Review of the OFT's investigation procedures in competition cases

Summary of responses to consultation

October 2012

OFT1455
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1 INTRODUCTION

1.1 On 28 March 2012, the Office of Fair Trading (OFT) published a consultation document (the Consultation) on revised procedures for its investigations under the Competition Act 1998 (the CA98).¹

1.2 There were three elements to the Consultation:

• A consultation on the OFT’s proposal to introduce a system of collective decision-making in CA98 investigations, including the separation of responsibility for the opening of a case and the issue of a Statement of Objections from responsibility for making the decision on whether there has been an infringement of competition law.

• The announcement of a number of significant enhancements to its investigation processes under the CA98, as well as of the extension of the trial of the Procedural Adjudicator’s role for a further year (until 21 March 2013), with an expanded remit.

• A consultation on a revised draft of its Guide to the OFT’s investigation procedures in competition cases (OFT 1263), which was first published on 2 March 2011, to reflect the abovementioned changes.

1.3 More specifically, the OFT’s key changes set out in the Consultation were:

• The proposal to introduce collective decision-making for certain decisions in CA98 cases.

• The opportunity, in cases in which the OFT proposes to impose a financial penalty, for parties to make representations on key elements of the OFT’s draft penalty calculation.

• Publication of case opening notices and case-specific administrative timetables on the OFT website.

• Enhanced oral hearings, to provide greater opportunity for dialogue between parties to an investigation and the decision-makers on the case.

• More 'state of play' meetings, to update parties on the OFT’s progress in an investigation and provide a forum for parties to make their views known during the investigation.

• New arrangements for internal checks and balances within the OFT, involving scrutiny by lawyers and economists who are not part of the investigation team.

• An extension to the trial of the Procedural Adjudicator role for a further year until 21 March 2013, and with an expanded remit, including responsibility for chairing oral hearings in CA98 cases and reporting to the decision-makers on certain procedural issues.

1.4 In the Consultation, the OFT asked specifically for respondents' views on the following:

• Its proposal for a revised decision-making model and, in particular, respondents' views on whether that model would enhance robustness of the OFT's decision-making.

• The transitional arrangements proposed were the new decision-making model to be introduced.

• Whether the revised draft guidance covered in sufficient detail all aspects of the revised processes in the OFT's CA98
investigations and, if not, what additional guidance would be useful.

- How easy the revised draft guidance was to understand and how easy its format was to follow.

- Whether greater guidance on the OFT’s settlement policy and procedures would be worthwhile at this time or whether it should be left to a later date, for instance after the establishment of the Competition and Markets Authority (CMA).

1.5 As part of the consultation process, the OFT held a discussion event on 2 May 2012 with members of the legal, academic and business communities to explain the decision-making proposal and the other procedural enhancements included in the Consultation, to facilitate an exchange of views on these, and to hear suggestions on the practical implementation of the changes announced. A summary of the event and the issues raised at it is available on the OFT website. Where relevant, we have included in this document views expressed by attendees at this event.

1.6 The consultation period ended on 19 June 2012. The OFT received a total of 30 written responses to the Consultation.

1.7 Having considered the responses received, the OFT has published a revised Guide to the OFT’s investigation procedures in competition cases (OFT 1263rev) (October 2012) (the Final Guidance). The Final Guidance updates the OFT’s previously guidance on how it conducts its CA98 investigations, published in March 2011, to

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3 A list of those parties who provided written responses to the consultation is set out at Annex A. One confidential response was submitted.

reflect the outcome of the consultation process and the OFT's practice as at the date of publication.

1.8 This document summarises the principal views and comments expressed in the written responses to the Consultation and the OFT's responses to them. This document should be read in conjunction with the Consultation. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on the OFT's website.⁵ Nor is this Summary of Responses a definitive statement of the OFT's policy or procedures in CA98 cases. Parties seeking guidance on those procedures should refer to the Final Guidance itself.

⁵ See www.oft.gov.uk/OFTwork/consultations/ca98-investigation-procedures/
2 COLLECTIVE DECISION-MAKING

2.1 In the Consultation, we asked for views on our proposal to introduce collective decision-making for certain decisions in CA98 cases. Details of the proposal consulted upon are included in paragraphs 2.14 to 2.20 of the Consultation.

Question one: Do you agree with the proposal for a revised decision-making model set out in the draft guidance? In particular, do you consider the changes will enhance the robustness of decision-making?

2.2 The vast majority of the respondents to the consultation and attendees at the May discussion event welcomed this proposal as a material improvement over the current decision-making model and one that could be expected to increase the robustness of CA98 decisions as well as reducing the perceived or actual risks of confirmation bias. Respondents were also widely supportive of the introduction of 'collective judgment' into final decision-making.

2.3 A small number of respondents, while still considering the OFT’s proposals to represent an improvement on past practice, did have some doubts as to the extent to which those proposals would fully meet the OFT’s robustness objectives. For example, one respondent considered that the changes would not guarantee robust decision-making without further investment in training for OFT case teams on evidence-gathering and analysis, while others commented that robustness and separation would be further enhanced by use of independent panel members in decision-making in CA98 cases.

2.4 As regards the OFT’s aim of reducing any perception of confirmation bias, as noted above, most respondents considered that the OFT’s proposals should achieve, or were a positive step towards, that objective. Some respondents considered that specific aspects of the new decision making model, would still create some potential bias concerns, although the comments of other respondents on those aspects indicated that they were less concerned. For example:
Some respondents considered it to be problematic that a Case Decision Group member on one case could be the Senior Responsible Officer (SRO) on another, and that Case Decision Group members would therefore review work of their peers. Other respondents, however, felt any such risk could be adequately addressed by suitable ring-fencing, such as the SRO on a case not being allowed to be on the Case Decision Group of a case considering similar issues, or by ensuring that a culture of challenge was instilled in the OFT.

Similarly, one respondent commented that the presence of the Chief Economist and General Counsel on the Decisions Committee, having been previously responsible (through the 'internal check and balance' procedure) for ensuring that legal and economic risks in the case had been taken into account, risked undermining the 'purity' of separation. However, another considered this to be an unavoidable risk in any unitary agency, and was overridden by the benefits of the senior oversight that the Chief Economist and General Counsel would provide early in the investigation process.

2.5 A small number of respondents raised concerns regarding the potential complexity of the OFT’s proposed procedural model. Similarly, some respondents were concerned that the new model would extend the investigation timetable. By contrast, others believed that the new model should not slow down investigations and could actually speed them up. Other respondents commented that, in any event, any necessary balancing of the speed of OFT investigations against the robustness of the decision reached should favour the latter.

2.6 Two respondents argued that the decision-making reforms should be enshrined in the OFT’s Rules to give businesses additional certainty that they would be followed and allow OFT to be held legally accountable.
2.7 Some questions or concerns were raised by respondents in relation to specific details of the practical implementation of the new decision-making model. These are set out in more detail in subsections (i) to (vi) below, together with the OFT's views in relation to each issue.

**OFT's views**

2.8 Having noted the general support expressed for its proposal to introduce collective decision-making, the OFT has decided to proceed with implementation of such a model. In light of specific views expressed in several of the consultation responses, and following further internal consideration of those views, the OFT has refined further the model consulted upon in March. Further details of these refinements are included at the end of each of subsections (i) to (vi) below.

**i) Decisions for which the Case Decision Group would be responsible**

2.9 Several respondents considered that the Case Decision Group should not be involved in discussions of the possible settlement of cases with parties, given the possible (or perceived) impact this might have on the Case Decision Group's independence of judgement in any future decisions (for example on final infringement) in the same case, especially if settlement negotiations were to break down. The majority of those respondents who proposed an alternative model suggested that such decisions should remain the SRO's responsibility, possibly with the Decisions Committee acting as a check and balance. One respondent proposed a 'standing Case Decision Group' to deal specifically with settlements.

2.10 One respondent raised a practical concern as to whether the OFT had sufficient resource for Case Decision Groups to take all the decisions for which they had been given responsibility, and suggested that the

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6 Particularly prior to the issue of a Statement of Objections in a case, or in cases in which settlement is discussed or agreed with some parties under investigation and not others.
transfer of decision-making powers to Case Decision Groups could be phased. Several attendees at the May discussion event also referred to the need for the OFT to take the resource implications of the proposed decision-making model into account.

**OFT's views**

2.11 In light of the specific views expressed in several of the consultation responses, the OFT has, following further consideration, decided to limit the matters that the Case Decision Group will be responsible to determining:

- whether, based on the facts and evidence before it, the legal test for establishing an infringement of the CA98 has been met, and
- if it has, the appropriate penalty to be imposed.

2.12 The OFT considers in particular that it would, on balance, be preferable for the Case Decision Group not to be involved in: the discussion of possible settlement or commitments, the agreement of a settlement, the decision to accept commitments, or the decision to make an interim measures direction. The purpose of this is twofold. First, to eliminate any perceived risk that the Case Decision Group, having taken, or considered taking, material decisions at an earlier stage in the case, might be less able to consider impartially the final decision on infringement in the case concerned. The OFT has

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7 It was suggested that, for example, the power conferred on Case Decision Groups could be limited initially to taking decisions on infringement, with any extension of those powers only being considered once this initial power had 'bedded in'.

8 For example, if the Case Decision Group were to be involved in discussions on either the possible settlement of, or the possible acceptance of commitments in, a case, but those discussions did not ultimately result in an agreement being reached or not all parties settled or gave commitments. Or if the Case Decision Group had decided to make (or considered making) an interim measures direction at an earlier stage of the case.
therefore decided to remove those decisions from the list of decisions which are the responsibility of Case Decision Groups. Second, to avoid the need to appoint a Case Decision Group before a Statement of Objections has been issued, and thus to avoid the risk of any delay to the case at that stage while that Case Decision Group is formed and reads into the case.

2.13 Instead, the SRO will remain responsible for taking these decisions at any stage of the case (that is, pre- or post-Statement of Objections), subject to appropriate governance arrangements and after consulting other OFT officials as appropriate. Further details are provided in the Final Guidance.

ii) The role of the Decisions Committee and its interaction with the Case Decision Group

2.14 Several respondents supported the proposal that the Case Decision Group would consult the Decisions Committee before a decision was formally adopted, on the grounds that it would (i) increase robustness and public perceptions of Board accountability and (ii) ensure consistency of legal, economic and policy issues. One respondent suggested that the Decisions Committee should also be responsible for periodically reviewing the OFT’s investigation practices across all cases to ensure a consistent approach.

2.15 A number of respondents requested more clarity as to the Decisions Committee’s role and interaction with the Case Decision Group. In particular, several respondents felt that it should be made more clear whether the Case Decision Group or the Decisions Committee was the final decision-maker in a case.9 Other respondents asked for further clarity as to the weight the Case Decision Group would be required to give to the views of the Decisions Committee. In this

9 One further suggestion in this regard was the Decisions Committee be renamed (for example as the ’Decisions Review Committee’) to clarify its role and emphasise that it would not take the final decision on the facts of the case as to whether a party had infringed the CA98.
regard, some respondents indicated that they would have concerns if the role of the Decisions Committee extended beyond acting as a final 'check and balance' for policy and consistency issues between cases. Another respondent suggested that OFT Non-Executive Directors should be included in the Decisions Committee.

**OFT’s views**

2.16 The OFT has noted respondents' requests for additional clarity as to the respective roles of, and interaction between, the Case Decision Group and the Decisions Committee.

2.17 In light of those comments, the Final Guidance clarifies that (once appointed) the Case Decision Group acts as the decision-maker on whether, based on the facts and evidence before it, the legal test for establishing an infringement has been met. Where the Case Decision Group finds the legal test to have been met and proposes that the OFT issues an infringement decision, it will consult the Decisions Committee to provide an opportunity for the Decisions Committee to provide its views on any legal, economic or policy issues arising out of that proposed decision. Having considered the views expressed, the Case Decision Group will then proceed to its final decision. The Case Decision Group’s final decision must be formally adopted by the Decisions Committee before that decision is issued by the OFT.

2.18 In line with this, the OFT has also decided to rename the Decisions Committee the 'Policy Committee' in the Final Guidance, to reflect better and hence make clearer the nature of the Committee’s involvement in CA98 cases, which, as noted above, principally will address policy issues and issues of consistency between cases.

2.19 So as to remain consistent with the terminology used in the OFT's Consultation (and by respondents in their written responses), in this document, the Policy Committee will, for ease, continue to be referred to as the 'Decisions Committee'.
iii) The role of the Case Decision Group and SRO following issue of the Statement of Objections, including responsibility for drafting and issuing any Supplementary Statement of Objections

2.20 Several respondents expressed a view that the final Procedural Guidance should provide further detail on the respective roles of the Case Decision Group and the SRO once a Case Decision Group had been appointed. To the extent that respondents provided their own views on this issue, the majority considered that the Case Decision Group should be relatively active following the issuance of any Statement of Objections.10 These respondents generally felt that the need for decision-makers to engage fully in a case and 'efficiency of process' considerations overrode any perceived increased risk of 'bias'.

2.21 More specifically, a number of respondents also requested more detail on who would be responsible for instructing the case team to draft a Supplementary Statement of Objections (and for overseeing that drafting), and who would decide to issue the Supplementary Statement of Objections. Some respondents expressed concerns with the proposal in the Consultation that the Case Decision Group would be responsible for taking the decision to issue a Supplementary Statement of Objections, on the grounds of a risk of confirmation bias when the same Case Decision Group then came to assess the case presented in that Supplementary Statement of Objections.11

10 Including, for example, instructing the case team as to any necessary clarifications sought by the Case Decision Group, or other steps to be taken on the Case Decision Group’s behalf.

11 Alternatives suggested by respondents included providing that, if a Case Decision Group considered that a Supplementary Statement of Objections was necessary in light of the parties’ representations on the Statement of Objections, it could remit this matter to the SRO, with guidance as to what the Supplementary Statement of Objections should cover. The SRO would then be responsible for deciding ultimately whether a Supplementary Statement of Objections should in fact be issued.
2.22 However, of those respondents who addressed the point specifically in their responses, the majority considered it not to be necessary (and might cause practical issues) for a wholly new Case Decision Group to be appointed to consider the case set out in a Supplementary Statement of Objections.

**OFT’s views**

2.23 Having considered the responses and internal views received, the OFT agrees with the majority of respondents that the Case Decision Group should have a relatively active role post-Statement of Objections. The Case Decision Group will oversee the case team in, for example, undertaking further investigation, or drafting a Supplementary Statement of Objections in accordance with the Case Decision Group’s views of the case. The SRO will continue to have an active role in any such further investigative step to be taken but will act subject to instructions/guidance by Case Decision Group.\(^{12}\)

2.24 In line with the arrangements described above, the OFT has also retained its proposal that the Case Decision Group is responsible for the decision to issue a Supplementary Statement of Objections (if one is required) and in the light of the parties' further representations, subsequently to determine whether, based on the evidence in that Supplementary Statement of Objections, the legal test for establishing an infringement has been met.

2.25 The OFT notes that its proposal means that the Case Decision Group will be responsible both for deciding to issue a Supplementary Statement of Objections and for taking the final infringement decision. However, the OFT has only limited resources and must ensure that its proposals are workable in practice and that they do not unduly delay investigations. The OFT is also seeking (given

\(^{12}\) As explained more fully in the Final Guidance, the SRO will also remain responsible post-SO for decisions on whether to accept commitments offered by a party under investigation, whether to make an interim measures direction, and whether a case is appropriate for settlement.
concerns raised by stakeholders in this regard) to ensure that, where possible, its proposals do not result in cases taking longer to reach a conclusion. The OFT is concerned that a requirement to establish a new Case Decision Group after a Supplementary Statement of Objections has been issued, and in particular the need for them to familiarise themselves with the issues in the case, would not only place a significant burden on the OFT’s limited resources, but would also risk causing significant delay to the investigation. There also may be challenges in finding sufficient staff to form a second Case Decision Group on the same case.

iv) Identity of Case Decision Group members

2.26 Some respondents requested further detail as to which members of OFT staff would be eligible to act as a Case Decision Group members. Several respondents emphasised the importance of Case Decision Group members being sufficiently senior and experienced in CA98 cases, and of having sufficient time, given other potential demands on their time, to engage fully with the case.13 No concerns were raised as to the requirement that one Case Decision Group member should be legally qualified or that the SRO should be precluded from being on the Case Decision Group, although one respondent suggested an additional requirement that each Case Decision Group include a qualified economist.

OFT’s views

2.27 The Final Guidance states explicitly that the Case Decision Group will include at least one member of the Decisions Committee and at least one of its members (who may be the Decisions Committee member) will be legally qualified. The Final Guidance also makes it clear that the SRO will not be a member of the Case Decision Group to ensure that the final decision as to whether there has been an infringement

13 This view was also expressed by a number of attendees at the May discussion event.
of the law is taken by officials who were not involved in the decision to issue the Statement of Objections.

v) The extent of the evidence that would be provided to the Case Decision Group or to which it would have access

2.28 Certain respondents requested more clarity on the extent of the evidence that would be provided to the Case Decision Group in each case, or that the Case Decision Group would be able to request, and queried whether this would include exculpatory evidence. Other respondents questioned whether the Case Decision Group would be able to hear witnesses. Several respondents suggested that, in addition to the Case Decision Group considering the Statement of Objections and the parties' written representations thereon, it should also, as a minimum, review the key underlying evidence (that is, the evidence relied upon by the OFT in the Statement of Objections or that the parties had brought to the Case Decision Group's attention in their written or oral representations).

OFT’s views

2.29 Each Case Decision Group member will review: (i) the Statement of Objections; (ii) the underlying evidence relied on in the Statement of Objections; and (iii) the parties' written representations and accompanying evidence, and will be expected to have done so prior to any attending oral hearing with that party.

2.30 They will also have access to the full file and be able to request copies of any additional documents on the file they may consider relevant or necessary. Parties will remain free to draw to the Case Decision Group's attention any documents on the file they consider to be relevant to their defence in the written representations, including any exculpatory documents.
vi) Should the Case Decision Group take decisions unanimously or by majority?

2.31 A significant number of respondents asked for more clarity within the Guidance on whether the Case Decision Group would take decisions unanimously or by majority and, if the latter, whether dissenting opinions would be published. However, few respondents suggested which option would be more appropriate, and views were not uniform where they did so: two respondents considered that unanimity should be required while another could see benefits to either approach.

OFT's views

2.32 The OFT has given this issue careful consideration, and considers that, should the issue become relevant to a particular case, the OFT will consider how it should be addressed in light of the circumstances of the case.

2.33 The OFT notes that the Case Decision Group's decision must be formally adopted as a decision of the OFT by the Decisions Committee, operating under the delegated authority of the OFT Board. As at present, the final decision will be a single decision adopted by the OFT as a whole.

Question two: Do you agree with the proposed transitional arrangements if the new decision-making model is introduced?

2.34 The Consultation provided that, at the point in time when the new decision-making model was implemented, existing investigations that were prior to the oral hearing stage would transfer to the new decision-making model, whether or not the Statement of Objections had been issued. Not all respondents commented expressly on that proposal. Those that did, did not raise significant concerns. However, some respondents did suggest minor variations or alterations to the transitional arrangements, principally either to address specific factual scenarios which the existing proposal did not appear to cover, or to ensure that parties to cases not transferring to the new
decision-making model would nonetheless benefit where possible from the other procedural enhancements being introduced by the OFT. For example, one respondent noted that the existing arrangements did not account adequately for circumstances where parties have elected not to have an oral hearing.\textsuperscript{14}

**OFT’s views**

2.35 In light of the views received, and the potential for the proposed transitional arrangements not to deal clearly with specific factual circumstances, the OFT has decided to simplify the transitional arrangements it will adopt. As a result, the Final Guidance provides that the new decision-making model will apply to all ongoing and future cases, except those in which a Statement of Objections was issued prior to 18 July 2012, being the date on which the decision to implement a collective decision making model was approved by the OFT Board. To provide additional clarity for parties, these transitional provisions have now been added to the text of the Final Guidance itself (the draft revised guidance having been silent on the question of transition).

2.36 The other changes in the Final Guidance (those not related directly to the new decision-making model) take full effect from the date of publication of that Final Guidance (16 October 2012). Where practicable and appropriate, we will apply those revised procedures also in cases remaining under the OFT’s previous decision-making model. By way of example, any future oral hearings in cases not transferring to the new decision-making model will be chaired by the Procedural Adjudicator and be attended by the decision maker (in those cases, the SRO rather than the Case Decision Group) and the Chief Economist and General Counsel (or their representatives).

\textsuperscript{14} The suggestion of that respondent was that in such cases, the new decision-making model should only apply if the parties had yet to submit their written representations to the OFT.
3 DRAFT PENALTY CALCULATIONS

The proposal to provide an opportunity to comment on key elements of the draft penalty calculation

3.1 The OFT’s proposal to issue a draft penalty statement was welcomed both by respondents to the Consultation and by attendees at the May discussion event. Some commented that they felt that the OFT’s existing process compared unfavourably with the European Commission’s approach and that the new proposals would decrease the risk of parties launching appeals on penalty and might facilitate settlement discussions. A few respondents cautioned against using the draft penalty statement as a substitute for robust analysis or appropriate fine calculations, or as a cover for negotiation on the size of a fine. One respondent recommended that an equivalent draft statement should be issued if the OFT intended to impose directions.

3.2 However, both in the written consultation responses received and at the May discussion event, there were divergent views as to whether the draft penalty statement should be provided to parties in (or with) the Statement of Objections, or at a later stage in the investigation. A small majority of those respondents to the consultation who expressed a preference for one or other of those alternatives favoured later publication. One respondent noted that the timing depended on the OFT’s approach to post-Statement of Objections settlement and how this would be affected by an early statement of the likely fine.

3.3 Those respondents who expressed a preference for including the key details of the draft penalty calculations in (or with) the Statement of Objections noted in particular that such an approach would help to inform parties’ reply to the Statement of Objections and might aid

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15 One respondent expressed a preference for a flexible approach, while two others left the matter open but recommended that a consistent approach should be taken across all cases.
their decision as to whether to seek settlement. Moreover, it would help test the robustness of penalty calculations at an earlier stage in the case and may benefit companies in their commercial reporting and accounting, allowing them to estimate more accurately the likely magnitude of the contingent liability for which they must account. Additionally, by avoiding the requirement to have separate arrangements for parties' written and oral representations on the draft penalty statement, issuing the draft penalty statement at the Statement of Objections stage would reduce the risk of lengthening the investigation and increasing resource demands for both parties and the OFT.

3.4 The concerns raised by written respondents and attendees at the May discussion event about including key details of the draft penalty calculations in the Statement of Objections included, principally, that: i) both the parties' written representations and their oral hearings would become dominated by discussion of issues of the magnitude of the penalty (rather than substantive issues of liability); ii) that inclusion of the details might give parties the impression that the OFT had already taken a decision on liability without having heard any representations from the parties (and that, by corollary, parties would have concerns that, were they to make representations on that penalty calculation, it might give the impression that they had accepted liability); iii) the need for the case team to collect the (additional) information from parties to produce a draft penalty statement may delay the issue of a Statement of Objections and prolong the case; and iv) the draft penalty statement would, necessarily, not take into account either the parties' representations or the views of the Case Decision Group (particularly on issues such as specific deterrence and proportionality), reducing the extent to which the approach taken in the draft penalty statement would be likely to be reflected in any penalty ultimately issued.

3.5 A number of respondents asked that additional detail be included in the Final Guidance regarding the extent of information that would be provided in the draft penalty statement.
3.6 Other respondents considered that, if there were an uplift in the draft penalty as a result of a Case Decision Group determination or Supplementary Statement of Objections, parties should be given a further opportunity to make representations (consistent with the practice of the European Commission).

3.7 A number of respondents also made comments regarding the extent to which the draft penalty statement should be disclosed to third parties. A significant majority felt that complainants or third parties should not receive a redacted version of the draft penalty statement, or be able to comment on the proposed fine, as this was a matter of public policy for the OFT. One respondent considered that third parties need not receive a non-confidential copy of the draft penalty statement, insofar as their ability to comment on the substance of the Statement of Objections would provide sufficient opportunity to comment on penalty-related matters in which they had a legitimate interest, such as the duration of the alleged infringement. Another submitted that the draft penalty statement should not be shared through the European Competition Network; that its issuance should not be announced; and that parties’ written representations in response should also be kept confidential.

3.8 Some respondents asked for clarity on the legal form the draft penalty statement would take (for example, whether it would be a ‘provisional decision on penalties’).

**OFT’s views**

3.9 The OFT welcomes the support from respondents for its proposal to give parties the opportunity to comment on the key elements of the draft penalty calculation before a final decision on penalty is taken.

3.10 As regards the timing of issuance of the draft penalty statement, the OFT considers that this is a difficult and finely balanced issue, with strong arguments in either direction, as the varied responses received to the Consultation reflect. However, after careful consideration, the OFT has decided that, on balance, issuing a draft penalty statement at a later stage of the investigation is a preferable and more
practicable approach. Accordingly, the Final Guidance provides that a draft penalty statement will be issued once any written and oral representations made on the Statement of Objections have been considered, if the Case Decision Group is considering reaching an infringement decision and imposing a financial penalty on a party. The Final Guidance further states that parties will be offered the opportunity to comment on that draft penalty statement in writing and orally (in person or by telephone).

3.11 The OFT considers that the approach it has decided to adopt has the key benefit of allowing for a more detailed and accurate draft penalty statement, which takes into account parties’ representations on liability and includes the Case Decision Group’s views on those elements of the draft penalty calculation (such as proportionality and deterrence) that can practically be determined only by the Case Decision Group following parties’ representations.

3.12 The OFT also notes that issuing a draft penalty statement at a later stage of the investigation and separately from the Statement of Objections reduces the risk that parties might feel that a decision on liability has already been taken or that parties are distracted from focusing on defending the substantive questions of liability for the alleged infringement in their written representations and oral hearing on the Statement of Objections. The OFT further considers that, importantly, this approach best achieves the key objective of increasing the robustness of the OFT’s penalty decisions.

3.13 The OFT recognises that the need to allow for separate written and oral representations on a draft penalty statement may extend the period between the issue of the Statement of Objections and the OFT’s final decision on whether there has been on infringement. However, it considers that such a delay could be offset by time savings at other stages in the investigation (for example prior to the issue of the Statement of Objections). Moreover, there would be a time and cost saving overall both for parties and for the OFT if an appeal on penalty is avoided by parties having had a chance to
comment on a more refined draft penalty statement prior to the final infringement decision being issued.

3.14 With regard to disclosure of the draft penalty statement to third parties, the OFT has noted the view of certain respondents that complainants or third parties should not receive a redacted version of the draft penalty statement, or be able to comment on the proposed fine, as this is a matter of public policy for the OFT. The OFT does not intend to provide the draft penalty statement to formal complainants or other third parties. However, having given the matter careful consideration, the OFT considers that it would be appropriate for a non-confidential version of a party’s draft penalty statement to be provided to other parties under investigation to whom draft penalty statements have also been issued. This will provide those parties with transparency as to the OFT’s application of the principle of equal treatment in its draft penalty calculations. This has now been expressly provided for in the Final Guidance.
4 CASE OPENING NOTICES AND ADMINISTRATIVE TIMETABLES

Proposal to publish case opening notices

4.1 Many respondents welcomed, in principle, the increased transparency\textsuperscript{16} that would be provided by publishing case opening notices on the formal opening of an investigation.\textsuperscript{17} However, several requested more detail on, for example, the proposed contents of case opening notices, and the OFT’s approach to publication thereof (including how and when such publication might be deferred). Some respondents also considered that parties should be given advance notice of any publication (for example, an embargoed copy of the case opening notice).

4.2 A significant majority\textsuperscript{18} of the respondents that addressed the issue were opposed to the OFT’s proposal to publish parties’ names in case opening notices in ‘appropriate cases’.\textsuperscript{19} The following reasons were given:

\textsuperscript{16} One respondent noted that, in addition to the benefits identified in the OFT’s consultation document, case opening notices would also add transparency in cases that do not end in a published decision but where the outcomes still affected behaviour in an industry.

\textsuperscript{17} A few respondents were opposed to any publication of information regarding cases at the outset of the investigation. Others, while not opposing in itself the publication of case opening notices, requested that the OFT commit to exercising caution in relation to the publication and content of such notices.

\textsuperscript{18} Only one respondent expressly favoured naming parties, noting that parties’ public company disclosure obligations would be unaffected by case opening notices, given the information published would be no broader than that set out in the case initiation letter sent to parties upon the opening of an investigation.

\textsuperscript{19} See footnote 41 of the draft guidance consulted upon.
• The adverse impact on companies' reputation, share price and commercial arrangements, particularly given the risk that a case opening notice would be misinterpreted by media outlets as indicating that a company had engaged in wrongdoing (even if the OFT made clear that no infringement finding had been made).

• The risk that publication would trigger the launch of damages claims.

• The degree of evidence on the basis of which the OFT was able to open a formal investigation (under the section 25 CA98 threshold of 'reasonable grounds to suspect') was not necessarily sufficiently probative to justify publication.

• The OFT’s stated objectives for the policy could be achieved through means other than publishing case opening notices.

4.3 Several consultees stressed the importance of the OFT adopting a clear and consistent approach regardless of which option it ultimately favoured.

4.4 Some respondents suggested that only the key issues of the case and the sector in question should be published in case opening notices, but others thought this might be problematic because it could, for example, falsely implicate by association parties not under investigation. Or, that where some parties publicised that they were not involved, negative inferences might be drawn about those who stayed silent.

4.5 Another respondent felt that any publication should only take place after significant engagement with the parties, to ensure there was a case to answer.

OFT’s views

4.6 The OFT has noted that the majority of respondents did not oppose the principle of the OFT publishing of case opening notices in some
form: generally, respondents’ principal concerns related to the more specific issue of the publication of the names of parties under investigation. The OFT also appreciates respondents’ concern that the OFT ensures that, in any event, it adopts a consistent approach to publication, in order to minimise uncertainty for parties.

4.7 In light of this, the Final Guidance continues to provide for the publication on the OFT’s website of a notice containing basic factual details of the case, once parties have been notified of such formal opening. However, the OFT has decided that on balance, it is preferable, at this stage, to limit its initial proposal to publish parties’ names.

4.8 Therefore, the Final Guidance clarifies that the OFT has decided that it will not publish parties’ names in case opening notices, except in exceptional circumstances, such as where the parties’ involvement in the OFT’s investigation is already in the public domain or where parties request that the OFT name them in the case opening notice (and the OFT considers doing so to be appropriate in the circumstances); or where the OFT considers that the level of potential harm to consumers or other businesses (including businesses in the same sector not involved in the investigation) from parties remaining unidentified is such as to justify disclosure.

Proposal to publish and keep updated case-specific administrative timetables

4.9 There was widespread support from respondents for the enhanced transparency created by the proposal to publish and keep updated case-specific timetables.20 Several felt that, provided the published timetables were not too conservative in their estimates, they could stimulate case teams’ efforts to meet internal deadlines, assist companies in managing their resources, or benefit complainants who

20 One respondent argued that the perceived benefits could be achieved without publication, by providing the timetable to parties and complainants only.
often felt 'cut off' from the OFT's investigation. One respondent suggested that, to ensure timetables were kept to and were sufficiently tight, adherence could be a 'key performance indicator', or a formal stop/go review could be triggered if no formal step had been taken in a case during the preceding 12 months. Another respondent did, however, caution that case team’s efforts to meet a timetable deadline must not result in the sacrificing of fair, robust analysis of the case.

4.10 To the extent that concerns were raised about the proposal to publish timetables, they related principally to the proposal to publish the reasons for any delay or change to the original timetable (broadly, the concern was that this might inappropriately attribute responsibility for delays to parties, or be used by the OFT to pressurise parties to meet unrealistic deadlines).

4.11 Some respondents requested more clarity on the timing of later investigation stages, including the OFT’s internal procedures in the run-up to a Statement of Objections, the issue of a Statement of Objections, and the final decision. Only one respondent proposed a specific time limit, suggesting that the initial estimate of the period from case opening to the issue of a Statement of Objections should not exceed 12 months.

OFT’s views

4.12 Having noted the widespread support for the proposal to publish administrative timetables, the OFT has decided to proceed with its implementation in the form consulted upon. The Final Guidance does however, seek to provide additional clarity, for example by specifying that the timetable initially published will cover the investigative stages up to the OFT’s decision on whether to issue an Statement of
Objections. The Final Guidance further states that, if a Statement of Objections is issued, the timetable will at that point be updated to indicate the anticipated timing of the key milestones until the end of the investigation.

4.13 As regards the publication of the reasons for any delay to the original timetable, the OFT has noted parties' concerns and agrees that such publication should be handled sensitively and pragmatically.

21 Ofcom has stated in its recently published Enforcement Guidelines (July 2012) that it will take the same approach to the timetables it publishes in Competition Act cases (see paragraph 7.13 of those guidelines, available to download at www.ofcom.org.uk).
5 ENHANCED ORAL HEARINGS

5.1 The proposal for enhanced oral hearings was widely welcomed by respondents, several of whom also welcomed the commitment that the Case Decision Group, Chief Economist (or a representative) and General Counsel (or a representative) will all attend those oral hearings.22

5.2 Respondents to the Consultation and attendees of the May discussion event were supportive of the objective of greater interactivity at the oral hearing. However, views differed as to what such 'interactivity' should entail and many respondents and attendees sought further clarity in the Final Guidance on this. Most respondents considered that 'interactive' should mean that oral hearings would allow a 'genuine interchange' and that questioning of the case team as well as the parties should be expressly provided for.

5.3 Some respondents cautioned, however, against the oral hearing becoming a 'set piece' or mini-trial, or becoming the main focus of the whole investigation. Many respondents also thought that cross-examination of the parties would not be appropriate (although one felt that the parties should be able to call witnesses) and that any questions should be limited to matters in the Statement of Objections and written representations.

5.4 Most respondents did not comment specifically on multi-party hearings and, of those that did, one supported their use ‘in appropriate cases’. Another respondent felt that they should only be used rarely, such as when requested by parties or where there were differing views on key evidence.

22 On this specific point, one respondent felt that the General Counsel and Chief Economist should, where possible, attend themselves rather than being represented by one of their team.
5.5 A number of respondents pointed out that the parties and Case Decision Group needed to have sufficient time to prepare for an oral hearing. Several were concerned that the proposal to hold oral hearings 10-20 working days after the deadline for submission of parties' written representations would not allow either the parties or the OFT sufficient time to prepare.

5.6 There were differing views as to what should be agreed or notified to the parties in advance of the oral hearing, with respondents' suggestions including: the agenda and key issues to be discussed; a list of participants; and (to the extent possible) the questions that would be asked of parties about their written representations.

5.7 Several respondents advocated 'active' chairing of the oral hearing by the Procedural Adjudicator, including following up lines of inquiry on his/her own initiative to draw out issues clearly, while one suggested that the Procedural Adjudicator's report be made available to the parties as well as the Case Decision Group.

5.8 One respondent and several attendees at the May discussion event suggested reverting to the term 'oral hearings' rather than 'oral representation meetings' as parties would be more familiar with this term.

**OFT's views**

5.9 In light of the general support for the proposal for enhanced oral hearings, the OFT has decided to retain its proposal, subject to certain modifications in the light of feedback received from external respondents.

5.10 More specifically, the OFT accepts that both parties and the Case Decision Group may need more than 10–20 working days from submission of written representations to prepare for the Oral Hearing. Accordingly, the Final Guidance extends this to 'around 20 to 30 working days after the deadline for the submission of the written representations on the Statement of Objections.'
5.11 The OFT also accepts that parties may be more familiar with the term 'oral hearing' than 'oral representations meeting', and has therefore reverted to 'oral hearing' in the Final Guidance.

5.12 The OFT is pleased that both respondents to the Consultation and attendees at the May discussion event welcomed the OFT's proposal to commit to the attendance of the Case Decision Group, the Chief Economist (or a representative) and General Counsel (or a representative) at the oral hearing. Accordingly, the Final Guidance retains that commitment.

5.13 With regards to its objective of providing greater opportunity for interactive dialogue at the oral hearing, the OFT notes the widespread support for this aspect of its proposal, and has given careful consideration to the views expressed as to how such 'interactivity' should be manifested. The OFT remains keen to encourage interested parties to take up the opportunity to have oral hearings and thereby to fully exercise their rights to be heard (this being, as many respondents to the Consultation noted, the primary purpose of the oral hearing). The OFT hopes that the changes being introduced in the Final Guidance will further incentivise parties to request oral hearings. The oral hearing provides the parties with a first and key opportunity to highlight areas of importance to their case directly to the Case Decision Group and to ensure that the Case Decision Group is provided with an opportunity to ask questions of the parties to fully understand their arguments. That Case Decision Group are not only the final decision makers in the case, but are also 'fresh pairs of eyes' in the investigation, having not been involved in the decision to issue the Statement of Objections.

5.14 The Final Guidance provides that the OFT may ask questions of the parties at the hearing. By introducing a formal opportunity for the OFT to ask questions on the parties' representations, the OFT hopes also to ensure not only greater testing of the legal and economic evidence therein, but also that any matters in those representations which are unclear to the Case Decision Group are clarified as quickly as possible, so avoiding the risk to parties that their representations
have been misinterpreted or misunderstood. The OFT notes that it remains the case that parties are not obliged to answer any questions asked by the OFT at the oral hearing, or can choose to respond to questions in writing after the oral hearing if they feel unable to fully answer the question in the oral hearing itself.

5.15 Although requested by some respondents to the Consultation, the OFT has, after careful consideration, not included in the Final Guidance express provision for the direct questioning of the Case Decision Group or the case team by the parties. Parties will, however, still have adequate opportunity to make full oral representations at the hearing, and in doing so, can reiterate or clarify concerns raised in their written representations that they may have with the OFT's case set out in the Statement of Objections. The Case Decision Group will give due consideration to those concerns as part of its assessment of the case. The OFT notes further that, as the Case Decision Group may not have heard the representations of all parties to an investigation at the time of a party’s oral hearing, it would not be appropriate for parties to seek to elicit from the Case Decision Group their views on the case at that stage, and Case Decision Group members will not be willing to engage with parties in this way.

5.16 In order further to ensure a productive and focused oral hearing for both the OFT and the parties, the Final Guidance also provides expressly that case teams should agree with parties an agenda in advance of a party’s oral hearing, including details of the key issues proposed to be covered at the oral hearing. As noted above, the agenda for the oral hearing will include a reasonable period for the parties to make their oral representations, and for the OFT to ask questions. The Final Guidance further states that, in the event that an agenda is not agreed between the parties and the case team at least 10 working days prior to the hearing, the agenda will be determined by the Procedural Adjudicator.

5.17 For clarity and completeness, the OFT notes that – as discussed above – where the OFT issues a draft penalty statement to a party,
that party will be offered a separate oral hearing at that stage to make oral representations specifically on matter of the OFT’s draft penalty calculation as set out in the draft penalty statement. At that hearing, the Case Decision Group will not consider further representations on whether there has been an infringement of the law (other than in exceptional cases detailed in the Final Guidance). The written and oral representations on the Statement of Objections represent parties’ opportunity to make representations in this regard. Further details are included in the Final Guidance.
6 MORE STATE OF PLAY MEETINGS

6.1 Respondents welcomed the proposal to increase the number of 'state of play' meetings, with several noting the considerable value parties placed on such direct access to case teams and decision-makers. Respondents also viewed state of play meetings as an important way of ensuring that issues and any misunderstandings were addressed as early as possible, with some respondents remarking in particular that this would avoid too much emphasis being placed on the oral hearing as a means of addressing those issues.

6.2 Many respondents believed that the Case Decision Group should attend any post-Statement of Objections state of play meeting, with some also suggesting that the SRO should attend all state of play meetings.

6.3 Several respondents stated that it was important that the OFT engaged actively with the parties at the state of play meeting, using the meeting to verify the robustness of its case. A number of respondents believed that the state of play meeting should be used to spell out clearly to parties the nature of the OFT’s case and the basis (legal and evidential) for that thinking. Some respondents felt that the OFT should commit to providing parties with a non-confidential copy of any formal complaint prior to the first state of play, or should inform the parties of the key supporting evidence for the case against them and give the parties a chance to review the evidence.

6.4 One respondent wanted more clarity on the circumstances in which complainants and third parties would be entitled to their own state of play meeting.

6.5 One respondent recognised that it was important that the OFT retained a degree of flexibility over the timing of state of play meetings but recommended that the OFT considered holding the first meeting prior to case opening and shortly after the initial, informal information request. Another respondent believed that parties should be able to request, and typically be granted, a state of play meeting.
where, for example, 12 months had elapsed since the last state of play meeting.

**OFT's views**

6.6 In light of the general support for its proposal to increase the number of state of play meetings, the OFT has retained this proposal in the Final Guidance.

6.7 The OFT agrees that active and regular engagement between the OFT and the parties during an investigation can be an important means of ensuring that issues and any misunderstandings are addressed as early as possible. The Final Guidance clarifies, as requested by a number of respondents, that at least one Case Decision Group member will attend the state of play meeting to be held after a party’s written/oral representations on the Statement of Objections, to ensure that parties continue to have access to the decision maker in an investigation.

6.8 The OFT notes suggestions that it commit to informing parties of the key evidence supporting the case against them (and give them a chance to review it) prior to the Statement of Objections. The OFT considers that this would not be practicable in all cases, and may in fact risk leading to unnecessary delays to the investigation. However, as noted in the Final Guidance, and in accordance with the OFT’s broader transparency commitments,\(^{23}\) the OFT will generally update parties as to its provisional thinking at both the pre-Statement of Objections and post-Statement of Objections state of play meeting.

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7 NEW ARRANGEMENTS FOR INTERNAL CHECKS AND BALANCES

7.1 Many respondents expressly welcomed the OFT's proposals for enhanced internal checks and balances, with a number noting in particular that the resultant involvement of the General Counsel and Chief Economist would help to ensure sufficient senior oversight at an early stage in the investigation (the importance of which was a common theme across responses). One respondent suggested that parties should be granted direct access to the General Counsel and Chief Economist, or their teams, to report any concerns and to ensure adequate peer review occurred from the outset of the investigation.

7.2 A small number of respondents raised concerns as to whether the proposals would guarantee sufficiently impartial and senior oversight early in an investigation

7.3 One respondent suggested that a formal 'devil's advocate' role be created, involving someone closer to the case than the 'checks and balance' teams but not actually on the case team. Only two respondents specifically referred to the proposal to remove the obligation on case teams to consult an internal Steering Committee, with one supporting the proposal and the other opposing it.

OFT's views

The OFT notes the positive responses received in this area. In light of this, the OFT has retained these proposals, with some consequential amendments made to reflect the OFT's decision to modify the types of decision for which the Case Decision Group will be responsible (as discussed above). The OFT notes that it subjects investigations to internal review and scrutiny throughout the course of an investigation, and that the proposals in the Consultation supplement this, by providing for a further, formalised 'fresh pair of eyes' review from legal and economic specialists at two key stages of an investigation.
8 EXTENSION OF THE PROCEDURAL ADJUDICATOR TRIAL

8.1 Respondents welcomed the proposal to extend the trial of the Procedural Adjudicator role until March 2013. Several respondents did however consider that the Procedural Adjudicator role should be established permanently rather than on a trial basis. Some respondents also commented that the lack of cases since the establishment of the role on a trial basis should not be taken as an indication that the role was not important or effective, but could in fact be regarded as evidence of the positive 'disciplining' effect that the role has had on case teams in relation to procedural matters.

8.2 The majority of respondents supported the proposal to extend the Procedural Adjudicator’s remit to include the chairing of oral hearings and reporting to the decision-makers on procedural issues after the oral hearing has taken place.24

8.3 One respondent queried whether the Procedural Adjudicator would have sufficient time to carry out its duties, given the current incumbent already holds another senior role in the OFT: that respondent therefore favoured a separate appointment for the Procedural Adjudicator role, reporting directly to the OFT Board.

8.4 A small number of respondents expressed some concerns about the proposal that the Procedural Adjudicator would chair oral hearings. One respondent felt that that additional role might be perceived as potentially hindering the Procedural Adjudicator’s ability to report objectively on the fairness of the hearing procedure. Another noted the importance of ensuring that the Procedural Adjudicator's enhanced role did not compromise his/her actual and perceived independence from the case team. Two others commented that the

24 A few respondents suggested the extension of the Procedural Adjudicator’s role might go further, giving the Procedural Adjudicator general, as well as specific, responsibilities for ensuring procedural propriety, similar to those of the EU Hearing Officer.
position of chair required a specific skill-set, and favoured that role being taken by a person with experience of acting as a chairperson.

**OFT's views**

8.5 The OFT welcomes the support expressed for the Procedural Adjudicator role. In light of this and specific suggestions that the role be established on a more permanent footing, the OFT has decided to extend the trial of the role until such time as the OFT’s responsibility for competition law enforcement is transferred to the Competition and Markets Authority (CMA). The OFT’s Briefing Note on the Procedural Adjudicator trial\(^{25}\) has been updated accordingly. It is for the CMA to determine the extent to which it establishes a Procedural Adjudicator or equivalent role from that point onwards.\(^{26}\)

8.6 The OFT has, in line with its Briefing Note, sought to evaluate the trial against various criteria, including whether the role has assisted building confidence in the fairness and robustness of the OFT’s procedures and in resolving procedural issues more swiftly (or whether it has in fact resulted in cases taking longer). The OFT has also considered whether the Procedural Adjudicator role is working well in the absence of a specific statutory framework.


\(^{26}\) The Enterprise and Regulatory Reform Bill, which is currently before Parliament, provides for the establishment of the CMA to take over the OFT’s responsibility for enforcing the CA98. More specifically, under clause 34(6) of the Bill, the rules adopted by the CMA may include arrangements for it to deal with procedural complaints about its conduct during an investigation, including the possible appointment of a person who has not been involved in the investigation in question to consider any such complaint.
8.7 As noted in the Consultation, there have been few applications to the Procedural Adjudicator since the start of the trial period.27 As such, there remains limited empirical evidence on which to evaluate the role. However, from the OFT’s perspective, the experience of the role to date does suggest that the Procedural Adjudicator has provided an effective mechanism for resolving procedural disputes in a timely manner. Past Procedural Adjudicator cases have also indicated to the OFT areas where its processes or procedures might be clarified or improved and, through publication of the procedural decisions reached, provided transparency about procedural issues.

8.8 There is only a relatively short period of time until the CMA is due to assume responsibility for enforcement of the CA98. Given this, and as the Procedural Adjudicator role appears to be working well in the absence of a specific statutory framework, the OFT does not consider that it would an efficient use of our resources to seek to place the role on a statutory footing at this stage. Nor does the OFT consider that this would enhance the ability of parties to investigations to raise procedural concerns. By extending the trial, the OFT also aims to provide the CMA with as much experience as it can of the operation of a Procedural Adjudicator system in CA98 cases, on which the CMA can base its decision in that regard.

8.9 Given the general support from respondents for the expansion of the Procedural Adjudicator’s remit, this proposal has been retained in the Final Guidance. The OFT notes the concerns raised regarding the workload implications for the Procedural Adjudicator of his/her expanded remit. The OFT will keep the resource impact of its proposals under review and, if concerns arise, may consider appointing a further, or alternative, Procedural Adjudicator.

27 In the consultation, the OFT noted that only two disputes were referred to the Procedural Adjudicator during the initial one-year trial period. As at the date of this document, one further case has been assessed by the Procedural Adjudicator.
9 FURTHER GUIDANCE ON THE ACCESS TO FILE PROCESS

9.1 The OFT’s proposals on access to file and confidentiality rings elicited few comments from respondents. Those respondents that did comment welcomed the increased use of confidentiality rings, but agreed that their use would not be appropriate in all cases, and should be decided case-by-case. One respondent suggested the OFT should include in-house counsel in confidentiality rings, but acknowledged that this raised practical challenges.

9.2 One respondent welcomed the clear statement in the draft guidance (paragraph 7.10) that the OFT may challenge or reject parties’ confidentiality claims if they impeded other parties’ rights of defence.

OFT’s views

9.3 In light of the support expressed for this proposal, the OFT has decided to implement the proposal in the Final Guidance in the form consulted upon.
10 OTHER REVISIONS TO THE CA98 PROCEDURES GUIDANCE

Question three: Does the revised draft guidance cover in sufficient detail all aspects of the revised processes in our investigations under CA98? If not, what additional guidance would be useful?

Question four: Do you have any comments on how easy the draft guidance is to understand and whether its format is easy to follow?

10.1 Individual respondents raised other issues on which they felt further clarity or detail would be needed in the Final Guidance, such as on:

- the interrelation of CA98 investigations with parallel proceedings under the Cartel Offence in the Enterprise Act 2002
- the interrelation of investigation procedures with the leniency process
- the identity of the person responsible for deciding to close a case based on the OFT's administrative priorities
- the description of the OFT's complaint-handling process set out in Chapter 4 of the Guidance
- the OFT's policy on its use of section 27 notices
- the OFT's commitment to respect confidentiality/legal professional privilege.

10.2 Many respondents did not comment on whether the draft guidance provided sufficient clarity generally but, of those who did, the majority considered it logically structured and easy to follow. One respondent requested that the OFT produce a 'quick guide' for business. Other respondents suggested a limited number of specific and non-material drafting changes, such as definitions of terms.
OFT's views

10.3 The OFT is pleased that the vast majority of respondents have found the Guidance logically structured and easy to follow.

10.4 The OFT has given careful consideration to all comments and suggestions made (including those on drafting) and sought to accommodate in the Final Guidance those that it considered appropriate and within the scope of the Final Guidance. The OFT has also sought to clarify in the Final Guidance as far as possible the points that respondents have identified as unclear or ambiguous.

10.5 In response to the suggestion that the OFT should produce a quick guide for business, the OFT notes that quick guides for businesses on OFT's powers and application of competition law are already publicly available on OFT's website at www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/publications.
11 GUIDANCE ON THE OFT’S SETTLEMENT POLICY AND PROCEDURES

Question five: 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?

11.1 Most respondents who expressly answered this question considered that the OFT should produce further guidance on its settlement policy and procedure at the earliest opportunity. Several respondents said that this should cover both policy and procedure while others believed that it should make clear how the OFT’s approach to the settlement of cases interacted with its commitments and leniency policies.

11.2 One respondent suggested leaving the matter to the forthcoming CMA, given current uncertainty about much of the competition regime.

OFT’s views

11.3 The OFT notes the wide support for further guidance on the OFT’s settlements policy and procedure at this time.

11.4 The OFT has made minor amendments to the description of the settlement process in Chapter 11 of the Final Guidance, in particular to reflect its decision that the Case Decision Group should not be responsible for discussing or agreeing possible settlement of cases with parties. The OFT has also clarified the internal OFT governance processes that must be completed before the SRO in a case can discuss or agree to the settlement of a case with parties.

11.5 The OFT is still considering whether it would be appropriate to proceed with settlement guidance at this time and will make an announcement on this in due course.
ANNEXE A: ALPHABETICAL LIST OF WRITTEN RESPONDENTS TO THE CONSULTATION

1. Addleshaw Goddard LLP
2. Allen & Overy LLP
3. American Bar Association
4. Ashurst LLP
5. Baker & McKenzie LLP
6. Berwin Leighton Paisner LLP
7. CBI
8. Charles Russell LLP
9. City of London Law Society Competition Law Committee
10. Cleary Gottlieb Steen & Hamilton, LLP
11. Clifford Chance LLP
12. Competition Commission
13. EDF Energy plc
14. Edwards Wildman Palmer UK LLP
15. Freshfields Bruckhaus Deringer LLP
16. Dr. Emanuele Giovannetti, Anglia Ruskin University
17. Herbert Smith LLP
18. Hogan Lovells International LLP
19. International Chamber of Commerce, UK
20. Linklaters LLP
21. Lloyds Banking Group
22. Professor Bruce Lyons, ESRC Centre for Competition Policy, University of East Anglia
23. Macfarlanes LLP
24. Maclay Murray & Spens LLP
25. Norton Rose LLP
26. Office of Rail Regulation
27. Reed Smith LLP
28. Simmons & Simmons LLP
29. Taylor Wessing LLP
30. Confidential Response