

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

Guidance

March 2011

OFT1263

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1 PREFACE

- 1.1 We have set out in this guidance document general information for the business and legal communities and other interested parties on the processes that we use when using our powers under the Competition Act 1998 (the **Act**) to investigate suspected infringements of competition law. It supersedes our previous quick guide on how we conduct investigations under the Act entitled *Under Investigation*.¹ You may find it useful to read this document alongside other Office of Fair Trading (**OFT**) documents, including – *Enforcement*,² *OFT Prioritisation Principles*,³ *Powers of Investigation*,⁴ and *Involving third parties in Competition Act investigations*.⁵
- 1.2 In this guidance, we have set out our procedures and explained the way in which we conduct investigations into suspected competition law infringements. This is our current practice as at the date of publication of this document. It may be revised from time to time to reflect changes in best practice or the law and our developing experience in assessing and investigating cases. Please refer to the OFT website to ensure you have the latest version of this guidance.

¹ OFT 426 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft426.pdf

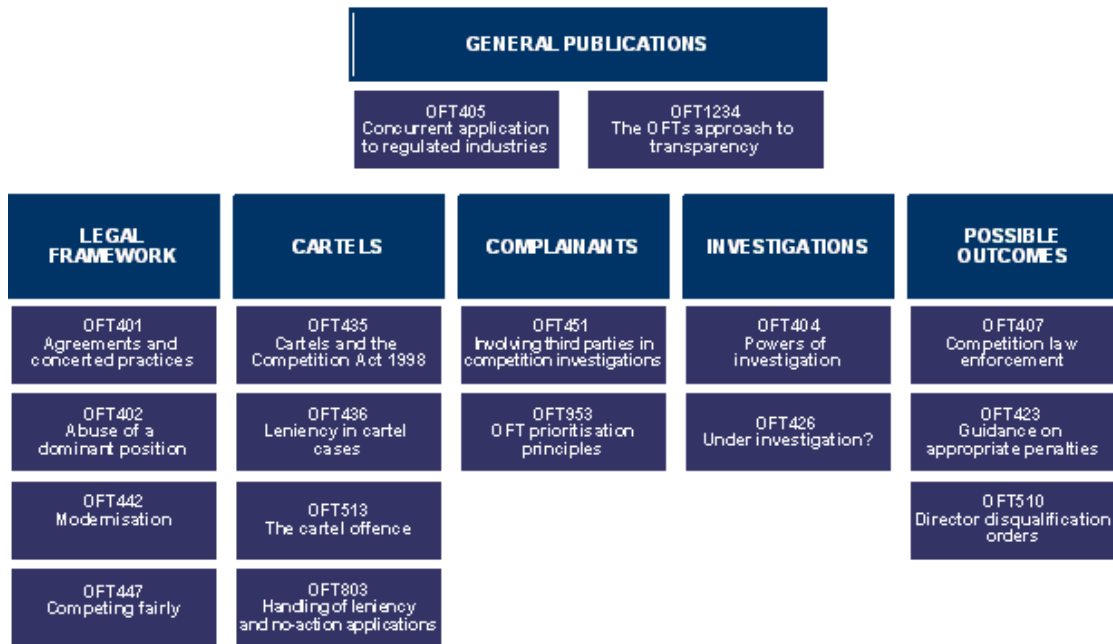
² OFT 407 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf

³ OFT 953 available to download at www.offt.gov.uk/shared_offt/about_offt/oft953.pdf

⁴ OFT 404 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft404.pdf

⁵ OFT 451 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft451.pdf

Figure 1.1 Overview of OFT publications referred to in this guidance



1.3 This guidance is concerned exclusively with our investigations under the Act. It does not cover OFT investigations into individuals suspected of having committed the criminal cartel offence⁶ nor does it cover director disqualification order proceedings.⁷

1.4 This guidance does not cover the procedures used by sectoral regulators⁸ in their competition law investigations. Further guidance on this is

⁶ More information on the criminal cartel offence can be found in OFT 515 available to download at www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/enterprise_act/offt515

⁷ More information on director disqualification orders can be found in OFT 510 available to download at www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/offt510.pdf

⁸ The Office of Communications, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Utility Regulation, the Water Services Regulation Authority, the Office of Rail Regulation, and the Civil Aviation Authority.

available in *Concurrent Application to Regulated Industries*⁹ or from the relevant organisation's website.

- 1.5 This document incorporates the commitments made in our recently published Transparency Statement insofar as they apply to investigations under the Act.¹⁰
- 1.6 We will apply this guidance flexibly. This means that we will have regard to the guidance when we deal with suspected competition law infringements but that, when the facts of an individual case reasonably justify it, we may adopt a different approach. For example, we may adopt a different approach in circumstances where at the same time as conducting an investigation into a suspected competition law breach by a business,¹¹ in parallel we are also looking at whether an individual has committed a criminal cartel offence.
- 1.7 This document is not a definitive statement of, or a substitute for, the law itself and the legal tests which we apply in assessing breaches of competition law are not addressed in this guidance. A range of OFT publications on how we carry out this substantive assessment is available on the [OFT website](#). We recommend that any person who considers that they or their business may be affected by an investigation

⁹ OFT 405 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft405.pdf

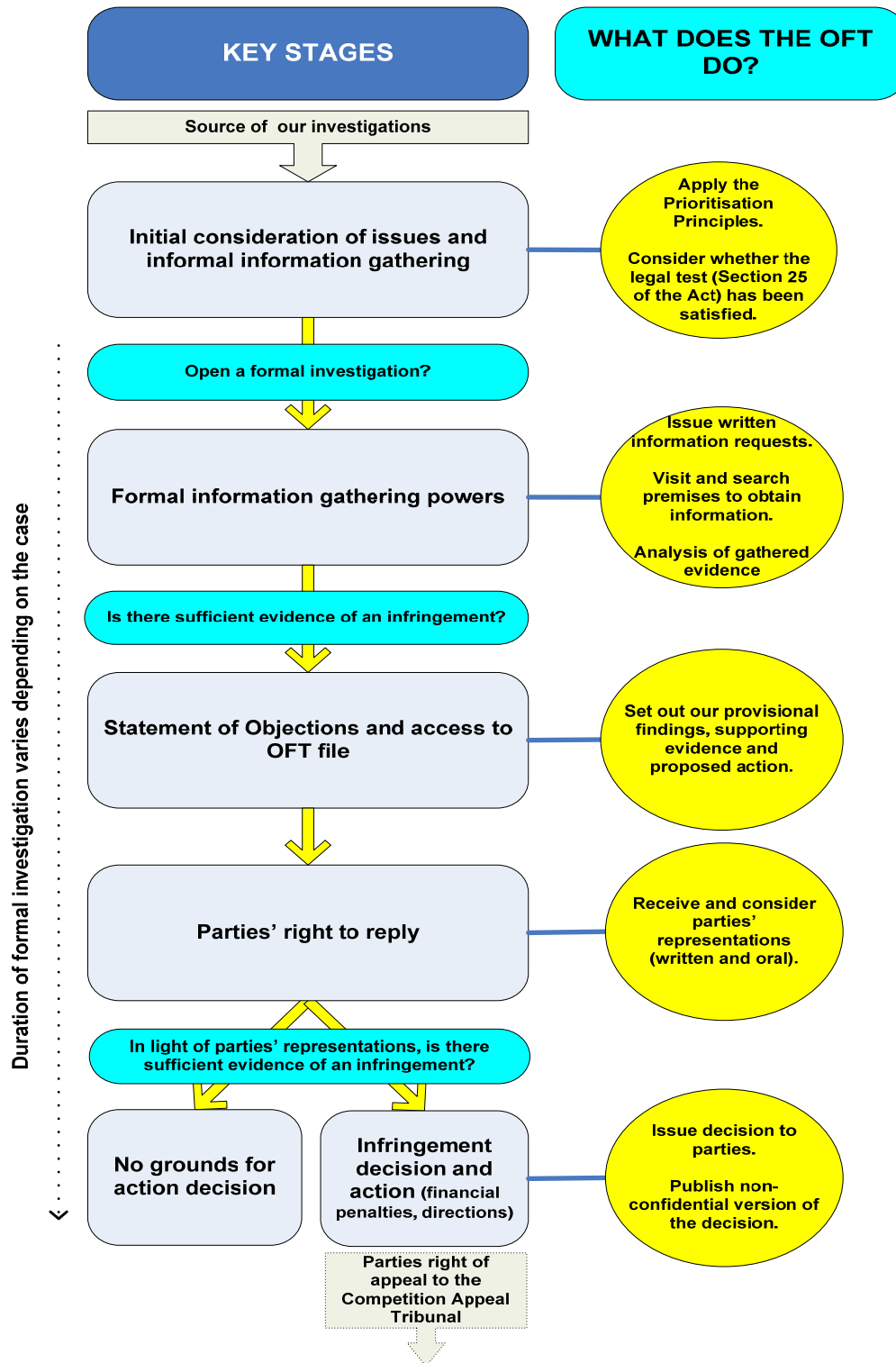
¹⁰ OFT 1234 available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

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

into suspected anti-competitive practices should seek independent legal advice.

- 1.8 This guidance sets out the procedures we follow within the legal framework outlined in Chapter 2. It addresses each stage of a typical investigation in turn. The key stages of an investigation into a suspected infringement and a summary of our action at these stages is set out at figure 1.2.

Figure 1.2 – Key stages in an investigation



2 THE LEGAL FRAMEWORK

- 2.1 The Treaty on the Functioning of the European Union (TFEU) and the Act both prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.
- 2.2 More information on the laws on anti-competitive behaviour is available in the OFT quick guide *Competing Fairly*¹² and in the more detailed guidance on *Agreements and Concerted Practices*¹³ and *Abuse of a dominant position*.¹⁴
- 2.3 In the UK, competition law is applied and enforced principally by the OFT.¹⁵ The Act gives us powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions in the Act and Articles 101 and 102 TFEU.¹⁶
- 2.4 Under EU legislation,¹⁷ as a 'designated national competition authority', when we apply national competition law to a suspected anti-competitive agreement or abusive conduct, and the agreement or conduct may affect

¹² OFT 447 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft447.pdf

¹³ OFT 401 available to download at www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications

¹⁴ OFT 402 available to download at www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications

¹⁵ However, it is open to any person to bring a standalone action in the High Court for an injunction and/or damages as a result of an alleged infringement of competition law. In relation to the regulated sectors (communications, gas, electricity, railways, air traffic services, water and sewerage), the respective sectoral regulators have concurrent powers with the OFT to apply and enforce the legal provisions.

¹⁶ See Chapter III (Investigation and Enforcement) of the Act.

¹⁷ Article 3 of EU Regulation 1/2003.

trade between Member States, we are also required to apply Articles 101 and 102 TFEU.

- 2.5 Further information on the framework for applying Articles 101 and 102 and the interaction with the Chapter I and Chapter II Prohibitions in the Act is available in the OFT guide *Modernisation*.¹⁸
- 2.6 There are procedural rules that apply when we take investigative or enforcement action.¹⁹ In addition, we are required to carry out our investigations and make decisions in a procedurally fair manner according to the standards of administrative law.²⁰
- 2.7 In exercising our functions, as a public body, we must also ensure that we act in a manner that is compatible with the Human Rights Act 1998.

¹⁸ OFT 442 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft442.pdf

¹⁹ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (the **OFT Rules**).

²⁰ See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10.

3 THE SOURCES OF OUR INVESTIGATIONS

Summary

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

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

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

- 3.3 We also rely on information from external sources to bring to our attention potentially anti-competitive conduct. This could be from individuals with so called 'inside' information about a cartel²¹ or from a complainant.

Cartels and leniency

- 3.4 A business which is or has been involved in a cartel²² may wish to take advantage of the benefits of our leniency programme prompting them to approach us with information about its operation.
- 3.5 By confessing to us, a business could gain total immunity from, or a significant reduction in, any financial penalties we can impose if we decide that the arrangement breaches the Chapter I prohibition and/or Article 101 TFEU.²³
- 3.6 It is also a criminal offence for an individual to dishonestly engage in cartel arrangements in the UK. Cooperating current and former employees and directors of companies which obtain immunity from financial penalties will normally receive immunity from prosecution. Also,

²¹ We operate a financial reward programme in exchange for information about the operation of a cartel. For more information, go to www.ofc.gov.uk/OFTwork/cartels-and-competition/cartels/rewards

²² A cartel is an agreement between businesses not to compete with each other. The agreement can often be verbal. Typically, illegal cartels involve cartel members agreeing on price fixing, bid rigging, output quotas or restrictions, and/or market sharing arrangements. In some cartels, more than one of these elements may be present. For the purposes of our leniency programme, price-fixing includes resale price maintenance.

²³ More information on how we set penalties is available in Part 5 of OFT guideline *Enforcement* (OFT 407) available to download at www.ofc.gov.uk/shared_ofc/business_leaflets/ca98_guidelines/oft407.pdf and *Guidance as to the appropriate amount of a penalty* (OFT423) available to download at www.ofc.gov.uk/shared_ofc/business_leaflets/ca98_guidelines/oft423.pdf

an individual who comes forward with information about a cartel may receive immunity from criminal prosecution.²⁴

- 3.7 In addition, we will not apply for a competition disqualification order against any current director of a company whose company has benefited from leniency.²⁵ However, we may apply for an order against a director who has been removed or has otherwise ceased to act as a director of a company owing to his role in the breach of competition law and/or for opposing the application for leniency, or against a director who fails to co-operate with the leniency process.
- 3.8 We encourage business representatives who suspect that their business has been involved in cartel activity to blow the whistle on the cartel.
- 3.9 For more information on what constitutes a cartel, see our quick guide *Cartels and the Competition Act*²⁶ and our guideline *Agreements and Concerted Practices*.²⁷

How to apply for leniency

- 3.10 We handle leniency applications in strict confidence. Applications for lenient treatment under the OFT's leniency programme should be made to the Senior Director or Director of our Cartels and Criminal Enforcement Group (**CCEG**) in the first instance. The contact details of

²⁴ Section 188 of the Enterprise Act 2002. Further guidance is available in *The cartel offence* (OFT 513) available to download at www.of.gov.uk/shared_of/business_leaflets/enterprise_act/oft513.pdf

²⁵ In respect of the activities to which the grant of leniency relates. For further detail, see OFT guidance *Competition Disqualification Orders* (OFT 510) available to download at www.of.gov.uk/shared_of/business_leaflets/enterprise_act/oft510.pdf

²⁶ OFT 435 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_mini_guides/oft435.pdf

²⁷ OFT 401 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft401.pdf

the relevant individuals are available on our website.²⁸ More detailed information on our leniency programme is available in *Leniency in cartel cases*²⁹ and *in Leniency and no-action*.³⁰

Complaints about possible breaches of competition law

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

How to make a competition complaint

- 3.12 If an individual or a business suspects that another business is infringing competition law, they should contact us.
- 3.13 Complaints about suspected cartels should be made by calling our Cartel Hotline on **0800 085 1664** or by emailing us at cartelshotline@oft.gsi.gov.uk. These complaints are handled in confidence by CCEG. Guidance on reporting a suspected cartel to the OFT is available in the OFT quick guide *Cartels and the Competition Act*.³¹
- 3.14 For all other competition related complaints, please call our Enquiries and Reporting Centre (ERC) on **08457 22 44 99** or email us at enquiries@oft.gsi.gov.uk in the first instance. We will be able to advise

²⁸ www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/confess

²⁹ OFT 436 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft436.pdf

³⁰ OFT 803 available to download at www.oft.gov.uk/shared_oft/reports/comp_policy/oft803.pdf

³¹ OFT 435 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft435.pdf

whether the matter is within our remit and, if it is, how to submit a complaint in writing for consideration by our competition experts.

- 3.15 Complaints made to ERC which appear to relate to a suspected cartel will be redirected to the Cartel Hotline. Similarly, complaints to the Cartel Hotline about a non-cartel competition matter will be passed to ERC.
- 3.16 The Annexe to the OFT guideline *Involving third parties in Competition Act investigations*³² also provides guidance and further detail on the type of information that we look for in a written, reasoned complaint.

Pre-complaint discussions

- 3.17 The requirement for a written, reasoned complaint does not preclude complainants from approaching us informally in the first instance. Pre-complaint discussions may be helpful to businesses in deciding whether to commit the necessary time and effort in preparing a reasoned complaint.
- 3.18 In such cases, we will endeavour to give an initial view as to whether we would be likely to investigate the matter further if a formal complaint were to be made. This view would be based both on the likelihood of the complaint raising competition concerns and on the assessment of the complaint against our Prioritisation Principles to see if it falls within our casework priorities at the time (see Chapter 4 for more information on how we prioritise cases). However, any view given at this stage will not commit the OFT to opening an investigation.
- 3.19 To be able to engage in pre-complaint discussions, we would expect to receive a basic level of information in writing from the complainant covering the key aspects of their concerns. This should include:

³² OFT 451 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft451.pdf

- the identity of the complainant and the party/ies to the suspected infringement, and their relationship to one another (for example, whether they are competitors, customers or suppliers)
- the reasons for making the complaint, including a brief description of:
 - the product(s)/service(s) concerned
 - the agreement or conduct the complainant believes to be anti-competitive
 - the type of business operated by the complainant and the party(ies) to the suspected infringement (for example, manufacturer, wholesaler, retailer) and an indication of their geographic scale (for example, local, national, or international)
 - if known, the size of the market and of the parties involved (for example, market shares).

3.20 Whether we engage in pre-complaint discussions will depend on the availability of resource and whether the issue(s) outlined in the basic information suggest to us that the case is one that would merit a prioritisation assessment by us. In cases where pre-complaint discussions are appropriate, we aim to suggest a date for the discussions within ten working days of receiving the required information.

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

Confidentiality of complaints

3.22 We understand that individuals and companies may want to ensure that details of their complaints are not made public. If a complainant has specific concerns about disclosure of their identity or their commercially

sensitive information, they should let us know at the same time as submitting their complaint. We are prohibited³³ from disclosing certain confidential information and while we are considering whether to pursue a complaint we aim to keep the identity of the complainant confidential.

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

³³ Rule 1(1) and 6 of the OFT Rules and Part 9 of the Enterprise Act 2002. However, Part 9 does permit the OFT to disclose confidential information in certain specified circumstances.

4 WHAT WE DO WHEN WE RECEIVE A COMPLAINT

Summary

- We use published Prioritisation Principles to decide which complaints to take forward to the Initial Assessment Phase.
- Prioritised cases will be allocated to one of our groups within Markets and Projects.
- We typically gather information informally at this stage (that is, not using our formal powers of investigation).
- We aim to keep complainants informed of the progress of their complaint.

What we do when we receive a complaint

- 4.1 With the exception of complaints about suspected cartels, all competition complaints should be submitted to our Enquiries and Reporting Centre (**ERC**). Complaints received by ERC about suspected cartel activity are redirected to the Cartel Hotline.
- 4.2 We respond to all complaints we receive. We aim to give an initial response within ten working days of receipt in at least 90 per cent of complaints. Where a competition complaint raises more complex issues, that require longer to assess, we will respond within 30 working days of receipt. All complaints that we receive are given a complaint reference number.
- 4.3 If ERC considers that a complaint relates to possible anti-competitive behaviour (other than cartel activity), the complaint is passed to our Preliminary Investigations team. The Preliminary Investigations team may engage in informal dialogue with the complainant if we need to clarify

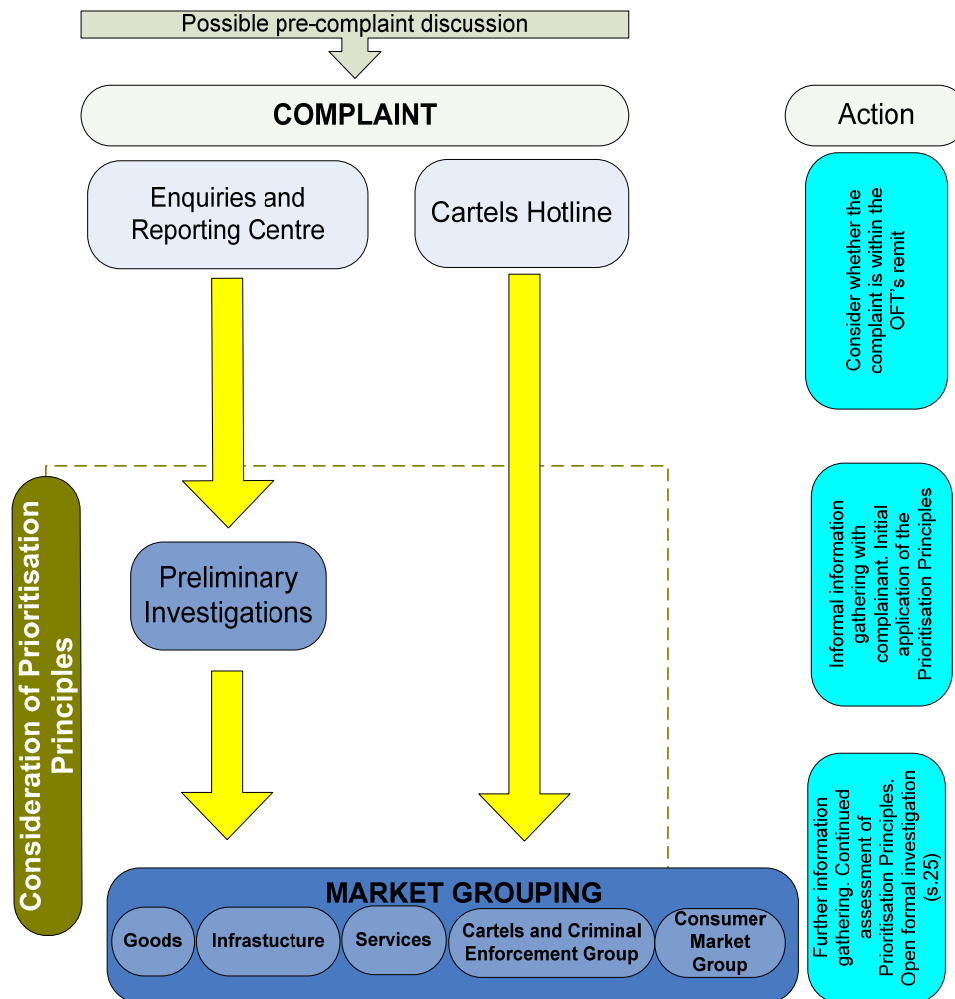
any information provided to us at this stage or if we require additional information.

- 4.4 Although we consider all complaints we receive, we cannot formally investigate all suspected infringements of competition law. We decide which cases to investigate on the basis of our Prioritisation Principles. These take into account the likely **impact** of our investigation in the form of direct or indirect benefits to consumers, the **strategic significance** of the case, the **risks** involved in taking on the case, and the **resources** required to carry out the investigation. The Preliminary Investigations team carries out an initial assessment of whether a complaint satisfies our Prioritisation Principles.
- 4.5 Further information on our Prioritisation Principles and how we apply them in practice is available in the OFT publication *Prioritisation Principles*.³⁴
- 4.6 We aim to keep complainants informed of the progress of their complaint and share with them our expected timescale for dealing with it. In all cases we aim to communicate to the complainant within four months from the date of receipt of their complaint whether we have decided to open a formal investigation.
- 4.7 However, our ability to follow up on a complaint and to determine within four months whether to open a formal investigation depends to a great extent on the timely cooperation of the complainant and the amount and quality of information they provide us with. Well structured written complaints supported by evidence are likely to proceed more rapidly to a prioritisation assessment and, if they are prioritised, to an investigation. They can also assist complainants in being granted Formal Complainant status if we proceed to a formal investigation. See Chapter 5 for more details on the process for becoming a Formal Complainant.

³⁴ OFT 953 available to download at www.offt.gov.uk/OFTwork/publications/publication-categories/corporate/general/oft953

- 4.8 If we decide not to prioritise a complaint at this stage, we will write to the complainant to inform them of the fact. In appropriate cases, we may send a warning letter to a company to inform them that we have been made aware of a possible breach of competition law by them and that, although we are currently not minded to pursue an investigation, we may do so in future if we receive further evidence of a suspected infringement or our prioritisation assessment changes.
- 4.9 Where we prioritise a complaint, the case will be allocated to the appropriate OFT group for formal or further informal investigation.

Figure 1.3 – Complaint Process



Which part of the OFT carries out the investigation?

- 4.10 We have four groups which carry out the majority of competition investigations. These are Services, Goods, Infrastructure, and CCEG (together referred to as the Markets and Projects groups). A chart showing the structure of the OFT is available on the [OFT website](#).
- 4.11 Goods, Services, and Infrastructure are organised around sectors of the economy rather than by legal tools. This means that they are responsible for both competition and consumer casework, and market studies. For example, Services focuses on areas such as financial services and professional services. Goods is responsible for consumer goods such as food, drink, clothing, pharmaceuticals, chemicals, metals, electrical appliances and recreational goods. Infrastructure focuses on areas such as transport, construction, property, the creative industries and the knowledge economy, including information technology. Most cartel investigations are run by CCEG.
- 4.12 However, there is flexibility in the allocation of cases between our Markets and Projects groups. This means that a case that falls into the area covered by one group may be allocated to another group where that group is better placed to carry out the investigation, for instance, where it has more available resources at the time. This may include allocating the case to our Consumer Market Group.
- 4.13 The processes underpinning our investigations and the tools available to us are identical across all our groups.³⁵ Information on the different groups within Markets and Projects is available on the OFT website.³⁶

³⁵ However, any covert surveillance or handling of covert human Intelligence sources under the Regulation of Investigatory Powers Act 2000 will only be carried out by CCEG in relation to investigations into suspected cartels.

³⁶ www.offt.gov.uk/about-the-offt/offt-structure/structure/

Initial assessment phase

- 4.14 Once we have decided to take forward a case within Markets and Projects, we may gather more information from the complainant, the company/ies under investigation, and/or third parties on an informal basis. This may involve sending an informal request for information, a request for clarification of information already provided to us in the complaint, or an invitation to meet with us. In these circumstances, where we are not using our formal powers to gather information, we rely on voluntary cooperation.³⁷
- 4.15 In the case of suspected cartels, however, we are unlikely to contact the companies under investigation informally as to do so may prejudice our investigation. Instead, we typically use our formal information gathering powers from the outset.
- 4.16 On the basis of the information we have gathered at that time, if we consider we have reasonable grounds for suspecting that competition law has been breached, we can open a formal investigation. This allows us to use our formal information gathering powers (see Chapter 6).

³⁷ We can only use our formal information gathering powers where we have reasonable grounds for suspecting that competition law has been breached.

5 OPENING A FORMAL INVESTIGATION

Summary

- The decision to open a formal investigation depends upon whether
 - the legal test that allows us to use our formal investigation powers has been satisfied, and
 - whether the case continues to fall within our casework priorities.
- When we open a formal investigation, the case is allocated a Team Leader, a Project Director and a Senior Responsible Officer.
- In appropriate cases, when we open a formal investigation, we will send the companies under investigation a case initiation letter including contact details for key members of the case team and the identity of the decision maker.
- We will grant Formal Complainant status, in relation to an investigation, to any person who has submitted a written, reasoned complaint to us, who requests Formal Complainant status, and whose interests are, or are likely to be materially affected by the subject-matter of the complaint.
- Formal Complainants have the opportunity to become involved at key stages of our investigation.

- 5.1 If a complaint is likely to progress to a formal investigation, the case is allocated:

- a designated Team Leader, who leads the case team and is responsible for day-to-day running of the case
 - a Project Director, who directs the case and is accountable for delivery of high quality timely output, and
 - a Senior Responsible Officer (**SRO**), who is accountable for delivery of the case.
- 5.2 The SRO decides whether there are sufficient grounds to open a formal investigation and whether the evidential requirements of an infringement have been met. In carrying out these decision-making functions, the SRO consults with other senior OFT officials as appropriate.
- 5.3 For these purposes, the decision to open a formal investigation means deciding whether the legal test³⁸ which allows us to use our formal investigation powers has been met and whether the case continues to fall within our casework priorities.
- 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 indicative timescale – as far as we are able to say at this early stage, and key contact details for the case such as the Team Leader, Project Director and SRO.³⁹
- 5.5 We shall also indicate to the parties in the case initiation letter who the decision maker is. This means the person responsible for the key decisions on the case, including the decision to issue a Statement of Objections (**SO**), the decision to issue a final decision, and the decision

³⁸ Under section 25 of the Act we may use our formal investigation powers where we have reasonable grounds for suspecting that competition law has been breached.

³⁹ See *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.offt.gov.uk/shared_offt/consultations/668117/OFT1234.pdf

to impose a financial penalty and/or directions. The decision maker is generally, but need not be, the SRO.

- 5.6 In some instances, we will send out a formal information request at the same time as sending the case initiation letter or the information request may form part of the case initiation letter. See Chapter 6 for more information on formal information requests.
- 5.7 In some cases, it will not be appropriate to issue a case initiation letter at the start of a case, as to do so may prejudice our investigation, such as prior to unannounced inspections or witness interviews. In these cases, we will send out the letter as soon as possible.
- 5.8 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.

Granting Formal Complainant status

- 5.9 We will grant Formal Complainant status in relation to an investigation to any person who has submitted a written, reasoned complaint to us, who requests Formal Complainant status, and whose interests are, or are likely to be materially affected by the subject-matter of the complaint. Typically, we will remind complainants who have submitted a written, reasoned complaint but who have not requested formal status that they may apply to be treated as a Formal Complainant. We may grant Formal Complainant status to more than one complainant in an investigation.
- 5.10 The principal advantage of acquiring this status is that Formal Complainants have the opportunity to become involved at key stages of our investigation.
- 5.11 For example, we will consider providing Formal Complainants with access to the same information available to companies under investigation at the outset of our formal investigation. This will depend on the circumstances of the individual case. Where we do provide such information, the Formal Complainant is under a legal obligation to

respect its confidentiality. Later on, we will also invite Formal Complainants to comment, usually in writing, on the provisional findings in our SO through a structured process, before our investigation is concluded. See Chapter 12 for more detail on this.

- 5.12 Other interested third parties who are not Formal Complainants may also have an opportunity to become involved in our investigation. For example, we may consider inviting them to comment on our SO where we consider that it would be appropriate to do so.
- 5.13 More information on the involvement in OFT investigations of Formal Complainants and other interested third parties is available in the OFT guideline *Involving third parties in Competition Act investigations*.⁴⁰

⁴⁰ OFT 451 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft451.pdf

6 OUR FORMAL POWERS OF INVESTIGATION

Summary

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

Information gathering powers

- 6.1 We have a range of powers to obtain information to help us establish whether an infringement has been committed. We can require the production of specified documents or information, enter premises without a warrant, and enter and search premises with a warrant. The entering of premises can be with or without notice.
- 6.2 The following paragraphs give an overview of the extent of our formal powers and how we use them. More detailed guidance is available in the OFT guideline *Powers of Investigation*.⁴¹

⁴¹ OFT 404 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft404.pdf

Written information requests

- 6.3 This is the power we use most often to gather information during our investigations. We send out formal information requests (also referred to as section 26 notices)⁴² in writing to obtain information from a range of sources such as the business(es) under investigation, their competitors and customers, complainants, and suppliers. It is a criminal offence punishable by a fine or imprisonment not to comply with a formal information request without a lawful excuse,⁴³ or to provide false or misleading information,⁴⁴ or to destroy, falsify or conceal documents.⁴⁵
- 6.4 Under this power, we can also ask for information that is not already written down, for example market share estimates based on knowledge or experience, and we can also require past or present employees of the business providing the document to explain any document that is produced. Examples of the types of information we may ask for include internal business reports, copies of e-mails and other internal data.
- 6.5 Our request will tell the recipient what the investigation is about, specify or describe the documents and/or information that we require, give details of where and when they must be produced, and set out the offences that may be committed if the recipient does not comply.
- 6.6 We may send out more than one request to the same person or company during the course of our investigation. For example, we may ask for

⁴² Section 26 of the Act gives us the power to require the production of information and documents when conducting a formal investigation.

⁴³ Section 42 of the Act. For more information on potential criminal penalties for failing to co-operate with our powers of investigation go to *Powers of Investigation* OFT 404 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft404.pdf

⁴⁴ Section 44 of the Act.

⁴⁵ Section 43 of the Act.

additional information after considering material submitted to us in response to an earlier request.

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

Using draft information requests

- 6.8 Where it is practical and appropriate to do so, we will send the information request in draft.⁴⁶ In this way, we can take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which we must receive the information. The timeframe for comment on the draft will depend on the nature and scope of the request.
- 6.9 In certain circumstances, it would not be appropriate to send information requests in draft. For example, if in our view it would prejudice our investigation or if it would be inefficient because the request is for a small amount of information. We will assess each case on its facts to determine whether it would be appropriate to use a draft information request.

Advance notice of the issue of written information requests

- 6.10 In appropriate cases, we will seek to give recipients of large information requests advance notice so they can manage their resources accordingly. This is our usual approach.
- 6.11 However, in other circumstances, it may be inappropriate to give advance notice, such as where the request is for a small amount of

⁴⁶ See *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

information, the need for the information was unexpected, or where giving notice would prejudice our investigation. Where we do not give advance notice of large information requests, we will explain why.

Setting a deadline for a response to a written information request

- 6.12 When we send out a request, we also set a deadline by which we must receive the response. If a request has been provided in draft and the timescale for response to the final request already discussed, we will agree to an extension only in exceptional circumstances, so as to minimise any delay to our investigation.
- 6.13 The deadline specified in the final request will depend on the nature and the amount of information that we have requested. It is not possible for us to apply uniform, set timescales for responses to information requests.
- 6.14 Where a party has a complaint about the deadline set for a response to a written information request, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Adjudicator during the trial period.⁴⁷

Responding to our written information requests

- 6.15 As stated above, we expect recipients to comply fully with our information request within the given deadline. This is especially the case where we have engaged with them on the scope and purpose of the request, to help them comply. It is a criminal offence punishable by a fine or imprisonment not to comply with a formal information request

⁴⁷ See Chapter 14, details of trial available through www.ofc.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/

without a lawful excuse,⁴⁸ or to provide false or misleading information,⁴⁹ or to destroy or falsify documents.⁵⁰

- 6.16 Unless otherwise indicated, the response should be sent to the Team Leader in electronic format and in hard copy. If the response contains commercially sensitive information or details of an individual's private affairs and the sender believes that disclosure might significantly harm their interests or the interests of the individual, a separate non-confidential version along with an explanation which justifies why certain information should be treated as confidential should be submitted at the same time and in any event no later than four weeks from the date of submitting the original response. Any extensions to this deadline should be agreed with the Team Leader in advance of the deadline. In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information. See Chapter 7 on handling of confidential information.
- 6.17 In some cases, we may return information sent to us in response to a request where, after careful review, we consider it is duplicate information or information that is outside the nature and scope of the request.

Power to enter premises

- 6.18 In some cases, we will visit premises to obtain information. The power we use to gain entry will depend on whether we intend to inspect

⁴⁸ See footnote 43 above.

⁴⁹ See footnote 44 above.

⁵⁰ See footnote 45 above.

business premises (such as an office or a warehouse) or domestic premises (such as the home of an employee).⁵¹

- 6.19 Under certain circumstances we can enter business premises, but not domestic premises, without a warrant. Where we have obtained a warrant⁵² in advance of entry, we can enter and search both business and domestic premises. These two powers (to enter premises without a warrant and to enter premises with a warrant) are explained below.
- 6.20 The occupier of the premises does not have to be suspected of having breached competition law.⁵³

Entering premises without a warrant⁵⁴

- 6.21 An OFT officer who is authorised by us in writing to enter premises but does not have a warrant may enter business premises in connection with an investigation if they have given the premises' occupier at least two working days' written notice.
- 6.22 In certain circumstances, we do not have to give advance notice of entry.⁵⁵ For example, we do not have to give advance notice if we have

⁵¹ We also have powers to gather information to assist other authorities in relation to their investigations into suspected competition infringements in other parts of the EU. For example, we may assist the European Commission in obtaining information in relation to its investigations into suspected infringements of Articles 101 and 102 TFEU. More information on these powers can be found in *Powers of Investigation* (OFT 404) which is available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft404.pdf

⁵² From the High Court in England and Wales or Northern Ireland or the Court of Session in Scotland.

⁵³ For example, we could enter the premises of a supplier or a customer of the business suspected of breaching the law, so long as we have taken all reasonably practicable steps to notify them in advance of our intended entry.

⁵⁴ Section 27 of the Act.

reasonable suspicion that the premises are, or have been, occupied by a party to an agreement which we are investigating or a business whose conduct we are investigating, or if our authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

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

- 6.23 When an inspection without a warrant is taking place, our officers may require any person to:
- produce any document that may be relevant to our investigation - our officers can take copies of, or extracts from, any document produced
 - provide an explanation of any document produced
 - tell us where a document can be found if our officers believe it is relevant to our investigation.
- 6.24 Our officers may also require any relevant information electronically stored to be produced in a form that can be read and taken away, and they may also take steps necessary to preserve documents or prevent interference with them.⁵⁶

Entering and searching premises with a warrant⁵⁷

- 6.25 We can apply to the court⁵⁸ for a warrant to enter and search business or domestic premises.

⁵⁵ Section 27(3) of the Act.

⁵⁶ Section 27(5) of the Act.

⁵⁷ Section 28 of the Act in relation to business premises. Section 28A of the Act in relation to domestic premises.

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

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

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

6.28 In addition to our powers described above, the warrant also authorises our officers to search the premises for documents that appear to be of the kind covered by the warrant and take copies of or extracts from them.⁵⁹

6.29 The search may cover offices, desks, filing cabinets, electronic devices, such as computers and phones, as well as any documents. We can also take away from the premises:⁶⁰

- original documents that appear to be covered by the warrant if we think it is necessary to preserve the documents or prevent interference

⁵⁸ The High Court in England and Wales or Northern Ireland or the Court of Session in Scotland.

⁵⁹ For business premises, section 28(2)(b) of the Act. For domestic premises, section 28A(2)(b) of the Act.

⁶⁰ For business premises, section 28(2)(c) of the Act. For domestic premises, section 28A(2)(c) of the Act. We can only retain these documents for a maximum period of three months (for business premises, section 28(7) of the Act. For domestic premises, section 28(A)(8) of the Act).

with them or where it is not practicable to take copies of them on the premises.

- any document, or copies of it, to determine whether it is relevant to our investigation, when it is not practicable to do so at the premises. If we consider later on that the information is outside the scope of our investigation, we will return it.⁶¹
- any relevant document, or copies of it, contained in something else where it is not practicable to separate out the relevant document at the premises. As above, we will return information if we consider later on that it is outside the scope of our investigation.
- copies of computer hard drives, mobile phones, mobile email devices and other electronic devices.

What will happen upon arrival?

- 6.30 Our authorised officers will normally arrive at the premises during office hours. On entry, they will provide evidence of their identity, written authorisation by the OFT, and a document setting out what the investigation is about and describing what criminal offences may be committed if a person fails to co-operate. A separate document will also be provided that sets out the powers of the authorised officers and the right of the occupier to request that a legal adviser is present.
- 6.31 Where we have obtained a warrant, we will produce it on entry. The warrant will list the names of the OFT officers authorised to exercise the powers under the warrant and will state what the investigation is about and describe the criminal offences that may be committed if a person fails to co-operate.

⁶¹ However, the OFT may retain all of the material if it is not reasonably practicable to separate the relevant information from the irrelevant information without prejudicing its lawful use, for example as evidence.

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

Can a legal adviser be present?

- 6.33 The occupier may ask legal advisers to be present during an inspection, whether conducted with or without a warrant. If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, our officers may wait a short time for legal advisers to arrive.⁶²
- 6.34 During this time, we may take necessary measures to prevent tampering with evidence or warning other companies about our investigation.⁶³

What if there is nobody at the premises?

- 6.35 If there is no one at the premises when our officers arrive, our officers must take reasonable steps to inform the occupier that we intend to enter the premises. Once we have informed them, or taken such steps as we are able to inform them, we must allow the occupier or their legal or other representative a reasonable opportunity to be present when we carry out our search under the warrant.⁶⁴
- 6.36 If our officers have not been able to give prior notice, we must leave a copy of the warrant in a prominent place on the premises. If, having taken the necessary steps, we have entered premises that are

⁶² Rule 3(1) of the OFT Rules.

⁶³ This could include sealing filing cabinets, keeping business records in the same state and place as when OFT officers arrived, suspending external e-mail or making and receiving calls, and/or allowing our officers to enter and remain in offices of their choosing. It may be a criminal offence to tamper with evidence protected in this way.

⁶⁴ Rule 3(1) of the OFT Rules

unoccupied, on leaving we must leave them secured as effectively as we found them.⁶⁵

⁶⁵ For business premises, section 28(5). For domestic premises, section 28A(6) of the Act.

7 LIMITS ON OUR POWERS OF INVESTIGATION

Summary

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

Privileged communications

- 7.1 Under the Act, we are not allowed to use our powers of investigation to require anyone to produce privileged communications.⁶⁶
- 7.2 Privileged communications are communications, or parts of such communications, between a professional legal adviser and their client for the purposes of giving or receiving legal advice, or those which are made in connection with, or in contemplation of, legal proceedings, and for the purposes of those proceedings. For example, this would cover a letter from a company's lawyer to the company advising on whether a particular agreement infringed the law.

⁶⁶ Section 30 of the Act.

7.3 If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, our officer may request that the communications are placed in a sealed envelope or package. The officer will then discuss the arrangements for safe-keeping of these items by the OFT pending resolution of the dispute.

Privilege against self-incrimination

7.4 When we request information or explanations we cannot force a business to provide answers that would require an admission that they have infringed the law.⁶⁷ We can, however, ask for any documents already in existence, or information relating to facts, such as whether a given employee attended a particular meeting.

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

Handling confidential information

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

7.7 There are strict rules governing the extent to which we are permitted to disclose such information.⁶⁸ In many instances we may have to redact documents we propose to disclose to remove any confidential information, for example, by blanking out parts of documents or by aggregating figures.

⁶⁷ Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is given effect in the United Kingdom by the Human Rights Act 1998.

⁶⁸ Rule 6 of the OFT Rules and Part 9 of the Enterprise Act 2002.

- 7.8 If a person or company thinks that any information they are giving us or we have acquired is commercially sensitive or contains details of an individual's private affairs and that disclosing it might significantly harm the interests of the business or person, they should submit a separate non-confidential version of the information in an annexe clearly marked as confidential and set out clearly why the information should be considered confidential. We will not accept blanket or unsubstantiated confidentiality claims. The non-confidential version should be provided at the same time as the original response and in any event no later than four weeks from the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the Team Leader.
- 7.9 In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information.
- 7.10 Where we propose to disclose information identified by the person or business providing it as being confidential, for example where we do not agree that the information in question is confidential and/or where we consider that disclosure of the information is nevertheless necessary, we will give them prior notice of our proposed action, and will give them a reasonable opportunity to make representations to us. We will then inform the party whether or not we still intend to disclose information, after considering all the relevant facts.
- 7.11 Where a party is informed that we do still intend to disclose information and the party is unhappy about this, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with

the SRO, the party may refer the matter to the Procedural Adjudicator during the trial period.⁶⁹

⁶⁹ See Chapter 14, details of trial available through www.ofc.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/

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

Summary

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

8.1 We have the power⁷⁰ to require a business to comply with temporary directions (referred to as 'interim measures') while we complete our investigation.

⁷⁰ Section 35 of the Act.

- 8.2 We may do this where we have started but not yet concluded our investigation and we consider it necessary to act urgently either to prevent serious, irreparable damage to a person or category of persons, or to protect the public interest. We can act on our own initiative or in response to a request to do so.
- 8.3 In most cases, interim measures will have immediate effect. However, if a person fails to comply with them without reasonable excuse, it is our practice to apply to court for an order to require compliance within a specified time limit.
- 8.4 The court can require the person in default or any officer of a company responsible for the default, to pay the costs of obtaining the order.
- 8.5 If the measures relate to the management or administration of a business, the court order can compel the business or any of its officers to comply with them. Failure to comply with a court order will be in contempt of court.

Application for interim measures

- 8.6 Any person who considers that the alleged anti-competitive behaviour of another business is causing them serious, irreparable damage may apply to us to take interim measures.
- 8.7 They should contact the designated Team Leader who is responsible for the case in the first instance. The Team Leader will be able to discuss the information requirements and explain the procedure for dealing with such requests.
- 8.8 Applicants should provide as much information and evidence as possible to demonstrate their case for interim measures and they should also indicate as precisely as possible the nature of the interim measure being sought.

Decision to impose interim measures

- 8.9 We may provisionally decide to give an interim measures direction. In this case we will write to the business to which the directions are addressed setting out the terms of the proposed directions and our reasons for giving them. We will also allow them a reasonable opportunity to make representations to us. Given the time critical nature of the interim measures process, the time allowed may be short.
- 8.10 The business to which the directions are addressed will also be allowed to inspect documents on our file that relate to the proposed directions. We may withhold any documents to the extent to which they contain any confidential information.
- 8.11 After taking into account any representations, we will make our final decision and inform the applicant and any Formal Complainants and the business against which the order is being sought.

Rejecting an application for interim measures

- 8.12 If we provisionally decide to reject an application for interim measures, we will consult with the applicant and any other Formal Complainants before doing so by sending a provisional dismissal letter setting out our principal reasons for rejecting the application. We will give them an opportunity to submit comments and/or additional information within a certain time, the length of which will depend on the case.
- 8.13 If the comments from the applicant or Formal Complainant contain confidential information, a separate non-confidential version must be submitted at the same time (see Chapter 7 on handling confidential information). We may provide this to the business under investigation if we think it appropriate, such as where it may be relevant for the rights of defence.
- 8.14 We will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided to us, if we still decide to reject the application, we will send a

letter to the applicant and any other Formal Complainants and normally the business against which the directions are sought to inform them and give our reasons.

- 8.15 If the additional information from any of these parties does lead us to change our provisional view and decide that we should make an interim measures direction, we will inform the applicant, any other Formal Complainants, and the business against which the directions are sought, and our investigation will continue in the normal way.

Publication

- 8.16 We maintain a register on our website of all interim measures directions.⁷¹ We may also publish them in an appropriate trade journal.
- 8.17 More information on interim measures directions is available in *Enforcement*⁷² and *Involving third parties in Competition Act investigations*.⁷³

⁷¹ The register can be viewed at www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/

⁷² OFT 407 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf

⁷³ OFT 451 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft451.pdf

9 THE ANALYSIS AND REVIEW STAGE

Summary

- Regular review and scrutiny are a key part of our investigation process. Senior officials and advisors, both internal and external, can perform this function.
- We provide case updates to keep parties informed.

- 9.1 The evidence that we gather using our powers described above is fundamental to the outcome of our investigation. In all cases, we routinely review and analyse the information in our possession to test the factual, legal and economic arguments and to establish whether it supports or contradicts the theory/ies of competition harm.
- 9.2 In some cases, an investigation may start out by probing a particular set of circumstances that point to conduct of one type but information may later surface which indicates the existence of another type of potentially anti-competitive behaviour or a different theory of competition harm from that advanced earlier in the investigation. Alternatively, our early analysis may suggest that a large number of businesses have been acting unlawfully but later on it emerges that we only have enough evidence to warrant further investigation of some of them. We may also exercise our administrative discretion to focus our resources on investigating a limited set of activities or businesses.
- 9.3 The analysis and review stage therefore forms an essential part of our investigation process. In addition to carrying out their own analysis, our case teams seek input from other areas of the OFT to assist them.

Internal scrutiny

- 9.4 The SRO⁷⁴ decides whether there is sufficient evidence to prove an infringement. The SRO is also responsible and accountable for the consistency of OFT's decisions with the law and OFT policy. In exercising these functions the SRO consults with other senior officials as appropriate.
- 9.5 Throughout our competition investigations, as part of the quality assurance that we adopt in every case, we regularly scrutinise the way in which we handle our investigation and routinely assess the evidence before us to ensure that our actions and decisions are well-founded, fair and robust. This involves seeking internal advice as appropriate from specialist advisors on the legal, policy and economic issues that arise. In some instances, we may also seek advice from external sources, such as external counsel.
- 9.6 Our specialist advisers in the Chief Economist's Office (OCE), General Counsel's Office (GCO) and Policy analyse and review the relevant facts and highlight the risks associated with each possible course of action. They will give their recommendation on how to proceed, which may agree or disagree with the proposed approach advocated by the case team. Ultimately, the decision maker will decide which course of action to adopt after considering all the relevant facts and the full range of views articulated, including consulting other senior OFT officials as appropriate.

Case steering committee

- 9.7 Before we issue an SO or a final decision the decision maker will consult with a steering committee. The SRO or case team may also consult with a steering committee at other stages of an investigation, for example where they feel a complex issue may benefit from a wider discussion. A steering committee is made up of a range of senior officials and other

⁷⁴ See paragraph 5.2.

staff from across the OFT who have relevant experience which can be of value to that particular case.

- 9.8 Steering committees do not take decisions on how to run cases. Rather, their role is to provide the case team and decision maker with strategic advice and guidance. As steering committees are made up of staff from across the OFT, they also help consistency across our portfolio of competition cases. The nature of the competition concerns and the type of issues to be addressed will influence the membership of a steering committee. Steering committee meetings are chaired by the SRO.
- 9.9 The case team will present their analysis of the issue under consideration to the steering committee and propose their preferred option on how to proceed. The committee may carry out a number of functions, for example:
- debate the case team's proposals and give feedback
 - review the substance of the issues raised by the case team and highlight strengths and weaknesses
 - provide quality assurance to the analysis undertaken and the options considered by the case team
 - make suggestions relating to other activities that may be carried out and strategy.
- 9.10 After hearing the committee's advice, the decision maker in consultation with the case team will decide how best to proceed with the investigation.

Sharing our early thinking and giving regular updates

- 9.11 The time taken to establish the facts and whether they point to an infringement of competition law will vary from case to case depending on a range of factors such as, for example, the number of parties under investigation, the extent to which they cooperate with us, and the complexity of the conduct under consideration. In many cases, the facts

advanced by one party will directly contradict those put forward by another party. The purpose of our investigation is to establish which set of circumstances is more credible based on verifiable facts.

- 9.12 We generally provide case updates to companies under investigation and Formal Complainants either by telephone or in writing. These are often the most efficient and effective ways of sharing information on case progress for us and the parties alike.
- 9.13 At least once during the period before an SO is issued, we will offer all parties under investigation an opportunity to meet with representatives of the case team (including the SRO or Project Director) to ensure they are aware of the stage the investigation has reached. This meeting is generally limited to procedural matters and is not an opportunity to make representations on the substance of the case. We will inform the parties of the next stages of the investigation and the likely timing of these, subject to any restrictions we may have if the timing is market sensitive.⁷⁵ In some cases, we may decide it is appropriate to share our provisional thinking on a case.⁷⁶
- 9.14 In appropriate circumstances, we may also meet with parties on other occasions. This may be where they have new information that can materially assist us in taking forward our case. Parties who believe that a meeting of this kind would be useful should contact the Team Leader in the first instance to discuss the matter.
- 9.15 As a matter of routine, we inform all businesses under investigation and Formal Complainants of the expected date of issue of our SO, in cases where we propose to decide that an infringement has occurred, and of

⁷⁵ As to market sensitivity considerations, see para. 3.27-3.42 (and particularly para. 3.28) of *Transparency – A Statement on the OFT's approach* (OFT 1234), available to download at www.offt.gov.uk/shared_offt/consultations/668117/OFT1234.pdf

⁷⁶ See *Transparency – A Statement on the OFT's approach* (OFT 1234), *ibid.*

our final decision. Where we are subsequently unable to meet the expected date, we will give our reasons for this.

9.16 We also publish regular updates on our website so that other interested parties are aware of case progress.

9.17 We have published a Transparency Statement on our website, setting out the steps we take to ensure our work is open and accessible⁷⁷. If you have a concern or complaint about our procedures or the handling of a case, you should contact the SRO in the first instance. If you are unable to resolve the dispute with the SRO, certain procedural complaints may be referred to the Procedural Adjudicator during the trial period.⁷⁸ If your dispute falls outside the scope of the Procedural Adjudicator trial, the Transparency Statement sets out the options available to you to pursue the complaint.

⁷⁷ Available at www.offt.gov.uk/shared_offt/consultations/668117/OFT1234.pdf

⁷⁸ See Chapter 14, details of trial available through www.offt.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/

10 INVESTIGATION OUTCOMES

Summary

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

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

- We can decide to close our investigation on grounds of administrative priorities.
- We can issue a decision that there are no grounds for action if we have not found evidence of an infringement.

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

Closing our investigations on the grounds of administrative priorities

- 10.2 Not all of our investigations result in a finding that there has been a breach of competition law. We may decide that a formal investigation no longer merits the continued allocation of our resources because it no longer fits within our casework priorities and/or because we do not have sufficient evidence in our possession to determine whether a breach has been committed and we consider that further investigation is not warranted. We may take this decision at any stage of our investigation.
- 10.3 If we decide to close an investigation on the grounds of administrative priorities, we will inform any Formal Complainants in writing, setting out our principal reasons for not taking forward the investigation. The amount of detail given will vary according to the circumstances of each case. In more advanced investigations we are likely to give more details than in the case of complaints which have not been the subject of extensive investigation.
- 10.4 We will give Formal Complainants an opportunity to submit their comments or any additional information within a specified time frame. Generally, we will give two to four weeks to respond. In complex cases which have been extensively investigated, we may give longer.

- 10.5 If a Formal Complainant's response contains confidential information, they will be asked to submit a separate non-confidential version at the same time (see Chapter 7 on handling confidential information). We may provide this to the company we are investigating if we think it appropriate, such as if it is likely to change our preliminary view.
- 10.6 We will also give a copy of the provisional closure letter to the business under investigation giving them an opportunity to comment within the same time frame.
- 10.7 We will consider any comments and further evidence submitted within the specified time limit before reaching a final view on whether to close our investigation.
- 10.8 If we decide to close the case, we will write to the Formal Complainant and the business under investigation, explaining why any additional information sent to us has not led us to change our view. The level of detail given will depend on the case and the nature of the additional information provided.
- 10.9 In these circumstances, we may also write to the business under investigation to inform them that we have been made aware of a possible breach of competition law by them and that although we are currently not minded to pursue an investigation, we may do so in future if our priorities change, for example in response to further evidence we receive.
- 10.10 We will also issue a public statement linking to the relevant page on our website and explain why we have closed the case on administrative priority grounds.
- 10.11 If the response to our provisional closure letter leads us to change our preliminary view and decide that an investigation should be continued, we will inform the company under investigation and the Formal Complainant and continue our investigation in the normal way.

Issuing a no grounds for action decision

- 10.12 If we do not find evidence of a competition law infringement, we may publish a reasoned no grounds for action decision.⁷⁹
- 10.13 In such cases, we will provide a non-confidential version of our proposed decision to the Formal Complainant. The consultation process on the proposed decision will be the same as for provisional case closure letters.
- 10.14 Further information is available in *Involving third parties in Competition Act investigations*.⁸⁰

Accepting commitments on future conduct

- 10.15 If we consider that the case gives rise to competition concerns, instead of making a provisional infringement decision (see Chapter 11 below), we may be prepared to accept binding promises, called 'commitments', from a business relating to their future conduct.⁸¹ We must be satisfied that the commitments offered fully address our competition concerns. The decision to accept commitments is at our discretion.
- 10.16 We are likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.
- 10.17 We are very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position.

⁷⁹ Rule 7(3) of the OFT Rules.

⁸⁰ OFT 451 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft451.pdf

⁸¹ Section 31A of the Act.

- 10.18 A business under investigation can offer commitments at any time during the course of that investigation, until a decision is made. However, we are unlikely to consider it appropriate to accept commitments at a very late stage in our investigation, such as after we have considered representations on our SO.
- 10.19 If a business would like to discuss offering commitments, they should contact the Team Leader in the first instance. If we think that commitments may be appropriate, we will send a summary of our competition concerns to the business. Once commitments have been offered, we may discuss them with the business to see if they would be acceptable to us.
- 10.20 If we propose to accept the commitments offered, we will consult those who are likely to be affected by them and give them an opportunity to give us their views within a time limit of at least 11 working days.
- 10.21 Following this, if we intend to make significant changes to the commitments before accepting them, we will allow another opportunity for Formal Complainants and any other interested third parties to express their views within at least six working days.
- 10.22 Once accepted, we will publish the commitments on our website.
- 10.23 Further information on our approach to commitments is contained in the OFT guideline *Enforcement*.⁸²

Issuing a statement of objections

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

⁸² OFT 407 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf

11 ISSUING OUR PROVISIONAL FINDINGS – THE STATEMENT OF OBJECTIONS

Summary

- Where our provisional view is that the conduct under investigation amounts to an infringement, we will issue our Statement of Objections to each business we consider to be responsible for the infringement.
- The decision maker is responsible for the decision to issue a Statement of Objections.
- The Statement of Objections represents our provisional view and proposed next steps. It allows the business being accused of breaching competition law an opportunity to know the full case against them.
- We give each recipient of our Statement of Objections an opportunity to inspect our investigation file.
- At this stage, we may also invite the Statement of Objections recipient to contact us if they would like to enter into discussions on an early resolution to the case.

11.1 Following the analysis of the evidence on our files, if our provisional view is that the conduct under investigation amounts to an infringement, we will issue our SO to each business we consider to be responsible for the infringement and give them an opportunity to inspect our file.⁸³

⁸³ Rule 4 of the OFT Rules.

- 11.2 At this stage, we may also invite SO recipients to contact us if they would like to enter into discussions on an early resolution to the case. The early resolution process, also known as the settlement process, applies where a business under investigation admits that it has breached competition law and co-operates with our investigation. In return for an admission and cooperation we will impose a reduced penalty on the business. Businesses may wish to approach us earlier on in our investigation to discuss the possibility of exploring early resolution. If so, they should contact the Team Leader in the first instance. Typically, however, consideration of early resolution will be appropriate when we consider that the evidential standard for an infringement is met. Early resolution will not be appropriate in every case and we will exercise our discretion on a case by case basis to decide whether or not it would be appropriate to offer to enter into early resolution discussions.
- 11.3 The SO represents our provisional view and proposed next steps. It allows the businesses being accused of breaching competition law an opportunity to know the full case against them and, if they choose to do so, to formally respond in writing and orally.
- 11.4 The SO will set out the facts and our legal and economic assessment of them which led to our provisional view that an infringement has occurred. We will also set out any action we propose to take, such as imposing financial penalties⁸⁴ and/or issuing directions⁸⁵ to stop the infringement if we believe it is ongoing and our reasons for taking the action.

⁸⁴ More information on how we set penalties is available in Part 5 of OFT guideline *Enforcement* (OFT 407) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft407.pdf and *Guidance as to the appropriate amount of a penalty* (OFT423) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf

⁸⁵ More information on directions can be found in *Enforcement* (OFT407) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft407.pdf

- 11.5 It is our current practice to send a hard copy of the SO and covering letter to recipients by courier or recorded delivery. Typically, we also provide an electronic copy in pdf format.
- 11.6 It is our normal practice publicly to announce the issue of the SO on our website and to make an announcement on the Regulatory News Service.⁸⁶
- 11.7 As far as possible, we aim to give the directly affected parties fair and sufficient notice, as well as advance sight of announcement documents, to enable them to prepare their response.
- 11.8 The timing of the announcement and any advance notice will depend on whether there is any market sensitivity about the announcement. We have to balance our responsibilities concerning the control and release of market sensitive information against our objective of, as far as possible, giving directly affected parties fair and sufficient notice.
- 11.9 As a general rule, if there is no market or other sensitivity about the fact or date of the announcement, we will be open about the date and publish the date on our website, up to several days before the full announcement. We will tell affected parties in advance of placing any statement on the substance of the matter on our website. The exact notice given will depend on the circumstances of the particular case in point.
- 11.10 Generally, in non-market sensitive announcements, we aim to give parties advance sight of the content of our announcement, in confidence, unless there is a compelling reason no to do so.
- 11.11 In the case of market sensitive announcements, where appropriate, we will apply the FSA's Guideline for the control and release of price sensitive information by Industry Regulators.⁸⁷

⁸⁶ www.investegate.co.uk

- 11.12 If there is no market or other sensitivity about the date of the announcement as opposed to the content of the announcement, we will be open about the date and publish that date on our website up to several days in advance of the full announcement. We will also inform media organisations. We will tell parties in advance of informing the media or placing any statement about the substance of the matter on our website.
- 11.13 If the date and content of the announcement may be market-sensitive, for example, where nothing about the investigation has previously been announced, we will notify affected parties after financial markets have closed including, where appropriate, financial markets in other countries.
- 11.14 In particular, if the date of the announcement is not in the public domain, we will inform those directly affected in strict confidence the evening before issue once relevant financial markets have closed.
- 11.15 More details about the way in which we publicly announce the issue of an SO is available in our Transparency Statement.⁸⁸

Who decides whether to issue a statement of objections?

- 11.16 The decision maker decides whether to issue an SO. The decision maker may consult other senior OFT officials, such as the Chief Executive, Executive Directors and/or other Senior Directors when carrying out this assessment, in addition to members of the case team.
- 11.17 The decision maker will be chosen at the outset of the formal investigation and companies under investigation will be informed of who the decision maker is (along with details of the other key members of the case team). The decision maker is generally, but need not be, the SRO.

⁸⁷ www.fsa.gov.uk/pubs/ukla/ir_guidelines.pdf

⁸⁸ For a general guide to our approach when we make a public announcement, see *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

If, later on, it is necessary to allocate a new decision maker to the case, we will inform the companies under investigation.

11.18 The decision maker is not involved in day-to-day matters during an investigation. However, they are kept informed of case progress. They have access to all of the evidence and analysis upon which to base their decisions.

Inspection of our file

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

11.20 We allow recipients of the SO a reasonable opportunity, typically six to eight weeks, to inspect copies of disclosable documents on our file. These are documents that relate to matters contained in the SO, but excluding certain confidential information⁸⁹ and OFT internal documents.⁹⁰

11.21 Access to file is usually given by supplying the file in electronic form on a DVD. Where a business does not have the relevant electronic means to view the documents in this way or if there are only a very small number of documents, we will send hard copies. In rare circumstances, businesses can inspect the file on our premises.

⁸⁹ Under Rule 1(1) of the OFT Rules confidential information means commercial information whose disclosure the OFT thinks might significantly harm the legitimate business interests of the company to which it relates, or information relating to the private affairs of an individual whose disclosure the OFT thinks might significantly harm the individual's interests, or information whose disclosure the OFT thinks is contrary to the public interest.

⁹⁰ Rule 5(3) of the OFT Rules.

- 11.22 In addition to sending copies of disclosable documents, we will also send a separate schedule of external documents, which lists all documents held in our file other than internal documents. In some cases, we may send electronic copies of documents as well as the schedule.
- 11.23 We will also consider requests for access to our file by other methods, for example, by using 'confidentiality rings' or 'data rooms'. Such requests will be considered on a case by case basis. We have discretion as to whether or not to agree to such requests and are likely to do so only where there are clearly identifiable benefits in doing so and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned.

12 RIGHT TO REPLY

Summary

- Recipients of the Statement of Objections have an opportunity to respond to it.
- Formal Complainants and third parties who may be able materially to assist our assessment of a case will generally also be provided with an opportunity to comment.
- The decision maker will attend all oral representations meetings unless it is impractical to do so.
- We will carefully and objectively consider all written and oral representations to appraise the case as set out in the Statement of Objections and to assess whether the conclusions reached in the Statement of Objections continue to be supported by the evidence and the facts.
- If we receive new information in response to the Statement of Objections which indicates evidence of a different alleged infringement or a material change in the nature of the infringement, and we propose to rely on this information to establish an infringement, we will issue a supplementary Statement of Objections.

Written representations

- 12.1 When we issue an SO, we will invite each SO recipient to respond in writing. However, there is no obligation to submit a response.
- 12.2 Written representations provide an opportunity to comment on the matters referred to in the SO. This may involve comments regarding the

facts relied on by the OFT and the legal and economic assessment set out in the SO.

- 12.3 The deadline for submitting written representations will be specified in the SO and will be set having regard to the circumstances of the case. Usually the deadline for an SO recipient to submit written representations will be at least 40 working days and no more than 12 weeks from the issue of the SO.
- 12.4 Where a party has a complaint about the deadline set for submitting written representations, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Adjudicator during the trial period.⁹¹
- 12.5 When an SO recipient submits written representations they should also provide a non-confidential version of their representations, along with an explanation which justifies why information should be treated as confidential. We will not accept blanket or unsubstantiated confidentiality claims. The non-confidential version should be provided at the same time as the original response and in any event no later than four weeks from the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the Team Leader.
- 12.6 In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information.

⁹¹ See Chapter 14, details of trial available through www.of.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/.

- 12.7 Formal Complainants and third parties who may be able materially to assist our assessment of a case will generally also be provided with an opportunity to submit written representations. In most cases, disclosure of a non-confidential version of the SO will be sufficient to enable third parties to provide the OFT with informed comments and this will not generally include any annexed documents. The document is for the Formal Complainant's benefit only and should not be disclosed to others. The deadline for a Formal Complainant or third party to submit written representations (along with a non-confidential version) will be between 20 to 30 days from the date on which we send the SO to them.
- 12.8 The non-confidential version of the written representations that have been submitted by a Formal Complainant or third party will be disclosed to the SO recipient to allow them an opportunity to comment. We will not generally allow Formal Complainants and other third parties an opportunity to comment on the SO recipient's written representations, although this may be appropriate in certain circumstances.⁹²
- 12.9 In some cases, we may decide to consult Formal Complainants and third parties to a more limited extent, or not at all, for instance in cartel cases where there is a risk of prejudice to a related criminal investigation.
- 12.10 Further information on the involvement of Formal Complainants and interested third parties at SO stage is available in *Involving third parties in Competition Act investigations*.⁹³

⁹² For example, when the recipient and a third party put forward different versions of the same facts and it is necessary to decide which version is more credible.

⁹³ OFT 451 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft451.pdf

Oral representations

- 12.11 The SO recipient may also request a meeting to make oral representations to us on the matters referred to in the SO.⁹⁴ In this case, they should make it clear in their written representations that they would like to do so. The SO recipient can bring legal or other advisers to the meeting to assist in presenting the oral representations, subject to any reasonable limits that the OFT may set in terms of the number of persons that may attend the meeting on behalf of the SO recipient. Formal Complainants and other interested third parties will generally not be permitted to attend the SO recipient's oral representations meeting.⁹⁵
- 12.12 The meeting at which oral representations are presented will be held around 10 to 20 working days after the deadline for the submission of the written representations.
- 12.13 The decision maker will attend all oral representations meetings unless it is impractical to do so and, where it is, the case team will notify the party in advance of who will attend the meeting on behalf of the decision maker. The meeting will also be attended by members of the case team. The meeting will be chaired by a senior OFT official who is independent of the case team.
- 12.14 To promote a focused and productive meeting, we will ask the SO recipient to give an indication, in advance, of the matters they propose to focus on in their oral representations.
- 12.15 Oral representations should be used by the SO recipient as an opportunity to highlight issues of particular importance to their case, which have been set out in the written representations. The oral

⁹⁴ Rule 5(4) of the OFT Rules.

⁹⁵ In some cases, we may decide that it is appropriate to hold a multi-party meeting, including Formal Complainants and/or other interested third parties.

representations may also provide a useful opportunity for parties to clarify the detail set out in their written representations.

- 12.16 As a general rule, any points raised at this stage should be limited to those already submitted to us in writing.
- 12.17 At the end of the presentation of the oral representations, the case team may have general questions or questions of clarification. It will be helpful for the case team, and is likely to assist the progress of the investigation, if full responses are provided to these questions but there is no obligation to answer. It is possible to respond to questions in writing after the meeting.
- 12.18 A transcript of the oral representations meeting will be taken and the SO recipient will be asked to confirm the accuracy of the transcript and to identify any confidential information. We will not accept blanket or unsubstantiated confidentiality claims.
- 12.19 If the decision maker changes after the oral representations meeting(s) but before we issue a final decision, the new decision maker will review the transcript of the oral representations meeting(s).

Considering representations

- 12.20 In some cases, the volume of information submitted as part of the representations process can be extensive. We will carefully and objectively consider all written and oral representations to appraise the case as set out in the SO and to assess whether the conclusions reached in the SO continue to be supported by the evidence and the facts.
- 12.21 This will primarily involve assessment of the representations by the case team. In addition, other areas of the OFT may be consulted and be involved with the assessment of the representations (see Chapter 9). An original set of all written representations and the transcript from the oral representations meeting will be placed on the case file.

Letter of facts

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

Supplementary statement of objections

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

12.24 We will give the SO recipient a further opportunity to respond in the same way as before. We will set the time frame for responding after taking into account the extent of the difference in the objections raised in the first SO compared with the supplementary SO and allow them an opportunity to inspect new documents on the file. The process will be the same as that set out in Chapter 11. The time frame for responding to a supplementary SO will almost always be shorter than the time given to respond to the original SO.

12.25 If it appears to us unlikely that engaging with Formal Complainants or other interested third parties at this stage will materially assist our investigation, we may decide to consult them on a more limited basis, or not at all. This may be the case, for example, where the supplementary SO is very narrow in scope.

13 THE FINAL DECISION

Summary

- If we decide that the legal test for establishing an infringement is met, we will issue an infringement decision to each business found to have infringed the law.
- The decision maker is responsible for the decision to issue an infringement decision.
- If we do not find evidence of a competition law infringement, we may publish a reasoned decision explaining why.
- A final opportunity will be given to the addressee of the decision to make confidentiality representations.
- The non-confidential version of the decision and the summary will be published on our website.

13.1 The issue of a decision represents the culmination of our investigation. If the decision maker decides that the legal test for establishing an infringement is met, we will issue an infringement decision to each company found to have infringed the law.⁹⁶

13.2 As noted in Chapter 10, if we do not find evidence of a competition law infringement, we may publish a reasoned no grounds for action decision.

⁹⁶ Section 31 of the Act and Rule 7 of the OFT Rules.

Issue of an infringement decision

- 13.3 In addition to an infringement decision, we will issue a press announcement, make an announcement on the Regulatory News Service and publish a page on our website which describes the case.
- 13.4 We will inform the addressee(s) before the issue of the infringement decision, and the announcement of the decision. As a general rule, as described in Chapter 11, in non-market-sensitive announcements, we aim to give parties advance sight of the content of the OFT's announcement, in confidence, unless there is a compelling reason not to do so. In both market-sensitive and non-market sensitive situations, we will aim to balance an open approach with the need to ensure the orderly announcement of full information.⁹⁷
- 13.5 The infringement decision will set out in full the facts on which we rely to prove the infringement, the action that we are taking and address any material representations that have been made during the course of our investigation. If a financial penalty is being imposed, the infringement decision will explain how the level of penalty has been calculated.⁹⁸ The infringement decision may also give directions to bring the infringement to an end.⁹⁹

⁹⁷ For a general guide to our approach when we make a public announcement, see *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

⁹⁸ More information on how we set penalties is available in Part 5 of OFT guideline *Enforcement* (OFT 407) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of407.pdf and *Guidance as to the appropriate amount of a penalty* (OFT423) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf

⁹⁹ Section 32 and 33 of the Act. If a business fails to comply with our directions, we may seek a court order to enforce them under section 34 of the Act.

- 13.6 If the case involves more than one party, each party will receive a copy of the decision. Information that is confidential will be disclosed through the infringement decision to other parties only if disclosure is strictly necessary. Before disclosing any confidential information, we will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If we consider that disclosure might significantly harm legitimate business interests or the interests of an individual, we will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which we are allowed to make the disclosure.¹⁰⁰
- 13.7 After the infringement decision and press announcement have been issued, we will generally notify Formal Complainants and other interested third parties (for example, third parties who have submitted written representations during the investigation) of our decision.

Publication

Confidentiality

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

¹⁰⁰ Section 244 of the Enterprise Act 2002.

Summary

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

Final publication

- 13.10 The non-confidential version of the infringement decision and the summary will be published on the page on our website which describes the case. We also maintain a register¹⁰¹ of decisions in investigations under the Act and the details of the case will be placed on the register.

¹⁰¹ www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/

14 COMPLAINTS ABOUT OUR INVESTIGATION HANDLING, RIGHT OF APPEAL AND REVIEWING OUR PROCESSES

- 14.1 We have published a Transparency Statement¹⁰² on our website setting out the steps we take to ensure our work is open and accessible. Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner when dealing with us. Complaints about responses from ERC should be made to the Head of ERC in the first instance.¹⁰³
- 14.2 Once a formal investigation has been opened, any concerns or complaints about our procedures or how we handle our investigation should be made in writing to the SRO in the first instance. If you are unable to resolve the dispute with the SRO, certain procedural complaints may be referred to the Procedural Adjudicator during the trial period. Details of the Procedural Adjudicator trial are available on our website.¹⁰⁴ If your dispute falls outside the scope of the Procedural Adjudicator trial, the Transparency Statement sets out the options available to you to pursue the complaint.
- 14.3 Addressees of our appealable decisions and third parties with a sufficient interest in our appealable decisions have a right to appeal them to the Competition Appeal Tribunal. Appealable decisions include decisions as to whether there has been a competition law infringement, interim

¹⁰² See figure one in *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

¹⁰³ www.of.gov.uk/about-the-oft/of-structure/governance/complaint

¹⁰⁴ Details of trial available through www.of.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/.

measures decisions and decisions on the imposition of, or the amount of, a penalty.¹⁰⁵

14.4 Where the law does not provide for an appeal, an application for judicial review may be brought in certain circumstances.¹⁰⁶

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

¹⁰⁵ Section 46 of the Act and section 47 of the Act as substituted by section 17 of the Enterprise Act 2002.

¹⁰⁶ A judicial review application may be brought before the Administrative Court of the Queen's Bench Division under Part 54 of the Civil Procedure Rules