are typically used in the early stage of such inquiries or investigations.
- 4.5 Where it is practicable and appropriate, the CMA will discuss a draft of its information requests with the intended recipients so as to enable requests to be prepared that reduce the burden on the recipients (for example, by helping to shape requests, having regard to how information is held by the relevant parties). However, this approach may not always be possible, for example when the case involves multiple parties, each holding the information differently; or where the CMA is under time pressure to meet a statutory (or administrative) deadline. Examples of when the CMA may not provide any advance notice of a proposed information request prior to exercising its formal investigation powers include when it is concerned that there is a risk that the information could be destroyed, urgency or because the request is for a small amount of information, making it inefficient to do so. The CMA will consider representations about the scope of any information request and deadline for compliance.
- 4.6 The CMA will seek to set a reasonable deadline for all information requests and where draft formal requests have been issued the final request will have considered any representations on the proposed deadline.
- 4.7 It is likely that during the course of a case the CMA will seek additional information. When doing so, the same factors identified in paragraphs 4.3 to 4.6 are again likely to be relevant.
- 4.8 Parties should make known any difficulties and discuss any queries raised by any information request including any difficulties in responding within the timeframe set out in a request by contacting the case team as soon as

possible after receiving a request, or as soon as they become aware that they may not meet the stipulated deadline.

- 4.9 The CMA may impose administrative financial penalties for non-compliance with some of the CMA's formal information gathering powers in relation to CA98 investigations, and its mergers and markets cases. Any decision to impose a penalty for failure to comply with a formal request for information may take into account (but will not depend on) whether the CMA had sent a draft request and set a deadline for compliance which took into account comments from that party.<sup>43</sup>
- 4.10 Prior to commissioning a survey as part of the information gathering process, the CMA will consult such of the parties directly involved as it considers appropriate on the draft survey design and content. The CMA may also require parties directly involved to provide information about their customers and suppliers.

### **Identifying confidential information**

- 4.11 The CMA recognises that the confidentiality of parties' information is an important consideration for those who participate in a CMA case.
- 4.12 The CMA may therefore require that, in respect of all information supplied, parties should make known to the case team which information they consider to be confidential, and provide sufficient explanations for their claim, for example, regarding the nature of the information, the harm that could be caused, the likelihood of harm and the magnitude of that harm. The explanations provided will be taken into account when considering whether to disclose any of the information provided. The CMA's commitment to transparency means that confidentiality claims will be rigorously assessed. Such claims should be kept to the minimum extent necessary to protect confidentiality, and the CMA will not accept blanket or unsubstantiated claims for confidentiality. Having taken into account parties' confidentiality representations, the CMA will ultimately decide whether it is appropriate to disclose the information and, if so, the manner in which that disclosure should occur.
- 4.13 When providing key or substantial submissions, parties should also provide a second, non-confidential version. The CMA will permit a short interval for the

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<sup>43</sup> Detailed guidance on the CMA's approach to penalties and other sanctions is available in *Administrative Penalties: Statement of policy on the CMA's approach (CMA4)*.

provision of a non-confidential version, but the exact period permitted will differ depending on the type of work and will take into account the possibility that a delay in receiving confidentiality claims may adversely affect the CMA's statutory or administrative timetable.

4.14 Information may be viewed as 'confidential information' if it is:

- information whose disclosure the CMA thinks is contrary to the public interest
- commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
- information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual's interests.<sup>44</sup>

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

- information that is already in the public domain or can readily be deduced from information in the public domain, and
- financial information or other data<sup>45</sup> relating to a business which is more than two years old.

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

- financial information or other data<sup>46</sup> relating to a business which is less than two years old
- information which, if disclosed, may adversely affect the competitive process in the market

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<sup>44</sup> See also Rule 1 of the Competition and Markets Authority Competition Act 1998 Rules 2014, which defines confidential information in the context of CA98 investigations.

<sup>45</sup> This could include, for example, parties' turnover, sales, market share data, etc.

<sup>46</sup> See footnote 45.

- information relating to the strategy (past or future) of a business, and
- responses to surveys (in aggregate or individually), the disclosure of which could be harmful to a firm or individual or where the identity of the person providing the information should be protected.

### **Disclosure of information obtained by the CMA**

4.17 The CMA may use any information that it obtains during a case for the purposes of facilitating the exercise of any of its statutory functions. Part 9 of the EA02 imposes a general restriction on the disclosure of information which the CMA obtains during the exercise of any of its functions (referred to as ‘specified information’) to other persons.<sup>47</sup> The restriction applies during the lifetime of an individual or while the undertaking continues in existence. Only disclosure falling within one of the ‘information gateways’ (see below) is permitted.

4.18 The CMA may disclose specified information if:

- the CMA obtains the required consents (section 239 of the EA02)
- the disclosure is required for the purpose of a European obligation (section 240 of the EA02)
- the disclosure is made for the purpose of facilitating the exercise by the CMA of any of its statutory function (section 241(1) of the EA02)
- the information is disclosed to another public authority in the UK for the purpose of facilitating the exercise by that authority of its functions under the EA02 and/or the legislation set out in Schedule 15 of the EA02<sup>48</sup> (under section 241(3) of the EA02)
- the information is disclosed to any person (after the CMA satisfies itself that the disclosure is proportionate to what is sought to be achieved by it) (under section 242 of the EA02)
  - in connection with the investigation of any criminal offence in any part of the UK

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<sup>47</sup> Section 237 of the EA02.

<sup>48</sup> See chapter 6 for further detail on the application of Part 9 of the EA02 to disclosures to UK public authorities, and chapter 7 for detail on the application of Part 9 to disclosures to overseas public authorities.

- for the purposes of any criminal proceedings there or
  - for the purpose of any decision whether to start or bring to an end such an investigation or proceedings,
- the disclosure is to facilitate the performance of an overseas public authority's functions (under section 243 of the EA02).
- 4.19 The CMA may also disclose (under section 241A of the EA02) specified information which has been ordered by the Secretary of State to be 'prescribed'<sup>49</sup> information to any person for the purposes of:
- actual or prospective prescribed civil proceedings in the UK or elsewhere
  - obtaining legal advice in relation to such proceedings, or
  - establishing, enforcing or defending legal rights that are or may be the subject of such proceedings.
- 4.20 The information gateways of section 241A and 243 of the EA02 do not apply to all information received by the CMA (for example, in connection with a merger, market or CA98 investigation).<sup>50</sup>
- 4.21 Where the CMA discloses information to a person there are restrictions on the further disclosure or use of the information by that person. These restrictions vary between the information gateways. It is a criminal offence to disclose information in circumstances where such disclosure is not permitted under Part 9 of the EA02, where a person contravenes a direction under section 243(4) of the EA02 not to do so, or where a person uses the information disclosed to him for a purpose not permitted under the Part 9 of the EA02.<sup>51</sup>
- 4.22 Generally, if the CMA is considering making a disclosure for the purpose of its investigation, it will most commonly consider making the disclosure with the consent of the person to whom the information relates or by the information gateway under section 241(1) of the EA02.

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<sup>49</sup> For these purposes 'prescribed' means prescribed by order of the Secretary of State. As at the date of publication of this Statement, the Secretary of State has issued one order prescribing certain information and proceedings for the purposes of this section (the Enterprise Act 2002 (Disclosure of Information in Civil Proceedings etc) Order 2007, SI 2007/2193).

<sup>50</sup> See section 241A(2) and section 243(3) of the EA02 respectively.

<sup>51</sup> Section 245 of the EA02.



- 4.23 Even when an information gateway applies, the CMA is required to have regard to certain considerations before making a disclosure. In particular, the CMA must have regard to the three considerations set out in section 244 of the EA02, namely:
- the need to exclude from disclosure (so far as it is practicable to do so) any information whose disclosure the CMA considers to be contrary to the public interest
  - the need to exclude from disclosure (so far as practicable)
    - commercial information the CMA considers might significantly harm the legitimate business interests of the undertakings or
    - information relating to the private affairs of an individual which the authority thinks might significantly harm that individual's interests,
  - the extent to which the disclosure of information relating to the private affairs of an individual or commercial information is necessary for the purpose for which the authority is permitted to make the disclosure.
- 4.24 These three considerations are applied by the CMA on a case-by-case basis when the CMA is considering disclosure of specified information. When decisions are finely balanced, the CMA will have particular regard to the need for disclosure to achieve due process.

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

- 4.25 The remainder of chapter 4 provides an overview of the CMA's approach to disclosure, both to parties directly involved and to others, in connection with the conduct of the CMA's case. Chapter 4 also applies when a public authority is a party in Phase 2 references and appeals. The CMA's approach to the disclosure of specified information to other public authorities, including sectoral regulators and overseas public authorities in other circumstances, is explained in chapters 6 and 7 of this Statement.
- 4.26 If an information gateway other than the consent gateway in section 239 of the EA02 applies, and the CMA considers, having taken into account the relevant statutory considerations, that it is appropriate to make the disclosure, it is not obliged to obtain the consent of the party to whom the information relates. However, the CMA will consider a party's representations regarding the confidential nature of any information they have provided.

- 4.27 The CMA will generally seek to inform the party claiming confidentiality or the party to whom the information relates of its intention to make a disclosure. When giving such advance notice, the CMA will provide details of the information it proposes to disclose relevant to the person concerned for example by way of a description, inventory or draft of the proposed disclosure. Other than when legally required to provide notice and besides the circumstances set out in chapter 6 and 7, the CMA might choose not to do so if, for example, it considers that the party has already had sufficient opportunity to submit confidentiality claims, or if the CMA has sought to protect the information to be disclosed (for example, by anonymising or aggregating data).
- 4.28 When the CMA considers it appropriate to disclose information it will consider how best to protect confidential information. For example, the CMA may redact, anonymise or aggregate confidential information, such as by providing ranges in relation to market share data.<sup>52</sup>
- 4.29 Sometimes, the CMA may use confidentiality rings or data rooms as a means of making disclosure of confidential information while recognising the restrictive nature of the disclosure (see below). Their use will be restricted to when it is necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process although in CA98 investigations, the CMA may also use confidentiality rings at access to file stage to handle the disclosure of confidential information where there appear to be identifiable benefits in doing so.<sup>53</sup>
- 4.30 Confidentiality rings enable disclosure of specific quantitative and/or qualitative data or documents to a defined group.<sup>54</sup> The group is determined on a case-by-case basis but, generally, disclosure is made to the relevant parties' external (legal and/or economic) advisers.
- 4.31 Data rooms enable access to a specific category of confidential data or documents to a defined group. As for confidentiality rings, the group is

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<sup>52</sup> Particular procedures apply to the disclosure of information provided by would-be leniency applicants (see *Applications for leniency and no-action in cartel cases* (OFT1495), in particular chapter 7). For further guidance on disclosure in Phase 2 merger inquiries and market investigations, see *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)), paragraphs 9.11-9.15.

<sup>53</sup> See *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), chapter 11 for further guidance.

<sup>54</sup> Subject to any restrictions in the DPA98 in relation to personal information.

determined on a case-by-case basis. Data rooms are typically used to provide access to data to enable parties' advisers to gain further understanding of the CMA's analysis and to confirm or challenge the CMA's findings or conclusions. They may also be used to allow advisers to carry out an assessment of a specific set of qualitative documents. A data room provides access to the confidential data or documents on the CMA premises, and in so doing has the advantage of providing additional protection.

- 4.32 Access to documents in a confidentiality ring or data room will be subject to confidentiality undertakings provided by the persons with access (and for employees, their employer firm) which address, amongst other matters, how they may use the information disclosed to them and the restrictions that apply to onward disclosure. In the case of data rooms, the CMA will also require advisers to follow data room rules concerning the proper conduct of the data room, including making provision for bringing into and taking out of the data room such items as materials, notes and equipment.
- 4.33 It will be a condition of access to a confidentiality ring or data room that information reviewed by advisers is not shared with their client(s). It is for advisers to satisfy themselves of the steps they are required to take under any relevant professional conduct rules to ensure that they are able to operate on this basis.
- 4.34 Requests for the use of confidentiality rings and data rooms will be considered on a case-by-case basis. The CMA has discretion as to whether to agree to such requests, and is likely to do so only where it is proportionate, there are clear benefits in doing so, and potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned. The CMA will also take into account whether it is appropriate to provide access at the time the request is made, having regard to the progress of the case, the resource implications of operating confidentiality rings and data rooms, and of risks of human error and information leaks.

## 5. Complaints and accountability

### Disputes regarding the conduct of a case

- 5.1 Parties should raise any complaints about the conduct of an ongoing CMA case with the most senior CMA contact responsible for that case, who will review the case team's actions and aim to either put things right, or give an explanation for the course of action taken by the case team.
- 5.2 If a party is not satisfied with the senior CMA contact's response, they may request a review of the handling of their complaint by:
- the Procedural Officer (PO), where the complaint concerns certain procedural disputes in CA98 investigations,<sup>55</sup> and disputes relating to requests for confidentiality in merger cases<sup>56</sup> and market studies and investigations, or
  - the General Counsel's Office (GCO) in relation to any disputes falling outside the PO's remit.
- 5.3 This does not alter the procedures in place for submitting general complaints about the CMA or about closed cases, which should be addressed in the first instance to the CMA Enquiries Unit, who will then escalate as and when appropriate.
- 5.4 The CMA's decisions in merger cases, market studies and market investigations are subject to appeal to the Competition Appeal Tribunal (Tribunal), which will apply the same principles as would be applied by a court on an application for judicial review in dealing with the review. The CMA's decisions in CA98 investigations are subject to a full merits review by the Tribunal. In addition, parties with sufficient interest have the right to seek judicial review of administrative decisions.

### Accountability

- 5.5 The CMA is accountable to the public through Parliamentary scrutiny in Westminster and the devolved administrations, for example through inquiries by select committees.

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<sup>55</sup> Further information on the role of the Procedural Officer can be found in *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8).

<sup>56</sup> In Phase 1 merger cases, the procedure will only apply to disputes regarding the confidentiality of information that the CMA proposes including in published decisions.

5.6 A member of the public may complain to the Parliamentary and Health Service Ombudsman (Ombudsman)<sup>57</sup> via a Member of Parliament about the CMA's administrative actions, after seeking to resolve the complaint with the CMA. The CMA will have regard to the Ombudsman's Principles of Good Administration, which are:

- getting it right
- being customer-focused
- being open and accountable
- acting fairly and proportionately
- putting things right, and
- seeking continuous improvement.

## **Publications**

5.7 Each financial year, the CMA will produce an Annual Plan, setting out its objectives for the year, which is laid before Parliament. The CMA is accountable to Parliament for the delivery of these objectives via the presentation of its Performance Report.

5.8 The CMA will aim to provide consistent information in its Performance Report<sup>58</sup> for all closed consumer and competition enforcement cases, mergers casework, markets casework, reviews of undertakings and orders and regulatory appeals. This information will include:

- the date the case was opened
- a summary of the findings and/or recommendations, and
- the date the case was closed and the time taken to complete it.

5.9 The CMA will also provide information in its Performance Report on its ongoing work that is in the public domain.

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<sup>57</sup> Further information available on the Ombudsman's website at [www.ombudsman.org.uk/](http://www.ombudsman.org.uk/).

<sup>58</sup> The CMA is required, under paragraph 14 of Schedule 4 of the ERR13, to provide certain information in an annual performance report.

- 5.10 The CMA will publish a Business Plan for each spending review period, setting out its vision, high-level priorities and planned expenditure over the spending review period. Information regarding the Business Plan will be available on [www.gov.uk/cma](http://www.gov.uk/cma).
- 5.11 The CMA is required to prepare resource accounts for each financial year, which are audited by the National Audit Office.

## 6. Disclosure to UK public authorities<sup>59</sup>

- 6.1 As explained in chapter 4, Part 9 of the EA02 imposes a general restriction on the disclosure of information which the CMA obtain during the exercise of any of its functions (referred to as ‘specified information’) to other persons. The restriction applies during the lifetime of an individual or while the undertaking continues in existence. Only disclosure falling within one of the ‘information gateways’ is permitted. These restrictions apply to the exchange of information between public authorities.
- 6.2 The CMA may however disclose specified information where an information gateway exists.<sup>60</sup> The information gateways that most commonly apply when the CMA is considering disclosure to another UK public authority are:
- the CMA obtains consent (section 239 of the EA02)
  - to facilitate the CMA’s functions (section 241(1) of the EA02)
  - to facilitate the exercise of other UK public authorities’ functions under the EA02 and/or other legislation as set out in Schedule 15 of the EA02 (section 241(3) of the EA02)<sup>61</sup>
  - for the purpose of civil proceedings (section 241A of the EA02),<sup>62</sup>
  - for the purpose of criminal proceedings (section 242 of the EA02).<sup>63</sup>
- 6.3 As explained in chapter 4, there are restrictions that apply to the use and further disclosure of information disclosed under the information gateways. For further information see chapter 4. When information is disclosed by the CMA for the purpose of the CMA’s functions, the receiving authority may not further disclose that information without the agreement of the CMA,<sup>64</sup> and the

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<sup>59</sup> The explanations in chapter 4 about making information requests and the handling of information may also be applicable to public authorities when they are treated as a party in Phase 2 merger and market references and appeals. This chapter applies when the CMA is considering disclosure of information to another UK public authority.

<sup>60</sup> The full list of information gateways is provided in paragraph 4.18 of chapter 4.

<sup>61</sup> For example, other governmental departments, Trading Standards Service and sectoral regulators

<sup>62</sup> This gateway is not applicable in relation to information received by the CMA while exercising its merger, market and CA98 functions. Further information about this information gateway is set out in paragraphs 4.19 and 4.20.

<sup>63</sup> See also footnote 4.

<sup>64</sup> Section 241(2) of the EA02.

receiving authority may only use the information for the purpose for which the CMA disclosed it.<sup>65</sup> When information is disclosed by the CMA under other information gateways (apart from section 239 of the EA02) the information may only be used for the purpose of the disclosure.

- 6.4 As explained in chapter 4, it is a criminal offence to disclose information in circumstances where such disclosure is not permitted under Part 9 of the EA02, where a person contravenes a direction under section 243(4) of the EA02 not to do so, or where a person uses the information disclosed to him for a purpose not permitted under the Part 9 of the EA02.<sup>66</sup>

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

- 6.5 Even where an information gateway is relevant, the CMA must consider the statutory considerations in section 244 of the EA02 (see paragraph 4.23 for more details) before deciding whether or not to disclose the information. In assessing whether the disclosure is 'necessary for the purpose'<sup>67</sup> the CMA will have regard to the extent to which it believes the disclosure of the information may be relevant to the receiving authority's investigation or other statutory function.
- 6.6 The CMA will therefore assess the function or purpose for which the information is required and the scope of the information requested. In this context, the CMA will require the authority requesting the information (the requesting authority) to provide details of the function or purpose for which the information is required and/or, if it is an information request, to specify the scope of the information request. In cases where the CMA is considering whether to disclose information on its own initiative, it will form a preliminary view on whether there is a suitable statutory gateway, although it will normally liaise with the relevant public authority to clarify the point.
- 6.7 When considering whether to disclose information under the information gateways, the CMA will take into account the sensitivity of the information and any representations received from the person to whom the information relates. In some circumstances, the CMA may consider it appropriate to restrict the information disclosed for example through anonymisation, aggregation or provision of ranges.

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<sup>65</sup> Section 241(2A) of the EA02.

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

<sup>67</sup> Section 244(4) of the EA02.



- 6.8 The CMA will take into account the protection of the information afforded by any restrictions that apply on the use and further disclosure of the information. In the absence of information to the contrary, and provided the Part 9 of the EA02 restrictions on use and further disclosure (or equivalent legislative provisions affording the same or greater protection) apply, the CMA will consider that a recipient public authority will be mindful of the need to protect any specified information passed on to it so that the risks of inappropriate use or disclosure are limited. The CMA will not regard the disclosure of specified information to another public authority to enable that authority to carry out its statutory functions as being contrary to the public interest. As to the obligation to protect certain information exchanged within the UK Competition Network (UKCN), see paragraph 6.15.
- 6.9 Even when an information gateway is available, there may be circumstances when the CMA will decline to provide the information to the other public authority. For example, when overall it may be more efficient or speedier for the public authority to request the information. Another circumstance might be when the limitations on the use or further disclosure that will apply, were the CMA to make the disclosure, would not be suitable to the public authority's purpose for requesting the information.

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

- 6.10 Under the ERRA13 the CMA and sectoral regulators having concurrent CA98 powers are required to put into place information sharing arrangements to disclose certain kinds of information to each other in connection with CA98 cases relevant to their regulated sectors in order to facilitate the exercise of their functions.<sup>68</sup> They are also permitted, but not required, to share information about a broader range of complaints than those where there are sufficient grounds for suspecting a CA98 infringement. For further information about these arrangements, see *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (CMA10).
- 6.11 To give effect to the statutory requirement and in order to strengthen the collaborative framework through which sectoral regulators and the CMA will work to further the interests of UK consumers, the CMA and the sectoral regulators have established the UKCN. The UKCN brings together the CMA with the Financial Conduct Authority (FCA), the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), the Northern Ireland Authority for Utility

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<sup>68</sup> Regulation 4(1) of the Competition Act 1998 (Concurrency) Regulations 2004.

Regulation (URegNI), the Office of Rail Regulation (ORR), the Civil Aviation Authority (CAA), and Monitor (the latter having observer status). The mission of the UKCN<sup>69</sup> is to promote competition for the benefit of consumers and to prevent anticompetitive behaviour both through facilitating use of competition powers and the development of pro-competitive regulatory frameworks, as appropriate.

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

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

6.13 The CMA will (subject to the circumstances described in this and the following paragraphs) usually give notice of its proposal to disclose specified information. However, in line with established case law,<sup>70</sup> it may decide that it is not appropriate to do so in some circumstances such as:

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

6.14 If the CMA considers it necessary or appropriate to pass information deriving from a leniency applicant to another UK agency, such as the Serious Fraud Office (SFO), the CMA would inform the applicant or its legal adviser first.

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<sup>69</sup> See the UKCN Statement of Intent.

<sup>70</sup> R Kent Pharmaceuticals Ltd v Serious Fraud Office, [2004] EWCA Civ 1494, 11 November 2004

However, applicants must accept that the CMA may refer cases to the SFO and the expectation should be that such referrals will be on the basis of a full disclosure of all material in the CMA's possession.<sup>71</sup>

- 6.15 Having regard to the enhanced partnership working, the responsibility of members (and observers) of the UKCN to protect any information disclosed to each other, including under Part 9 of the EA02 (or equivalent legislative provisions affording the same or greater protection apply), the CMA will generally not give the person to whom the information relates prior notice of its proposal to make a disclosure.
- 6.16 When giving advance notice, the CMA will provide details of the information it proposes to disclose relevant to the person concerned for example by way of a description, inventory or draft of the proposed disclosure.

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<sup>71</sup> See *Applications for leniency and no-action in cartel cases* (OFT1495) for further guidance.

## 7. Cooperation with overseas public authorities

- 7.1 The CMA works with its international counterparts to promote convergence and a consistent approach to tackling anti-competitive practices, assessing multi-jurisdictional mergers and protecting consumers' interests. It may share information about its experiences and cases to assist in identifying issues of common interest and coordinating efforts, as well as comparing results and findings.
- 7.2 The CMA is a member of various international organisations, such as the Organisation for Economic Cooperation and Development (OECD), International Competition Network (ICN), European Competition Network (ECN) and the EU Consumer Protection and Co-ordination Network, and is also a party to a number of bilateral agreements entered into on an ad hoc basis with other agencies.
- 7.3 While the CMA may freely share general information about its work and experiences with overseas public authorities,<sup>72</sup> or through international fora, the disclosure of specified information is only permissible if an information gateway is available under Part 9 of the EA02. The information gateway permitting disclosure of specified information for the purposes of facilitating the exercise by the CMA of its own statutory functions applies in relation to disclosures to overseas public authorities, as it does to UK public authorities.<sup>73</sup>
- 7.4 The CMA may also seek the necessary consents to the disclosure of information to an overseas authority.<sup>74</sup> Consent is generally sought in the form of a waiver, permitting the CMA to disclose information to another (named) authority.<sup>75</sup>
- 7.5 Where a gateway for disclosure of specified information exists other than that contained in section 243(1) of the EA02 described below (for example if the

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<sup>72</sup> Meaning a person or body outside the UK which appears to the CMA to exercise functions of a public nature in the enforcement of consumer or competition legislation (sections 243(11) and (12) of the EA02).

<sup>73</sup> Section 241(1) of the EA02.

<sup>74</sup> Section 239 of the EA02.

<sup>75</sup> The CMA will consider the format of a waiver on a case by case basis, as the content will differ based on the circumstances of the case. For reference, the ICN model waiver form in relation to merger cases, and the model waiver forms used by a number of other competition agencies, can be viewed here: [www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf).

CMA's disclosure is for the purpose of facilitating the exercise by the CMA of any of its statutory functions), the CMA will need to have regard to the considerations contained in section 244 of the EA02 (and to those in section 243(6) of the EA02).

### **Disclosure of specified information under an EU obligation**

- 7.6 The CMA may disclose information to another person if the disclosure is required for the purpose of an EU obligation.
- 7.7 The CMA is obliged, under certain EU obligations, to disclose certain information it receives in the course of exercising its statutory functions to the Commission and/or other European competition and consumer protection authorities. The CMA will still nevertheless need to have regard to the three considerations in section 244 of the EA02 in deciding whether to disclose the specified information.
- 7.8 The EU obligations relevant to the CMA include Articles 11 and 12 of Regulation 1/2003<sup>76</sup> and paragraphs 2.2.3 and 2.3.3 of the Commission Notice on cooperation within the network of competition authorities,<sup>77</sup> which provide for the disclosure of information for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union, Articles 4, 9, 21 or 22 of the EU Merger Regulation,<sup>78</sup> and the Regulation on Consumer Protection Cooperation.<sup>79</sup>

### **Disclosure of specified information to overseas public authorities under section 243 of the EA02**

- 7.9 The CMA may also disclose specified information to overseas public authorities<sup>80</sup> in order to facilitate:
- the investigation and bringing of criminal proceedings<sup>81</sup>

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<sup>76</sup> Council Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>77</sup> Commission Notice 2004/C101/03.

<sup>78</sup> Council Regulation (EC) No 137/2004 on the control of concentrations between undertakings.

<sup>79</sup> Regulation (EC) No 2006/2004.

<sup>80</sup> See footnote 72.

<sup>81</sup> Section 243(2)(c) and (d) of the EA02.

- the investigation and bringing of civil proceedings in connection with the enforcement of specified legislation,<sup>82</sup> or
- a decision as to whether to start or bring to an end such investigations or proceedings.<sup>83</sup>

Disclosure to overseas authorities for these purposes is not permitted where the information is obtained by the CMA in connection with the CMA's mergers and markets functions under the EA02,<sup>84</sup> and under other specified legislation.<sup>85</sup>

- 7.10 Information disclosed to an overseas public authority may be disclosed subject to the condition that it must not be further disclosed without the agreement of the CMA.<sup>86</sup> The disclosed information may not be used by the overseas public authority for any purpose other than that for which it was first disclosed.<sup>87</sup>
- 7.11 The Secretary of State has the power to prevent a disclosure to an overseas authority which the CMA would be permitted to make under Part 9 of the EA02 where he or she thinks it would be more appropriate for any investigation or proceedings to be carried out in the UK or another country.<sup>88</sup>
- 7.12 In deciding whether to disclose information to an overseas public authority for the purposes listed in paragraph 7.9, the CMA must have regard to a number of other factors, including:
- whether the matter in respect of which disclosure is sought is sufficiently serious to justify making the disclosure
  - whether the law of the overseas country to whose authority disclosure would be made provides appropriate protection against self-incrimination in criminal proceedings

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<sup>82</sup> Sections 243(2)(a) and (b) and 243(12) of the EA02.

<sup>83</sup> Section 243(2)(e) of the EA02.

<sup>84</sup> Section 243(3)(d) of the EA02.

<sup>85</sup> Section 243(a), (b), (c) of the EA02.

<sup>86</sup> Section 243(10)(a) of the EA02.

<sup>87</sup> Section 243(10)(b) of the EA02.

<sup>88</sup> Section 243(4) of the EA02.

- whether the law of that country provides appropriate protection for the storage and disclosure of personal data, and
  - whether any mutual assistance arrangements apply.<sup>89</sup>
- 7.13 Before disclosing information under section 243 of the EA02, the CMA must have regard to the considerations in both section 243(6) of the EA02 and section 244 of the EA02.
- 7.14 The CMA will balance the considerations in section 243(6) of the EA02 on a case-by-case basis having regard to the particular circumstances of the disclosure in question. However, the CMA considers that the disclosure of information for the purpose of bringing civil and criminal proceedings on matters relating to competition law and consumer protection, or for conducting investigations leading to these proceedings, will generally be ‘sufficiently serious’ for the purpose of section 243(6) of the EA02. Criminal proceedings covered by mutual assistance agreements to which the UK is party will also normally be deemed sufficiently serious.
- 7.15 Section 243(7) of the EA02 states that protections are ‘appropriate’ if the relevant protection corresponds to that provided in any part of the UK. Therefore, protections which are directly analogous to those afforded in the UK will satisfy this consideration.
- 7.16 For example, in respect of the protection in relation to the storage and disclosure of personal data, the CMA is minded to consider that the protection afforded by the EU Directive 95/46 on the Protection of Individuals with the regard to the Processing of Personal Data (the Data Protection Directive) – which has been implemented in the UK through the DPA 98 – is appropriate for the purposes of section 243(6)(c) of the EA02. The laws of the countries which have implemented the Data Protection Directive would accordingly be considered to give appropriate protection under section 243(6)(c) of the EA02. Similarly, the European Commission – which affords protection in the area concerned equivalent to that contained in the Data Protection Directive<sup>90</sup> and whose officials are bound by the obligation of professional secrecy – is also considered to give appropriate protection under section 243(6)(c) of the EA02.

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<sup>89</sup> Section 243(6) of the EA02.

<sup>90</sup> Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the European institutions and bodies and on the free movement of such data. See OJ L0008, 12/01/2001.

- 7.17 In addition to the considerations in section 243(6) of the EA02, the CMA may also take into account additional considerations although it is not legally required to do so. One such consideration is the past record of an overseas public authority as regards compliance with disclosure conditions in relation to previous requests. This may be particularly relevant when there are no mutual assistance arrangements in place between the country concerned and the UK; or where it was in doubt about the adequacy of protections for the storage and disclosure of personal data but the considerations in section 243(6) of the EA02 were otherwise met. Another consideration which may also be taken into account is reciprocity (that is, whether the overseas authority concerned has previously declined to disclose information although it had the power to do so).
- 7.18 When the CMA intends to make a disclosure to an overseas authority, the CMA will take into account parties' representations regarding the confidential nature of any information they have provided.<sup>91</sup> Also, if appropriate, the CMA will seek to protect the information to be disclosed (for example by anonymising or aggregating data or using ranges).
- 7.19 Although not required to do so, the CMA will generally seek to give notice of a possible disclosure. When giving such advance notice, the CMA will provide details of the information it proposes to disclose relevant to the person concerned for example by way of a description, inventory or draft of the proposed disclosure.
- 7.20 However, in line with established case law,<sup>92</sup> it may decide that it is not appropriate to give notice in some circumstances, such as:
- where the giving of prior notice may hamper an investigation
  - where information is being passed on to another investigating or prosecuting authority
  - the information is required as a matter of urgency,
  - it would be impracticable to do so (for example, because of the number of persons to whom notice would otherwise need to be given).

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<sup>91</sup> See *Applications for leniency and no-action in cartel cases* (OFT1495), paragraphs 7.31 and 7.32 which state that disclosure of information supplied as part of an application for leniency or immunity will never take place without consent except for in the two circumstances explained.

<sup>92</sup> *R Kent Pharmaceuticals Ltd v Serious Fraud Office*, [2004] EWCA Civ 1494, 11 November 2004.



7.21 In these circumstances, the CMA will take into account the protection of the information afforded by any restrictions that apply on the use and further disclosure of the information.

## 8. Freedom of information and data protection

### FOIA

- 8.1 The FOIA was introduced to improve the transparency and accountability of public bodies and gives anyone a general right of access to information held by the CMA.
- 8.2 When a person makes a request for recorded information, the FOIA requires the CMA to (i) inform the requester whether or not it holds the requested information; and (ii) if it does, it must disclose the information to the requester unless there is an applicable exemption. A request for information will be dealt with within 20 working days.<sup>93</sup>
- 8.3 There are a number of exemptions from disclosure under the FOIA of particular relevance to a request for information held by the CMA, including where disclosure would be prohibited under any statutory enactment, including the EA02.<sup>94</sup> Part 9 of the EA02 therefore continues to apply.
- 8.4 The CMA might also seek to rely on the law enforcement qualified exemption at section 31(1)(g) of the FOIA to withhold information if it considered its disclosure would, or would be likely to, prejudice the exercise by the CMA of its statutory functions for the purposes set out at section 31(2) of the FOIA. Section 31 of the FOIA is a qualified exemption requiring the carrying out of a public interest test to determine whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.
- 8.5 The CMA might also seek to rely on section 32 of the FOIA which provides for an absolute exemption from disclosure where the requested information is held by a public authority in a document placed in the custody of a person conducting an inquiry, for the purpose of the inquiry. For the purposes of section 32 of the FOIA, an 'inquiry' includes any inquiry or hearing held under any provision contained in, or made under, an enactment. It includes, for example, the CMA when exercising its Phase 2 merger and market and regulatory appeal functions.

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<sup>93</sup> This deadline may be extended if the CMA reasonably requests further information or is considering the public interest test (sections 10(2) and (3) of the FOIA).

<sup>94</sup> Section 44(1)(a) of the FOIA provides for an absolute exemption in this regard.

- 8.6 Requests for information under the FOIA should be submitted to the Information Access Team. Any person not satisfied with the CMA's refusal to provide information in response to an FOIA request has the right to an internal review of the CMA's decision, and a further right to complain to the Information Commissioner's Office (ICO) if that person is not satisfied with the internal review decision.
- 8.7 The CMA is required to have a publication scheme, approved by the ICO, and to publish information covered by the scheme. More information about the FOIA generally is available on the ICO website.<sup>95</sup>

## **DPA98**

- 8.8 The DPA98 sets out rules for processing personal data relating to living individuals (the data protection principles). The principles include the need for those who process personal data (that is, do anything at all with it, such as collecting, recording, using or transferring it) to be open with those whose data they process about how that personal data is used.
- 8.9 The CMA is bound by the provisions of the DPA98 where it is processing personal data. No personal data will be disclosed by the CMA unless that disclosure is compliant with the DPA98.
- 8.10 Particular issues arise in respect of the handling and disclosure of underlying data from surveys conducted by the CMA, or by other parties. Both the DPA98, as mentioned, and the Code of Conduct of the Market Research Society apply to personal data, and the latter requires the anonymity of respondents to be preserved unless they have given informed consent. If the CMA considers it necessary to disclose any of the underlying data, it must ensure that the identities of the persons who participated in the survey are protected. The CMA will consider what protection may be necessary to ensure that the identity of survey respondents is not revealed. Anonymisation is not always sufficient to prevent someone being identifiable.
- 8.11 Any person may ask the CMA whether it is processing any personal data about them and if so, to be provided with a copy of it. If not satisfied with the CMA's response, that person may complain to the ICO.

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<sup>95</sup> [www.ico.org.uk](http://www.ico.org.uk).

## ANNEXE(S)

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## A. Key changes to existing guidance

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

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

## B. Status of OFT and CC guidance documents

B.1 The table below indicates the status of OFT and CC guidance documents related to transparency and disclosure that had been published and were in effect prior to the transfer of their functions to the CMA on 1 April 2014. The *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)) has been adopted by the CMA Board in order to facilitate the exercise by the CMA of its functions.

OFT/CC Code	Title	Status of document	
		Replaced/ obsolete <sup>96</sup>	Adopted by the CMA Board <sup>97</sup>
OFT1234	Transparency – a statement of the OFT's approach	✓	-
CC7 (revised)	Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973	-	✓
CC12	Disclosure of information by the Competition Commission to other public authorities	✓	-
CC6	Competition Commission: guidance to merger reference groups, market reference groups and special reference groups	✓	-
OFT518	Overview of the Enterprise Act	✓	-

B.2 Parties should refer to the CC7 (revised) (the adopted guidance) for further guidance on the CMA's approach to transparency and disclosure, subject in particular to the following general limitations:

- in the case of conflict between this Statement and the adopted guidance, the adopted guidance prevails

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<sup>96</sup> OFT and CC publications listed in this column have, at the date of publication of this Statement, been replaced, or rendered obsolete, by CMA guidance or publications.

<sup>97</sup> OFT and CC publications listed in this column have been adopted by the CMA Board (subject to any guidance or publications prepared by the CMA in the future).

- the original text of the adopted guidance has been retained unamended, except as indicated in Annexe A: as such, that text does not reflect or take account of developments in case law, legislation or practice, since its original publication, and
- the adopted guidance should be read subject to the following cross-cutting amendments:
  - references to the 'OFT' and 'CC' (except where referring to specific past OFT or CC practice or case law), should be read as referring to the CMA
  - certain OFT or CC departments, teams or individual roles may not be replicated in the CMA, or may be renamed. A copy of the CMA's organisational chart is available on [www.gov.uk/cma](http://www.gov.uk/cma), and
  - parties should check any contact details against those listed on [www.gov.uk/cma](http://www.gov.uk/cma), which will be the most up to date.