Guidance on the application of the Utility Regulator's competition powers

November 2017

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Preface

About the Utility Regulator

1. The Northern Ireland Authority for Utility Regulation (the 'Utility Regulator' or the 'UR') is a non-ministerial independent government department responsible for regulating Northern Ireland's electricity, gas, and water and sewerage industries.

2. Where the UR is considering exercising its functions it is generally required to carry out those functions in a manner it considers best calculated to further the 'principal objective', wherever appropriate by either promoting or facilitating competition.

   - ***Electricity:*** The principal objective in electricity is to protect consumers, where appropriate by promoting effective competition.[1]
   - ***Gas:*** The principal objective in gas is to "promote the development and maintenance of an efficient, economic and co-ordinated gas industry in Northern Ireland...". Subject to the principal objective we are obliged to carry out functions in a manner which we consider is best calculated to facilitate competition.[2]
   - ***Water and sewerage:*** The principal objective in water and sewerage is to protect consumers, where appropriate by facilitating effective competition.[3]

3. We are responsible for regulating the electricity, gas, water and sewerage industries in Northern Ireland, promoting the short- and long-term interests of consumers. This includes acting to protect consumers when market competition fails. One part of

[1] The Energy (Northern Ireland) Order 2003 article 12.

[2] The Energy (Northern Ireland) Order 2003 article 14.

[3] The Water and Sewerage Services (Northern Ireland) Order 2006 article 6.

this is using our competition powers to take action when market competition does not deliver the benefits expected.

4. We have powers to enforce the competition prohibitions in the Competition Act 1998 in relation to the activities for which it is responsible and to make market investigation references under the Enterprise Act 2002 to the Competition and Markets Authority (CMA) in relation to those activities.[4]

5. These powers are held concurrently with the CMA and include the power to enforce the UK and EU competition law prohibitions on anti-competitive agreements[5] and on abuse of a dominant position, as well as the power to conduct market studies and to refer a market for a full market investigation by the CMA.

6. Concurrency means that either we or the CMA may take on a particular case under the competition prohibitions, or they can make a market investigation reference. The way that we work together with the CMA has recently been revised in the Enterprise and Regulatory Reform Act 2013 (ERRA13) and associated secondary legislation. The UR and CMA have also agreed a Memorandum of Understanding[6] that sets out how we will interact with each other at a working level.

7. As a result of Schedule 14 to the ERRA13, since April 2014 we have been under an obligation, before exercising its direct regulatory powers of licence enforcement, to consider whether it would be more appropriate to proceed under the Competition Act 1998 (i.e. using its competition prohibition powers).

8. What this means in practice is that we **must** consider using its competition powers before using its direct regulatory powers, such as through licences.

[4] The Electricity (Northern Ireland) Order 1992 article 46; The Gas (Northern Ireland) Order 1996 article 23; and The Water and Sewerage Services (Northern Ireland) Order 2006 article 29.

[5] The term 'agreement' is used to mean an agreement, a decision of an association of undertakings, or a concerted practice.

[6] CMA/ NIAUR Memorandum of Understanding – Concurrency. A copy may be accessed at www.gov.uk/cma

9. We are also a member of the UK Competition Network (UKCN),[7] a forum consisting of the CMA and sectoral regulators[8] which have concurrent competition law powers.

About this document

10. This Guidance contains general information designed to inform stakeholders about how we undertake and apply our competition powers and duties in relation to electricity, gas and water and sewerage services in Northern Ireland.

11. It also sets out what businesses should expect if they are subject to investigation or enforcement action and the routes available to them to challenge our decisions.

12. The Guidance seeks to clarify the relationship between sectoral regulation and competition law. In addition, it aims to promote awareness of how competition law applies to the electricity, gas and water and sewerage industries in Northern Ireland and the importance of compliance.

13. Throughout this document, we will identify other relevant documents that we will refer to in enforcing our competition law

[7] The UKCN has published a statement of intent for the network that sets out group membership and objectives in more detail. A copy may be accessed at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262996/UKCN_Statement_of_Intent_FINAL.pdf

[8] Although there are various definitions for different purposes, in this document the term 'sectoral regulators' refers to the following entities which have, or are expected in due course to have competition law powers:

– the CAA (Civil Aviation Authority), in respect of air traffic services and airport operation services

– Ofcom (Office of Communications), in respect of communications (telecommunications, broadcasting and postal services)

– Ofgem (Gas and Electricity Markets Authority), in respect of electricity and gas in Great Britain

– the FCA (Financial Conduct Authority), in respect of financial services –and the Payment Systems Regulator (PSR) in respect of inter-bank payment transfer systems

– the ORR (Office of Rail and Road), in respect of railways services in Great Britain and highways in England

– the Ofwat (Water Services Regulation Authority) in respect of water and sewerage services in England and Wales

powers. In particular, we refer to relevant guidelines issued by the CMA and the European Commission on specific aspects of competition law.

14. This Guidance, upon the completion of the consultation process and in its 'final' form, will supplement the UR's Enforcement Procedure[9] that was published in March 2016 that primarily focuses on our sector regulation powers.

Contacting the UR about a competition issue

15. We welcome information from businesses and their representatives, and consumers relating to our competition and regulatory work, including complaints.

16. Details of how to contact us in respect of a competition issue can be found at Appendix 2 of this Guidance.

[9] http://www.uregni.gov.uk/publications/utility_regulator_enforcement_procedure_-_2016

CHAPTER 1

Introduction

Purpose of this Guidance

1.1 This Guidance is designed to inform our stakeholders – consumers and consumer groups, Government, industry, industry advisers, trade bodies and other interested parties – about how we apply our concurrent competition powers.

1.2 In doing so, this document also seeks to provide some guidance on the interface between generally applicable competition law and the sector specific legislation for electricity, gas, and water and sewerage services in Northern Ireland.

1.3 The CMA publishes on its webpages a range of guidance on the application of competition law and, where appropriate, we refer to these publications elsewhere in this document. This Guidance should not be read in isolation. It should be read in conjunction with the CMA's documents and relevant legal instruments.[10]

1.4 This Guidance is not intended to be comprehensive in that it cannot cover every possible set of circumstances. It is intended to set out the general framework we use so that stakeholders will be aware of the processes and principles that we will have regard to when dealing with suspected competition law infringements and using our other competition powers.

1.5 This Guidance will supplement our Enforcement Procedure[11]. As a best practice regulator, we are committed to applying the Guidance in accordance with the principles of better regulation – transparent, consistent, proportionate, accountable and targeted.[12]

1.6 This Guidance is not intended to be nor is it a definitive statement

[10] The CMA guidance is available on their webpages at www.gov.uk/cma

[11] http://www.uregni.gov.uk/publications/utility_regulator_enforcement_procedure_-_2016

[12] The principles of better regulation are available from https://www.gov.uk/government/organisations/better-regulation-delivery-office

of or a substitute for the law itself. It should be read in conjunction with the appropriate legal instruments, EU case law and United Kingdom case law.[13] As stated above, it is advisable to read this guidance alongside other competition law publications, in particular those published by the CMA.

1.7 We recommend that any stakeholder who is in doubt about how they may be affected by the UK and European legislation referred to in this Guidance seek independent legal advice.

1.8 We will seek to adhere to the procedures outlined in this Guidance. This Guidance does not in itself impose requirements on, or purport to fetter the discretion of, the Utility Regulator. We will apply this Guidance flexibly. For the avoidance of doubt, if the particular facts of an individual case justify, we may depart from this Guidance.

1.9 This Guidance may be reviewed from time to time in order for us to keep it relevant and up to date. Please visit our website (www.uregni.gov.uk) to ensure that you have the latest version of this Guidance.

1.10 Our competition powers mean that we can:

1. Consider *complaints about anti-competitive behaviour* and where necessary, take action to stop it. Where we find a business is acting anti-competitively, we can impose financial penalties of up to 10% of the business' worldwide turnover.
2. Carry out sector *reviews* of the market in order to maintain our expertise and facilitate future action.
3. Conduct *market studies* where we identify some aspect of a market that may potentially impede competition, such as creating barriers to entry, or harming consumers.
4. Make *market investigation references (MIRs)* to the CMA to carry out an in-depth market investigation over a period of up to 18

[13] This case law is available from sources including http://curia.europa.eu/, http://ec.europa.eu/competition/court/index.html, http://www.catribunal.org.uk/ and http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/

months[14], which may lead to the CMA imposing remedies to rectify any adverse effects on competition (AECs) that it finds.

5. *Communicate* with stakeholders about how the market is functioning, and how to comply with competition law. This includes issuing guidance on our powers.

1.11 The protection of utility consumers in Northern Ireland is at the core of why we exist. One of our aims to achieve this is to continuously seek to improve quality, choice and value for electricity, gas, and water and sewerage service consumers in Northern Ireland. Competition works for the benefit of consumers when businesses compete fairly and on the merits of the goods or services they provide. We will therefore use our competition powers, where necessary, to achieve this in practice for domestic and non-domestic consumers.

1.12 Further information on the CMA and our concurrent competition powers is set out in chapter 2.

How to comply with competition law

1.13 The majority of businesses[15] wish to comply with competition law.

1.14 It is the responsibility of each business to satisfy itself that it is complying with competition law on an on-going basis. We recognise that a 'one size fits all' approach is not necessarily appropriate for competition law compliance and that the appropriate actions to achieve compliance may vary. For example depending on the size of business and the nature of the risks identified. Neither we nor the CMA will endorse or approve a business's compliance programme[16].

[14] This period may be extended, by no more than six months, if the CMA considers that there are special reasons for doing so.

[15] See chapter 2 below for the definition of a business in the context of the application of EU and UK competition law.

[16] The 'Competition Act and cartels' section of the CMA web pages contains 'Competition law compliance: guidance for businesses' which includes various types of guidance documents. These guidance documents are available on the CMA web pages at www.gov.uk/cma.

Structure of this Guidance

1.15 The remainder of this Guidance is structured into the following chapters:

- Chapter 1 Overview of the competition prohibitions
- Chapter 2 The Utility Regulator's concurrent competition powers
- Chapter 3 Complaints, early stage analysis and referral resolution options
- Chapter 4 Information gathering and disclosure of information
- Chapter 5 Managing an investigation
- Chapter 6 Market oversight provisions
- Chapter 7 Super-complaints
- Appendix 1 Glossary
- Appendix 2 How to contact the Utility Regulator about a competition issue

Overview of the competition prohibitions

Competition law infringements

We have concurrent powers with the CMA to enforce the UK competition prohibitions in the Competition Act 1998 (CA98), and the equivalent EU competition prohibitions in the Treaty on the Functioning of the EU (TFEU), in cases related to the provision of electricity, gas, and water and sewerage services in Northern Ireland.

Article 101[17] of TFEU and Chapter I of CA98 prohibit agreements between undertakings, decisions by associations of undertakings and concerted practices that have the object or effect of preventing, restricting or distorting competition to an appreciable extent.

Article 102[18] of TFEU and Chapter II of CA98 prohibit conduct[19] which amounts to an abuse of a dominant position in a market.

Introduction

1.16 This chapter discusses:

- What is a competition infringement?
- When would we investigate a competition infringement?

What is a competition infringement?

1.17 We have concurrent powers with the CMA to apply and enforce

[17] Articles 101 and 102 apply when there is an appreciable effect on trade between two or more member states.

[18] Articles 101 and 102 apply when there is an appreciable effect on trade between two or more member states.

[19] Conduct by one or more undertakings.

the UK competition prohibitions in Chapter I[20] and Chapter II[21] of the CA98, and the equivalent EU prohibitions in Article 101 and Article 102 of the TFEU in relation to the provision of electricity, gas, and water and sewerage services in Northern Ireland[22].

1.18 When we apply Articles 101 and 102 of TFEU, we are bound by the fundamental principle of the primacy of EU law. This means that we must follow the case law of the European Court interpreting EU legislation, and we must have regard to any existing relevant decision or statement of the European Commission. Consequently, an agreement or conduct which is prohibited by Article 101 or Article 102 cannot be permitted under domestic law. That being the case, UR cannot permit an agreement or conduct which is otherwise prohibited under Article 101 or Article 102.

1.19 In addition, section 60 CA98 sets out principles for ensuring that the UK authorities handle questions arising in relation to the application of the Chapter I and Chapter II prohibitions in such a way as to ensure consistency of treatment of corresponding questions arising under EU law.

1.20 For further information, please see the CMA competition law guidance on modernisation.[23]

Article 101 and the Chapter I prohibition: anti-competitive agreements

1.21 Article 101 of TFEU and the Chapter I prohibition in the CA98 both prohibit agreements between undertakings,[24] decisions by associations of undertakings and concerted practices that have the object or effect of

[20] Section 2(1) of CA98

[21] Section 18(1) of CA98

[22] Article 46 of the Electricity (Northern Ireland) Order 1992; Article 23 of the Gas (Northern Ireland) Order 1996; Article 29 of the Water and Sewerage Services (Northern Ireland) Order 2006.

[23] The CMA guidance on 'Modernisation: Understanding Competition Law' (OFT442) is available from www.gov.uk/cma.

[24] The term 'undertaking' refers to any autonomous economic entity engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings, non-profit making organisations and (in some circumstances) public entities that offer goods or services on a given market. Companies in the same corporate group will generally be considered to constitute a single 'undertaking'.

preventing, restricting or distorting competition. Article 101 applies to agreements that may appreciably affect trade between Member States in the EU[25]. The Chapter I prohibition applies to agreements implemented or intended to be implemented in the whole or part of the United Kingdom, which may affect trade within the United Kingdom.

1.22 These prohibitions apply to agreements which, in particular:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and/or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

1.23 This list is non-exhaustive and only illustrative. However, it must be noted that the prohibitions apply to both horizontal and vertical agreements[26]. We may apply the Chapter I prohibition and Article 101 prohibition to other types of agreements[27] to determine whether they fall foul of these prohibitions.

1.24 Further information is available in the CMA competition guidance entitled 'Agreements and Concerted Practices: understanding competition

[25] See Commission notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [Official Journal C 101 of 27.4.2004]

[26] A vertical agreement is a term used to denote agreements between firms at different levels of the supply chain. A horizontal agreement is an agreement for co-operation between two or more competing businesses operating at the same level in the market.

[27] In this chapter, we use the term 'agreement' to mean an agreement, a decision of an association of undertakings, or a concerted practice.

law' (OFT401)[28].

Legal exemption regime

1.25 In certain circumstances, an agreement may be exempt from the Article 101 prohibition or the Chapter I prohibition. Neither we nor the CMA will provide 'pre-approval' to a particular agreement or practice. It is for parties and their advisers to satisfy themselves that the agreement or practice in question benefits from the exemption.

1.26 Agreements that fall within the prohibition but which satisfy the conditions set out in Article 101(3) of TFEU and/or sections 9(1) or 10 of CA98 are exempt and shall not be prohibited without the need for a prior decision to that effect. Such agreements are valid and enforceable from the moment that the conditions are satisfied, and for as long as that remains the case.

1.27 There are four conditions, all of which must be met for an agreement to have the benefit of the exemption.

- the agreement contributes to improving production or distribution or promoting technical or economic progress[29];
- the agreement allows consumers a fair share of the resulting benefit;
- the agreement does not impose on the businesses concerned restrictions which are not indispensable to the attainment of these objectives; and
- the agreement does not afford the businesses the possibility of eliminating competition in respect of a substantial part of the products in question.

1.28 The European Commission has issued a Notice entitled *Guidelines on the Application of Article 101(3) of the Treaty*[30] to assist companies and their advisers in determining whether an agreement satisfies the exemption conditions.

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[28] This guidance is available from www.gov.uk/cma.

[29] In Article 101(3), this criterion includes the phrase... "the production or distribution **of goods**....", but is typically applied by analogy to the production or distribution of services.

[30] OJ C101. 27.04.2004, p97.

1.29 As stated above, it is for parties and their advisers to determine whether the agreement or arrangement in question satisfies the exemption conditions. We are not required to carry out an assessment of whether these conditions are satisfied before deciding to commence an investigation into a potential breach. Notwithstanding this, if a party argues that its agreement is exempt, we will have regard to the European Commission's Notice in considering whether an exemption applies.

1.30 The European Commission may adopt block exemption regulations so that particular categories of agreement which it considers satisfy the conditions in Article 101(3) are not prohibited under Article 101.[31] Where an agreement is covered by an EU block exemption regulation the parties to the agreement are relieved of the burden of showing that their agreement satisfies the conditions in Article 101(3). They only have to prove that the agreement satisfies the conditions of the relevant block exemption. The agreement will also then be exempt from the Chapter I prohibition.

1.31 The European Commission may withdraw the benefit of any EU block exemption regulation if it finds that in a particular case the agreement in question has effects that are incompatible with the exemption conditions. Similarly, the CMA or a sectoral regulator (including the UR) may withdraw the benefit of a block exemption[32] or vary the conditions for a parallel exemption under section 10 CA98 in a particular case[33].

Article 102 and the Chapter II prohibition

1.32 Article 102 of TFEU and the Chapter II prohibition in CA98 both prohibit conduct by an undertaking which amounts to an abuse of a dominant position in a market. Article 102 applies to conduct within the EU or in a substantial part of it in so far as it may affect trade between

[31] The European Commission may only issue an EU block exemption regulation where it has been empowered to do so by an EU Council Regulation. For instance Council Regulation (EEC) 19/65 (JO, 06.03.1965, p533, Spec. ed. (1965 - 1966) p35)) (as amended, most recently, by Council Regulation (EC) 1215/1999 and the Modernisation Regulation) allows the European Commission to adopt EC block exemption regulations in respect of vertical agreements and industrial property rights.

[32] Article 29(2) of the Modernisation Regulation.

[33] Section 10(5) of CA98.

Member States. The Chapter II prohibition applies if the dominant position[34] is held within the whole or part of the United Kingdom and the conduct in question may affect trade within the whole or part of the United Kingdom.

1.33 These prohibitions provide that conduct may, in particular, constitute an abuse if a dominant undertaking:

- directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions;
- limits production, markets or technical development to the prejudice of consumers;
- applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- makes the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

1.34 Although not an exhaustive list, some of the most common forms of prohibited behaviour that are likely to be seen in the regulated sectors by an undertaking in a dominant position are predatory pricing, margin squeeze and refusal to supply:

- Predatory pricing: this is a pricing strategy of a dominant undertaking where they sell a product or service at a very low price, intending to drive competitors out of the market, or create barriers to entry for potential new entrants (competitors) to the market. If competitors or potential new entrants are unable to provide services at prices that are equal to or lower than the dominant undertaking without losing money, they will likely cease trading in that market or choose not to enter in the first place.

[34] In *United Brands v Commission (Case 27/76),* the European Court has defined a dominant market position as: '...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'

- Margin squeeze: This is a term used to describe some forms of exclusionary behaviour, by a dominant undertaking, involving an interaction between two levels in a supply chain. This applies in particular to cases where the controller of an infrastructure facility with a dominant position seeks to 'reserve for itself' parts of a related downstream market.

- Refusal to supply: this is the refusal, by a dominant undertaking, to supply goods or services, or the imposition of prices so high (or other conditions) that they amount to a constructive refusal to supply. It must be noted that a refusal to supply may arise from a dispute between a seller and a buyer with no implications with regards to the competition prohibitions. Businesses may refuse to supply for a range of legitimate business reasons e.g. non-payment for goods. In these situations, the refusal to supply may be a commercial dispute and, as such, not fall within the competition prohibitions.

1.35 For examples of competition law cases recently or concurrently pursued by the sectoral regulators, please see the CMA's 'Annual report on concurrency – 2015' (CMA43)[35].

Exclusions

1.36 Certain types of conduct are excluded from the application of the prohibition. These include:

- conduct which would result in a concentration with a Community dimension and thereby be subject to the EU Merger Regulation[36]; and

- conduct which is carried out by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly, insofar as the application of Article 102 or the Chapter II prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to the undertaking.

1.37 There is no legal exemption regime, block nor parallel exemptions

[35] This is available at www.gov.uk/cma.

[36] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. (OJ L24, 29.1.04, p. 1–22).

from Article 102 or the Chapter II prohibition. However, it is a defence for the dominant undertaking to show that the conduct was objectively justified by, and proportionate to, the achievement of legitimate commercial objectives.

Exclusions to Chapter I and Chapter II

1.38 In addition to the exclusions noted, CA98 sets out a number of specific exclusions for certain categories of conduct:[37]

- Section 39 of CA98 provides for immunity from penalty under the Chapter I prohibition (but not the Article 101 TFEU) for all 'small' agreements, **except price fixing**. The category of agreements prescribed for the purposes of section 39(1) of CA98 is all agreements between undertakings, the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million;
- Section 40 of CA98 provides for immunity from penalty under the Chapter II prohibition (but not Article 102 TFEU) for conduct of minor significance if the perpetrator's turnover is less than £50 million per annum;
- To the extent the conduct is engaged in order to comply with a legal requirement;
- Conduct which is necessary to avoid conflict with international obligations and is the subject of an order by the Secretary of State; and
- Conduct which is necessary for compelling reasons of public policy and is the subject of an order by the Secretary of State.

1.39 The Secretary of State has the power to add, amend or remove the exclusions from the Chapter I and Chapter II prohibitions in certain circumstances.

[37] A domestic exclusion does not, however, exclude conduct from applicable EU law. Any conduct affecting trade between Member States that is excluded under CA98 remains subject to Articles 101 and 102, unless there is an equivalent exclusion at EU level.

How the prohibitions are applied

1.40 Where the Chapter I or Chapter II prohibitions are applied and there is an actual or potential effect on trade between Member States of the EU, we are required to apply Article 101 and/or 102 TFEU in accordance with Article 3 of Regulation 1/2003[38]. Depending on the particular facts of the case, we will decide whether to apply the Chapter I or Chapter II prohibitions in parallel with the application of Articles 101 or 102[39].

1.41 We will consider each case individually in conjunction with the principles developed through EU case law and will have regard to the notice issued by the European Commission 'Guidance on the effect on trade concept contained in Articles 101 and 102 of the EC Treaty' (2004/C/101/07).

1.42 As set out in paragraphs 1.21 to 1.39 above, when we apply Articles 101 and 102 of TFEU, we are bound by the fundamental principle of the primacy of EU law.

1.43 Our jurisdiction, under the competition prohibitions, extends to the activities connected with the provision of electricity, gas, and water and sewerage services in Northern Ireland. In this context, we may:

- consider complaints about possible infringements of any of Article 101, Article 102, Chapter I and the Chapter II prohibitions;
- impose interim measures pending the outcome of an investigation to prevent significant damage occurring or to protect the public interest;

[38] 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 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN

[39] In cases where an undertaking has committed an infringement of both EU competition law (Article 101 or Article 102 of the TFEU) and national competition law (Chapter I or Chapter II of the CA98), the undertaking will not be penalised twice for the same anti-competitive conduct (paragraph 4.13 of ' 'Modernisation: Understanding Competition Law' (OFT442)).

- carry out investigations, both on our own initiative and in response to complaints, including requiring the production of documents and the provision of information, and searching premises (for further details see CMA Guidance on 'Powers of Investigation of anti-competitive behaviour')[40];
- accept commitments that are binding on an undertaking;
- consider settlements in all cases under Chapter I and Chapter II (or Articles 101 and 102) whereby a business under investigation may admit to an infringement and accept a streamlined administrative procedure for the rest of the investigation in return for a reduced penalty[41];
- impose financial penalties on undertakings found to have infringed any of the prohibitions, taking account of the statutory guidance on penalties issued by the CMA;
- give and enforce directions to bring an infringement to an end[42];
- submit objections in private legal proceedings before the court, as a designated NCA under the EU Modernisation Regulation 1/2003;
- offer information on how Article 101 and Article 102 and the Chapter I and Chapter II prohibitions apply to the provision of electricity, gas, and water and sewerages services in Northern Ireland; and

[40] This is available from www.gov.uk/cma.

[41] In the past, settlement has sometimes been referred to as ‘early resolution’. We now use the term ‘settlements’. This term is also used by other competition authorities such as the European Commission. See Rule 9 of the CMA CA98 Rules. See also paragraph 2.1 and 2.26 of the CMA’s Guidance as to the appropriate amount of a penalty (OFT423), which provides that the CMA will reduce penalties where a business settles. This guidance is available from www.gov.uk/cma.

[42] The CMA Guidance on 'Competition law application and enforcement' is available from www.gov.uk/cma.

- we may publish written guidance in the form of an opinion where a case raises novel or unresolved questions about the application of Article 101 and Article 102, the Chapter I and/or the Chapter II prohibitions in the UK, and where we consider there is an interest in issuing clarification for the benefit of a wider audience.

1.44 In addition, when we are enforcing the competition prohibitions we must:

- liaise with other EU and UK competition authorities as appropriate on cases including sharing information in respect of the application of Articles 101 and 102 of the TFEU and Chapters I and II of CA98 between the CMA, the EU and other sector regulators[43] [44];
- issue a statement of objections (SO)[45] to each party we consider has infringed any of the competition prohibitions where we propose to make an infringement decision;
- inform the addressee(s) of the SO of the period within which they may make written representations to us on the confidentiality of their information and the matters referred to in the SO;
- provide the addressee(s) of the SO with the opportunity to inspect the file[46] which relates to the matters contained within the SO. This is in order that they can properly defend themselves against an allegation of having breached competition law[47];

[43] See the CMA guidance on Regulated Industries: 'Guidance on concurrent application of competition law to regulated industries', March 2014 (CMA10) which is available from: www.gov.uk/cma.

[44] Sector regulators oversee activities, business and services in specific sectors. They are responsible for setting out the rules and regulations that the organisations within their jurisdiction must comply with, and also for monitoring activity within their given sector to ensure that the rules continue to be applied.

[45] For further information on Statement of Objections, please see Chapter 5.

[46] This obligation does not extend to confidential information or to internal UR documents.

[47] For further information on access to file, see the CMA's guidance 'Guidance on the CMA's

- offer the SO addressee(s) an opportunity to attend an oral hearing to make oral representations to us on any matter referred to in the SO.

1.45 The CMA has powers to issue specific guidance on penalties, to issue guidance on commitments and settlements[48] and to make procedural rules, which it has done in the form of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (CA98 Rules)[49]. In issuing such guidance and rules, the CMA is required to consult publicly with stakeholders as well as with the sectoral regulators.

1.46 Subject to observing the procedural requirements in the CA98 Rules, we may conduct competition law investigations in accordance with our own procedures.

1.47 The CMA maintains a register of decisions in investigations under CA98. Further information on how the CMA has applied and enforced competition law in particular cases may be found in the CMA's decisions.[50]

When we would investigate a competition infringement

1.48 The UR shares concurrent competition law enforcement powers with the CMA in relation to the supply of electricity, gas, and water and sewerage services in Northern Ireland and will liaise with the CMA to determine which authority is better or best placed to proceed in a given case. Details of the concurrency regime are provided in chapter 2 below.

1.49 We have the discretion whether to open an investigation. Before doing so, in each case, we will apply our prioritisation principles (see paragraphs 3.10 to 3.16 below) to assist us in determining whether we wish to take the case forward.

1.50 We may be alerted to possible CA98 infringements from a variety of sources, including:

investigation procedures in Competition Act 1998 Cases' March 2014, which is available from www.gov.uk/cma.

[48] For further information, please see 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8) and 'Appropriate CA98 penalty calculation' (OFT423). These guidance documents are available at www.gov.uk/cma.

[49] SI 2014/458

[50] These decisions are available from the CMA's webpage www.gov.uk/cma.

- complaints from the public or businesses. Such complainants may be granted 'Formal Complainant' status by us;[51]
- super-complaints from designated bodies (see chapter 7);
- 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;
- our own enquiries – for example as a result of our own market monitoring; or
- market studies or other own-initiative work or intelligence-gathering.

1.51 In order to open an investigation, as a result of a complaint, information from a leniency applicant (see paragraphs 1.56 to 1.59), or on our own initiative, we must have reasonable grounds for suspecting that a breach has occurred[52]. That is not the same as a formal decision that the prohibition has been infringed.

1.52 This assessment of whether there are reasonable grounds for suspicion involves factual, economic and legal analysis and will depend upon our assessment of the information available. Examples of information that may be taken into account in making such assessment include information provided by disaffected members of a cartel, statements from employees or ex-employees, or a complaint, or it may derive from other workstreams carried out by us under our sector review, market study or regulatory functions. Where permitted by law, we may also have recourse to information exchanged with members of the UKCN or the European Competition Network (ECN)[53].

[51] We will follow the CMA's Procedural Guidance (Guidance on the CMA's investigation procedures in Competition Act 1998 cases, March 2014 (CMA8)). This may be accessed at www.gov.uk/cma.

[52] Section 25 of CA98.

[53] The European Competition Network (ECN) is a forum for discussion and cooperation of European competition authorities in cases where Articles 101 and 102 of TFEU are applied. The European Commission and competition authorities from EU member states cooperate with each other through the ECN by: informing each other of new cases and envisaged enforcement decisions; coordinating investigations, where necessary; helping each other with investigations; exchanging evidence and other information; and discussing various issues of

Cartels and leniency

1.53 An undertaking which is or has been involved in a cartel may wish to take advantage of the benefits of the leniency programme (as set out in CMA guidance[54]), prompting them to approach us with information about its operation.

1.54 A cartel is an agreement between undertakings that seriously restricts competition, by way of illegally agreeing on price fixing, bid rigging, output quotas or restrictions, and/or market sharing or division. In some cartels, more than one of these elements may be present.

1.55 Typically, they are agreements between competitors, although resale price maintenance (a supplier agreeing with its business customer as to the price at which that customer will resell goods or services) may also be a cartel for the purpose of leniency. The cartel agreement need not be written or formal and can often be oral.

1.56 By cooperating with us, an undertaking could qualify for total immunity from, or a significant reduction in, any financial penalties and other sanctions we can impose if we decide that there is a breach of the Chapter I prohibition and/or Article 101 of the TFEU.[55]

1.57 To benefit from immunity or reductions in penalty an undertaking must meet the following conditions:

- Admission - Leniency is given in exchange for admissions of participation in cartel conduct, including an acceptance that such conduct amounted to an infringement of civil competition law (and, if relevant, the cartel offence although this does not relate to undertakings). There are different protections available for individuals from criminal offences and for businesses from civil penalties.

common interest.

54 The CMA's guidance on 'Leniency and no-action applications in cartel cases' (OFT1495) is available from www.gov.uk/cma.

55 More information on how the CMA sets penalties is available in Part 5 of OFT guidance Enforcement (OFT407) and OFT's guidance as to the appropriate amount of a penalty (OFT423). Both are available from www.gov.uk/cma.

- Information - The applicant must provide us with all (non-legally privileged) information, documents and evidence available to it regarding the cartel activity.
- Cooperation - The applicant must maintain continuous and complete cooperation throughout the investigation and any subsequent proceedings. This is at the heart of the leniency process.
- Termination - The applicant must refrain from further participation in the cartel activity from the time of disclosure to us of the cartel activity (unless we direct otherwise).
- Coercer test - If the applicant has taken steps to coerce another business to take part in the cartel activity it will be eligible only for a reduction in fine of up to 50 per cent, even if it is the first to report (although non-coercing employees will still be eligible for criminal immunity).

1.58 In accordance with the CMA's Information Note[56], as endorsed by the UKCN, all businesses should first approach the CMA regarding their application for leniency. In the event that any initial leniency enquiries or leniency applications are made to the Utility Regulator – we will direct the person making the leniency enquiry or application to the CMA.

1.59 In all cases, decisions about the ultimate grant of leniency will be made by the authority to which the case has been allocated with Concurrency Regulations.

1.60 We will not apply for a competition disqualification order against any current director of a company whose company has benefitted from leniency. However, we may apply for an order against a director who has been removed or otherwise ceased to act as a director of a company owing to his role in the alleged breach of competition and/or for opposing leniency.

[56] 'Arrangements for the handling of leniency applications in the regulated sectors' available from www.gov.uk/cma

CHAPTER 2

2.1 The Utility Regulator's concurrent competition powers

The Utility Regulator's competition law powers

Concurrent jurisdiction between the UR and the CMA

2.2 As noted in Chapter 1, we are one of the sectoral regulators in the UK with certain concurrent competition law powers. The arrangements by which the CMA and the sectoral regulators apply competition law in the regulated sectors, are often referred to as 'concurrency' arrangements.

2.3 We have concurrent competition powers with the CMA[57] under both the UK and EU competition prohibitions and the market provisions in respect of electricity, gas, and water and sewerage services in Northern Ireland.

2.4 This means that, alongside the CMA, we can:

- enforce the UK competition prohibitions in Chapters I and II of the CA98 and, where trade between EU Member States may be affected, the equivalent EU competition prohibitions in Article 101 and Article 102 of the TFEU (see chapter 1);
- undertake market studies under Part 4 (market studies and market investigations) of the Enterprise Act 2002 (EA02) (see chapter 6);
- make market investigation references under Part 4 of the EA02 (see chapter 6); and
- undertake investigations into super-complaints under Part 1 of the EA02 (see chapter 7).

2.5 The intention of the most recent competition legislation[58] is to strengthen the primacy of general competition law and improve the coordination between the CMA and the UR. Where a matter raises issues that fall within both our and the CMA's concurrent jurisdiction, we and the

[57] Prior to 1 April 2014, the competition prohibitions and the market provisions were applied and enforced in the UK by the CMA's predecessors, the Office of Fair Trading (OFT) and the Competition Commission (CC).

[58] Enterprise and Regulatory Reform Act 2013 (ERRA13) and the Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations).

CMA will closely cooperate to avoid duplication, ensure transparency and maximise our complementary skills and expertise whilst promoting competitive outcomes for the benefit of consumers of electricity, gas, and water and sewerage services in Northern Ireland.[59]

Effective cooperation between the CMA and the sectoral regulators

2.6 The CMA and the sectoral regulators have demonstrated their commitment to making the concurrency framework more effective through the establishment of the UK Competition Network (UKCN), which is an enhanced forum for cooperation to enable them to work together to ensure the consistent and effective use of competition powers across all sectors. .

2.7 We discuss issues of mutual interest with the CMA as part of the UKCN and bilaterally, and we engage with each other not just in the exercise of our concurrent competition powers but also with a view to promoting competition for the benefit of electricity, gas, and water and sewerage service users in Northern Ireland. To the extent permitted by law, we engage in broad strategic dialogue, share relevant information, best practice and cooperate closely to ensure the consistent application of competition law in the UK. We also consult one another on any issues that may have significant implications for the other.

2.8 The Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations) set out mechanisms for allocation of cases, require the establishment of information sharing arrangements, and facilitate the secondment of staff for competition case work as between the CMA and sectoral regulators.[60]

Who is best placed to take action?

2.9 Where there is a suspected infringement of the competition prohibitions, we will liaise and cooperate closely with the CMA. This includes the two authorities exchanging information in their possession about the potential infringement, subject to the relevant legal

[59] Where the agreement or conduct concerned may affect trade between Member States of the EU, the European Commission may apply the EU competition prohibitions.

[60] Respectively, regs 4 to 8,9 and 10 of the Regulations

requirements, including for the purposes of determining jurisdiction[61].

2.10 The UR and the CMA will reach agreement on which authority is better placed or best placed to take responsibility for the case. The factors for determining allocation will include as appropriate:

- the sectoral knowledge of us and the CMA;
- whether the case affects more than one regulated sector and / or non-regulated sectors not subject to concurrent competition law;
- previous contacts between the parties or complainants and us or the CMA;
- experience in dealing with any of the undertakings which may be involved in the proceedings;
- experience in dealing with any similar issues which may be involved in the proceedings;
- whether the CMA considers it necessary to exercise its functions under the competition prohibitions in relation to a case in order to develop United Kingdom competition policy or to provide greater deterrent and precedent effect for the benefit of competition and consumers, either within the relevant regulated sector, or more widely; and
- whether the case being allocated to the CMA and supported by us (or vice versa) will provide the best combination of competition and sector-specific expertise.

2.11 If a suspected infringement is drawn to the attention of us or the CMA by way of a complaint, it is expected that an agreement on case allocation will take no more than two months after the receipt of the complaint by the authority that first received it.

2.12 However, if agreement cannot be reached within a reasonable

[61] For more information, see The Competition Act 1998 (Concurrency) Regulations 2014, available from http://www.legislation.gov.uk/uksi/2014/536/contents/made, and the 'Guidance on concurrent application of competition law to regulated industries' (CMA10), available from www.gov.uk/cma.

time, the CMA will decide how to allocate the case.

2.13 The complainant will be informed, as a matter of policy, as to which authority is handling the complaint.

2.14 The Concurrency Regulations provide for a 'standstill obligation' so that, once it has been decided which authority will exercise functions under the competition prohibitions in relation to a particular case, no other authority can exercise any of the ‘prescribed functions’ in relation to that same case. In effect, this means that a case will be dealt with by only one organisation at any one time. Prescribed functions are:

- the opening of a formal investigation under section 25 of CA98;
- the withdrawal of an exclusion from the Chapter I prohibition in relation to an individual agreement; and
- the making of certain formal decisions, including: the finding of an infringement, requiring that an infringement be brought to an end, ordering interim measures, accepting commitments by decision and imposing financial penalties.

2.15 This 'standstill obligation' does not prevent us from liaising with other authorities within the UKCN and cooperating with them as appropriate in respect of a case.

2.16 Once jurisdiction in relation to a case has been allocated to us, the only way in which another authority can take action in relation to that case is where the case is formally transferred to that authority or the CMA decides to take over a case from us. It is also open to the CMA (or any other concurrent regulator should they have jurisdiction over the conduct or agreement in question) to take action under CA98 should we decide not to open a formal investigation.

2.17 The UR and the CMA will each share information with the other competent person who would, but for the allocation of the case to the other competent person, have concurrent jurisdiction in the case. Mechanisms are in place for the UR or the CMA to comment on each other’s cases in the electricity, gas, and water and sewerage sectors in Northern Ireland.[62]

[62] Paragraph 3.49 of ‘Guidance on concurrent application of competition law in regulated

2.18 Further information regarding the concurrent competition powers and concurrency arrangements is set out in:

- 'The Competition Act 1998 (Concurrency) Regulations 2014';[63]
- The CMA's 'Guidance on concurrent application of competition law to regulated industries';[64] and
- The 'Memorandum of Understanding between the Competition and Markets Authority and the Northern Ireland Authority for Utility Regulation – concurrent competition powers' (the MOU).[65]

Use of competition law or sector-specific powers

2.19 It must be noted that from April 2014, as a result of Schedule 14 to the Enterprise and Regulatory Reform Act 2013, we are under an obligation, before exercising its direct regulatory powers of licence enforcement, to consider whether it would be more appropriate to proceed under the Competition Act 1998 (i.e. using its competition prohibition powers).

2.20 The objectives of our sector-specific regulatory powers may overlap with the aims of competition law to a certain extent but they are not identical.

2.21 In some situations we may be able to choose between the powers available to us to address a particular matter and there may be similarly overlapping objectives of different powers. Where we are able to choose between the powers available to us to address a particular matter we will select the one we consider is the most appropriate in the specific case.

industries' (CMA10) and paragraphs 40-41 of the 'Memorandum of Understanding between the Competition and Markets Authority and the Northern Ireland Authority for Utility Regulation – concurrent competition powers' detail the mechanisms that are in place. A copy of these documents may be obtained from www.gov.uk/cma.

[63] 'The Competition Act 1998 (Concurrency) Regulations 2014' are available from http://www.legislation.gov.uk/uksi/2014/536/contents/made.

[64] The 'Guidance on concurrent application of competition law to regulated industries' (CMA10) is available from www.gov.uk/cma.

[65] The Memorandum of Understanding between the CMA and the UR on concurrent competition powers is available at www.gov.uk/cma.

2.22 However, we are required to consider whether to use competition powers in preference to our sector-specific enforcement powers against a provider of electricity, gas, and water and sewerage services in Northern Ireland.

CHAPTER 3

Complaints, early stage analysis and referral resolution options

Introduction

3.1 This chapter explains how you can tell us about any concerns you may have and, if appropriate, how we will carry out any early stage analysis.

Telling us about your concerns

3.2 You can contact us to share information with us and discuss any concerns you may have relating to electricity, gas, and water and sewerage services in Northern Ireland. Please see Appendix 2 for details on how to raise a concern about a competition issue with us and the type of information we will require in the first instance.

3.3 However, we encourage those with concerns to first read this guidance and consider the following suggestions:

- **Try and resolve matters through discussions**. Not every matter of disagreement is suitable for resolution through an investigation. If it is appropriate, there may be benefits in trying to resolve problems directly with the target of your complaint before asking us to take action.
- **Speak to us**. We are always prepared to discuss emerging issues. We will not give a view on the merits of a complaint but may be able to refer you to previous policy decisions or investigations that have dealt with similar issues.
- **Consider any relevant decisions**. The issue that concerns you may have been the subject of a previous sector review, market study or decision.

- **Gather as much evidence and information as possible**. We realise that, in some cases, complainants may not have access to all relevant information (for example information that is in the possession of the business whose conduct you are concerned with or of a competitor). However, you should provide as much evidence as possible to the Utility Regulator to support your complaint.

3.4 Once you have talked to us, we may ask you to send us supporting information or invite you to submit a formal complaint as explained in the relevant chapters of this guidance.

Early stage analysis

Pre-complaint stage

3.5 We aim to address concerns and complaints in the most efficient and effective way. In some cases, we may be able to resolve an issue through informal advice.

The inquiry phase

3.6 Before we commence an investigation, a sector review or a market study, we carry out an initial inquiry to determine whether there is an issue to address.

3.7 We may gather further information (usually without using our formal information gathering powers) to help us decide whether to undertake any subsequent work.

3.8 We generally do not publish details of inquiries, or comment publicly on inquiries. To the extent we are permitted to do so, we may discuss inquiries with other stakeholders where we believe that they may be able to provide information or other assistance to help us decide whether to undertake any subsequent work. For example, we may request factual information from or seek the views of the CMA in the light of its expertise and experience.

3.9 We may request that the complainant submit to us a written reasoned complaint to form the basis for further action following these initial inquiries. The types of information that we may ask for are explained in the relevant chapters of this Guidance.

Prioritisation principles

3.10 The Utility Regulator has finite resources and we cannot investigate every complaint or possible infringement of competition law of which we are made aware. We must therefore prioritise which work, including enforcement activity, to undertake.

3.11 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 a number of 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 in terms of the possible deterrent effect of an investigation or decision);
- the risks involved in taking on a case (i.e. the likelihood of a successful outcome);
- whether other tools are available that would be more appropriate to achieve the same or a better outcome; and
- the resources required to carry out the investigation.

3.12 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, it is the CMA that may decide this (see paragraphs 3.41 to 3.44).

3.13 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 also has the power to take over an investigation we have opened (see paragraph 3.48).

3.14 While we may assess the strength and quality of the available evidence, a 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.

3.15 In some cases it may be appropriate to deal with suspected infringements of competition law without formal enforcement action. For example, we may alert businesses to possible concerns without formally opening an investigation.

3.16 Our prioritisation assessment underlies our decision as to whether or not to investigate a matter. However, if we decide not to open a formal investigation into a matter under CA98, it is open to the CMA (or any other regulator should they have concurrent jurisdiction over the agreement or conduct in question) to take action under CA98, following consultation with the UR (see paragraphs 3.48 above and The CMA's 'Guidance on concurrent application of competition law to regulated industries'[66] with regard to case allocation).

[66] The 'Guidance on concurrent application of competition law to regulated industries' (CMA10) is available from www.gov.uk/cma

CHAPTER 4

Information gathering and disclosure of information

Introduction

4.1 This chapter sets out the legal framework and our approach to information gathering and disclosure of information.

Information gathering

4.2 In assessing matters brought to our attention, as well as reviewing the information contained in a complaint, we will make use of publicly available information and, where permitted, information already available to us through our regulatory, consumer and competition activities.

4.3 We will also, where permissible, make use of information provided to the Utility Regulator through the UKCN and the ECN.

4.4 Even where we have extensive information that has been obtained for one regulatory purpose, we may need to supplement that information in order to carry out a specific assessment of the issue in another regulatory context. In such circumstances, we may rely on parties to cooperate and provide information on a voluntary and informal basis before having recourse to our formal information gathering powers.

4.5 In line with the Better Regulation principles, our decisions are evidence-based. The receipt of information is therefore important to the quality and effectiveness of our work. However, we are conscious of the burden that information requests can place on business. When formulating and determining the scope of information requests, we will therefore seek to be fair and reasonable, and issue clear and focussed requests with a realistic timeframe for response, while seeking to balance these considerations with ensuring the efficient and effective operation of the UR.

4.6 Parties should make known to us any difficulties and discuss any queries raised by any information request with us as soon as possible after receiving a request, or as soon as they become aware that they may not be able to meet the specified deadline.

Disclosure of information

4.7 We aim to be transparent in the way we carry out our competition investigative and enforcement work. This:

- ensures fairness for parties which are directly affected by our work;
- allows other interested persons an opportunity to participate, where appropriate;
- contributes to robust, properly evidenced, and effective outcomes, for which we are accountable; and
- enhances the value of our work by making it more meaningful and accessible to electricity, gas, and water and sewerage services stakeholders in Northern Ireland, including consumers.

4.8 Our duties are contained in the EA02, CA98, Energy (Northern Ireland) Order 2003 (the Energy Order), the Water & Sewerage Services (Northern Ireland) Order 2006 (the Water Order), the Data Protection Act 1998 (DPA98), and the Freedom of Information Act 2000 (FOIA00). With this legal framework in mind, we have put in place measures to ensure the careful handling of confidential material we obtain as part of our competition work.

4.9 In conducting our work we must balance the often competing considerations of transparency and openness on the one hand against the protection of confidential information on the other. This chapter briefly outlines the applicable legal framework and explains our approach to disclosure and practical handling of confidential information.

The legal framework

What information is protected from disclosure?

4.10 Under Part 9 of EA02, there is a general restriction (subject to exceptions) on disclosure by us of information that we obtain in connection with our market study, market investigation reference, super-complaint, or CA98 investigation functions (referred to as 'specified information'), which relates to an individual or to the business of an undertaking, and which is not already lawfully public. The general restriction on disclosure applies

during the lifetime of the individual or while the undertaking continues in existence.[67]

4.11 In terms of the exceptions to this general restriction on disclosure, we may only disclose such information where one or more of the information 'gateways' set out in sections 239 to 243 EA02 applies. Depending on which gateway applies, disclosure may be to another person or another public authority in the UK, or to an overseas public authority. However, the gateways do not apply to all of the information we receive under our competition related functions.

4.12 Under EA02, we may disclose specified information if:

- we obtain the appropriate consent(s)[68];
- an obligation requires its disclosure[69];
- it is disclosed to facilitate the exercise by us of any of our statutory functions[70];
- it is disclosed to another public authority in the UK to facilitate the exercise by that authority of its functions under EA02, CA98 and particular elements of its other statutory functions[71];
- it is disclosed to any person:
    - in connection with the investigation of any criminal offence in any part of the UK;
    - for the purposes of any criminal proceedings there; or
    - for the purpose of any decision whether to start or bring to an end such an investigation or proceedings; and in each case;
    - the Utility Regulator is satisfied that the disclosure is proportionate to what is sought to be achieved by it[72].

[67] Section 237 EA02.

[68] Section 239 EA02.

[69] Section 240 EA02.

[70] Section 241(1) EA02.

[71] Section 241(3) EA02.

[72] Section 242 EA02.

- it is disclosed to an overseas public authority to facilitate the exercise of its functions.[73]

4.13 In each case where an information gateway applies, before we disclose any information, we must have regard to three considerations set out in section 244 EA02. These are:

- the need to exclude from disclosure (so far as practicable) any information whose disclosure we think is contrary to the public interest;
- the need to exclude from disclosure (so far as practicable):
    - commercial information whose disclosure 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 whose disclosure we consider might significantly harm that individual's interests; and
- the extent to which disclosure of such commercial information or information about an individual's private affairs is necessary for the purpose for which we are permitted to disclose it.

4.14 If we are considering disclosing the information to an overseas public authority to assist it in exercising certain of its functions, in addition to having regard to the considerations in section 244 EA02, we must also take into account the factors set out in section 243(6) EA02[74]. If we disclose information pursuant to an information gateway, restrictions on its use and further disclosure may apply to the person or body to whom we

[73] Section 243 EA02. This information gateway does not apply to specified information we obtain in connection with our market study and market investigation reference functions under Part4 EA02.

[74] These factors are (i) whether the matter in respect of which the disclosure is sought is sufficiently serious to justify making the disclosure; (ii) whether the law of the overseas country to whose authority disclosure would be made provides appropriate protection against self-incrimination in criminal proceedings; (iii) whether the law of that overseas country provides appropriate protection for the storage and disclosure of personal data; and (iv) whether any mutual assistance arrangements apply in relation to the disclosure of the information of the kind to which section 237 EA02 applies.

disclose it.[75]

4.15 It is a criminal offence to disclose information in circumstances where such disclosure is not permitted under Part 9 EA02[76], or where the Secretary of State has given a direction that disclosure must not be made to an overseas authority[77], or where a person uses information disclosed to him for a purpose not permitted under Part 9 EA02.[78]

4.16 More detailed guidance on the protection of information and disclosure under Part 9 EA02 is available in the CMA's guidance entitled 'Transparency and disclosure: Statement of the CMA's policy and approach' (CMA6).[79]

Enhanced information sharing with the CMA and other sectoral regulators

4.17 The Concurrency Regulations provide that the CMA and sectoral regulators with concurrent CA98 powers must put in place information sharing arrangements to disclose certain information to each other in respect of investigations under CA98 relevant to their regulated sectors in order to facilitate the exercise of their functions.[80]

4.18 This requirement has been given effect by our working with the CMA, including in the Memorandum of Understanding on concurrent competition powers dated May 2014 between the CMA and us, and through the establishment by the CMA, we and other sectoral regulators of the UK Competition Network.

4.19 We must have regard to the Part 9 EA02 provisions, referred to above, including the three statutory considerations set out in section 244 EA02 (see paragraph 4.13), prior to sharing information in this way and also if we propose to disclose any information we have obtained under Part I of CA98 or under EA02 for the purposes of our sector specific functions.

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75 Section 241(2), (2A), and (4) EA02, section 242(2) EA02, section 243(10) EA02.

76 Section 245(1) EA02.

77 Section 245(2) EA02.

78 Section 245(3) EA02.

79 The guidance is available from www.gov.uk/cma.

80 Regulation 9(1)

4.20 More information on our approach to sharing information with the CMA in relation to our concurrent CA98 powers is available in the Memorandum of Understanding referred to above.[81]

Disclosure of specified information required by an EU obligation

4.21 We may disclose specified information to another person if disclosure is necessary for the purpose of an EU obligation (see paragraph 4.12 above).

4.22 As a designated NCA, we will participate in, and support the CMA in its lead participation in, the activities of the ECN. We are required to carry out our EU competition law functions in close co-operation with our European competition partners.[82]

4.23 In particular, we may exchange confidential information with the European Commission and national competition authorities of other Member States of the EU.[83] Shared in this way, information may only be used to apply the EU competition prohibitions and in respect of the subject matter for which it was collected. However, if national competition law is applied to the same case and in parallel to EU competition law, and if it does not lead to a different outcome, the information may also be used in the application of our national competition law powers.[84]

4.24 Before sharing information under this obligation, we must take into account the three statutory considerations set out in section 244 EA02 (see paragraph 4.13 above).

Additional considerations

Relevant to competition prohibition investigations - privileged communications

4.25 Under CA98, we are not allowed to require the production or

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81 The Memorandum of Understanding between the UR and the CMA is available from www.gov.uk/cma

82 Article 11(1) Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003).

83 Article 12(1) of Regulation 1/2003.

84 Article 12(2) of Regulation 1/2003.

disclosure of privileged communications.[85]

4.26 A privileged communication is a communication between a professional legal adviser and that adviser's client or a communication which is made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings.[86]

Relevant to market studies and market investigation references

4.27 In addition to Part 9 EA02, Article 63 of the Energy Order and Article 265 of the Water Order also apply to information we obtain in the context of our market study and market investigation reference functions relating to electricity, gas, and water and sewerage services in Northern Ireland. Where that information relates to the affairs of an individual or to a particular business, we are not permitted to disclose it during the lifetime of the individual or so long as the business is carried on.[87]

4.28 We may only disclose the information if one or more of the information gateways in paragraphs 2, 3, 4 and 8 of article 63 of the Energy Order or paragraph 2, 3, 7 and 8 of article 265 of the Water Order applies. These information gateways are similar to those set out in Part 9 EA02.

4.29 It is a criminal offence to disclose information where such disclosure would not be permitted under article 63 Energy Order and article 265 Water Order. As criminal sanctions also apply to disclosure of information in contravention of Part 9 EA02, in the event of a conflict between these provisions, we will adopt a cautious approach and will not disclose any information if it would not be permitted by either EA02, the Energy Order or the Water Order.

The UR's approach to confidentiality requests

4.30 In CA98 investigations and market studies, a balance has to be struck between the interests of a party in protecting its confidential information, and the interests of other parties in having a right of access to documents relevant to the substance of the case ('access to the file')

[85] Section 30(1) CA98

[86] Section 30(2) CA98

[87] Article 63(1) the Energy (Northern Ireland) Order 2003; and Article 265(1) the Water and Sewerage Services (Northern Ireland) Order 2006.

which need to be protected as a matter of due process.

4.31 When providing submissions or supplying information to us, for example in response to an information request, parties should identify which of the information is confidential and give reasons why its disclosure would significantly harm their interests. We do not accept blanket or unsubstantiated confidentiality claims. We will carefully consider these explanations, having regard to the relevant legal considerations, before we decide whether to disclose the information.

4.32 Where we decide that disclosure is permitted and would be appropriate, prior to making disclosure, typically we will notify the party claiming confidentiality or the party to whom the confidential information relates that we propose to disclose the information and will provide details of that information.[88]

4.33 In certain circumstances, however, we may consider that giving prior notice would not be practicable or appropriate.[89] For example, we may decide not to give prior notice where one of the following applies:

- the giving of prior notice may hamper our, and / or the requesting authority's, investigation;
- the information is being passed to another UK public authority or investigating or prosecuting authority;
- the information is required urgently; in which case we will consider whether it would be appropriate to inform the relevant party after disclosure is made;
- advance notice would not be practicable due to the number of persons who would need to be notified, in which case we will consider whether it would be appropriate to publish a notice on our website announcing our intention to disclose information and inviting comments from interested parties.

4.34 Subject to the circumstances described above, in the case of

[88] Particular procedures apply to disclosure of information provided by would-be leniency applicants. For details, please see CMA guidance entitled Applications for leniency and no-action cartel cases (OFT1495), in particular chapter 7.

[89] See R (on the application of Kent Pharmaceuticals Limited) v Director of the Serious Fraud Office [2004] EWCA Civ 1494, 11 November 2004

CA98 investigations, we will ensure that we comply with our CA98 Rules (Rule 7) duties to give notice and invite representations.

4.35 We will consider the manner of disclosure having regard to any appropriate protections. For example, we may disclose market share figures by providing ranges or we may redact or anonymise confidential information.

4.36 We may use confidentiality rings or data rooms if we are satisfied that the information should be disclosed but consider that the sensitive nature of the material requires additional safeguards to be applied, for example that the information be disclosed only to external legal or economic advisers of the parties rather than the parties themselves.

4.37 Due process requires that those acting for a party in a case should be aware of the relevant material, but this consideration needs to be balanced against the harm in disclosing to the business itself any sensitive commercial information (e.g. of a competitor or a supplier). In the context of CA98 investigations, in certain circumstances, it may be appropriate to use confidentiality rings to give access to file.

4.38 A confidentiality ring ensures that the information is provided to specified persons subject to those persons undertaking to us not to disclose the information further. In most cases, we will aim to provide the information in electronic format.

4.39 A data room is a physically secure, continually monitored environment, in which a restricted number of external advisers of parties may access confidential information. Before access is granted, advisers are required to give undertakings to us regarding their conduct in the data room, in particular how they handle the information, as well as restrictions on disclosing the information outside the data room.

4.40 We expect that data rooms will not be used often in the context of our competition investigations. Before considering whether to use a data room, we will consider whether it would be more appropriate to disclose the information via a confidentiality ring.

4.41 If a party is not satisfied with a proposed disclosure decision, it may request a review of that decision to us. A party may raise any concerns they have relating to a proposed disclosure decision to the

Senior Responsible Officer[90] in the first instance.

[90] Please refer to Chapter 6 for more information on the Senior Responsible Officer.

CHAPTER 5

Managing an investigation

Possible outcomes of an investigation using our competition powers

There are a number of possible outcomes or actions that may arise during or after an investigation. These include that we may:

- close a case using our prioritisation principles, in order to make the best use of resources;
- make a no grounds for action decision if we have not found sufficient evidence of an infringement;
- give directions to bring an infringement of any of the prohibitions (which has been proven) to an end;
- give interim measures directions during an investigation;
- accept binding commitments offered to us;
- consider settlements offered to us;
- impose financial penalties on undertakings for infringing any of these prohibitions;
- apply for directors' disqualification orders (i.e. to disqualify a director of a business that has infringed any of these prohibitions from holding a UK directorship for a period).

Decisions that we or the CMA make as to whether a prohibition has or has not been infringed and on penalties may be appealed. Appeals to the Competition Appeals Tribunal (CAT) of infringement and non-infringement decisions are full appeals on the merits of the decision.

Introduction

5.1 This chapter sets out the key elements on how we will manage an investigation into a suspected competition prohibition breach. It covers:

- Opening a formal investigation.
- Powers of investigation.
- Possible outcomes of an investigation.
- Appeals of decisions.
- Private actions.
- Where to find further information.

Opening a formal investigation

5.2 If a complaint is likely to progress to a formal investigation, the case is allocated an Investigation Team, which includes:

- a designated Manager, who leads the case team and is responsible for day-to-day running of the case;
- a Director, who directs the case and is accountable for delivery of high quality timely output; and
- a Senior Responsible Officer (SRO), who is responsible for authorising the opening of a formal investigation and taking certain other decisions, including, where the SRO considers there is sufficient evidence, authorising the issue of a Statement of Objections[91]. Or closing an investigation where the Investigation Team has found insufficient evidence of a competition breach, or in accordance with our Prioritisation Principles.

5.3 For these purposes, the decision to open a formal investigation means deciding whether the legal test[92] which allows us to use formal investigation powers has been met and whether the case continues to fall within our casework priorities.

[91] The roles of the Team Leader, Director and Senior Responsible Officer will be consistent with those set out in the 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA*) which is available to view at www.gov.uk/cma.

[92] Under section 25 of the CA98 the UR may conduct an investigation where there are reasonable grounds for suspecting that competition law has been breached (or, in the case of an agreement, that the relevant prohibition would be breached were the agreement not to benefit from an individual exemption or should any applicable block or parallel exemption be capable of being cancelled or withdrawn by the UR).

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

5.5 In some instances we will send out a formal information request at the same time as sending the case initiation letter or the information request may form part of the case initiation letter. Please see paragraphs 5.11 to 5.18 below for further detail on information gathering and requests.

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

5.7 Also, it may be necessary to limit the information that we give in the case initiation letter, for example, to protect the identity of a whistleblower in a suspected cartel investigation, or the identity of a complainant where there are good reasons for doing so.

5.8 Section 25A (1) of the CA98 sets out the type of information that a notice of investigation may contain. The notice will generally include basic details of the case, such as whether the case is being investigated under Article 101, Article 102, the Chapter I and/or Chapter II prohibitions, a brief summary of the suspected infringement, and the industry sector involved. We will also outline the administrative timetable for the case[93]. If the timetable changes during the investigation, the timetable will be updated in the notice of investigation, including reasons for the changes that have been made.

Publish notice of the investigation

5.9 Once a formal investigation is opened (and parties have been informed), we may publish a notice of investigation stating our decision to conduct a formal investigation. This would indicate which of the competition prohibitions are suspected to have been infringed; summarise the case under investigation (i.e. the nature of the suspected

[93] Initially, the timetable will cover the investigative stages up to the UR's decision on whether to issue a Statement of Objections. If the UR issues a Statement of Objections, the timetable will be updated with indicative timing of the steps to the end of the investigation.

infringement); and on a case by case basis may identify any business whose activities are being investigated[94] and any market affected.

5.10 The decision about whether we publish such a notice will be specific to the circumstances of each case. We may include the names of any businesses it is investigating in a notice of investigation. We would not generally expect to publish the names of the parties under investigation other than in exceptional circumstances. This may include, for example, situations where the parties' involvement in our investigation is already in the public domain or subject to significant public speculation (and we consider it appropriate to publish details of the parties in the circumstances); where a party requests that we name them in the notice of investigation (and we consider doing so to be appropriate in the circumstances); or where we consider that the level of potential harm to consumers or other businesses (including businesses in the same sector not involved in the investigation) from parties remaining unidentified is such as to justify disclosure. We will usually only include parties' names in the notice of investigation at a later stage of an investigation, typically if a Statement of Objections is issued.

Information gathering

5.11 Once a formal investigation has been opened, we have a range of information gathering powers under our competition enforcement functions. Sections 26-28A of CA98 provides us with various powers to investigate suspected anti-competitive behaviour, subject to procedural protections against self-incrimination and legal advice. Generally, we can:

- require any person to produce documents or information in a specified format that is related to the matter of the investigation;
- compel individuals connected to a business under investigation to attend interviews and answer questions about documents; and

[94] The UR will act in a manner that is consistent with 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8) on whether to identify a party whose activities are under investigation. See in particular paragraph 5.9 (CMA8). A copy of this guidance may be obtained at www.gov.uk/cma.

- make unannounced visits to search business and residential premises and seize documents and evidence that are not subject to legal privilege.[95]

5.12 There are penalties for not complying with our information requests and it is a criminal offence to obstruct the information gathering process[96].

5.13 These powers are set out in detail in the CMA's guidance 'Powers of Investigation of anti-competitive behaviour' and in 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8).[97]

5.14 When requesting information under CA98 and under the EU competition prohibitions, we will specify the suspected infringement that we are investigating. In the first instance, we are likely to seek information from the business we are investigating and from the complainant, if a complaint has been made. But we may also seek information from third parties as appropriate. Such third parties may include competitors, customers, and suppliers of the undertaking(s) under investigation.

5.15 We may also have recourse to information that has been obtained using our general regulatory powers under article 63 of the Energy Order, article 265 of the Water Order, or under our consumer protection powers in Part 4 of the EA02 and use that information to facilitate an investigation of a matter under CA98.

5.16 As a designated NCA, the Utility Regulator will participate in, and support the CMA in its lead participation in, the activities of the ECN. As such, we will receive information from the European Commission and NCAs from other Member States pursuant to Regulation 1/2003. We will only use information received from the European Commission or another NCA in accordance with Articles 12 and 28 of the Regulation 1/2003.

5.17 This means that, generally, information which is shared will only be used in evidence for the purpose of applying Articles 101 and 102 and in respect of the subject-matter for which it was collected by the transmitting competition authority. If the information has been collected for

[95] Subject to the provisions of s.50 Criminal Justice and Police Act 2001 which allow for the removal of material from premises when it is not feasible to conduct a review at the scene.

[96] See ss.42-44 CA98

[97] These documents are available from www.gov.uk/cma.

a European Commission case and an NCA is applying national competition law in the same case (and will not be arriving at a different outcome to the decision in the Commission's case) the information can be used by the NCA.

5.18 There are further restrictions in place concerning the exchange of leniency materials and privileged documents as well as a restriction on the use of evidence to impose criminal sanctions on individuals[98].

Statements of objections and parties' rights to make representations

5.19 Under section 31 of CA98, following an investigation, we may make an infringement decision in relation to an alleged infringement of Article 101 or Article 102 or the Chapter I or Chapter II prohibitions.

5.20 Before doing so, we must provide written notice to the person or persons likely to be affected (a 'statement of objections' or SO) and provide them with an opportunity to make representations.

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

5.22 The SO will set out the facts and our legal and economic assessment of them which led to the provisional view that an infringement has occurred. We will also set out any action it proposes to take, such as imposing financial penalties and/or issuing directions to stop the infringement if we believe it is ongoing, as well asour reasons for taking that action.

5.23 The statement of objections will set out our preliminary position regarding the alleged infringement, including the key elements of law and facts relied upon, so that the addressees of the SO can exercise their rights of defence.

5.24 As part of the right to be heard, the addressee(s) will be given access to our file, subject to appropriate confidentiality arrangements, so

[98] See the Commission Notice on Cooperation with the Network of Competition Authorities OJ 2004 C101 p.43

that they can comment on the evidence relied upon and gather evidence that might support their case.

5.25 If appropriate, we may also prepare and provide a non-confidential version of the SO to certain interested parties, such as the complainant (if there is one).[99] Following receipt of the SO, parties may make written representations on it to us. We will also allow parties an opportunity to make representations at an oral hearing.

5.26 Should subsequent evidence come to light after the parties' representations, we will notify the parties of our position via a letter of facts or a supplementary statement of objections[100] and allow them an opportunity to respond before we take a final decision.

Outcomes of an investigation

5.27 There are a range of possible outcomes during and following an investigation, which include amongst other things:

- using our prioritisation principles (as set out at paragraph 3.10 to 3.16), close a case in order to make best use of our finite resources;
- making a no grounds for action decision where there is insufficient evidence of an infringement;
- giving directions to bring an infringement (which has been proven) to an end;
- giving interim measures directions during an investigation;
- accepting binding commitments offered to us;
- considering settlements offered to us;

[99] In respect of the EU competition prohibitions, Article 6 of Commission Regulation (EC) No 773/2004 (relating to the conduct of proceedings by the Commission pursuant to Article 81and 82 of the EC Treaty) requires that in certain circumstances we must provide the complainant with a non-confidential version of the statement of objections.

[100] Which one will be appropriate will depend on the nature of the new evidence and, in particular, whether it supports the case as stated in the SO, or whether it indicates a different infringement / a material change to the infringement as stated.

- imposing financial penalties on undertakings for infringing Article 101, Article 102, the Chapter I and/or Chapter II prohibitions; and
- applying for directors' disqualification orders.

5.28 The Utility Regulator [101]must ensure that enforcement decisions will be taken on the basis of a strict separation between the investigation and the decision functions. Therefore, post SO, decisions on an infringement will be taken by persons other than those responsible for issuing the SO.

5.29 We anticipate that we will appoint an Enforcement Committee to make the enforcement determinations. The SO and any responses will be passed to the Enforcement Committee for its consideration.

5.30 The Enforcement Committee may be either the Board of the UR or an ad-hoc committee of the Board established for the purposes of making a formal determination on enforcement action in that particular case. The Board's decision as to whether or not to appoint an ad-hoc committee will be made on the basis of manageability in each particular case.

5.31 Where the Enforcement Committee is an ad-hoc committee of the Board it will be comprised of individuals selected by the Chair (following recommendations, where possible, from the Chief Executive) from a list of persons who are authorised to sit on an Enforcement Committee.

5.32 Once the membership of the Enforcement Committee for the case has been appointed, we will normally inform the company of the names of members of the Enforcement Committee and give the company an opportunity to make representations on this, which we will take into account.

5.33 The CMA's guidance, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8), and the CMA's webpages set out more details of how the CMA and concurrent regulators, including the UR, will apply their powers of enforcement.[102]

[101] Pursuant to Rule 3 of the CA98 CMA Rules

[102] This is available from www.gov.uk/cma.

Directions

5.34 We may give written directions, as we consider appropriate, to bring an infringement to an end where we have made a decision that Article 101, Article 102, the Chapter I and/or Chapter II prohibitions has, or have been, infringed[103]. Such directions might, amongst other things, require a business to modify or terminate an agreement or modify or cease its conduct. Directions may also require positive action (or structural changes) on the part of the undertaking concerned.

5.35 The directions, which are enforceable by court order[104], may be given to such person(s) as we consider appropriate, which includes individuals and undertakings.

Interim measures directions

5.36 Interim measures directions are temporary directions which require certain steps to be taken while a CA98 investigation is carried out. We may give interim measures directions, pending our final decision as to whether or not there has been an infringement of Article 101, Article 102 TFEU, the Chapter I and/or Chapter II CA 98 prohibitions. Interim measures directions will not affect the final decision.

5.37 We have the power to give interim measures directions if both of the following are satisfied[105]:

- we have reasonable grounds to suspect an infringement and have begun an investigation but have not yet completed it; and
- we consider that it is necessary to do so as a matter of urgency because of one of the following factors:
  - to prevent significant damage to a particular person or category of persons; or
  - to protect the public interest.

5.38 For further guidance on the application of these principles see the 'Competition Act 1998: Guidance on the CMA's investigation procedures in

[103] Sections 32 and 33 of CA98.

[104] Section 34 of CA98.

[105] Section 35 of CA98.

Competition Act 1998 cases' (CMA8)[106].

Accepting commitments

5.39 We may accept binding commitments from undertakings suspected of infringing Article 101, Article 102, the Chapter I and/or Chapter II prohibitions. Under section 31D of CA98, we are required to have regard to the CMA's guidance[107] when considering whether to accept commitments offered.[108] We are only likely to consider it appropriate to accept commitments in cases where the competition concerns are readily identifiable, where the concerns are addressed by the commitments offered and the proposed commitments are capable of being implemented effectively, and, if necessary, within a short period of time[109].

Imposing penalties

5.40 We have the ability to impose a financial penalty in relation to a breach of Article 101, Article 102, the Chapter I and/or Chapter II prohibitions. We will have regard to the CMA's guidance when determining the appropriate level of a penalty we will impose for an infringement. This relevant guidance is OFT's guidance as to the appropriate amount of a penalty' (OFT423)[110]. We may impose a financial penalty on an undertaking of up to 10 per cent of the undertaking's global turnover.

5.41 We will provide the parties with an opportunity to make written and oral representations on a draft penalty statement[111] in advance of issuing any financial penalty.

Settlements

5.42 We may consider settlement in relation to a breach of Article 101,

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[106] This is available from www.gov.uk/cma.

[107] part 4 of Competition law application and enforcement

[108] Please see CMA guidance 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8) www.gov.uk/cma.

[109] In relation to any one investigation, we may accept commitments in respect of some of our competition concerns and continue our investigation in respect of other concerns arising from the same agreement or conduct.

[110] This is available from: https://www.gov.uk/government/collections/cma-ca98-and-cartels-guidance

[111] Pursuant to rule 11 of the CA98 CMA's Rules

Article 102, the Chapter I and/or Chapter II prohibitions, provided the evidential standard for giving notice of a proposed infringement decision is met.

5.43 Settlement is a voluntary process in which a settling business must admit that it has breached competition law and accept that a streamlined administrative process will apply for the remainder of the investigation.[112] An infringement decision will be issued in every settlement case unless we decide not to make an infringement finding against the settling business.

5.44 We may impose a financial penalty on any settling business, including a settlement discount.

Directors' disqualification orders

5.45 We may apply to the court for a Competition Disqualification Order (CDO) against an individual director.[113] Under a CDO, the court may disqualify an individual from acting as a company director.

5.46 Before making an application for a CDO against a person, the UR shall give notice to the person likely to be affected by the application (an 'article 13C notice').

5.47 We may accept a Competition Disqualification Undertaking (CDU) from a person instead of applying for a CDO or, where a CDO has been applied for, instead of continuing with the application for a CDO.[114] A CDU is an undertaking by a person that for the period specified in the undertaking he or she will not do any of things that would be a criminal offence for any person subject to a CDO.

5.48 Directors can eliminate the risk of a CDO being made against them by ensuring that their company does not infringe competition law. Accordingly, directors have a direct individual incentive to be committed to ensuring that their company has an effective competition law compliance culture.

[112] When engaging in a settlement process the UR will be mindful of the CMA's guidance document 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8) www.gov.uk/cma.

[113] Article 13A to 13E of the Company Director Disqualification (Northern Ireland) Order 2002.

[114] Article 13B (2) of the Company Director Disqualification (Northern Ireland) Order 2002.

Publishing decisions

5.49 Where we make a decision under Article 101 TFEU, Article 102 TFEU, the Chapter I and/or Chapter II CA98 prohibitions, we will publish our decision on our website and on the CMA's public register.[115] We may make the following decisions:

- there has been an infringement of Article 101 and/or Article 102 of TFEU, the Chapter I and/or Chapter II CA98 prohibitions;
- there is no case to answer under Article 101 and/or Article 102 of TFEU; or
- there are no grounds for action under the Chapter I and/or Chapter II CA98 prohibitions.

5.50 If we commence an investigation but subsequently decide to terminate it, we will publish a notice that the activities of the business in question are no longer being investigated.

5.51 When making public the outcome of our investigation, we will have regard to whether the information to be published is market sensitive (which will include considering the position of listed companies as appropriate) or could otherwise harm a party's legitimate commercial interests. We will take this into account when deciding on the timing of announcements, as is current practice for our announcements relating to price control proposals.

Appeals against decisions

5.52 Under sections 46 and 47 of CA98, certain decisions taken by us may be appealed against to the Competition Appeal Tribunal (CAT). In particular, decisions that we or the CMA make as to whether Article 101, Article 102, the Chapter I and/or the Chapter II of the competition prohibition have or have not been infringed may be appealed.

5.53 Appeals to the CAT of infringement decisions are full appeals on the merits of the decision. The CAT may confirm or set aside our decision,

[115] CA98 decisions are published on the UR's website www.uregni.gov.uk and the CMA's public register https://www.gov.uk/government/publications/ca98-public-register.

impose, revoke or vary the amount of any penalty imposed by us, remit the matter to us or make any other decision, give any such directions or take such other steps that we ourselves could have made.

5.54 Other decisions we take may be subject to judicial review. Judicial review allows individuals, businesses, and other groups to challenge the lawfulness of decisions made by Ministers, Government Departments, local authorities and other public bodies. A decision may be challenged via judicial review if, in arriving at the decision, the decision making body:

- has acted outside the scope of its statutory powers;
- acted in a procedurally unfair manner;
- acted irrationally; or
- acted contrary to an individual's legitimate expectation as protected by law.

5.55 The Human Rights Act 1998 created an additional ground, making it unlawful for public bodies to act in a manner which is incompatible with rights under the European Convention on Human Rights.

Private actions in the courts

5.56 As well as any public enforcement action that we can take, an individual or business may rely on the Chapter I and II prohibitions and Articles 101 and 102 TFEU directly before a court to seek damages for any harm suffered and/or an injunction to prevent an infringement continuing. A claimant will have to show that the defendant breached one of the UK or EU competition prohibitions and that, as a result of the infringement, they have suffered a quantifiable loss.

5.57 An individual or business wishing to bring a claim can commence either a standalone action or a follow-on action.

Standalone actions

5.58 A standalone action is a claim brought where the alleged breach of competition law is not already the subject of an infringement decision by a relevant competition authority, such as the European Commission, the UR or the CMA. In this type of action, the claimant will have to prove to the court that the breach of competition law occurred and that the claimant

suffered loss as a result of that breach.

5.59 Standalone actions may be brought before the ordinary courts or the CAT.

Follow-on actions

5.60 Where a breach of competition law has already been established in an infringement decision taken by a relevant competition authority, a claimant may bring a follow-on action. This means that the claimant can rely on the findings of infringement and fact contained in the decision[116]; and in most cases they need only prove that they suffered loss as a result of that infringement.

Follow-on actions in the ordinary courts

5.61 Where a claim relates to precisely the same facts and parties as an existing infringement decision, the decision is effectively binding on the ordinary courts. A claimant can generally rely on the decision in the ordinary courts to prove the breach of competition law and findings of fact[117] and will need to prove only that the breach caused them to suffer loss.

5.62 Where an existing decision does not relate to precisely the same facts, it will not have the same binding effect on the court. The decision may be relevant however – for example if it concerns the same market but different parties – and it may still be admitted as evidence and is likely to have a persuasive influence on the court.

'Follow-on' actions in the Competition Appeal Tribunal

5.63 The CAT is bound by existing infringement decisions of a relevant competition authority. This means that a claimant relying on such a decision need only prove that the infringement caused them to suffer loss.

Representative actions

5.64 Follow-on actions for damages may also be brought before the CAT by a person who has been authorised by the CAT to bring such

[116] It is unclear whether all findings of fact, or only those that constitute the elements of the infringement, can be relied on. See Case no. 1106/5/7/08 Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited on 21 December 2009 ([2009] CAT 36).

[117] If the decision is being appealed, the claim can only be brought with permission of the court.

actions on behalf of a class of consumers.[118]Such representative actions are intended to facilitate claims against a defendant where a large number of consumers have suffered similar losses, but where each loss is too small for an individual claim to be worthwhile. This might happen where a large number of consumers have each been overcharged a relatively small sum as the result of a cartel.

5.65 All consumers affected will automatically be included within the action, unless they expressly "opt out".

Voluntary redress

5.66 Voluntary redress schemes allow those affected by an infringement to claim compensation through a scheme without the need to pursue litigation in the courts. A person (which may include more than one undertaking applying jointly) who has infringed competition law may apply to us for approval of a voluntary redress scheme. An application can be submitted to us either during the course of an ongoing investigation or where an infringement decision has already been made by us or the European Commission.[119]

Further information

5.67 Further information on how we, the CMA and the other concurrent regulators have applied and enforced the competition prohibitions in particular cases may be found in our, the CMA's and regulators decisions, which are available on their websites.

5.68 The CMA has a wide range of guidance on the application of competition law available which is available from www.gov.uk/cma.

[118] Section 47B of CRA15.

[119] The application form for a person wishing to apply for approval of a voluntary redress scheme from the UR can be found at www.uregni.gov.uk. The UR has adopted the CMA's guidance in approval of voluntary redress schemes this can be found at www.gov.uk/cma

CHAPTER 6

Market oversight provisions

Market provisions

Sector reviews

Under our sector-specific regulation functions, we must keep under review the provision of electricity, gas, and water and sewerage services in Northern Ireland and elsewhere, and collect information about the provision of such services. Sector reviews do not have to consider a specific issue but can be carried out to improve our understanding of a particular aspect of the sectors we regulate.

A sector review does not need to lead to a particular course of action or require a decision about whether to apply a remedy.

Market studies

Market studies, carried out under our competition law functions, assess whether a particular market is working in the best interest of electricity, gas, and water and sewerage consumers in Northern Ireland. It may possibly lead to proposals as to how competition might be made to work more effectively.

Market studies can relate to practices across a range of services. We may conduct a market study to improve our knowledge or to look at developing markets, for example where the potential risks to consumers may be high, or where there may be potential barriers to entry.

A market study may result in a range of outcomes.

Market investigation references

We can make a market investigation reference (MIR) to the CMA requesting that it conduct an in-depth market investigation.

Alternatively, in lieu of us making an MIR, we can accept binding undertakings from market participants to address any competition harming features we have identified.

Introduction

6.1 This chapter discusses our market oversight powers. It is split into two main sections:

- Sector reviews (under our sector-specific regulatory functions) and market studies (under our competition law functions).
- Market Investigation References (MIRs).

6.2 As stated in chapter 3 above, under ERRA13 we are required to consider whether to use our competition prohibition powers in preference to taking enforcement action against a licensee using our sectoral powers.

6.3 We must also consider whether the use of our CA98 powers would be more appropriate before we use our market oversight provisions to promote competition. Therefore, before initiating a market study or making a market investigation reference, we will, in normal circumstances, first consider whether a matter warrants investigation as an infringement of the UK and/or EU competition prohibitions and if we conclude that it does, we will then discuss/agree with the CMA who will be taking it forward.

Sector reviews and market studies

What are sector reviews and market studies?

6.4 Sector reviews and market studies allow us to consider in broad terms the functioning of the markets for which we have responsibility. We may carry out a sector review or a market study where we consider we require a more in depth understanding of the industry or a particular market.

6.5 Sector reviews and market studies may cover a particular product or service, a group of products and services, or particular practices that affect the provision of products and services across a range of markets.

6.6 Sector reviews and market studies may address more than one aspect of the market, such as a combination of structural and behavioural features, rather than the behaviour of any particular undertaking(s).

6.7 It is a legislative requirement that, so far as it appears practicable,

we keep the provision of electricity[120], gas[121], and water and sewerage[122] services in Northern Ireland and elsewhere under review. The sector review is wholly our function for the industries we regulate. It is not a concurrent power with the CMA. Its purpose is to allow us to maintain oversight of the sectors for which we are responsible.

6.8 Undertaking a market study under Part 4 of EA02 is a concurrent function with the CMA. Our powers are derived under article 56 of the Electricity (Northern Ireland) Order 1992; article 23 of the Gas (Northern Ireland) Order 1996; and article 29 of the Water and Sewerage Services (Northern Ireland) Order 2006.

6.9 A market study is more formal in structure than a sector review in that it has a maximum statutory timetable of 12 months. Its purpose is to examine the causes of why particular markets are not working well, leading to proposals as to how they might be made to work better.

6.10 To commence a market study we must first publish a market study notice. The publication of the notice triggers the statutory timetable which we must follow and provides us with information gathering powers under section 174 of EA02. In contrast, a sector review does not have a statutory timetable or specific formal information gathering powers.

Choosing between a sector review and a market study

6.11 In general, we are more likely to undertake sector reviews on an ongoing basis rather than market studies so as to maintain an understanding of the sectors we regulate in Northern Ireland. The more evidence we have that there are particular features of a market which have the potential to affect competition adversely, the more likely we are to conduct a market study.

6.12 A sector review does not need to have a specific issue or concern at its origin. It could for instance be a response to issues raised by stakeholders or because we want to understand more about a particular issue. Additionally, it does not need to lead to a particular course of action or require a decision about whether to apply a remedy.

[120] Article 50 of the Electricity (Northern Ireland) Order 1992.

[121] Article 27 of the Gas (Northern Ireland) Order 1996.

[122] Article 60 of the Water and Sewerage Services (Northern Ireland Order) 2006.

6.13 Conversely, a market study is a more formal tool which requires that we either provide the industry or particular market with a 'clean bill of health', or pursue further action to remedy any competition harm we have identified. The more serious nature of a market study is reflected in the applicable 12 month statutory timeframe and in the access it provides to the wide ranging information gathering powers under section 174 of EA02. See paragraph 7.29 below for more information on these powers.

6.14 In certain circumstances, we are limited in our options and are required to undertake a formal market study. We must issue a notice where both of the following criteria are satisfied:

- we are proposing to consider the extent to which a matter in relation to the provision of electricity, gas, and water and sewerage services in Northern Ireland has or may have adverse effects on consumers and to assess the extent to which steps should be taken to remedy, mitigate or prevent any such adverse effects; and
- we consider the matter is one where it would be appropriate for us to exercise our powers of investigation under the EA02 in connection with deciding whether to make an MIR to the CMA.

6.15 In considering whether to undertake a sector review or a market study we will consider:

- issues raised by industry either consistently in ongoing discussions or as part of a complaint;
- issues arising from our market monitoring, intelligence gathering, surveys and research;
- issues arising from a complaint under consumer law;
- issues arising from the discharge of our regulatory functions; and
- where permitted by law, information exchanged within the UKCN and ECN.

6.16 Additionally, we may also be asked to undertake a sector review

by the Department of Enterprise Trade and Investment for electricity[123] and/or gas[124]; and the Department of Regional Development for water and sewerage[125] services.

Managing sector reviews and market studies

6.17 We expect to follow a broadly similar process for sector reviews and market studies. However, we have significantly greater flexibility for a sector review than for a market study.

6.18 In either case we will appoint a project manager who will be the single point of contact for the review or study.

6.19 We will usually initially undertake a period of primarily desk-based research before deciding what particular market oversight tool we will use. At this point we will not, as general practice, notify the industry that we are undertaking a review or study. We may advise key industry stakeholders at this stage, especially if we are seeking to gather information externally.

6.20 Following our initial research we will then decide, subject to our findings and prioritisation principles, whether to take further action and what form it will take; either a sector review or market study. We consider we are under no obligation to publish the findings of our initial research should we decide that no further action is necessary at that time.

6.21 In taking a decision to progress to either a sector review or market study we will publish a notice to that effect. To commence a market study, we are required to publish a statutory market study notice. Such a notice must specify the following points:

- The matter in relation to which we are proposing to carry out the market study.
- The period during which representations may be made to us in relation to the matter.
- The timetable for the market study.

6.22 For a sector review, we are not required to publish a notice. However, in normal circumstances we intend to publish a notice when we

[123] Article 50 of the Electricity (Northern Ireland) Order 1992.

[124] Article 27 of the Gas (Northern Ireland) Order 1996.

[125] Article 60 of the Water and Sewerage Services (Northern Ireland) Order 2006.

plan to carry out a sector review and the notice will include the scope and timetable for the work.

6.23 In practice, we expect there will be little difference in the broad content of either a notice for a sector review or a market study. The main difference will be in regard to the timetable imposed under a market study. (illustrated in figure 6.1 below).

6.24 In the case of a sector review, we may follow a different, usually shorter, timetable and we are not obliged to make decisions concerning a potential MIR. Notwithstanding this, we consider that it is consistent with our duties and the better regulation principles to produce a timetable so as to reduce uncertainty in the industry or market(s) under review.

Figure 6.1: Stylised statutory timetable for a market study

6.25 As noted above, we are required under a market study to set a timetable to gather representations from industry. We will also adopt this practice when undertaking a sector review. Given the timetable requirements, the period for submitting representations will generally be no more than six weeks starting from the date of publication of the notice.

6.26 During this period, we may also deploy (under a market study) our formal information gathering powers (described below). It is unlikely that we will be able to consider further representations beyond the dates specified in our publications or information requests.

6.27 We will aim to be fair and reasonable in its requests for information and the deadlines we set for parties to respond to such

requests. We will seek to avoid unnecessary burdens for businesses while seeking to balance those concerns with timetable demands and the effective operation of our market study.

6.28 Following publication of the first market study report, there will be a period during which representations may be made in response to the report findings. Again, given the short timetable, this will generally last for no more than six weeks starting from the date of publication.

Formal powers to gather information in a market study

6.29 Section 174 of EA02 gives us certain investigatory powers that we may use when we consider we have reasonable grounds for suspecting that any feature of a market prevents, restricts or distorts competition. These powers allow us:

- to require the attendance of parties to give evidence;
- to require the production of specified documents; and
- to require the supply of specified information including estimates and forecasts.

6.30 Parties should be aware there are civil and criminal penalties for failure to comply with a request for information, or for providing false and misleading information.

Outcomes of sector reviews and market studies

6.31 The potential outcomes of a sector review and a market study may be similar. However, for a sector review there is no requirement on us to reach a definitive conclusion about further action and the possibility of making an MIR to the CMA. As such, a potential outcome of a sector review is that we may undertake a market study, in which case we will issue a market study notice at the time we publish our sector review report.

6.32 The principal outcomes of a sector review or market study are one or more of the following:

- A clean bill of health for the market.
- Consumer-focused action.
- Recommendations to business.

- Recommendations to Government.
- Investigation and enforcement action, which could encompass consumer law or competition law as well as regulatory action under economic licence enforcement.
- An MIR or, having consulted on a potential MIR - undertakings in lieu of an MIR (see below for further information on MIRs).

6.33 Except in the event of a clean bill of health, the outcomes of a sector review or a market study generally require follow-up work, either to implement actions which are for the UR to pursue, or to monitor the implementation of recommendations addressed to others, such as business or Government. We consider each of these in turn below.

A clean bill of health

6.34 A clean bill of health will mean that some or all of the potential consumer detriment identified during the initial review is not substantiated by the information obtained, or that intervention would not be proportionate to the detriment. However, it does not preclude us from revisiting the market at a later date should new information come to light, or if a change in market circumstances were to occur, which suggests that there are concerns about the functioning of the market, and if our prioritisation principles are met.

Consumer-focused action

6.35 Consumer-focused action may take the form of a UR-led information campaign. The objective of such campaigns could be to raise awareness so that consumers are able to make better purchasing decisions. The campaign may stress factors that consumers should consider when making a purchase, or inform consumers of their rights when transacting with businesses.

6.36 Consumer-focused action will involve us working in partnership with the Consumer Council for Northern Ireland and may include other organisations that assist consumers and other Government bodies. If the market involves a particular group of consumers, we may also work with the most appropriate organisation to help ensure that the campaign is successful.

Recommendations to business

6.37 Where market problems can be addressed through changes to business behaviour, we may make recommendations to business. For example, we may recommend that businesses in the market develop a code of conduct or improve an existing one.

Recommendations to government

6.38 If we conclude that changes in legislation, government policy, and/or regulatory practice are necessary to remedy any problems which may be identified in the market, we will make recommendations to the NI Assembly, UK Government and/or other public agencies or other regulators.

6.39 If the recommendations are wider than the UK, we may recommend that the Government takes action at the EU level.

6.40 We will share information where permitted to accompany our recommendations.

6.41 To promote our recommendations to the NI Assembly or the UK Government, we will meet relevant agencies and departments to present findings and answer questions.

6.42 The Department of Trade, Enterprise and Investment (DETI) is responsible for coordinating the NI Assembly's responses where market studies make regulatory recommendations in respect of energy matters. The Department for Regional Development (DRD) is responsible for coordinating the NI Assembly's responses where market studies make regulatory recommendations in respect of water matters. We will liaise closely with DETI and DRD to monitor how actions on recommendations are progressing.[126]

6.43 The UK Department for Business, Innovation and Skills (BIS) is responsible for coordinating the UK Government's responses where market studies make regulatory recommendations. We will liaise closely with BIS, DETI and DRD, to monitor how actions on recommendations are progressing at a regional level.

[126] Please be aware that the Northern Ireland Civil Services is currently going through a structural reorganisation and the bodies listed will need to be revisited once this has concluded.

Investigation and enforcement action

6.44 A review or a study may help inform potential enforcement action, or identify alternative or additional outcomes. This is likely where:

- Evidence or understanding obtained indicates possible breaches of competition law, consumer law or economic regulation licence conditions.
- Evidence or understanding obtained indicates a modification to an economic licence condition is appropriate.
- Where the review or study concludes that enforcement action is necessary to address the issues identified.

Market investigation reference to the CMA

6.45 The MIR process is discussed in more detail below. However, when the findings of a market study give rise to reasonable grounds to suspect that a feature or combination of features of a market in the UK prevents, restricts or distorts competition, and an MIR appears to be an appropriate and proportionate response, we are able to make an MIR to the CMA to conduct an in-depth market investigation. This market investigation is conducted by a CMA 'Group' of independent panel members[127].

Market investigation references (MIRs)

What is an MIR?

6.46 An MIR is the first step in a detailed examination of cross-market practices or particular market(s) we have decided to refer to the CMA. The MIR sets out:

[127] The CMA's guidance 'Market Investigation References' (OFT511) describes the legal test applied by the CMA when making a decision to refer a market, the process for making that decision and how the test is applied.

The CMAs guidance 'Market investigation guidelines' (CC3) describes how it conducts its market investigations once a reference has been made.

Both of these guidance documents are available at www.gov.uk/cma.

- Evidence that we have collected and analysed to deduce that there is a feature or features of a particular industry, market or market(s) that are having an adverse effect on competition (AEC).
- What we consider is beyond the scope of our statutory powers to remedy but where the CMA has the potential to remedy with its more wide ranging powers.

6.47 Our power to make an MIR under Part 4 of EA02 is a concurrent function with CMA. Further details on our concurrent MIR powers are in chapter 3.

6.48 We have the power to make two types of MIR. These are an ordinary reference and a cross-market reference (a type of reference in respect of specific features or combination of features that exist in more than one market).

Ordinary reference

6.49 An ordinary reference is a reference which is not a cross-market reference (see below).[128]

6.50 To make an ordinary reference, we must have reasonable grounds for suspecting that any feature or combination of features of a market in the UK for goods or services prevents, restricts, or distorts competition in connection with the supply of acquisition of any goods or services in the UK or a part of the UK.[129]

Cross-market reference

6.51 A cross-market reference is a reference in respect of a specific feature or a combination of features that exist in more than one market, which means that we do not have to refer the whole of each market

[128] This is the type of reference that existed under the EA02 prior to the addition of the cross-market reference which came into effect on 1 April 2014 as a result of the Enterprise and Regulatory Reform Act 2013. Please note also that public interest references can be made by the Secretary of State in cases that raise defined public interest issues. For further information on public interest references, see 'Market Studies and Market Investigations: Supplemental guidance on the CMA's approach' (CMA3). This guidance is available www.gov.uk/cma.

[129] Section 131 EA02.

concerned.[130]

6.52 To make a cross-market reference, we must have reasonable grounds for suspecting that a feature or a combination of features, of more than one market in the UK[131] prevents, restrict or distorts competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK[132]. Only features which relate to conduct can be the subject of a cross-market reference.[133]

6.53 The types of issue for which cross-market references are likely to be most appropriate include:

- Features that do not fit neatly within one market.
- Recurring sources of consumer complaint or identified detriment which have the potential to affect competition adversely across multiple, distinct markets.

6.54 A cross-market reference must specify:

- the enactment under which it is made;
- the date on which it is made, and
- the feature or features concerned and the descriptions of goods or services to which it or they relate[134]

Choosing an MIR

6.55 For the purposes of an ordinary MIR, a feature may be one or more of the following:

- The structure of the market concerned or any aspect of that structure.

[130] Sections 131(2A) and (6) of EA02.

[131] With regards the provision of electricity, gas, and/or water and sewerage services in Northern Ireland.

[132] Section 131 EA02.

[133] Sections 131(1) and 131(2A) of EA02.

[134] Section 133(1) EA02. See 'Market Studies and Market Investigations: Supplemental guidance on the CMA's approach' (CMA3). This guidance is available www.gov.uk/cma.

- Any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned.
- Any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.
- 'Conduct' includes any failure to act (whether intentional or not) and any other unintentional conduct.

6.56 For the purposes of a cross-reference, a feature may only be one or more of the conduct features mentioned above.

6.57 We may consider that we have sufficient evidence to meet this test in a number of ways including but not limited to:

- The result of a sector review.
- The result of a market study.
- The result of a super-complaint (see chapter 7 below).
- The result of information gathered during our discharge of our regulatory functions.

6.58 If the statutory tests for making an MIR are met, we have the discretion rather than a duty to make an MIR. We will only make an MIR to the CMA if, in our view, the appropriate reference test set out in section 131 of EA02 is met; and where we consider that each of the following criteria is met:

- It would not be more appropriate to deal with the competition problem(s) identified by applying our (or the CMA's) CA98 powers or other powers available to us.
- It would not be more appropriate to address the competition problem(s) identified by accepting undertakings in lieu of an MIR.
- The scale of the problem(s) identified in terms of the adverse effect on competition is such that a more detailed examination by a CMA group would be appropriate.

- There is a reasonable prospect that appropriate remedies would be available in the event that the CMA was to find that competition is adversely affected.

6.59 Further information on the different forms of MIR is available in the CMA guidance 'Market Studies and Market Investigations: Supplemental guidance on the CMA's approach' (CMA3) and 'Market investigations guidelines' (CC3).[135]

Managing an MIR

6.60 Where we are proposing to make an MIR to the CMA, we must first consult, so far as practicable, any person on whose interests the reference is likely to have a substantial impact.[136] We will discharge this obligation through public consultation on a provisional decision on an MIR.

6.61 In undertaking this consultation we must, so far as practicable, give our reasons for the proposed reference. The specific content of the provisional decision will vary from case to case but we expect that it would typically cover the following points:

- Draft terms of reference for the market investigation, including:
  - A description of the goods or services concerned.
  - The identity of the main parties affected by the reference, whether as suppliers or as customers; or this may involve the identification of categories of parties rather than parties.
  - A view as to the possible definition of the market (or markets) affected.
- A statement of reasons setting out a summary of the evidence that has led us to have a reasonable suspicion that competition is prevented, restricted or distorted, including the possible market features that may be relevant.
- Some indication of the availability of the potential remedies that the CMA has available that it could apply to the market(s) to remove the adverse effects on competition.

[135] These guidance documents are available from www.gov.uk/cma.

[136] Section 169 of EA02.

6.62 Unless arising from a substantial piece of analysis such as a sector review or market study, we will not attempt to make more than a preliminary analysis of these points in the statement of reasons. It will be for the CMA group to produce a definitive analysis if an MIR is made.

6.63 If an MIR is proposed during a market study we must publish a provisional decision within 6 months and the formal MIR decision within 12 months of the publication of the market study notice (see figure 6.1).

6.64 The length of the formal consultation period, following the issuing of a provisional decision stating our reasons for a proposed MIR, will depend upon the complexity of the issues and the extent to which discussions have already taken place with the affected parties.

6.65 In general, we expect to have discussed and consulted on the issues with the parties concerned, where they have been identified, before the start of the formal consultation period. In such cases, a relatively short formal consultation may be appropriate and we will aim to conduct a consultation for no more than six weeks. It is during this consultation that any representations regarding undertakings in lieu of an MIR should be made.

Decision following MIR consultation

6.66 At the end of the MIR consultation period we will take account of any representations received before making a final decision about whether to make an MIR.

6.67 The possible outcomes following an MIR consultation are:

- Accepting undertakings in lieu of an MIR.
- Making an MIR to the CMA.
- Not making an MIR.
- Pursue any of the alternative actions noted above, such as a clean bill of health.

6.68 We can accept undertakings in lieu of an MIR (when we are considering an MIR) and where such undertakings achieve as comprehensive a solution as is reasonable and practicable to any adverse effects on competition identified (and any detrimental effects on consumers so far as they result or may be expected to result from such

adverse effects). We may also have regard, as appropriate, to the effect of the undertakings on any relevant customer benefits arising from a feature or features of the markets concerned.

6.69 In this situation, the report following the consultation must in particular contain the decision to accept the undertakings, the reasons for the decision and such information we consider appropriate for facilitating a proper understanding of our reasons for the decision.

6.70 EA02 obliges us to consult any persons whose interests are likely to be substantially affected before making a decision about whether or not to accept undertakings in lieu of an MIR.

6.71 Any MIR that we make must be published together with the reasons for it. This will cover the same ground as the draft MIR notice, taking account of any relevant points that have arisen from the consultation on the proposal. An MIR shall, in particular, specify:

- The enactment under which it is made.
- The date on which it is made.
- The description of goods or services to which the feature or combination of features concerned relates.

Outcome of an MIR

6.72 Following an MIR it is for the CMA to decide whether competition is indeed prevented, restricted or distorted, and (if so) what, if any, action should be taken to remedy the adverse effect(s) on competition and/or any detrimental effect(s) on customers resulting from it (in the form of higher prices, lower quality, less choice of services, or less innovation in relation to services in any market in the UK).

Further information

6.73 Further information on how the UR, the CMA and the other concurrent regulators make market investigation references may be found on their websites. The CMA has issued guidance on making MIRs which contains further information[137].

[137] CMA guidance 'Market Studies and Market Investigations: Supplemental guidance on the CMA's approach' (CMA3) and 'Market investigations guidelines' (CC3) which are available from www.gov.uk/cma.

CHAPTER 7

Super-complaints

Super-complaints

Consumer bodies designated by the Secretary of State may submit a super-complaint to the CMA and the concurrent regulators (including the UR) where they consider that there is any market feature, or combination of features, such as the structure of a market or the conduct of those operating within it, that is or appears to be significantly harming the interests of consumers.

We and the CMA have concurrent powers to undertake investigations as a result of super-complaints regarding the provision of electricity, gas, and water and sewerage services in Northern Ireland.

Within 90 days of receiving a super-complaint, we have a duty to publish a reasoned response stating what action, if any, we intend to take in response to a super-complaint.

Introduction

7.1 This chapter discusses our powers to investigate super-complaints. It covers:

- What is a super-complaint?
- Who can bring super-complaints?
- Why we would investigate a super-complaint?
- Managing a super-complaint investigation.
- Potential outcomes of a super-complaint investigation.
- Where to find further information.

What is a super-complaint?

7.2 A super-complaint can be made when a designated body considers that there is a market feature, or combination of features (such

as the structure of a market or the conduct of those operating within it), that is or appears to be significantly harming the interests of consumers.

7.3 We and the CMA have concurrent powers to undertake investigations as a result of super-complaints[138] made about electricity, gas, and water and sewerage services in Northern Ireland. As part of the concurrency arrangements, we will consult each other to decide which authority is better placed to deal with the super-complaint. Further details on our concurrent super-complaint powers are in chapter 3.

Who can bring a super-complaint?

Need to be a designated body

7.4 The aim of the super-complaints process is to strengthen the voice of consumers, as they are unlikely to have access individually to the kind of information necessary to judge whether markets are failing them. Consumer groups can collate individuals' complaints to assess whether there is a problem and take the necessary action.

7.5 However, it is important to remember that anybody can still bring complaints for us to consider. Super-complaints are simply a route into the system – an initial 'fast-tracking' to ensure that complaints about market failure which harms consumers are given consideration within a fixed timeframe.

Which bodies have been designated so far?

7.6 Only bodies designated by the Secretary of State can bring a super-complaint. At the time of publication, the bodies who have been designated as bodies which can submit super-complaints that are likely to be of relevance to electricity, gas, and water and sewerage services in Northern Ireland are:

- The Consumer Council for Northern Ireland.
- The Consumers' Association (known as 'Which?').

Why we would investigate a super-complaint?

7.7 We have a duty to make a reasoned response to a super-complaint within 90 calendar days from the day after a complaint is

[138] The UR has its concurrent powers to deal with super-complaints by virtue of section 205 EA02.

received. This includes a decision on whether or not we or the CMA intends to take any action.

Managing a super-complaint investigation

7.8 On receipt of a super-complaint concerning electricity, gas, and/or water and sewerage services in Northern Ireland, the super-complainant will be contacted within five working days to acknowledge receipt and let them know whether the UR or the CMA will be the main contact during the 90 day period.

7.9 We will examine the contents of the super-complaint in more detail to see if it meets the criteria set out in section 11 of EA02. The complaint must explain the feature, or combination of features, of a market in the UK for goods or services that is or appears to be significantly harming the interests of consumers. The CMA has issued guidance on what information to submit for a super complaint to ensure it is given super-complaint status[139].

7.10 If the super-complaint satisfies the criteria, we will assess the quality of information and evidence supplied. We will decide whether it is possible to proceed on the basis of the information provided or if further evidence or clarification is required. In parallel, we will also form a view as to whether the super-complaint is frivolous or vexatious, in which case we will reject the complaint.

7.11 Within 90 days after the day on which we receive the super-complaint, we have a duty to publish a reasoned response stating what action, if any, we intend to take in response to the complaint. This 90 day period is the maximum time allowed for a response, but a swifter decision may be possible in certain circumstances.

Outcome of a super-complaint investigation

7.12 The possible outcomes of a super-complaint include:

- Enforcement action under regulatory, competition or consumer law.

[139] The CMA guidance 'Super-complaints: guidance for designated consumer bodies' (OFT514) is available from www.gov.uk/cma.

- Commencing a sector review or market study into the issue.
- Making an MIR to the CMA if there is a potential adverse effect on competition.
- Finding that another authority with concurrent duties is better placed to deal with the super-complaint and take necessary action.
- Referring the super-complaint to another sectoral regulator without concurrent duties.
- Referring the super-complaint to another consumer enforcement body.
- Finding the super-complaint requires no action.
- Finding the super-complaint to be unfounded.
- Dismissing the super-complaint as frivolous or vexatious.

7.13 This list is not exhaustive. It should also be noted that a super-complaint could generate more than one outcome depending on the issues raised.

Further information

7.14 Further information on how the UR, the CMA and the other concurrent regulators investigate super-complaints may be found on their websites.

7.15 More information on super-complaints can be found in CMA guidance 'Super-complaints: Guidance for designated consumer bodies' (OFT512)[140].

[140] This guidance is available from www.gov.uk/cma.

Appendix 1

Glossary

Abbreviation	Explanation
AECs	Adverse effects on competition
BIS	Department for Business, Innovation and Skills
CA98	Competition Act 1998
CA98 Rules	Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014
CAT	Competition Appeal Tribunal
CC	Competition Commission
CCPC	Competition and Consumer Protection Commission in the Republic of Ireland
CDDA	Company Disqualification Act 1986
CDO	Competition Disqualification Order
CDU	Competition Disqualification Undertaking
CMA	Competition and Markets Authority
Concurrency Regulations	Competition Act 1998 (Concurrency) Regulations 2014
CRA15	Consumer Rights Act 2015
DETI	Department for Enterprise, Trade and Investment
DPA98	Data Protection Act 1998
DRD	Department for Regional Development
EA02	Enterprise Act 2002
EC	European Commission
ECN	European Competition Network
Energy Order	The Energy (Northern Ireland) Order 2003
ERRA13	Enterprise and Regulatory Reform Act 2013

EU	European Union
FOIA00	Freedom of Information Act 2000
ICO	Information Commissioner's Office
MIRs	Market investigation references
NCA	National Competition Authority
OFT	Office of Fair Trading
SO	Statement of objections
SRO	Senior responsible officer
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKCN	UK Competition Network
Utility Regulator or UR	The Northern Ireland Authority for Utility Regulator
Water Order	The Water and Sewerage Services (Northern Ireland) Order 2006

Appendix 2

How to contact the Utility Regulator about a competition issue

Please use this form to notify any issues relating to a market not working well, unfair terms in a contract, or any issues related to poor competition.

The Utility Regulator welcomes information about practices in the marketplace, but cannot respond in detail to individual complaints.

*** denotes mandatory fields**

Your contact details*

***Title:**	
***Forename:**	
***Surname:**	
***Postal address:**	
***Email address:**	

Details of the issue you would like to report*

Which organisation do you represent (if any)?	
Which business are you raising issues about?	
Please describe your issue as precisely as possible below. Any supporting documentation should be attached to the email.	

Which market do you think the issue is in? Please define it in as much detail as possible, using the UK Standard Classification Index*

Names of any other organisations you have contacted about this issue

Please email the completed form to competition@uregni.gov.uk. We will acknowledge receipt of your form.

You can also post the form to: Mr Donald Henry (competition issue), Utility Regulator, Queens House, 14 Queen Street, Belfast BT1 6ED.

Please note the following about the information you have provided:

This information may contribute to our investigations into businesses and markets or other work. If it does so, we may need to contact you but we cannot enter into correspondence regarding the matters you mention otherwise than as required to enable it to perform its statutory functions

Unless you indicate otherwise, we will assume that information you provide is intended to be used by the Utility Regulator in its work, and is to be shared or disclosed only so far as is necessary for statutory purposes and in line with legal requirements. All information provided to us is handled in accordance with our obligations under the Data Protection Act 1998 and with other legislation designed to protect individual privacy and commercial confidentiality.