

Unclassified**English - Or. English****13 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by the
United Kingdom**

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More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

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1. Relevant legal framework

1. When carrying out investigations under the CA98, the CMA must comply with its statutory rules¹ relating to procedural matters, which are referred to as the ‘CMA’s Rules’ in this document. The CMA’s Rules contain provisions relating to access to the CMA’s case file in CA98 investigations.²
2. The CMA is also under certain statutory obligations under the Enterprise Act 2002 (‘EA02’) to protect confidential information relating to individuals and businesses that comes to the CMA in connection with the exercise of its statutory functions. As set out in more detail further below, the CMA has a legal ‘gateway’ to disclose its case file to parties in a CA98 investigation because this is connected to the exercise of its functions in investigating anti-competitive behaviour under the CA98 and allows parties to exercise their rights of defence (as reflected by the relevant provisions of the CMA’s Rules).
3. More broadly, the CMA, as a UK public authority, must reach decisions in accordance with principles of administrative and public law, which underpin the lawful exercise of power by government. In particular, public authorities, such as the CMA, must ensure their administrative powers are exercised fairly; that is, in accordance with principles of fair procedure, including giving the affected parties an opportunity to be heard. In principle, a breach of procedural fairness is one of the possible grounds for a judicial review of a public authority’s decision by the UK courts.

2. What is the file and when is access provided?

4. In a case under the CA98, where the CMA’s provisional view is that the conduct under investigation amounts to an infringement of competition law, the CMA will issue a Statement of Objections to each business it considers to be responsible for the infringement. The Statement of Objections will set out the facts and the CMA’s legal and economic assessment which led to the provisional view that an infringement occurred.
5. At generally the same time as the issue of the Statement of Objections, these parties will be given an opportunity to inspect the CMA’s ‘file’.
6. The CMA’s Rules set out (at Rule 6(2)) that the CMA: “*must give a relevant party a reasonable opportunity to inspect the documents in the CMA’s file that relate to the matters referred to in the [Statement of Objections]*”. The CMA’s Rules also provide that the CMA’s file as disclosed to parties may exclude certain confidential information and CMA internal documents.³ The second section of this submission describes further how the CMA assesses ‘confidential information’.

¹ The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014 SI 2014/458.

² Rule 6 and Rule 11 of the CMA’s Rules.

³ The term ‘internal document’ is defined in Rule 1(1) of the CMA’s Rules as: (a) a document produced by, or exchanged between, the CMA, a regulator or another public authority and which has not been produced for the purpose of public disclosure by the CMA, a regulator or another public

7. The way that material related to matters under investigation is gathered will depend on the specific powers of investigation used or whether it is provided voluntarily, for example as part of a leniency application. Generally speaking, the file will contain all of the documents obtained by the CMA during the course of the investigation which the CMA considers are relevant to the scope of its investigation, including both inculpatory and exculpatory material. This may, for example, include documents from parties under investigation, documents from third parties, documents from leniency parties (the treatment of leniency information is explained at paragraph 49 below), or documents from other agencies (for example, the concurrent regulators in the UK or national competition authorities in the EU under Regulation 1/2003).

3. Parties who have access to the file

8. If the case involves more than one party, each party will receive a copy of the Statement of Objections, and each party will be given access to the CMA's file. Information that is confidential will be disclosed through the Statement of Objections to other addressees only if disclosure is necessary in order for them to exercise their rights of defence. As set out in the section on 'Confidential information' below, before disclosing any confidential information, the CMA 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 the CMA considers that the disclosure of information in the Statement of Objections might significantly harm legitimate business interests or the interests of an individual, the CMA will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which the CMA is permitted to make the disclosure.

9. Where the CMA is investigating anti-competitive agreements or conduct, the CMA has a discretion to address the Statement of Objections to fewer than all the persons who are, or were, a party to the alleged agreement or conduct. The CMA will notify any party who is not an addressee under Rule 5(3) of the CMA's Rules that a Statement of Objections has been issued and will provide a non-confidential version of the Statement of Objections, following a request by such a party, where it is deemed that it is necessary for them to review it to protect their rights of defence. The CMA will only provide access to documents on its file where it is established that access is required in order for such a party to make representations on the Statement of Objections.

10. The CMA may also provide an opportunity to submit written representations on a non-confidential version of the Statement of Objections to complainants or other third parties who are likely to materially assist the CMA with its investigation and who meet certain criteria. The CMA will not generally provide any additional documents or evidence to such third parties in addition to the non-confidential version of the Statement of Objections.

authority, or (b) a document produced by, or exchanged between, any person from time to time retained under a contract for services by the CMA, a regulator or another public authority and the CMA, a regulator or another public authority and which has not been produced for the purpose of public disclosure.

4. Method for disclosure

11. The CMA is required under the CMA's Rules to allow the addressees of the Statement of Objections a "reasonable opportunity" to inspect its file. The time given will depend on the size of the file, the nature of the documents on the file, and the access to file process being used.

12. Access to the file is generally given at the same time as the issue of the Statement of Objections and is usually provided in electronic form by secure email.

13. Carrying out a confidentiality assessment of all of the documents on the CMA's case file and disclosing redacted versions of all of the documents containing confidential information to parties can be time-consuming and burdensome both for the CMA and for parties involved in the investigation. Prior to issuing the Statement of Objections, the CMA will discuss with the businesses under investigation the process envisaged for giving access to the file.

14. In order to ensure that the access to file process is as efficient as practicable, both for the parties involved and the CMA, the CMA will typically provide addressees with: (a) copies of documents that are directly referred to in the Statement of Objections (commonly referred to by case teams as the 'key' documents), redacted as appropriate; and (b) a schedule containing a detailed list of all of the documents on the file. This schedule would list the 'key' documents, as well as the other documents on the file that are not directly referred to in the Statement of Objections (commonly referred to as 'non-key' documents).

15. Addressees will have a reasonable opportunity to inspect additional documents that are listed in the schedule on request. The CMA will set a reasonable deadline for business to make such requests. Where a business does request access to additional documents in the schedule, the CMA may consider the use of a confidentiality ring and/or data room in order to facilitate the additional disclosure.⁴ This approach to access to file would generally only be carried out with the consent of the relevant parties and, as noted above, would have been discussed with the businesses under investigation in advance of the Statement of Objections being issued.⁵

16. The CMA may consider requests for other methods of providing access to its file on a case-by-case basis, including the use of a confidentiality ring, which might be appropriate where disclosure of a specific category or categories of confidential information would enable a defined group (eg a party's legal advisers) to further their understanding or prepare confidential submissions on behalf of their client.

17. As above, the use of a confidentiality ring to facilitate access to the CMA's file would generally only be carried out with the consent of the parties under investigation, and after the CMA has sought representations from parties who have provided information to the CMA. Access to documents in a confidentiality ring will be subject to confidentiality undertakings⁶ provided by the persons with access (and for employees, their employer firm)

⁴ The CMA will generally use confidentiality rings rather than data rooms in CA98 investigations.

⁵ Where a party is settling with the CMA, it must confirm that it accepts there will be a 'streamlined' administrative process for the remainder of the investigation, which would normally include streamlined access to file arrangements (CMA8, paragraph 14.8).

⁶ The CMA has published template confidentiality undertakings.

which address, amongst other matters, how they may use the information disclosed to them and the restrictions that apply to onward disclosure.

18. After being given access to the confidentiality ring, advisers would have a reasonable opportunity to request their client to have access to additional documents that have been viewed by advisers in the confidentiality ring.

19. The CMA has a discretion as to whether to pursue this type of approach and would be likely to do so only where it is proportionate and there are identifiable benefits, and also where any legal and practical difficulties can be swiftly resolved with the parties concerned. Further information regarding the operation of confidentiality rings is set out in the section on ‘Confidential information’ below.

5. Further evidential material after the issue of the Statement of Objections

20. Where the CMA acquires new evidence after the issue of the Statement of Objections which supports those objections and the CMA is considering relying on it to establish an infringement, the CMA will put that evidence to the addressee in writing (referred to as a ‘letter of facts’) and give it the opportunity to respond to the new evidence.⁷ The time given for responding will be set according to the volume and complexity of the new evidence.

21. If new information received by the CMA in response to the Statement of Objections indicates that there is evidence of a different suspected infringement or there is a material change in the nature of the infringement described in the Statement of Objections the CMA will issue a Supplementary Statement of Objections.⁸

22. The CMA will give the addressees an opportunity to make representations on the Supplementary Statement of Objections. The CMA will set the time frame for responding after taking into account the extent of the difference in the objections raised in the first Statement of Objections compared with the Supplementary Statement of Objections and allow the addressees an opportunity to inspect new documents that have been added to the CMA’s case file.

23. In addition, when the CMA gives notice to addressees that the CMA proposes to impose a penalty for an infringement of the CA98 (referred to as a draft penalty statement), the CMA is required to give the relevant parties a reasonable opportunity to inspect the documents in the CMA’s file that relate to matter set out in the notice.⁹

6. Parties’ use of information on the CMA’s file and consequences for breach of confidentiality

24. It is a criminal offence, punishable by fine and/or imprisonment, for any person to whom information is disclosed in the course of a CMA investigation to disclose or otherwise use the information other than for the purpose of facilitating the exercise of any of the CMA’s functions under the CA98 or any other enactment. Restrictions on the further

⁷ CMA8, paragraph 12.25.

⁸ CMA8, paragraph 12.26 to 12.28.

⁹ Rule 11 of the CMA’s Rules.

disclosure of information apply to the CMA and to other persons to whom it makes disclosure.

25. In practical terms, this means that a person to whom information is disclosed for the purpose of accessing information on the CMA's file (which has not been made publicly available) may use that information for the purpose of responding to the CMA's Statement of Objections, but must not make any onward disclosure of that information.

26. In relation to parties' advisers that have been granted access to a confidentiality ring or data room, unlawful disclosure of the disclosed material may also lead to the reporting of such breaches to their regulatory bodies and to termination of their access to the disclosed material.

7. Access to the CMA's file after its investigation has closed

27. The CMA's Rules do not make provision for investigated parties or other interested third-parties to have access to the case file after an investigation has been concluded. Once an investigation is concluded, the information contained in the case file remains protected under the EA02. This means the CMA remains under a general restriction on the disclosure of such information. The restriction applies during the lifetime of an individual or while the undertaking concerned continues in existence.

28. In these circumstances the CMA could decide disclose information on its case file if one of the 'information gateways' set out in the EA02 applies, which include disclosure to another UK public authority, in pursuance with an EU obligation, or to overseas authorities; having had regard to the three considerations set out in section 244 of the EA02 – see paragraph 33 below.

29. As a public body, the CMA is subject to the Freedom of Information Act 2000 ('FOIA'). The CMA considers requests for information made under FOIA on a case by case basis and will, for example, consider whether any relevant exemptions apply in relation to the information requested.

8. Rules on disclosure when a competition case is examined on appeal (in the CAT) or at trial

30. If a party challenges any infringement finding of the CMA, the appeal is heard by a separate judicial body, the Competition Appeal Tribunal ('CAT'). These are separate proceedings in which the CAT will make its own orders for disclosure of the CMA's file and any other relevant material under the CAT's own rules.¹⁰

31. In relation to private actions (whether 'standalone' or 'follow on' based on a prior CMA decision), the relevant court will also make its own orders for disclosure. In most damages actions to date, the CAT has ordered that disclosure should follow the principles set out for standard disclosure under Rule 31 of the Civil Procedure Rules. In practice, it is likely that many of the documents on the CMA's file will already be in the possession of one or more of the parties to the litigation and therefore those parties may be subject to any disclosure order. However, the CAT has previously ordered the Office of Rail Regulation

¹⁰ See The Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648).

(now the Office of Rail and Road) to disclose documents on its file relating to a CA98 investigation to one of the parties to the litigation.¹¹

9. Confidential Information

32. There are strict rules governing the extent to which the CMA is permitted to disclose confidential under the EA02, which contains provisions on the disclosure of information by public bodies in the UK.

33. Even where the CMA has a ‘gateway’ to disclose information in the context of its statutory functions (as described further above under the section on ‘Access to file’), the CMA is required to have regard to certain considerations before making a disclosure. In particular, the CMA must have regard to three key considerations set out in section 244 of the EA02, namely:

1. the need to exclude from disclosure (so far as it is practicable to do so) any information whose disclosure the CMA considers to be contrary to the public interest;
2. the need to exclude from disclosure (so far as practicable)
3. commercial information the CMA considers might significantly harm the legitimate business interests of the undertakings, or
4. information relating to the private affairs of an individual which the authority thinks might significantly harm that individual’s interests,
5. the extent to which the disclosure of information relating to the private affairs of an individual or commercial information is necessary for the purpose for which the authority is permitted to make the disclosure.

34. The statutory position in the EA02 is reflected in the definition of ‘confidential information’ in Rule 1(1) of the CMA’s Rules, which states that confidential information means–

1. commercial information whose disclosure the CMA or a regulator thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
2. information relating to the private affairs of an individual whose disclosure the CMA or a regulator thinks might significantly harm the individual's interests, or
3. information whose disclosure the CMA or a regulator thinks is contrary to the public interest.

35. In practice, therefore, the CMA has to weigh up the possible confidentiality of information on its case file with the possible need for a party under investigation to have access to information which they may use to defend themselves.

36. In carrying out this assessment, the CMA will generally request representations on the confidentiality of information held on its file. The CMA will ask parties to identify information (which has been provided by that party or has been otherwise acquired by the

¹¹ See Order of the Tribunal (Disclosure by ORR) dated 2 April 2009 in Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited.

CMA) that the party considers is commercially sensitive or contains details of an individual's private affairs, the disclosure of which might significantly harm the interests of the business or person.

37. The CMA will ask parties to provide sufficient explanations for their claim, for example, regarding the nature of the information, the harm that could be caused, the likelihood of harm and the magnitude of that harm. The explanations provided will be taken into account when considering whether to disclose any of the information provided. The CMA will not accept blanket or unsubstantiated claims for confidentiality. Having taken into account parties' confidentiality representations, the CMA will ultimately decide whether it is appropriate to disclose the information and, if so, the manner in which that disclosure should occur.

38. In some cases the CMA may require that, in respect of all information supplied to the CMA, parties should make known to the case team which information they consider to be confidential at the time of submitting documents to the CMA. In some cases, however, the CMA may decide to seek confidentiality representations from parties later on in an investigation, on specific groups of documents, when the nature and scope of the investigation has been further developed, or possibly narrowed. If this is the case, the CMA will often make clear to a relevant party what information in the documents in question it considers to be confidential, before asking for a party's representations.

39. The CMA will usually consider that the disclosure of information that is already in the public domain (or can readily be deduced from information in the public domain) or financial information or other data relating to a business which is more than 2 years old will be unlikely to cause harm to the person or business to which it relates.¹²

40. The following information will normally be considered to be confidential so that if the CMA is considering whether disclosure is appropriate, it will need to consider the manner of disclosure:

1. financial information or other data relating to a business which is less than 2 years old;
2. information which, if disclosed, may adversely affect the competitive process in the market;
3. information relating to the strategy (past or future) of a business; and
4. responses to surveys (in aggregate or individually), the disclosure of which could be harmful to a firm or individual or where the identity of the person providing the information should be protected.¹³

41. In many cases, the CMA may redact documents that the CMA proposes to disclose to parties as part of its case file, in order to remove or limit the disclosure of confidential information, by blanking out parts of documents or aggregating figures. On the other hand, the CMA may not agree with a person or business that particular information is confidential, or the CMA may agree that the information is confidential, but consider that it is necessary to disclose the information to the parties under investigation in order to

¹² Paragraph 4.15, Transparency and disclosure: Statement of the CMA's policy and approach, CMA6.

¹³ Paragraph 4.16, Transparency and disclosure: Statement of the CMA's policy and approach, CMA6.

enable them to exercise their rights of defence. In such circumstances, the CMA will give the person or business prior notice of its proposed action, and give them a reasonable opportunity to make representations or challenge the assessment made by the case team (the process for which is set out below).

42. As noted above, in some cases, the CMA may consider the use of practices such as confidentiality rings or data rooms in order to enable the disclosure of specific quantitative or qualitative data or documents to a defined group (usually a parties' legal and/or economic advisers).¹⁴ For example, the CMA has used confidentiality rings/data rooms in competition investigations where this has enabled a defined group of advisers acting on behalf of a party to further their understanding or prepare confidential submissions in relation to confidential quantitative data or a specific set of qualitative documents.

43. The CMA will seek the consent of relevant parties before disclosing confidential information in a confidentiality ring or data room in such circumstances, but the CMA has the discretion to decide that a confidentiality ring or data room procedure is a necessary way of disclosing information for the purpose of facilitating its functions (in particular information that is central to a party's rights of defence), even if a relevant party does not consent.

44. Whereas under a confidentiality ring the CMA would generally provide electronic access to the specific data or information in question, a data room provides access to the confidential data or documents on the CMA's premises, and so has the advantage of providing additional protection. The CMA generally uses confidentiality rings rather than data rooms in CA98 investigations, however additional enhanced security measures may be taken where information is considered by the CMA to be particularly sensitive.

45. Access to documents in a confidentiality ring or data room will be subject to confidentiality undertakings provided by the persons with access (and for employees, their employer firm) which address, amongst other matters, how they may use the information disclosed to them and the restrictions that apply to onward disclosure. In the case of data rooms, the CMA will also require advisers to follow data room rules concerning the proper conduct of the data room, including making provision for bringing into and taking out of the data room such items as materials, notes and equipment.

46. It will be a condition of access to a confidentiality ring or data room that information reviewed by advisers is not shared with their client(s). It is for advisers to satisfy themselves of the steps they are required to take under any relevant professional conduct rules to ensure that they are able to operate on this basis.

47. Requests for the use of confidentiality rings and data rooms will be considered on a case-by-case basis. The CMA has discretion as to whether to agree to such requests, and is likely to do so only where it is proportionate, there are clear benefits in doing so, and potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned. The CMA will also take into account whether it is appropriate to provide access at the time the request is made, having regard to the progress of the case, the resource implications of operating confidentiality rings and data rooms, and of risks of human error and information leaks.

¹⁴ As also noted above, the CMA has published template confidentiality undertakings.

10. Leniency material

48. The fact that an undertaking has applied for leniency will not normally be revealed to other parties in a competition investigation until the Statement of Objections has been issued. However, in the course of the CMA's investigation it may be necessary, directly or indirectly, to disclose information provided by a leniency applicant to third party witnesses or to those suspected of direct involvement in a cartel.¹⁵

49. Whilst application statements, including transcripts of oral statements, will be placed on the CMA's case file, when assessing the need for the disclosure of these documents, the CMA will give weight to the strong public interest in encouraging full and frank applications, and notes that non-disclosure of such material may be in the public interest in order to protect the efficacy of the leniency regime. In practice, this means that the CMA will not ordinarily grant access to the application statement to other recipients of a Statement of Objections unless this is necessary for rights of defence purposes. This protection will not extend to other documents provided by a leniency applicant, such as pre-existing documents or witness statements, which refer to or include information from the application statement. Such documents will ordinarily need to be disclosed as part of the access to file process.

50. As a matter of general policy, the CMA would firmly resist, on public interest grounds, requests for disclosure of leniency material, or the fact that leniency has been sought, where such requests are made, for example, in connection with private civil proceedings whether in the UK or overseas. In any event the CMA must observe the general prohibitions on disclosure set out in the EA02. In this regard, it should be borne in mind that the identity of leniency applicants and certain information they have provided, will enter the public domain through any published infringement decision or through any criminal proceedings held in open court.

11. Procedural challenges

51. Parties who wish to raise a complaint about the conduct of an ongoing CMA case (for example, the CMA's proposed action as regards access to its file or the handling of confidential information) can contact the most senior CMA contact responsible for that case (the Senior Responsible Offer ('SRO')), in the first instance). In the event that a party is unable to resolve to dispute with the SRO, certain procedural complaints may be referred to the CMA's Procedural Officer ('PO').

52. The PO's remit includes disputes about the following issues relating to the procedures followed during the course of a competition investigation:

1. deadlines for parties to respond to information requests, submit non-confidential versions of documents or submit written representations on the Statement of Objections or Supplementary Statement of Objections;
2. requests for confidentiality redactions of information in documents on the CMA's case file, in the Statement of Objections or in the final decision;

¹⁵ A detailed explanation of the CMA's approach to the disclosure and use of information provided by leniency applicants is set out in section 7 of its guidance Applications for leniency and no-action in cartel cases (OFT 1495, July 2013, adopted by the CMA Board).

3. requests for disclosure or non-disclosure of certain documents on the CMA's case file;
 4. issues relating to oral hearings, including, for example, with regard to issues such as the date of the hearing; and
 5. other significant procedural issues that may arise during the course of an investigation.
53. The PO is independent from the investigation and its decision-makers. The PO does not have jurisdiction to resolve disputes about the substance of the case.
54. The CMA's decisions may also be challenged on procedural grounds by way of judicial review of administrative decisions in the UK courts by any party with a sufficient standing, or in the context of an appeal to the CAT of the CMA's final decision in the investigation.