Review of the OFT's investigation procedures in competition cases

A consultation document

March 2012
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Scope of this consultation

| Topic of this consultation | The primary purpose of this document is to consult on the OFT’s proposal to introduce a new structure for the way the OFT makes decisions in investigations under the Competition Act 1998 (CA98).

The OFT is also announcing in this document the extension of the trial of a Procedural Adjudicator role for a further year, with an expanded remit, and a number of other significant enhancements it is making to its CA98 investigation processes.

This consultation also concerns the OFT’s proposal to publish revised guidance on how the OFT conducts CA98 investigations. |
| Scope of this consultation | This consultation is intended to give interested parties the opportunity to provide views and comments on the proposed decision-making structure and on the proposed revised guidance. The guidance describes the OFT’s current approach to CA98 investigations, as well as its proposed decision-making structure. The guidance is limited to the OFT’s investigations under the CA98 and does not extend to investigations by sectoral regulators. |
| Geographical scope | There is no specific geographical dimension to this consultation. |
| Impact assessment | Not applicable. |
**Basic information**

<table>
<thead>
<tr>
<th>To</th>
<th>This consultation is aimed at those who have an interest in the OFT’s CA98 investigations. In particular, it may be of interest to businesses and their legal advisers.</th>
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<tr>
<td>Duration</td>
<td>The consultation will run from 28 March to 19 June 2012.</td>
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<tr>
<td>Enquiries</td>
<td>If you have any queries regarding the content of this consultation, please contact:</td>
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<td>Ginevra Di Berardino</td>
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<td>How to respond</td>
<td>We would welcome your comments on: the proposal for a revised decision-making model set out in this document, whether greater guidance on the OFT’s settlement policy and procedures under the CA98 would be worthwhile, and the proposed revised guidance on how the OFT conducts CA98 investigations. Annexe A contains the specific questions on which your feedback is sought. Please respond to as many questions as you are able and provide supporting evidence for your views where appropriate. We encourage you to respond to the consultation in writing (by email, or alternatively by letter, using the contact details above).</td>
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<td>When responding to this consultation please state</td>
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whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

**Additional ways to become involved**
If you wish to meet with the OFT team involved to discuss your views, please contact Ginevra Di Berardino (contact details given above).

**After the consultation**
After the consultation, we will decide whether any changes are necessary to the draft guidance which we have published for consultation, and publish the final version of the revised guidance on our website. We will also publish a summary of the responses received during the consultation. Both documents will be available on the OFT’s website: www.oft.gov.uk.

**Compliance with the Code of Practice on Consultation**
This consultation complies with HM Government’s *Code of Practice on Consultation*. A list of the key criteria, along with a link to the full document, can be found at Annexe B.

**Background**

**Getting to this stage and previous engagement**
We consider it important to keep our CA98 procedures under review in light of lessons learnt from cases, international best practice and feedback from external stakeholders, and to make changes and improvements where appropriate. We also recognise the importance of being open and clear about the procedures that we follow when undertaking investigations into anti-competitive practices.

The OFT published guidance on its CA98 investigation procedures (OFT1263) and launched a trial of a
Procedural Adjudicator role in March 2011. Respondents to the OFT’s consultation on this guidance in August 2010 suggested some additional changes which the OFT did not implement in the March 2011 guidance but noted at the time that it would consider further. Having reviewed the lessons learnt from developments in cases over the past year (including judgments of the Competition Appeal Tribunal), we have identified a number of improvements to our procedures which will build on the changes already made. The improvements also address feedback from the public consultation issued by the Department for Business, Innovation and Skills on the reform of the competition regime.

We have decided to update this guidance to reflect our current practice, the proposed revised decision-making model on which we are consulting, and the extension of the trial of a Procedural Adjudicator role for a further year with an expanded remit.
Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Jessica Nardin
OFT Consultation Coordinator
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
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A copy of the key criteria from the Better Regulation Executive’s *Code of Practice on Consultation* can be found in Annexe B.
Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual’s interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that Information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation’s IT system.
1 EXECUTIVE SUMMARY

1.1 Effective enforcement of competition law is vital for efficient markets and as a driver for economic growth, delivering benefits for consumers and the economy. It is important that the Office of Fair Trading (OFT), like other competition authorities, keeps innovating and constantly improving the conduct of effective and efficient competition enforcement. As part of this, the OFT considers it important to keep its Competition Act 1998 (CA98) procedures under review in light of lessons learnt from cases, international best practice and feedback from external stakeholders, and to make changes and improvements where appropriate.

1.2 On 15 March, the Government announced significant reforms to the UK competition regime, centred around the creation of a new single Competition and Markets Authority (CMA), bringing together functions of the OFT and the Competition Commission. Following consultation, the Government has decided to embed an enhanced administrative approach to antitrust enforcement, involving improvements to the speed of the process and the robustness of decision-making, addressing perceptions of confirmation bias. In the legislation for the CMA the Government will make provision enabling statutory procedural rules to cover a number of principles, such as the separation of decision-making from investigation.

1.3 The primary purpose of this document is to consult on a proposed new structure for the way the OFT makes decisions in CA98 investigations until the CMA takes on its responsibilities. This would involve a move to collective judgement and the separation of the decision-makers from the investigation team, in order to improve the robustness of OFT decision-making processes.

1 Growth, Competition and the Competition Regime: Government Response to Consultation, March 2012
1.4 The OFT is also announcing in this document the extension of the trial of a Procedural Adjudicator role for a further year, with an expanded remit, and a number of other significant enhancements it is making to its CA98 investigation processes.

1.5 These changes are designed to improve the speed of investigations and increase public accountability for this whilst fully respecting rights of defence, to enhance the level of engagement with parties to the investigation, and to increase the robustness of its investigations and procedures with greater senior oversight of cases by experienced staff. The OFT considers that the changes will provide a solid platform from which the CMA can work towards the Government’s vision for the future antitrust regime and will facilitate a smooth transition into the CMA, helping to reduce the risk of a reduction in enforcement action as a result of the transition.

1.6 All of these changes are reflected in revised draft CA98 Procedural Guidance, attached at Annexe C to this document.\(^2\)

Background

1.7 Over the last few years, the OFT has introduced various streamlining initiatives designed to increase the speed and improve the quality and efficiency of its CA98 investigations. These include: scoping of cases in order to ensure more focused investigations, more focused information requests, tighter timescales for parties to provide non-confidential versions of documents submitted to the OFT, tighter (but reasonable) deadlines for parties to provide responses to information requests, and the launch of the Procedural Adjudicator trial in March 2011, which provides a mechanism to resolve disputes on procedural issues swiftly.

\(^2\) The guidance is limited to the OFT’s investigations under the CA98 and does not extend to investigations by sectoral regulators.
The OFT consulted on its procedures for its CA98 investigations in August 2010, which led to the publication of its CA98 Procedural Guidance in March 2011. As a result of this consultation, the OFT introduced various new measures to improve the quality, efficiency and transparency of its CA98 investigation processes and reflected these in the March 2011 Procedural Guidance. These included: offering informal pre-complaint discussions to help potential complainants decide whether to commit the necessary time and effort to prepare a formal, reasoned complaint, a commitment to reach a decision on whether to formally open a case no later than four months after receiving a substantiated complaint, a commitment to send a case initiation letter on opening a formal investigation setting out the details and key contacts of investigators, including the Senior Responsible Officer and the decision-maker on the case, and a commitment that the decision-maker would attend the oral hearing unless this was impractical.

Respondents to the OFT’s consultation in August 2010 suggested some additional changes which the OFT did not implement in the March 2011 Procedural Guidance but noted at the time that it would consider further. Having reviewed the lessons learnt from developments in cases over the past year (including judgments of the Competition Appeal Tribunal) and international best practice, the OFT has identified a number of further improvements to its procedures which will build on the changes already made. These improvements also address feedback from the public consultation issued by the Department for Business, Innovation and Skills on the reform of the competition regime.

3 OFT1263, A guide to the OFT’s investigation procedures in competition cases, March 2011.

4 A Competition Regime for Growth: A Consultation on Options for Reform, March 2011.
Summary of key proposals and announcements

1.10 The OFT has therefore decided to make further improvements to its CA98 processes to improve their speed, quality and robustness in the immediate term and to provide a firm foundation for the CMA to build on. Several of these improvements have already been implemented in individual cases, as part of a continuous process of improvement of the OFT’s CA98 procedures. The proposed amendments to the CA98 procedural guidance reflect the formalising and standardisation of these procedures across the OFT’s CA98 case portfolio and are intended to provide transparency as to current OFT investigation processes.

Proposed changes to the OFT’s CA98 decision-making processes

1.11 The OFT is consulting on a proposal to introduce collective decision-making in CA98 cases for certain decisions, such as infringement decisions. The revised decision-making model offers the following features compared to the current system: collective judgement, enhanced senior oversight, enhanced legal oversight, separation of the investigation team and decision-makers, separation of the individuals authorising the opening of a case and the issue of a Statement of Objections and those responsible for making the decision on whether there has been an infringement, and engagement between the parties and the decision-makers.

Extension of Procedural Adjudicator trial with expanded role

1.12 The OFT has decided to extend the Procedural Adjudicator trial, which had been due to end on 21 March 2012, for a further year until 21 March 2013. The second year of the trial will involve an expanded role for the Procedural Adjudicator, including responsibility for chairing oral hearings in CA98 cases. In addition, the Procedural Adjudicator will be required to report to the decision-makers for the case following the oral hearing to highlight to them any procedural issues that have been brought to the attention of the Procedural Adjudicator during the investigation and to confirm whether the parties’ right to be heard has been respected.
Other enhancements to CA98 procedures

1.13 The other key enhancements to the OFT’s CA98 investigation processes include:

- **Case opening notices and administrative timetables**: The OFT intends in future to publish on its website a Case Opening Notice setting out basic details of the CA98 investigation and a case-specific administrative timetable for the investigation. This will have the benefit of enhancing transparency of the OFT’s current portfolio of CA98 cases as well as the transparency of case-specific timetables. The OFT will also commit to updating the case timetable and publishing the reasons why a timetable has been changed in any particular case.

- **More State of Play Meetings**: The OFT plans routinely to offer more state of play meetings in order to update parties on the OFT’s progress in an investigation, to give them the opportunity to make their points of view known throughout the proceedings, and to provide an opportunity for case teams to share emerging thinking on certain issues, where appropriate.

- **New Ability for Parties to Make Representations on Key Elements of Draft Penalty Calculations**: The OFT has decided to ensure that parties are provided with an opportunity to comment in writing and orally on the key elements of the draft penalty calculation in advance of the final penalty decision being adopted. These details may be included in the Statement of Objections with parties invited to comment on them in their written representations and at the oral hearing, or they may be included in a separate draft penalty calculation statement with separate arrangements for written and oral representations.

- **Enhanced oral hearings**: The OFT has decided to enhance its oral hearings to provide greater opportunity for interactive dialogue between parties to an investigation and the decision-
makers on the case, as well as enhanced testing of the evidence and the legal and economic arguments.

- **New arrangements for internal checks and balances:** The OFT has decided to adopt new arrangements for internal scrutiny by lawyers and economists who are not part of the case team of the legal and economic analysis in the case, including the key evidence being relied upon. In future, the General Counsel and Chief Economist (or their representatives) will attend all oral hearings and will be consulted on all proposed decisions under the proposed revised decision-making structure.

1.14 The OFT is keen to hear views on the proposed changes to its CA98 decision-making procedures, in particular whether the changes will enhance the robustness of CA98 decision-making. The OFT also invites comments on the proposed revisions to its CA98 procedural guidance to reflect the changes.

1.15 A number of interested observers have requested greater guidance on the OFT’s settlement policy and procedures. The OFT recognises that such an exercise would be valuable given the OFT’s experience to date. It may facilitate further improvement of the procedures and better understanding of the issues involved among interested parties as well as encouraging more parties to settle CA98 cases through greater transparency. The OFT welcomes views on whether this is worthwhile at this time or should be left to a later date, for instance after the establishment of the CMA.

**Structure of the Consultation Document**

1.16 The remainder of this consultation document is structured as follows:

- Chapter 2 sets out the background to the consultation and the key changes announced or proposed for consultation,

- Chapter 3 contains further detail on the proposed changes to the OFT’s decision-making processes for CA98 investigations,
• Chapter 4 summarises some further minor changes that have been made to the CA98 Procedural Guidance,

• Annexe A contains the questions for consultation,

• Annexe B contains the consultation criteria,

• Annexe C contains the revised draft CA98 Procedural Guidance,

• Annexe D contains the revised briefing note for the extended Procedural Adjudicator trial.
2 BACKGROUND AND KEY CHANGES PROPOSED

Introduction

2.1 The primary purpose of this document is to consult on a proposed new structure for the way the OFT makes decisions in CA98 investigations. This would involve a move to collective judgement and the separation of the decision-makers from the investigation team in order to improve the robustness of OFT decision-making processes.

2.2 The OFT is also announcing in this document the extension of the trial of a Procedural Adjudicator role for a further year, with an expanded remit, and a number of other significant enhancements it is making to its CA98 investigation processes.

2.3 These changes are designed to improve the speed of investigations and increase public accountability for this whilst fully respecting rights of defence, to enhance the level of engagement with parties to the investigation, and to increase the robustness of its investigations and procedures with greater senior oversight of cases by experienced staff. The changes are reflected in revised draft CA98 Procedural Guidance, attached at Annexe C to this document.

2.4 Over the last few years, the OFT has introduced various streamlining initiatives designed to increase the speed, quality and efficiency of its CA98 investigations. These include:

- **Scoping of cases**: The OFT aims to focus its investigations as narrowly as appropriate in order to make optimal use of OFT resources and reassesses the appropriate scope during the course of the investigation,

- **More focused information requests**: Case teams aim to send focused information requests at the outset of a case in order to reduce burdens on parties and minimise the risk of collecting voluminous quantities of irrelevant material which would then need to be reviewed by the OFT case team,
• **Access to file: provision of confidentiality redactions:** Case teams routinely request parties to provide non-confidential versions of documents at the same time as providing responses to requests for information from the OFT (or within four weeks of this) in order to speed up preparations for the access to file stage.

• **Tighter (but reasonable) deadlines and fewer time extensions:** Case teams have been setting tighter (but reasonable) deadlines for parties to provide responses to information requests and non-confidential versions.

• **Launch of the Procedural Adjudicator trial in March 2011:** This provides a mechanism to resolve disputes on procedural issues swiftly.

2.5 The OFT consulted on its procedures for CA98 investigations in August 2010, which led to the publication of its CA98 Procedural Guidance in March 2011. As a result of the consultation, the OFT introduced various new measures to improve the quality, efficiency and transparency of its CA98 investigation processes and reflected these in the March 2011 Procedural Guidance. These included: offering informal pre-complaint discussions to help potential complainants decide whether to commit the necessary time and effort to prepare a formal, reasoned complaint, a commitment to reach a decision on whether to formally open a case no later than four months after receiving a substantiated complaint, a commitment to send a case initiation letter on opening a formal investigation setting out the details and key contacts of investigators, including the Senior Responsible Officer and the decision-maker on the case, and a commitment that the decision-maker would attend the oral hearing unless this was impractical.

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5 See OFT1263 *A Guide to the OFT’s investigation procedures in competition cases* available at www.of.t.gov.uk.
2.6 Parties responding to the 2010 consultation suggested some additional changes which the OFT did not implement in the March 2011 Procedural Guidance but noted at the time that it would consider further, for example concerning case timetables. Since then, the OFT has, amongst other things, issued one statement of objections, two infringement decisions, a commitments decision, a ‘no grounds for action’ decision and three formal investigations closed on the grounds of the OFT’s administrative priorities.6

2.7 Having reviewed the lessons learnt from developments in cases over the past year (including judgments of the Competition Appeal Tribunal (CAT)), the OFT has identified a number of further improvements to its procedures which will build on the changes already made. These improvements also address feedback from the public consultation issued by the Department for Business, Innovation and Skills (BIS) on the reform of the competition regime.7

2.8 On 15 March, the Government announced significant reforms to the UK competition regime8, centred around the creation of a new single Competition and Markets Authority, bringing together functions of the OFT and the Competition Commission. Following consultation, the Government has decided to embed an enhanced administrative approach to antitrust enforcement, involving improvements to the speed of the process and the robustness of decision-making, addressing perceptions of confirmation bias. In the legislation for the CMA the Government intends to make provision enabling statutory procedural rules to cover a number of

6 See, for example, OFT press releases 53/11 (13 April 2011), 89/11 (10 August 2011), 120/11 (8 November 2011), 124/11 (17 November 2011) and 129/11 (2 December 2011), and case closure summaries in respect of cases CE/9440-11 (December 2011), CE/9459/11 (February 2012) and CE/9470-11 (March 2012). As at the end of February 2012, the OFT had 19 open civil or criminal antitrust investigations.

7 A Competition Regime for Growth: A Consultation on Options for Reform, March 2011

8 Growth, Competition and the Competition Regime: Government Response to Consultation, March 2012
principles, such as the separation of final decision-making from investigation.

2.9 Until the CMA takes on its responsibilities, the OFT will continue to prioritise enforcement action against those who have breached the law in order to achieve its mission of making markets work well for consumers, as set out in its Annual Plan for 2012/13. The OFT considers that the changes set out in this consultation document will support this objective through enhancing the efficiency and effectiveness of the CA98 enforcement regime during this period. In addition, the OFT considers that the changes will provide a solid platform from which the CMA can work towards the Government’s vision for the future antitrust regime and will facilitate a smooth transition into the CMA, helping to reduce the risk of a reduction in enforcement action as a result of the transition.

2.10 The OFT recognises that the majority of businesses want (and make active efforts) to comply with competition law. Fostering and promoting a culture of compliance is absolutely essential to achieving the effectiveness of the competition regime. To that end, the OFT will also continue to support businesses who wish to comply with the law through advocacy, education and guidance in order to achieve its mission of making markets work well for consumers, as set out in its Annual Plan for 2012/13.

2.11 The OFT has decided to make further improvements to its CA98 processes to improve their speed, quality and robustness in the immediate term and to provide a firm foundation for the CMA to build on. Several of these improvements have already been implemented in individual cases, as part of a continuous process of improvement of the OFT’s CA98 procedures. The proposed amendments to the CA98 procedural guidance reflect the formalising and standardisation of these procedures across the OFT’s CA98 case portfolio and are intended to provide transparency as to current OFT investigation processes.
Summary of Key Changes

2.12 Each of the changes set out in this consultation document is designed to support one or more of the following objectives:

- increasing the speed of CA98 investigations, through ensuring they are progressed as efficiently and swiftly as possible and enhancing public accountability for this whilst fully respecting the rights of defence,
- enhancing the level of engagement with parties to the investigation,
- improving the robustness of the OFT’s CA98 investigation and decision-making processes.

2.13 The various streamlining initiatives the OFT has already put in place (see paragraph 2.4 above) are already delivering improvements in the speed of investigations. The OFT remains committed to continuing these initiatives on an ongoing basis.

Proposed Changes to CA98 decision-making processes

2.14 The OFT is consulting on a proposed new decision-making model for CA98 investigations. Currently the Senior Responsible Officer (SRO), who is accountable for delivery of the case, is generally the decision-maker for CA98 cases. As such, the SRO decides whether to open an investigation, whether there is sufficient evidence to issue a Statement of Objections and whether there is sufficient evidence to issue an infringement decision. External observers have commented that this structure resulted in a risk of confirmation bias since there is no separation between the investigation team and the decision-maker. In addition, some observers were specifically concerned about the same individual authorising the issue of a Statement of Objections and also taking the decision on whether there has been an infringement. Although there is a full merits review by the CAT in CA98 cases, some external observers perceive a risk of confirmation bias in the current system.
2.15 The OFT recognises that there is a perception among some respondents to the BIS consultation that these are issues that need to be addressed. Whilst the OFT’s track record on defending infringement decisions on appeal is good\(^9\), we believe that the changes outlined in this document should help address those concerns.

2.16 The OFT is consulting on a proposal to introduce collective decision-making in CA98 cases for certain decisions, such as infringement decisions. This involves the formation by the OFT Board of a ‘Decisions Committee’ constituted of the OFT’s senior staff, which will appoint a three-member group (the Case Decision Group),\(^{10}\) not including the SRO, to be the decision-makers in each case in which a Statement of Objections is issued. The Decisions Committee will be consulted on all CA98 cases in which a Statement of Objections is issued. Further details of the OFT’s proposals for a revised decision-making model are described in Chapter 3 of this document.

2.17 The revised decision-making model offers the following features compared to the current system:

- Collective judgement – the final decision is taken by a group of three persons rather than one individual,

- Enhanced senior oversight – the decision-makers will include senior OFT staff and will consult with a Decisions Committee representing the most senior levels of the organisation,

- Enhanced legal oversight – at least one of the decision-makers will be a lawyer,

\(^9\) Fewer than five per cent of parties have been successful in overturning OFT decisions on liability during the course of the CA98 regime.

\(^{10}\) The names used for the decisions committee and case decision group at this stage are working titles to reflect their functions. Other, appropriate, names may be ultimately used.
• Separation of the investigation team and decision-makers – the decision-makers appointed following issue of a Statement of Objections will not have had any earlier involvement in the investigation, thus reducing any perception of confirmation bias,

• Separation of the individual authorising the opening of a case and the issue of a Statement of Objections and those taking the final decision on whether there has been an infringement – a new group of decision-makers will be appointed following issue of a Statement of Objections (or where a decision on commitments, early resolution or interim measures is required prior to the issue of a Statement of Objections),

• Engagement between the parties and the decision-makers – with the decision-makers engaging directly with the parties through reviewing their written and oral representations and asking questions at the enhanced oral hearing (see below).

2.18 Whilst the introduction of collective decision-making may result in some cases taking longer, the proposal would ensure that the case and evidence is tested more robustly and systematically at administrative phase before a decision is taken. The proposal seeks to strike an appropriate balance among these different objectives and ensure that the procedures do not have an undue adverse impact on the speed of decision-making or be duplicative of other stages in the process, including full merits review by the CAT.

2.19 The OFT proposes that, at the point in time when the new decision-making model is implemented, existing CA98 investigations which are prior to the oral hearing stage will transfer to the new decision-making model, whether or not the SO has already been issued. Existing CA98 investigations in which the oral hearing(s) have already been held will continue under the current decision-making model, to ensure that the parties have had access to the decision-maker in the oral hearing.
2.20 The OFT has reflected the proposed decision-making model at Chapters 11, 12 and 13 of the revised draft CA98 Procedural Guidance which is at Annexe C to this document.

**QUESTION FOR CONSULTATION**

The OFT is proposing to introduce a collective decision-making model in CA98 cases.

Q1. Do you agree with the proposal for a revised decision-making model set out in this document? In particular, do you consider the changes will enhance the robustness of decision-making?

Q2. Do you agree with the proposed transitional arrangements if the new decision-making model is introduced?

**Extension of Procedural Adjudicator trial with expanded role**

2.21 Respondents to the OFT’s August 2010 consultation called for a 'Hearing Officer'-style role for OFT’s CA98 investigation proceedings. The OFT therefore decided to trial a new Procedural Adjudicator role, with a limited remit, for a one-year period. The OFT has now decided to extend the Procedural Adjudicator trial, which had been due to end on 21 March 2012. During the one year trial, there have been eight procedural decisions escalated to Senior Responsible Officers (SRO), of which six were successfully resolved by the relevant SRO. In two cases an application was made to the Procedural Adjudicator for a review of the SRO’s decision. In both of these cases, the Procedural Adjudicator reached a decision within six working days, ahead of the ten working day target. The OFT therefore has concluded that, from its perspective, the Procedural Adjudicator role appears to have provided an effective mechanism for resolving procedural disputes in a timely manner. A high proportion (75 per cent) of disputes has been resolved by the SRO, with a minority (25 per cent) of disputes resulting in an application to the Procedural Adjudicator. Procedural Adjudicator cases have provided important 'lessons
learnt’ for the relevant case teams and the Office more generally on procedural matters as well as, through publication of procedural decisions, transparency about procedural issues.

2.22 However, given the low number of applications received during the trial period, the OFT considers there is insufficient evidence to decide whether to install the role on a permanent basis. Therefore the OFT has decided to extend the duration of the trial for another year until 21 March 2013.

2.23 At the same time, the OFT has decided to expand the role of the Procedural Adjudicator to include responsibility for chairing oral hearings in CA98 cases for the extended trial period.

2.24 In addition, the Procedural Adjudicator will be required to report to the SRO (or the Case Decision Group if the decision-making changes in this consultation document are implemented) following the oral hearing to highlight any procedural issues that have been brought to the attention of the Procedural Adjudicator during the investigation and to confirm whether the parties’ right to be heard has been respected, including whether the oral hearing was properly conducted. The Procedural Adjudicator will continue to report directly to the Chief Executive or, if the Chief Executive is one of the Case Decision Group, to the Chairman.

2.25 This expanded role took effect from 21 March 2012. The OFT considers that these enhancements of the Procedural Adjudicator’s role will provide greater consistency in the conduct of oral hearings whilst also providing further comfort to the parties that the effective exercise of their right to be heard is respected, and hence, more generally, in the legitimacy and fairness of OFT’s processes.

2.26 If the Procedural Adjudicator’s workload were to increase in the future, consideration could be given to the appointment of a second Procedural Adjudicator.11

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11 The European Commission, for example, has two Hearing Officers.
2.27 The OFT has reflected the changes to the duration of the trial and to the scope of the Procedural Adjudicator’s role at Chapters 12 and 14 of the revised draft CA98 Procedural Guidance which is at Annexe C to this document. These changes have also been reflected in an updated version of the Briefing Note on the trial of the Procedural Adjudicator role. The revised Briefing Note is at Annexe D and is also available on the OFT website.

2.28 The OFT will evaluate the trial at the end of the extended trial period in order to decide whether to retain the role (with or without changes to the Procedural Adjudicator’s remit) or remove the role.
The Procedural Adjudicator Trial

The one-year trial period started on 21 March 2011. The Procedural Adjudicator role was introduced to resolve procedural disputes arising in CA98 investigations in a swift, efficient and cost-effective manner. The OFT has a common interest with parties to CA98 investigations in ensuring that such disputes are resolved efficiently to avoid delays to its CA98 investigations.

The Procedural Adjudicator role applies to cases in which the OFT has opened a formal investigation under the CA98, that is where the OFT has reasonable grounds for suspecting that competition law has been breached and the OFT has decided to prioritise the case for investigation.

A party that is unhappy with a decision on a procedural matter is encouraged to raise its concern with the Senior Responsible Officer (SRO) of the case. If the SRO has been unable to resolve the concern to the party’s satisfaction, the party may apply to the Procedural Adjudicator for a review of the SRO’s decision if it relates to:

- Deadlines for responding to information requests, submitting non-confidential versions of documents or to submit written representations on the statement of objections or supplementary statement of objections,
- Requests for confidentiality redactions of information in documents on the OFT’s case file, in a statement of objections or in a final decision,
- Requests for disclosure or non-disclosure of certain documents on the OFT’s case file,
- Issues relating to oral representations meetings, such as the date of the meeting, and
- Other significant procedural issues that may arise during the course of an investigation.

The standard of review exercised by the Procedural Adjudicator is similar to judicial review grounds – whether the SRO’s decision was unreasonable or irrational, whether the case team has respected the necessary procedural requirements and/or whether the party’s rights of defence have been respected.

The decisions of the Procedural Adjudicator, or a summary of the decisions, are published either at the time the decision is taken or at the end of the case, subject to confidentiality redactions as appropriate.
Currently the OFT’s website does not contain information on all open CA98 investigations. The OFT is committed to improving the transparency of its work where possible and has decided that there is insufficient visibility of the OFT’s work and misunderstanding of the number of investigations currently underway. In addition, in some cases, businesses or individuals with information relevant to a case may not be aware that an investigation is ongoing. External observers have also commented that the timetable for OFT investigations is not always published and that CA98 investigations could be speeded up by increasing OFT’s public accountability for case delivery timescales. This was also raised by some respondents to the OFT’s August 2010 consultation.

The OFT therefore intends in future to publish on its website a Case Opening Notice setting out basic details of the CA98 investigation and a case-specific administrative timetable for the investigation. This will have the benefit of enhancing transparency of the OFT’s current portfolio of CA98 cases as well as transparency of case-specific timetables. Currently, the parties to the investigation are provided with details of the case-specific timetable, but this is not generally published.

The OFT will also commit to updating the case timetable and publishing the reasons why a timetable has been changed in any particular case. This will provide enhanced public accountability for investigation timescales. It will also allow case teams to publicise the reasons for the delay where this is outside the control of the OFT, for example, where a party to the investigation has not provided some key data within the deadline given. This should also encourage parties to comply with the timetable and minimise any incentives on parties unduly to delay the investigation if they are aware that such conduct may be publicised on the OFT’s website.

The OFT plans to issue a Case Opening Notice in every case where it opens a formal investigation, that is when the section 25
CA98 threshold of 'reasonable grounds to suspect' an infringement has been reached and the OFT has decided to prioritise the case for investigation. This will ensure public transparency of the number of ongoing formal CA98 investigations. In some cases there may be sensitivities in publishing information at the early stages of the case, for example where this may prejudice the investigation if it alerts businesses to the fact that an investigation is underway in advance of dawn raids taking place. In such cases, the level of information that can be published in the Case Opening Notice may be scant at that stage – it may simply refer to an investigation having been launched in a broad industry sector with no timetable information. The Case Opening Notice will be updated later once the risk of prejudicing the investigation has subsided.

2.33 In other cases, as now, the Case Opening Notice may contain information on the parties to the investigation, whilst making it clear that the notice only refers to the opening of an investigation and that it does not mean that the parties have infringed the law. We note that BIS proposes to introduce legislative change to provide explicitly that absolute privilege from defamation would attach to such notices that named parties.

2.34 The publication on the OFT website of Case Opening Notices for CA98 cases containing basic details of the investigation, case-specific administrative timetables and reasons for any deviations has been incorporated in Chapter 5 of the revised draft CA98 Procedural Guidance which is at Annexe C to this document.

**More State of Play Meetings**

2.35 Following the successful introduction of state of play meetings with parties under investigation, as set out in the March 2011 Procedural Guidance, the OFT plans routinely\(^\text{12}\) to offer more state

\(^{12}\) The OFT has offered more state of play meetings in some recent cases and has found them to be useful and efficient. It has therefore decided to make this standard practice in CA98 investigations.
of play meetings in order to update parties on the OFT’s progress in an investigation, to give them the opportunity to make their points of view known throughout the proceedings, and to provide an opportunity for case teams to share emerging thinking on certain issues, where appropriate. This will enhance the level of transparency to parties under investigation and may also help to improve the speed and robustness of investigations if it is possible to resolve issues with the parties at an early stage of the investigation through further engagement with them.

2.36  In the current Procedural Guidance we offer at least one state of play meeting in the period before an SO is issued. In general, we now intend to offer at least two state of play meetings in the period before an SO is issued – one at an early stage of the investigation and one before the decision is taken on whether or not to issue an SO.

2.37  We will invite parties to the first meeting once the case has been formally opened. It will cover such issues as the anticipated scope of the investigation, next stages and proposed timetable. This meeting will provide the parties with greater transparency on the nature and scope of the investigation. The second meeting will take place before the decision is taken on whether or not to issue an SO. At this meeting the case team will update the parties on the OFT’s provisional thinking on the case, including the key potential competition concerns identified.

2.38  In some cases it may not be appropriate to hold a state of play meeting at the outset of the investigation where this may prejudice the ongoing investigation. However, a state of play meeting will take place before the decision is taken on whether or not to issue an SO. At this meeting the case team will update the parties on the OFT’s provisional thinking on the case, including the key potential competition concerns identified.

2.39  In all cases where an SO is issued, a further state of play meeting will be held after the parties have submitted their written representations and the oral hearing(s) have been held. At this meeting, the case team will update the parties on the OFT’s
preliminary views on how it intends to proceed with the case in light of the written and oral representations.

2.40 These meetings will be attended as a matter of course by the SRO or Project Director in a case along with the case team. Case teams remain free to hold additional state of play meetings with the parties if they consider that these would be useful and appropriate.

2.41 The OFT considers that the new arrangements for state of play meetings will provide enhanced engagement between parties and the case team throughout the investigation, and greater transparency on the progress of the investigation.

2.42 The changes concerning state of play meetings have been reflected in Chapter 9 of the revised draft CA98 Procedural Guidance which is at Annexe C to this document.

New Ability for Parties to Make Representations on Key Elements of Draft Penalty Calculations

2.43 Currently, parties are not provided routinely with the opportunity to comment on draft penalty calculations before the financial penalty is decided upon by the OFT and imposed on the party at the time an infringement decision is taken. In some cases, elements of the penalty calculation are included in the Statement of Objections with the party being invited to comment on them, but in others they are not. Some external observers have commented that this may result in an increased number of appeals against penalty decisions since parties consider that that is the first and often the only opportunity they have to comment on the appropriate level of financial penalty. A number of respondents to our October consultation on revised penalty guidance requested an opportunity to comment on a draft penalty calculation. The European Commission has also recently introduced such a procedure.

2.44 The OFT has therefore decided to ensure that parties are provided with an opportunity to comment in writing and orally on the key elements...
elements of the draft penalty calculation (including the proposed starting point percentage, the proposed relevant turnover figure to be used, the proposed duration and, to the extent possible, the facts that may give rise to aggravating and mitigating factors) in advance of the penalty decision being taken. These details may be included in the Statement of Objections with parties invited to comment on them in their written representations and at the oral hearing, or they may be included in a separate draft penalty calculation statement with separate arrangements for written and oral representations.

2.45 This change is designed to allow the parties involved to make informed representations on the main parameters of the penalty calculation at the administrative stage before the decision on the penalty is taken, which should improve the robustness of OFT penalty decisions. If the revised decision-making proposals are implemented, the final decision on the appropriate level of penalty will be taken by the Case Decision Group rather than the SRO, introducing separation of responsibilities regarding penalties.

2.46 The opportunity for parties to comment in writing and orally on the key elements of the draft penalty calculation in advance of the final penalty decision being adopted are reflected at Chapter 11, paragraph 11.5 of the revised draft CA98 Procedural Guidance which is at Annexe C to this document.

Enhanced Oral Hearings

2.47 The OFT has decided to enhance its oral hearings to provide greater opportunity for interactive dialogue between parties to an investigation and the decision-makers on the case, as well as enhanced testing of the evidence and the legal and economic arguments. The oral hearing will be attended by the Case Decision Group, members of the case team, the Chief Economist (or a representative of the Chief Economist) and the General Counsel (or a representative of the General Counsel). The oral hearing will be chaired by the Procedural Adjudicator. The party will be given the opportunity to make oral submissions and then the OFT will question the party on its written representations. As set out
earlier, following the oral hearing, the Procedural Adjudicator will produce a report for the decision-makers addressing all procedural issues of significance relating to the fairness of the procedure.

2.48 Multi-party hearings may be considered on specific issues in appropriate cases, such as where there are differing views on a key issue such as market definition or differing interpretations offered of a key piece of evidence.

**New arrangements for Internal Checks and Balances**

2.49 The OFT has decided to adopt new arrangements for internal scrutiny of the legal and economic analysis in the case, including the key evidence being relied upon.

2.50 The General Counsel will be responsible for ensuring that there has been a thorough review of the robustness of the legal analysis and the key evidence being used to support the legal case by lawyers who are not part of the case team or advising the case team. The General Counsel will be responsible for ensuring that the relevant decision-maker(s) (for example, the SRO in relation to a Statement of Objections, the Case Decision Group for an infringement decision) is/are aware of any significant legal risks before the decision is taken. The General Counsel (or a representative of the General Counsel) will attend the oral hearing and may ask questions of the parties. The General Counsel will be a member of the proposed Decisions Committee.

2.51 The Chief Economist will be responsible for ensuring that there has been a thorough review of the robustness of the economic analysis and the key evidence being used to support the economic case by economists who are not part of the case team. The Chief Economist will be responsible for ensuring that the relevant decision-maker(s) (for example, the SRO in relation to a Statement of Objections, the Case Decision Group for an infringement decision) is/are aware of any significant risks on the economic analysis before the decision is taken. The Chief Economist (or a representative of the Chief Economist) will attend the oral hearing
and may ask questions of the parties. The Chief Economist will be a member of the proposed Decisions Committee.

2.52 The OFT’s new arrangements for internal checks and balances are reflected mainly in Chapter 9, and also at paragraphs 12.23 and 12.24, of the revised draft CA98 Procedural Guidance which is at Annexe C to this document.

Other Changes

2.53 The revised draft CA98 Procedural Guidance contains further guidance on the access to file process, including the circumstances in which the OFT may consider it to be appropriate to use confidentiality rings and/or data rooms as a way of providing access to file and, if so, the way in which this will be done. This is reflected in Chapter 11, paragraphs 11.23 to 11.25, of the revised draft CA98 Procedural Guidance which is at Annexe C to this document.

2.54 In view of the enhanced checks and balances being provided by the General Counsel, the Chief Economist, the Case Decision Group and the full Decisions Committee, the current requirement for case teams to consult a steering committee before a Statement of Objections or final decision is issued will be removed. This was previously referred to in Chapter 9 of the CA98 Procedural Guidance, and has now been removed from the revised draft set out at Annexe C to this document.

2.55 Some further minor changes to the CA98 Procedural Guidance are summarised in Chapter 4 of this document.
Settlement Guidance

2.56 A number of interested observers have requested greater guidance on the OFT’s settlement policy and procedures. The OFT recognises that such an exercise would be valuable given the OFT’s experience to date. It may facilitate further improvement of the procedures and better understanding of the issues involved among interested parties as well as encouraging more parties to settle CA98 cases through greater transparency. The OFT welcomes views on whether this is worthwhile at this time or should be left to a later date, for instance after the establishment of the CMA.

Next Steps

2.57 The questions on which we specifically invite responses in this consultation exercise are set out at Annexe A to this document.
2.58 We will consider carefully the responses to this consultation document before deciding whether to proceed with the proposed changes to CA98 decision-making. We will also consider the responses carefully before finalising the wording of our revised CA98 procedural guidance.

2.59 The OFT will publish a formal response to this consultation summarising the main views expressed by respondents to this consultation and the decisions that the OFT has reached.

2.60 We currently anticipate publishing the final revised guidance (including or excluding the proposed decision-making changes) before Autumn 2012. The majority of the changes will come into effect from the date of publication of the revised guidance. The extension and expansion of the Procedural Adjudicator trial took effect from 21 March 2012.
3 PROPOSED CHANGES TO CA98 DECISION-MAKING PROCESSES

3.1 The OFT is consulting on a proposal to introduce collective decision-making in CA98 cases. The revised decision-making model offers the following features compared to the current system:

- Collective judgement – the final decision is taken by a group of three persons rather than one individual,

- Enhanced senior oversight – the decision-makers will include senior OFT staff and will consult with a Decisions Committee representing the most senior levels of the organisation,

- Enhanced legal oversight – at least one of the decision-makers will be a lawyer,

- Separation of the investigation team and decision-makers – the decision-makers appointed following issuance of a Statement of Objections (SO) will not have had any earlier involvement in the investigation, thus reducing any perception of confirmation bias,

- Separation of the individual authorising the opening of a case and the issue of an SO and those taking the final decision on whether there has been an infringement – a new group of decision-makers will be appointed following issue of an SO (or where a decision on commitments or early resolution is required prior to the issue of an SO),

- Engagement between the parties and the decision-makers – with the decision-makers engaging directly with the parties through reviewing their written and oral representations and asking questions at the enhanced oral hearing (described in Chapter 2 of this document).

3.2 The proposed decision-making model involves the establishment by the OFT Board of a committee of the OFT’s senior staff,
including the Chief Executive, other executive members of the OFT Board, the Chief Economist, the General Counsel and the head of policy (the Decisions Committee), which would be consulted on all CA98 cases post-SO. In cases where an SO has been issued or where a decision is required in relation to commitments or early resolution prior to the issue of an SO, the Decisions Committee would appoint a three-member group (the Case Decision Group) to be the decision-makers in the case.

3.3 The Senior Responsible Officer (SRO) would be responsible for authorising the opening of an investigation and the issue of an SO, as well as making case closure decisions prior to issue of an SO. The SRO would remain accountable for delivery of the case until such time as a Case Decision Group is appointed.

3.4 The appointment of the Case Decision Group would take place after an SO has been issued in the case, although it may take place earlier, for example where a decision is required on commitments, early resolution or interim measures directions prior to an SO being issued (see below). The parties to the investigation would be informed of the identity of the Case Decision Group.

3.5 A Case Decision Group would be appointed to be the decision-makers for a range of decisions under CA98. These 'Collective Decisions' are decisions on (a) whether or not to accept commitments (pre- or post-SO), (b) whether or not to enter into an early resolution (settlement) agreement (pre- or post-SO), (c) whether or not to give interim measures directions (pre- or post-SO), (d) whether or not to issue an infringement decision (with or without directions) or 'no grounds for action' decision (post-SO), and (e) on the appropriate amount of any penalty (post-SO). The Case Decision Group would also be responsible for authorising the issue of a supplementary SO, having considered representations to the SO.

13 The list of members of the Decisions Committee would be published on the OFT’s website.
3.6 The Case Decision Group would include at least one member of the Decisions Committee and at least one of its members would be legally qualified.

3.7 The SRO on the case would not be a member of the Case Decision Group to ensure separation of the investigation team and the decision-makers. Further, given their role in providing checks and balances on the legal and economic analysis in the case, the General Counsel and Chief Economist would not be members of the Case Decision Group.

3.8 The Case Decision Group would review the SO, the parties’ written representations and the key underlying evidence (particularly evidence used to support the case in the SO, plus other evidence highlighted by parties in their written representations as disputing the facts in the case). The Case Decision Group would also attend the oral hearings with parties to the investigation, actively engaging with the parties through asking questions on their representations. In addition, the Chief Economist and General Counsel (or their representatives) would attend oral hearings and may ask questions of the parties.

3.9 The case team, led by the SRO and/or Project Director, would continue to be responsible for running the investigation throughout the process, from case opening to the final decision, while the Case Decision Group would be responsible for taking Collective Decisions. This would ensure a separation between the investigators and final decision-makers on the case. The case team would also be responsible for drafting Collective Decisions (and, where applicable, supplementary SOs) in accordance with the instructions of the Case Decision Group.

3.10 The Case Decision Group would consult the Decisions Committee before taking a Collective Decision, providing an opportunity for the General Counsel, Chief Economist, head of policy and other senior officials to be consulted and provide their views. The Case Decision Group’s consultation with the Decisions Committee would contribute to the robustness and consistency of OFT’s decision-making in CA98 cases, since the Decisions Committee
would be consulted on all CA98 cases in which an SO is issued. The OFT Board would separately be informed about key risks in cases. The Case Decision Group’s decision would be formally adopted by the Decisions Committee.

3.11 The Case Decision Group would operate under delegated authority from the Decisions Committee, which would in turn operate under delegated authority from the OFT Board.

3.12 In circumstances where a member of the Case Decision Group were unable to continue as a Case Decision Group member (for example, where a member of the Case Decision Group left his or her post), the Decisions Committee would appoint a new member of the Case Decision Group to replace them before a Collective Decision is taken. If a Case Decision Group member changed after the oral hearing(s), the new member would review the transcript of the oral hearing(s) as well as the SO, the parties’ written representations and the key underlying evidence.

3.13 The OFT proposes that, at the point in time when the new decision-making model is implemented, existing CA98 investigations which are prior to the oral hearing stage will transfer to the new decision-making model, whether or not the SO has already been issued. Existing CA98 investigations in which the oral hearing(s) have already been held will continue under the current decision-making model, to ensure that the parties have had access to the decision-maker in the oral hearing.
QUESTION FOR CONSULTATION

The OFT is proposing to introduce a collective decision-making model in CA98 cases.

Q1. Do you agree with the proposal for a revised decision-making model set out in this document? In particular, do you consider the changes will enhance the robustness of decision-making?

Q2. Do you agree with the proposed transitional arrangements if the new decision-making model is introduced?
4 FURTHER MINOR CHANGES TO THE CA98 PROCEDURAL GUIDANCE

4.1 The OFT has made several further minor changes to the revised draft Procedural Guidance set out at Annexe C to this document. Mostly, these changes have been made as a result of the changes to our CA98 decision-making processes outlined in Chapters 2 and 3 of this document. Other revisions have been made to the draft Procedural Guidance in order further to enhance transparency of our procedures and/or for clarification purposes.

4.2 The relevant chapters of the Procedural Guidance are referred to below as 'PG Chapters' to distinguish them from references to the chapters in this document.

4.3 We have updated PG Chapter 4 to reflect the current OFT organisational structure chart.

4.4 In light of the proposed new decision-making model described in Chapter 3 of this document, we have amended the description of the role of the SRO in the context of an investigation at PG Chapter 5 (paragraph 5.1) and at PG Chapter 9 (paragraph 9.4). The revised draft guidance makes clear that, under the proposed new arrangements, the SRO, who leads the investigation team, would be responsible for authorising the opening of an investigation and the issue of an SO, as well as making case closure decisions prior to issue of an SO.

4.5 At PG Chapter 6, we have amended paragraph 6.15 concerning compliance with deadlines to respond to our written information requests, to include the 'proposed deadline for completion' among the aspects of a written information request on which we may engage with parties to help them comply.

4.6 At PG Chapter 7, we have revised the drafting to provide greater clarity on the circumstances in which we may propose to disclose information identified by the person or business providing it as being confidential (revised paragraph 7.10).
4.7 In light of the proposed new decision-making model described in Chapter 3 of this document, we have amended PG Chapter 8 concerning interim measures and PG Chapter 10 in relation to commitments, to reflect the fact that interim measures decisions and commitment decisions would be taken by the Case Decision Group. Also, we have noted that the parties will be informed of the identity of the Case Decision Group members.

4.8 In relation to commitments, we have further amended PG Chapter 10 (specifically paragraph 10.21) to refer to the fact that, after receipt of responses to the consultation on proposed commitments, we will hold a meeting with the party/ies that offered commitments to inform them of the general nature of the responses received and to indicate whether we consider that significant changes are required to the proposed commitments before we would consider accepting them.
A QUESTIONS FOR CONSULTATION

Q1. Do you agree with the proposal for a revised decision-making model set out in this document? In particular, do you consider the changes will enhance the robustness of decision-making?

Q2. Do you agree with the proposed transitional arrangements if the new decision-making model is introduced?

Q3. Does the revised draft guidance set out at Annexe C cover in sufficient detail all aspects of the revised processes in our investigations under CA98? If not, what additional guidance would be useful?

Q4. Do you have any comments on how easy the revised draft guidance is to understand and whether its format is easy to follow?

Q5. Do you agree that greater guidance on the OFT’s settlement policy and procedures would be worthwhile at this time or do you think it should be left to a later date, for instance after the establishment of the CMA?
B CONSULTATION CRITERIA

Public bodies are required to perform consultations in accordance with the following criteria wherever possible:

B.1 When to consult – formal consultation should take place at a stage when there is scope to influence the policy outcome.

B.2 Duration of consultation exercises – consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

B.3 Clarity of scope and impact – consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

B.4 Accessibility of consultation exercises – consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

B.5 The burden of consultation – keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees’ buy-in to the process is to be obtained.

B.6 Responsiveness of consultation exercises – consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

B.7 Capacity to consult – officials running consultations should seek guidance in how to run effective consultation exercises and share what they have learned from the experience.

B.8 The full Code of Practice on Consultation can be found on the website of the Department for Business, Innovation and Skills: www.bis.gov.uk/files/file47158.pdf.
ANNEXE C

A guide to the OFT’s investigation procedures in competition cases

Guidance
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*Chapter*

1. Preface
2. The legal framework
3. The sources of our investigations
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7. Limits on our powers of investigation
8. Taking urgent action to prevent serious damage or to protect the public interest
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10. Investigation outcomes
11. Issuing our provisional findings – The statement of objections
12. Right to Reply
13. The final decision
14. Complaints about our investigation handling, right of appeal and reviewing our processes
1 PREFACE

1.1 We have set out in this guidance document general information for the business and legal communities and other interested parties on the processes that we use when using our powers under the Competition Act 1998 (the Act) to investigate suspected infringements of competition law. It supersedes our previous quick guide on how we conduct investigations under the Act entitled Under Investigation.¹ You may find it useful to read this document alongside other Office of Fair Trading (OFT) documents, including – Enforcement,² OFT Prioritisation Principles,³ Powers of Investigation,⁴ and Involving third parties in Competition Act investigations.⁵

1.2 In this guidance, we have set out our procedures and explained the way in which we conduct investigations into suspected competition law infringements. This is our current practice as at the date of publication of this document. It may be revised from time to time to reflect changes in best practice or the law and our developing experience in assessing and investigating cases. Please refer to the OFT website to ensure you have the latest version of this guidance.

¹ OFT426 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft426.pdf
⁴ OFT404 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft404.pdf
1.3 This guidance is concerned exclusively with our investigations under the Act. It does not cover OFT investigations into individuals suspected of having committed the criminal cartel offence\(^6\) nor does it cover director disqualification order proceedings.\(^7\)

1.4 This guidance does not cover the procedures used by sectoral regulators\(^8\) in their competition law investigations. Further guidance on this is

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\(^6\) More information on the criminal cartel offence can be found in OFT 515 available to download at [www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/enterprise_act/oft515](http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/enterprise_act/oft515)

\(^7\) More information on director disqualification orders can be found in OFT 510 available to download at [www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf)

\(^8\) The Office of Communications, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Utility Regulation, the Water Services Regulation Authority, the Office of Rail Regulation, and the Civil Aviation Authority.
available in *Concurrent Application to Regulated Industries*\(^9\) or from the relevant organisation’s website.

1.5 This document incorporates the commitments made in our published Transparency Statement insofar as they apply to investigations under the Act.\(^10\)

1.6 We will apply this guidance flexibly. This means that we will have regard to the guidance when we deal with suspected competition law infringements but that, when the facts of an individual case reasonably justify it, we may adopt a different approach. For example, we may adopt a different approach in circumstances where at the same time as conducting an investigation into a suspected competition law breach by a business,\(^11\) in parallel we are also looking at whether an individual has committed a criminal cartel offence.

1.7 This document is not a definitive statement of, or a substitute for, the law itself and the legal tests which we apply in assessing breaches of competition law are not addressed in this guidance. A range of OFT publications on how we carry out this substantive assessment is available on the OFT website.\(^12\) We recommend that any person who considers that they or their business may be affected by an investigation into suspected anti-competitive practices should seek independent legal advice.

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\(^11\) The relevant provisions of competition law apply to agreements between, and conduct by, ‘undertakings’. An undertaking means any natural or legal person carrying on commercial or economic activities relating to goods or services, irrespective of legal status. For example, a sole trader, partnership, company or a group of companies can each be an undertaking. Further guidance on the meaning of ‘undertaking’ can be found in OFT Guidance Agreements and concerted practices (OFT401) and relevant European case law, such as C-205/03 *Fenin*. In this Guidance the word ‘business’ should be understood to include all forms of undertaking.

\(^12\) See Figure 1.1 above.
1.8 This guidance sets out the procedures we follow within the legal framework outlined in Chapter 2. It addresses each stage of a typical investigation in turn. The key stages of an investigation into a suspected infringement and a summary of our action at these stages is set out at Figure 1.2.
Figure 1.2 – Key stages in an investigation

**KEY STAGES**

- Source of our investigations
- Initial consideration of issues and informal information gathering
- Open a formal investigation?
- Formal information gathering powers
- Is there sufficient evidence of an infringement?
- Statement of Objections and access to OFT file
- Parties’ right to reply
- In light of parties’ representations, is there sufficient evidence of an infringement?
- No grounds for action decision
- Infringement decision and action (financial penalties, directions)
- Parties right of appeal to the Competition Appeal Tribunal

**WHAT DOES THE OFT DO?**

- Apply the Prioritisation Principles.
- Consider whether the legal test (Section 25 of the Act) has been satisfied.
- Issue written information requests.
- Visit and search premises to obtain information.
- Analysis of gathered evidence.
- Set out our provisional findings, supporting evidence and proposed action.
- Receive and consider parties’ representations (written and oral).
- Issue decision to parties, Publish non-confidential version of the decision.
2 THE LEGAL FRAMEWORK

2.1 The Treaty on the Functioning of the European Union (TFEU) and the Act both prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.

2.2 More information on the laws on anti-competitive behaviour is available in the OFT quick guide *Competing Fairly*¹³ and in the more detailed guidance on *Agreements and Concerted Practices*¹⁴ and *Abuse of a dominant position*.¹⁵

2.3 In the UK, competition law is applied and enforced principally by the OFT.¹⁶ The Act gives us powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions in the Act and Articles 101 and 102 TFEU.¹⁷

2.4 Under EU legislation,¹⁸ as a 'designated national competition authority', when we apply national competition law to a suspected anti-competitive agreement or abusive conduct, and the agreement or conduct may affect trade between Member States, we are also required to apply Articles 101 and 102 TFEU.

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¹⁶ However, it is open to any person to bring a standalone action in the High Court for an injunction and/or damages as a result of an alleged infringement of competition law. In relation to the regulated sectors (communications, gas, electricity, railways, air traffic services, water and sewerage), the respective sectoral regulators have concurrent powers with the OFT to apply and enforce the legal provisions.

¹⁷ See Chapter III (Investigation and Enforcement) of the Act.

¹⁸ Article 3 of EU Regulation 1/2003.
2.5 Further information on the framework for applying Articles 101 and 102 and the interaction with the Chapter I and Chapter II Prohibitions in the Act is available in the OFT guide *Modernisation*.19

2.6 There are procedural rules that apply when we take investigative or enforcement action.20 In addition, we are required to carry out our investigations and make decisions in a procedurally fair manner according to the standards of administrative law.21

2.7 In exercising our functions, as a public body, we must also ensure that we act in a manner that is compatible with the Human Rights Act 1998.

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19 OFT442 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/of442.pdf


3 THE SOURCES OF OUR INVESTIGATIONS

Summary

- We obtain information about possible competition law breaches through a number of sources
  - our research and market intelligence, and other workstreams
  - leniency applications
  - complaints to our Enquiries and Reporting Centre or to our Cartel Hotline.
- This chapter sets out how to contact us to apply for leniency or to complain about a suspected cartel or other potential competition law breach.
- In some cases, complainants can approach us informally in the first instance.

3.1 There are a variety of ways in which information can come to the OFT’s attention, leading us to investigate whether competition law may have been breached.

3.2 Our own research and market intelligence may prompt us to make initial enquiries into suspected anti-competitive conduct. Alternatively, evidence gathered through our other workstreams, such as our merger or markets functions, or use of our powers under the Regulation of Investigatory Powers Act 2000, or information received via the European Competition Network or the European Commission may reveal potentially anti-competitive behaviour. In these circumstances, we gather publicly available information and may write to businesses or individuals seeking further information that we consider could be relevant.

3.3 We also rely on information from external sources to bring to our attention potentially anti-competitive conduct. This could be from
individuals with so called 'inside' information about a cartel\textsuperscript{22} or from a complainant.

**Cartels and leniency**

3.4 A business which is or has been involved in a cartel\textsuperscript{23} may wish to take advantage of the benefits of our leniency programme prompting them to approach us with information about its operation.

3.5 By confessing to us, a business could gain total immunity from, or a significant reduction in, any financial penalties we can impose if we decide that the arrangement breaches the Chapter I prohibition and/or Article 101 TFEU.\textsuperscript{24}

3.6 It is also a criminal offence for an individual dishonestly to engage in cartel arrangements in the UK. Cooperating current and former employees and directors of companies which obtain immunity from financial penalties will normally receive immunity from prosecution. Also, an individual who comes forward with information about a cartel may receive immunity from criminal prosecution.\textsuperscript{25}

\textsuperscript{22} We operate a financial reward programme in exchange for information about the operation of a cartel. For more information, go to www.oft.gov.uk/OFTwork/cartels-and-competition/cartels/rewards

\textsuperscript{23} A cartel is an agreement between businesses not to compete with each other. The agreement can often be verbal. Typically, illegal cartels involve cartel members agreeing on price fixing, bid rigging, output quotas or restrictions, and/or market sharing arrangements. In some cartels, more than one of these elements may be present. For the purposes of our leniency programme, price-fixing includes resale price maintenance.

\textsuperscript{24} More information on how we set penalties is available in Part 5 of OFT guideline Enforcement (OFT407) available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/of407.pdf and Guidance as to the appropriate amount of a penalty (OFT423) available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/of423.pdf.

3.7 In addition, we will not apply for a competition disqualification order against any current director of a company whose company has benefited from leniency. However, we may apply for an order against a director who has been removed or has otherwise ceased to act as a director of a company owing to his role in the breach of competition law and/or for opposing the application for leniency, or against a director who fails to co-operate with the leniency process.

3.8 We encourage business representatives who suspect that their business has been involved in cartel activity to blow the whistle on the cartel.

3.9 For more information on what constitutes a cartel, see our quick guide *Cartels and the Competition Act* and our guideline *Agreements and Concerted Practices*.

**How to apply for leniency**

3.10 We handle leniency applications in strict confidence. Applications for lenient treatment under the OFT's leniency programme should be made to the Senior Director or Director of our Cartels and Criminal Enforcement Group (CCEG) in the first instance. The contact details of the relevant individuals are available on our website. More detailed information on our leniency programme is available in *Leniency in cartel cases* and *in Leniency and no-action*.

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26 In respect of the activities to which the grant of leniency relates. For further detail, see OFT guidance *Competition Disqualification Orders* (OFT510) available to download at www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/of510.pdf


29 www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/confess


Complaints about possible breaches of competition law

3.11 Another way in which we receive information from external sources is where an individual or a business complains to us about the behaviour of another business. Complaints can be a useful and important source of information relating to potentially anti-competitive behaviour.

How to make a competition complaint

3.12 If an individual or a business suspects that another business is infringing competition law, they should contact us.

3.13 Complaints about suspected cartels should be made by calling our Cartel Hotline on **0800 085 1664** or by emailing us at [cartelshotline@oft.gsi.gov.uk](mailto:cartelshotline@oft.gsi.gov.uk). These complaints are handled in confidence by CCEG. Guidance on reporting a suspected cartel to the OFT is available in the OFT quick guide *Cartels and the Competition Act.*

3.14 For all other competition related complaints, please call our Enquiries and Reporting Centre (ERC) on **08457 22 44 99** or email us at [enquiries@oft.gsi.gov.uk](mailto:enquiries@oft.gsi.gov.uk) in the first instance. We will be able to advise whether the matter is within our remit and, if it is, how to submit a complaint in writing for consideration by our competition experts.

3.15 Complaints made to ERC which appear to relate to a suspected cartel will be redirected to the Cartel Hotline. Similarly, complaints to the Cartel Hotline about a non-cartel competition matter will be passed to ERC.

3.16 The Annexe to the OFT guideline *Involving third parties in Competition Act investigations* also provides guidance and further detail on the type of information that we look for in a written, reasoned complaint.

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Pre-complaint discussions

3.17 The requirement for a written, reasoned complaint does not preclude complainants from approaching us informally in the first instance. Pre-complaint discussions may be helpful to businesses in deciding whether to commit the necessary time and effort in preparing a reasoned complaint.

3.18 In such cases, we will endeavour to give an initial view as to whether we would be likely to investigate the matter further if a formal complaint were to be made. This view would be based both on the likelihood of the complaint raising competition concerns and on the assessment of the complaint against our Prioritisation Principles to see if it falls within our casework priorities at the time (see Chapter 4 for more information on how we prioritise cases). However, any view given at this stage will not commit the OFT to opening an investigation.

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

- the identity of the complainant and the party/ies to the suspected infringement, and their relationship to one another (for example, whether they are competitors, customers or suppliers)

- the reasons for making the complaint, including a brief description of:
  - the product(s)/service(s) concerned
  - the agreement or conduct the complainant believes to be anti-competitive
  - the type of business operated by the complainant and the party(ies) to the suspected infringement (for example, manufacturer, wholesaler, retailer) and an indication of their geographic scale (for example, local, national, or international)
  - if known, the size of the market and of the parties involved (for example, market shares).
3.20 Whether we engage in pre-complaint discussions will depend on the availability of resource and whether the issue(s) outlined in the basic information suggest to us that the case is one that would merit a prioritisation assessment by us. In cases where pre-complaint discussions are appropriate, we aim to suggest a date for the discussions within ten working days of receiving the required information.

3.21 If you wish to approach us about the possibility of a pre-complaint discussion, you should contact ERC (contact details above) in the first instance. If sending an email, please include the words 'Pre-Complaint Discussion' in the subject line of the email.

Confidentiality of complaints

3.22 We understand that individuals and companies may want to ensure that details of their complaints are not made public. If a complainant has specific concerns about disclosure of their identity or their commercially sensitive information, they should let us know at the same time as submitting their complaint. We are prohibited\(^{34}\) from disclosing certain confidential information and while we are considering whether to pursue a complaint we aim to keep the identity of the complainant confidential.

3.23 Later on, if we have sufficient information to carry out a formal investigation and we provisionally decide that a business under investigation has infringed the law, we may have to reveal to them the identity of the complainant where they cannot properly respond to the allegations against them in the absence of such disclosure. However, before disclosing a complainant’s identity or any of their information, we will discuss the matter with them and give them an opportunity to make representations to us.

\(^{34}\) Rule 1(1) and 6 of the OFT Rules and Part 9 of the Enterprise Act 2002. However, Part 9 does permit the OFT to disclose confidential information in certain specified circumstances.
4 WHAT WE DO WHEN WE RECEIVE A COMPLAINT

Summary

- We use published Prioritisation Principles to decide which complaints to take forward to the Initial Assessment Phase.

- Prioritised cases will be allocated to one of our groups within Markets and Projects.

- We typically gather information informally at this stage (for example, not using our formal powers of investigation).

- We aim to keep complainants informed of the progress of their complaint.

What we do when we receive a complaint

4.1 With the exception of complaints about suspected cartels, all competition complaints should be submitted to our Enquiries and Reporting Centre (ERC). Complaints received by ERC about suspected cartel activity are redirected to the Cartel Hotline.

4.2 We respond to all complaints we receive. We aim to give an initial response within ten working days of receipt in at least 90 per cent of complaints. Where a competition complaint raises more complex issues, that require longer to assess, we will respond within 30 working days of receipt. All complaints that we receive are given a complaint reference number.

4.3 If ERC considers that a complaint relates to possible anti-competitive behaviour (other than cartel activity), the complaint is passed to our Preliminary Investigations team. The Preliminary Investigations team may engage in informal dialogue with the complainant if we need to clarify any information provided to us at this stage or if we require additional information. The Preliminary Investigations Team is part of the Pipeline and Performance Group.
4.4 Although we consider all complaints we receive, we cannot formally investigate all suspected infringements of competition law. We decide which cases to investigate on the basis of our Prioritisation Principles. These take into account the likely impact of our investigation in the form of direct or indirect benefits to consumers, the strategic significance of the case, the risks involved in taking on the case, and the resources required to carry out the investigation. The Preliminary Investigations team carries out an initial assessment of whether a complaint satisfies our Prioritisation Principles.

4.5 Further information on our Prioritisation Principles and how we apply them in practice is available in the OFT publication *Prioritisation Principles*.35

4.6 We aim to keep complainants informed of the progress of their complaint and share with them our expected timescale for dealing with it. In all cases we aim to communicate to the complainant within four months from the date of receipt of their complaint whether we have decided to open a formal investigation.

4.7 However, our ability to follow up on a complaint and to determine within four months whether to open a formal investigation depends to a great extent on the timely cooperation of the complainant and the amount and quality of information they provide us with. Well structured written complaints supported by evidence are likely to proceed more rapidly to a prioritisation assessment and, if they are prioritised, to an investigation. They can also assist complainants in being granted Formal Complainant status if we proceed to a formal investigation. See Chapter 5 for more details on the process for becoming a Formal Complainant.

4.8 If we decide not to prioritise a complaint at this stage, we will write to the complainant to inform them of the fact. In appropriate cases, we may send a warning letter to a company to inform them that we have been made aware of a possible breach of competition law by them and that, although we are currently not minded to pursue an investigation,

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we may do so in future if we receive further evidence of a suspected infringement or our prioritisation assessment changes.

4.9 Where we prioritise a complaint, the case will be allocated to the appropriate OFT group for formal or further informal investigation.

**Figure 1.3 – Complaint Process**

Which part of the OFT carries out the investigation?

4.10 We have three groups which carry out the majority of competition investigations. These are: Services, Infrastructure and Public Markets (SIP); Goods and Consumer; and CCEG (together referred to as the Markets and Projects groups). A chart showing the structure of the OFT is available on the [OFT website](http://www.of.t.gov.uk).
4.11 SIP and Goods and Consumer are organised around sectors of the economy rather than by legal tools. This means that they are responsible for both competition and consumer casework, and market studies. For example, SIP focuses on areas such as financial services, professional services, transport, construction, property, the creative industries, the knowledge economy, including information technology, and public markets. Goods and Consumer is responsible for consumer goods such as food, drink, clothing, pharmaceuticals, chemicals, metals, electrical appliances and recreational goods as well as for investigating potential breaches of consumer law. Most cartel investigations are run by CCEG.

4.12 However, there is flexibility in the allocation of cases between our Markets and Projects groups. This means that a case that falls into the area covered by one group may be allocated to another group where that group is better placed to carry out the investigation, for instance, where it has more available resources at the time.

4.13 The processes underpinning our investigations and the tools available to us are identical across all our groups. Information on the different groups within Markets and Projects is available on the OFT website.

**Initial assessment phase**

4.14 Once we have decided to take forward a case within Markets and Projects, we may gather more information from the complainant, the company/ies under investigation, and/or third parties on an informal basis. This may involve sending an informal request for information, a request for clarification of information already provided to us in the complaint, or an invitation to meet with us. In these circumstances, where we are not using our formal powers to gather information, we rely on voluntary cooperation.

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36 However, any covert surveillance or handling of covert human Intelligence sources under the Regulation of Investigatory Powers Act 2000 will only be carried out by CCEG in relation to investigations into suspected cartels.


38 We can only use our formal information gathering powers where we have reasonable grounds for suspecting that competition law has been breached.
4.15 In the case of suspected cartels, however, we are unlikely to contact the companies under investigation informally as to do so may prejudice our investigation. Instead, we typically use our formal information gathering powers from the outset.

4.16 On the basis of the information we have gathered at that time, if we consider we have reasonable grounds for suspecting that competition law has been breached, we can open a formal investigation. This allows us to use our formal information gathering powers (see Chapter 6).
### OPENING A FORMAL INVESTIGATION

**Summary**
The decision to open a formal investigation depends upon whether

- the legal test that allows us to use our formal investigation powers has been satisfied, and
- whether the case continues to fall within our casework priorities.

- When we open a formal investigation, the case is allocated a Team Leader, a Project Director and a Senior Responsible Officer.

- In appropriate cases, when we open a formal investigation, we will send the companies under investigation a case initiation letter including contact details for key members of the case team including the Senior Responsible Officer, who will decide whether or not to issue a Statement of Objections in the case.

- We will also publish a Case Opening Notice setting out basic details of the case and a case-specific administrative timetable for the investigation.

- We will grant Formal Complainant status, in relation to an investigation, to any person who has submitted a written, reasoned complaint to us, who requests Formal Complainant status, and whose interests are, or are likely to be materially affected by the subject-matter of the complaint.

- Formal Complainants have the opportunity to become involved at key stages of our investigation.
5.1 If a complaint is likely to progress to a formal investigation, the case is allocated:

- a designated Team Leader, who leads the case team and is responsible for day-to-day running of the case
- a Project Director, who directs the case and is accountable for delivery of high quality timely output, and
- a Senior Responsible Officer (SRO), who is responsible for authorising the opening of a formal investigation and, where the SRO considers there is sufficient evidence, the issuing of a Statement of Objections.

5.2 For these purposes, the decision to open a formal investigation means deciding whether the legal test\(^{39}\) which allows us to use our formal investigation powers has been met and whether the case continues to fall within our casework priorities.

5.3 Once the decision has been taken to open a formal investigation, we will send the businesses under investigation a case initiation letter setting out brief details of the conduct that we are looking into, the relevant legislation, the case-specific timetable, and key contact details for the case such as the Team Leader, Project Director and SRO.\(^{40}\)

5.4 In some instances, we will send out a formal information request at the same time as sending the case initiation letter or the information request may form part of the case initiation letter. See Chapter 6 for more information on formal information requests.

5.5 In some cases, it will not be appropriate to issue a case initiation letter at the start of a case, as to do so may prejudice our investigation, such as prior to unannounced inspections or witness interviews. In these cases, we will send out the letter as soon as possible.

\(^{39}\) Under section 25 of the Act we may use our formal investigation powers where we have reasonable grounds for suspecting that competition law has been breached.

\(^{40}\) See Transparency – A Statement on the OFT’s approach (OFT1234) available to download at [www.of.gov.uk/shared/of/consultations/668117/OFT1234.pdf](http://www.of.gov.uk/shared/of/consultations/668117/OFT1234.pdf)
5.6 Also, it may be necessary to limit the information that we give in the case initiation letter, for example, to protect the identity of a whistleblower in a suspected cartel investigation or the identity of a complainant where there are good reasons for doing so.

5.7 Once a formal investigation is opened and the parties have been informed of this, we will generally publish a Case Opening Notice containing basic details of the case, including the timetable for the case. If the timetable changes during the investigation, the timetable will be updated in the Case Opening Notice, including reasons for the changes that have been made.

5.8 In some cases, such as cartel investigations, it will not be possible to include many details of the investigation at the stage of publishing the Case Opening Notice since this might prejudice the OFT’s ongoing investigation. The Case Opening Notice will be updated once we are able to provide further details of the investigation without prejudicing the investigation.

### Granting Formal Complainant status

5.9 We will grant Formal Complainant status in relation to an investigation to any person who has submitted a written, reasoned complaint to us, who requests Formal Complainant status, and whose interests are, or are likely to be materially affected by the subject-matter of the complaint. Typically, we will remind complainants who have submitted a written, reasoned complaint but who have not requested formal status that they may apply to be treated as a Formal Complainant. We may grant Formal Complainant status to more than one complainant in an investigation.

5.10 The principal advantage of acquiring this status is that Formal Complainants have the opportunity to become involved at key stages of our investigation.

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41 The Case Opening Notice will contain basic information such as whether the case is being investigated under the Chapter I and/or II prohibitions, a brief summary of the alleged infringement, the industry sector involved and, in appropriate cases, the names of the parties under investigation.
5.11 For example, we will consider providing Formal Complainants with access to the same information available to companies under investigation at the outset of our formal investigation. This will depend on the circumstances of the individual case. Where we do provide such information, the Formal Complainant is under a legal obligation to respect its confidentiality. Later on, we will also invite Formal Complainants to comment, usually in writing, on the provisional findings in our SO through a structured process, before our investigation is concluded. See Chapter 12 for more detail on this.

5.12 Other interested third parties who are not Formal Complainants may also have an opportunity to become involved in our investigation. For example, we may consider inviting them to comment on our SO where we consider that it would be appropriate to do so.

5.13 More information on the involvement in OFT investigations of Formal Complainants and other interested third parties is available in the OFT guideline *Involving third parties in Competition Act investigations*.42

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6 OUR FORMAL POWERS OF INVESTIGATION

Summary

- After we have opened a formal investigation, we can use our formal powers to obtain information.
- We can issue formal information requests (section 26 notices) in writing.
- We also have the power to enter, and in some instances to search, business and domestic premises.
- It can be a criminal offence not to comply with our information-gathering process.

Information gathering powers

6.1 We have a range of powers to obtain information to help us establish whether an infringement has been committed. We can require the production of specified documents or information, enter premises without a warrant, and enter and search premises with a warrant. The entering of premises can be with or without notice.

6.2 The following paragraphs give an overview of the extent of our formal powers and how we use them. More detailed guidance is available in the OFT guideline *Powers of Investigation.*

Written information requests

6.3 This is the power we use most often to gather information during our investigations. We send out formal information requests (also referred to

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as section 26 notices)\(^4\) in writing to obtain information from a range of sources such as the business(es) under investigation, their competitors and customers, complainants, and suppliers. It is a criminal offence punishable by a fine or imprisonment not to comply with a formal information request without a lawful excuse,\(^4\) or to provide false or misleading information,\(^6\) or to destroy, falsify or conceal documents.\(^7\)

6.4 Under this power, we can also ask for information that is not already written down, for example market share estimates based on knowledge or experience, and we can also require past or present employees of the business providing the document to explain any document that is produced. Examples of the types of information we may ask for include internal business reports, copies of e-mails and other internal data.

6.5 Our request will tell the recipient what the investigation is about, specify or describe the documents and/or information that we require, give details of where and when they must be produced, and set out the offences that may be committed if the recipient does not comply.

6.6 We may send out more than one request to the same person or company during the course of our investigation. For example, we may ask for additional information after considering material submitted to us in response to an earlier request.

6.7 We will ask for documents or information which, in our opinion, are relevant to the investigation at the time we send out the request. Any queries about the scope of an information request or the time given to respond should be raised with the Team Leader or Project Director as soon as possible.

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\(^4\) Section 26 of the Act gives us the power to require the production of information and documents when conducting a formal investigation.

\(^4\) Section 42 of the Act. For more information on potential criminal penalties for failing to co-operate with our powers of investigation go to *Powers of Investigation* OFT404 available to download at [www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/of404.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/of404.pdf)

\(^6\) Section 44 of the Act.

\(^7\) Section 43 of the Act.
Using draft information requests

6.8 Where it is practical and appropriate to do so, we will send the information request in draft. In this way, we can take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which we must receive the information. The timeframe for comment on the draft will depend on the nature and scope of the request.

6.9 In certain circumstances, it would not be appropriate to send information requests in draft. For example, if in our view it would prejudice our investigation or if it would be inefficient because the request is for a small amount of information. We will assess each case on its facts to determine whether it would be appropriate to use a draft information request.

Advance notice of the issue of written information requests

6.10 In appropriate cases, we will seek to give recipients of large information requests advance notice so they can manage their resources accordingly. This is our usual approach.

6.11 However, in other circumstances, it may be inappropriate to give advance notice, such as where the request is for a small amount of information, the need for the information was unexpected, or where giving notice would prejudice our investigation. Where we do not give advance notice of large information requests, we will explain why.

Setting a deadline for a response to a written information request

6.12 When we send out a request, we also set a deadline by which we must receive the response. If a request has been provided in draft and the timescale for response to the final request already discussed, we will agree to an extension only in exceptional circumstances, so as to minimise any delay to our investigation.

6.13 The deadline specified in the final request will depend on the nature and the amount of information that we have requested. It is not possible for us to apply uniform, set timescales for responses to information requests.

6.14 Where a recipient has a complaint about the deadline set for a response to a written information request, the recipient should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the recipient may refer the matter to the Procedural Adjudicator during the trial period.49

Responding to our written information requests

6.15 As stated above, we expect recipients to comply fully with our information request within the given deadline. This is especially the case where we have engaged with them on the scope and purpose of the request and the proposed deadline for its completion, to help them comply. It is a criminal offence punishable by a fine or imprisonment not to comply with a formal information request without a lawful excuse,50 or to provide false or misleading information,51 or to destroy or falsify documents.52

6.16 Unless otherwise indicated, the response should be sent to the Team Leader in electronic format and in hard copy. If the response contains commercially sensitive information or details of an individual’s private affairs and the sender believes that disclosure might significantly harm their interests or the interests of the individual, a separate non-confidential version along with an explanation which justifies why certain information should be treated as confidential should be submitted at the same time and in any event no later than four weeks from the date of submitting the original response. Any extensions to this deadline should

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50 See footnote 43 above.

51 See footnote 44 above.

52 See footnote 45 above.
be agreed with the Team Leader in advance of the deadline. In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information. See Chapter 7 on handling of confidential information.

6.17 In some cases, we may return information sent to us in response to a request where, after careful review, we consider it is duplicate information or information that is outside the nature and scope of the request.

**Power to enter premises**

6.18 In some cases, we will visit premises to obtain information. The power we use to gain entry will depend on whether we intend to inspect business premises (such as an office or a warehouse) or domestic premises (such as the home of an employee).\(^53\)

6.19 Under certain circumstances we can enter business premises, but not domestic premises, without a warrant. Where we have obtained a warrant\(^54\) in advance of entry, we can enter and search both business and domestic premises. These two powers (to enter premises without a warrant and to enter premises with a warrant) are explained below.

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\(^{53}\) We also have powers to gather information to assist other authorities in relation to their investigations into suspected competition infringements in other parts of the EU. For example, we may assist the European Commission in obtaining information in relation to its investigations into suspected infringements of Articles 101 and 102 TFEU. More information on these powers can be found in *Powers of Investigation* (OFT404) which is available to download at [www.of.t.gov.uk/shared_of.t/business_leaflets/ca98_guidelines/of.t404.pdf](http://www.of.t.gov.uk/shared_of.t/business_leaflets/ca98_guidelines/of.t404.pdf)

\(^{54}\) From the High Court in England and Wales or Northern Ireland or the Court of Session in Scotland.
6.20 The occupier of the premises does not have to be suspected of having breached competition law.\textsuperscript{55}

**Entering premises without a warrant\textsuperscript{56}**

6.21 An OFT officer who is authorised by us in writing to enter premises but does not have a warrant may enter business premises in connection with an investigation if they have given the premises' occupier at least two working days' written notice.

6.22 In certain circumstances, we do not have to give advance notice of entry.\textsuperscript{57} For example, we do not have to give advance notice if we have reasonable suspicion that the premises are, or have been, occupied by a party to an agreement which we are investigating or a business whose conduct we are investigating, or if our authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

**What powers do we have when entering business premises without a warrant?**

6.23 When an inspection without a warrant is taking place, our officers may require any person to:

- produce any document that may be relevant to our investigation - our officers can take copies of, or extracts from, any document produced
- provide an explanation of any document produced
- tell us where a document can be found if our officers believe it is relevant to our investigation.

\textsuperscript{55} For example, we could enter the premises of a supplier or a customer of the business suspected of breaching the law, so long as we have taken all reasonably practicable steps to notify them in advance of our intended entry.

\textsuperscript{56} Section 27 of the Act.

\textsuperscript{57} Section 27(3) of the Act.
6.24 Our officers may also require any relevant information electronically stored to be produced in a form that can be read and taken away, and they may also take steps necessary to preserve documents or prevent interference with them.\(^{58}\)

**Entering and searching premises with a warrant\(^{59}\)**

6.25 We can apply to the court\(^{60}\) for a warrant to enter and search business or domestic premises.

6.26 We would usually seek a warrant to search premises where we believe that the information relevant to our investigation may be destroyed or otherwise interfered with if we requested the material via a written request. Therefore, we mostly use this power to gather information from companies or individuals suspected of participating in a cartel.

**What powers do we have when entering premises with a warrant?**

6.27 An inspection carried out under a warrant will authorise our officers to enter premises using reasonably necessary force but only if they are prevented from entering the premises. Our officers cannot use force against any person.

6.28 In addition to our powers described above, the warrant also authorises our officers to search the premises for documents that appear to be of the kind covered by the warrant and take copies of or extracts from them.\(^{61}\)

\(^{58}\) Section 27(5) of the Act.

\(^{59}\) Section 28 of the Act in relation to business premises. Section 28A of the Act in relation to domestic premises.

\(^{60}\) The High Court in England and Wales or Northern Ireland or the Court of Session in Scotland.

\(^{61}\) For business premises, section 28(2)(b) of the Act. For domestic premises, section 28A(2)(b) of the Act.
6.29 The search may cover offices, desks, filing cabinets, electronic devices, such as computers and phones, as well as any documents. We can also take away from the premises:

- original documents that appear to be covered by the warrant if we think it is necessary to preserve the documents or prevent interference with them or where it is not practicable to take copies of them on the premises.

- any document, or copies of it, to determine whether it is relevant to our investigation, when it is not practicable to do so at the premises. If we consider later on that the information is outside the scope of our investigation, we will return it.

- any relevant document, or copies of it, contained in something else where it is not practicable to separate out the relevant document at the premises. As above, we will return information if we consider later on that it is outside the scope of our investigation.

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

**What will happen upon arrival?**

6.30 Our authorised officers will normally arrive at the premises during office hours. On entry, they will provide evidence of their identity, written authorisation by the OFT, and a document setting out what the investigation is about and describing what criminal offences may be committed if a person fails to co-operate. A separate document will also be provided that sets out the powers of the authorised officers and the right of the occupier to request that a legal adviser is present.

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62 For business premises, section 28(2)(c) of the Act. For domestic premises, section 28A(2)(c) of the Act. We can only retain these documents for a maximum period of three months (for business premises, section 28(7) of the Act. For domestic premises, section 28(A)(8) of the Act).

63 However, the OFT may retain all of the material if it is not reasonably practicable to separate the relevant information from the irrelevant information without prejudicing its lawful use, for example as evidence.
6.31 Where we have obtained a warrant, we will produce it on entry. The warrant will list the names of the OFT officers authorised to exercise the powers under the warrant and will state what the investigation is about and describe the criminal offences that may be committed if a person fails to co-operate.

6.32 Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for our authorised officers during the inspection.

**Can a legal adviser be present?**

6.33 The occupier may ask legal advisers to be present during an inspection, whether conducted with or without a warrant. If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, our officers may wait a short time for legal advisers to arrive.64

6.34 During this time, we may take necessary measures to prevent tampering with evidence or warning other companies about our investigation.65

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

6.35 If there is no one at the premises when our officers arrive, our officers must take reasonable steps to inform the occupier that we intend to enter the premises. Once we have informed them, or taken such steps as we are able to inform them, we must allow the occupier or their legal or other representative a reasonable opportunity to be present when we carry out our search under the warrant.66

6.36 If our officers have not been able to give prior notice, we must leave a copy of the warrant in a prominent place on the premises. If, having

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64 Rule 3(1) of the OFT Rules.

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

66 Rule 3(1) of the OFT Rules
taken the necessary steps, we have entered premises that are unoccupied, on leaving we must leave them secured as effectively as we found them.\footnote{For business premises, section 28(5). For domestic premises, section 28A(6) of the Act.}
7 LIMITS ON OUR POWERS OF INVESTIGATION

Summary

- We cannot require the production of privileged communications.
- We cannot force a business to provide answers that would require an admission that they have infringed the law.
- We are subject to strict rules governing the extent to which we are permitted to disclose confidential and sensitive information.
- We expect to receive a separate non-confidential version of any documents or materials containing sensitive or confidential information, along with a clear explanation as to why the information should be considered confidential.

Privileged communications

7.1 Under the Act, we are not allowed to use our powers of investigation to require anyone to produce privileged communications.\(^{68}\)

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

7.3 If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, our officer may request that the communications are placed in a sealed envelope or package. The

\(^{68}\) Section 30 of the Act.
officer will then discuss the arrangements for safe-keeping of these items by the OFT pending resolution of the dispute.

Privilege against self-incrimination

7.4 When we request information or explanations we cannot force a business to provide answers that would require an admission that they have infringed the law.\(^69\) We can, however, ask for any documents already in existence, or information relating to facts, such as whether a given employee attended a particular meeting.

7.5 The law on privilege is complicated. As investigators of a possible infringement, we are not able to advise on the circumstances in which a person can claim privilege. Anyone in any doubt about how it applies in practice should seek independent legal advice.

Handling confidential information

7.6 During the course of our investigations we acquire a large volume of confidential information relating to both businesses and individuals.

7.7 There are strict rules governing the extent to which we are permitted to disclose such information.\(^70\) In many instances we may have to redact documents we propose to disclose to remove any confidential information, for example, by blanking out parts of documents or by aggregating figures.

7.8 If a person or company thinks that any information they are giving us or we have acquired is commercially sensitive or contains details of an individual’s private affairs and that disclosing it might significantly harm the interests of the business or person, they should submit a separate non-confidential version of the information in an annexe clearly marked as confidential and set out clearly why the information should be considered confidential. We will not accept blanket or unsubstantiated

\(^{69}\) Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is given effect in the United Kingdom by the Human Rights Act 1998.

confidentiality claims. The non-confidential version should be provided at the same time as the original response and in any event no later than four weeks from the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the Team Leader.

7.9 In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information.

7.10 There may be occasions where we propose to disclose information identified by the person or business providing it as being confidential either to parties to the investigation or by including the information in a published decision. For example we may not agree with the person or business who provided it that the information in question is confidential or we may agree that the information is confidential but consider that it is necessary to disclose the information either to the parties in the investigation in order to enable them to exercise their rights of defence or in a published decision. In such circumstances, we will give the person or business who provided the information prior notice of our proposed action and will give them a reasonable opportunity to make representations to us. We will then inform the party whether or not we still intend to disclose information, after considering all the relevant facts.

7.11 Where a party is informed that we do still intend to disclose information and the party is unhappy about this, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Adjudicator during the trial period.71

7.12 In some cases, we may consider the use of practices such as ‘confidentiality rings’ or ‘data rooms’ at access to file stage to handle

the disclosure of confidential information to a limited group of persons. We are likely to do so where there are identifiable benefits in doing so and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned\textsuperscript{72}. In such cases, the person or business that provided the information will be informed of the proposal and provided with a reasonable opportunity to make representations to us. We will then inform the person or business whether or not we still intend to use the proposed ‘confidentiality ring’ and/or ‘data room’ arrangement, after considering all the relevant facts.

7.13 Where a person or business is informed that we do still intend to use the ‘confidentiality ring’ and/or ‘data room’ arrangement and the person or business is unhappy about this, the person or business should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the person or business may refer the matter to the Procedural Adjudicator during the trial period.\textsuperscript{73}

\textsuperscript{72} See further detail at Chapter 11

8 TAKING URGENT ACTION TO PREVENT SERIOUS DAMAGE OR TO PROTECT THE PUBLIC INTEREST

Summary

- We can require a business to comply with temporary directions (interim measures) where
  - we have started but not yet concluded an investigation, and
  - we consider it necessary to act urgently either to prevent serious irreparable damage to a person or category of persons, or to protect the public interest.
- In these circumstances, we can act on our own initiative or in response to a request to do so.
- Any person who considers that the alleged anti-competitive behaviour of another business is causing them serious, irreparable damage may apply to us to take interim measures.
- If a person fails to comply with the interim measures without reasonable excuse, we would apply to court for an order to require compliance within a specified time limit.

8.1 We have the power\(^{74}\) to require a business to comply with temporary directions (referred to as ‘interim measures’) while we complete our investigation.

8.2 We may do this where we have started but not yet concluded our investigation and we consider it necessary to act urgently either to prevent serious, irreparable damage to a person or category of persons, or to protect the public interest. We can act on our own initiative or in response to a request to do so.

\(^{74}\) Section 35 of the Act.
8.3 In most cases, interim measures will have immediate effect. However, if a person fails to comply with them without reasonable excuse, it is our practice to apply to court for an order to require compliance within a specified time limit.

8.4 The court can require the person in default or any officer of a company responsible for the default, to pay the costs of obtaining the order.

8.5 If the measures relate to the management or administration of a business, the court order can compel the business or any of its officers to comply with them. Failure to comply with a court order will be in contempt of court.

Application for interim measures

8.6 Any person who considers that the alleged anti-competitive behaviour of another business is causing them serious, irreparable damage may apply to us to take interim measures.

8.7 They should contact the designated Team Leader who is responsible for the case in the first instance. The Team Leader will be able to discuss the information requirements and explain the procedure for dealing with such requests.

8.8 The Team Leader will also explain that, interim measures decisions being Collective Decisions\(^{75}\), a Case Decision Group will be appointed to make the decision on whether or not to give interim measures directions.\(^{76}\) The parties will be informed of the identity of the Case Decision Group members.

8.9 Applicants should provide as much information and evidence as possible to demonstrate their case for interim measures and they should also indicate as precisely as possible the nature of the interim measure being sought.

\(^{75}\) See paragraph 11.26

\(^{76}\) See paragraph 11.26
Decision to impose interim measures

8.10 We may provisionally decide to give an interim measures direction. In this case we will write to the business to which the directions are addressed setting out the terms of the proposed directions and our reasons for giving them. We will also allow them a reasonable opportunity to make representations to us. Given the time critical nature of the interim measures process, the time allowed may be short.

8.11 The business to which the directions are addressed will also be allowed to inspect documents on our file that relate to the proposed directions. We may withhold any documents to the extent to which they contain any confidential information.

8.12 After taking into account any representations, we will make our final decision and inform the applicant and any Formal Complainants and the business against which the order is being sought.

Rejecting an application for interim measures

8.13 If we provisionally decide to reject an application for interim measures, we will consult with the applicant and any other Formal Complainants before doing so by sending a provisional dismissal letter setting out our principal reasons for rejecting the application. We will give them an opportunity to submit comments and/or additional information within a certain time, the length of which will depend on the case.

8.14 If the comments from the applicant or Formal Complainant contain confidential information, a separate non-confidential version must be submitted at the same time (see Chapter 7 on handling confidential information). We may provide this to the business under investigation if we think it appropriate, such as where it may be relevant for the rights of defence.

8.15 We will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided to us, if we still decide to reject the application, we will send a letter to the applicant and any other Formal Complainants and normally the business against which the directions are sought to inform them and give our reasons.
8.16 If the additional information from any of these parties does lead us to change our provisional view and decide that we should make an interim measures direction, we will inform the applicant, any other Formal Complainants, and the business against which the directions are sought, and our investigation will continue in the normal way.

Publication

8.17 We maintain a register on our website of all interim measures directions.\textsuperscript{77} We may also publish them in an appropriate trade journal.

8.18 More information on interim measures directions is available in \textit{Enforcement}\textsuperscript{78} and \textit{Involving third parties in Competition Act investigations}.\textsuperscript{79}

\textsuperscript{77} The register can be viewed at www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/

\textsuperscript{78} OFT407 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft407.pdf

9 THE ANALYSIS AND REVIEW STAGE

Summary

- Regular review and scrutiny are a key part of our investigation process. Senior officials and advisors, both internal and external, can perform this function.

- We provide case updates to keep parties informed.

- We offer parties the opportunity to meet with the case team at state of play meetings.

9.1 The evidence that we gather using our powers described above is fundamental to the outcome of our investigation. In all cases, we routinely review and analyse the information in our possession to test the factual, legal and economic arguments and to establish whether it supports or contradicts the theory/ies of competition harm.

9.2 In some cases, an investigation may start out by probing a particular set of circumstances that point to conduct of one type but information may later surface which indicates the existence of another type of potentially anti-competitive behaviour or a different theory of competition harm from that advanced earlier in the investigation. Alternatively, our early analysis may suggest that a large number of businesses have been acting unlawfully but later on it emerges that we only have enough evidence to warrant further investigation of some of them. We may also exercise our administrative discretion to focus our resources on investigating a limited set of activities or businesses.

9.3 The analysis and review stage therefore forms an essential part of our investigation process. In addition to carrying out their own analysis, our case teams seek input from other areas of the OFT to assist them.
Internal scrutiny

9.4 The SRO\textsuperscript{80} decides whether there are sufficient grounds to open a formal investigation and whether there is sufficient evidence to issue an SO, as well as making case closure decisions prior to issue of an SO. In exercising these functions the SRO consults with other senior officials as appropriate.

9.5 Throughout our competition investigations, as part of the quality assurance that we adopt in every case, we regularly scrutinise the way in which we handle our investigation and routinely assess the evidence before us to ensure that our actions and decisions are well-founded, fair and robust. This involves seeking internal advice from specialist advisors on the legal, policy and economic issues that arise. In some instances, we may also seek advice from external sources, such as external counsel.

9.6 To provide internal checks and balances before a Statement of Objections is issued or a Collective Decision\textsuperscript{81} is taken, specialised lawyers and economists from outside the case team analyse and review the relevant facts and key underlying evidence and highlight to the case team and the relevant decision maker(s) the legal and/or economic risks associated with the proposed course of action.

9.7 The General Counsel and the Chief Economist are responsible for ensuring that there has been a thorough review of the robustness of, respectively, the legal and the economic analysis (and of the evidence being used to support this) before a Statement of Objections is issued or a Collective Decision is taken.

9.8 The General Counsel is responsible for ensuring that the relevant decision maker(s) is (are) aware of any significant legal risks before the decision is taken. The Chief Economist is responsible for ensuring that the relevant decision maker(s) is (are) aware of any significant risks on the economic analysis before the decision is taken.

\textsuperscript{80} See paragraph 5.1

\textsuperscript{81} See paragraph 11.26
9.9 The General Counsel and the Chief Economist (or their representative(s)) will attend the oral representations meeting(s)\textsuperscript{82} and may ask questions of the parties.

**Sharing our early thinking and giving regular updates**

9.10 The time taken to establish the facts and whether they point to an infringement of competition law will vary from case to case depending on a range of factors such as, for example, the number of parties under investigation, the extent to which they cooperate with us, and the complexity of the conduct under consideration. In many cases, the facts advanced by one party will directly contradict those put forward by another party. The purpose of our investigation is to establish which set of circumstances is more credible based on verifiable facts.

9.11 We generally provide case updates to companies under investigation and Formal Complainants either by telephone or in writing. These are often the most efficient and effective ways of sharing information on case progress for us and the parties alike.

9.12 We will also offer all parties under investigation opportunities to meet with representatives of the case team (including the SRO or Project Director) to ensure they are aware of the stage the investigation has reached. At these ‘state of play’ meetings, we will inform the parties of the next stages of the investigation and the likely timing of these, subject to any restrictions we may have if the timing is market sensitive.\textsuperscript{83} We will also, generally, share our provisional thinking on a case.\textsuperscript{84}

9.13 We will invite parties to the first ‘state of play’ meeting once the case has been formally opened. This will cover the anticipated scope of the investigation, next stages and the proposed timetable. This meeting will provide the parties with greater transparency on the nature and scope of the investigation. We will invite parties to a second ‘state of play’

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\textsuperscript{82} See further at Chapter 12.
meeting before the decision is taken on whether or not to issue a Statement of Objections. At this meeting we will update the parties on the OFT’s provisional thinking on the case, including the key potential competition concerns identified.

9.14 In some cases it may not be appropriate to hold a state of play meeting at the outset of the investigation where this may prejudice the ongoing investigation. However, we will invite parties to a 'state of play' meeting before the decision is taken on whether or not to issue a Statement of Objections. At this meeting we will update the parties on the OFT’s provisional thinking on the case, including the key potential competition concerns identified.

9.15 In all cases where a Statement of Objections is issued, we will invite parties to a further 'state of play' meeting after the parties have submitted their written representations and the oral hearing(s) have been held. At this meeting, we will update the parties on the OFT’s preliminary views on how it intends to proceed with the case in light of the written and oral representations.

9.16 In appropriate circumstances, we may also meet with parties on other occasions. This may be where they have new information that can materially assist us in taking forward our case. Parties who believe that a meeting of this kind would be useful should contact the Team Leader in the first instance to discuss the matter.

9.17 As a matter of routine, we will keep parties to the investigation informed of the case timetable and any changes to this, as well as publishing this information in the Case Opening Notice on our website.85

9.18 We have published a Transparency Statement on our website, setting out the steps we take to ensure our work is open and accessible.86 If you have a concern or complaint about our procedures or the handling of a case, you should contact the SRO in the first instance. If you are unable to resolve the dispute with the SRO, certain procedural

85 See Chapter 5.

86 Available at www.oft.gov.uk/shared_of/consultations/668117/OFT1234.pdf
complaints may be referred to the Procedural Adjudicator during the trial period.⁸⁷ If your dispute falls outside the scope of the Procedural Adjudicator trial, the Transparency Statement sets out the options available to you to pursue the complaint.

**INVESTIGATION OUTCOMES**

### Summary

- There are a number of ways in which our investigation can be resolved.
  - We can close our investigations on the grounds of administrative priorities.
  - In these circumstances, we may also write to businesses explaining that, although we are not currently pursuing a formal investigation, we have concerns about their conduct.
  - We can issue a decision that there are no grounds for action if we have not found evidence of an infringement.
  - We can accept commitments from a business about their future conduct.
  - We will issue a Statement of Objections where our provisional view is that the conduct under investigation amounts to an infringement.
  - After issuing a Statement of Objections and receiving the parties' representations, we can issue a final decision that the conduct amounts to an infringement.

### 10.1 Our investigations can be resolved in a number of ways.

- We can decide to close our investigation on grounds of administrative priorities.

- We can issue a decision that there are no grounds for action if we have not found evidence of an infringement.

- We may accept commitments from a business relating to their future conduct where we are satisfied that these commitments fully address our competition concerns.
• We will issue an SO where our provisional view is that the conduct under investigation amounts to an infringement (see Chapter 11 below). After allowing the business(es) under investigation an opportunity to make representations on our SO (see Chapter 12 below), if we still consider that they have committed an infringement, we can issue an infringement decision against them and impose fines and/or directions to bring to an end any ongoing anti-competitive conduct.

Closing our investigations on the grounds of administrative priorities

10.2 Not all of our investigations result in a finding that there has been a breach of competition law. We may decide that a formal investigation no longer merits the continued allocation of our resources because it no longer fits within our casework priorities and/or because we do not have sufficient evidence in our possession to determine whether a breach has been committed and we consider that further investigation is not warranted. We may take this decision at any stage of our investigation.

10.3 If we decide to close an investigation on the grounds of administrative priorities, we will inform any Formal Complainants in writing, setting out our principal reasons for not taking forward the investigation. The amount of detail given will vary according to the circumstances of each case. In more advanced investigations we are likely to give more details than in the case of complaints which have not been the subject of extensive investigation.

10.4 We will give Formal Complainants an opportunity to submit their comments or any additional information within a specified time frame. Generally, we will give two to four weeks to respond. In complex cases which have been extensively investigated, we may give longer.

10.5 If a Formal Complainant’s response contains confidential information, they will be asked to submit a separate non-confidential version at the same time (see Chapter 7 on handling confidential information). We may provide this to the company we are investigating if we think it appropriate, such as if it is likely to change our preliminary view.

10.6 We will also give a copy of the provisional closure letter to the business under investigation giving them an opportunity to comment within the same time frame.
10.7 We will consider any comments and further evidence submitted within the specified time limit before reaching a final view on whether to close our investigation.

10.8 If we decide to close the case, we will write to the Formal Complainant and the business under investigation, explaining why any additional information sent to us has not led us to change our view. The level of detail given will depend on the case and the nature of the additional information provided.

10.9 In these circumstances, we may also write to the business under investigation to inform them that we have been made aware of a possible breach of competition law by them and that although we are currently not minded to pursue an investigation, we may do so in future if our priorities change, for example in response to further evidence we receive.

10.10 We will also issue a public statement linking to the relevant page on our website and explain why we have closed the case on administrative priority grounds.

10.11 If the response to our provisional closure letter leads us to change our preliminary view and decide that an investigation should be continued, we will inform the company under investigation and the Formal Complainant and continue our investigation in the normal way.

Issuing a no grounds for action decision

10.12 If we do not find evidence of a competition law infringement, we may publish a reasoned no grounds for action decision.\(^88\)

10.13 In such cases, we will provide a non-confidential version of our proposed decision to the Formal Complainant. The consultation process on the proposed decision will be the same as for provisional case closure letters.

10.14 Further information is available in *Involving third parties in Competition Act investigations*.\(^89\)

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\(^88\) Rule 7(3) of the OFT Rules.
Accepting commitments on future conduct

10.15 If we consider that the case gives rise to competition concerns, instead of making a provisional infringement decision (see Chapter 11 below), we may be prepared to accept binding promises, called ‘commitments’, from a business relating to their future conduct. \[90\] We must be satisfied that the commitments offered fully address our competition concerns. The decision to accept commitments is at our discretion.

10.16 We are likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.

10.17 We are very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position.

10.18 A business under investigation can offer commitments at any time during the course of that investigation, until a decision is made. However, we are unlikely to consider it appropriate to accept commitments at a very late stage in our investigation, such as after we have considered representations on our SO.

10.19 If a business would like to discuss offering commitments, they should contact the Team Leader in the first instance. The Team Leader will explain that, commitment decisions being Collective Decisions \[91\], a Case Decision Group will be appointed to make the decision on whether or not to accept commitments. \[92\] The parties will be informed of the identity of the Case Decision Group members.

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\[90\] Section 31A of the Act.

\[91\] See paragraph 11.26

\[92\] See paragraph 11.26
10.20 If we think that commitments may be appropriate, we will send a summary of our competition concerns to the business. Once commitments have been offered, we may discuss them with the business to see if they would be acceptable to us.

10.21 If we propose to accept the commitments offered, we will consult those who are likely to be affected by them and give them an opportunity to give us their views within a time limit of at least 11 working days. After receipt of the responses to this consultation, we will hold a meeting with the party (parties) that offered commitments to inform them of the general nature of responses received and to indicate whether we consider that significant changes are required to the commitments before we would consider accepting them.

10.22 If the party (parties) offer revised commitments including significant changes, we will allow another opportunity for Formal Complainants and any other interested third parties to express their views within a time limit of at least six working days.

10.23 Once accepted, we will publish the commitments on our website.

10.24 Further information on our approach to commitments is contained in the OFT guideline *Enforcement.*

**Issuing a statement of objections**

10.25 We will issue an SO where our provisional view is that the conduct under investigation amounts to an infringement. See chapter 11 for more detail on this.

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11 ISSUING OUR PROVISIONAL FINDINGS – THE STATEMENT OF OBJECTIONS

Summary

- Where our provisional view is that the conduct under investigation amounts to an infringement, we will issue our Statement of Objections to each business we consider to be responsible for the infringement.

- The SRO is responsible for the decision to issue a Statement of Objections.

- The Statement of Objections represents our provisional view and proposed next steps. It allows the business being accused of breaching competition law an opportunity to know the full case against them.

- We give each recipient of our Statement of Objections an opportunity to inspect our investigation file.

- Where we intend to impose a financial penalty on a party, we will give it the opportunity to comment in writing and orally on the key elements of the draft penalty calculation.

- At this stage, we may also invite the Statement of Objections recipient to contact us if they would like to enter into discussions on an early resolution to the case.

- A Case Decision Group will be appointed to be the final decision-makers on whether or not the party (parties) have infringed competition law. We will inform parties of the identity of the Case Decision Group members.

11.1 Following the analysis of the evidence on our files, if our provisional view is that the conduct under investigation amounts to an infringement,
we will issue our SO to each business we consider to be responsible for the infringement and give them an opportunity to inspect our file.\textsuperscript{94}

11.2 At this stage, we may also invite SO recipients to contact us if they would like to enter into discussions on an early resolution to the case. The early resolution process, also known as the settlement process, applies where a business under investigation admits that it has breached competition law and co-operates with our investigation. In return for an admission and cooperation we will impose a reduced penalty on the business. Businesses may wish to approach us earlier on in our investigation to discuss the possibility of exploring early resolution. If so, they should contact the Team Leader in the first instance. The Team Leader will explain that, early resolution (settlement) decisions being Collective Decisions\textsuperscript{95}, the Case Decision Group will make the decision on whether or not to enter into an early resolution (settlement) agreement.\textsuperscript{96} If a Case Decision Group has not yet been appointed, the Team Leader will explain that one will be appointed and the parties will be informed of the identity of the Case Decision Group members. Consideration of early resolution will be appropriate when we consider that the evidential standard for an infringement is met. Early resolution will not be appropriate in every case and we will exercise our discretion on a case by case basis to decide whether or not it would be appropriate to offer to enter into early resolution discussions.

11.3 The SO represents our provisional view and proposed next steps. It allows the businesses being accused of breaching competition law an opportunity to know the full case against them and, if they choose to do so, to formally respond in writing and orally.

11.4 The SO will set out the facts and our legal and economic assessment of them which led to our provisional view that an infringement has occurred. We will also set out any action we propose to take, such as

\textsuperscript{94} Rule 4 of the OFT Rules.

\textsuperscript{95} See paragraph 11.26

\textsuperscript{96} See paragraph 11.26
imposing financial penalties\textsuperscript{97} and/or issuing directions\textsuperscript{98} to stop the infringement if we believe it is ongoing and our reasons for taking the action.

11.5 Where we intend to impose a financial penalty for the infringement of competition law, we will provide the party with an opportunity to comment in writing and orally on key elements of the draft penalty calculation (including the proposed starting point percentage, the proposed relevant turnover figure to be used, the proposed duration and, to the extent possible, the facts that may give rise to aggravating and mitigating factors) in advance of the penalty decision being taken. These details may be included in the SO with the parties invited to comment on them in their written representations and at the oral representation meeting, or they may be included in a separate draft penalty calculation statement with separate arrangements for written and oral representations.

11.6 It is our current practice to send a hard copy of the SO and covering letter to recipients by courier or recorded delivery. Typically, we also provide an electronic copy in pdf format.

11.7 It is our normal practice publicly to announce the issue of the SO on our website and to make an announcement on the Regulatory News Service.\textsuperscript{99}

11.8 As far as possible, we aim to give the directly affected parties fair and sufficient notice, as well as advance sight of announcement documents, to enable them to prepare their response.

\textsuperscript{97} More information on how we set penalties is available in Part 5 of OFT guideline *Enforcement* (OFT407) available to download at \url{www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft407.pdf} and *Guidance as to the appropriate amount of a penalty* (OFT423) available to download at \url{www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf}.

\textsuperscript{98} More information on directions can be found in *Enforcement* (OFT407) available to download at \url{www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft407.pdf}.

\textsuperscript{99} \url{www.investegate.co.uk}
11.9 The timing of the announcement and any advance notice will depend on whether there is any market sensitivity about the announcement. We have to balance our responsibilities concerning the control and release of market sensitive information against our objective of, as far as possible, giving directly affected parties fair and sufficient notice.

11.10 As a general rule, if there is no market or other sensitivity about the fact or date of the announcement, we will be open about the date and publish the date on our website, up to several days before the full announcement. We will tell affected parties in advance of placing any statement on the substance of the matter on our website. The exact notice given will depend on the circumstances of the particular case in point.

11.11 Generally, in non-market sensitive announcements, we aim to give parties advance sight of the content of our announcement, in confidence, unless there is a compelling reason not to do so.

11.12 In the case of market sensitive announcements, where appropriate, we will apply the FSA’s Guideline for the control and release of price sensitive information by Industry Regulators.100

11.13 If there is no market or other sensitivity about the date of the announcement as opposed to the content of the announcement, we will be open about the date and publish that date on our website up to several days in advance of the full announcement. We will also inform media organisations. We will tell parties in advance of informing the media or placing any statement about the substance of the matter on our website.

11.14 If the date and content of the announcement may be market-sensitive, for example, where nothing about the investigation has previously been announced, we will notify affected parties after financial markets have closed including, where appropriate, financial markets in other countries.

100 www.fsa.gov.uk/pubs/ukla/ir_guidelines.pdf
11.15 In particular, if the date of the announcement is not in the public domain, we will inform those directly affected in strict confidence the evening before issue once relevant financial markets have closed.

11.16 More details about the way in which we publicly announce the issue of an SO is available in our Transparency Statement.\(^{101}\)

**Who decides whether to issue a statement of objections?**

11.17 The SRO decides whether or not to issue an SO. Before doing so, the SRO will consult with the General Counsel and Chief Economist (or their representatives) to ensure that the SRO is aware of any significant legal and economic risks that have been identified. The SRO may also consult other senior OFT officials as appropriate.

11.18 The SRO will be chosen at the outset of the formal investigation and companies under investigation will be informed of who the SRO is (along with details of the other key members of the case team). If, later on, it is necessary to allocate a new SRO to the case, we will inform the companies under investigation.

**Inspection of our file**

11.19 At the same time as issuing the SO, we will also give the recipients of the SO the opportunity to inspect our file. This is to ensure that they can properly defend themselves against the allegation of having breached competition law.

11.20 We allow recipients of the SO a reasonable opportunity, typically six to eight weeks, to inspect copies of disclosable documents on our file. These are documents that relate to matters contained in the SO, but excluding certain confidential information\(^{102}\) and OFT internal documents.\(^{103}\)

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\(^{101}\) For a general guide to our approach when we make a public announcement, see *Transparency – A Statement on the OFT’s approach* (OFT 1234) available to download at [www.oft.gov.uk/shared_oft/consultations/668117/OFT1234.pdf](http://www.oft.gov.uk/shared_oft/consultations/668117/OFT1234.pdf)

\(^{102}\) Under Rule 1(1) of the OFT Rules confidential information means commercial information whose disclosure the OFT thinks might significantly harm the legitimate business
11.21 Access to file is usually given by supplying the file in electronic form on a DVD. Where a business does not have the relevant electronic means to view the documents in this way or if there are only a very small number of documents, we will send hard copies. In rare circumstances, businesses can inspect the file on our premises.

11.22 In addition to sending copies of disclosable documents, we will also send a separate schedule of external documents, which lists all documents held in our file other than internal documents. In some cases, we may send electronic copies of documents as well as the schedule.

11.23 We will also consider requests for access to our file by other methods, for example, by using 'confidentiality rings' or 'data rooms'. Such requests will be considered on a case by case basis. We have discretion as to whether or not to agree to such requests and are likely to do so only where there are clearly identifiable benefits in doing so and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned.

11.24 Where we decide to use a 'confidentiality ring' or 'data room', we will provide the parties involved with details of how we propose this will work in practice, for example through providing copies of the proposed data room rules and the confidentiality undertakings that will be required from those are given access to the data room.

11.25 In some cases, where the parties consent, we may propose that some confidential information is disclosed on an 'external adviser only' basis. For example, in some cases a 'confidentiality ring' has been considered where there is a large volume of documents on the case file which are not being relied upon in the SO. If the parties agree, the case team may adopt a streamlined access to file process, preparing redacted versions of the case file only for documents which are being relied upon in the SO or have been identified as being relevant to the case. A 'confidentiality interests of the company to which it relates, or information relating to the private affairs of an individual whose disclosure the OFT thinks might significantly harm the individual’s interests, or information whose disclosure the OFT thinks is contrary to the public interest.

103 Rule 5(3) of the OFT Rules.
ring' on an 'external adviser only' basis is used to allow the parties' external advisers to check the remainder of the file to ensure that the case team has disclosed all relevant documents to the parties, with the case team only needing to prepare redacted versions of any additional documents identified as necessary for disclosure to the party.

**Appointment of Decision Group**

11.26 Once we have issued an SO, a three-member Case Decision Group is appointed to be the decision-makers in the case. The Case Decision Group is responsible for taking decisions on (a) whether or not to accept commitments; (b) whether or not to enter into an early resolution (settlement) agreement; (c) whether or not to give interim measures directions; (d) whether or not to issue an infringement decision (with or without directions) or 'no grounds for action' decision; and (e) on the appropriate amount of any penalty (Collective Decisions).

11.27 The SRO will not be a member of the Case Decision Group to ensure that the final decision is taken by officials who were not involved in the decision to issue the SO.

11.28 We will inform the parties of the identity of the Case Decision Group members. At least one member of the Case Decision Group will be a lawyer.

11.29 The Case Decision Group will be appointed by – and will operate under the delegated authority of – the Decisions Committee\(^\text{104}\), which is constituted of the OFT’s senior staff, including the Chief Executive, other executive members of the OFT Board, the Chief Economist, the General Counsel and the head of policy.

\(^\text{104}\) The Decisions Committee operates under delegated authority from the OFT Board.
12 RIGHT TO REPLY

Summary

- Recipients of the Statement of Objections have an opportunity to respond to it.

- Formal Complainants and third parties who may be able materially to assist our assessment of a case will generally also be provided with an opportunity to comment.

- The Case Decision Group will review the Statement of Objections, the parties’ written representations and the key underlying evidence. They will attend all oral representations meetings. The Chief Economist and General Counsel (or their representatives) will also attend.

- We will carefully and objectively consider all written and oral representations to appraise the case as set out in the Statement of Objections and to assess whether the conclusions reached in the Statement of Objections continue to be supported by the evidence and the facts.

- If we receive new information in response to the Statement of Objections which indicates evidence of a different alleged infringement or a material change in the nature of the infringement, and we propose to rely on this information to establish an infringement, we will issue a supplementary SO.

Written representations

12.1 When we issue an SO, we will invite each SO recipient to respond in writing. However, there is no obligation to submit a response.

12.2 Written representations provide an opportunity to comment on the matters referred to in the SO and, where appropriate, on the draft penalty calculation. This may involve comments regarding the facts
relied on by the OFT and the legal and economic assessment set out in the SO.

12.3 The deadline for submitting written representations will be specified in the SO and will be set having regard to the circumstances of the case. Usually the deadline for an SO recipient to submit written representations will be at least 40 working days and no more than 12 weeks from the issue of the SO.

12.4 Where a party has a complaint about the deadline set for submitting written representations, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Adjudicator during the trial period.105

12.5 When an SO recipient submits written representations they should also provide a non-confidential version of their representations, along with an explanation which justifies why information should be treated as confidential. We will not accept blanket or unsubstantiated confidentiality claims. The non-confidential version should be provided at the same time as the original response and in any event no later than four weeks from the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the Team Leader.

12.6 In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information.

12.7 Formal Complainants and third parties who may be able materially to assist our assessment of a case will generally also be provided with an opportunity to submit written representations. In most cases, disclosure of a non-confidential version of the SO will be sufficient to enable third parties to:

parties to provide the OFT with informed comments and this will not generally include any annexed documents. The document is for the Formal Complainant’s benefit only and should not be disclosed to others. The deadline for a Formal Complainant or third party to submit written representations (along with a non-confidential version) will be between 20 to 30 days from the date on which we send the SO to them.

12.8 The non-confidential version of the written representations that have been submitted by a Formal Complainant or third party will be disclosed to the SO recipient to allow them an opportunity to comment. We will not generally allow Formal Complainants and other third parties an opportunity to comment on the SO recipient’s written representations, although this may be appropriate in certain circumstances.106

12.9 In some cases, we may decide to consult Formal Complainants and third parties to a more limited extent, or not at all, for instance in cartel cases where there is a risk of prejudice to a related criminal investigation.

12.10 Further information on the involvement of Formal Complainants and interested third parties at SO stage is available in Involving third parties in Competition Act investigations.107

Oral representations

12.11 We encourage SO recipients to take up the opportunity to make oral representations to us on the matters referred to in the SO.108 They should make it clear in their written representations that they would like to do so. The SO recipient can bring legal or other advisers to the meeting to assist in presenting the oral representations, subject to any reasonable limits that the OFT may set in terms of the number of persons that may attend the meeting on behalf of the SO recipient.

106 For example, when the recipient and a third party put forward different versions of the same facts and it is necessary to decide which version is more credible.


108 Rule 5(4) of the OFT Rules.
Formal Complainants and other interested third parties will generally not be permitted to attend the SO recipient’s oral representations meeting.\(^{109}\)

12.12 The meeting at which oral representations are presented will be held around 10 to 20 working days after the deadline for the submission of the written representations.

12.13 The Case Decision Group will attend all oral representations meetings. The meeting will also be attended by members of the case team, the Chief Economist (or a representative of the Chief Economist) and the General Counsel (or a representative of the General Counsel). The meeting will be organised and chaired by the Procedural Adjudicator.

12.14 To promote a focused and productive meeting, we will ask the SO recipient to give an indication, in advance, of the matters they propose to focus on in their oral representations.

12.15 Oral representations should be used by the SO recipient as an opportunity to highlight issues of particular importance to their case, which have been set out in the written representations to the Case Decision Group. The oral representations may also provide a useful opportunity for parties to clarify the detail set out in their written representations. As a general rule, any points raised at this stage should be limited to those already submitted to us in writing.

12.16 During the presentation of the oral representations, the case team, the Case Decision Group and other members of OFT staff present may ask questions on the parties’ written representations or questions of clarification. It will be helpful for the case team, and is likely to assist the progress of the investigation, if full responses are provided to these questions but there is no obligation to answer. It is possible to respond to questions in writing after the meeting.

12.17 A transcript of the oral representations meeting will be taken and the SO recipient will be asked to confirm the accuracy of the transcript and to

\(^{109}\) In some cases, we may decide that it is appropriate to hold a multi-party meeting, including Formal Complainants and/or other interested third parties.
identify any confidential information. We will not accept blanket or unsubstantiated confidentiality claims.

12.18 Following the oral hearing, the Procedural Adjudicator will report to the Case Decision Group to highlight any procedural issues that have been brought to the attention of the Procedural Adjudicator during the investigation and to confirm whether the parties' right to be heard has been respected, including whether the oral representations meeting was properly conducted.

12.19 If a Case Decision Group member changes after the oral representations meeting(s) but before we issue a final decision, the new member will review the transcript of the oral representations meeting(s).

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

**Considering representations**

12.21 In some cases, the volume of information submitted as part of the representations process can be extensive. We will carefully and objectively consider all written and oral representations to appraise the case as set out in the SO and to assess whether the conclusions reached in the SO continue to be supported by the evidence and the facts.

12.22 This will involve assessment of the representations by the case team, the Case Decision Group and other OFT officials, as set out below.

12.23 The General Counsel and the Chief Economist are responsible for ensuring that there has been a thorough review of the robustness of, respectively, the legal and the economic analysis (and of the evidence being used to support this) by specialised lawyers and economists from outside the case team before the Case Decision Group decides whether or not to issue an infringement decision. The General Counsel and the Chief Economist are also responsible for ensuring that the Case Decision Group are aware of any significant legal and economic risks or concerns before the decision is taken.
12.24 The Case Decision Group will consult the Decisions Committee before taking a decision on whether or not to issue an infringement decision to take into account their views, for example on any legal, economic or policy issues arising. In particular, the Case Decision Group will consult with the General Counsel and Chief Economist (or their representatives) to ensure that the Case Decision Group is aware of any significant legal and economic risks that have been identified.

12.25 An original set of all written representations and the transcript from the oral representations meeting will be placed on the case file.

**Letter of facts**

12.26 Where we acquire new evidence at this stage which supports the objection(s) contained in the SO and the Case Decision Group proposes to rely on it to establish that an infringement has been committed, we will put that evidence to the SO recipient in a letter and will give them an opportunity to respond to the new evidence. The timeframe for responding will depend on the volume and complexity of the new evidence. However, it will not be as long as the time to respond to the SO.

**Supplementary statement of objections**

12.27 If new information received by us in response to the SO indicates that there is evidence of a different suspected infringement or there is a material change in the nature of the infringement of which the SO recipients have already been accused, we will issue a supplementary SO setting out the new set of facts on which we propose to rely to establish an infringement. The Case Decision Group will be responsible for deciding whether to issue a supplementary SO.

12.28 We will give the SO recipient a further opportunity to respond in the same way as before. We will set the time frame for responding after taking into account the extent of the difference in the objections raised in the first SO compared with the supplementary SO and allow them an opportunity to inspect new documents on the file. The process will be the same as that set out in Chapter 11. The time frame for responding to a supplementary SO will almost always be shorter than the time given to respond to the original SO.
12.29 If it appears to us unlikely that engaging with Formal Complainants or other interested third parties at this stage will materially assist our investigation, we may decide to consult them on a more limited basis, or not at all. This may be the case, for example, where the supplementary SO is very narrow in scope.
13 THE FINAL DECISION

Summary

- If we decide that the legal test for establishing an infringement is met, we will issue an infringement decision to each business found to have infringed the law.
- The [Case Decision Group], having consulted the Decisions Committee, is responsible for the decision to issue an infringement decision and, where appropriate, the level of financial penalty to be imposed. The final decision is formally adopted by the Decisions Committee.
- If we do not find evidence of a competition law infringement, we may publish a reasoned decision explaining why.
- A final opportunity will be given to the addressee of the decision to make confidentiality representations.
- The non-confidential version of the decision and the summary will be published on our website.

13.1 The issue of a decision represents the culmination of our investigation. If the Case Decision Group, in consultation with the Decisions Committee, decides that the legal test for establishing an infringement is met, the final decision will be formally adopted by the Decisions Committee. We will issue an infringement decision to each company found to have infringed the law.110

13.2 As noted in Chapter 10, if we do not find evidence of a competition law infringement, the Case Decision Group may decide, in consultation with

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110 Section 31 of the Act and Rule 7 of the OFT Rules.
the Decisions Committee, to publish a reasoned no grounds for action decision. The final decision will be formally adopted by the Decisions Committee.

**Issue of an infringement decision**

13.3 In addition to an infringement decision, we will issue a press announcement, make an announcement on the Regulatory News Service and publish a page on our website which describes the case.

13.4 We will inform the addressee(s) before the issue of the infringement decision, and the announcement of the decision. As a general rule, as described in Chapter 11, in non-market-sensitive announcements, we aim to give parties advance sight of the content of the OFT’s announcement, in confidence, unless there is a compelling reason not to do so. In both market-sensitive and non-market sensitive situations, we will aim to balance an open approach with the need to ensure the orderly announcement of full information.\(^{111}\)

13.5 The infringement decision will set out in full the facts on which we rely to prove the infringement, the action that we are taking and address any material representations that have been made during the course of our investigation. If a financial penalty is being imposed, the infringement decision will explain how the Case Decision Group decided upon the appropriate level of penalty, having taken into account the parties’ written and oral representations on the draft penalty calculation.\(^{112}\) The infringement decision may also give directions to bring the infringement to an end.\(^{113}\)

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\(^{111}\) For a general guide to our approach when we make a public announcement, see *Transparency – A Statement on the OFT’s approach* (OFT1234) available to download at www.oft.gov.uk/shared_oft/consultations/668117/OFT1234.pdf


\(^{113}\) Section 32 and 33 of the Act. If a business fails to comply with our directions, we may seek a court order to enforce them under section 34 of the Act.
13.6 If the case involves more than one party, each party will receive a copy of the decision. Information that is confidential will be disclosed through the infringement decision to other parties only if disclosure is strictly necessary. Before disclosing any confidential information, we will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If we consider that disclosure might significantly harm legitimate business interests or the interests of an individual, we will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which we are allowed to make the disclosure.\footnote{Section 244 of the Enterprise Act 2002.}

13.7 After the infringement decision and press announcement have been issued, we will generally notify Formal Complainants and other interested third parties (for example, third parties who have submitted written representations during the investigation) of our decision.

Publication

Confidentiality

13.8 The decision addressee will already have had the opportunity to make confidentiality representations. After the infringement decision has been issued we will allow them one final opportunity to make representations on information which they deem to be confidential and is contained in the decision. The deadline for this final set of representations will be much shorter than the deadline for representations on the SO and will normally be four weeks from the date of the issue of the decision. Any representations must be limited to confidentiality issues only and, as at the other stages in our process, we will not accept blanket or unsubstantiated confidentiality claims.

Summary

13.9 A summary of the infringement decision will also be prepared. This will provide a brief overview of our investigation (for example, the date the
SO was issued and other key milestones in the investigation) and the infringement decision (for example, the nature of the infringement, the parties involved and the overall financial penalty).

Final publication

13.10 The non-confidential version of the infringement decision and the summary will be published on the page on our website which describes the case. We also maintain a register\textsuperscript{115} of decisions in investigations under the Act and the details of the case will be placed on the register.

\textsuperscript{115} \url{www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/}
14 **COMPLAINTS ABOUT OUR INVESTIGATION HANDLING, RIGHT OF APPEAL AND REVIEWING OUR PROCESSES**

14.1 We have published a Transparency Statement\(^{116}\) on our website setting out the steps we take to ensure our work is open and accessible. Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner when dealing with us. Complaints about responses from ERC should be made to the Head of ERC in the first instance.\(^{117}\)

14.2 Once a formal investigation has been opened, any concerns or complaints about our procedures or how we handle our investigation should be made in writing to the SRO in the first instance. If you are unable to resolve the dispute with the SRO, certain procedural complaints may be referred to the Procedural Adjudicator during the trial period. Details of the Procedural Adjudicator trial are available on our website.\(^{118}\) If your dispute falls outside the scope of the Procedural Adjudicator trial, the Transparency Statement sets out the options available to you to pursue the complaint.

14.3 Addressees of our appealable decisions and third parties with a sufficient interest in our appealable decisions have a right to appeal them to the Competition Appeal Tribunal. Appealable decisions include decisions as to whether there has been a competition law infringement, interim measures decisions and decisions on the imposition of, or the amount of, a penalty.\(^{119}\)

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\(^{116}\) See figure one in *Transparency – A Statement on the OFT’s approach* (OFT1234) available to download at www.oft.gov.uk/shared_oft/consultations/668117/OFT1234.pdf

\(^{117}\) www.oft.gov.uk/about-the-oft/ofot-structure/governance/complaint


\(^{119}\) Section 46 of the Act and section 47 of the Act as substituted by section 17 of the Enterprise Act 2002.
14.4 Where the law does not provide for an appeal, an application for judicial review may be brought in certain circumstances.\textsuperscript{120}

14.5 Following the completion of an investigation, case teams routinely evaluate the investigation process undertaken to determine what went well and how things may be improved for other ongoing and future cases. Typically, the 'lessons learnt' are shared with colleagues across the Office. This evaluation process is unrelated to the investigation process but remains an important way in which we ensure that best practice can be applied across all our investigations under the Act.

\textsuperscript{120} A judicial review application may be brought before the Administrative Court of the Queen's Bench Division under Part 54 of the Civil Procedure Rules
D TRIAL OF PROCEDURAL ADJUDICATOR IN
COMPETITION ACT 1998 CASES: UPDATED BRIEFING
NOTE

Background

1. We are committed to continuous improvement of our Competition
Act 1998 (CA98) procedures in order to maximise the
effectiveness of the CA98 regime and minimise burdens on parties
to an investigation. This involves streamlining our processes
where possible, whilst fully respecting the rights of defence. We
are also committed to improving the transparency of our CA98
investigations and procedures, where possible.

2. During the consultation on our draft CA98 investigation procedural
guidance in August 2010, a significant number of respondents
called for the introduction of a Hearing Officer role in CA98
investigations, principally to provide a swift mechanism to resolve
disputes in relation to case team decisions on procedural matters
in the course of CA98 investigations. Many had the perception
that currently the only option available to parties is to apply for
judicial review of such decisions.

3. We have a common interest with parties to investigations in
ensuring that such disputes are resolved efficiently to avoid delays
to our CA98 investigations and additional costs to all.
Accordingly, we considered this request carefully to see whether
we could, without legislation, introduce a mechanism to address
the concern and assist in the swift resolution of procedural
disputes.

Procedural Adjudicator’s role

4. Therefore, we decided to trial a Procedural Adjudicator\(^1\) role for
CA98 cases for a one-year period starting from 21 March 2011.
We subsequently announced in March 2012 that we would extend

\(^1\) The title Procedural Adjudicator was chosen to distinguish the role from that of the EU
Hearing Officer, which differs in scope.
the trial until 21 March 2013. The Procedural Adjudicator role is to resolve disputes in relation to case team decisions on certain procedural issues in a swift, efficient and cost-effective manner.

Identity of the Procedural Adjudicator

5. For the trial period, the Procedural Adjudicator has been an internal OFT appointment. The Procedural Adjudicator role was filled by Jackie Holland, Director of Competition Policy, who is a qualified solicitor. Jackie is a senior OFT official, who is experienced in procedural issues arising in CA98 cases.

6. The Procedural Adjudicator does not have any current involvement in the OFT’s CA98 cases to ensure that she is independent of the case team. The Procedural Adjudicator reports directly to the Chief Executive of the OFT (or the Chairman if the Chief Executive is the decision maker on the case).

Scope of Procedural Adjudicator role

7. The Procedural Adjudicator role only applies to cases in which we have decided to open a formal investigation under the CA98, that is, where we have reasonable grounds to suspect that competition law has been breached and we have decided to prioritise the case for investigation. These are cases in which the section 25 CA98 threshold, that allows us to use our formal powers of investigation, has been met.

8. The Procedural Adjudicator only becomes involved at the request of a party to the investigation and only after the party has been unable to resolve the dispute with the Senior Responsible Officer (SRO) of the case. If a party is unhappy with the decision of a case team on a procedural matter, it should raise its concern with the SRO as soon as possible. Where an approach to the SRO has not resulted in a resolution of the concerns and they fall within the scope of the trial, the party can apply for a review of the SRO’s decision by the Procedural Adjudicator.

9. The Procedural Adjudicator is able to review decisions taken by case teams in relation to the following procedural matters in CA98 cases:
a. deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the statement of objections or supplementary statement of objections

b. requests for confidentiality redactions at the access to file and Statement of Objections stages or in a final decision

c. requests for disclosure or non-disclosure of certain documents at access to file stage

d. procedural issues relating to oral representations meetings, such as the date of the meeting, and

e. other significant procedural decisions that may arise.

10. Some disputed decisions may fall outside the scope of the Procedural Adjudicator trial, and in such cases the party should refer to our Transparency Statement\(^2\) (particularly paragraph 5.5) for information on our general complaints procedure.

11. The Procedural Adjudicator is not able to review case team decisions on the scope of information requests or other decisions of the case team relating to the substance of the case.

12. The standard of review exercised by the Procedural Adjudicator is similar to judicial review grounds. The Procedural Adjudicator will consider whether the case team’s decision is unreasonable or irrational, whether the case team has respected the necessary procedural requirements and/or whether the party’s rights of defence have been respected.

**Timing and Procedure**

13. The purpose of the trial is to provide a swift, efficient and cost-effective mechanism for reviewing specific decisions of the case team on procedural matters. The success of the trial would be

assessed by reference to the criteria discussed at paragraph 21 below.

14. A party wishing to apply to the Procedural Adjudicator for a review of a decision will need to make an application as soon as possible and, in any event, within five working days of being notified of the SRO’s decision on the issue in question (see paragraph 9 above).

15. The party will need to provide a short summary of the issue in question and provide copies of relevant correspondence between the party and the case team. The Procedural Adjudicator will provide an opportunity for each side to present their arguments orally on the telephone or at a meeting before issuing a short, reasoned decision.

16. The Procedural Adjudicator will endeavour to deal with the complaint as quickly as possible, with an indicative administrative target of taking decisions in 90 per cent of cases within ten working days from receipt of the application.

17. The Procedural Adjudicator will arrive at a short, reasoned decision either confirming the case team’s decision or reaching a different one in whole or in part. The Procedural Adjudicator’s decision will be binding on the case team. The role of the Procedural Adjudicator does not prejudice the party’s rights in respect of judicial review and/or any appeal before the CAT.

18. We will publish the Procedural Adjudicator’s decision, or a summary of that decision, either at the time of the decision or at the end of the case, subject to confidentiality redactions as appropriate.

19. Further details of the procedure are available on the OFT website.
Evaluation of Trial

20. We will evaluate the trial at the end of the trial period to see whether the trial has achieved its objectives. This will enable us to assess the likely costs and benefits of adopting the role on a permanent basis. In particular, we will:

   a. evaluate whether the Procedural Adjudicator role has assisted in resolving procedural issues more swiftly

   b. assess whether in fact cases are taking longer than before the trial

   c. consider whether the Procedural Adjudicator role has assisted in building confidence in the fairness and robustness of our procedures in CA98 cases, and

   d. decide whether the Procedural Adjudicator role is working well in the absence of a specific statutory framework. If it is not, but we consider it would work well with one, we may recommend that legislation is introduced to bring in a statutory role.

21. The possible outcomes of the trial are as follows:

   a. establishing the role permanently, with or without changes and whether or not with recommendations that the role operate on a statutory basis

   b. discontinuing the role, or

   c. extending the duration of the trial – if it is considered that insufficient data has been gathered to take a decision on whether the role has been successful or not.

22. It is highly likely that the Procedural Adjudicator role will be discontinued if we find that cases are taking longer than before the trial, since the trial will not have achieved one of its objectives, which is to provide a swift mechanism for the resolution of disputes over case team decisions on procedural matters.
23. We reserve the right to suspend the trial during the year should we find that parties or their lawyers are misusing the system, for example with a view to delaying investigations, and this is resulting in cases taking longer than before the trial.

**Additional Roles from 21 March 2012**

24. From 21 March 2012, the Procedural Adjudicator role will be expanded to include:

   a. Chairing oral hearings in CA98 cases, and

   b. Reporting to the relevant decision-maker(s) following the oral hearing to highlight any procedural issues that have been brought to the attention of the Procedural Adjudicator during the investigation and to confirm whether the parties’ right to be heard has been respected, including whether the oral hearing was properly conducted.

25. The OFT considers that these additional roles will provide greater consistency in the conduct of oral hearings whilst also providing further comfort to the parties that the effective exercise of their right to be heard is respected and, more generally, in the legitimacy and fairness of the OFT’s processes.

**March 2012**