

Finalised guidance

FG15/8: The FCA's concurrent competition enforcement powers for the provision of financial services

A guide to the FCA's powers and procedures under the Competition Act 1998

As updated in April 2018

1 Overview

- We have powers to enforce the prohibitions under UK and EU competition law on anti-competitive agreements and conduct in relation to the provision of financial services.
- Our competition law functions are 'concurrent' – the Competition and Markets Authority (CMA) and possibly other regulators may also exercise them in this sector.

Introduction

- 1.1 Part 1 of the Competition Act 1998 (CA98) and Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibit anti-competitive agreements and abuses of a dominant position.¹

¹ We do not have powers to prosecute the criminal cartel offence in section 188 of EA02.

- 1.2 As from 1 April 2015, under the concurrency provisions in the Financial Services and Markets Act 2000 (FSMA),² we have competition law powers, including powers under CA98 in relation to agreements and conduct relating to the provision of financial services.³ The term 'financial services' is not defined but, in our view, includes any service of a financial nature such as banking, credit, insurance, personal pensions or investments. 'Financial services' therefore goes beyond financial services regulated by us or other bodies.
- 1.3 We also have powers to carry out market studies as provided by the Enterprise Act 2002 (EA02) and to refer markets to the CMA for detailed investigation. These powers are covered in separate guidance available on our website.
- 1.4 These competition powers may also be used by the CMA for all sectors of the economy so, for financial services, the CMA and the FCA have concurrent competition law functions ('concurrent functions') and the FCA is a 'concurrent regulator'.
- 1.5 This guidance explains how we will use our concurrent functions for the prohibitions in Chapter 1 and Chapter 2 CA98 and/or Article 101 and Article 102 TFEU for the provision of financial services within the UK, in particular the enforcement processes we will follow, and how these relate to our other powers and duties.⁴
- 1.6 This document focuses on the procedural aspects of the FCA's powers of enforcement under CA98. For guidance on the application of the CA98 prohibitions, please use the CMA's guidance documents, including *Agreements and concerted practices* (OFT401) and *Abuse of a dominant position* (OFT402), which apply to all areas of economic activity, including financial services.⁵ We have not duplicated all the guidance that the CMA, with its greater experience, has issued. However, where CMA guidance is more detailed than ours, we shall consider its guidance in deciding how to proceed.

Legislative context and other guidance documents

- 1.7 The legal framework for the FCA's CA98 concurrent enforcement powers for the provision of financial services in the UK includes (but is not limited to):
 - Articles 101 and 102 TFEU and Regulation 1/2003⁶
 - CA98
 - Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (CA98 Rules)

² Sections 234I to 234O FSMA.

³ On 1 April 2014, the Payment Systems Regulator (PSR) was established as the regulator for payment systems in the UK. The PSR is a subsidiary of the FCA with its own statutory objectives and board. The PSR has been given concurrent powers under CA98 and EA02 in relation to participation in payment systems, and will issue its own guidance on its concurrent powers.

⁴ This document constitutes advice and information issued pursuant to section 52 CA98, referred to in this document as guidance for the sake of convenience.

⁵ Available at www.gov.uk/government/collections/cma-ca98-and-cartels-guidance.

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, OJ L 1, 4.1.2003, p. 1.

- Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations)
- FSMA
- Financial Services Act 2012
- EA02
- Enterprise and Regulatory Reform Act 2013

1.8 Additionally, we must have regard to:

- the CMA's guidance on the appropriate level of a penalty imposed under section 36 CA98⁷
- the CMA's statement of policy in relation to the imposition of penalties under section 40A CA98⁸
- the CMA's guidance as to the circumstances in which it may be appropriate to accept commitments under section 31A CA98⁹

1.9 The CMA's Guidance on concurrent application of competition law to regulated industries (Concurrency Guidance)¹⁰ explains how the concurrency regime operates in relation to CA98.

1.10 This guidance sets out how we will carry out enforcement action under our new powers under CA98. Our approach will be informed by our general enforcement policy,¹¹ subject to the statutory rules that apply to CA98 enforcement. We refer where relevant in this guidance to the CMA's Procedural Guidance¹² and other guidance documents.

1.11 We may revise our guidance from time to time, eg in light of our experience or because of changes in the law. Our website will always contain the most up-to-date version.

⁷ The guidance in force as at the date of this document is OFT423 *OFT's guidance as to the appropriate amount of a penalty* (which has been adopted by the CMA Board).

⁸ CMA 4 *Administrative Penalties: Statement of Policy on the CMA's Approach*.

⁹ OFT 407 *Enforcement*.

¹⁰ CMA10, available at www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries.

¹¹ See our Enforcement Guide, available at <http://fshandbook.info/FS/html/FCA>.

¹² *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases* (CMA8).

2 Our approach to using our CA98 powers

- We seek to exercise our functions transparently and fairly, and parties are able to challenge our procedural and substantive decisions.
- We are a national competition authority (NCA) under Regulation 1/2003, which places certain obligations on us in the application of EU competition law.
- Only one regulator can exercise prescribed CA98 functions in any one case at any one time, and there are procedures in place to ensure the best-placed authority takes a case forward.
- There may be instances in which we take enforcement action under our other powers as well as CA98.
- Our 'primacy' obligations mean that, before exercising certain of our powers set out in FSMA, we have a duty to consider whether it would be more appropriate to proceed under CA98.

Fair and transparent process

- 2.1 We aim to exercise our functions as transparently as possible, recognising the importance of making sure that appropriate information is provided on our decision making process and also that we should be open and accessible both to affected stakeholders and the general public. Our general approach to transparency as a financial services regulator is set out in the FCA transparency framework.¹³ However, the legal framework for the disclosure of information gathered under CA98 is different from that for information gathered under our other functions. This guidance sets out what we propose to publish about our CA98 investigations and how we will liaise with parties under investigation and third parties.
- 2.2 We are also committed to ensuring fair treatment in the exercise of our powers: this protects the rights of those we are investigating and of third parties, and assists us in our decision-making. We must carry out our investigations and make decisions in a procedurally fair, transparent and proportionate manner, according to the standards of administrative law. In addition, we must comply with the Human Rights Act 1998.¹⁴
- 2.3 Conducting an investigation involves taking many administrative decisions, eg setting deadlines, determining the scope of information requests, and deciding on the disclosure

¹³ August 2013, available at www.fca.org.uk/static/fca/documents/feedback-statements/fca-transparency-framework.pdf.

¹⁴ The FCA is designated as an NCA by means of The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261, which provides that regulators mentioned in section 54(1) of the 1998 Act are NCAs; that section has been amended to include the FCA.

of information. Anyone who wishes to query such a decision should raise it with the case team (see section 4).

- 2.4 If it is not possible to resolve the dispute in this way, procedural complaints can be made to the FCA's Procedural Officer¹⁵, whose details can be found on our website.¹⁶ They may consider complaints that relate to:
- 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
 - requests for treatment of confidential information in documents on the FCA's case file, in a Statement of Objections or in a final decision
 - requests for disclosure or non-disclosure of certain documents on the FCA's case file
 - issues relating to oral hearings, eg the date of the hearing
 - other significant procedural issues that may arise during the course of an investigation
- 2.5 The Procedural Officer is not able to review FCA decisions beyond those listed above, eg decisions on the scope of requests for information or decisions relating to the substance of a case.
- 2.6 The Procedural Officer will also chair any oral hearing and prepare a report assessing its fairness (see section 6 below). They will not otherwise be involved in the investigation.
- 2.7 In addition, the FCA operates a Complaints Scheme, details of which are on our website.¹⁷ However, we expect that complaints in relation to procedural matters within the scope of the Procedural Officer's jurisdiction will be more appropriately dealt with by the Procedural Officer, who is established for that purpose.¹⁸ Ultimately, a party with sufficient interest can seek judicial review, in the High Court, of an administrative decision taken by the FCA.
- 2.8 Parties whose agreements or conduct are the subject of a decision specified in section 46 CA98 have a right of appeal on its merits to the Competition Appeal Tribunal (CAT). These decisions are:
- whether the Chapter 1 or Chapter 2 prohibition, or the prohibition in Article 101 or 102 TFEU has been infringed
 - the imposition of a penalty for an infringement of Chapter 1 or Chapter 2 CA98 or Article 101 or Article 102 TFEU or the amount of such a penalty
 - the cancellation of a block or parallel exemption

¹⁵ The role of the FCA's Procedural Officer is similar to that carried out by the CMA's Procedural Officer in relation to procedural complaints. See www.gov.uk/procedural-officer-raising-procedural-issues-in-cma-cases#procedural-officer-role-scope-and-process-competition-act-1998-investigations.

¹⁶ <https://www.fca.org.uk/about/promoting-competition/procedural-office>.

¹⁷ www.fca.org.uk/about/making-complaints-about-us

¹⁸ However, the complaint can nonetheless be taken up by the complaints investigator under section 87 of the Financial Services Act 2012.

- withdrawing the benefit of a regulation of the European Commission pursuant to Article 29(2) of Regulation 1/2003
 - not releasing commitments pursuant to a request made under section 31A(4)(b)(i) CA98
 - releasing commitments under section 31A(4)(b)(ii)
 - directions and interim measures in relation to agreements or conduct
- 2.9 A party can also appeal the imposition of an administrative penalty imposed on it under section 40A CA98¹⁹ to the CAT.
- 2.10 Third parties with a sufficient interest in a decision of the type set out in section 47 CA98 also have a right of appeal to the CAT. Such decisions include whether:
- the Chapter 1 or Chapter 2 prohibition, or the prohibition in Article 101 or 102 TFEU has been infringed
 - to accept or release commitments, or to accept a variation of commitments (unless that variation is not material in any respect)
 - to make or not make directions, under section 35 CA98

Regulation 1/2003

- 2.11 We are an NCA for the purposes of Regulation 1/2003. We have certain obligations under Article 3 of Regulation 1/2003, including that we must apply Article 101 and/or Article 102 TFEU in any case where we are applying the Chapter 1 or Chapter 2 prohibition respectively if trade between EU Member States may be affected. We must notify the European Commission if we open an investigation involving the application of Article 101 and/or Article 102 TFEU. This assists in the efficient allocation of cases between NCAs and between NCAs and the European Commission.
- 2.12 The European Commission has the power to take over cases involving an alleged breach of Article 101 and/or Article 102 TFEU from NCAs such as the FCA, by initiating proceedings. If we have already opened an investigation, then the European Commission shall consult with us before initiating its own proceedings.²⁰
- 2.13 We may not prohibit an agreement or concerted practice under national competition law if it would not be prohibited under Article 101 TFEU. This does not prevent the application of stricter national law to an agreement if it predominantly pursues different objectives from those pursued by Article 101. We may apply national law which is stricter than Article 102 TFEU in respect of unilateral conduct.²¹

¹⁹ See footnote 36 in relation to administrative penalties.

²⁰ Article 11(6), Regulation 1/2003

²¹ Article 3, Regulation 1/2003

Case allocation under concurrency arrangements and the UKCN

- 2.14 Our functions under CA98 in respect of the provision of financial services are concurrent with those of the CMA and, in certain instances, other regulators that have concurrent functions over the provision of some financial services (for example, the Payment Systems Regulator).
- 2.15 While cases may be transferred between concurrent authorities, only 1 authority can exercise prescribed functions in respect of a case at any moment.²² The Concurrency Regulations and Concurrency Guidance set out how information will be shared between relevant competent authorities and how cases will be allocated. The general principle is that the regulator that will be responsible for a case depends on which one is better or best placed to do so.²³ We will cooperate with the CMA and other concurrent regulators to ensure the effective and efficient handling of cases in relation to financial services. If agreement cannot be reached, the CMA may determine which relevant competent authority should exercise their power. We entered into a memorandum of understanding with the CMA that sets out the framework for our cooperation.²⁴
- 2.16 We are part of the UK Competition Network (UKCN), which is an alliance of the CMA and UK sector regulators that have a duty to promote competition in the interests of consumers. The UKCN's Statement of Intent can be found as an annex to the Concurrency Guidance.
- 2.17 The FCA will participate in, and support the CMA in its lead participation in, the activities of the European Competition Network and the International Competition Network, and other international forums as appropriate.

Relationship with FSMA

- 2.18 The FCA has a broad range of legal tools to address competition concerns, and when considering a competition issue, we shall consider the appropriateness of the available tools when deciding what action, if any, to take. These tools include market studies under FSMA and EA02 or enforcement action under CA98 or FSMA. We also have more general regulatory and rule-making powers. While in relation to CA98 we have a specific primacy obligation (set out in section 234K FSMA), this applies only to the 6 powers listed (see paragraphs 2.23 to 2.26).
- 2.19 Our guiding principle will be to choose the tool that will allow us most efficiently and effectively to investigate and if necessary remedy the possible harm that we have

²² The prescribed functions include the opening of a formal investigation and the taking of a decision within the meaning of section 46(3) CA98, including a decision as to whether the Chapter 1 or Chapter 2 prohibition has been infringed.

²³ See Concurrency Guidance paragraph 3.22, which contains a list of factors relevant to which authority will be best placed.

²⁴ The memorandum of understanding is available on www.fca.org.uk/publication/mou/fca-cma-concurrent-competition-powers-mou.pdf.

identified. This will be influenced by the facts in front of us (see paragraph 2.26 for examples). Procedural factors may be relevant: for instance, as noted (paragraph 1.2), our concurrent powers go beyond the firms that we regulate.

- 2.20 Anti-competitive agreements or abusive conduct by authorised firms may breach obligations under FSMA or other legislation, as well as competition law. In addition, they may call into question the fitness and propriety of those authorised firms and the fitness and integrity of individuals working at such firms. Accordingly, there may be instances in which we take enforcement action under our other powers as well as CA98, in parallel or sequentially. We will act reasonably and proportionately when considering taking other enforcement action (such as imposing fines, disqualification or suspensions) and, for example, the level of any fine to be imposed.²⁵ We will also take into account fines levied by authorities in connected cases.
- 2.21 We will make clear when using our formal information gathering powers which powers we are using and the nature of the suspected infringement(s) that we are investigating. Where more than one of our enforcement powers is considered to be potentially appropriate, we may make separate information requests under different information gathering powers. We will seek to decide as early as possible the most appropriate power(s) to deal with the specific agreement or conduct in question.
- 2.22 In some circumstances we may begin an investigation under CA98 and subsequently decide that action under our other powers is more appropriate, or vice versa. In such cases we will inform the party or parties involved.

'Primacy'

- 2.23 We are bound by statutory provisions giving 'primacy' to CA98 enforcement in certain situations. This means that, before exercising certain of our powers set out in FSMA (listed in paragraph 2.24 below), we have a duty to consider whether it would be more appropriate to proceed under CA98. If we consider that it would be more appropriate to proceed under CA98, we must do so rather than exercise that other power.
- 2.24 The specified powers are the powers under:
- section 55J(2) FSMA to vary or cancel a Part 4A permission (to carry out regulated activities)
 - section 55L FSMA to impose or vary a requirement on an authorised person with a Part 4A permission
 - section 88E FSMA to take action against a sponsor firm (to advance our operational objectives)
 - section 89U FSMA to take action against a primary information provider (to advance our operational objectives)

²⁵ The FCA's guidance on the imposition of penalties under FSMA is set out in the Decision Procedures and Penalties Manual, available at www.fshandbook.info/FS/html/FCA/DEPP.

- section 192C FSMA to give a direction to a qualifying parent undertaking
- section 196 FSMA to impose a requirement (intervention in respect of incoming firms)

2.25 We will determine on a case by case basis whether it may be more appropriate to proceed under CA98. We will look at the potential harm to competition raised by the conduct or agreement in question, the resource and timing implications of the actions available to us, and the potential outcomes (including their suitability for addressing the issues identified) and deterrent effect of those actions. Other factors may also be relevant to our considerations.²⁶

2.26 Some cases are likely to fall more naturally for investigation under CA98 (such as collusion amongst rivals to fix prices or allocate customers; unilateral strategic conduct by a firm to exclude rivals). In others it will be clear that CA98 is not the appropriate legal instrument. For example, if the proposed action relates to behaviour of a single undertaking that is not dominant, or if the behaviour does not appear likely to be capable of affecting competition. By way of example, this could include action under section 55J(2) or section 55L FSMA taken on the basis of a firm's non-compliance with a Financial Ombudsman Service award against the firm, non-payment of FCA fees or repeated failure to pay FCA fees except under threat of enforcement action, or failure to take out professional indemnity insurance.

²⁶ See the CMA's 'Baseline' annual report on concurrency, April 2014, CMA 24, paragraph 47, which states that the use of competition law may encourage companies to think in terms of the effects of their activities rather than compliance with specific rules; the greater flexibility of competition law compared to *ex ante* regulation which may be reviewed only periodically; and that the application of competition law in regulated sectors may set a precedent across the regulated sector and more widely in the economy.

3 Case initiation

- We may be alerted to possible CA98 infringements from a variety of sources, including other work we are undertaking, or information shared with us by others.
- We cannot investigate every possible CA98 infringement of which we become aware, and must prioritise which cases to take forward.
- When we open an investigation, we will generally provide the parties we are investigating with basic information about the case, though we will delay doing so if it could prejudice our investigation.

Sources of potential CA98 investigations

3.1 We may be alerted to possible CA98 infringements from a variety of sources:

- complaints from the public or businesses. Such complainants may be granted 'Formal Complainant' status by the FCA.²⁷
- super-complaints from bodies designated under section 234C FSMA,²⁸ such as Which?, the Consumer Council Northern Ireland, Citizens Advice and the Federation of Small Businesses.
- referrals from other authorities. This could include information shared by the CMA under the concurrency arrangements or information received from the European Commission or NCAs.
- applicants for leniency.
- our own enquiries and supervisory activities over regulated firms.
- market studies or other own-initiative work or intelligence-gathering.

3.2 Regulated firms should bring their own actual and possible contraventions to the FCA's attention, as they are obliged to do under Principle 11 of the Principles for Businesses and rules in the FCA's Supervision manual.²⁹ See further paragraphs 6.4-6.8.

3.3 Complaints from the public or businesses about possible CA98 infringements can be made by contacting:

²⁷ We will follow the CMA's Procedural Guidance (*Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, March 2014 (CMA8)) about the granting of Formal Complainant status to any person who meets the criteria set out by the CMA.

²⁸ We have produced guidance on how designated bodies can bring a super-complaint (*Guidance for designated Consumer Bodies on making a Super-complaint under s234C (FG13/1)*). This guidance should be read in light of the fact that, following the commencement of amendments to FSMA made by the Financial Services (Banking Reform) Act 2013, a super-complaint cannot be made to the FCA if it is a complaint which could be made to the Payment Systems Regulator by a designated representative under section 68 FS(BR)A.

²⁹ Principle 11 of the FCA Handbook requires authorised firms to notify the FCA of anything "relating to the firm of which that regulator would reasonably expect notice". This includes, for example, competition law infringements.

Competition Division
Strategy & Competition
Financial Conduct Authority
25 The North Colonnade
London E14 5HS

Email: CompetitionMailbox@fca.org.uk
Tel: 0845 606 9966 (call rates may vary), 0300 500 0597

- 3.4 Complaints can also be made by filling in the form on our website.³⁰
- 3.5 We also have a whistleblowing programme, details of which can be found on our website (including contact details).³¹ Whistleblowers are individuals who want to provide information about wrongdoing in the regulated sector and want their information and identity to be treated confidentially. Whistleblowers can be employees/contractors of firms who meet the criteria in the Public Interest Disclosure Act 1998 or other individuals (for example, consultants, associates or employees of other regulated or non-regulated firms).
- 3.6 The FCA does not offer immunity from criminal offences. However, individuals who have been involved in the behaviour in question may wish to familiarise themselves with the CMA's leniency policy in relation to cartel activity (see section 6) to see if it may be relevant to them. They may be eligible to apply to the CMA for immunity from criminal prosecution for the cartel offence under section 188 of the EA02.

Deciding whether to open an investigation – prioritisation assessment

- 3.7 We cannot investigate every complaint or possible infringement of competition law of which we are made aware and must therefore prioritise which work to undertake.
- 3.8 We will decide on a case by case basis whether to open an investigation. In deciding whether to investigate a possible infringement of competition law, we will have regard to several factors, including:
- the likely impact of the investigation in terms of the direct and indirect consumer benefit that investigation may bring
 - the significance of the case (including the possible deterrent effect of an investigation or decision)
 - the risks involved in taking on a case (including the likelihood of determining whether or not there has been an infringement)
 - whether other tools are available that would be more appropriate to achieve the same or a better outcome (see paragraphs 2.18 and 2.19)
 - the resources required to carry out the investigation

³⁰ www.fca.org.uk/report-competition-law-infringements.

³¹ www.fca.org.uk/site-info/contact/whistleblowing.

- 3.9 These criteria are illustrative, rather than exhaustive. Before launching any CA98 investigation we will consult the CMA, and discuss whether it (or possibly another concurrent regulator) should lead the investigation. Ultimately, the CMA may decide this (see paragraphs 2.14 and 2.15).
- 3.10 We will keep our prioritisation assessment of any particular case under review and it may be that we need to close an investigation once it has been opened, if our assessment of its priority changes. The CMA has the power to take over an investigation we have opened (see paragraph 2.15).
- 3.11 While we may assess the strength and quality of the available evidence, an administrative decision not to conduct an investigation, or to close an investigation after it has been opened, is not a decision on the merits of the case. It does not imply any view about the merits of a complaint or whether there has been a breach of competition law. Our choice of whether to take enforcement action is a question of how we use our resources effectively and efficiently. In some cases, it may be appropriate to deal with suspected infringements of competition law without formal enforcement action. We may alert businesses to possible concerns without formally opening an investigation, for example by issuing advisory or on notice letters.
- 3.12 We usually issue advisory and on notice letters where there may be a potential infringement of competition law but we decide not to open an investigation on grounds of our prioritisation criteria (paragraph 3.8). Such letters do not constitute formal decisions relating to infringements of competition law. They set out the behaviour of potential concern, giving the firm involved an opportunity to investigate and to consider whether the behaviour meets its obligations under competition law. While advisory letters are largely educational in nature (and intended to increase awareness of competition law, to achieve greater compliance by the relevant firm), on notice letters are more significant as we ask the firm to tell us what it has done or will do in order to address the concerns we raised.
- 3.13 Our decision about which type of letter we send is based on various factors, including the seriousness of any potential anti-competitive practices, the strength of the evidence we have, and the potential for the practices to harm competition in the sector. We have developed our use of such letters in light of the CMA's guidance and practice.³²
- 3.14 Our prioritisation assessment underlies our decision as to whether to investigate a matter. However, if the FCA decides not to open a formal investigation into a matter under CA98, it is open to the CMA (or any other regulator with concurrent jurisdiction over the agreement or conduct in question) to take action under CA98, following consultation with the FCA (see paragraphs 2.14-2.15 and the Concurrency Guidance with regard to case allocation).

³² We call 'on notice letters' what the CMA calls 'warning letters' - <https://www.gov.uk/guidance/warning-and-advisory-letters-essential-information-for-businesses>.

Opening a formal investigation

- 3.15 If we decide to open a formal investigation under CA98, we will generally send the business(es) under investigation a case initiation letter setting out brief details of the conduct which we are investigating, the relevant legislation, our indicative proposed timetable, and contact details. We will generally inform the person who has provided the information resulting in the case (for example, the person making a complaint). However, we will not communicate either with the business(es) under investigation or with third parties at the start of an investigation if this may prejudice the investigation (for example, where we intend to conduct unannounced inspections), and we may need to limit the amount of information provided if there are good grounds for doing so (for example, to protect the identity of a whistleblower or a complainant).
- 3.16 We may in some circumstances (eg if we consider that it may assist us in our investigation or is necessary for market stability) publish basic information about the investigation, in accordance with our powers under section 25A CA98. If we publish information identifying a business whose activities are being investigated, and subsequently decide to terminate the investigation into that business, we will (in compliance with our statutory obligations) publish a notice stating that the activities of that business are no longer being investigated.

4 Conduct of the investigation

- We will assemble a case team to conduct the investigation, headed by a Case Sponsor who will take certain key decisions up to and including any decision to issue a Statement of Objections.
- We will keep parties informed on the progress of our investigation, including holding 'state of play' meetings.
- We have formal information gathering powers to investigate suspected CA98 infringements.
- We can order interim directions in order to prevent significant damage or protect the public interest.
- There are several potential outcomes of an investigation, including case closure, finding no grounds for action, accepting commitments or finding an infringement.

The case team and decision makers

- 4.1 The FCA will assemble a case team to conduct the investigation. This may consist of case officers, investigators, lawyers, economists, financial analysts and others with the necessary expertise from across the FCA. Each investigation will have a Case Sponsor (who may be 2 people), who will take the following decisions, as appropriate:
- whether there is sufficient evidence to issue a Statement of Objections (see paragraphs 5.1-5.6)
 - to close a case on grounds of administrative priorities (before or after the issue of a Statement of Objections (see paragraph 4.17)
 - to make an interim measures direction (see paragraphs 4.13-4.16)
 - to accept commitments offered by a party under investigation (see paragraphs 4.20-4.23)
 - whether a case is appropriate for settlement (see paragraphs 6.9-6.19)
- 4.2 These decisions are described in more detail in the relevant paragraphs, including in relation to the additional approvals needed for certain decisions.
- 4.3 We will maintain a clear division between the conduct of the investigation and the ongoing supervision of authorised firms under FSMA.

Keeping parties informed

- 4.4 The FCA expects to provide case updates to businesses under investigation and Formal Complainants either by telephone or in writing. We will also offer 'state of play' meetings to businesses under investigation. We use these meetings to ensure that the business is aware of the stage the investigation has reached, and inform it of the next steps and the likely timing of these, subject to any restrictions due to confidentiality or market sensitivity.
- 4.5 We are likely to hold state of play meetings after a case has been formally opened (unless this could prejudice the ongoing investigation), before the decision is taken to issue a Statement of Objections (see section 5) and after we have received the oral and written representations on the statement of objections.
- 4.6 The FCA will keep businesses under investigation and Formal Complainants to the investigation informed of the anticipated case timetable and any changes to this.

Information gathering

- 4.7 We need considerable amounts of information in order to make well-evidenced decisions. We expect to require this both from the subjects of our investigations and from third parties. We appreciate that providing such information may be onerous, and we will seek to make the process as efficient as possible without prejudicing the ongoing investigation. This may involve sharing draft information requests before they are formally issued, or discussing with parties how they hold data in order to tailor our requests to their systems.
- 4.8 Once we have 'reasonable grounds for suspecting'³³ an infringement of the prohibitions contained in Part 1 of the CA98 and/or Article 101 or Article 102 of the TFEU, we may use the information gathering powers provided by the CA98. These are described in the CMA's Procedural Guidance.³⁴ In summary, we:
- can issue requests for information and documents (commonly referred to as section 26 notices) in writing.
 - can conduct compulsory interviews with any individual connected to a business under investigation.³⁵
 - have the power to enter business and domestic premises, require the production of documents and take copies of documents. Such entry may be either with or (for business premises) without a warrant. If we have obtained a warrant, we may search for and seize documents.
 - may fine any business or individual who (without reasonable excuse) does not comply with our information gathering powers.³⁶

³³ This is the legal test under section 25 of CA98.

³⁴ *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, March 2014 (CMA8), Chapter 6.

³⁵ Under section 26A of CA98.

- 4.9 We also have extensive powers to obtain information from those subject to our regulation under FSMA (as set out in the FCA's Enforcement Information Guide)³⁷, and we may use information we gain in other ways during an investigation under CA98. However, once we have decided to launch an investigation under CA98, we would use the tools provided by CA98 to conduct that investigation.
- 4.10 The CMA's Procedural Guidance describes the limits on its powers of investigation under CA98.³⁸ Those limits apply equally to the FCA so that we:
- cannot require the production or disclosure of privileged communications³⁹
 - cannot force a business to provide answers that would require an admission that it has infringed the law
 - are subject to strict rules governing the extent to which we are permitted to disclose confidential and sensitive information (see section 7)
- 4.11 We expect to receive a separate non-confidential version of any document or materials containing sensitive or otherwise confidential information, along with a clear explanation as to why the redacted information should be considered confidential.⁴⁰
- 4.12 Where information has been gathered using powers under CA98, we may use it to investigate other matters under CA98 or other legislation such as FSMA, subject to and in accordance with the relevant legislation, case law and restrictions relating to the use of leniency information shared with us by other competition authorities set out in paragraph 6.6 (see also section 7).

Taking urgent action to prevent significant damage or to protect the public interest

- 4.13 Under section 35 of CA98, we have the power to require a business to comply with temporary directions (referred to as 'interim measures') while we complete the investigation. In summary, we can require a business to comply with temporary directions where:
- the investigation has been started but not yet concluded, and
 - it is necessary to act urgently either to prevent significant damage to a person or category of persons, or to protect the public interest.

³⁶ Under section 40A of CA98, we may impose penalties for parties failing to comply with our investigation gathering powers without reasonable excuse. In determining whether, and if so how, to proceed under section 40A CA98, we must have regard to the CMA's Policy Statement on Administrative Penalties (*Administrative penalties: Statement of Policy on the CMA's approach* (CMA 4)). In addition, it is a criminal offence to provide false or misleading information, or to destroy, falsify or conceal documents (subject to certain statutory defences and conditions).

³⁷ <https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf>

³⁸ See its Chapter 7.

³⁹ See section 30 of CA98.

⁴⁰ However, the FCA may nonetheless disclose such information pursuant to one of the statutory gateways (set out in EA02 for information gathered under CA98).

- 4.14 We can impose interim measures 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 significant damage may apply to us to take interim measures. If a person fails to comply with the interim measures without reasonable excuse, we will apply to court for an order to require compliance within a specified time limit. When we consider whether to impose interim measures, we will have regard to the factors set out in CMA8 paragraphs 8.13 to 8.16.
- 4.15 In terms of the procedure we will follow:
- any application should be made to the case team in writing, providing as much detail as possible as to why the grounds set out in section 35 CA98 are met,
 - the Case Sponsor may provisionally decide to give an interim measures direction (a provisional decision which may follow a complaint or be on our own initiative). We will write to the business to which the directions are addressed setting out the terms of the proposed directions and the reasons for giving them,
 - we will also allow that business a reasonable opportunity to make representations. Given the nature of the interim measures process, the time allowed may be short,
 - we will allow the business to inspect documents on our file, other than those parts that are confidential (see section 7),
 - after taking into account any representations, and having satisfied ourselves as to the adequacy of the evidence we are relying upon, taking into account all the circumstances of the case, we will make our final decision and inform the applicant and any Formal Complainants and the business against which the order is being sought. The Case Sponsor is responsible for deciding whether to give an interim measures direction, subject to obtaining the approval of a Director of Division,
 - we will publish any interim measures direction we issue.
- 4.16 If the Case Sponsor provisionally decides to reject an application for interim measures:
- we will consult the applicant and any other Formal Complainants before doing so by sending a provisional dismissal letter setting out the 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,
 - 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 section 7 on handling confidential information). We may provide this non-confidential version to the business under investigation if we think it would be appropriate to do so, such as where it may be relevant for the rights of defence,
 - we will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided, if the Case Sponsor still decides 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,

- however, if the comments and/or additional information from any of these parties leads the Case Sponsor to change their provisional view and to 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 the interim measures application will continue as set out in paragraph 4.15.

Possible outcomes of investigation

- 4.17 There are several ways in which an investigation under CA98 can be resolved.⁴¹ In summary:
- we will issue a Statement of Objections where our provisional view is that the conduct under investigation amounts to an infringement. After doing this and receiving the parties' representations, we can issue a final decision that the conduct amounts to an infringement, and can impose a fine and/or directions on the business(es) concerned (see sections 5 and 6),
 - we can issue a decision that there are no grounds for action (either before or after issuing a Statement of Objections) if we have not found sufficient evidence of an infringement (see section 5),
 - we can close our investigation on the grounds of administrative priorities at any time (before or after issuing a Statement of Objections). 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 will consult Formal Complainants before taking a decision to close an investigation on grounds of administrative priorities,
 - we can accept commitments from a business about its future conduct (see paragraphs 4.20-4.23).
- 4.18 Infringement decisions⁴², penalty decisions and decisions that there are no grounds for action will be taken by the Competition Decisions Committee (see sections 5 and 6). All other decisions are the responsibility of the Case Sponsor, although the Case Sponsor will need the agreement of a Director of Division for any decision to accept commitments.
- 4.19 As noted (paragraph 2.22), it is possible that information obtained during an investigation under CA98 may lead to and/or be used in enforcement action under FSMA.

⁴¹ See paragraph 7.11 below in relation to taking action using the FCA's powers under other statutes, which could be in addition to one of the outcomes listed below.

⁴² Other than in settlement cases, for which, see paragraphs 6.9-6.19 below.

Commitments

- 4.20 Under section 31A of CA98, we may accept commitments from one or more businesses for the purposes of addressing the competition concerns that we are investigating in a particular case. Commitments are binding promises from a business in relation to its future conduct.
- 4.21 We will have regard to the CMA's guidance on the circumstances in which it may be appropriate to accept commitments.⁴³ If we choose to accept commitments we will close our investigation and not take an infringement decision.
- 4.22 We will give notice of any proposal to accept commitments and allow at least 11 working days for interested third parties to give their views on the proposed commitments. We will meet with each business that offered commitments to inform them of the general nature of responses received and to indicate whether we consider that changes are required to the commitments. If the parties offer material modifications to the proposed commitments, we will allow interested third parties at least 6 working days to comment on the modified commitments. We may repeat the process, although we do not want the process of considering commitments to become overlong.
- 4.23 If we accept commitments, then we cannot continue the investigation, make a final decision, or order interim measures.⁴⁴ However, we can take such action if we have reasonable grounds to suspect that there has been a material change in circumstances, a business has not adhered to the commitments we accepted, or if the information that led us to accept the commitments was incomplete, false, or misleading in a material particular.⁴⁵

⁴³ Annexe A in *Enforcement* (OFT407).

⁴⁴ Section 31B(1) of CA98.

⁴⁵ Section 31B(2) of CA98.

5 The Statement of Objections and following steps

- We will issue a Statement of Objections setting out our provisional findings if we consider that the conduct under investigation amounts to an infringement.
- We will provide the addressees of a Statement of Objections with access to the file of documents relating to the matters set out within it. We may provide third parties with access to the Statement of Objections, if they could materially assist our investigation.
- Addressees have the opportunity to make written and oral representations, which will be considered by a Competition Decisions Committee who will be appointed after the issuing of the Statement of Objections.
- If necessary, we may issue a Supplementary Statement of Objections or a Statement of Facts.
- If we propose to issue an infringement decision and impose a penalty, we will issue the addressee with a draft penalty statement setting out how the penalty will be calculated.
- The Competition Decisions Committee will be responsible for a final infringement decision or a decision that there are no grounds for action.

Decision to issue a Statement of Objections and appointment of a Competition Decisions Committee

- 5.1 Where our provisional view is that the conduct under investigation amounts to an infringement, we will issue a Statement of Objections to each business we consider to be responsible for the infringement (the addressee(s)). The Case Sponsor is responsible for the decision to issue a Statement of Objections, after consultation with other senior officials within the FCA.
- 5.2 A Competition Decisions Committee comprising at least 3 people will be appointed to be the final decision maker on whether or not the business/es under investigation have infringed the prohibitions contained in Chapter 1 or Chapter 2 of CA98/ Article 101(1) or 102 TFEU, once the Statement of Objections has been issued. It will be drawn from a panel appointed by the FCA Board to act as decision makers in CA98 cases.
- 5.3 We will inform those businesses of the identity of the Competition Decisions Committee members. However, the case team will remain the primary contact for parties and parties should not contact the Competition Decisions Committee directly.

The Statement of Objections

- 5.4 The Statement of Objections sets out our provisional view and proposed next steps. It gives the business accused of a breach of competition law an opportunity to know the full case against it and, if it chooses to do so, to respond formally.
- 5.5 The Statement of Objections will set out the facts and our legal and economic assessment of them which led to the provisional view that an infringement has occurred. It will also set out any action we propose to take, such as imposing financial penalties⁴⁶ and/or issuing directions to stop the infringement if we believe it is ongoing, as well as our reasons for taking that action.
- 5.6 We will keep businesses informed of the timing of steps in our investigation as far as is possible and practicable while complying with our legal obligations, and to the extent that doing so would not prejudice ongoing investigations. We will normally announce the issue of a Statement of Objections on our website and make an announcement on a regulatory information service. However, we may decide not to announce the issue of a Statement of Objections, or may vary the extent of any publication, depending on the circumstances of the case and in particular the market sensitivity of any information we would otherwise publish. However, in any situation and at any time, listed companies may need to consider their own market disclosure obligations.

Access to the file

- 5.7 At the same time as issuing the Statement of Objections, we will also give the addressee(s) of the Statement of Objections the opportunity to inspect the file. This is to ensure that they can properly defend themselves against the allegation of having breached competition law.
- 5.8 We will allow addressee(s) of the Statement of Objections a reasonable opportunity (typically 6 to 8 weeks), to inspect copies of disclosable documents on the file. These are documents that relate to matters contained in the Statement of Objections, excluding certain confidential information and FCA internal documents.⁴⁷ Section 7 sets out the statutory framework for the disclosure of information. Confidential information must not be forwarded without our consent.
- 5.9 We may, if appropriate, exclude routine administrative documents from the file and list them in a schedule, allowing businesses to access specific documents upon request. Routine administrative documents would be those which do not relate to the substance of matters set out in a Statement of Objections, and could include, for example, correspondence setting up meetings.
- 5.10 In appropriate circumstances, we may consider establishing confidentiality rings (within which confidential information may be disclosed to a defined group) or data rooms (within which access to confidential information may be given to a defined group).

⁴⁶ See paragraphs 5.27-5.28 below in relation to the issuing of a draft penalty statement.

⁴⁷ Confidential information and internal information are defined in Rule 1(1) of the CA98 Rules.

Involving third parties

- 5.11 We may provide Formal Complainants (see paragraph 3.1 above) and third parties who may be able to assist materially our assessment of a case with an opportunity to submit written representations. We expect that disclosure of a non-confidential version of the Statement of Objections will be sufficient for third parties to give us informed comments: this will not generally include any annexed documents. Any such document is to be used only for making representations to us and must not be disclosed to others.

Responding to the Statement of Objections

- 5.12 We will give the recipients of the Statement of Objections the opportunity to make written and oral submissions to the Competition Decisions Committee.
- 5.13 We will set a reasonable time limit for parties to make written submissions. While this will depend on the circumstances, in particular the complexity of the case, we anticipate that we will give addressees between 8 and 12 weeks to respond. We anticipate giving Formal Complainants and other third parties between 4 and 6 weeks to respond with any representations on the Statement of Objections.
- 5.14 Parties should submit non-confidential versions of their written submissions at the same time or shortly after submission of those submissions to us.
- 5.15 We will disclose non-confidential Formal Complainant and third party submissions to the addressees of the Statement of Objections. In some circumstances, it may be appropriate to share a party's representations with Formal Complainants and other third parties for their comment, eg where different versions of the facts have been put forward. We will seek submissions from the party regarding confidentiality before disclosing such representations to the Formal Complainant.
- 5.16 We will invite the addressee(s) of the Statement of Objections to make oral submissions to the Competition Decisions Committee. Any oral hearing will be chaired by the Procedural Officer.⁴⁸
- 5.17 The oral hearing provides the addressee with an opportunity to highlight to the Competition Decisions Committee issues of particular importance to its case, and which have been set out in its written representations.
- 5.18 During the oral hearing, the Competition Decisions Committee and FCA staff present may ask questions about the addressee's written representations or questions of clarification. There is no obligation to answer, and addressees may respond to questions in writing after the hearing.
- 5.19 We will take a transcript of the oral hearing and the addressee will be asked to confirm the accuracy of the transcript and to identify any confidential information.

⁴⁸ See paragraph 2.4 above.

- 5.20 Following the oral hearing, the Procedural Officer will report to the Competition Decisions Committee, indicating any procedural issues that have been brought to the attention of the Procedural Officer during the investigation and confirming whether the parties' right to be heard has been respected, including an assessment of the fairness of the procedure followed in the oral hearing.⁴⁹
- 5.21 We will consider holding multi-party oral hearings in appropriate cases, such as where there are differing views on key issues.

Steps following representations

Consideration

- 5.22 The Competition Decisions Committee will consider the Statement of Objections and representations from the addressee(s), Formal Complainants and third parties. It may draw on advice from FCA staff, including economists, lawyers and those with sectoral expertise.

Letter of facts

- 5.23 It may be that we acquire new evidence at this stage which supports the objection(s) contained in the Statement of Objections. If the Competition Decisions Committee proposes to rely on it to establish that an infringement has been committed, it will put that evidence to the addressee in a letter and give it an opportunity to respond to the new evidence. The time allowed for responding will depend on the volume and complexity of the new evidence. However, it will be shorter than the time given to respond to the Statement of Objections.

Supplementary Statement of Objections

- 5.24 If new information received by the Competition Decisions Committee in response to the Statement of Objections indicates that there is evidence of a different suspected infringement or there is a material change in the nature of the infringement described in the Statement of Objections, the Competition Decisions Committee will issue a Supplementary Statement of Objections setting out the new set of facts on which the Competition Decisions Committee proposes to rely to establish an infringement.
- 5.25 The Competition Decisions Committee will give the addressee a further opportunity to respond in writing and orally, and to inspect new documents on the file.
- 5.26 If it appears unlikely that engaging with Formal Complainants or other interested third parties at this stage will materially assist the investigation, the Competition Decisions Committee may decide to consult them on a more limited basis, or not at all.

⁴⁹ Rule 6(7) and (8) of the CA98 Rules.

Draft penalty statement

- 5.27 Where, once any written and oral representations made on the Statement of Objections have been considered, the Competition Decisions Committee is considering reaching an infringement decision and imposing a financial penalty on a party, we will provide that party with a draft penalty statement.⁵⁰ This will set out the key aspects⁵¹ relevant to the calculation of the penalty that we propose to impose, based on the information available to us at the time.⁵² It will also include a brief explanation of the Competition Decisions Committee's reasoning for its provisional findings on each aspect. We will provide access to any new relevant documents on the file, which will include non-confidential versions of the draft penalty statements issued to other addressees of the Statement of Objections, if applicable.
- 5.28 Parties will be offered the opportunity to comment on the draft penalty statement in writing and to attend an oral hearing (in person or by telephone) with the Competition Decisions Committee.⁵³

Possible decisions

- 5.29 Following consideration of the Statement of Objections and representations from the addressees, Formal Complainants and third parties, including the possible additional steps described above (paragraphs 5.22 to 5.28), the Competition Decisions Committee will decide to issue:
- an infringement decision, or
 - a decision that there are no grounds for action.⁵⁴
- 5.30 As noted in paragraph 2.22, we may consider that information discovered during a CA98 investigation may justify taking action under our powers under other legislation, such as FSMA.

Infringement decision

- 5.31 If we are satisfied that the legal test for establishing an infringement is met, we will issue an infringement decision to each business that the Competition Decisions Committee has

⁵⁰ Rule 11 of the CA98 Rules.

⁵¹ Including, for example, the starting point percentage, the relevant turnover figure to be used, the duration of the infringement, any uplift for specific deterrence, any aggravating/mitigating factors (and the proposed increase/decrease in the penalty for these), and any adjustment proposed for proportionality.

⁵² Rule 11 of the CA98 Rules. For further information on how the CMA calculates the appropriate amount of a penalty, see CMA73 *CMA's guidance as to the appropriate amount of a penalty* available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf. We must have regard to the CMA's Guidance on penalties for the time being in force.

⁵³ Rule 6 of the CA98 Rules.

⁵⁴ There are alternative options for the closure of a case following the issuing of a Statement of Objections, which would not be taken by the Competition Decisions Committee. As noted (see paragraph 4.17), we may close a case on grounds of administrative priorities at any time; however, we expect that we will rarely do so once it has reached the stage of issuing a Statement of Objections. The FCA may also accept commitments from businesses to address its competition concerns at any stage, but we anticipate that we would be unlikely to do so at a very late stage, such as following receipt of the representations from the addressee(s) of the Statement of Objections.

found to have infringed the law.⁵⁵ The infringement decision will set out the facts on which we rely to prove the infringement and the action that we are taking, and will address material representations made during the course of the investigation. In cases that involve more than one party, information that is confidential will be disclosed to other parties only if necessary. The infringement decision may impose a financial penalty (see section 6) and may also give directions to bring the infringement to an end.⁵⁶ If a business fails to comply with our directions, we may seek a court order to enforce them.⁵⁷

5.32 We expect to issue a press announcement regarding any infringement decision, and to make an announcement on a regulatory information service. If so, we will inform the addressee(s) before the issue of the infringement decision and its announcement.

5.33 We will publish a summary, and a non-confidential version of the infringement decision, after seeking representations on confidentiality from the addressee(s) and third parties if relevant.

Decision that there are no grounds for action

5.34 If, having completed its consideration of the case, the Competition Decisions Committee does not find sufficient evidence of a competition law infringement, we will close the case.

5.35 Before taking a decision that there are no grounds for action, we will consult any Formal Complainant in the case.

5.36 We will generally follow the same procedure as for issuing an infringement decision, including making an announcement and publishing a non-confidential version of the decision, although we may decide not to publish a no grounds for action decision, eg if it may affect an ongoing investigation under our other powers.

⁵⁵ Section 31 of CA98 and Rule 10(1) of the CA98 Rules.

⁵⁶ Sections 32-33 of CA98.

⁵⁷ Section 34 of CA98.

6 Penalties, leniency and settlement

- If we find a competition law infringement, we may impose a penalty.
- We will have regard to the CMA's leniency policy when imposing fines under CA98, meaning that we will grant immunity from, or a reduction in the fine imposed on, a business meeting the criteria in the CMA's leniency policy.
- We may, at our discretion, agree a settlement with parties who admit that they have committed a CA98 infringement and agree to a streamlined procedure for the remainder of the investigation.

Penalties

6.1 If we find an infringement of the prohibitions in Chapter 1 or Chapter 2 of CA98 / Article 101(1) or 102 TFEU, we may impose a penalty on the infringing undertaking(s). The infringement decision will explain how the Competition Decisions Committee decided upon the appropriate level of penalty, having taken into account our statutory obligations in fixing a financial penalty⁵⁸ and the parties' written and oral representations on the draft penalty calculation.

Leniency and the regulatory duty of cooperation and disclosure

6.2 Under leniency arrangements, those who have participated in cartel activity such as price-fixing or market sharing can choose to give detailed confessions of their infringements, in return for significant reductions in, or complete immunity from, penalties for that infringement. Leniency may also be also available (in differing degrees) to firms that provide information that adds significant value to a pre-existing CA98 investigation. We will have regard to the CMA's Penalties guidance and will apply the CMA's leniency policy when pursuing enforcement under CA98.⁵⁹ This means that we will grant immunity from a fine, or a reduction in the fine, for the infringement of competition law, to an undertaking satisfying the criteria set out in the CMA's leniency policy.

⁵⁸ Section 36(7A) of CA98. We will have regard to the CMA's penalty guidance for the time being in force when setting the amount of a penalty, available at www.gov.uk/government/collections/cma-ca98-and-cartels-guidance. The penalty guidance in force at the date of publication of this document is OFT423 *OFT's guidance as to the appropriate amount of a penalty*.

⁵⁹ See CMA73 *CMA's guidance as to the appropriate amount of a penalty* (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf) and OFT1495 *Applications for leniency and no-action in cartel cases - OFT's detailed guidance on the principles and process* available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf.

- 6.3 Leniency applications shall be made directly to the CMA: firms shall approach the CMA for leniency in the first instance to ascertain the availability of leniency (including what type) and in order to secure their provisional marker and place in the single leniency queue system applicable to leniency applications made in regulated sectors.⁶⁰ The CMA will then coordinate with us in relation to all applications made in financial services.
- 6.4 A firm regulated by us under FSMA has a duty under Principle 11 of the Principles for Businesses to deal with its regulators in an open and cooperative way, and must disclose to us appropriately anything relating to the firm of which we would reasonably expect notice.⁶¹ A person in relation to whom we have given approval to perform a controlled function under FSMA has a duty under Principle 4 of the Statements of Principle for Approved Persons to deal with us, the PRA and other regulators in an open and cooperative way, and must disclose appropriately any information of which we or the PRA would reasonably expect notice. In addition, senior conduct rules staff members (as defined in the FCA Handbook glossary) have a duty under COCON Senior manager conduct Rule 4 to disclose appropriately any information of which the FCA or PRA would reasonably expect notice.⁶² These obligations are independent of the voluntary decision to apply for leniency: a step that firms or individuals may choose not to take.⁶³
- 6.5 Under the provisions for concurrent enforcement of the competition prohibitions by the CMA and sector regulators such as the FCA, we and the CMA will share information on actual and potential cases in the financial services sector (which may include leniency information⁶⁴), subject to the restrictions in applicable legislation (including Part 9 of EA02 and Part 23 of FSMA).
- 6.6 We will use leniency information that we receive from the CMA only for the purpose of enforcement of the competition prohibitions, unless the leniency applicant agrees otherwise. This restriction on use also applies to any information a resulting FCA CA98 investigation obtains. However, the fact that an applicant has applied for leniency will not prevent us from using information we have from other sources or that applicant (eg under its self-reporting obligations), to take enforcement action under FSMA or any other legislation.
- 6.7 When we receive leniency information from the CMA, we may also contact the leniency applicant to remind it of any obligations it might have to notify relevant conduct to us under Principle 11 of the FCA's Principles for Businesses, Principle 4 of the FCA's

⁶⁰According to the single leniency queue system, UK applicants need only make an application for leniency to one authority – now the CMA – and, subject to their meeting the relevant conditions, their place in the leniency queue shall be secured irrespective of which authority ultimately takes forward enforcement action. For further information, please refer to the CMA information note, available at www.gov.uk/government/consultations/leniency-arrangements-in-the-regulated-sectors, which explains that these arrangements apply amongst the full members of the UK Competition Network.

⁶¹ See also the notification requirements in SUP 15.3 of the FCA Handbook.

⁶² Whether APER or COCON applies depends on the type of firm in question.

⁶³ These obligations are different from conditions under which an applicant may receive leniency. SUP 15.3.35G of the FCA's Handbook provides guidance that a notification under SUP 15.3 is not in itself sufficient to count as a leniency application.

⁶⁴ Leniency information for these purposes is any information which came into the possession of any of the CMA, its predecessor bodies, or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency under the Chapter 1 prohibition or Article 101 TFEU. It includes any information that an investigation resulting from the leniency application obtains.

Statements of Principle for Approved Persons or Senior Manager Conduct Rule 4 in COCON.

- 6.8 We require prompt notification under Principle 11⁶⁵ regardless of whether a firm is considering applying for leniency. The FCA Handbook provides further guidance on Principle 11, for example, in SUP 15.3.9G, and this makes clear that while notifications will depend on the event in question, the FCA expects to discuss matters with firms at an early stage. We do not think that the Principle 11 regime and the CMA leniency regime conflict: firms can meet the requirements of both regimes if they act promptly.⁶⁶ However, firms who are concerned about the interaction of notifications under Principle 11 and the CMA's leniency regime should contact us and the CMA and we will work together and discuss how to proceed based on the individual circumstances of the case.

Settlement

- 6.9 Settlement is a voluntary process in which:
- a party admits that it has been party to an agreement or has been engaged in conduct which infringes one or more of the prohibitions in Chapter 1 or Chapter 2 of CA98 / Article 101(1) TFEU or 102 TFEU,
 - the party agrees to a streamlined administrative procedure for the remainder of the investigation (see paragraph 6.13),
 - we issue an infringement decision but impose a reduced penalty on the settling party (see paragraph 6.12).
- 6.10 The decision to engage in settlement discussions and to settle is at our discretion. The circumstances in which we are likely to consider it appropriate to settle a case will depend on several factors:
- whether we consider that we have a sufficient understanding of the nature and gravity of the suspected infringement to make a reasonable assessment of the appropriate outcome,
 - the likely procedural efficiencies and resource savings that can be achieved,
 - the number of parties in a case,
 - in multi-party cases, the number of parties interested in pursuing settlement discussions,
 - the prospect of reaching a settlement in a reasonable time. We will not allow parties to use settlement discussions in order to delay an investigation. We will set clear and

⁶⁵ The requirement to notify also arises from Principle 4 of the FCA's Statements of Principle for Approved Persons and Senior Manager Conduct Rule 4 in COCON.

⁶⁶ Firms considering applying for leniency should have regard to the CMA's guidance. See OFT1495 (*ibid*), and in particular paragraphs 3.8–14 on conducting internal investigations and paragraphs 3.24–28 on maintaining confidentiality and securing evidence.

challenging timetables for settlement discussions to ensure that they result in a prompt outcome and do not divert resources unnecessarily from the formal process.

- 6.11 The settlement procedure is separate from leniency or the commitments procedure, though it is possible for a leniency applicant to benefit from both leniency and settlement discounts.

Requirements for settlement

- 6.12 We will require a settling party to take a number of actions:

- admit liability in relation to the nature, scope and duration of the infringement. The scope of the infringement will include, as a minimum, the material facts of the infringement as well as the legal characterisation of the infringement,
- cease the infringing behaviour immediately from the date that it enters into settlement discussions with us, where it has not already done so. It must also refrain from engaging again in the same or similar infringing behaviour,
- confirm it will pay a penalty set at a maximum amount. This maximum penalty (which will apply provided the business continues to follow the requirements of settlement) will reflect the application of a settlement discount to the penalty that would otherwise have been imposed. This discount will reflect the circumstances of the case, in particular whether the case is being settled before or after issue of a Statement of Objections. Settlement discounts will be capped at a level of 20% for settlement pre-Statement of Objections and at 10% for settlement post-Statement of Objections. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation.

- 6.13 In addition, in order to achieve our objective of resolving the case efficiently, settling parties must accept that:

- there will be a streamlined administrative process for the remainder of the investigation. This may include streamlined access to file arrangements (eg through access to key documents only and/or through the use of a confidentiality ring), no written representations on the Statement of Objections (except in relation to manifest factual inaccuracies), no oral hearings, no separate draft penalty statement after settlement has been reached and no Competition Decisions Committee being appointed (see paragraph 5.2),
- there will be an infringement decision against the settling party,
- the decision will remain final and binding as against it, even if another addressee of the infringement decision successfully appeals it,
- the settling party may be required to undertake to assist us in any continued investigation or in a defence should another party appeal a decision in the case.

- 6.14 The settling party may be required to confirm that they will not appeal a subsequent infringement decision to the Competition Appeal Tribunal.
- 6.15 Parties should not disclose the fact or content of settlement discussions to other persons unless required by law or regulatory requirements, apart from information about the matter to which the infringement decision relates once made public.

Settlement decision procedure

- 6.16 A decision to initiate a settlement procedure will be taken by the Case Sponsor, subject to approval by at least 2 members of the FCA's senior management, one of whom will be of at least Director of Division level (which may include an acting Director) and the other of whom will be of at least Head of Department level (the Settlement Decision Makers). At least one of the Settlement Decision Makers will not be from the Enforcement and Financial Crime Division.
- 6.17 The Settlement Decision Makers will not have been directly involved in establishing the evidence on which the decision is based. They may, but need not, be involved in the discussions exploring possible settlement. If they approve the decision of the Case Sponsor to settle the case, they will formally issue the infringement and penalty decision.
- 6.18 We hold settlement discussions on the basis that neither we nor the party concerned would rely against each other on any admissions or statements made in the course of the settlement discussions, if settlement discussions fail and the matter becomes contested (in an infringement decision or a subsequent appeal from a contested decision⁶⁷) or in other proceedings. The Competition Decisions Committee (if it has been appointed) will be informed that one or more businesses are exploring the possibility of settlement (because this will extend the case timetable) but would not be involved in the settlement discussions other than in exceptional circumstances.
- 6.19 The terms of any proposed settlement will be put in writing⁶⁸ and be agreed by us and the party concerned. The admission will be by reference either to the alleged infringement as set out in the Statement of Objections or, if the case settles before a Statement of Objections is issued, will be made by reference to the infringements as set out in a summary statement of facts that we will present to the party.

⁶⁷ If we do not require a settling party to waive its right of appeal, and that party appeals a settlement decision against it, the FCA may use admissions made during the course of the settlement negotiations.

⁶⁸ Though the FCA may consider a reasoned request from the settling business to provide the confirmation that it accepts the settlement requirements orally, which will be transcribed at the FCA's premises.

7 Disclosure and use of information by FCA in CA98 investigations

- We must handle confidential information carefully and may not disclose it other than in accordance with either FSMA or EA02 (as applicable).
- The framework for disclosure of information by us is governed by the context in which we have obtained it.
- Where specified information is received by us in connection with our CA98 functions, it will be dealt with under EA02 and is excluded from the FSMA regime governing disclosure of information.
- Where appropriate, we may use information obtained during the course of a CA98 investigation to take action under other legislation.

Disclosure of information by the FCA

- 7.1 The framework for our use and disclosure of information will be determined by the context in which it has been provided to, or obtained by, us and under which legislation. We may use information that we have received from many lawful sources in conducting investigations under CA98. However, we may only disclose such information under the applicable legal regime. Accordingly, when we wish to disclose information that we have gathered under our FSMA powers in a CA98 investigation, we must apply the relevant FSMA disclosure provisions.⁶⁹

Disclosure under FSMA

- 7.2 When we receive information for the purposes of, or in discharge of, our statutory functions under FSMA which is not in the public domain and relates to a person's business or other affairs, the information will be 'confidential information' under section 348 FSMA. Information which is already publicly available, or which is aggregated in a format so that it cannot be attributed to a particular firm or individuals, is excluded from the definition of confidential information in FSMA.
- 7.3 However, when we receive information for the purposes of, or in discharge of, our concurrent functions, this information is expressly excluded from the FSMA regime and

⁶⁹ The converse would also apply for use and disclosure of information gathered under a CA98 investigation during a FSMA enforcement procedure.

will instead be dealt with under the rules set out in EA02 (in other words, information we receive for the purposes of or in discharge of our concurrent competition law functions can only be disclosed by us under Part 9 EA02, ie not under FSMA). (See paragraphs 7.6 - 7.9.)⁷⁰

- 7.4 Where we have obtained information under FSMA rather than in connection with our concurrent functions (see paragraph 7.6), FSMA provisions on disclosure will apply. Section 348(1) FSMA prevents us from disclosing confidential information unless we have the consent of the person who provided the information (and the person about whom the information relates, if a different person) or a 'gateway' applies. A gateway is an exception to our duty of confidentiality, allowing the disclosure of confidential information to third parties in certain circumstances. If we do not have a gateway, we may not release confidential information without the relevant consent(s).
- 7.5 The full set of gateways is set out in the Gateway Regulations.⁷¹ They include a gateway to the Prudential Regulation Authority to assist it in the discharge of its public functions, and disclosure of information not subject to single market restrictions to the CMA for the purpose of assisting it to discharge its functions (including under CA98). When we disclose information pursuant to a gateway, we may restrict the use to which it may be put.

Disclosure under EA02

- 7.6 When we receive information in connection with the exercise of our concurrent functions, Part 9 of the EA02 will apply to any disclosure of such information.⁷² Part 9 EA02 imposes a general restriction on the disclosure of information relating to the affairs of an individual or any business of an undertaking which we obtain during the exercise of our CA98 functions (referred to as 'specified information') to other persons.⁷³ The restriction applies during the lifetime of an individual or while the undertaking continues in existence (for the individual or business to which the specified information relates, respectively).
- 7.7 Only disclosure falling within one of the 'information gateways' is permitted, as set out in sections 239 to 243 EA02. These gateways include where we obtain the required consents⁷⁴ or where the disclosure is made for the purpose of facilitating the exercise by us of any of our statutory functions.⁷⁵
- 7.8 Even when Part 9 of EA02 and one of its information gateways apply, we must have regard to certain considerations before making a disclosure. In particular, we must have regard to the 3 considerations set out in section 244 EA02, namely:
- the need to exclude from disclosure (so far as it is practicable to do so) any information whose disclosure we consider to be contrary to the public interest,

⁷⁰ Section 348(7) FSMA.

⁷¹ Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188)

⁷² Section 348(7) FSMA.

⁷³ Section 237 EA02.

⁷⁴ Section 239 EA02.

⁷⁵ Section 241 EA02.

- the need to exclude from disclosure (so far as practicable) commercial information we consider might significantly harm the legitimate business interests of the undertaking to which it relates; or information relating to the private affairs of an individual which we think might significantly harm that individual's interests,
- the extent to which the disclosure of information relating to the private affairs of an individual or of commercial information is necessary for the purpose for which we are permitted to make the disclosure.

7.9 We will apply these 3 considerations on a case by case basis when we are considering disclosure of specified information. When decisions are finely balanced, we will have particular regard to the need for disclosure to achieve due process, for example, to safeguard the rights of defence of an addressee of a Statement of Objections.

7.10 Where we disclose information to another person, there are restrictions on the further disclosure or use of the information by that person.

Taking action under other powers

7.11 Given our other objectives and powers, in certain circumstances, it may be appropriate for us to use information that we receive during the course of a CA98 investigation to take action under different statutes, where applicable. Any restrictions that may apply to the use of information transferred to the FCA from a member of the ECN or the CMA do not apply to information received by the FCA directly from firms or individuals.