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Quickguides

Competition law investigations by UK authorities

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Quickguide overview

This Quickguide summarises the procedure followed by the Competition and Markets Authority when investigating a suspected breach of UK competition law, the possible outcomes of an investigation, and key rights of defence which must be respected. Topics covered include:

- How an investigation is likely to start
- Powers to demand the production of information and/or search premises
- Limits on the powers to obtain evidence
- The parties' rights of defence
- Settlement
- Possible outcomes: decisions, penalties and remedies
- Interim measures
- Appeals
- Rights of complainants and other third parties

A one-page flowchart providing an overview of the investigation process is also included at the back of this Quickguide.

Brexit

The UK left the EU on 31 January 2020 and the Brexit Transition Period ended on 31 December 2020. On 1 January 2021, the UK and EU became two fully distinct regulatory, legal and customs territories, whose relationship is governed by the Trade and Cooperation Agreement (TCA).

Businesses should seek legal advice in relation to cases which were in progress and/or factual matters which existed before 1 January 2021, as these may be subject to transitional arrangements.

For further information on any of these areas please speak to one of the contacts listed on the final page of this Quickguide, or your usual Ashurst contact.

Competition law investigations by UK authorities

1. Introduction

A core function of the UK Competition and Markets Authority (CMA) is to undertake investigations of potential breaches of UK competition law. If an infringement is suspected and the necessary standard of proof is satisfied the CMA may gather evidence through formal or informal requests for information, through on-site searches of premises (so-called "dawn raids"), and/or through use of surveillance powers.

Such investigations may ultimately lead to an infringement decision, with significant financial penalties potentially being imposed on the infringing business(es). The CMA may also seek the disqualification of directors under the provisions of the Company Directors Disqualification Act 1986. Where the CMA investigation relates to suspected cartel activity, it may also lead to a separate but parallel criminal prosecution against relevant individuals under the provisions of the Enterprise Act 2002 (Enterprise Act). The criminal cartel offence can be sanctioned by imprisonment for up to five years as well as unlimited financial penalties.

This Quickguide explains the law, process and issues surrounding competition investigations by the CMA. The flow diagram at the end of this document summarises the various stages of a CMA investigation.

UK sectoral regulators with concurrent competition powers (these include Ofcom, Ofgem, Ofwat, the Financial Conduct Authority, the Payment Systems Regulator, the Office of Rail Regulation, the Civil Aviation Authority, and the Northern Ireland Authority for Utility Regulation) also have the power to undertake investigations for breaches of UK competition law. This Quickguide will continue to refer to investigations conducted by the CMA, but these concurrent regulators have powers similar to those of the CMA.

2. Underlying competition law provisions

Anti-competitive agreements

Briefly, Chapter I of the UK Competition Act 1998 (Competition Act) prohibits anti-competitive agreements between separate undertakings which have as their object or effect the prevention, restriction or distortion of competition, and which may appreciably affect trade within the UK .

Agreements which are found to be anti-competitive may, nevertheless, be exempt from the prohibitions if they satisfy the following cumulative exemption criteria:

- the restrictions must lead to improvements in distribution or production, or promote technical or economic progress;
- consumers must enjoy a fair share of the resulting benefits;
- the restrictions must go no further than is necessary to achieve the benefits; and
- the restrictions must not eliminate competition altogether.

The most serious types of anti-competitive arrangements are where the whole purpose, or "object", of the agreement is anti-competitive. This includes "cartel"-type agreements between competitors to fix prices, to share customers or markets, to limit supply or production, or to rig bids in response to an invitation to tender. As noted above, these areas of cartel activity may also result in criminal prosecution of relevant individuals under the Enterprise Act. Some types of information-sharing arrangements between competitors are also considered to be very serious infringements (although not criminal), as are any arrangements whereby a distributor is required to charge resale prices fixed by

its supplier. Such agreements are extremely unlikely to be capable of exemption, and are typically punished with heavy fines.

A second category of infringing agreements relates to those whose object is not in itself anti-competitive, but whose effect on the market place may nevertheless be to restrict, prevent or distort competition, even if that is not the parties' actual intention. Such agreements might include exclusivity provisions or non-compete restrictions in a distribution arrangement, or joint arrangements between competitors in relation to product standards, research and development or perhaps joint production. These types of infringements are more likely to be exemptible or, if an investigation is launched, the competition concerns can often be dealt with by amending the terms of the agreement.

Abuse of dominance

Chapter II of the Competition Act prohibits the abuse of a dominant position if it may affect trade within the UK.

A dominant business is one which enjoys such market strength that it can act independently of its customers, competitors or suppliers. Being dominant is not prohibited in itself, but a dominant business is under a special responsibility not to distort competition further. Consequently, actions which might be wholly legitimate for a non-dominant business may be illegal for a dominant business.

Abuses fall into two broad categories:

- exclusionary abuses, where the dominant business uses its market power to try to keep competitors out of the market, or to increase the difficulties which they face in competing. Examples include predatory pricing to force a competitor out of the market or certain forms of loyalty discounts which make it very hard for a competitor to win market share; and
- exploitative abuses, where the dominant business uses its market power to impose unfair trading terms on its customers (or suppliers). Examples include charging excessively high prices or requiring unwanted goods to be purchased with the desired goods. As a matter of administrative priority, exploitative abuses are less commonly investigated by the competition authorities than exclusionary abuses.

Abuse of a dominant position is never capable of exemption, although certain conduct will not be considered abusive if it can be shown to be "objectively justified". For example, a dominant undertaking's refusal to supply a customer is typically considered to be an abuse, but it may be permissible if there are objectively justifiable reasons for the refusal, such as the poor credit history of the customer which makes it an unacceptable commercial risk.

3. Starting an investigation

A potential breach of UK competition law will most commonly come to the attention of the CMA as a result of:

- a complaint made by a third party, such as a competitor or customer;
- a whistle-blower (i.e. an individual reporting a cartel to the CMA, or a party to a cartel seeking leniency (see below));
- information received from an overseas competition authority;
- an investigation in another area (for example, a broader market investigation may uncover suspicions of specific anti-competitive practices which could then become the focus of new and separate individual investigations); or
- the CMA's own inquiries.

In deciding whether to investigate any potential infringement of the competition law rules, the CMA must consider at an early stage whether to deal with the matter under the civil prohibitions (i.e.

Chapter I and/or Chapter II), or to treat the infringement as a criminal matter under the Enterprise Act, or both.

The detailed procedural rules which must be followed, and the CMA's powers of investigation, differ depending on whether a civil or criminal investigation is being undertaken (see further below).

Starting a civil investigation

The CMA has the power to begin an investigation under the Competition Act whenever it has "*reasonable grounds for suspecting*" that Chapter I or Chapter II has been infringed.

The CMA has wide discretion as to whether to open an investigation, and it does not take on every case which comes to its attention. In deciding which cases to investigate, the CMA will take into account its "prioritisation principles" (published in April 2014). These include the likely direct effect on consumer welfare of the alleged infringement, its strategic significance, the likelihood of a successful outcome, and the resource implications of opening an investigation.

Starting a criminal investigation

Where cartel activity is suspected, the CMA has the power to begin a criminal investigation under the Enterprise Act if there are "*reasonable grounds for suspecting*" that a cartel offence has been committed. The CMA shares its responsibilities for investigating the criminal "cartel offence" with the Serious Fraud Office (SFO), and in practice will often operate under the SFO's direction.

A criminal investigation under the Enterprise Act can be commenced in parallel with a civil investigation under the Competition Act, in which case all evidence will be gathered under the stricter criminal procedure rules.

4. Leniency

In order to encourage whistle-blowing, reductions or even total immunity from fines are available to businesses which reveal the existence of cartel behaviour (but not other types of competition law infringements) to the CMA. Individuals employed by the business who have been involved in the cartel may also benefit from immunity from criminal prosecution (by way of a so-called "no action letter").

The CMA will grant full immunity from fines imposed under the Competition Act in respect of a breach of Chapter I to a member of a cartel, and immunity from criminal prosecution to employees involved in the cartel, where the business is the first cartel participant to come forward with information, and the following conditions are fulfilled:

- the CMA has not yet commenced an investigation;
- the cartel member accepts that it participated in a cartel, which by definition includes acceptance of an infringement of competition law;
- the cartel member provides the CMA with all the (non-legally privileged) information, documents and evidence available to it regarding the cartel activity;
- the cartel member co-operates with the CMA fully and continuously throughout the investigation;
- the cartel member ceases its cartel activity from the time of disclosure to the CMA (unless the CMA directs it to continue, for example, if the CMA does not want the other cartel participants to suspect a whistle-blower); and
- the cartel member has not been a ringleader of the cartel by coercing another undertaking to participate.

Where the CMA has already begun an investigation, it may still be possible to benefit from full immunity where the other conditions set out above are satisfied and the CMA has not yet issued a statement of objections (see further below). In deciding whether to grant full immunity in such circumstances (which is entirely at the CMA's discretion), the CMA will consider the stage of the

investigation at which the undertaking has come forward, whether the CMA already has sufficient evidence in its possession to reach an infringement decision, the nature of the evidence which the undertaking can provide, and whether the cartel member has acted as a ringleader of the cartel. While the CMA has the power to grant full immunity in such circumstances, it has confirmed that it would not expect to grant immunity or discounts on any financial penalty of more than 50% in resale price maintenance cases.

Where an undertaking is not the first to approach the CMA, or where it does not satisfy any of the other necessary criteria for full immunity from fines (in particular, if it was a cartel ringleader), an undertaking may still receive a reduction in the amount of a penalty of up to 50 per cent. The level of any reduction will be determined by the overall "added value" of the material provided by the leniency applicant.

However, seeking leniency raises a number of important strategic issues. A party to an infringement needs to consider carefully the broader implications, including:

- will applying for leniency increase exposure to a possible follow-on action for damages brought by a party harmed as a result of infringing conduct? The potential value of any such claim needs to be considered against the potential level of any fine for the infringement. The extent to which a third party might be able to strengthen a private litigation claim by gaining access to evidence provided as part of a leniency application should also be considered (this is a heavily contested issue);
- is leniency available in other jurisdictions affected by the infringement? If so, simultaneous leniency applications may be required so that other cartel members do not seek leniency first in other jurisdictions (the CMA's leniency regime only provides immunity from fines imposed by the CMA in the UK under the Competition Act for infringements of UK competition law, and immunity from prosecution under the Enterprise Act); and
- is there personal liability in other jurisdictions, such as criminal sanctions? If so, would the leniency application also trigger protection against such personal liability?

The CMA also offers individuals (for example, an employee who is aware of a cartel involving their employer) financial incentives of up to £100,000 for providing the CMA with information about a cartel. In order to be eligible for a reward, the information provided by the individual must be accurate, verifiable and useful information which helps the CMA in the detection and investigation of the cartel and, in appropriate cases, leads to the imposition of fines under the Competition Act and/or criminal prosecution of the individuals involved under the Enterprise Act.

5. The CMA's powers to demand the production of information or documents

The CMA has the power to begin a Competition Act investigation whenever it has reasonable grounds for suspecting that the Chapter I or Chapter II prohibitions have been infringed. Where it has reasonable grounds for suspecting that the infringement relates to cartel activity, it may also begin a criminal investigation under the Enterprise Act.

The CMA has powers to obtain evidence about the suspected infringement in a number of ways. Most commonly, it will gather information by sending written questions to the parties (and relevant third parties). In connection with either a civil or criminal investigation, the CMA may obtain information either by a formal request or, more commonly, by an informal request.

Request for information

An informal request may be directed at any person, not just a person suspected of an infringement. For example, it may be directed at a third party which is not suspected of an infringement but which is, for example, a purchaser in (or supplier to) the market(s) in which an infringement is suspected, and which may therefore have valuable evidence in its possession. There is no legal obligation to respond to an informal request for information (although it may be advisable to do so), but if a response is

given to an informal request made in connection with a civil investigation under the Competition Act, it is a criminal offence to supply false or misleading information.

A formal written request for information can be issued in connection with either a civil or criminal investigation. The time given to respond will depend on the amount and complexity of the material requested, but will typically be two to four weeks from receipt of the notice. Failure to comply with a formal written request without a reasonable excuse is a criminal offence punishable by a fine and, in the case of a request made in a criminal investigation, up to six months' imprisonment. Extreme caution should therefore be exercised, and legal advice sought, before deciding not to comply.

In both civil and criminal investigations, the CMA may request the production of any specified document or any specified information which it considers "*relates to any matter relevant to the investigation*". The written notice must in both cases indicate:

- the subject matter and purpose of the investigation;
- the nature of the offences of failing to comply with the notice; and
- the document or information, or category of document or information, which it requires.

The CMA can also specify in the notice the time and place for providing any document or information, and the manner or format for its production.

6. The CMA's powers to enter and search premises and to conduct surveillance

As noted above, the CMA has wide powers (regularly used) to conduct inspections, or "dawn raids", of premises in order to obtain information relating to a suspected infringement of competition law. Dawn raid searches for documents, emails and other data are now usually undertaken using forensic search software tools.

The detailed procedure which must be followed by the CMA in carrying out its inspection, and the extent of the CMA's powers to enter and search premises, remove documents and question individuals will depend on a number of different factors, including whether it is a civil or criminal investigation, and whether the CMA has a warrant. It is therefore important to ensure that legal advice is sought as quickly as possible when faced with an inspection by the CMA, so that legal advisers can be physically present at the inspection as quickly as possible to ensure that the appropriate procedural rules are followed. This Quickguide does not cover all of the various procedural rules in detail. However, an overview of the CMA's powers is set out below. For further information, please see the separate Ashurst Quickguide on *"Dawn raids: dealing with inspections by competition authorities in the UK"*.

Inspection of premises without a warrant

Any officer of the CMA, who is authorised by the CMA in writing, is permitted under the Competition Act to enter any business premises (i.e. not a private dwelling) in connection with an investigation into a suspected infringement of UK competition law. This power cannot, however, be exercised when the premises are unoccupied, and the CMA is not permitted to use force to enter the premises. If the premises are not occupied by a party to the suspected infringement, the investigating officer must provide the occupier with at least two working days' written notice. The written authorisation (and prior written notice, where appropriate) must set out the subject matter and purpose of the investigation, and details of the offences of failure to comply, obstruction or providing false or misleading information.

Although it is not obligatory to submit to a raid without a warrant, and the CMA cannot force entry, it is a criminal offence, punishable by a fine, to intentionally obstruct the CMA investigating officer (for example, by refusing to allow him to enter the premises), or not to comply with any requirement imposed by him (subject to the limits imposed on the CMA's powers to obtain evidence, discussed below). In practice, the CMA will typically have a warrant, or will obtain one fairly rapidly in the event that entry is legitimately refused.

An authorised CMA officer entering business premises without a warrant may require:

- any person on the premises to produce any document which the officer considers relevant to the investigation, and to provide an explanation of it;
- any person (not just a person on the premises) to state where any such document may be found (to the best of their knowledge and belief); and
- the production, in a format which can be taken away and read, of any information stored in an electronic form which is accessible from the premises, and which the officer considers relevant to the investigation.

Anyone required to produce a document by the CMA investigating officer who intentionally or recklessly destroys, conceals or falsifies the document, or who knowingly or recklessly provides false or misleading information to the CMA, will also be guilty of a criminal offence, punishable by up to two years' imprisonment and/or a fine.

Inspection of premises with a warrant

The CMA may apply to the High Court for a warrant to enter and search both business and domestic premises. In practice, warrants are obtained for the majority of dawn raids carried out by the CMA in connection with both civil and criminal investigations, as this gives the CMA greater powers to enter and search the premises and seize relevant evidence.

Inspection in connection with a civil investigation

A warrant can be obtained to enter and search both business premises and/or domestic premises (for example, the home(s) of directors, managers or other employees of an undertaking suspected of involvement in an infringement) in a civil investigation, where it is suspected that relevant documents may be kept at those premises. In all cases, the warrant must indicate the subject matter and purpose of the investigation, and the nature of the offences which may be committed if a person fails to comply.

A warrant authorises the CMA officers to:

- enter the premises specified in the warrant, using such force as is reasonably necessary for the purposes of gaining entry;
- search the premises and take copies of, or extracts from, any relevant documents;
- take possession of original documents if it appears to be necessary to preserve them or prevent interference;
- take any other steps which appear necessary to preserve the documents or prevent interference;
- take possession of any document or copies of it to determine whether it is relevant to the investigation, when it is not practicable to do so at the premises;
- require any person to provide an explanation of any document which appears to be relevant; and
- require the production, in a format which can be taken away and read, of any information stored in an electronic form which is accessible from the premises, and which the officer considers relevant to the investigation.

It is an offence intentionally to obstruct the CMA investigating officer, or not to comply with any requirement imposed by him. The penalty imposed for obstructing a CMA officer where a warrant has been obtained can include imprisonment for up to two years, as well as a fine. The same penalties also apply to intentionally or recklessly destroying, concealing or falsifying a document required by the CMA officer, or knowingly or recklessly providing false or misleading information to the CMA.

Inspection in connection with a criminal investigation

All criminal investigation inspections by the CMA (or SFO) require a warrant. The warrant will authorise the CMA officers to exercise the same powers as outlined above in the context of a civil investigation inspection with a warrant.

It is a criminal offence to intentionally obstruct the CMA investigating officer or to fail to comply with any requirement imposed by him, punishable by a fine and/or two years' or six months' imprisonment respectively. The penalty for intentionally or recklessly destroying, concealing, falsifying or otherwise disposing of any documents relevant to the CMA's criminal investigation (including prior to the CMA's inspection, where the person in question knows or suspects that an inspection is likely to be carried out) can include up to five years' imprisonment.

When seizing documents in the context of a criminal investigation, the CMA will apply the rules regarding collection of criminal evidence contained in the Police and Criminal Evidence Act 1984 (PACE). The CMA is also required to ensure that any individual whom it suspects may have committed the criminal cartel offence is cautioned before being interviewed, in accordance with the PACE Codes of Practice.

The CMA's powers to conduct surveillance

The CMA is authorised to conduct directed surveillance (i.e. monitoring the movement of individuals) and covert human surveillance (i.e. use of informants) in relation to both civil and criminal cartel investigations although, in practice, the CMA has stated that it will only use these powers in relation to the investigation of covert cartels. The use of surveillance powers must be authorised by a senior CMA official and the relevant Home Office Codes of Practice must be followed.

7. Limits on the CMA's powers to obtain evidence

There are important limitations on the CMA's powers to obtain evidence, whether by way of a written request, during a dawn raid or through use of its surveillance powers, although these issues tend to come up more acutely in the context of a dawn raid situation. Relevance of the document, legal professional privilege and the privilege against self-incrimination must all be considered. The fact that a document contains highly sensitive confidential commercial material, however, has no impact on the CMA's powers to obtain it, although the CMA is under an obligation to protect confidential information from disclosure (also discussed below).

Relevance

The CMA is not entitled to use its powers to go on a "fishing expedition" to find evidence of competition law infringements. Where the CMA requests information or documents or inspects premises, the investigating officer can only require the production of information or documents which are "relevant" to the investigation (specifically, in a dawn raid under a warrant, which fall within the scope of the warrant).

In a dawn raid situation, in particular, the issue of relevance is a key issue in limiting the documents which the CMA is entitled to see. As noted above, the CMA's authorisation papers/warrant will set out the subject matter of the dawn raid, and the CMA is not entitled to search more widely than the limits of the subject matter. However, in practice, the description of the subject matter included in the authorisation papers may be very broad and/or ambiguous in respect of the time period concerned, the relevant geographic area or the precise products and/or services being investigated. If this is the case, it is important to seek as much clarification as possible at the outset of the dawn raid to establish the exact parameters for the raid.

Where the CMA carries out a dawn raid with a warrant investigating either an infringement of Chapter I or Chapter II, or in connection with a criminal investigation, it has additional "seize and sift" powers under the Criminal Justice and Police Act 2001. These powers permit the CMA to:

- take copies, or take possession, of any document in order to determine later whether (or the extent to which) the document is covered by the warrant where, in all the circumstances, it is not reasonably practicable to determine this on the premises; or
- take copies, or take possession, of any document comprised in something else where, in all the circumstances, it is not reasonably practicable to separate the document covered by the warrant from documents or information that are not covered by the warrant on the premises.

Legal professional privilege

Documents that are protected by legal professional privilege, such as legal advice provided to an undertaking by its legal advisers, are not required to be disclosed to the CMA. Under the UK rules, a document will be protected by legal professional privilege where it is either:

- a confidential communication between a professional legal adviser (including in-house counsel) and a client for the purposes of giving or receiving legal advice; or
- a confidential communication made in connection with, or in contemplation of, legal proceedings and for the sole or dominant purpose of those proceedings.

In the event of a dispute over the privileged status of a document which cannot be resolved through discussions between the CMA and the undertaking and/or its legal advisers, the document will be placed in a sealed envelope. The CMA will agree with the undertaking where the disputed documents are to be kept and any conditions that apply pending a decision on privilege.

Privilege against self-incrimination

Undertakings and individuals benefit under human rights law from a privilege against self-incrimination. The CMA may compel an undertaking to provide information or pre-existing documents which are incriminating, but cannot compel the provision of oral answers which might involve an admission on its part of an infringement. However, the CMA is permitted to ask limited questions during a dawn raid (for example, asking for explanations of acronyms or abbreviations) so care has to be taken to ensure legitimate questioning does not stray into prompting self-incriminating answers.

Confidentiality and disclosure

As noted above, the fact that a document is commercially and strategically highly confidential is irrelevant in terms of whether it has to be disclosed to the CMA. However, there are protections in place to ensure that disclosure to the CMA does not result in any wider loss of confidentiality. As a general rule, the CMA is not permitted to disclose any information obtained under the Enterprise Act, Competition Act or other legislation enforced by the CMA which relates to the affairs of a living individual, or to the business of an existing undertaking, which has not already been lawfully disclosed to the public.

There are, however, a number of exceptions to this rule, such as to facilitate the performance by the CMA of any of its functions, or where the relevant individual or undertaking has consented to the disclosure. Where the CMA decides to disclose information, it is required to have regard to:

- whether disclosure is in the public interest;
- whether the disclosure of commercial information would significantly harm the legitimate interests of the business to which it relates; and
- whether the disclosure of information about the private affairs of an individual would significantly harm that individual's interests.

The CMA may also disclose information and/or documents obtained using its civil powers for the purposes of any criminal proceedings or in connection with the investigation of any UK criminal offence. In order for any such documents to be admissible as evidence in criminal proceedings, the CMA must have complied with the standards required in criminal proceedings when recording, handling

and storing the documents. There is no restriction upon the use of documents obtained by the CMA under its criminal powers of investigation for the purposes of its civil proceedings.

Information gathered in the course of the CMA's investigations is, as a general rule, exempt from disclosure under the Freedom of Information Act 2000.

8. Exercising the parties' rights of defence (civil investigations)

Before it adopts an infringement decision or a decision regarding interim measures or fines, the CMA must ensure that the parties to an alleged infringement know the case against them and are given an opportunity to be heard. The CMA can base its decisions only on those matters on which the relevant undertakings have been able to comment. This entitlement is the core of the parties' "rights of defence".

Statement of objections

In order to respect the parties' right to know the case against them, the CMA will issue a "statement of objections" once it has reached a provisional view, supported by sufficient information and evidence, that there has been an infringement. This often lengthy document sets out the case against the parties and allows them an opportunity to respond to the allegations. It will include the relevant facts and supporting evidence, the CMA's legal analysis of such facts and evidence, and the CMA's provisional conclusions.

The statement of objections will also contain a time limit within which the parties may respond in writing (the time limit will be set on a case-by-case basis but is usually at least 40 working days, and is no more than 12 weeks). The parties' response is essentially their defence. Where the response identifies weaknesses in the evidence or analysis in the statement of objections, the CMA may decide to address those issues again in a supplemental statement of objections.

Access to the file

The CMA's rules of procedure require that, where the CMA has issued a statement of objections regarding an intended infringement decision, it must give the relevant person(s) a reasonable opportunity (typically the same time frame as given to respond to the statement of objections) to inspect the documents which are referred to in the statement of objections and (upon request) to inspect the rest of the documents in the CMA's case file, with the exception of CMA internal documents and documents which contain confidential information. This allows the parties to see the evidence against them set in the context of the whole body of evidence – and therefore also gives the parties an opportunity to identify any exculpatory evidence which supports their defence. In practice, access is typically provided by the CMA by supplying the file in electronic format on a DVD, although hard copies may be provided in certain circumstances.

With regard to confidential documents, the CMA will ask all parties whose documents are on the file to identify any business secrets or other confidential information within those documents, to provide reasons for the claims of confidentiality, and to provide the CMA with non-confidential versions of the documents. Access will normally be given to the non-confidential versions only, although in some cases a "confidentiality ring" may be established to allow access to confidential documents to a limited group of people (for example, external lawyers), usually via an electronic dataroom.

Oral representations

As a further element of the rights of defence, all recipients of a statement of objections will be offered the opportunity to meet with the CMA to make oral representations on matters referred to in the statement of objections. These meetings are not akin to a court hearing as there is no adversarial element as such, but they provide an opportunity for the parties to elaborate on their written

responses to the statement of objections. They are usually held 20-30 working days after the deadline for the submission of the written representations.

The Procedural Officer

Where procedural issues arise in an investigation and those issues cannot be resolved with the CMA's case team, relevant parties may raise the issue with the CMA's Procedural Officer. The Procedural Officer is available to rule on disputes concerning procedure which arise between the parties and the CMA's case team, but has no power in relation to the substantive issues of the case. Issues which might be brought before the Procedural Officer therefore include disputes concerning deadlines for the submission of information, confidentiality and redactions, the scope of access to the file, or issues such as the date of the oral representations meeting, etc. The Procedural Officer has no involvement in case work and reports directly to the CMA Chief Executive.

9. The end of the investigation – settlement, decisions, penalties and remedies

A competition investigation by the CMA may end in a number of ways:

- an infringement decision where appropriate (with, or – in exceptional circumstances – without fines)[1];
- a commitments decision;
- a settlement agreement;
- initiation of a criminal prosecution of individuals alleged to have committed the cartel offence;
- an application to court for a disqualification order against company directors;
- a "no grounds for action" decision; or
- a case closure decision.

Each of these is explained briefly below. It should be noted that, in some cases, the end of the CMA's investigation may result in more than one of these outcomes. For example, in cartel cases, the CMA may adopt an infringement decision with fines (addressed to the undertakings involved in the infringement) as well as bringing criminal proceedings against the individuals involved.

Infringement decision

Where the CMA concludes that there is strong and compelling evidence that the parties have infringed the competition prohibitions, the civil investigation process ends with the issue of a formal CMA infringement decision. The CMA will set out the relevant law and the facts of the case, apply the law to the facts, draw its conclusions and, where appropriate, impose a fine. Its decision must be published in writing.

Where the infringement was either intentional or negligent, the CMA may impose a fine of up to ten per cent of the undertaking's worldwide aggregate group turnover for the business year preceding the last year of the infringement. In determining the appropriate level of the fine, the CMA will apply a five-step methodology, taking into account the severity of the infringement, its scope and duration, any mitigating or aggravating factors, and the need to ensure that the fine provides sufficient deterrence. The fine will then be adjusted to reflect any reductions for leniency and/or early resolution (discussed above).

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[1] Sections 39 and 40 of the Competition Act provide limited immunity from fines for "small agreements" in relation to infringements of the Chapter I prohibition (stated in the CMA's guidance to be agreements between undertakings whose combined annual turnover does not exceed £20 million) and for "conduct of minor significance" in relation to infringements of the Chapter II prohibition (stated in the CMA's guidance to be conduct by an undertaking whose annual turnover does not exceed £50 million). This immunity does not apply to infringements of the Chapter I prohibition which are price-fixing agreements, and it may be withdrawn by the CMA in certain circumstances.

Although fines are rarely close to the ten per cent maximum, they may be high in absolute terms (for example, the CMA imposed a fine of £121.5 million on British Airways for its part in the transatlantic fuel surcharges cartel).

Where the CMA finds that there has been an infringement of UK competition law, it may require the infringement to be brought to an end, and may issue such directions as it considers appropriate to achieve this. The CMA has a wide discretion in this regard: examples given in the Competition Act are directions requiring parties to vary or terminate an infringing agreement, or to modify or cease infringing conduct.

Commitments decision

Where the CMA intends to take an infringement decision following a civil investigation but the parties are prepared to amend their arrangements to remove the competition concerns, the CMA has the power to take a formal commitments decision, recording and formalising the remedies which have been proposed but without making a finding of infringement.

This type of decision cannot be accompanied by fines, so is typically used where the competition concerns are less serious and where, for example, the CMA does not wish to impose fines for deterrence-related policy reasons. Commitments decisions most commonly concern "effects" infringements, where the underlying purpose of the parties was not anti-competitive. Commitments may also be accepted where a less serious potential infringement is continuing, in order to swiftly remedy the competition concerns.

Settlement

Prior to April 2014, the Office of Fair Trading (OFT), the predecessor to the CMA, reached "settlement" or "early resolution" agreements in eight cases, offering a reduction in fines to parties who were prepared to admit liability for the alleged infringement and waive some of their procedural rights of defence. In contrast to the formalised settlement procedure offered by the European Commission in EU investigations, the OFT's settlement process was more flexible, and took various different forms in different cases and was applied at different stages of the case.

With effect from 1 April 2014, section 42 of the Enterprise and Regulatory Reform Act 2013 introduced the statutory basis for a formal settlement procedure for cases under the Competition Act. In response to calls for greater guidance on the settlement procedure which the CMA intended to follow, the CMA formalised its procedure and published guidance in March 2014 (revised January 2019), as part of its guidance on its investigation procedures. The CMA reached its first decision under the formalised settlement procedure in March 2015, in relation to an investigation into agreements preventing estate and lettings agents from advertising their fees or discounts in a local property newspaper. The CMA applied a settlement discount of ten per cent to the penalties imposed on each of the parties.

Settlement can take place either before or after a statement of objections is issued. The settlement discount is capped at 20 per cent for pre-statement of objections settlements and ten per cent for post-statement of objections settlements. These discounts are applied to the maximum penalty that the settling business would pay if the CMA issued an infringement decision and are in addition to any reductions under the leniency programme (discussed above).

The CMA will require settling parties inter alia to admit liability, cease the infringing behaviours, confirm that they will pay a penalty set at a maximum amount (subject to any settlement discount) and agree to a streamlined administrative process (for example, reduced access to the file, limited responses to a statement of objections and no oral hearing). In addition, there are likely to be further specific requirements that relate to the particular circumstances of the case. A settlement discount will be revoked if a settling party subsequently appeals the CMA's final decision or if the CMA withdraws from the settlement process (where, for example, the settling business does not adhere to the settlement requirements).

Although settlement agreements are often announced by the CMA highlighting the admission of infringement and the amount of expected fines, it will still go on to issue a formal infringement decision in the case, which will typically include the imposition of (reduced) fines.

Criminal prosecution of individuals alleged to have committed the cartel offence

Where the CMA is satisfied that there is enough evidence to provide a realistic prospect of conviction of (an) individual(s) alleged to have committed the criminal cartel offence, the CMA may decide to initiate a criminal prosecution. In taking this decision, the CMA must also consider whether the prosecution would be in the public interest. The file will then be passed to the Director of Public Prosecutions.

The criminal proceedings will normally take place in the Crown Court, and the prosecution will be handled by the Crown Prosecution Service. As noted above, if convicted, an individual may face up to five years' imprisonment and/or an unlimited fine.

Since the criminal cartel offence came into force in June 2003, there have only been three successful prosecutions, all of which have involved guilty pleas by the individuals concerned. In 2007, three individuals were jailed for their involvement in the marine hose cartel, having pleaded guilty as part of a US plea bargain arrangement. In September 2015, an individual who pleaded guilty in relation to involvement in the water storage tank cartel was sentenced to six months' imprisonment, suspended for 12 months, and ordered to do 120 hours community service. In September 2017, an individual was sentenced to two years' imprisonment, suspended for two years, and a six-month curfew order, following a guilty plea in relation to involvement in the precast concrete drainage products cartel.

Notably, two other executives prosecuted in respect of the same conduct in the water storage tank cartel were acquitted following a trial in June 2015, and a number of other attempts to bring prosecutions for the criminal cartel offence have failed, including a high-profile case related to the long-haul fuel surcharges cartel between British Airways and Virgin Atlantic (where the OFT's case collapsed part-way through the trial) and a prosecution in relation to supplies to the automotive sector (which was dropped).

The OFT argued that the requirement under the Enterprise Act to show that an individual had acted "dishonestly" made it very difficult to prosecute individuals for the criminal cartel offence, and in April 2014 the offence was amended as part of wide-ranging UK competition law reforms, so as to no longer include the dishonesty requirement. It is intended that this should facilitate a greater number of prosecutions, although no cases have yet been brought under the new rules.[2]

It should be noted that where individuals are involved in cartel activities, there may also be related actions for director disqualification (if the individuals are company directors), and to confiscate any individual financial gains from the cartel activities, under the Proceeds of Crime Act 2002.

Director disqualification

Directors of companies involved in breaches of competition law may be disqualified from being a director of any company. There are two scenarios in which director disqualification may occur.

The CMA may apply to court for a competition disqualification order (CDO) to be made against a director. Under the Company Directors Disqualification Act 1986, the court is obliged to issue a CDO against a person, if:

- the company of which they are a director has breached competition law; and
- the court considers their conduct as a director makes them unfit to manage a company.

[2] The new regime only applies where the relevant agreement was concluded after 1 April 2014. If the relevant agreement was concluded prior to that date, the dishonesty element must still be proven.

Important considerations include whether:

- the director's conduct contributed to the breach of competition law;
- the director's conduct did not contribute to the breach of competition law but he or she had reasonable grounds to suspect that the undertaking's conduct constituted a breach and took no steps to prevent it; or
- the director did not know but ought to have known that the undertaking's conduct constituted a breach.

A person subject to a CDO must not (unless permitted by the court) be director of a company, act as a receiver of a company's property, directly or indirectly promote, form or manage a company, nor act as an insolvency practitioner for duration of the CDO. The maximum period of time of which a CDO can apply is 15 years. It is a criminal offence to breach a CDO.

Directors can voluntarily provide a competition disqualification undertaking (CDU) to the CMA at any time during an investigation or during court proceedings, which negates the need for a CDO. A CDU has the same effect as a CDO, for the period of time specified in the undertaking (being a maximum of 15 years). A breach of a CDU has the same consequences as a breach of CDO.

The CMA will consider whether director disqualification is appropriate in every Chapter I and Chapter II investigation and is increasingly using its powers to pursue this where companies breach competition law. In March 2021, the CMA secured its 25th director disqualification.

"No grounds for action" decision

Where the CMA concludes that it has not found evidence of an infringement of competition law, it will take a reasoned "no grounds for action" decision. There is no obligation to publish such decisions, although the CMA may do so (and its predecessor, the OFT, did so in practice).

Case closure on grounds of administrative priorities

In some cases, the CMA may decide to initiate an investigation under the Competition Act, but then subsequently consider that the investigation no longer merits the ongoing allocation of CMA resources, for example, because it no longer fits within the CMA's casework priorities or because the CMA does not have sufficient evidence to determine whether an infringement has occurred and it considers that further investigation is not warranted. In such cases, it may close the case on grounds of administrative priorities. The decision to close a case on the grounds of administrative priorities may be taken at any stage of the CMA's investigation, even after the issue of a statement of objections.

10. Interim measures

The duration of a competition investigation is typically measured in years rather than months. In cases where the alleged infringement is causing immediate damage, there is a risk that – by the time the CMA has investigated the facts, followed the procedure required by the rights of defence and reached its conclusions – the outcome is of theoretical interest only as the harm done by the anti-competitive conduct in the interim is irreparable. In cases where this concern exists, it is possible for the CMA to impose interim measures, pending a final determination of the case, where the following conditions are met:

- the CMA must have a reasonable suspicion that either Chapter I or Chapter II has been infringed, and be in the process of investigating the suspected infringement;
- it must consider it necessary to impose interim measures in order to protect the public interest or in order to prevent significant damage to particular persons or businesses; and
- it must consider it necessary for those measures to be taken as a matter of urgency.

The CMA can give any interim measures directions that it considers appropriate to prevent the harm feared, and the directions will last until the CMA's investigation is completed, or the CMA decides that it no longer has a reasonable suspicion of an infringement.

In assessing the damage which is likely to be caused to particular persons or businesses if interim measures are not granted, the CMA will consider that damage will be "significant" where a person or business (or category of persons/businesses) is, or is likely to be, restricted in their ability to compete effectively, such that this is causing, or is likely to cause, significant damage to their commercial position. The damage can be temporary or permanent and can include actual or potential financial loss, ability to obtain supplies and/or access to customers, or damage to goodwill or reputation.

The requirement to show "significant" damage was introduced with effect from 1 April 2014, replacing the previous stricter requirement to show "serious and irreparable" damage. The threshold for interim measures being granted by the CMA is now notably lower than that which must be met by the European Commission before it can impose interim measures under EU competition law (see the Ashurst Quickguide to "*Competition law investigations by the European Commission*").

The OFT was very reluctant to impose interim measures, doing so in just one case (in which the interim measures were subsequently withdrawn),. Despite the lower threshold for interim measures, these remain rare. The CMA imposed interim measures for the first time in September 2020 (in order to protect competition on UK-US air routes whilst it investigates an agreement involving BA and American Airlines): these interim measures effectively continued commitments previously given to the European Commission.

11. Appeals

Any "appealable decision" of the CMA may be appealed to the Competition Appeal Tribunal (CAT) – this will include, for example, a decision as to whether Chapter I or Chapter II has been infringed, or a decision to impose a penalty, or a commitments decision. It should be noted, however, that the CAT has taken the view in a number of cases that a decision by the CMA to close a case on grounds of administrative priorities does not amount to a decision as to infringement or non-infringement of competition law, and is therefore not an appealable decision.

Appeals to the CAT may be on points of law or errors of fact, or on the basis that the CMA has exercised its discretion wrongly – in other words, the CAT undertakes a full review of the merits of the case. In practice, appeals against CMA decisions are common, particularly where fines have been imposed.

The CAT may uphold or set aside the CMA's decision, or it may remit the case back to the CMA to reconsider, or it may make its own decision. The CAT can also review the amount of any penalty imposed by the CMA. It is also possible to request interim relief from the CAT, pending the outcome of the appeal, which may be applied for before an appeal is made. Interim relief (which will typically suspend the effect of the CMA's decision) will be granted where the appeal is not manifestly unfounded, and the CAT considers that it is appropriate to do so, taking into account all the interests involved.

Any party wishing to appeal against a CMA decision (including third parties who have standing to do so) must submit a detailed application to the CAT within two months of being notified of the disputed decision, or two months of the decision being published (whichever is earlier). Preparing an appeal application involves a considerable amount of work, and parties considering an appeal should seek legal advice as soon as possible.

A further right of appeal from the judgment of the CAT lies to the Court of Appeal, although this is limited to points of law or the amount of penalty, and leave to appeal must be obtained from either the CAT or the Court of Appeal. A further appeal to the Supreme Court on points of law is available, again with leave.

In the context of a criminal investigation, an individual convicted of the criminal cartel offence in the Crown Court may appeal the conviction and/or the sentence imposed to the Court of Appeal. A further

right of appeal to the Supreme Court is available if the case raises a point of law of general public importance, although leave to appeal must be obtained.

12. Rights of complainants and other third parties

Third parties play an important role in competition investigations and in many cases are the driving force behind them. A business which submits a complaint to the CMA highlighting an alleged infringement of competition law, and which is granted "Formal Complainant" status, enjoys the strongest third party rights in relation to an CMA competition investigation. Formal Complainant status will normally be granted to any person who:

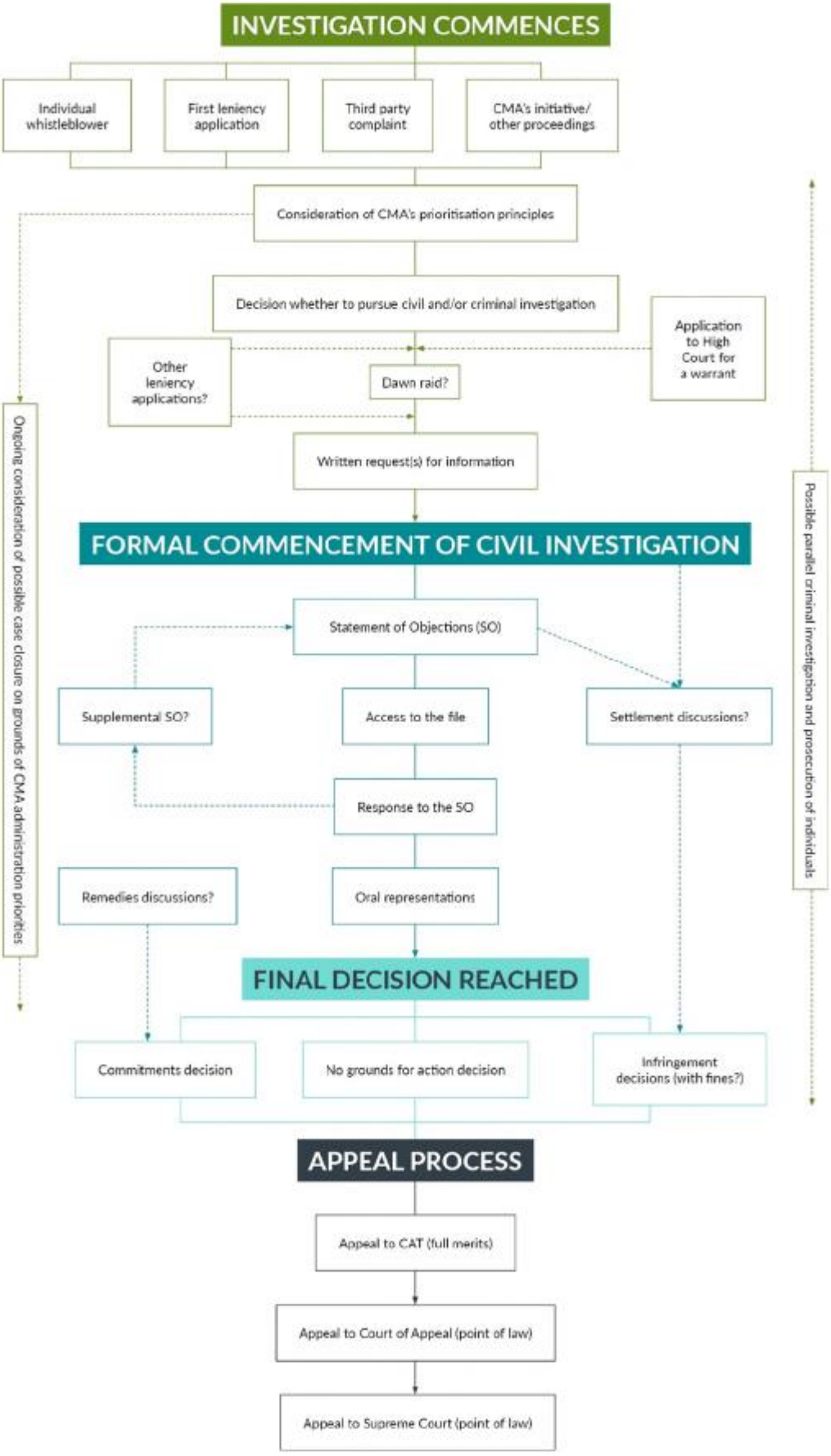
- has submitted a written, reasoned complaint to the CMA, containing certain specified information about the alleged infringement;
- has requested Formal Complainant status; and
- whose interests are, or are likely to be, materially affected by the agreement(s) or conduct which is the subject matter of the complaint.

There may be more than one Formal Complainant in respect of the same CMA investigation.

The CMA will normally consult a Formal Complainant before rejecting a complaint or before deciding to close the file (having initiated an investigation). Where the CMA's investigation proceeds to the statement of objections stage, a Formal Complainant will also normally receive a non-confidential version of the statement of objections, and be given the opportunity to submit comments to the CMA in response (although this right may be limited in cartel cases where there is a risk of prejudice to a related criminal investigation). A Formal Complainant will not normally be invited to attend the parties' oral representations meetings, but may be given the opportunity to meet separately with the CMA where the CMA considers it appropriate to do so in the circumstances of a particular case. Formal Complainants will not, however, generally be given access to any documents or information contained in the CMA's file other than the statement of objections.

Third parties which do not have Formal Complainant status may also be involved in competition investigations, and also enjoy a number of (more limited) rights. For example, where the CMA believes that a third party may be in possession of useful evidence, it may send an information request and/or, in certain circumstances, may inspect the business premises of third parties. Third parties are also free to submit their views in writing on a case, and may request a (non-confidential) copy of the statement of objections, where one is issued. A copy will normally be provided where the third party is, or is likely to be, materially affected by the alleged infringement and is likely materially to assist the CMA in its investigation. In such cases, the third party will be given an opportunity to comment on the statement of objections and may, where appropriate, be invited to meet with the CMA. Where remedies or commitments are being considered by the CMA, these will invariably be "market tested", i.e. the proposed remedies or commitments will be disclosed to third parties for their comments.

13. Overview of the investigation process



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If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.

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