

March 2017

Trust in water

# **Guidance on Ofwat's approach to the application of the Competition Act 1998 in the water and wastewater sector in England and Wales**

[www.ofwat.gov.uk](http://www.ofwat.gov.uk)

The logo for Ofwat, featuring the letters 'O', 'f', 'w', 'a', and 't' in a bold, sans-serif font. The letter 'w' is white and is contained within a dark blue circle.

## About this document

This document sets out our guidance on Ofwat's approach to the application of the Competition Act 1998 (CA98) and the equivalent provisions under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) to the water and wastewater sector in England and Wales. Our aim is to provide more clarity on how the competition law prohibitions may apply in the sector.

This guidance replaces our previous guidance on these issues. We have reflected developments in legislation and case law that have taken place since the publication of earlier guidance,<sup>1</sup> as well as our experience of applying CA98 to date.

When applying our concurrent competition powers, we will also take account of any changes to competition law guidance issued by the Competition and Markets Authority (CMA) and the European Commission.<sup>2</sup>

In line with best practice, we are issuing this guidance on competition law to provide a backdrop on how we may approach competition law issues that arise in the future. While the guidance is intended to assist companies in understanding potential competition law issues in the water and sewerage sector in England and Wales, all companies operating in the sector must be clear that it is their responsibility to assure themselves that they have taken the necessary steps to ensure compliance with competition law, whether that is enforced by:

- Ofwat;
- the Competition and Markets Authority; or
- the European Commission.

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<sup>1</sup> Notably the guidance reflects changes introduced by the Enterprise and Regulatory Reform Act 2013 to strengthen the primacy of competition law and to improve the operation of the competition concurrency regime. We have also updated our procedures to reflect improvements in best practice.

<sup>2</sup> It should be noted that this guidance does not take into account the result of the referendum in June 2016 in favour of the UK leaving the European Union (EU) or the consequences of the UK ceasing to be an EU Member State (or member of the European Economic Area). The guidance reflects current UK and EU law which Ofwat must follow. We would expect to update the guidance in light of developments in this respect.

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## 1. Introduction

### 1.1 Background

As the economic regulator of the water and sewerage sector, Ofwat's role is to help build customers' and wider society's trust and confidence in the vital public services the water sector provides. We do this in a number of ways including:

- overseeing how the sector is performing;
- being ready to step in if service providers fall short;
- using the right tools from our available toolkit to achieve the best results; and
- acting clearly and predictably.

As part of our responsibilities, we have concurrent powers to apply competition law with respect to water and sewerage activities in England and Wales. In particular we have concurrent jurisdiction to apply the prohibitions on restrictive agreements and concerted practices, and the abuse of a dominant position under the Competition Act 1998 (CA98) and the equivalent provisions under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

We exercise our competition law powers concurrently with the Competition and Markets Authority (CMA).

### 1.2 Our approach to regulation

In January 2015, we launched our strategy, '[Trust in water](#)'<sup>3</sup>, which sets out our journey to become a regulator that is more:

- **outcomes focused** – focusing on the things that really matter to water and sewerage customers, the environment and society now and in the future;
- **relationships focused** – encouraging the water and sewerage sector to step up, take responsibility for its relationships, be open, honest, fair and transparent;
- **proportionate and targeted** – focusing our regulatory intervention where it is needed most, stepping in where necessary (and only where necessary) to protect customers; and

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<sup>3</sup> <http://www.ofwat.gov.uk/about-us/>

- **willing and able to use all the tools in our regulatory tool kit** – using both our traditional tools, as well as broader tools to shine a light on issues and provoke debate.

Our shared vision<sup>4</sup> for the water and sewerage sector in England and Wales is that customers and wider society have trust and confidence in vital public water and sewerage services. The need for effective competition in appropriate elements of the sector, where the contestability of services can promote further efficiencies and innovation, is reflected in part of our statutory duties<sup>5</sup> and is central to that vision.

Given our focus on realising the benefits of effective competition for water and sewerage customers, our concurrent powers under competition law are a critical part of our toolkit for intervening when markets are not performing or delivering as they should. Having competition law powers for the water and sewerage sector (alongside those held by the CMA ensures that we can protect the 'level playing field' and the dynamics of contestable markets in the sector from agreements, conduct or practices that distort competition and impact adversely on customers. In addition, we are now required to consider whether the use of our competition powers would be more appropriate instead of taking relevant enforcement action under our sector-specific, regulatory powers<sup>6</sup>.

In line with best practice, we are issuing this guidance on competition law to provide a backdrop on how we may approach competition law issues that arise in the future. However, while the guidance is intended to assist companies in understanding potential competition law issues in the water and sewerage sector in England and Wales, all companies operating in the sector must be clear that it is their responsibility to assure themselves that they have taken the necessary steps to ensure compliance with competition law, whether that is enforced by:

- Ofwat;
- the CMA; or
- the European Commission.

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<sup>4</sup> <http://www.ofwat.gov.uk/about-us/vision/>

<sup>5</sup> Under sections 2(2A)(a) and 2(2B) of the Water Industry Act 1991 (as amended), Ofwat must further the consumer objective by protecting the interests of consumers, wherever appropriate by promoting effective competition.

<sup>6</sup> Schedule 14, Enterprise and Regulatory Reform Act 2013 (and see section 2.2 below)

## 1.3 Changing times

To date, although large parts of the water and wastewater sector have been characterised by monopoly, there are competitive markets in operation. These include:

- the appointment of new incumbent companies (known as 'NAV's'<sup>7</sup>) to sites within the areas of existing incumbent companies;
- competition for the provision of new connections to incumbent companies' existing infrastructure (including where the new infrastructure is provided through 'self-lay' before being connected to the incumbent's existing infrastructure); and
- competition in the supply chain to the incumbent companies.

Despite these existing markets, this guidance comes at an important time. Water and sewerage markets are evolving further from being largely monopolistic and regulated to being more contestable and, in some parts of the value chain, subject to head to head competition. So, there are new challenges ahead for companies within the sector as they start to operate in, and interact with, those markets.

In particular, from April 2017 amendments to the Water Industry Act 1991 (WIA91) will allow approximately 1.2 million eligible business customers in England<sup>8</sup> to choose their supplier of water and sewerage retail services. For customers who use the system of an incumbent company whose area is wholly or mainly in England, the market will be extended to include all such business customers. There are already similar arrangements in the water and sewerage sector in Scotland and eligible business customers will be able to take advantage of both markets.

Where the incumbent's area is wholly or mainly in Wales, only business customers with premises that each use more than 50 megalitres of water per year will be able to choose their water supplier, reflecting the policy position of the Welsh Government (this position will not change in April 2017). In September 2016, we also published our report to Government on [the costs and benefits of extending retail competition to residential customers in England](#). Should Government pursue this option, this will of course have implications for competition enforcement.

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<sup>7</sup> The reference to "NAV's" – New Appointments and Variations - is based on the appointment of a new undertaker and the variation of the existing undertaker's area – see sections 8 and 9 Water Industry Act 1991 in particular.

<sup>8</sup> The market will be for all eligible business, charity and public sector customers who use the system of an incumbent company whose area is wholly or mainly in England.

There is flexibility in the new markets that will be opened. For example, the Government issued supplier of first resort and exit regulations<sup>9</sup>, which enable new retailers in the relevant water and sewerage markets to exit the market efficiently, without disadvantaging customers. The existing incumbent monopoly companies in England can also choose to exit the relevant retail markets.<sup>10</sup> In addition, an in-area trading ban which prevented a new entrant owned by an existing incumbent monopoly company from competing in that company's own area has been removed – this will in particular stimulate competition for customers who want to be served more efficiently on a multi-site basis.

Looking ahead, amendments made by the Water Act 2014 will also enable the development of new markets for the upstream (non-retail) water and sewerage services provided by English water and sewerage companies. When the changes are brought into force (which currently will not happen before 2019), new entrants will have new opportunities to provide new sources of water or sewerage treatment services with obligations upon incumbents to provide access to their networks and treatment and storage systems. The Water Act 2014 will make it easier for the existing water and sewerage companies to buy and sell water and sewerage services to and from each other. There will also be a legal framework for owners of small-scale water storage to sell excess water into the public supply. In addition, there will be reforms to the existing framework for adopting water and sewerage infrastructure 'self-laid' by developers.

Separately, our Water2020 programme is promoting the use of markets to inform, enable and incentivise better use of resources and innovation through water resource trading and the contestable provision of bio-resources transportation, treatment and recycling/disposal. These markets will also be supported by direct procurement for customers on projects with a whole life cost of more than £100 million. These changes have the potential to:

- unlock substantial benefits for customers, companies, the environment and investors;
- help meet future challenges; and
- ensure that water and sewerage services are resilient, efficient and service providers are taking a long-term approach.

In Wales the Welsh Government has retained the existing scope for markets in relation to services provided by water and sewerage companies operating within

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<sup>9</sup> The Water and Sewerage Undertakers (Exit from the Non-household Retail Market) Regulations 2016 (the 'Exit Regulations')

<sup>10</sup> Regulation 4 of the Exit Regulations limits the ability to exit to companies whose supply area is wholly or mainly in England.

Wales. The water supply licensing regime introduced by the Water Act 2014 therefore provides for the continuation of the pre-existing regime in relation to such companies. However, the Water Act 2014 does give the Welsh Government the power to extend the full new water supply and sewerage licensing regime if it considers it appropriate to do so.

The effective application of competition law will be a key tool for us in protecting the development of these new markets, ensuring their market dynamic and realising their benefits for customers and the environment. Without properly addressing competition concerns, markets will not work effectively for customers and society, which could erode trust and confidence in those markets and the sector as a whole.

We have already put in place regulatory structures to enable the new business retail market in England opening in April 2017 to work effectively. There will be a number of new codes, including a Wholesale Retail Code<sup>11</sup> and a Market Arrangements Code<sup>12</sup>, and a number of new charging rules. In particular, there will be charging rules issued by us that will cover charges from the existing incumbent companies to:

- end users<sup>13</sup>;
- new retailers (where the rules are referred to as wholesale charging rules)<sup>14</sup>;
- relevant parties for new connections<sup>15</sup>; and
- other incumbent companies for bulk supply agreements<sup>16</sup>.

There will also be various codes and rules in relation to the additional new upstream markets in England enabled by the Water Act 2014 (which will not come into force before 2019).

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<sup>11</sup> The WRC is a statutory code which includes the requirements placed on wholesalers and retailers for the operation of the market requirements for wholesalers and retailers to follow in maintaining the central register at the Market Operator and also contains the processes which inform the design and construction of the market's central operating system (CMOS).

<sup>12</sup> The MAC is a non-statutory code, which sets out how the market will operate as well as the role and function of the market operator and systems and processes to support this.

<sup>13</sup> Charges scheme rules have since 17 November 2015 set out the principles and specific requirements that apply to water undertakers and sewerage undertakers when making their charges schemes for end users.

<sup>14</sup> These charging rules applicable to incumbents wholly or mainly in England will also replace the previous "costs principle" in section 66D WIA91 (prior to its amendment by the Water Act 214) which previously regulated the access prices paid by new entrants to existing incumbent companies for use of the incumbents' systems to supply their own customers. The UK Government will retain the "costs principle" in relation to introductions of water until the upstream market changes in the Water Act 2014 are brought into force.

<sup>15</sup> See further <http://www.ofwat.gov.uk/wp-content/uploads/2016/12/Charging-rules-for-new-connections---decision-document.pdf>

<sup>16</sup> See section 94(3) WA14. This does not cover the charges from undertakers to large user customers under section 56 WIA91.



Ofwat will monitor these existing and new competitive markets closely and will not hesitate to intervene in a proportionate way using the right tools, including enforcement under competition law, to ensure that competition works well for the benefit of consumers.

## 1.4 Responsibilities

Although we have put in place regulatory structures to enable markets within the water and sewerage sector to work effectively, ultimately all companies operating in the sector, whether an incumbent water and sewerage company, a new retailer or any other business, are responsible for managing their own compliance with competition law. It is vital that companies view their approach to these new markets (and the other existing markets in the sector) through both a regulatory lens and a competition law lens.

For example, in relation to the specific markets operating, or planned, within the sector, although all of the companies operating within those markets must comply with any codes or rules that govern them, these obligations are broadly principles based (particularly our charging rules). It is therefore likely that companies will find more than one way of complying with their obligations under any of the codes and/or rules, particularly given their differing sizes and organisational structures.

It is important to note that, even if a company is compliant with a relevant obligation within the codes and/or rules for a market, it may still be in breach of competition law. Therefore, given the different likely approaches, this can lead to the possibility of one compliant approach to a particular obligation being a breach of competition law, while another may not. Accordingly, companies should ensure that they take into account competition law when deciding on their approach to such obligations. Further, the codes and/or rules for any of the markets within the water and sewerage sector will not cover every scenario faced by companies, nor are they designed to. In particular, incumbent companies will need to be conscious of their special responsibility under Chapter II of the CA98<sup>17</sup> where they are in a dominant position (or a “super-dominant” position).

In relation to existing markets, we have previously carried out investigations under the Competition Act 1998 into incumbent company behaviour in both the NAV market and the market for new water and sewerage connections. Importantly, as well as ensuring new markets are designed and run effectively, we will continue to

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<sup>17</sup> The Chapter II prohibition and the concepts of ‘dominance’ and ‘super-dominance’ are explained in section 3.3

monitor and, where appropriate, use our competition law powers in relation to existing markets within the sector to ensure they are working for the benefit of all customers.

We expect all companies (whether an existing incumbent, a new retailer or any other business) to respond to any competition law concerns that arise in a manner that reflects the best interests of water and sewerage customers. That will include engaging with and responding to us (or the CMA) quickly, openly and, where appropriate, proactively considering commitments, settlements, and/or voluntary redress. This approach to competition law issues is in line with our general regulatory approach as evidenced by our strategy and our company monitoring framework.

## **This guidance**

Where companies and businesses operating in the water and sewerage sector do not meet their competition law obligations, Ofwat is committed to using its concurrent competition law powers to ensure that customers can realise the benefits of effective competition. This guidance provides companies and businesses with an important resource in understanding and meeting their obligations and in understanding how Ofwat will apply its powers. Our prioritisation principles<sup>18</sup> are unchanged.

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<sup>18</sup> <http://www.ofwat.gov.uk/publication/prioritisation-principles-application-competition-act-1998/>

## 2. Our competition law powers

### Key messages

The Competition Act 1998 is a central component of our legal powers. Ofwat can enforce the prohibitions under UK and EU competition law in relation to water and sewerage services in England and Wales.

Our competition law functions are 'concurrent' with the CMA, which can also exercise its competition powers in the sector.

Ofwat and the CMA must agree which authority is best placed to conduct an investigation in relation to the water and sewerage sectors.

### 2.1 UK and EU Competition law

Our competition law powers derive primarily from the CA98 and Articles 101 and 102 TFEU.<sup>19</sup>

Details about how the CA98 provisions are applied are set out in secondary legislation, including the 'CA98 Rules'<sup>20</sup> and the 'Concurrency Regulations'.<sup>21</sup> The latter deals specifically with the concurrent application of competition law by the CMA and sectoral regulators.<sup>22</sup> We are also required to have regard to CMA guidance in relation to the imposition of penalties and the acceptance of commitments<sup>23</sup> (both of which are discussed further in Chapter 4).

Where relevant, we refer in this guidance to guidelines published by the CMA and its predecessor body, the OFT, that have been adopted by the CMA. It should be noted that these documents state the law as it was at the time of their publication. In

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<sup>19</sup> Other pieces of domestic primary legislation containing relevant competition law provisions are the Enterprise Act 2002, the Enterprise and Regulatory Reform Act 2013 and the Consumer Rights Act 2015. However, Ofwat does not have jurisdiction to enforce the criminal cartel offence under the Enterprise Act 2002 and this Guidance does not apply to the market investigation or merger control provisions under that Act.

<sup>20</sup> Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014

<sup>21</sup> Competition Act 1998 (Concurrency) Regulations 2014.

<sup>22</sup> Further provision as to the application of Articles 101 and 102 TFEU can be found in Council Regulation (1/2003/EC) of 16 December 2002, OJ L1, 4.1.2003, p.1 ('the Modernisation Regulation').

<sup>23</sup> Pursuant to sections 31D and 38 CA98: the CMA's guidance on the appropriate level of a penalty imposed under section 36 CA98 and the CMA's guidance as to the circumstances in which it may be appropriate to accept commitments under section 31A CA98

considering potential competition law infringements, we will take into account any relevant legislative and case law developments since publication.

## **2.2 The Competition Act 1998 (CA98)**

Both Ofwat and the CMA have the power to apply and enforce the Chapter I and Chapter II prohibitions under the CA98 and Articles 101 and 102 TFEU in relation to all commercial activities connected with the supply of water or securing a supply of water, or with the provision or securing of sewerage services in England and Wales (for simplicity referred to in this Guidance as water and sewerage services).<sup>24</sup> These are the main UK and EU competition law provisions, which prohibit anti-competitive agreements and abusive conduct by dominant undertakings respectively. The substance of these provisions is explained in Chapter 3.

Importantly, the activities of businesses that are not appointed under the WIA91 may fall within the scope of Ofwat's competition law jurisdiction. As a result, a company that is not subject to any form of other regulation by us could potentially find itself the subject of a competition law investigation by us.

## **2.3 Treaty on the Functioning of the European Union (TFEU)**

Where national competition authorities in EU Member States, including Ofwat, apply national competition law to agreements or conduct which may affect trade between EU Member States, they are required as a matter of EU law also to apply Articles 101 or 102 of the TFEU.<sup>25</sup>

Under section 60 CA98, so far as possible we must deal with competition law issues under Part I CA98 in a way that is consistent with the treatment of equivalent issues under EU law. As a result, the position under Chapter I and Chapter II of the CA98 will generally be the same as under Articles 101 and 102 TFEU, subject to the fact that the latter only apply where there is an effect on inter-state trade.

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<sup>24</sup> Section 54 of the CA98 and section 31 of the WIA91. Ofwat's competition law jurisdiction does not extend to the supply of water and sewerage services in Scotland and Northern Ireland. In these parts of the UK the CMA has the sole power to enforce CA98 and Articles 101 and 102 TFEU with respect to these services and activities.

<sup>25</sup> Article 3 of the Modernisation Regulation. This obligation does not apply if the national law being applied pursues an objective which is predominantly different from those pursued by Article 101 and Article 102. We may also apply national law in a way which is stricter than Article 102 in relation to unilateral conduct.

This guidance will therefore focus on the Chapter I and Chapter II prohibitions, but parties should be aware that the EU provisions may be applied in parallel in appropriate circumstances. Further information on the framework for applying Articles 101 and 102 TFEU, and how those EU provisions interact with the domestic competition law provisions, is available in the guidance 'Modernisation' (OFT442).<sup>26</sup>

## 2.4 Concurrency

We cooperate with the CMA when exercising our competition law functions. We are part of the UK Competition Network which is a forum for co-operation between the CMA and UK sectoral regulators with concurrent competition powers.<sup>27</sup> We are also a designated National Competition Authority (NCA) within the European Competition Network for the purposes of the application of EU competition law.<sup>28</sup>

As with other UK sectoral regulators with concurrent competition powers, we have agreed a Memorandum of Understanding with the CMA setting out how we will work together for the purposes of applying and enforcing the CA98.<sup>29</sup> In addition, the CMA has published both rules<sup>30</sup> and detailed guidance<sup>31</sup> relating to the concurrent application and enforcement of competition law provisions by the CMA and sectoral regulators. This guidance should be read in conjunction with those documents.

Chapter 4 of this guidance outlines the procedure adopted by Ofwat and the CMA for the purpose of allocating competition law cases between them.

## 2.5 The 'primacy' of the Competition Act

We are required to consider whether the use of our CA98 powers is more appropriate before taking enforcement action or imposing penalties under the WIA91.<sup>32</sup> If we consider that the use of our CA98 powers would be more appropriate, we must exercise our CA98 powers rather than those WIA91 powers.

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<sup>26</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284432/oft442.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284432/oft442.pdf)

<sup>27</sup> NHS Improvement has observer status.

<sup>28</sup> [http://ec.europa.eu/competition/ecn/index\\_en.html](http://ec.europa.eu/competition/ecn/index_en.html)

<sup>29</sup> Updated MoU Ofwat and CMA 2016,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/502668/Ofwat\\_MoU.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502668/Ofwat_MoU.pdf)

<sup>30</sup> The Competition Act 1998 (Concurrency) Regulations 2014 SI 2014 No.536 (the Concurrency Regulations)

<sup>31</sup> CMA. <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>

<sup>32</sup> The Enterprise and Regulatory Reform Act 2013, Schedule 14.

These 'primacy' obligations, introduced by the Enterprise and Regulatory Reform Act 2013, do not extend to our dispute resolution functions.

We routinely consider the CA98 at an early stage when considering whether to use any of our relevant regulatory powers for the purpose of assessing how we can best facilitate effective competition in the sector.

We will keep parties informed of what powers we are using in relation to ongoing investigations. Where we conclude that it is appropriate to use a different tool during the course of an investigation, we will inform the parties and provide reasons.

## 2.6 Summary of our concurrent competition law powers

We have various powers we may exercise in respect of CA98 enforcement. In particular, we may:

- consider complaints about possible infringements of the Chapter I prohibition and the Chapter II prohibition;
- impose interim measures to prevent significant damage to a person or category of persons, or to protect the public interest;<sup>33</sup>
- carry out investigations, both on our own initiative and in response to complaints, including requiring the production of documents and the provision of information, and searching premises;<sup>34</sup>
- impose financial penalties on companies, taking account of the relevant statutory guidance on penalties;<sup>35</sup>
- give and enforce directions to bring an infringement to an end;
- accept binding commitments as to future conduct;
- reach settlements whereby a company admits an infringement in return for a reduction in penalty and a more expedited procedure;
- apply to court for a company director 'disqualification order' against directors of an infringing company (known as a 'Competition Disqualification Order')<sup>36</sup>;
- decide there are 'no grounds for action';
- approve voluntary redress schemes; and
- publish written guidance in the form of an Opinion where:

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<sup>33</sup> Section 35 CA98

<sup>34</sup> For further details see the CMA's 'Guidance on the CMA's investigation procedures in Competition Act 1998 (CMA8) and the guidance (OFT404) 'Powers of Investigation'.

<sup>35</sup> OFT423, 'Guidance as to appropriate amount of penalty'

<sup>36</sup> Sections 9C and 9E, Company Directors Disqualification Act 1986. Further guidance on Competition Disqualification Orders is available on the CMA website (OFT510) at <https://www.gov.uk/government/publications/competition-disqualification-orders>.

- a case raises novel or unresolved questions about the application of the Chapter I and/or the Chapter II prohibition; and
- we consider there is an interest in issuing clarification for the benefit of a wider audience.

### 3. The requirements of competition law

#### Key messages

The Competition Act 1998 (CA98) imposes two key prohibitions on anti-competitive conduct.

- Chapter I CA98 prohibits agreements between undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the UK (the Chapter I prohibition).
- Chapter II CA98 prohibits the abuse of a dominant market position (the Chapter II prohibition) within the UK.

Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) contain equivalent prohibitions where the anti-competitive conduct may affect trade between EU Member States.

This chapter summarises the main aspects of the analysis in CA98 cases. We highlight issues that may be particularly likely to arise in the water and sewerage sector. However, this guidance does not cover all points that may arise in CA98 cases.

#### 3.1 The Chapter I and Chapter II prohibitions: overview

The Chapter I prohibition, contained in section 2(1) of the CA98, prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have the object or effect of preventing, restricting or distorting competition. The Chapter I prohibition applies to agreements implemented or intended to be implemented in the whole or part of the United Kingdom, which may affect trade within the United Kingdom. An agreement is exempt from the Chapter I prohibition if it satisfies the criteria for exemption set out in section 9 of the CA98.

The Chapter II prohibition, contained in section 18(1) of the CA98, prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position in a market. The Chapter II prohibition applies if the dominant position is held within the whole or part of the United Kingdom and the conduct in question may affect trade within the United Kingdom.



## 3.2 The Chapter I: anti-competitive agreements and concerted practices

We set out below high level guidance on some of the key elements of the Chapter I prohibition on restrictive agreements. Some elements of this, in particular the discussion of the term 'undertaking' and discussion of market definition, are common to Chapter I and Chapter II CA98.

CA98 provides a non-exhaustive, indicative list of agreements to which the prohibition applies, namely those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.<sup>37</sup>

### Undertakings

The competition law provisions apply to 'undertakings'. The term 'undertaking' is used in competition law to refer to any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of firms, non-profit making organisations and (in some circumstances) public entities that offer goods or services on a given market.<sup>38</sup>

It should not be confused with the term 'undertaker', which is often used to describe a company holding an appointment under the WIA91 as a supplier of water and/or sewerage services.

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<sup>37</sup> Section 2(2) CA98

<sup>38</sup> See case C-41/90 Höfner and Elser v Macrotron GmbH [1991] ECR I-1979, [1993] 4 CMLR 306 and case T-319/99 Fenin v Commission [2003], ECR II-357, 4 March 2003 [2003] CMLR 1

### 3.3 Market definition

Market definition provides a framework for competition analysis. It is not an end in itself, but a starting point for cases under both the Chapter I and Chapter II prohibitions.

In Chapter I cases, market definition is considered when assessing the actual or potential competitive effects of agreements and concerted practices. The Chapter I prohibition applies only to agreements which have as their object or effect an 'appreciable' prevention, restriction or distortion of competition. Consideration of appreciability (and the application of certain **de minimis** rules) usually requires consideration of the relevant economic market. Agreements between undertakings are more likely to have an appreciable effect on competition where the undertakings concerned collectively have some degree of market power within the relevant market.

Market definition is also an important step in cases under the Chapter II prohibition. In order to determine whether an undertaking is dominant, it is generally necessary to define the relevant market in order to assess the extent of the undertaking's market power within the relevant market. This identifies the competitive constraints faced by an undertaking. Dominance is addressed in section 3.7 of this guidance, below.

We will assess the relevant market based on the facts of each individual case. In doing so, we will follow the framework set out in the CMA's guidance on market definition (OFT 403 'Market definition'). This will typically involve considering product and geographic dimensions, and may involve temporal dimensions. The appropriate market definitions may also change over time as more areas are opened up to competition.

#### **The 'hypothetical monopolist' test**

Defining the relevant market usually involves application of the 'hypothetical monopolist' test, which entails considering how customers (the 'demand side') and other suppliers (the 'supply side') would react to an attempt by a hypothetical monopolist to raise prices significantly above the competitive level. A significant price rise in this context is generally (and indicatively) taken to be in the region of 5 to 10 per cent of the price. This test is also sometimes referred to as the 'SSNIP' test (standing for 'small but significant non-transitory increase in price').

The application of the 'hypothetical monopolist' test will generally include consideration of the extent to which, following a hypothetical price increase:

- customers would switch to other products or services;
- suppliers not currently supplying that product or service would be able to switch their production within a short period of time;
- customers would be prepared to travel further than they currently do; and
- suppliers currently not supplying a given geographic area would be prepared to supply it.

The relevant market is defined as the narrowest set of products and geographic areas where a hypothetical monopolist could profitably raise prices.

The hypothetical monopolist test is primarily an intellectual framework for identifying a set of products, services, suppliers and geographic areas that can be usefully thought of as a market for the purposes of competition assessment. It needs to be applied flexibly and fit the industry in question. For instance, in some markets, price may not be the most relevant metric to use to assess competitive rivalry. Capacity or service changes may be more appropriate.

## Product market

Goods and services will fall within the same product market where they are sufficiently inter-changeable. This issue can be considered both in terms of demand and supply substitutability.

- On the demand side, products will be substitutable if customers consider them to be close enough substitutes for each other that they would be willing to switch between them in response to small, significant changes in product or service characteristics.
- On the supply side, the issue is how easily and quickly suppliers would be able and willing to switch their production to produce the product or service under consideration following a small but significant change in conditions within the relevant market. In both cases, so far as possible where data is available (bearing in mind that some markets will only be opened to competition from April 2017 or later), we would consider changes in customer and supplier behaviour following relatively small changes in market conditions, such as a modest price increase of the product or service under investigation.
- Defining the product market requires analysis of the specific nature of the product or service in question. For example, in a context where some retail markets are

open to competition and others are not, and differences exist on the basis of geography, it may be appropriate to draw a distinction between customer groups.

Notably after business retail market opening in England, a distinction between services for household and non-household customers may be appropriate. Further, it may be appropriate to define distinct markets for different products or services in the value chain, that are inputs into, or components of, the provision of water or sewerage services.

In general, in order to be included in the relevant market, substitution to or from a product or service must be a genuine possibility and capable of ready implementation.

For example, where a supplier could only expand its production after it had constructed new infrastructure, factors affecting that construction, including the time and cost required, would need to be taken into account. Certainty of delivery may also be a relevant factor, for example, if new infrastructure requires a lengthy process of approvals and planning permission where the outcome is necessarily uncertain.

In these cases, we are unlikely to consider such supply expansion as sufficiently timely to include these suppliers within our definition of the relevant market.

However, we would consider them at a later stage in the assessment of competition when assessing the constraint that entry and expansion may impose on the competitors within the relevant market.

#### **Market definition in the Fairfield CA98 investigation<sup>39</sup>**

On 24 April 2014, we issued a Supplementary Statement of Objections (SSO) to Anglian Water which set out our provisional view that there had been an infringement of the CA98 in relation to a margin squeeze for the provision of sewerage services at the Fairfield development in Milton Keynes.

We provisionally concluded in the SSO that there were separate and distinct product markets for water and sewerage services at both the upstream and downstream levels, and that the relevant geographic market was limited to the Fairfield site.

Ofwat's decision following its investigation noted that market definition was not critical in the Fairfield case, as Anglian Water was undoubtedly dominant at the

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<sup>39</sup> <http://www.ofwat.gov.uk/publication/fairfield-competition-act-1998-investigation-decision-summary/>

upstream level regardless of the precise market definition used. It was not therefore necessary for us to reach a final decision on issues of market definition and dominance. The final 'no grounds for action' decision issued in December 2015 stated that our indicative reasoning on the issues around market definition remained as set out in the SSO.

## Geographic market

When defining the relevant geographic market, the issue is whether the supply of a product or service in one geographic area places a competitive constraint on the supply of the same product or service in a different geographic area. Like product market definition, this will need to be determined on the facts of each case.

While company boundaries, water resource zones or catchment areas may be relevant to geographic market definition, the appropriate geographic market may not necessarily be coterminous with these. For instance, if a large customer is located near a boundary with another water company, it might be reasonably served by both. In such a case, we might include both companies in the relevant geographic market.

### Product and geographic markets in the water and sewerage sector

There are a number of separate **product markets** that might be defined, including providing retail water and sewerage services, providing connections to relevant water and waste water infrastructure, or the production of materials connected to anaerobic digestion or sludge. In determining the scope of the relevant markets for the purposes of an investigation, we will also take into account the statutory framework. This suggests that water and waste water services may be separate product markets, as they are subject to different regimes, and indeed they are not directly substitutable services. However, in any case we will take account of any bundling of services and integration along the value chain, and analyse both the demand and supply sides of the market as we did in the Fairfield investigation.

In determining the relevant **geographic market**, generally we will take into account the scope of an undertaker's area of appointment, as this is likely to confer a level of market power that is relevant to the assessment of dominance under the Chapter II prohibition. Within the current and proposed industry framework, actual and potential new appointments (where the appointed company is, or becomes, an undertaker), actual and potential water supply or sewerage licensees, customer self-supply, private supplies and on-site services might be

important influences on geographic market definitions, generating different, or narrower relevant geographic markets.

For instance, considering a regional market for water services may be appropriate where the substitution of products or services can only usefully be considered within that geographic area. Similarly, the market can, but need not necessarily, widen beyond what appears to be substitutable products if that is how consumers purchase the product.

### **3.4 Agreements, decisions and concerted practices**

The Chapter I prohibition may apply to all forms of agreements and arrangements between undertakings, including in particular the so-called 'hard core' forms of collusion for which there may also be criminal sanctions<sup>40</sup>. An agreement does not need to be in writing to fall within the scope of the CA98, which also covers tacit understandings as well as express agreements. Concerted practices include forms of co-ordination that fall short of a full agreement but nonetheless allow the parties to substitute practical co-operation for the risks of competition.

The concept of a 'decision' by an association of undertakings includes the rules and recommendations of trade associations.

### **3.5 Object or effect**

The Chapter I prohibition applies to an agreement only if it has as its object or effect the prevention, restriction or distortion of competition.

The 'object' of an agreement does not refer to the subjective intention of the parties, but rather to the objective meaning and purpose of the agreement considered in its legal and economic context. The question is whether the coordination of conduct in itself reveals a sufficient degree of harm to competition, such that it is not necessary to examine its effects.

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<sup>40</sup> See Section 4.10 below.

In practice, 'object' agreements tend to be those that obviously harm the competitive process or which have been established as object agreements in previous case law<sup>41</sup>.

Where it is not possible to say that an agreement has as its object the restriction of competition, it is necessary to consider its effects.

Any agreement between undertakings might be said to restrict the freedom of action of the parties in some sense. This is because the parties are then obliged to fulfil their side of the bargain. That does not, however, necessarily mean that the agreement is prohibited. An agreement will only be prohibited if it appreciably prevents, restricts or distorts competition. However, that includes potential as well as actual competition, such as where an agreement might have prevented a new entrant from entering the market.

In such effects cases, the assessment will typically require us to establish a 'counterfactual'. This is an idea of how competition would have developed if the agreement or arrangement had not existed. Once that has been done, the level of competition in the counterfactual can be compared with the level of competition arising or likely to arise under the agreement.

In assessing whether an agreement or concerted practice has an appreciable effect on competition, we will have regard to the European Commission's Notice on Agreements of Minor Importance.<sup>42</sup> This provides that, so long as they do not have the object of restricting competition, agreements will not appreciably restrict competition if:

- the aggregate market share of the parties does not exceed 10%, where the agreement is between actual or potential competitors; or
- the market share of each of the parties does not exceed 15%, where the agreement is between undertakings that are not actual or potential competitors.

## Horizontal and vertical agreements

'Horizontal agreements' are those between undertakings operating at the same level of the market. Agreements between direct competitors to limit competition are

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<sup>41</sup> For more information see European Commission [`Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice`](#)

<sup>42</sup> 'Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union', OJ 2014 C 291/1

regarded particularly seriously. Several types of horizontal agreement are considered to have the object of restricting competition. Of these, agreements or concerted practices between competitors to fix prices, share customers or markets, limit output or rig bids are treated as particularly serious infringements, and are referred to as cartels<sup>43</sup>. The sharing of commercially sensitive information which reduces uncertainty about future behaviour has also, in certain circumstances, been considered as a restriction of competition by object.

'Vertical agreements' are agreements between undertakings active at different levels of the market. For example, in the water and sewerage sector, vertical agreements may arise between appointed water and sewerage companies and downstream retailers.

### **The exemption conditions**

An agreement may not be unlawful under CA98 even if it restricts competition. Section 9 CA98 provides that an agreement is exempt from the Chapter I prohibition if it:

- (a) contributes to –
  - (i) improving production or distribution, or
  - (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, but
- (b) does not –
  - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
  - (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Unlike under section 2 CA98, where the entity alleging a restriction bears the burden of proof, the burden of proving that the exemption criteria are satisfied rests on the party claiming the benefit of the exemption.

However, if the conditions are satisfied, the agreement is not prohibited, and it is not necessary to have any prior decision to that effect. The agreement is valid and enforceable from the moment the conditions are satisfied and for so long as that remains the case.

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<sup>43</sup> See [Part 6 of the Enterprise Act, 2002](#).



Detailed guidance on the application of the exemption criteria can be found in European Commission guidance which details the position in respect of the exemption conditions under EU competition law,<sup>44</sup> but (as we explained above) the position under the Chapter I prohibition is likely to be the same.

An agreement will also be exempt from the Chapter I prohibition if it falls within a UK or EU 'block exemption'.<sup>45</sup> There are various block exemptions which may be of relevance and interest in the water and sewerage sectors, notably the block exemptions for:

- vertical agreements<sup>46</sup>; and
- research and development agreements<sup>47</sup>.

### **3.6 The Chapter I prohibition and changes in the water and sewerage sectors**

Given the important changes taking place in the water and sewerage sector in the coming years, we expect to monitor closely whether any agreements or conduct may impede or interfere with the development of an effectively competitive market, for example by restricting the potential emergence of new competitors or forms of competition.

#### **Collective agreements and the new retail market**

A number of the structures set up to facilitate the operation of the business retail market from April 2017 may from time to time involve some forms of collaboration within industry. These interactions may take place in the context of trade association meetings, or within separate organisations or fora. It will nevertheless be the responsibility of companies involved in such arrangements, and any trade associations themselves, to ensure that they conduct their interactions in a manner that is consistent with competition law.

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<sup>44</sup> European Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C101/08). The TFEU re-numbered Article 81 as Article 101 and Article 82 as Article 102.

<sup>45</sup> Section 6 CA98

<sup>46</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L102/1

<sup>47</sup> Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ 2010 L335/36

For example, the coordination or establishment of technical barriers to entry, collective or tacit agreements to inhibit the market from expanding or taking on larger scale self-supply, before and after opening of the retail market, could potentially result in enforcement action by us under the Chapter I prohibition.

### **3.7 The Chapter II prohibition/Article 102 TFEU**

The Chapter II prohibition prohibits conduct by one or more companies which amounts to an abuse of a dominant position which may affect trade within the UK.

A central step in Chapter II cases is to determine whether a company is dominant on the relevant market. If an undertaking is dominant, then it is necessary to consider whether it has engaged in abusive conduct. Market definition is addressed in more detail above.

#### **Dominance**

In the context of an assessment of the relevant market, an assessment can be made of whether an undertaking has a dominant position.

The European Courts have defined a dominant position as

‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers’.<sup>48</sup>

In other words, dominant companies are those with significant market power, which can be thought of as the ability to sustain prices significantly above competitive levels or restrict output or quality significantly below competitive levels.

Further, as well as acting in ways that are harmful to customers, a dominant undertaking may have both the ability and incentive to harm the process of competition in order to maintain its position of strength on the market. For example, a

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<sup>48</sup> Case 27/76 United Brands v Commission [1978] ECR 207. This definition has been used in other cases.

dominant undertaking could use its market power to make it harder for actual or potential competitors to compete by raising their costs or barriers to entry.

Dominance may involve more than one undertaking. Undertakings may be jointly or collectively dominant<sup>49</sup> where they are linked in such a way as to adopt a common policy on the market.

## Assessment of market power and dominance

Market share can be a useful indicator of market power, although it does not, on its own, determine whether an undertaking is dominant. In developing the case law on dominance, the courts have stated that dominance can be presumed, in the absence of evidence to the contrary, where an undertaking has a market share persistently above 50%.<sup>50</sup> Dominance has rarely been established in case law where an undertaking has a market share of below 40%, but this does not mean dominance in such cases may not be possible depending on features of a particular market.<sup>51</sup>

In assessing whether an undertaking enjoys a dominant position, we will have regard to the CMA's guidance: 'Assessment of Market Power' (OFT 415). We will look at a range of factors, including:

- the extent to which an undertaking faces competitive constraints (from, for example, existing competitors, potential competitors or because of strong buyer power on the part of its customers);
- customers' behaviour and options (for example, awareness of competition, the extent to which alternative providers are chosen, the extent to which substitutes are available, the time and costs involved in switching);
- competitors' behaviour and capacities (for example, their range of offers, their ability to increase available supplies within the relevant time period, the time and costs involved in acquiring customers);
- market operation (for example the extent of barriers to entry and exit, such as the regulation of water abstractions and discharges to the environment);
- an undertaking's conduct in a market with regard to price and output setting as well as its financial performance (such as persistently earning a rate of profit above competitive levels);

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<sup>49</sup> The concept of joint dominance was first defined in cases T-66, 77 and 78/89 *Società Italiana Vetro v Commission (Italian Flat Glass)* [1992] ECR II-1403, [1992] 5 CMLR 302. See further case T-102/96 *Gencor v Commission* [1999] ECR II-753, [1999] 4 CMLR 971

<sup>50</sup> Case C62/86, *AKZO Chemie BV v Commission* [1993] 5 CMLR 215

<sup>51</sup> See for example case T-219/99 *British Airways v Commission* [2003] ECR II-5917, where British Airways was found to have a dominant position with a market share between 39 and 46 per cent.

- market share and movements in market share over time; and
- the effect of regulation of prices, quality and other product characteristics.

### **Assessing market shares**

We will generally assess market shares by volume and by value, and data may be collected from a number of sources. Assessments by value can often be more sensitive indicators of market power, because undertakings that are able to secure prices above the competitive level are more likely to have relatively high shares by value.

When assessing market share we will generally consider shares and movement in share over a period of time.

### **Special responsibility and ‘super-dominance’**

Dominant undertakings have a special responsibility not to allow their conduct to impair or distort competition. A dominant company is not absolved of this special responsibility as a result of the existence of sectoral regulation.

Undertakings are said to be ‘super-dominant’ where they enjoy very significant market power, where they operate as a monopoly or quasi-monopoly. Generally, such circumstances are relevant to the assessment of the lawfulness of an undertaking’s conduct under the Chapter II/Article 102 prohibition.<sup>52</sup> In other words, ‘super-dominant’ undertakings have an even greater responsibility not to distort competition where such competition exists or not to prevent such competition from developing.

### **Abusive conduct**

Dominance itself is not prohibited by the CA98. It is only the abuse of a dominant position that is unlawful. In Chapter II cases, once dominance has been established it is therefore necessary to determine whether there has been any abusive conduct.

Section 18 CA98 states:

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<sup>52</sup> Konkurrensverket v TeliaSonera Sverige AB Case C-52/09 [2011] 4 CMLR 18

'Conduct may, in particular, constitute such an abuse if it consists in –

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.'

This list is not exhaustive. Other types of conduct may also be abusive, if it amounts to the dominant undertaking having recourse to methods different from those which characterise 'normal' competition.

Dominant undertakings can engage in 'exploitative' conduct that seeks to take advantage of customers (for example by restricting output or raising prices) or to exploit certain groups of customers (such as those who are less able to switch to alternative products). In addition, dominant undertakings may also engage in anti-competitive conduct that harms the process of competition. This includes exclusionary conduct, which has the object or effect of eliminating competitors from a market or hindering market participation by current competitors or potential new entrants. However, conduct is not abusive simply because it harms competitors. The CA98 does not protect competitors in themselves, but rather seeks to protect the process of competition and ultimately the interests of customers and consumers.

Examples of anti-competitive exclusionary abuse include margin squeeze, predation, undue discrimination or selective discounting, refusal to supply (and constructive refusal to supply), and the use of long term and/or exclusive contracts. In some circumstances, bundling and tying can also be considered abusive.

The OFT guidance 'Abuse of a Dominant Position' (OFT 402) provides further details on the type of conduct which might be considered an abuse of a dominant position.

## **Dominance and abuse in related markets**

It is not necessary for dominance and abuse to be on the same market. The Chapter II prohibition applies where an undertaking that is dominant in one market commits an abuse in a different but closely associated market.

This might occur, in particular, when a vertically integrated undertaking<sup>53</sup> that is dominant on one market commits an abuse on an upstream or downstream market on which it is not dominant, or on the market on which it is dominant in order to gain a competitive advantage in a related market.

When investigating this type of infringement Ofwat will take into account, among other things, the need for access to inputs from an upstream market in order to operate in the downstream market, and the setting of upstream and downstream prices by the dominant undertaking.

### **Predation, margin squeeze and refusal to supply**

Types of abusive conduct that may be of particular concern where dominant undertakings are vertically integrated include predation, refusal to supply and margin squeeze (although the first two abuses are not limited to that context).

In the examples below, we refer to high level points of guidance only. All of these issues raise complex questions of fact, which will be case-specific, and complex questions of law and economics which continue to be refined. For example, competition authorities and courts have considered a number of different costing methodologies and benchmarks when assessing abusive conduct, and the approach taken is case specific, having regard to the relevant precedents. The assessment is particularly complex in multi-product markets where common infrastructure is used to deliver multiple products and in the context of vertically integrated undertakings operating in a sector such as water and waste water with high infrastructure costs which are either sunk, or only recoverable in the long run.

Cost-benchmark analysis is based on the premise that in order to break even (on a given market) companies that do not engage in abusive behaviour need to cover their incremental costs in the short run and their total costs (including incremental and fixed costs) in the long run.

The following paragraphs should be read with the above in mind and companies are strongly advised to seek legal advice in appropriate circumstances.

**Predatory pricing** occurs where a dominant undertaking sets prices below cost (deliberately incurring a loss) which is likely to eliminate or substantially weaken a competitor and thus enable the dominant undertaking to maintain or strengthen its

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<sup>53</sup> This is where an undertaking acts on both the supply and retail markets, either as a single entity or through parent and subsidiary companies

market power. It is based on a comparison of the prices charged by a dominant undertaking and the costs incurred by it, taking into account its strategy. The key to assessment of predatory pricing (and indeed margin squeeze discussed below and many other forms of potentially abusive conduct) is to choose the correct cost benchmark by which to assess the dominant undertaking's conduct. This may vary by industry, and assessment of alleged predation will therefore need to be based on a careful, evidence-based analysis of the relevant circumstances.

**Margin squeeze** involves pricing behaviour on the part of the dominant undertaking which reduces the margin of the undertaking operating on the downstream market, preventing or limiting competition from efficient competitors in that market. Margin squeeze ordinarily requires consideration of the spread of prices and costs in the upstream and downstream markets. The aim of this enforcement is not to protect new entrants per se, but is rather concerned with ensuring that customers benefit as a result of healthy competition (in particular where such entrants would improve customer outcomes through better service or product quality, lower prices and innovative products and services).

A **refusal to supply** may take place in conjunction with abusive pricing conduct, or as a distinct abuse without a pricing element. It may occur where access to an upstream product (such as access to a monopoly network) is made impossible, more difficult or more costly for a downstream undertaking, particularly where the input is not replicable by the access seeker. We would be concerned in circumstances where such refusal or constructive refusal to supply could not be objectively justified (see below) and had as a consequence a reduction of competition in the downstream market.

## **Other abuses of dominance**

In addition to the abuses of dominance discussed above, other types of conduct by dominant undertakings can have the object and/or effect of restricting competition and may amount to an abuse. We have set out the examples of price discrimination and tying and bundling below, but other conduct, such as exclusive dealing or the use of loyalty inducing rebates could also, potentially, amount to an abuse.

**Tying and bundling** refer to situations in which two or more products are supplied together. They are capable of raising competition law concerns as in certain circumstances they may allow a company which is dominant on one market to leverage its market power onto another market (on which it was not previously dominant) by foreclosing competitors from that latter market.

**Price discrimination** occurs where a dominant undertaking offers differential pricing to different customers (or the same pricing to customers in different circumstances). This may occur as part of vertical supply chain abuses such as margin squeeze (as discussed above), or at a single level of a market such as in retail markets. Price discrimination may be harmful where it is used to exclude competitors

Both types of conduct are more likely to occur in retail markets, and may be objectively justified as being of benefit to customers. Ofwat will assess any such behaviour and its likely competitive impacts on a case by case basis.

### **Objective justification**

While the Chapter II prohibition does not, unlike the Chapter I prohibition, provide criteria for exemption, a dominant undertaking can defend itself against an allegation of abuse by demonstrating that it has an objective justification for its conduct.

A dominant undertaking must, however, put forward arguments and evidence to show that its conduct was objectively justified. Conduct must be proportionate in order to satisfy this test.

## **3.8 Competition law and regulation**

The water and sewerage sector is subject to significant sectoral regulation. However, companies operating in the sector need to comply with both sectoral regulation and competition law.

The application of the CA98 will take into account the existence of regulation in the sector in a number of ways. For example, whether an agreement generates anti-competitive effects will be assessed in light of the economic context, which will include any regulatory framework. In addition, under the Chapter II prohibition, assessments of market definition and dominance may be influenced by aspects of the regulatory regime, for example where a company has a virtual monopoly over the supply of services in a region as a result of being an appointed undertaker.

Even where the scope for competition is limited, the CA98 provisions will continue to apply where there remains some residual scope for competition or potential competition. Similarly, even though the regulatory framework may, for example, encourage certain behaviour, the CA98 prohibitions continue to apply to the extent



that an undertaking retains a degree of discretion in the way in which it implements sector specific rules or codes.<sup>54</sup>

For example, if there is more than one way to comply with a regulatory requirement, at least one of which is not anti-competitive, an undertaking is unlikely to be able to justify an agreement or conduct which is anti-competitive on the basis that it was undertaken for the purposes of regulatory compliance. Further, the fact that a company has complied with its regulatory obligations may not be sufficient to demonstrate that it has also complied with CA98.<sup>55</sup>

The exception is that Schedule 3 CA98 provides that the Chapter I and Chapter II prohibitions do not apply to an agreement or conduct to the extent that it is entered into or undertaken in order to comply with a legal requirement. For example, where anti-competitive conduct is required by national legislation or the national legal framework, and these provisions eliminate entirely any possibility of complying with them in a way which is not anti-competitive, the Chapter I and Chapter II prohibitions will not apply to the extent necessary to meet such requirements.<sup>56</sup>

Schedule 3 CA98 also excludes certain other categories of agreement and conduct from the Chapter I and Chapter II prohibitions, including in particular the activities of an undertaking entrusted by a public authority with the operation of services of general economic interest (SGEI). The SGEI exclusion applies to a firm entrusted with the provision of services of general economic interest, or having the character of a revenue-producing monopoly, only so far as the Chapter I or Chapter II prohibitions would obstruct the performance, in law or in fact, of the particular tasks assigned. The exclusion will be interpreted strictly, and Ofwat will have regard to the CMA's guidance on the SGEI exclusion<sup>57</sup>.

It is for undertakings to assess themselves whether any relevant exclusions may apply to their agreements, arrangements or conduct. We will have regard to guidance issued by the CMA when assessing any arguments to this effect.

In certain limited cases, the WIA91 prohibits the use by us of our powers under CA98.<sup>58</sup> In such cases, we will use the regulatory tools available to us under the WIA91 where we consider it appropriate.

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<sup>54</sup> Case C-280/08 P Deutsche Telekom AG v Commission [2010] ECR I-09552

<sup>55</sup> Or indeed vice versa, as regulatory obligations may go further than competition law compliance requires.

<sup>56</sup> Cases C-359 & 379/95P Commission and France v Ladbroke Racing [1997] ECR I-6265, [1998] 4 [CMLR] 27

<sup>57</sup> OFT421, 'Services of general economic interest exclusion'

<sup>58</sup> WIA91 ss.66D, 110A, 110B.

### 3.9 Consequences of a competition law infringement

As discussed above, where we investigate an infringement of the CA98, we may:

- impose a financial penalty on the infringing undertaking;
- generally make directions as to future conduct; or
- agree to accept commitments.

We explain these powers further in Chapter 4.

In addition, infringements of the CA98 may give rise to claims from third parties. Claims for redress for breaches of the CA98 can be brought in the UK courts which have jurisdiction to hear competition cases, including the Competition Appeal Tribunal (CAT) and the High Court. The three main types of relief available to a successful claimant are:

- damages;
- an injunction; and
- a declaration.

Claims for damages resulting from a CA98 infringement may be brought as either 'stand-alone' or 'follow-on' actions. A standalone action is a claim brought where the claimant itself seeks to prove that the CA98 has been infringed, without relying on an infringement decision of a competition authority.

Where Ofwat, the CMA, the European Commission or another sector regulator has made a final decision that the CA98 has been infringed, that decision will be binding on both the ordinary courts and the CAT (unless that decision is being appealed). A claimant can therefore use the decision as proof of a CA98 breach and may rely on certain findings of fact in it, so that in most cases they will need to prove only that they have suffered loss as a result of the infringement (a 'follow-on' action).

Where an anti-competitive agreement has been found to be unlawful under the CA98, the relevant restrictive provisions in that agreement and, in some circumstances, the entire agreement will be void and unenforceable. We may also apply to the court for a Competition Disqualification Order against a company director in appropriate cases.<sup>59</sup>

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<sup>59</sup> Sections 9C and 9E, Company Directors Disqualification Act 1986.

## 4. Our procedural approach: investigations and enforcement

### Key messages

Only one regulator can exercise prescribed CA98 functions in any one case at any one time. There are procedures in place to ensure the best-placed competition authority takes a case forward.

Our 'primacy' obligations mean that before exercising our formal enforcement powers set out in the WIA91 we have a duty to consider whether it would be more appropriate to proceed under the CA98.

We will apply our prioritisation principles to all potential CA98 investigations in deciding whether to begin an investigation and will continue to keep this under review.

We will seek to exercise our functions under the CA98 transparently and fairly.

### Opening cases

Potential cases involving a possible breach of the CA98 can come to our attention in a number of ways. This includes:

- complaints by the public and businesses;
- referrals from other authorities;
- proactive intelligence gathering;
- market studies and enquiries;
- applications for leniency; and
- other regulatory monitoring.

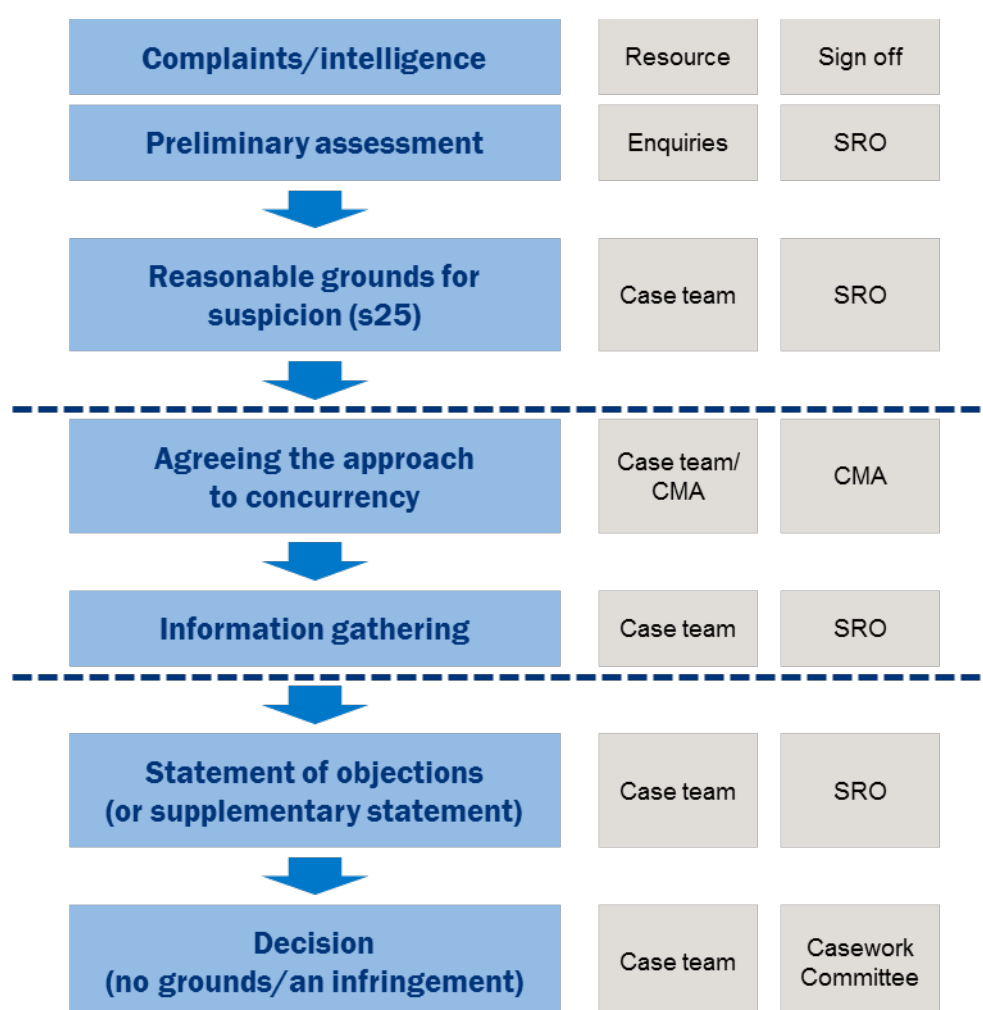
A CA98 investigation may also be opened following receipt of a super-complaint brought by a designated consumer body.<sup>60</sup>

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<sup>60</sup> See section 11 Enterprise Act 2002. A super-complaint is a complaint submitted by a designated consumer body that any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers.

Figure 1 below shows the stages that an investigation may include, from us becoming aware of an issue to a final decision. The column on the right indicates the body, team or individual (usually, the Senior Responsible Officer (SRO), Market Outcomes and Enforcement), within Ofwat that will generally be involved at each stage. The stages are described in further detail in this chapter. Further details on the procedure we follow is found in the CMA's Rules of Procedure<sup>61</sup> and the Concurrency Regulations.<sup>62</sup>

**Figure 1 Stages that an Ofwat CA98 investigation may include**



<sup>61</sup> Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014/458

<sup>62</sup> Competition Act 1998 (Concurrency) Regulations 2014

## 4.1 Preliminary assessment

When considering whether to open or continue with an investigation under the CA98, we are generally required to consider whether our other powers are a more appropriate means of addressing an issue. As explained above, before exercising our powers with regards to formal enforcement or financial penalties set out in WIA91, we must consider whether it would be more appropriate to proceed under the CA98.

It will be important for any complainant to present the best possible case to enable us to decide whether it is appropriate to open an investigation. Appendix 1 sets out the information that we would generally expect to see in any formal complaint if we are to take forward a CA98 investigation.

Complaints received by us will be assessed in the light of, for example:

- our jurisdiction;
- the nature of the alleged conduct;
- our applicable powers;
- the evidence;
- available resources; and
- our prioritisation principles.<sup>63</sup>

## 4.2 Prioritisation

As set out in our published prioritisation principles, our CA98 powers have an important part to play in ensuring the effective use of market forces. At the same time, we need to make the best use of our resources in order to achieve our aims. To do this, we need to take appropriate decisions about the work programmes and the projects we undertake, looking across all our areas of work. Our prioritisation principles are summarised below.

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<sup>63</sup>[http://www.ofwat.gov.uk/wp-content/uploads/2016/03/prs\\_inf\\_100920ca98priority.pdf](http://www.ofwat.gov.uk/wp-content/uploads/2016/03/prs_inf_100920ca98priority.pdf)

### **Our prioritisation principles**

**Impact** – The greater the positive impact on consumers from the decision, the more likely we are to open or continue an investigation.

**Strategic significance** – The intervention must be compatible with Ofwat's strategy.

**Risks** – The higher the likelihood of a successful outcome, the more likely we are to open or continue an investigation given our finite resources.

**Resources** – Ofwat must be satisfied that the resources required are proportionate to the expected benefits.

Once a case is opened and a case team assembled, the team will regularly review a CA98 investigation as it develops, taking a view as to whether the investigation continues to be justified in light of our prioritisation principles. If it is not, the investigation may be closed on the grounds of administrative priority.

While part of the assessment may take into account the strength and quality of the available evidence, an administrative decision not to open or to close an investigation on the basis of our prioritisation principles is not a decision on the merits of the case or whether there has been a breach of competition law. Our choice of whether to take enforcement action is a question of how we use our resources effectively and efficiently. In some cases it may be appropriate to deal with suspected infringements of competition law without formal enforcement action. For example, we may alert parties to possible concerns without formally opening an investigation.

If we decide not to open a formal investigation under the CA98, or close an investigation on the grounds of administrative priority, it is open to the CMA (or another concurrent regulator) to exercise their powers under the CA98, following consultation with us.<sup>64</sup>

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<sup>64</sup> Reg. 8, Competition Act 1998 (Concurrency) Regulations 2014

### 4.3 Reasonable grounds for suspecting an infringement

Once our case team has reviewed the available evidence and made a preliminary assessment of the agreement or conduct in question, they will consider whether there are 'reasonable grounds for suspecting'<sup>65</sup> an infringement of the CA98.

Once we have established that we have evidence suggesting there are reasonable grounds for suspecting that there is a breach of CA98, we must engage with the CMA within a set timeframe in order to agree the approach to concurrency (see section 4.5).

### 4.4 Agreeing the approach to concurrency

Before launching any CA98 investigation, Ofwat and the CMA (and any other relevant regulator) will consult one another to agree which authority will exercise its concurrent competition powers in relation to the case,<sup>66</sup> as soon as possible and in any event no later than one month from disclosure of the relevant information.<sup>67</sup>

In determining case allocation the guiding principle is that a case will be allocated to the competition authority best placed to exercise the concurrent competition enforcement powers.<sup>68</sup> We will endeavour to:

- reach agreement on which competition authority will exercise its powers in each case as soon as reasonably practical; and
- engage constructively with the CMA and any other relevant sectoral regulators.

If agreement cannot be reached, the CMA may determine which competition authority should act (see the Concurrency Regulations and Ofwat's MoU with the CMA).<sup>69</sup>

The CMA may direct that a case in progress is transferred from Ofwat to the CMA, if it is satisfied that to do so would further the promotion of competition within any market or markets in the United Kingdom for the benefit of consumers. The CMA can only issue such a direction before Ofwat has issued a Statement of Objections.

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<sup>65</sup>Section 25 CA98

<sup>66</sup> Regulation 4(2) of the Concurrency Regulations ([www.legislation.gov.uk/id/uksi/2014/536](http://www.legislation.gov.uk/id/uksi/2014/536)).

<sup>67</sup> See above, footnote 33. See paragraph 26 of the MOU.

<sup>68</sup>CMA10 contains a list of factors relevant to determining which regulator is 'better or best placed

<sup>69</sup>Regulation 5 of the Concurrency Regulations

The European Commission has the power to take over cases involving an alleged breach of Article 101 and/or Article 102 TFEU from NCAs by initiating proceedings.<sup>70</sup>

## 4.5 Conducting a formal investigation

We seek to exercise our functions transparently and fairly. We carry out our CA98 investigations and make CA98 decisions in accordance with the principles of administrative law, ensuring our procedure is fair. We are required to follow the CMA's procedural rules<sup>71</sup> when undertaking an investigation or taking enforcement action under the CA98 or Articles 101 and 102 TFEU and we will also have regard to the CMA's procedural guidance.<sup>72</sup>

When we decide to open a formal investigation under the CA98 we will generally send the party or parties under investigation a case initiation letter. This letter will set out brief details of the agreement or conduct under investigation, the relevant legislation, our indicative proposed timetable for the initial stages of the investigation and contact details. Where relevant, we will also generally inform the person who has provided relevant information to us giving rise to the investigation (for example, the person making a complaint). However, we will not communicate with the party or parties under investigation or with third parties at the start of an investigation if this may be prejudicial (for example, where we intend to conduct unannounced inspections). We may need to limit the amount of information provided in some cases (for example, to protect the identity of a whistle-blower or a complainant).

We may in some circumstances publish basic information about the investigation in accordance with our powers under section 25A CA98 (for example, if we consider that it may assist us in our investigation or is necessary for market stability). If we publish information identifying a party whose activities (including being a party to a particular agreement) are being investigated, and subsequently decide to terminate the investigation, we will publish a notice stating that the activities of that party are no longer being investigated, in compliance with our statutory obligations.<sup>73</sup>

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<sup>70</sup>Further details on case allocation as between NCAs from different Member States are provided in guidance adopted by the CMA. <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>

<sup>71</sup>The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458

<sup>72</sup>'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases',

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537006/CMA8\\_CA98\\_Guidance\\_on\\_the\\_CMA\\_investigation\\_procedures.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537006/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf)

<sup>73</sup> See paragraph 10 of The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458



## 4.6 Requesting and obtaining information

In order to reach decisions on the basis of robust evidence, we will require detailed information and data. Information may be needed from the subjects of our investigations and from third parties. We appreciate that providing such information may be onerous in some cases, and we seek to make the process as efficient as possible without prejudicing the investigation. This may entail sharing draft information requests before they are formally issued, or discussing with parties how they hold data in order to tailor our requests.

In summary, our powers in conducting an investigation include the power to:

- issue requests for information and documents (commonly referred to as section 26 notices) in writing;
- conduct compulsory interviews with any individual connected to a party under investigation;<sup>74</sup>
- enter into business and/or domestic premises and require the production of documents and take copies of documents. Such entry may be either with, or (for business premises) without, a warrant. If we have obtained a warrant, we may search for and seize documents;
- impose a penalty on any business or individual which (without reasonable excuse) does not comply with our information gathering powers,<sup>75</sup> having regard to the CMA's Statement of Policy on Administrative penalties (CMA4).

We cannot:

- require the production or disclosure of privileged communications;<sup>76</sup>
- force a party to provide answers that would require an admission that it has infringed the law;
- disclose confidential and sensitive information other than in accordance with our statutory powers.<sup>77</sup>

When we have requested information, we expect:

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<sup>74</sup>S26A CA98

<sup>75</sup>S40A CA98

<sup>76</sup>S30 CA98

<sup>77</sup> Part 9 EA02 imposes a general restriction on the disclosure of information. The Concurrency Regulations require arrangements to be made for the sharing with concurrent authorities of specific information during an investigation.

- to be provided with relevant information in a clear and concise format and within the time period set. We will work with parties to ensure information is provided in a way that suits both Ofwat and the parties, where possible;
- to receive separate non-confidential versions of any document or materials provided which contain sensitive or otherwise confidential information;
- a clear explanation as to why any redacted information should be considered confidential.

We may return information where, after careful review, we consider it is outside the scope of the request. However, we will retain this information for as long as necessary to satisfy ourselves that this is the case.

Where the volume of information involved is large, we will typically discuss with the companies concerned how the information may best be provided. This may involve, for example, the use of an information portal.

In principle, where information on one matter has been gathered using powers under the CA98, we may use it to investigate other matters under the CA98, and we may use information gained under the CA98 for investigations under EU competition law or other relevant legislation<sup>78</sup>. However, this is subject to certain constraints and limitations, in particular with respect to the use of leniency information shared with us by other concurrent regulators.

Any information received from the European Commission or another NCA will only be used in accordance with Article 12 of the Modernisation Regulation.<sup>79</sup> This provides for information sharing (which can include confidential information) amongst NCAs and/or the European Commission. In general, information exchanged on this basis will only be used in evidence for the purpose of applying Articles 101 and 102 TFEU in respect of the subject-matter for which it was collected. However, where national competition law is applied in the same case and in parallel to EU competition law, and does not lead to a different outcome, information so exchanged may also be used for the application of national competition law.

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<sup>78</sup> There are restrictions on disclosure of such information under Part 9 Enterprise Act 2002.

<sup>79</sup> EC Regulation 1/2003

## 4.7 Interim measures

We have the power to impose interim measures either on our own initiative or in response to a request to do so, where we consider it necessary to:

- act urgently either to prevent significant damage to a person or category of persons, or
- in order to protect the public interest.<sup>80</sup>

Interim measures generally require a party to comply with temporary directions, for example, to continue supplying a particular product or service, in circumstances where an investigation has been started but not yet concluded.

Applications for interim measures should be made to the SRO of the Market Outcomes and Enforcement Programme, with sufficient information and evidence to demonstrate the need for interim measures.

In considering an application for interim measures we will follow the procedure outlined in the CMA's guidance<sup>81</sup> which outlines the right for representations to be made by applicants and the party against whom interim measures are sought. Applications are likely to be determined by the SRO of the Market Outcomes and Enforcement Programme.

### **Casework Committee**

We established a Board Committee for Casework ('the Casework Committee') to make final decisions in strategic cases (as defined in Annex J of the Board's Rules of Procedure). In practice, a CA98 case will generally be classified as a strategic case and final decisions are likely to include key decisions after a Statement of Objections has been issued (including settlement decisions).

The terms of reference of the Casework Committee are interpreted in accordance with the CMA's Procedural Rules. The role played by the Casework Committee is similar to that played by the Case Decision Group in CMA investigations<sup>82</sup>.

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<sup>80</sup> See 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases'

<sup>81</sup> 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8)

<sup>82</sup> Op. cit, page 64: Appointment of a Case Decision Group.

The Casework Committee may voluntarily refer decisions back to Ofwat's Board, where it deems it appropriate to do so.

## 4.8 Investigation findings

There are several ways in which an investigation under the CA98 can be resolved. These are as follows.

- We may proceed to a formal infringement decision. Prior to doing so, we will issue a Statement of Objections setting out our provisional view as to why the agreement or conduct under investigation amounts to an infringement. If appropriate, having taken account of representations received and any new evidence, we may issue a final infringement decision, and impose a penalty and/or directions on the party or parties concerned.
- We may agree a settlement with the parties concerned which will permit an expedited process for reaching an infringement decision.
- We may issue a decision that there are no grounds for action (either before or after issuing a Statement of Objections) if we have not found sufficient evidence of an infringement.
- We may close our investigation on the grounds of administrative priorities at any time (before or after issuing a Statement of Objections), consulting formal complainants before taking a decision to do so.
- We may accept commitments from a party as to its future conduct which would not involve a finding of infringement.

If the Casework Committee decides to adopt an infringement decision, it will set out the key facts relied upon to prove the infringement and the nature of the sanction it will impose. It will also consider the material representations made during the course of the investigation. The infringement decision may impose a financial penalty and may contain directions to bring the infringement to an end. We will normally publish a summary of the investigation and a non-confidential version of the infringement decision.

Alternatively, the Casework Committee may adopt a 'No grounds for action decision' and close the investigation. In the same way as when issuing an infringement decision, we will set out the key facts relied upon to issue the decision - publishing either a case closure summary or a non-confidential version of the decision.

## Statement of objections

Where we reach the provisional view that the agreement or conduct under investigation amounts to a CA98 infringement and at that stage consider it appropriate to proceed to a formal decision, our current approach is that the SRO of the Market Outcomes and Enforcement Programme will decide to issue a Statement of Objections to each business considered to be responsible for the infringement.

The Statement of Objections represents Ofwat's provisional view based on our legal and economic assessment of the case. It allows the business that is accused of breaching the CA98 to know the full case against it and, if it chooses to do so, to respond in writing and orally. We give each addressee of a Statement of Objections an opportunity to inspect our investigation file.

Further information on the Statement of Objections procedure is contained in the CMA's guidance. We will generally follow the CMA's approach. We will normally announce the issue of a Statement of Objections but may not do so in certain cases, or may publish limited information, in light of for example, particular market sensitivities that may arise in any given case.

## Settlement

Settlement is a voluntary process in which a business must admit that it has breached the CA98 and accept that a streamlined administrative process will apply for the remainder of the investigation in return for a reduction in any financial penalty. The settlement process can be initiated at any time during the formal investigation, including after the issue of a Statement of Objections.

Ofwat will have regard to the CMA's guidance<sup>83</sup> when agreeing settlements in CA98 investigations and it should be noted that this process is substantially different from the settlement process in relation to other types of enforcement cases dealt with by Ofwat.

If settlement has been agreed before the issue of an SO, we will produce a statement setting out our findings so far and noting that the party concerned has

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<sup>83</sup> CMA8

accepted that it has infringed the CA98 and asked for settlement. Settlement decisions are likely to be taken by the Casework Committee.

In order for us to consider settlement, the undertaking in question must:<sup>84</sup>

- make a clear and unequivocal admission of liability in relation to the nature, scope, and duration of the infringement;
- cease the infringing behavior immediately; and
- confirm they accept a streamlined administrative process for the remainder of the investigation.

An infringement decision will be issued in every settlement case (unless exceptionally we decide not to make an infringement finding). We may impose a financial penalty on any settling business, including a settlement discount. This will be capped at:

- 20% for settlement pre-Statement of Objections; and
- 10% for settlement post-Statement of Objections.

## Financial penalties

If we decide that there has been an infringement of the CA98, we may impose a penalty on the infringing undertaking(s). In practice, such a decision is likely to be taken by the Casework Committee which will have regard to the CMA's penalty guidance when setting the amount of a penalty.<sup>85</sup>

Where the Casework Committee is considering reaching an infringement decision under the CA98 and imposing a financial penalty on a party, it will provide that party with a draft penalty statement, setting out the key considerations relevant to the calculation of the proposed penalty, based on the information available to it at the time. Parties will be given an opportunity to comment on the draft penalty statement in writing and to attend an oral hearing.

The infringement decision will explain how the appropriate level of penalty was decided upon, having taken into account our statutory obligations in fixing a financial

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<sup>84</sup> See paras 14.7-14.8 CMA8

<sup>85</sup> OFT 423, OFT's guidance as to the appropriate amount of a penalty, (September 2012)  
<https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation>

penalty and the parties' written and oral representations on the draft penalty calculation.

## 4.9 Early resolution: commitments and informal resolution

We may bring our investigation to an end without proceeding to an infringement or 'no grounds for action' decision in a number of ways.

### Warning or advisory letters

We may from time to time issue warning or advisory letters where we are concerned that an undertaking might be infringing the CA98 in connection with the supply of water and sewerage services in England and Wales. Generally, we will follow the process outlined by the CMA.<sup>86</sup>

Our approach will be based on various factors, including:

- the seriousness of any potential anti-competitive practices;
- the strength of the evidence Ofwat has; and
- the potential for the practices to harm competition in the relevant market sector.

Our warning letter will:

- explain our concerns about the relevant business practices;
- recommend that the addressee carry out a self-assessment of its business practices to ensure it is complying with competition law;
- ask the addressee to write to us with details of what it has done, or is planning to do, to ensure that it complies with competition law.

Our advisory letter will:

- explain our concerns about the relevant business practices;
- recommend that the addressee carry out a self-assessment of its practices to ensure it is complying with competition law; and
- request that the addressee let the CMA know it has received the letter.

A warning or advisory letter does not necessarily mean the recipient has breached the CA98. However, it is important that the party takes the matter seriously and

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<sup>86</sup> CMA8

responds when requested to do so. Failure to do so may result in us opening a full CA98 investigation.

## Commitments

Under section 31A CA98, we may accept commitments from one or more parties for the purpose of addressing the competition concerns at issue in a particular case. Commitments are binding promises from a party in relation to its future conduct. Ofwat may apply to the court if a party from whom we have accepted commitments fails (without reasonable excuse) to adhere to them.

We will have regard to the CMA's guidance on the circumstances in which it may be appropriate to accept commitments<sup>87</sup> and the process that the CMA adopts when considering commitments.<sup>88</sup> If we choose to accept commitments we will close our investigation and not make an infringement decision in relation to the issues covered by the commitments.

Undertakings under investigation can offer commitments at any time until an infringement decision is made. Commitments can be offered before we have issued a Statement of Objections even though we have not yet fully carried out our investigation but on the basis that we may have notified parties that we have reasonable suspicion of an infringement. To date, we have accepted such commitments in two cases.<sup>89</sup>

Commitments can also be offered after we have issued a Statement of Objections and generally after the parties have had an opportunity to make representations. However, we are unlikely to accept commitments at a very late stage.

Where we are offered commitments, we will consult those businesses affected by the agreement and/or conduct in question. We will seek views on, for example, whether the commitments address the potential harm arising from the agreement or conduct in question. If we propose to accept the final commitments offered, we may submit these to the Casework Committee for approval.

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<sup>87</sup> See OFT407 'Enforcement' and CMA8 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases'

<sup>88</sup> See paragraph 10.20 of CMA8 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8)

<sup>89</sup> See <http://www.ofwat.gov.uk/ib0415-ofwat-accepts-commitments-from-bristol-water/> and [http://www.ofwat.gov.uk/wpcontent/uploads/2015/11/pap\\_pos20130117alcontrol1.pdf](http://www.ofwat.gov.uk/wpcontent/uploads/2015/11/pap_pos20130117alcontrol1.pdf)



### **Bristol Water CA98 investigation**

In March 2013, we launched a formal investigation into the price and non-price terms Bristol Water applied when providing services to self-lay organisations. We did this in response to two separate complaints. These related to the services provided by Bristol Water to enable the provision of new water connections for new development sites, either by itself or by self-lay organisations (SLOs).

The complainants alleged that Bristol Water had used its dominant position to harm competition in the contestable market for providing new water connections.

During the early stages of its investigation, we identified four competition concerns related to Bristol Water's conduct (including pricing and non-pricing behaviours) that could potentially restrict entry and expansion of competitors in the new water connections market in Bristol Water's area.

In March 2015, we gave notice of our intention to accept a comprehensive set of binding commitments to address our concerns.

## **4.10 Leniency, voluntary redress, fines and penalties**

### **Leniency**

Under both EU and UK competition law, competition authorities may grant leniency to undertakings who inform them of cartel activities and commit to ongoing cooperation during an investigation. This is a powerful tool to enable competition authorities to uncover cartel activities, which are often difficult to identify. The benefits of increasing detection of these most serious competition infringements generally outweigh the loss of the deterrent effect that would come from imposing financial penalties on all the undertakings that participated in the infringing agreement(s).

Leniency may take the form of total immunity from fines for the first undertaking to successfully apply, or a reduction in penalties.

It is vital that undertakings who are considering applying for leniency do not delay in seeking to obtain a leniency 'marker' (that is, a marker recognising their place in the 'queue' for leniency). We do not have concurrent jurisdiction to prosecute the 'cartel

offence' (defined in the Enterprise Act 2002).<sup>90</sup> If we are made aware of conduct relating to a suspected cartel offence we will immediately refer the matter to the CMA. The CMA is the only authority empowered to grant criminal immunity and issue a no-action letter with respect to prosecutions under the criminal cartel offence and, for that reason, the CMA generally administers the grant of leniency markers (in collaboration with sectoral regulators where relevant).

All initial applications for leniency markers in cases involving water and waste water activities in England and Wales should be **made directly to the CMA** in accordance with its published leniency process and procedure.<sup>91</sup>

The CMA's process for applying for leniency is not repeated here. For further information on the types of leniency treatment which may be available to businesses, and the conditions which must be met to secure those benefits, see the CMA's 'Guidance as to the appropriate amount of a penalty' and guidance on leniency applications.<sup>92</sup>

## Voluntary redress

Voluntary redress schemes are a form of alternative dispute resolution. Under changes introduced by the Consumer Rights Act 2015, we have powers concurrently with the CMA to approve a redress scheme in relation to a CA98 infringement.<sup>93, 94</sup> The CMA and relevant regulators are required to publish guidance on applications for approval of redress schemes, the approval of such schemes, and the power to enforce approved schemes.<sup>95</sup> We will follow the CMA guidance<sup>96</sup> on the approval

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<sup>90</sup> EA2002, s.188: An individual is guilty of an offence if he agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the kind specified in s.188(2). These include agreements to fix prices, limit supply or production, market-sharing agreements, and bid-rigging agreements. As to concurrent jurisdiction in respect of the cartel offence, see the CMA's guidance CMA9, <https://www.gov.uk/government/publications/cartel-offence-prosecution-guidance>

<sup>91</sup> OFT1495

<sup>92</sup> See OFT 423, OFT's guidance as to the appropriate amount of a penalty, (September 2012) <https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation>, and OFT1495, Applications for leniency and no-action in cartel cases, (July 2013). <https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases>. In the event that we are initially approached by a leniency applicant, we will direct the applicant, in the first instance, to the CMA.

<sup>93</sup> Voluntary redress schemes in respect of a CA98 infringement are not to be confused with redress schemes for the resolution of customer complaints, which retailers must have in place in accordance with Ofwat's Customer Protection Code of Practice.

<sup>94</sup> Competition Act 1998 (Redress Scheme) Regulations 2015, (S.I. 2015, No.1587)

<sup>95</sup> Section 49C(9) of the CA98, as amended by the CRA15.

<sup>96</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/453925/Voluntary\\_redress\\_schemes\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf)

and enforcement of such redress schemes, but will exercise our discretion to use our powers in accordance with our prioritisation principles.

Where an undertaking offers a redress scheme, those affected by the infringement are able to claim compensation through the scheme without the need to pursue litigation in the courts.

In cases relating to the supply of water and waste water services in England and Wales, undertakings which have infringed the CA98 may apply to Ofwat or the CMA for approval of a voluntary redress scheme. When either authority proposes to exercise relevant powers, it will liaise with the other authority as appropriate.

### **4.11 Competition disqualification orders**

We have concurrent jurisdiction with the CMA to apply to a court for a competition disqualification order to be made against any director of a company which we have found to be in breach of competition law.<sup>97</sup> Such an order will be made if the court finds that the conduct of the director in relation to the breach of competition law makes him/her unfit to be concerned in the management of a company.

Before making such an application, we will give notice to the director concerned and give that person an opportunity to make representations to us.

### **4.12 Appeals**

A decision taken by us as to whether the Chapter I and/or the Chapter II prohibition under the CA98 or Articles 101 and/or 102 TFEU have been infringed may be appealed to the Competition Appeal Tribunal (CAT).<sup>98</sup> The CAT may:

- confirm or set aside our decision;
- impose, revoke or vary the amount of any penalty imposed by us;
- remit the matter to us; or
- make any other decision, including give any such directions or take such other steps that we ourselves could have made or taken.

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<sup>97</sup> Sections 9C and 9E, Company Directors Disqualification Act 1986. See also OFT510: <https://www.gov.uk/government/publications/competition-disqualification-orders>

<sup>98</sup> See CA98 sections 46 and 47, and Schedule 8

The procedure applicable to appeals to the CAT is set out in the Competition Appeal Tribunal Rules 2015.<sup>99</sup>

Where the CA98 does not provide for an appeal, an application for judicial review may be brought in certain circumstances. Parties should seek independent legal advice on their rights in this regard.

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<sup>99</sup> <http://www.catribunal.org.uk/240/Rules-and-Guidance.html>

## **Appendix 1 How to submit a complaint**

### **Where to send complaints**

Complaints should be submitted to:

Case Management Office  
Ofwat  
Centre City Tower  
7 Hill Street  
Birmingham  
B5 4UA

E-mail: [CaseManagementOffice@ofwat.gsi.gov.uk](mailto:CaseManagementOffice@ofwat.gsi.gov.uk)

Telephone: 0121 644 7500

### **Contents of a submission**

A submission should contain the following information to help us make a preliminary assessment of a relevant complaint.

#### **A summary of the complaint**

This should set out the CA98 or EU competition law prohibition(s) you believe have been infringed and why. It should also include details of:

- the alleged infringement, the parties involved and your relationship with the target of the complaint,
- the products or services connected to the supply of water and waste water services or activities in England and Wales,
- key dates of the alleged infringement,
- the detriment to the complainant,
- the detriment to customers and consumers in the market or related markets.

Please note that Ofwat is willing to receive anonymous complaints.

## **Background material**

You should include the following information as a minimum.

- Business name, address, telephone number, e-mail address and the contact details of a person who can discuss the detail of the complaint.
- A brief explanation of the nature of your business and its scale (local, national, international, approximate turnover).
- Details of any closely related markets which are relevant to your complaint.
- Approximate market shares of key participants active in the market and any related markets which are relevant to your complaint,
- The nature of supply and/or demand for products/services in the market, and any related products/services in the market or related markets, which are relevant to your complaint.

## **Supporting documentation**

You should include:

- any relevant letters, emails, reports or other documents which detail the events which are the cause of your complaint,
- any other material that will assist us with understanding and substantiating your complaint.

If you cannot provide any of the above information, please explain why in your submission.

## **Declaration**

If you are complaining on behalf of a regulated entity, whether a water undertaker or licensee, you should include a declaration that the information in your submission is correct and complete to the best of your knowledge. Your declaration should include:

- your name and signature;
- your position in the company; and
- the date.

## Process

Our case management office will acknowledge receipt of a complaint within ten working days, including an initial view as to whether the complaint meets the requirements set out above. If a submission does not meet these requirements, we will advise you what else may be needed before we will consider the complaint.

Should we decide to open a case in response to your complaint, Ofwat may send a non-confidential version of your submission to the parties named in your complaint. Ofwat may wish to do so prior to formally opening any investigation. If your submission contains confidential information, you should provide a separate non-confidential version that we can send to the target(s) of the complaint, as well as explaining why you believe the information to be confidential. We will consult you before revealing your identity and before revealing any confidential information that you have provided.

If Ofwat decides to investigate your complaint, we might request permission from you to publish details of the complaint, including your identity, on Ofwat's website.

If we issue a Statement of Objections, it is likely that we will need to reveal your identity to the addressee of the Statement of Objections. You should let us know if you are concerned about your identity being revealed.

If you need any further guidance on how to submit a complaint to Ofwat please contact our case management office.