CMS
law·tax·future

UK competition law enforcement

Decoding the CMA and CAT's decisions

September 2024

DATA
DRIVEN
DISPUTES

Contents

The CMA and CAT's decisions decoded

The Competition Act 1998 (**CA98**) is generally regarded as having brought UK competition law into the modern age. It contains two key provisions: Chapter I, which regulates anti-competitive agreements/concerted practices and Chapter II, covering the abuse of dominance.

Since the entry into force of the CA98 nearly 25 years ago the Competition and Markets Authority (**CMA**), and, prior to 2014, its predecessor the Office of Fair Trading (**OFT**), have brought over 160 cases under the legislation.

A number of the resulting decisions have been appealed to the Competition Appeal Tribunal (**CAT**) and the growing number of CA98 cases appealed on substance and level of fines has created a rich body of case-law on the various aspects of the CA98 prohibitions.

The CMS Antitrust, Competition and Trade team has completed a rigorous analysis of competition enforcement in the UK, analysing all 164 CMA CA98 competition law investigations and CAT appeals since the early 2000s. The Chapter II prohibition came into force in March 2000 and the Chapter I prohibition a year later in June 2001. We have analysed all CA98 investigations and appeals up to 31 May 2024.

Our findings are not just relevant to businesses active in the UK but also to individuals responsible for companies engaged in breaches of competition law. Two points stand out:

1. the CMA is now actively considering bringing director disqualification proceedings in every case. This threat is real and current: the power is being used; and
2. the CMA is raiding homes and will soon have seize and shift powers in these raids, including the power to seize devices from people's homes.

We were curious to find out the answer to the following questions, amongst many others. This was simply not possible without a comprehensive review of the regulator's decisions:

Is the CMA becoming so sophisticated in its investigations that the "traditional" infringements have dropped off its radar?

Are some sectors more prone to breaches of competition law than others?

Is the CMA now primarily focussed on tackling issues in the digital sector?

Is it still worth companies applying for leniency?

How often is the CMA willing to allow so-called "hybrid" settlements?

Is the likelihood of a company being raided dependent on its sector of activity?

Is there a shift in how investigations are being resolved?

How frequently does the CMA pursue director disqualification proceedings where directors are involved in an infringement?

To what extent do individual employees come under the CMA's spotlight during an investigation?

How deferential has the CAT been to the CMA's decision making?

To our knowledge, this analysis is the first of its kind in the market.

The data-driven analysis provided in the first part of this report is backwards-looking. Later in the report we share with you our thoughts on the trends we see shaping the competition enforcement landscape in the near-future:

- The continued focus on e-commerce
- Increased willingness to tackle novel theories of harm
- Focus on green agreements and environmental topics
- Evolving enforcement in digital markets
- A heightened focus on labour markets
- A growing role of the CAT in policing the CMA

If you would like to understand what our findings mean for your business and sector, we would be delighted to hear from you.

The CMS Antitrust, Competition and Trade team
September 2024

Data-driven analysis to decode the CMA and CAT's decisions

How CMA investigations are instigated

One of the key questions that businesses face when considering competition law enforcement risk is how conduct (both past and present) comes to be investigated by the CMA.

Of the CMA's investigations that have resulted in an infringement decision (i.e. excluding commitments, interim measures and no issues decisions), 63% originated from third-party complaints and tip-offs. The prominence of third-parties as a source of the CMA's enforcement activity is significant, bearing in mind that companies will have very limited awareness or control over these types of approaches to the regulator. Therefore, businesses need to ensure that they are minimising the risks of investigative action being taken, by identifying areas within their business that could give rise to competition concerns and ensuring they have comprehensive competition law compliance programmes in place.

A total of 24% of the regulator's investigations started with a leniency application informing the CMA of cartel activity. Businesses should therefore be aware of the processes that will need to be put in place rapidly if they become aware of non-compliant behaviour and want to explore a leniency application.

As market studies/investigations can result in the CMA commencing investigations under CA98 (c.6% so far), companies should be alive to ongoing market studies/investigations in their sector and the risk of coming under the CMA's microscope.

In light of the number of CMA investigations involving a dawn raid, it is vital that relevant employees are fully aware of what is expected of them in the event of an unannounced inspection.

> "The prominence of third-parties as a source of the CMA's enforcement activity is significant."

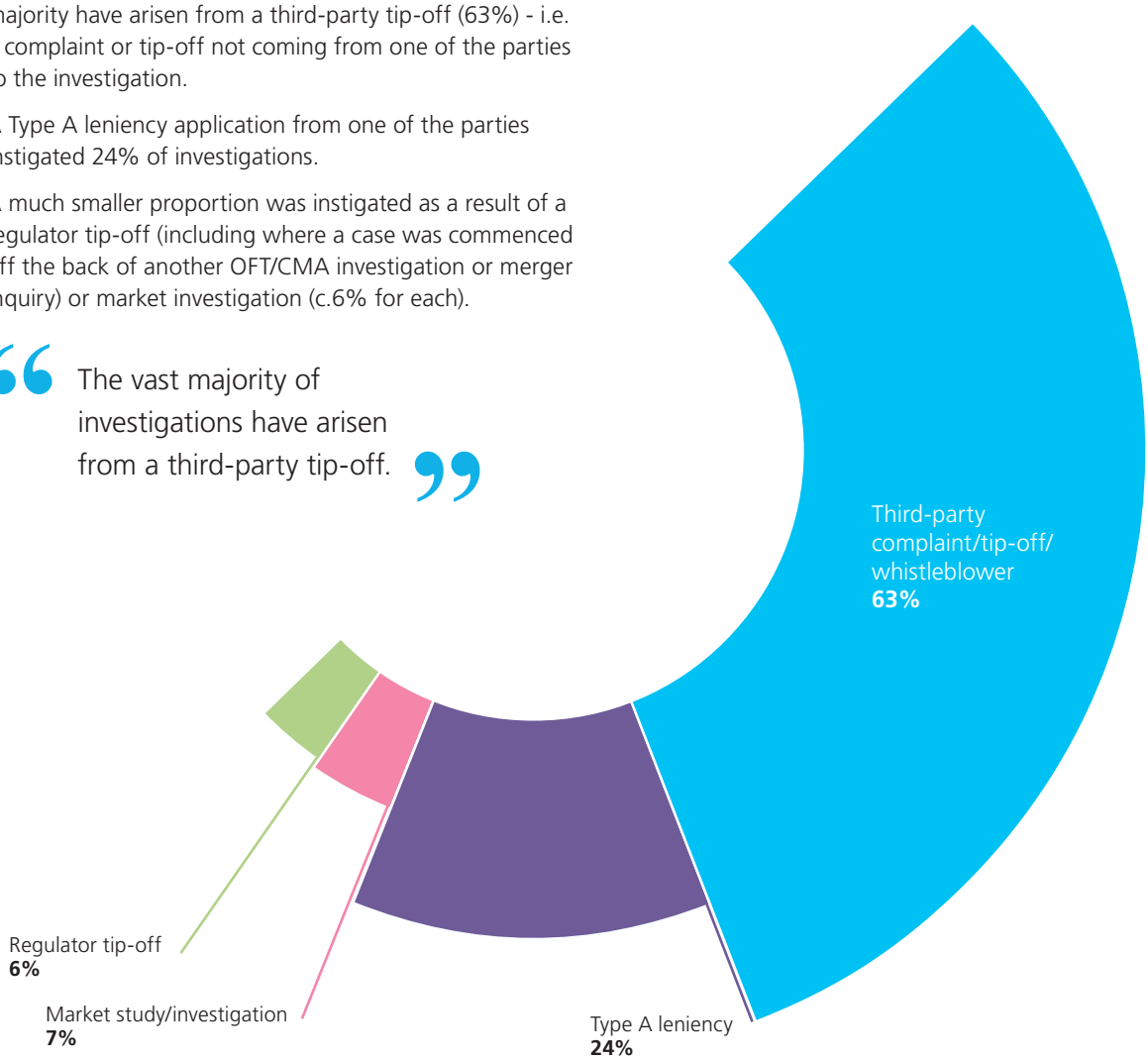
Reason for initiation of investigation

Of the investigations which have concluded and where it was possible to determine how they commenced, the vast majority have arisen from a third-party tip-off (63%) - i.e. a complaint or tip-off not coming from one of the parties to the investigation.

A Type A leniency application from one of the parties instigated 24% of investigations.

A much smaller proportion was instigated as a result of a regulator tip-off (including where a case was commenced off the back of another OFT/CMA investigation or merger inquiry) or market investigation (c.6% for each).

> The vast majority of investigations have arisen from a third-party tip-off.



Proportion of infringement decisions involving a dawn raid

68% of all infringement decisions involved a dawn raid. More domestic raids are likely as more people work flexibly and the CMA uses its powers to search for documents held away from the office.

The 49 raids carried out during the course of the CMA's investigations have been both unannounced and pre-announced (although typically the former). In both cases, the process subjects businesses and their employees to stress and unpredictability. It is therefore vital that companies have procedures in place to help reduce the pressure and uncertainties faced by a business in the event of a raid.

How CMA investigations are instigated:

Key takeaways

Companies need to have comprehensive internal processes in place to identify non-compliant behaviour – there is a real risk of competitors, customers or whistleblowers complaining to the regulator about conduct without a company's knowledge.

More often than not, a CMA investigation resulting in an infringement decision involves a dawn raid (whether unannounced or planned) so businesses and their employees need to review and refresh their training and dawn raid procedures on a regular basis.

Businesses need to be aware that the regulator increasingly requests comprehensive access to digital data and will have enhanced rights to take materials during domestic raids.

Employees need to understand their obligations regarding document retention and cooperation with CMA officials in order to avoid personal penalties.

Different sectors see different risks

The CMA has launched 164 investigations since the entry into force of the CA98, with the consumer and retail sector topping the chart as being the most investigated.

This is not surprising, as the CMA prioritises action that directly prevents consumer harm. The consumer and retail sector is also at greater risk of whistleblowing and media scrutiny, which may result in the CMA deciding it needs to commence an investigation.

The data shows some stark differences in the outcomes of investigations by sector. As an example, the building and construction sector saw 88% of investigations result in an infringement decision, all of which involved some form of anti-competitive agreement/concerted practice (most commonly around bid-rigging). All of these investigations also included a dawn raid. In contrast, the tech and telecoms sector has the highest proportion of commitments decisions, reflecting the fact that a number of investigations in this sector have related to abuse of dominance concerns, which are more readily addressed by forward-looking commitments.

“The data shows some stark differences in the outcomes of investigations by sector.”

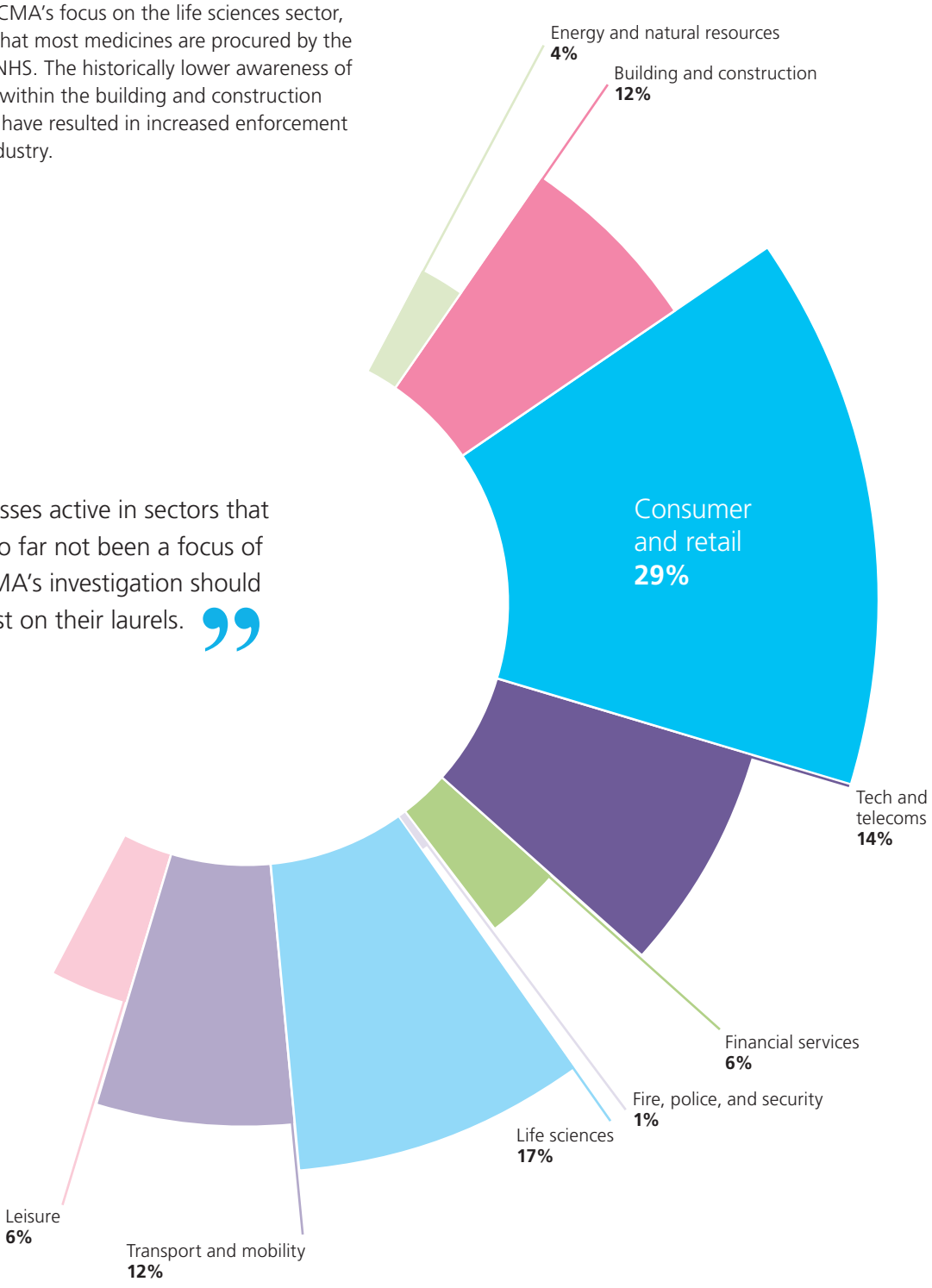
Investigations initiated by sector

The consumer and retail sector has seen the highest number of investigations (29% – including those that are still ongoing), reflecting the regulator's focus on markets and activity that directly affect consumers.

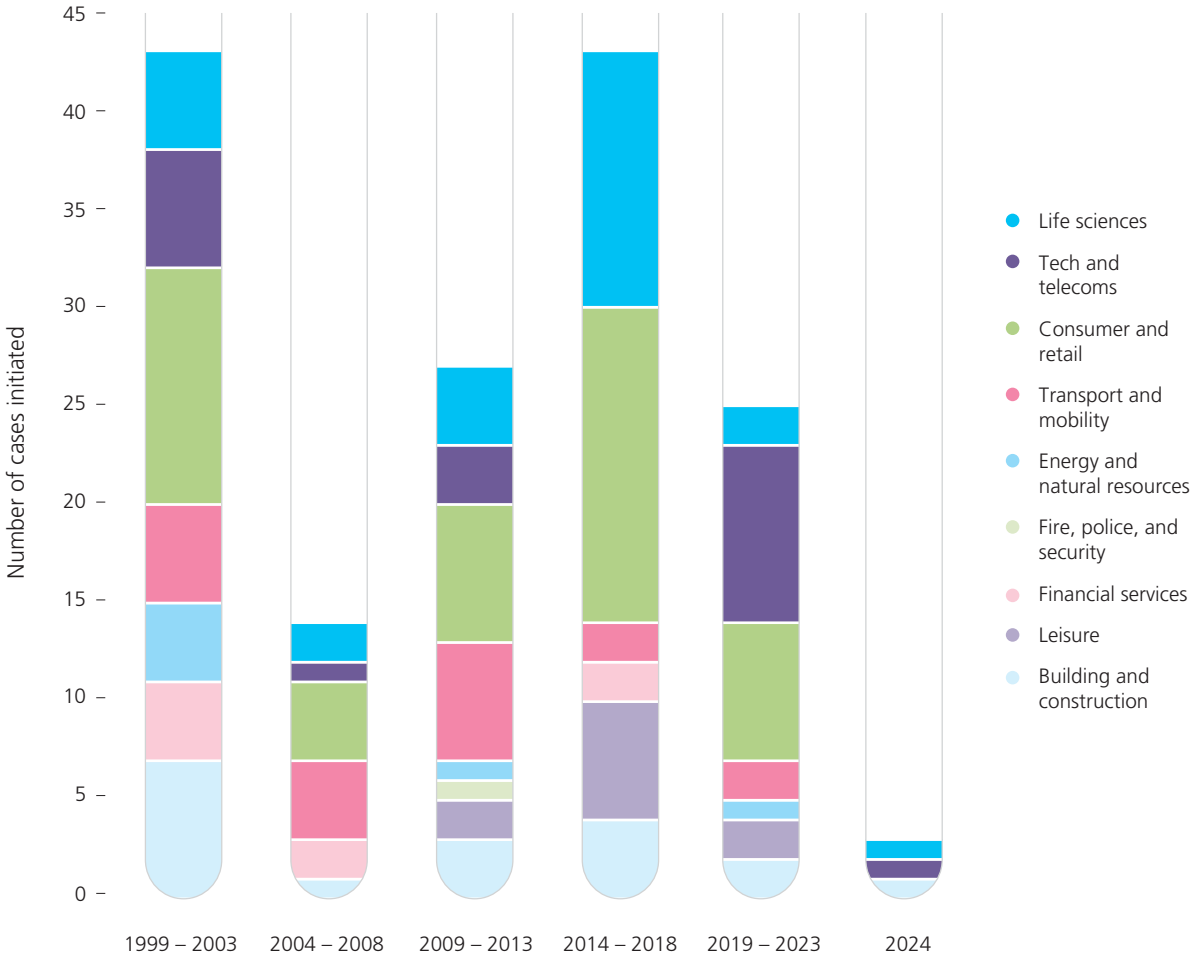
Other main areas of focus have included life sciences (17%), technology and telecoms (14%) and building and construction (12%). The importance of ensuring pharmaceutical products are accessible and fairly priced may explain the CMA's focus on the life sciences sector, especially given that most medicines are procured by the publicly-funded NHS. The historically lower awareness of competition law within the building and construction sector is likely to have resulted in increased enforcement activity in this industry.

Businesses active in sectors that have so far not been a focus of the CMA's investigation should not rest on their laurels. For example, in its 2024/2025 annual plan, the CMA announced its medium-term priority (i.e. over the next three years) of becoming more active in the travel and leisure sectors, as these are of particular importance to consumers.

> "Businesses active in sectors that have so far not been a focus of the CMA's investigation should not rest on their laurels."



Investigations initiated across sectors over time



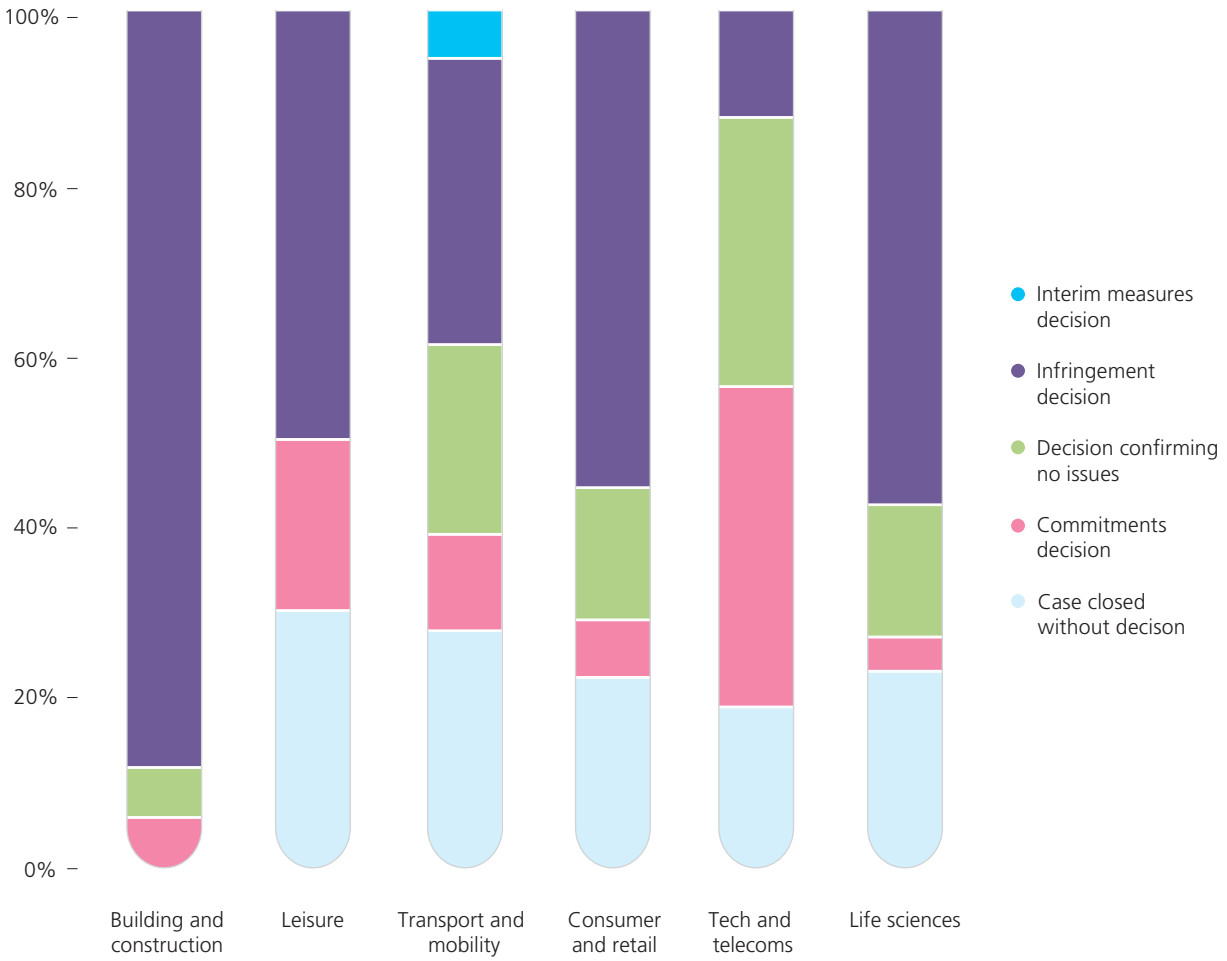
The CMA has been particularly interested in the technology and telecoms sector at two points since the entry into force of the CA98: in 1999-2003 and in 2019-2023, the latter reflecting the increased emphasis on regulating companies in the digital space. The investigations in this sector primarily involved suspected abuses of dominance under Chapter II CA98.

Following the introduction of the new Digital Markets, Competition and Consumers Act 2024 (**DMCCA**), there may be a decline in the number of investigations instigated by the CMA in this sector under CA98 against large online platforms. This is because the CMA is likely to use the new legislative package (supported by significant investment by the CMA in its Digital Markets Unit (**DMU**)), which has been specifically tailored to address the CMA's historic concerns.

For example, at the end of August 2024, the CMA announced that it had closed its existing CA98 investigations into Google's Play Store and Apple's App Store in anticipation of the entry into force of the DMCCA. Investigations under the CA98 will, however, continue to play an important role – particularly where businesses are not designated as having "strategic market status" for a specific activity.

Life sciences investigations were a particular focus of the regulator between 2014 and 2018, when the CMA launched a number of investigations including *Prochlorperazine*, *Liothyronine* and *Hydrocortisone*. This was a result of the CMA being made aware of the very high prices that were being paid by the NHS for these drugs.

Investigation outcomes by sector



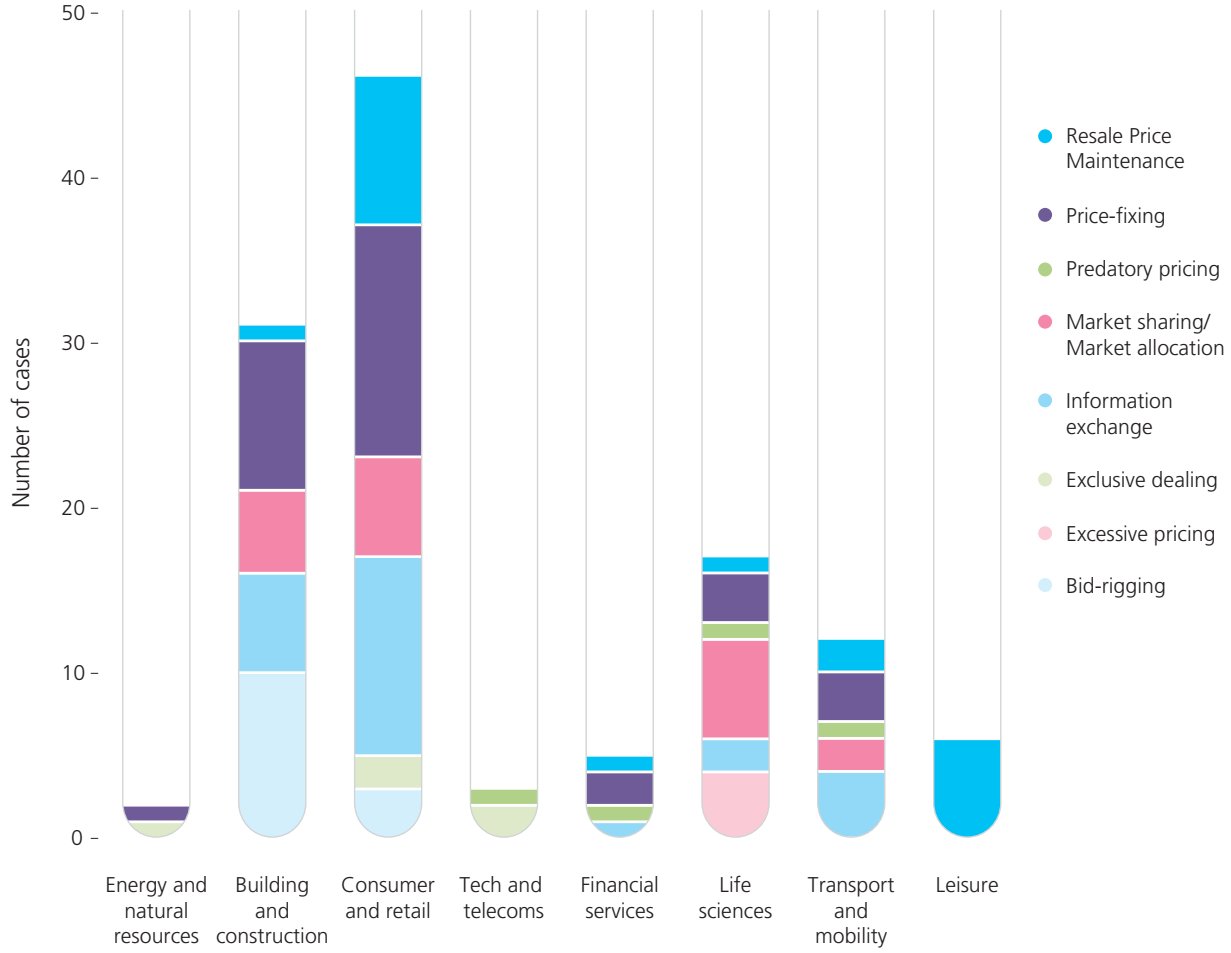
The building and construction sector stands out amongst the sectors where at least ten investigations have been conducted and subsequently closed. Nearly all of the investigations in this sector have resulted in an infringement decision. The high reliance on bidding processes in this industry, coupled with a historically lower awareness of antitrust laws, likely increase the risks of the most concerning kinds of collusive behaviour, which can only be penalised effectively with infringement decisions.

In the consumer and retail, and life sciences sectors, roughly 50% of cases have resulted in infringement decisions, with the remainder split between commitments decisions, no issues findings and closures without decisions.

Notably, outcomes in the tech and telecoms sector are relatively balanced, with the sector receiving the highest rate of commitments decisions and a relatively low rate of infringement decisions, reflecting the fact that there has been a higher number of Chapter II cases brought in this sector.

> “Nearly all of the investigations into the building and construction sector have resulted in an infringement decision.”

Most common infringements investigated by sector



In the building and construction sector, the most common infringements investigated by the CMA were based around bid-rigging, clearly reflecting the importance of tenders in this industry.

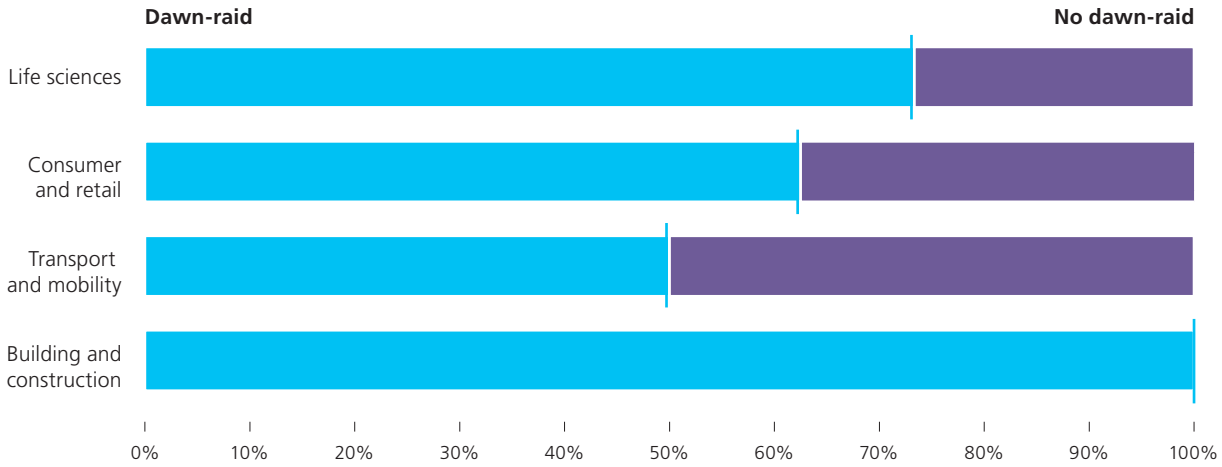
Price-fixing and information exchange were also a focus of infringements in that sector, as well as in the retail and consumer sector.

In light of the exchanges of commercially sensitive information and high levels of pricing transparency seen in these sectors, it is important that businesses have clear guardrails in place and that employees are fully aware of where competition law risks can arise, seeking specialist advice as and when necessary.

In some sectors, such as energy and natural resources and tech and telecoms, a relatively small number of investigations fall into the above common infringements, indicating that for these sectors, the regulator is likely to pursue more novel theories of harm.

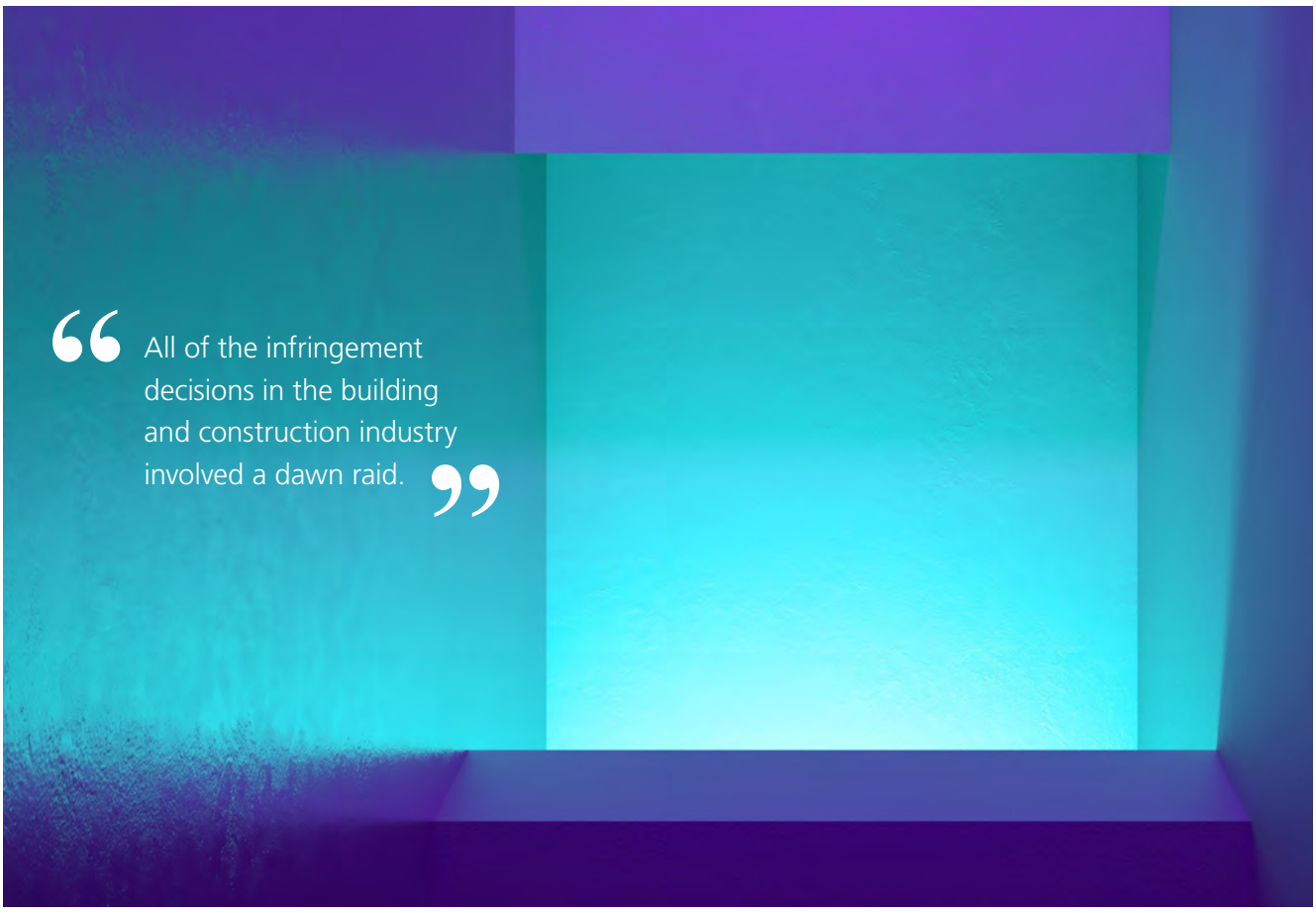
> “Price-fixing and information exchange were a focus of infringements in the retail and consumer sector.”

Infringement decisions involving a dawn-raid by sector



All of the infringement decisions in the building and construction industry involved a dawn raid. This is very high in comparison to the proportion carried out in other sectors where over ten investigations have been conducted and closed.

The severity of the allegations have presumably made inspections the most effective method for the CMA to obtain evidence, without risk of missing "smoking gun" materials or the destruction of evidence.



Different sectors see different risks:

Key takeaways

The building and construction industry is still very much on the CMA's radar. Companies active in this sector need to be particularly cautious when it comes to interactions with competitors. Regular compliance training sessions, whether that be refreshers for long-term employees or targeted modules for new joiners, would certainly be a worthwhile investment for these companies.

While the entry into force of the new digital markets regime by 2025 may mean that big platforms are subject to fewer investigations under CA98, digital remains a key area of interest for the CMA and it will continue to carry out enforcement activities more broadly in this sector.

Companies active in sectors that are directly consumer-facing (e.g. retail) or are funded from the public purse (e.g. life sciences) have historically been in the regulator's spotlight – a trend that is unlikely to change soon.

Information exchange is a thread running through a large number of CMA investigations carried out across sectors. Businesses need to train their sales teams, particularly those negotiating directly with competitors, on how to keep on the right side of the law.

Businesses active in sectors that have not been subject to a particularly large number of investigations in the past should by no means become complacent. Depending on future political and social developments, they could easily become the next target.

The relationship between duration and outcome

The longer the CMA investigation, the higher the fine. This could be because more complicated infringements require more time to investigate and lengthier investigations involve a higher number of participating companies, which eventually leads to higher fines.

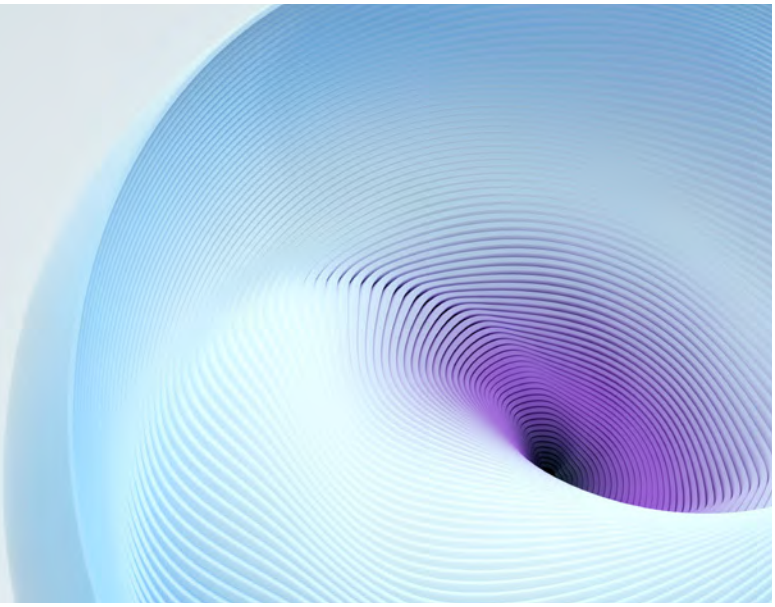
It is, however, important to remember that other factors contribute to the level of fine imposed. For example, it is not just the number of businesses involved but also their size that has a bearing on the magnitude of the penalties imposed.

There is a difference in duration according to different types of decisions: investigations resulting in an infringement decision (whether contested or settled) typically have the longest average duration, lasting c.30 months, while those ending in a commitments decision have the shortest, averaging around 20 months. There are a number of outliers, however, with one commitments process concluded in as little as two months. The length of time taken to reach an infringement decision has also varied significantly: the shortest being concluded in eight months and the longest, 90 months.

It is understandable that the regulator requires longer to reach an infringement decision, capable of standing up in court in the event of an appeal. Where the authority is actively engaged with a party in agreeing suitable commitments, there is a higher likelihood of both sides reaching a mutually satisfactory decision in a shorter period of time.

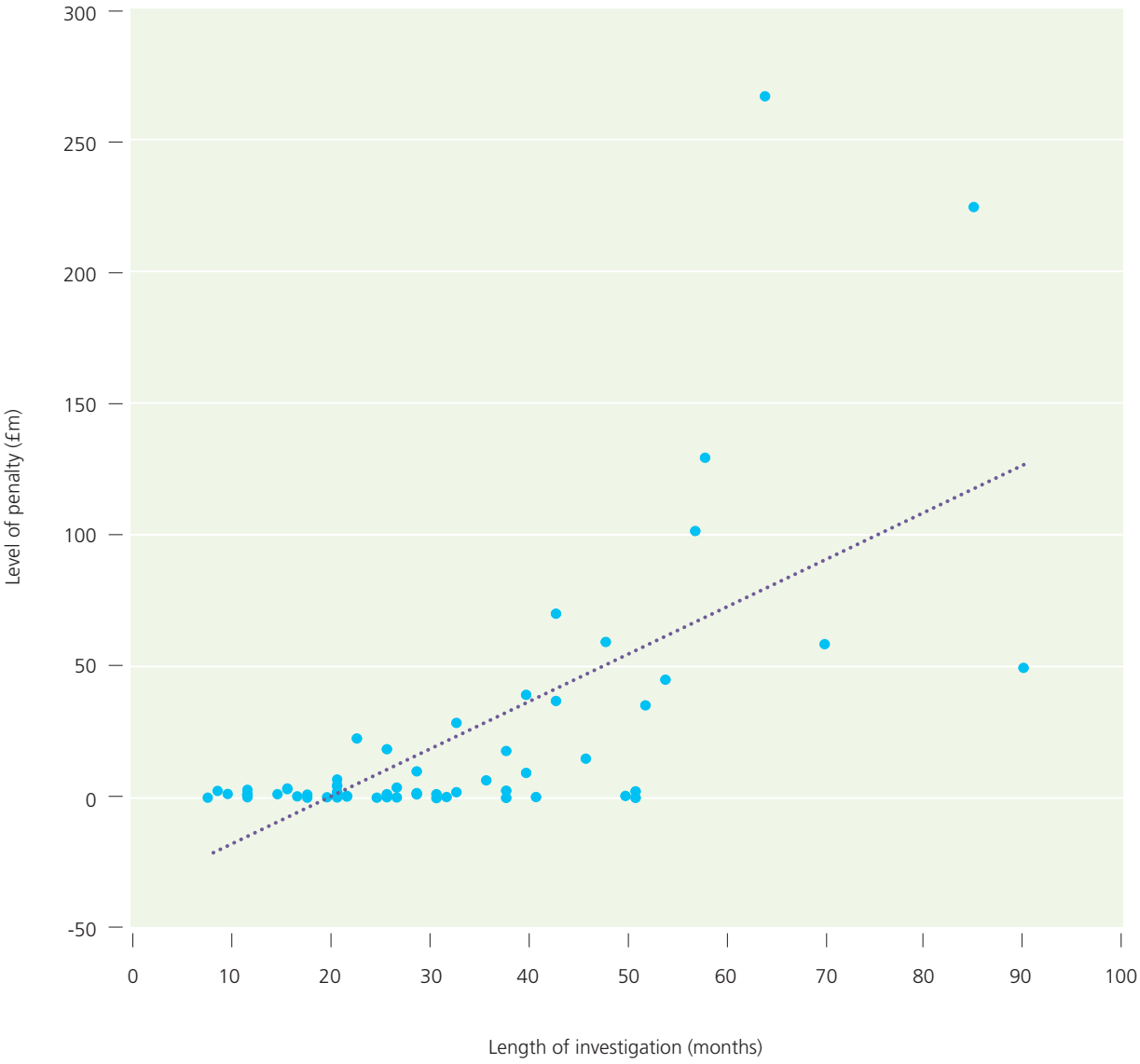
Settling a case also has a significant impact on its length. The average length of a fully contested investigation (commenced since 2014) was 40 months. This figure dropped to an average of 32 months where some parties agreed to settlement (so called "hybrid" settlement) and 20 months where all parties agreed to settle a case.

> "The length of time taken to reach an infringement decision has varied significantly: the shortest being concluded in eight months and the longest, 90 months."

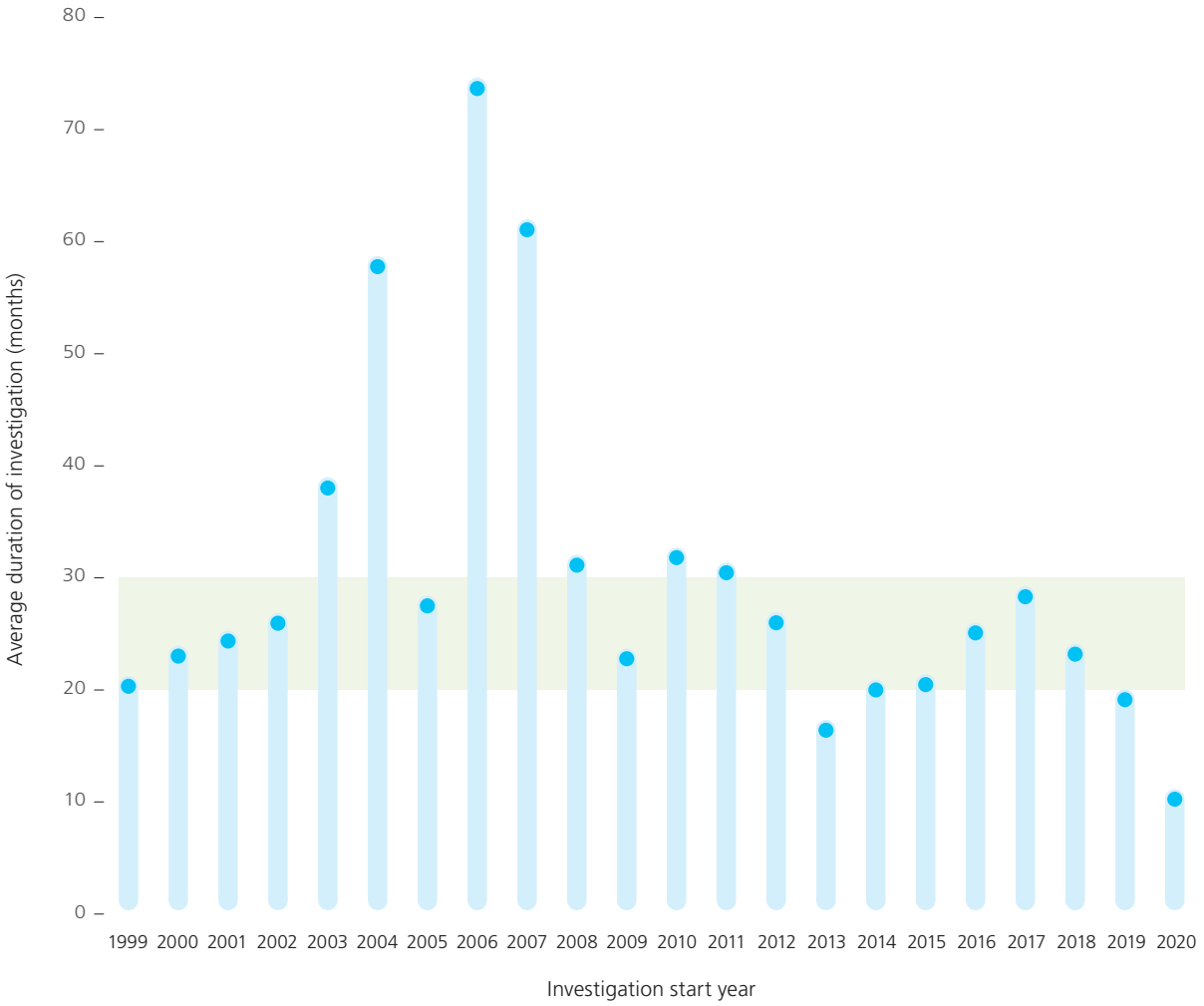


Comparison of investigation duration and penalty amounts

There appears to be some positive correlation between the length of a CMA investigation and the level of fine that is imposed at the conclusion of an investigation – i.e. higher fines are generally issued in longer investigations. This is particularly noticeable for investigations that last for longer than 35 months.



Investigation duration by start year



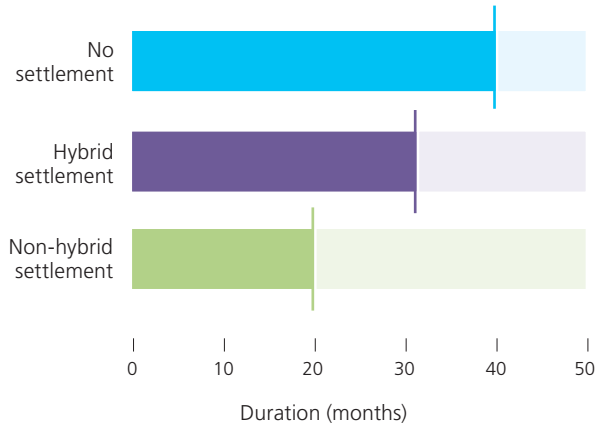
In recent years, the average duration of CMA investigations has remained relatively stable totalling 20-30 months for investigations commenced between 2011 and 2018.

This period of relative stability followed some of the longest investigations in the lifetime of the CA98, hitting an all-time high of an average of over 70 months for investigations started in 2006. This is in part explained by the CMA's investigation into the Mastercard and Visa interchange fees – a highly complex investigation that was closed after nearly a decade.

Interestingly, the average length of investigations dropped sharply to just ten months for those started in 2020. This may reflect that the CMA was able to start fewer complex antitrust investigations during the COVID-19 pandemic, as its resources were diverted elsewhere. The numbers for investigations started prior to COVID may be slightly inflated as some investigations were paused during part of the pandemic. While there is no guarantee of how long future CMA investigations may take, particularly where more complex issues of law and/or fact patterns are involved, these precedents provide businesses with a useful steer on how long they could be under the regulator's spotlight, allowing them to consider the potential implications for costs, resources, reporting obligations and ongoing publicity.

The shorter time periods may also reflect pressure from Government and commentators on the CMA to be taking decisions more frequently and quickly – indeed this pressure has materialised into a 'duty of expedition' imposed on the CMA for certain of its CA98 functions under the incoming DMCCA. But the CMA has of course to weigh this pressure against the need to allocate resources to the most important cases and to ensure its decisions will stand up to scrutiny on appeal (which is increasingly common). We do not expect the DMCCA to mean the CMA will do away with this careful balancing exercise, but it now needs to be mindful of its statutory duty to make decisions or take action as soon as reasonably practicable, which applies to all steps of any relevant investigatory, regulatory or enforcement process.

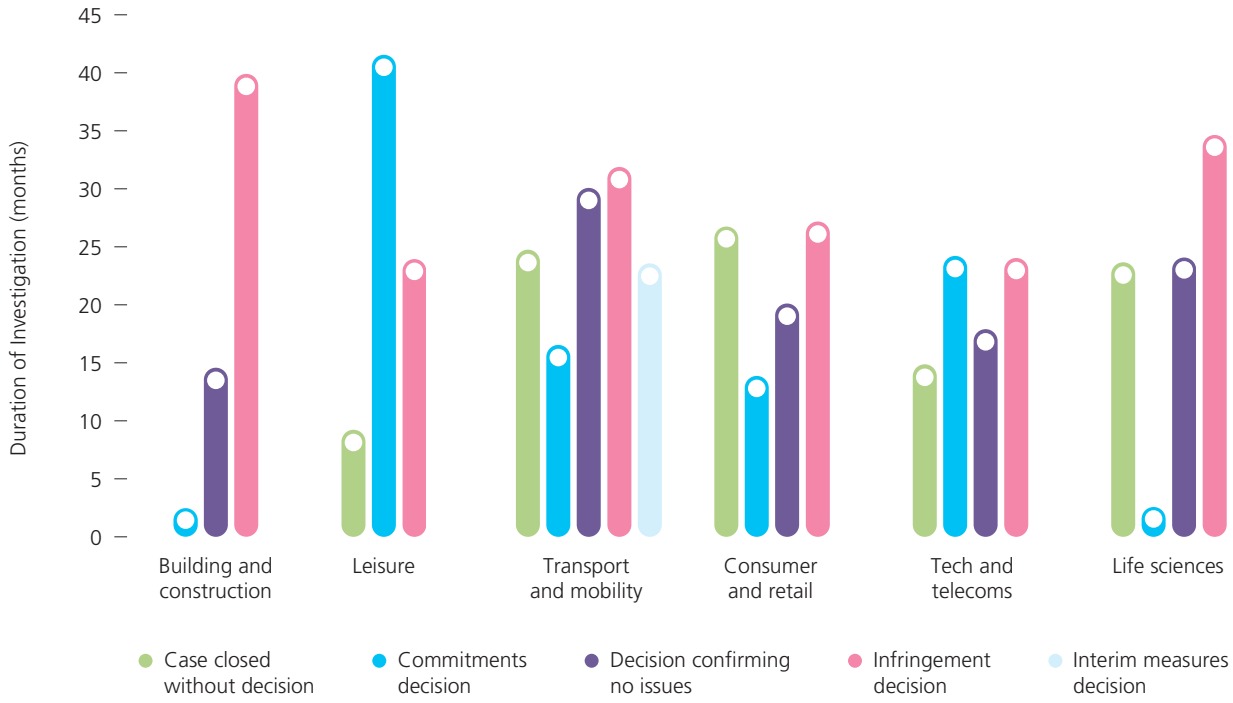
Average duration of investigation for settled and non-settled cases



Parties settling a case are required to sign up to a streamlined administrative procedure, which governs the remainder of the investigation. This is reflected in significantly shorter investigation durations as opposed to fully contested investigations.

For investigations commenced since 2014, when the CMA introduced a more formalised settlement procedure, the average duration of investigations involving "hybrid" settlement was 32 months and where all parties settled was 20 months. This compares to an average duration of 40 months for fully contested investigations.

Average duration of investigation by sector and decision type



Across the various sectors that have seen more than ten investigations, investigations have generally been most prolonged in the life sciences, building and construction, and transport sectors, with durations ranging from 23 to 40 months. A range of factors may explain the increased duration of investigations in these sectors. In the life sciences sector, a number of the investigations have centred around complex theories of harm and allegations of excessive pricing, which have required detailed enquiries into the factual and economic evidence. In the building and construction, and transport sectors, the number of companies under investigation could have elongated the proceedings, with the CMA required to manage each party's rights of defence.

The tech and telecoms sector exhibits the shortest average investigation duration, approximately 20 months, and falls below average for investigations resulting in an infringement decision or decision confirming no issues. The fact that a greater number of these investigations have been conducted under Chapter II CA98 and therefore only involved a single party, likely explains these shorter durations.

The relationship between duration and outcome:

Key takeaways

Antitrust investigations can be unpredictable and businesses need to be realistic about their potential length in order to ensure adequate internal resourcing and cost management. Listed companies also need to be abreast of their reporting obligations throughout the duration of an investigation.

Companies could consider the benefits of filing for leniency and/or engaging in settlement discussions with the regulator. While the two options are very different, both can help reduce the duration of an investigation, as well as the magnitude of a fine. However, both options also require an admission of an infringement, which can significantly increase the risk of follow-on damages claims by third parties who have suffered loss as a result of the infringement. Such claims may take the form of opt-out class actions, which in the UK have recently multiplied significantly, where the number of claimants may in some cases run into the millions.

The prevalence of different types of decision

The CMA arguably has a high success rate, with 50% of investigations resulting in an infringement decision. Companies need to be aware that once they come onto the regulator's radar, there is a real risk of an infringement decision being made, with the costs and negative publicity that entails.

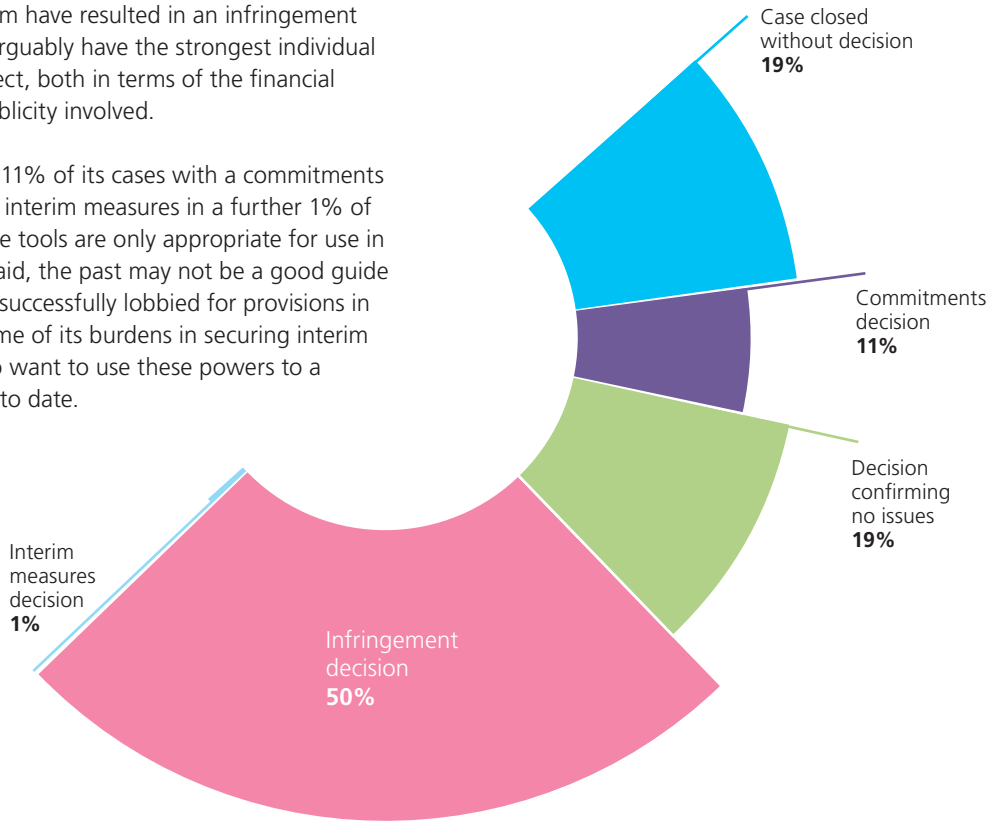
Additionally, in around 19% of cases, the CMA has closed its investigation without reaching a decision. In a further almost 20% of cases, the CMA has issued a reasoned decision that there are in fact no competition law issues. This figure is somewhat overstated, as it includes decisions reached by the OFT under the historic system whereby companies could seek comfort from the regulator that their agreements complied with competition law.

Businesses should also be aware that there are alternatives to infringement decisions at the regulator's disposal. For ongoing alleged infringements, commitments decisions have been used to address the regulator's concerns, particularly in abuse cases. And, while not an alternative to a final decision, the CMA's interim measures powers need to be taken seriously, notwithstanding their limited use to date, especially with incoming legislative changes to make their use easier for the CMA.

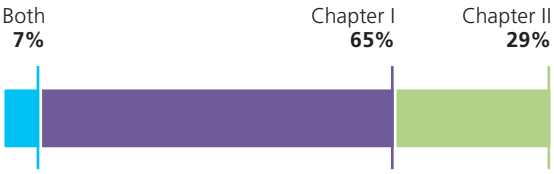
Case outcomes

Of the total number of cases concluded by the CMA under the CA98, roughly half of them have resulted in an infringement decision. Such decisions arguably have the strongest individual and general deterrent effect, both in terms of the financial penalties and negative publicity involved.

The CMA has only closed 11% of its cases with a commitments decision and has imposed interim measures in a further 1% of cases, indicating that these tools are only appropriate for use in very specific cases. That said, the past may not be a good guide to the future as the CMA successfully lobbied for provisions in the DMCCA to reduce some of its burdens in securing interim measures and is known to want to use these powers to a greater extent than it has to date.



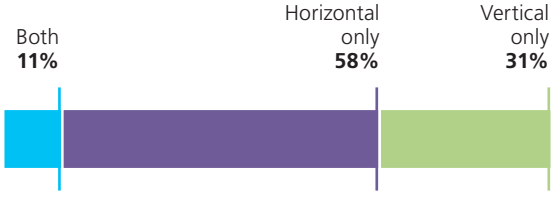
Cases by CA98 infringement



There are a greater number of investigations into potential Chapter I infringements (65%) than into Chapter II infringements (29%). Whilst the CMA is arguably more likely to become aware of Chapter II infringements (e.g. through customer or competitor complaints), this provision only applies to the subset of companies considered to have a dominant position on a given market, whereas Chapter I may apply to businesses of any size.

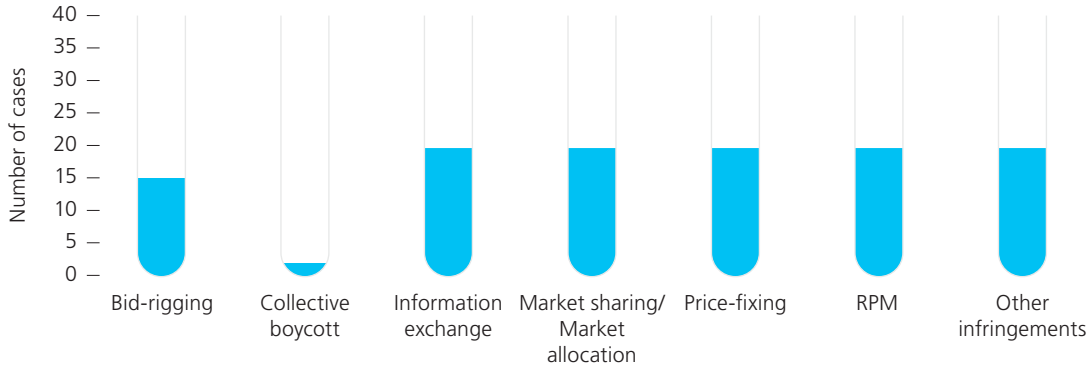
There are a limited number of investigations involving both Chapter I and Chapter II infringements (7%).

Horizontal/vertical infringements investigated for Chapter I cases



A greater proportion of Chapter I investigations concluded by the CMA involved horizontal infringements (58%) than vertical infringements (31%), clearly reflecting the fact that the regulator has prioritised the most serious forms of competition law breach. Only a small proportion (11%) involve both horizontal and vertical infringements.

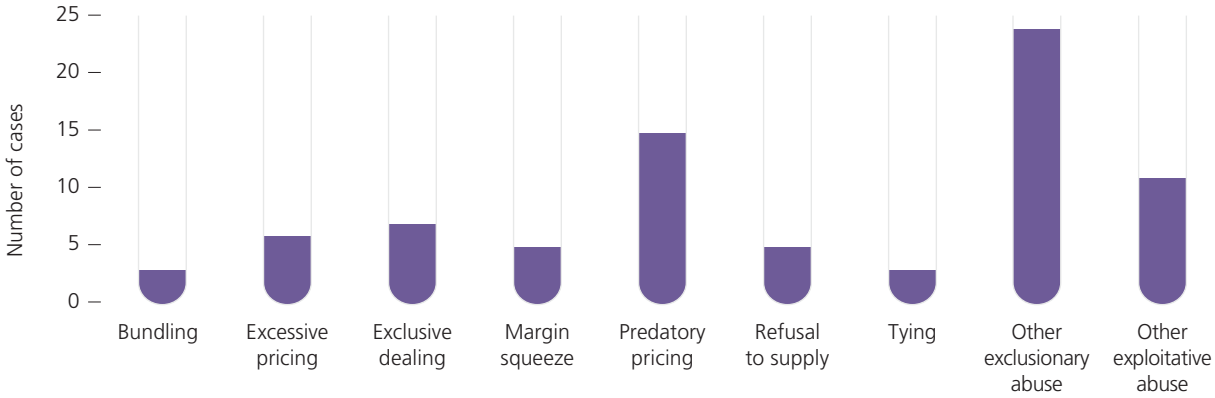
Chapter I infringements investigated



The spread of investigations (both concluded and ongoing) across the different categories of infringement brings out some interesting trends. There are a higher number of information exchange, price fixing, market sharing/allocation and retail price maintenance (**RPM**) investigations brought by the CMA. This trend potentially reflects the prevalence of such infringements in practice, and the CMA's recent focus on RPM, particularly in the context of e-commerce.

The CMA has conducted comparably few investigations into collective boycotts, likely reflecting the fact that such measures are harder to implement in practice and are more likely to be detected through customer complaints to the regulator.

Chapter II infringements investigated



In respect of Chapter II investigations, a large number of investigations cannot be categorised into the typical "buckets" of abuse. This explains the high vertical bars in the chart above for "other exploitative" (i.e. imposing unfair prices or conditions) and "other exclusionary" (i.e. forcing rivals to leave the market or deterring potential new entry) abuses. This is interesting in itself, as it demonstrates that the CMA is prepared to consider more novel theories of abuse than the "textbook" categories.

Of the typical categories of abuse, the CMA has conducted more investigations into predatory pricing than the other types – perhaps as it can be easier to make out this type of abuse and it is the subject of a greater number of competitor complaints.

It has carried out fewer investigations into bundling and tying practices, possibly reflecting the deterrent effect of a number of very high profile global investigations into these practices in the tech sector at the start of the 2000s and the greater difficulty of proving the anti-competitive nature of softer forms of bundling practices.

The prevalence of different types of decision:

Key takeaways

The CMA has a relatively high rate of success, with 50% of cases ending in an infringement decision.

The CMA has alternative tools at its disposal: it has agreed commitments with the parties in a number of cases, and is expected to make use of its interim measures powers more frequently in the future.

While the CMA continues to pursue breaches of competition law between direct competitors at the same level of the supply chain, businesses need to be aware that the regulator is becoming increasingly interested in so-called vertical infringements involving players at different levels of the market.

The regulator has by no means stopped looking into the more "traditional" infringements such as, price-fixing, market/customer sharing and information exchange. These, as ever, need to be a priority in any company's competition law compliance programme.

The intrusiveness of competition investigations on individuals' lives

Competition law investigations do not simply intrude on the day to day business of a company. They intrude on people's lives. Recognising this, and having the benefit of experienced advice to best handle it, are key.

Investigations can intrude on people's lives in six ways. The first five are relevant to employees with relevant information irrespective of grade. The sixth is relevant to directors.

Employees

First, the new DMCCA now imposes a duty on individuals not to falsify, conceal, destroy or otherwise dispose of documents that the individual knows or suspects are or would be relevant to a competition investigation (even one that is likely but has not yet started). They also have a duty not to cause or permit this to happen. The CMA can impose fines on individuals who fail to comply with this requirement (where they have no reasonable excuse). Documents obviously extend to electronic materials, so IT teams need to be trained (and will have an important role in any dawn raid and subsequent investigation).

Second, with the entry into force of the DMCCA, employees will have to be particularly aware of their obligations in the context of domestic raids, which have become more common with today's hybrid working models. The CMA will have a right to "seize and sift" evidence at employees' homes, meaning that CMA officials will be able to take documents and electronic devices away with them where it is not practical to decide on the premises what specific evidence should be taken.

Third, the CMA can fine anyone who (without reasonable excuse) obstructs a CMA official from entering business premises (with or without a warrant) or domestic premises (with a warrant). Intentional obstruction is also a criminal offence. Again these points are re-emphasised in the latest draft guidance.

Fourth, relevant employees can be and are regularly interviewed by the CMA during investigations, either on a voluntary or a compulsory basis. We provide statistics and analysis on the prevalence of this activity below.

The **fifth** issue is the criminal cartel offence. The details of this are beyond the scope of this report. It needs to be analysed in any cartel case. The reality is the CMA's focus has shifted, for a number of reasons, towards pursuing director disqualification – to which we now turn.

> "Employees will have to be particularly aware of their obligations in the context of domestic raids, which have become more common with today's hybrid working models."

Directors

The **sixth** issue concerns directors. Individuals in managerial positions need to be attuned to the substantial personal risks they may face in the event of their business being subject to a CMA investigation. The CMA is now considering director disqualification measures in every case it investigates.

A director can be disqualified for up to 15 years where a company that they have managed is found to have infringed Chapter I or II CA98 and the director's conduct makes them unfit to manage companies going forward. The regulatory aim is two-fold: to disbar the specific director from office but also to deter other directors and ensure that their companies are compliant with competition law. Disqualification is possible for any infringement of competition law, not just serious infringements (but seriousness will affect the duration of the disqualification, see further below).

There are two options available to the CMA:

1. applying to the court for a competition disqualification order (**CDO**); or
2. accepting a competition disqualification undertaking (**CDU**) – effectively a plea-bargain.

To apply for a CDO, the CMA must prove that a company of which the individual is a director has committed a breach of competition law and that that individual's conduct makes them unfit for office. A CDO can result in a director being disqualified for up to 15 years, with different "brackets" for periods of disqualification depending on the severity of infringement (over 10 years for particularly serious breaches, 6-10 years for serious cases that do not warrant a penalty in the top bracket and 2-5 years for less serious cases).

In considering whether to apply for a CDO, and when considering the appropriate length of duration of a disqualification, the CMA will have regard to the extent to which a director cooperated with the regulator during its investigation.

As an alternative to applying to the court for a CDO, the CMA can agree to a CDU offered by a director, which has the same effect as a CDO and has the same consequences when breached. Again, directors can be disqualified for up to 15 years under a CDU.

One consideration for directors of companies deciding whether to apply for leniency (see further below) is the effect that doing so can have on the individual liability of their relevant directors. The CMA will not apply for a CDO against any current or former director of a company that has benefited from leniency in relation to the activities to which the leniency relates. This is however not the case where a director has been removed from their role as a result of the part that they played in an infringement or for opposing a leniency application, or where they do not cooperate with the leniency process.

The CMA provides details of all CDOs and CDUs to Companies House, which keeps a register of all disqualified directors. The negative publicity, not just in the corporate sphere, can therefore be immense and greatly harm a director's personal reputation, as well as that of any companies of which they are in charge.

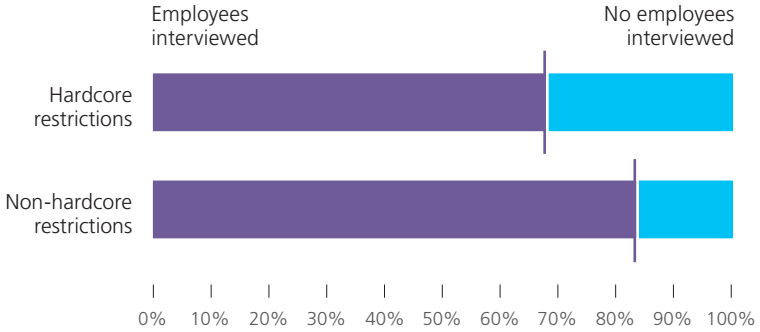
Statistical analysis: role of individuals

Investigations involving employee interviews

Companies should be aware that the CMA will more likely than not conduct interviews with employees during the course of an investigation. Employee interviews took place in 77% of all of the CMA's investigations that have resulted in an infringement decision under the CA98. It is important that employees fully understand their rights, particularly regarding the privilege against self-incrimination. Lawyers for the companies need to consider and manage actively the potential conflicts issues involved – which can differ from case to case.

Employees interviewed by restriction type

Interestingly, there is little difference between the proportion of employee interviews conducted in cases involving hardcore versus non-hardcore infringement restrictions, indicating that companies need to be ready for their employees to be interviewed during the course of CMA proceedings, irrespective of the nature of the infringement under investigation.



Proportion of infringement decisions involving directors and senior management

Directors were involved in 70% of cases that resulted in an infringement decision and of the total number of investigations resulting in an infringement decision, the CMA has pursued director disqualification in the High Court or secured a CDU in 18% of cases.

But all of the director disqualifications have been pursued in cases commenced during the last decade,

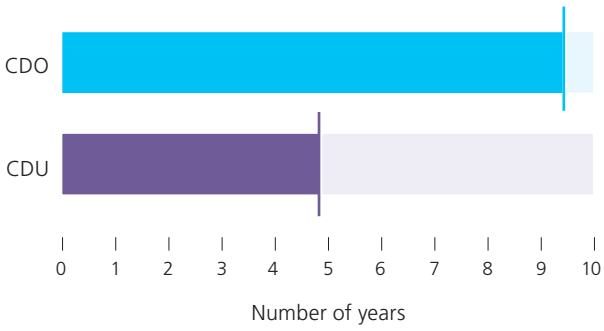
Proportion of director disqualifications pursued following infringement decisions

reflecting a change to the CMA's policy which is now to consider the suitability of seeking director disqualification in all CA98 cases. Therefore, the proportion above rises significantly if considering only cases begun since 2016 (which is roughly when the CMA policy changed). Of those cases, 29% resulted in director disqualifications being pursued in the High Court, or a CDU secured.

Number of CDOs and CDUs

So far, the CMA has only applied for and been granted **four CDOs**, whereas it has agreed **25 sets of CDUs**. This clearly emphasises that the procedure for applying for a CDO is far more onerous than accepting a CDU. But directors cannot assume that the CMA will not increasingly apply for CDOs in future.

Number of years of disqualification



The average length of time for which directors have been disqualified under the terms of a CDO has been almost twice as long as under the terms of a CDU.

This difference in duration clearly indicates the benefits for directors if they choose to offer a CDU to the CMA rather than waiting for the regulator to apply to the court for a CDO. But of course, that involves admitting liability. And the director, and/or the company, may not want to admit liability. Consideration of these issues requires careful balancing and expert advice.

> The average length of time for which directors have been disqualified under CDOs has been double that of CDUs. But of course, offering a CDU involves admitting liability which the director and/or the company may not want to do.

The intrusiveness of competition investigations on individuals' lives:

Key takeaways

Businesses need to be prepared for CMA interviews with employees and include clear guidance about their rights around self-incrimination. Businesses need to consider and manage actively any conflicts of interest.

Directors need to be particularly aware of the risk of disqualification with the CMA actively considering pursuing disqualification proceedings in all investigations.

The consequences for directors in terms of their personal reputation and future employability are substantial and should not be underestimated.

Where directors are faced with the risk of the CMA applying to the court for a CDO, they should weigh carefully the pros and cons of offering a CDU to the CMA – this will likely lead to them being disqualified for a substantially shorter period of time, but only if the counterfactual is that the company is held liable, which it may not be.

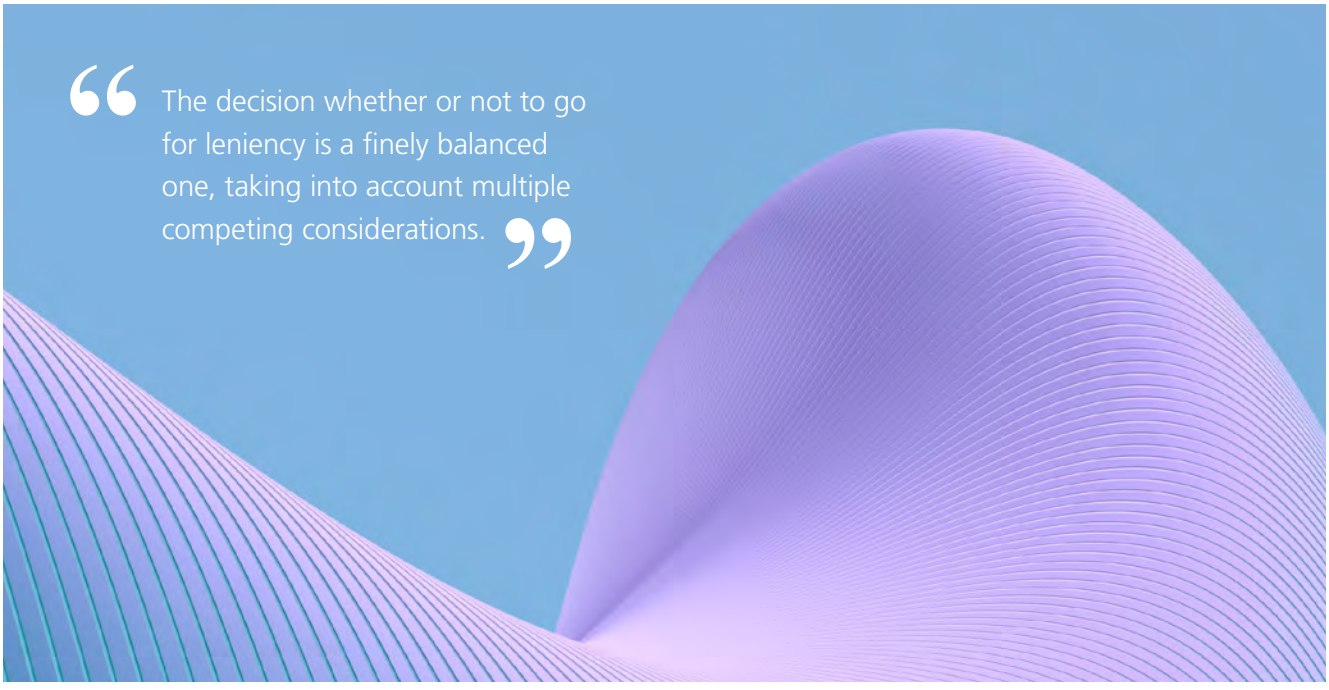
How companies approach investigations

Since the introduction by the OFT of a leniency procedure in 2002 and the introduction of the CMA's formal settlement procedure in 2014, it is clear that parties to investigations are often keen to benefit from the advantages that these schemes have to offer. In fact, more often than not, companies have sought to be awarded leniency or benefit from settlement (or indeed both combined) to gain a reduction in the level of fines imposed by the regulator in its infringement decisions.

Leniency

Under the CMA's leniency scheme, businesses that provide evidence of cartel activity and co-operate with the CMA 's investigation can benefit from a reduction in, or, in certain circumstances, complete immunity from, penalties.

Time is of the essence in the race for leniency. Any delays can have a substantial effect on the level of fines imposed on businesses at the end of the regulator's investigation. Equally, there is a danger in being too precipitate. The decision whether or not to go for leniency is a finely balanced one, taking into account multiple competing considerations. It should not be taken without careful specialist competition law advice.



Settlement

Under the settlement procedure, a business under investigation can admit that it has breached competition law and confirm that it accepts that the CMA will follow a streamlined administrative procedure for the remainder of its investigation, in exchange for reductions in financial penalties.

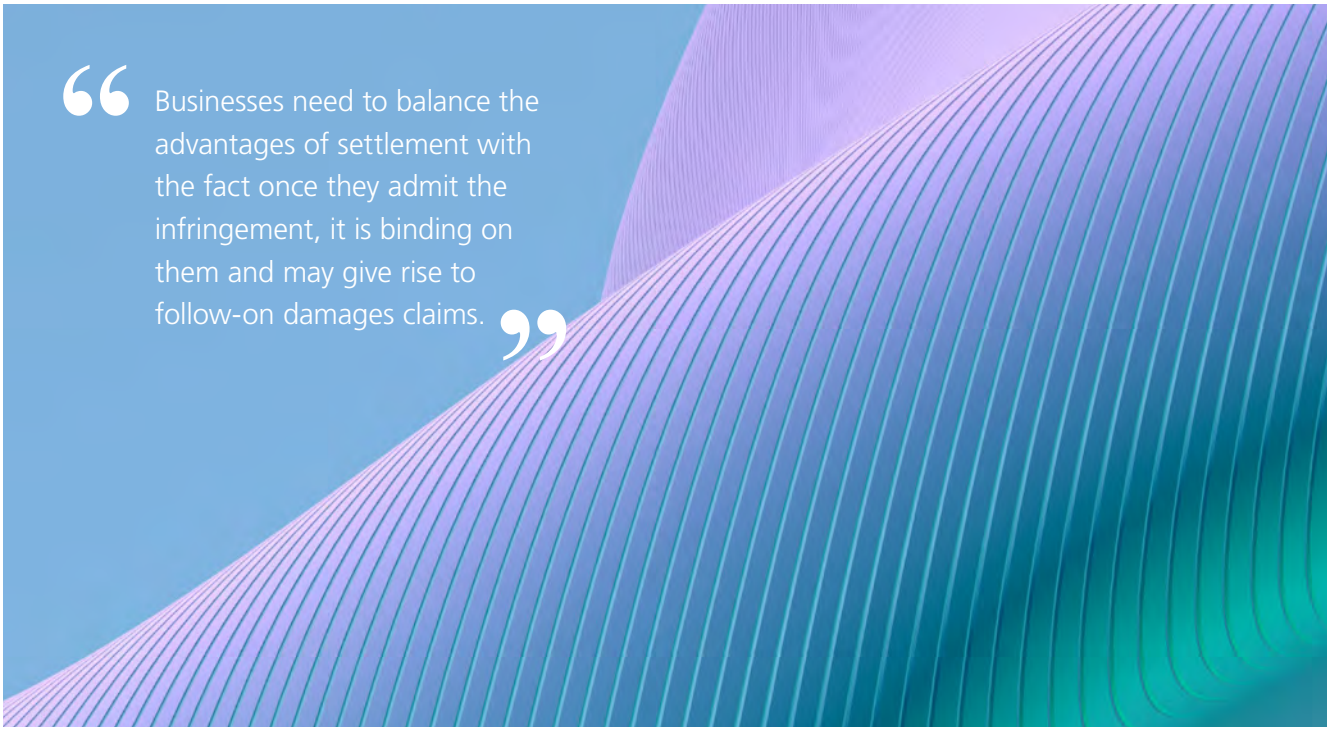
The operation of a settlement process and the decision as to whether to settle CA98 cases is at the discretion of the CMA. The regulator may reach out to parties to discuss if they would be willing to engage in settlement discussions. Or businesses may proactively explore whether the CMA would be willing to consider settling the case.

Businesses may not be aware of whether other participants in an infringement are also seeking to enter into settlement discussions. In those circumstances, a business can inquire as to whether the CMA would be prepared to settle the case against that individual business, whilst pursuing its case against other parties not open to settlement (so-called "hybrid" settlement).

The CMA is not obliged to settle any CA98 case it brings. But it will consider requests to settle by parties under investigation in cases where the evidential standard for giving notice of its proposed infringement decision is met and where settlement is likely to achieve procedural efficiencies and resource savings.

By entering into settlement discussions with the regulator, companies can benefit from substantial reductions in financial penalties imposed at the end of a CMA investigation. Such benefits are likely to increase if the regulator implements proposed changes to the level of fine reductions offered through settling a case during various stages of an investigation. In September 2024, the CMA closed a consultation into proposals to raise the level of discount to up to 40% for settlement prior to the regulator issuing its statement of objections (**SO**) (the SO being the formalised prosecutorial case against the parties to an investigation) – and up to 25% for settlement following issuance of the SO. Currently, those discounts are capped at 20% pre-SO and 10% post-SO.

Businesses need to balance these advantages against the fact that once they have admitted the infringement as part of a settlement procedure, it is binding on them and may give rise to a follow-on damages claim. A company that settles a CA98 case with the CMA will need to be aware of the effects on its subsequent rights of defence. It will not be able to appeal against the settlement decision and will also not benefit from the result of a successful appeal of the infringement decision by another party to the proceedings who decided not to settle.



Infringements involving leniency or settlements

In almost three quarters of cases resulting in an infringement decision, parties have sought to benefit from leniency, settlement or both. The fact that in only 26% of cases, companies have not been incentivised to go down either path is good evidence of the popularity of both procedures.

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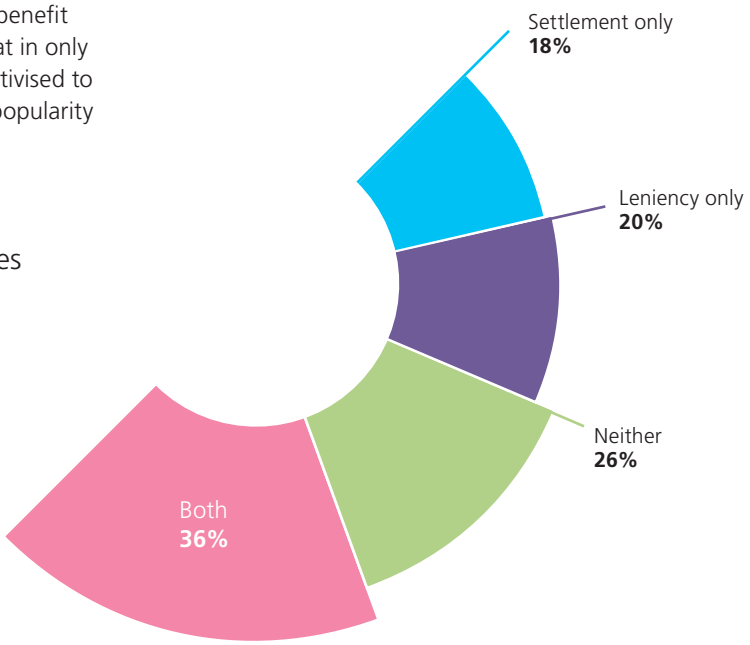
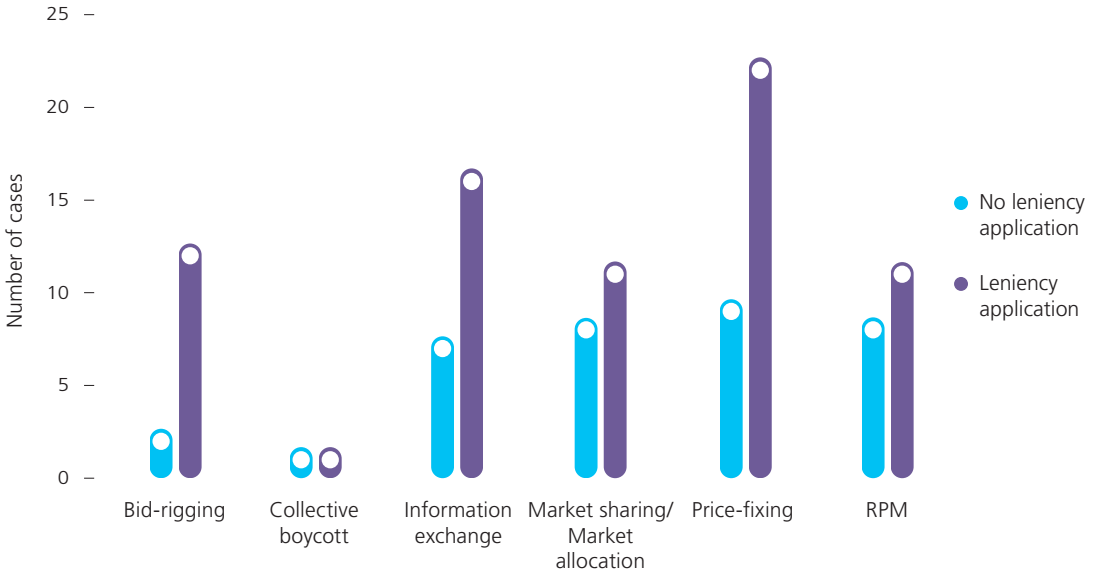


Leniency cases

Infringement decisions involving leniency applications by infringement type



Companies that have been involved in all forms of hardcore infringement have more often than not sought to benefit from the CMA's leniency regime. In fact in over 70% of cases involving price-fixing, the CMA received a leniency application.

With the regulator historically seeking to crack down on such infringements, and there being little doubt that, provided there is sufficient evidence, they are clear breaches of competition law, businesses have clearly been incentivised to cooperate proactively with the regulator in order to seek to reduce the scale of such financial penalties.

Settlement cases

Proportion of infringement decisions involving settlements

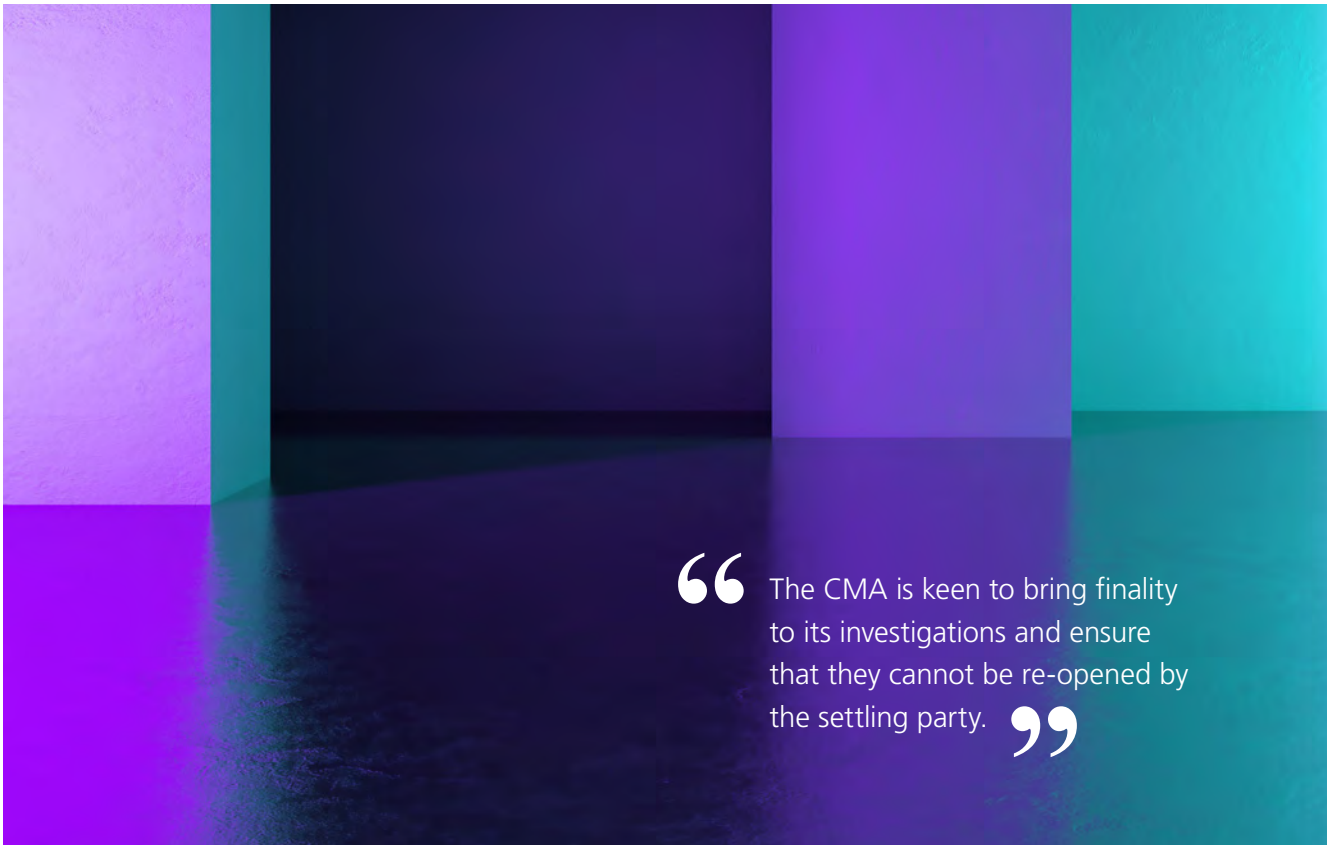
Over 50% of the regulator's investigations that have resulted in an infringement decision have involved settlement with at least one party.

The CMA revised its settlement procedure in December 2021, meaning that settling parties are no longer able to appeal a settlement decision to the CAT. The CMA is keen to bring finality to its investigations and ensure that they cannot be re-opened by the settling party subsequently appealing against the infringement decision and undoing the settlement. It will be interesting to see, once a few more years have passed, if this lack of right of appeal has any impact on the popularity of the settlement procedure.

Proportion of hybrid settlements

The CMA has successfully settled 39 of its investigations under Chapter I CA98.

Almost 30% of those investigations have involved "hybrid" settlement, whereby one or more parties settle the case, whilst others choose to contest it. This statistic indicates the CMA's openness to this dual approach, in spite of it offering more limited overall resource savings.



How companies approach investigations:

Key takeaways

Leniency and settlement procedures are not just hypothetical tools in the CMA's enforcement toolkit. There can be substantial benefits in pursuing these routes during an investigation.

Alongside actively seeking to mitigate the risks of becoming involved in infringements, companies should ensure they are familiar with the leniency and settlement procedures in the event that they become aware of wrongdoing or the CMA launches an investigation.

The race for leniency is time-critical and needs considered discussion with specialist competition lawyers. Delays can lead to higher fines at the end of an investigation but companies need to ensure they have enough evidence before approaching the regulator.

When considering whether to pursue settlement of a CMA investigation, businesses should be aware that once they have admitted the infringement it is binding against them; they will not benefit from a successful appeal by a non-settling party.

There is more flexibility in the way the regulator structures its investigations. A company under investigation should actively explore with the CMA a hybrid approach, if the business thinks settlement is the best option for it in the circumstances but other parties to an investigation might not be willing to go down the same route.

Appeals

Over a third of the CAT appeals brought against CMA decisions have been successful (meaning that the appellants have succeeded in having the CMA's decision on substance overturned or remitted, or, if they have only appealed on penalty, in having the fine reduced).

In addition, a further third of appeals have been partially successful (meaning that the appellants have succeeded on at least one of their grounds of appeal, but not all). This is based on the methodology used (see Methodology for further details), which has required a number of judgement calls to be made in order to present findings in a consistent manner.

Companies should however be aware that in all cases where a company has appealed a CAT judgment to the Court of Appeal, the court has upheld the CAT's findings. The CMA has only appealed against two CAT judgments: the regulator was unsuccessful in its first appeal but was successful in its most recent appeal of the CAT judgment in *Hydrocortisone* (considered in further detail below).

Appeals on substance

A substantive appeal is a full appeal on merits but it is an appeal against the CMA's substantive findings. The CAT does not start its review with a "blank slate". But the CAT can (and typically does) hear evidence, including fresh evidence not presented before the CMA, and make findings on issues of both fact and law. Businesses need to be aware that at the point at which they appeal a CMA decision, the case ceases to be an administrative procedure and instead becomes a judicial proceeding. A CAT appeal will typically involve a full adversarial trial, during which the court will hear live witnesses and detailed submissions on issues of fact and law.

The CAT has so far upheld half of the CMA's findings on substance. But in nearly 25% of cases, the CAT has set aside the CMA's decision on substance and in 12% of cases it has remitted the decision back to the CMA.

Appeals on penalty

Whilst the CAT will scrutinise the CMA's decision on penalties on the merits, it will place greater weight on the CMA's findings on matters of which the CMA has particular experience (e.g. the need for deterrence against certain infringements or the value provided by a particular leniency applicant). This means that it may be harder for an appellant to argue successfully that the CMA has erred in its findings on certain fining grounds. Nevertheless, the fact that in 14 cases appellants have been successful in reducing the level of fine imposed by the CMA clearly indicates that companies should not hesitate to appeal a fining decision if they feel that there are strong grounds for the CAT to review the CMA's findings.

Companies should note that appealing a CMA decision does bear the risk of the CAT increasing the level of fine originally imposed by the CMA – albeit this has only occurred in one case so far. That case was highly fact-specific with the CAT holding that the musical instrument manufacturer, Roland, should lose the benefit of its 20% settlement discount as it had breached its bargain with the CMA to accept a lower fine in return for agreeing not to appeal. The fact that the settlement procedure no longer allows appeals by settling parties (see further above) means that this specific case would not arise in future.

CAT appeals (substance and penalties)

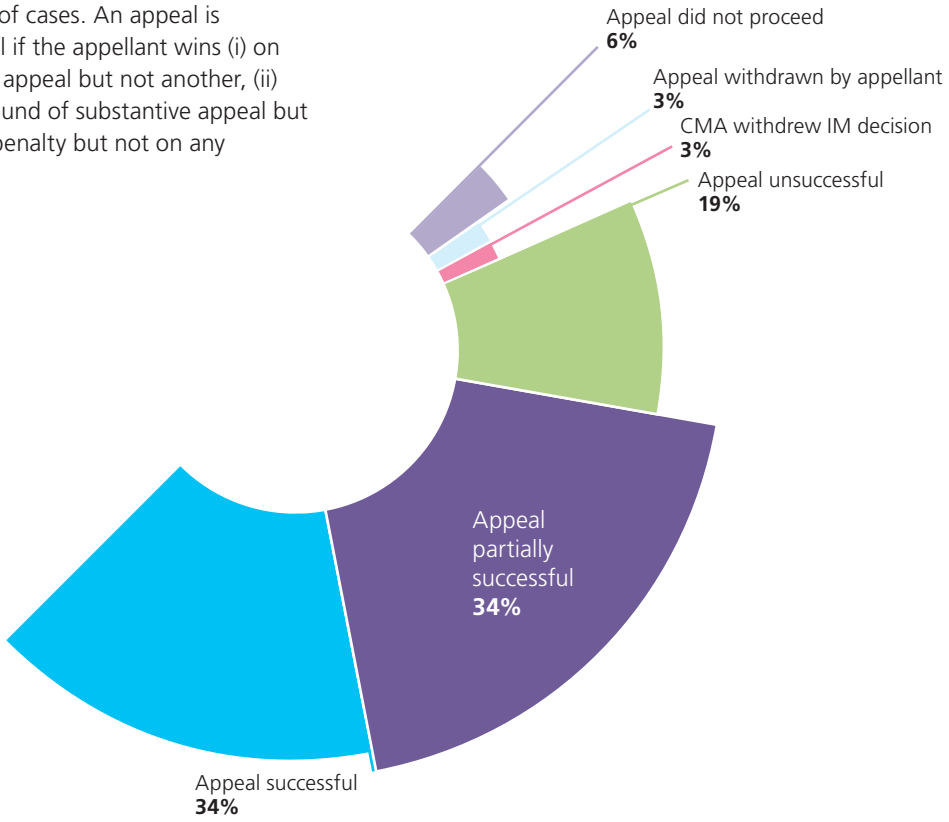
The nature of the often iterative stages of appeals against CMA decisions, plus the possibility of cross-appeals, makes an analysis of the CAT appeal judgments complicated. It requires a number of judgement calls to be made in order to present findings in a consistent manner.

CAT appeal outcomes

Based on the methodology used, appeals to the CAT against CMA decisions on grounds of substance and/or penalty have been successful, or at least partially successful, in almost 70% of cases. An appeal is deemed partially successful if the appellant wins (i) on one ground of substantive appeal but not another, (ii) on penalty and on one ground of substantive appeal but not on another, or (iii) on penalty but not on any substantive grounds.

Of the remaining c.30% of appeals to the CAT against CMA decisions, the CMA withdrew its interim measures decision in one case, the appellant withdrew its appeal in another case, and the appeal did not progress in two further cases. On this basis, only 19% of appeals to the CAT against CMA decisions were fully unsuccessful.

This success rate should give companies dissatisfied with the CMA's findings comfort that the CAT is prepared to exercise a strong level of scrutiny over the CMA's decisions.



Appeals on substance

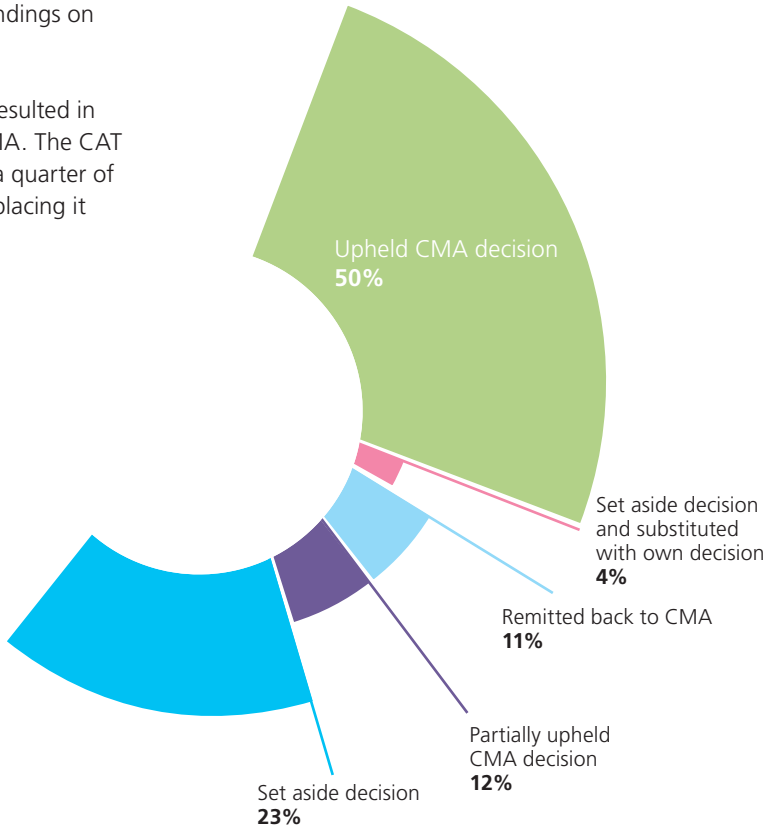
CAT judgments on substance

Appeals against the *substance* of the CMA's findings have yielded some form of positive result for the appellant in just under 40% of cases.

The CAT has upheld the CMA's original decision in 50% of cases and has partially upheld its findings on substance in 12% of cases.

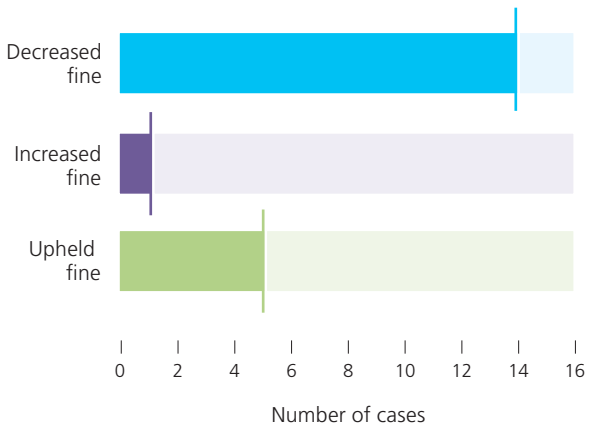
Just over 10% of appeals to the CAT have resulted in the court remitting the case back to the CMA. The CAT has set aside the CMA's decision in almost a quarter of cases and set aside the original decision, replacing it with its own in almost 5% of cases.

Companies therefore can take comfort from the fact that CAT appeals on substance have been successful in over a third of cases, albeit this is evidently highly specific to the facts and legal arguments in the case.



Appeals on penalty

CAT decision on penalty



In cases where parties have appealed the *level of fine* imposed by the CMA, their appeals have yielded relatively high levels of success, leading to a reduction of the financial penalty in 70% of cases. However, a large number of these cases were determined under the regulator's previous guidance, which has since been amended to reflect the CAT's rulings. In more recent cases, the level of success has been lower with the CAT decreasing the CMA's penalty in just under 50% of cases since 2017.

The risk of the CAT increasing the financial penalty is limited, albeit not non-existent. In one case, the CAT removed the company's discount for settlement as a result of its appeal.

Appeals:

Key takeaways

If companies and their advisers think that they have a strong reason to appeal against a CMA decision they should not shy away from doing so. The CAT has demonstrated that it is willing to rigorously test the CMA's findings.

Companies can appeal against a CMA finding on substance and/or against the level of fine imposed.

Appellants have to prepare themselves for the possibility of a full adversarial trial before the CAT.

An appellant can only withdraw its appeal with permission from the CAT (unless the CMA itself withdraws its decision).

Six trends to watch in CMA enforcement activity

Continued focus on e-commerce

Since the CA98 came into force nearly 25 years ago, there has been a steady stream of cases focusing on competition restrictions within e-commerce. Investigations have focused principally on online RPM practices, with a few investigations relating to online sales bans and online price fixing. Whilst there is some recently introduced flexibility for businesses, the CMA is likely to continue to prioritise enforcement in e-commerce.

Examples of CMA e-commerce investigations

Resale price maintenance:

- Bathroom fittings
- Commercial catering equipment
- Light fittings
- Mobility scooters (in part)
- Guitars
- Synthesizers and hi-tech equipment
- Digital pianos
- Digital keyboards
- Electronic drums

Online sales bans:

- Mobility scooters (in part)
- Sports equipment

Online price fixing:

- Online sales of posters and frames
- Leicester City FC merchandise
- Rangers FC-branded replica football kit

Horizonal agreements play an important role

Where cases have involved the primary supplier (and owner of the intellectual property rights) and resellers of the product operating at the same level of trade – i.e. as competing retailers – the CMA has framed restrictions on competition as horizontal. Businesses engaged in this type of dual distribution must therefore continue to be mindful of the rules applicable to horizontal agreements.

Flexibility for online retailers in vertical agreements

In July 2023, the CMA published guidance on the Vertical Agreements Block Exemption Order, covering how the Chapter I CA98 prohibition applies to online supply relationships. In some cases, this guidance provides more flexibility for online businesses, who may now be able to deploy arguments in defence of certain vertical restrictions:

1. *Bans on distributors selling suppliers' products on online marketplaces*

   These are now explicitly compatible with UK competition law. This is on the proviso that they are not intended to limit the "effective use of the internet", the relevant supply agreement does not include any severe restrictions on competition and the parties, relevant market shares are <30%.

2. *Dual pricing*

   Recognising the growth in the popularity of online shopping and the impact this has had on the high street, the CMA's guidance provides greater flexibility in relation to dual pricing. Suppliers can now charge a different wholesale price for products that are to be sold offline versus those to be sold via online channels, where the price difference takes into account investments or costs related to bricks and mortar distribution. However, differences in pricing must not be aimed at preventing distributors from selling online or restricting sales into a particular territory or to a certain customer group.

3. *Fulfilment contracts*

   In fulfilment contracts, where a supplier imposes a certain resale price on a distributor, there will be no RPM if the company that provides the fulfilment services downstream has been selected by the supplier and not the distributor. Prior to this change, this was a key issue in the building and construction industry, with companies having to come up with novel pricing mechanisms to avoid claims of RPM further down the supply chain.

Using technology to capture more cases

The CMA has rolled-out a digital data monitoring tool, which it has used in the musical instruments sector to monitor price levels automatically following RPM investigations in this industry. This tool, coupled with the CMA's annual plan for 2024/2025 announcing the regulator's intention to expand its use of data, technology and AI, will potentially result in the CMA conducting a greater number of investigations in respect of e-commerce practices.

Increased willingness to tackle novel theories of harm

A dichotomy appears in the CMA's enforcement practice: the CMA's pursuit of "easy win" cases that can send a clear message to businesses without involving protracted investigations and appeals versus its desire to tackle more complex theories of harm.

In a number of cases, the CMA has focused on a theory of harm very specific to the case and/or a narrow time period. This has the advantage of incentivising businesses to settle on a "clear cut" infringement with a potentially more limited fine, rather than a wider case which businesses may not be willing to fully accept. Even if the parties "fight" the case through the full administrative procedure, a narrow theory of harm is likely to reduce the risk of a subsequent appeal to the CAT.

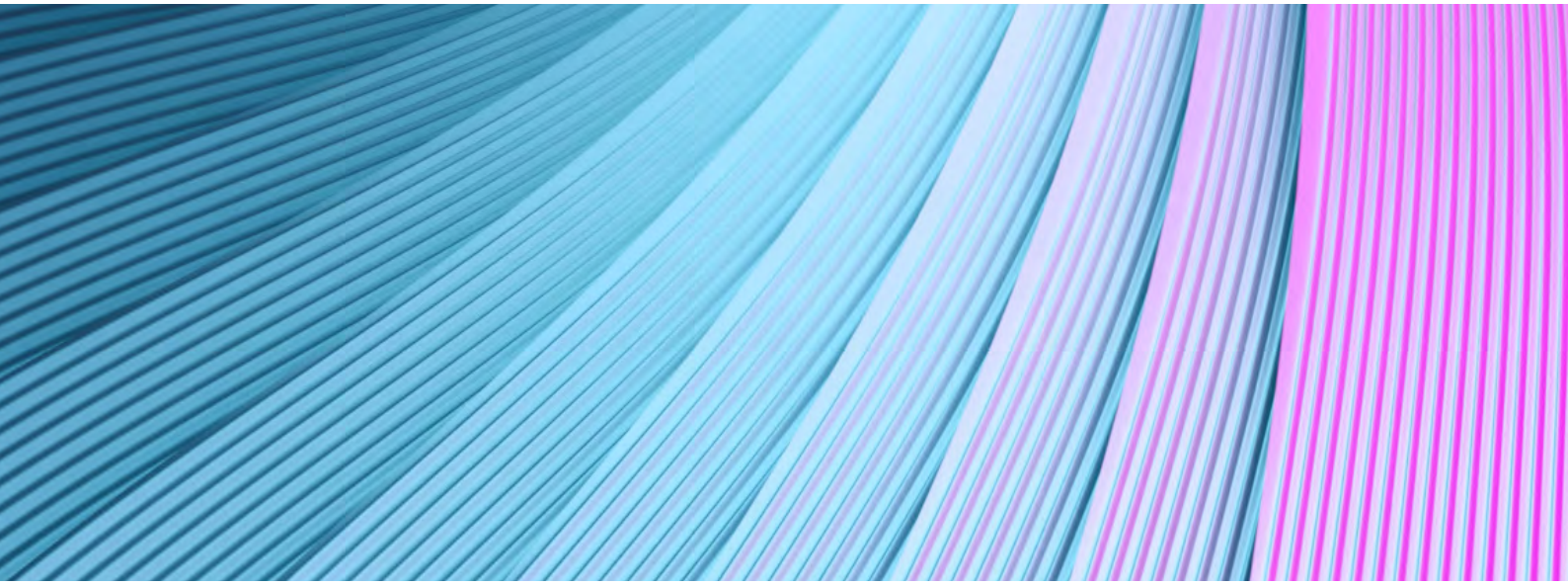
Hybrid settlements are increasing

The CMA's desire to facilitate the early resolution of cases is shown in its policy towards hybrid settlement approaches. In recent years, it has been open to allowing some parties to settle whilst leaving others to continue to defend the CMA's allegations. Although this dual approach offers more limited resource savings to the CMA, it will lead to a quicker resolution of the case against the settling parties and may increase the pressure on the remainder to settle.

Increasingly complex theories of harm

The CMA can be expected to continue to use its powers to pursue new theories of harm in response to changing technological, environmental and consumer conditions. For example, in its 2021 paper "Algorithms: How they can reduce competition and harm consumers", the CMA recognised the potential for algorithmic systems to facilitate collusion and sustain higher prices, through their potential to facilitate explicit coordination, the creation of "hub-and-spoke" structures enabling information exchange and autonomous tacit collusion. A small number of enforcement cases have been pursued by other competition authorities in relation to the use of pricing algorithms to enforce explicit collusive agreements and the CMA may be expected to follow suit if it is alerted to concerns of this nature.

> "The CMA can be expected to continue to use its powers to pursue new theories of harm in response to changing technological, environmental and consumer conditions."



Case study: *Prochlorperazine*

Date: 2017-2022 (set aside on appeal, 2024)

In *Prochlorperazine*, the CMA actively pursued a complex theory of harm, which required it to demonstrate that an overarching unwritten agreement had been entered into by the marketing authorisation holder, Alliance Pharmaceuticals, and another competitor.

Its infringement finding was ultimately overturned in the CAT. The CAT found that the CMA had failed to demonstrate, on the balance of probabilities, the existence of the alleged "market exclusion agreement". In reaching its findings, the CAT criticised the way the CMA assessed the factual evidence, including its selective and out of context quotation of certain passages of a document and its reliance on speculative explanations to rebut the wording of emails. And significantly, the CAT criticised the CMA for not calling witnesses from the parties including Alliance who authored documents on which the CMA sought to rely.

The case will have significant ramifications for the way in which the CMA prioritises its enforcement activity and discharges its burden of proof.

CMS acted for Alliance in this case.

"The case will have significant ramifications for the way in which the CMA prioritises its enforcement activity and discharges its burden of proof."

Going green

Green agreements and issues relating to environmental sustainability are increasingly on the CMA's radar. Supporting the transition to low-carbon growth has been, and continues to be, a strategic priority for the CMA. The CMA has announced in its most recent annual plan for 2024/2025 that it is committed to helping accelerate the UK's transition to a net zero economy and to promoting environmental sustainability.

In 2021, the CMA established a cross-organisational Sustainability Taskforce within the CMA to consider how it could better use the tools available under competition and consumer law to achieve the Government's net zero and sustainability goals. This work has focussed on three main areas:

1. Ensuring markets for environmentally sustainable products or services develop in ways favourable to competition and consumers (as it did with its market study on electric vehicle charging points);
2. Ensuring consumers are able to make informed choices about the environmental impact of the goods and services they use (using its consumer powers to develop the Green Claims Code); and
3. Ensuring that competition law is not an unnecessary barrier to companies pursuing environmental sustainability initiatives.

The third of those areas of work has led to the CMA publishing guidance to give firms greater clarity about agreements addressing environmental sustainability issues including climate change ("Green Agreements Guidance"). To assist businesses with making these types of assessments, the CMA has also introduced a new open-door policy whereby companies can contact the regulator to seek informal guidance on the compatibility of particular agreements with the Chapter I prohibition.

A key part of the open-door policy will be the publication of summaries of the CMA's competition law analysis relating to notified agreements. The growth of this body of precedents may avoid an increase in the number of investigations relating to sustainability issues, as companies will have a better idea as to the types of collaboration that will and will not be problematic under competition law and be able to seek guidance from the published materials.

While the publication of the Green Agreements Guidance has been universally welcomed, there would still appear to be a degree of nervousness from businesses around engaging in these types of agreement. This is perhaps understandable given that the environmental sustainability credentials of businesses and features of their products and services can often be an important parameter of competition. Many industries are also having to absorb the costs of increased environmental regulation in challenging market conditions. Given these factors and the CMA's strategic priority to support the transition to net zero and promote environmental sustainability, it is likely to investigate and take enforcement action where it does have concerns.

Evolving enforcement in digital markets

The CMA's approach to investigations in digital markets has been evolving over the course of the last 23 years.

Whilst a number of investigations were launched between 2000-2020 into digital activities, a relatively high number of these investigations were closed on administrative priority grounds, primarily as a result of voluntary changes in behaviour or the commencement of other work regulating the conduct of concern. There are a number of examples of this, with formal commitments being accepted by the CMA in only two cases involving digital activities in this period.

Examples of investigations into digital activities 2000-2020:

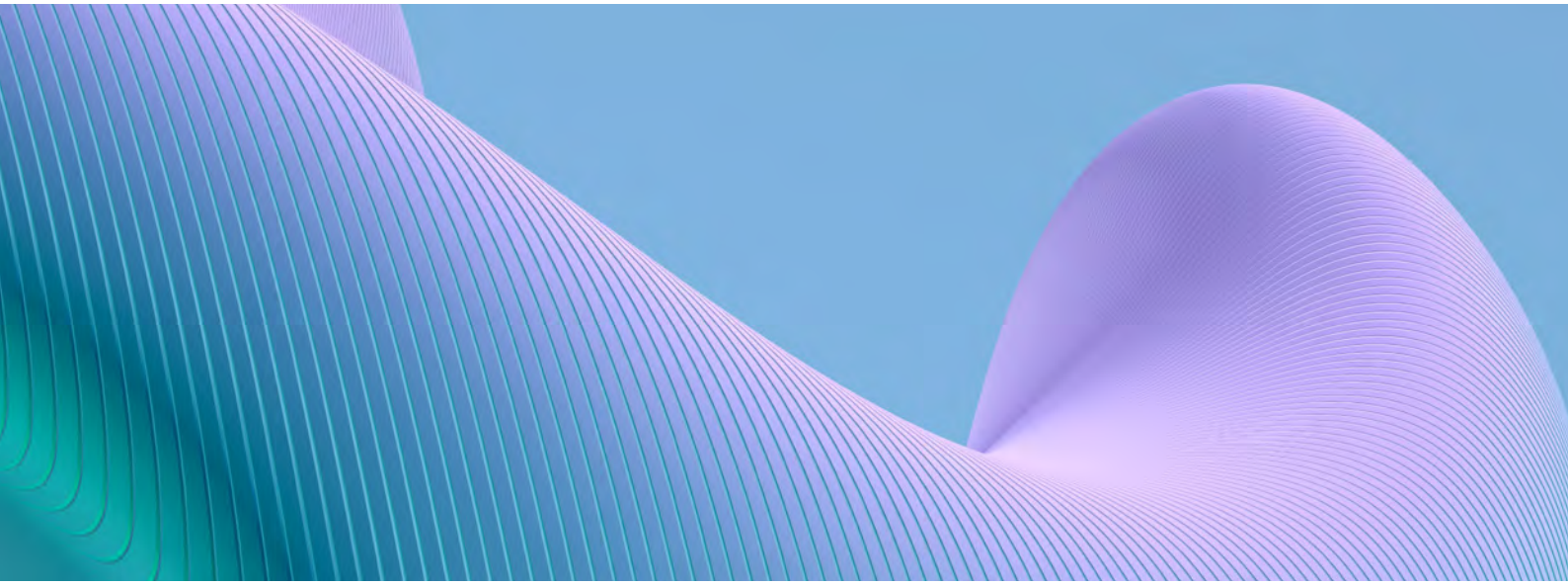
- *Amazon online retailer* (closed following changes to website)
- *e-Books* (closed due to European Commission activities in this area)
- *Hotel online booking* (closed due to activities of other European competition authorities in this area)
- *Energy Price Comparison websites* (closed due to Ofgem's Energy Market Investigation and the CMA's Digital Comparison Tools Market Study)
- *CMA's investigation into auction services* (closed following acceptance of commitments)
- *CMA's investigation into platform service for the automotive sector* (closed following acceptance of commitments)

Since 2020, the CMA's focus has shifted towards the bigger technology companies. This reflects the fact that following the UK's exit from the EU, the CMA has sought to bring its own cases against large technology companies, given that EU-wide enforcement by the European Commission no longer extends to the UK.

A very high number of these cases have been considered appropriate for resolution by commitments, reflecting the fact that these investigations concern alleged Chapter II CA98 infringements that can often be addressed through commitments relating to the party's future conduct.

Examples of digital markets investigations 2020-2024 with a commitments process:

- *Meta – use of data*
- *Amazon Marketplace – 'BuyBox'*
- *Google – 'Privacy Sandbox'*
- *Google – Google Play Store* (although the investigation was closed in August 2024 on administrative priority grounds prior to the entry into force of the DMCCA)



DMU changes the CMA's role

With the establishment of the DMU and the entry into force of the DMCCA, there is a clear question mark over the extent to which the CMA will continue to launch antitrust investigations in relation to the conduct of large digital companies.

The new Digital Markets competition regime imposes conduct requirements tailored to businesses with "Strategic Market Status", designed to mitigate the effect of market power. These conduct requirements will regulate how these types of business conduct themselves based on three overarching principles of "fair dealing", "open choices" and "trust and transparency". If a breach is found, it can result in:

— an enforcement order;
— fines;
— the acceptance of commitments to meet conduct requirements; or
— the adoption of a final offer mechanism in certain circumstances.

It seems likely that the CMA will prefer to use these significantly enhanced powers rather than continue to bring Chapter II CA98 investigations into large digital firms, at least for the types of investigation that have previously been considered amenable to resolution via commitments and/or to address forward-looking issues. Does this indicate a lesser role for competition law in the regulation of digital markets going forward?

Absolutely not. The CMA will still have a significant role to play in ensuring consumers are protected in the face of an ever-evolving digital economy, in particular as regards the problematic conduct of firms which may fall short of having "Strategic Market Status" (and are therefore outside the scope of the new Digital Markets competition regime). For instance, Chapter II CA98 powers will still be key to tackle conduct of niche tech companies which may have significant positions in their area of specialism but are nowhere near the ambit of the new Digital Markets competition regime, as well as to address Chapter I CA98 issues in the digital sphere. Moreover, the CMA has already demonstrated its willingness to use its powers to police competition at the forefront of technology, such as in the fields of artificial intelligence, blockchain and even the metaverse, as evidenced by its growing work on AI foundation models and much-anticipated paper on AI accelerator chips. And it will rely on its entire toolkit to be able to do so, including CA98 enforcement functions. It may in addition prefer to use CA98 enforcement powers for past conduct that has harmed consumers and/or competition, particularly since this will also enable claimants to bring follow-on damages actions based on its decision.

> "The CMA will still have a significant role to play in ensuring consumers are protected in the face of an ever-evolving digital economy."

Heightened focus on labour markets

The CMA has recently identified the protection of competition in labour markets as an enforcement priority – an area that might be considered to align with the "hipster" competition law movement. Over the past two years, the CMA has initiated investigations into the purchase of freelance services and the employment of staff supporting the production and broadcasting of sports and non-sports television content in the UK. Most recently, in January 2024, a cartel investigation into the fragrances sector was expanded to cover suspected no-poaching arrangements. In fact, competition authorities across the globe are increasingly focused on employment and labour markets.

The CMA's new Microeconomics Unit recently published its flagship report, the first of its kind in the UK, which takes a "deep dive" into key trends in the UK labour market, focusing on the impact of competition and employer market power. The report highlights the importance of well-functioning labour markets for productivity; where workers are able to access the right jobs, businesses have access to the right people and wages are higher, boosting the wider economy.

While acknowledging that frictions will always exist in labour markets and highlighting that this is an area in which competition authorities have traditionally been less active, Sarah Cardell, CEO of the CMA, noted that the CMA has the power to take enforcement action against firms which infringe competition law by fixing wages, just as it can against firms which collude to fix prices.

The CMA's heightened activity in labour markets, from both an investigatory and research perspective, demonstrates the regulator's keen interest to interact with and better understand this space. The CMA has clearly signalled to businesses that they need to understand and comply with their obligations under competition law with regard to their employment practices; and a competitive labour market reaps rewards for the wider economy, increasing productivity and innovation across sectors and regions.

From a practical point of view, in-house legal teams should exercise the same caution in interactions between businesses on labour issues as they would in relation to interactions on more commercial matters (such as markets, pricing and investments etc). Due diligence processes in transactions should also include investigation of potential competition law liability in the employment space.

Role of the CAT in policing the CMA

Against the sheer number and breadth of investigations brought by the CMA, it is worth reflecting on the CAT's role in policing the CMA's powers. The CAT has also frequently held the CMA to account for not sufficiently proving its case. In addition to the *Prochlorperazine* case cited at page 43 above, recent examples of this are:

Compare the Market appeal

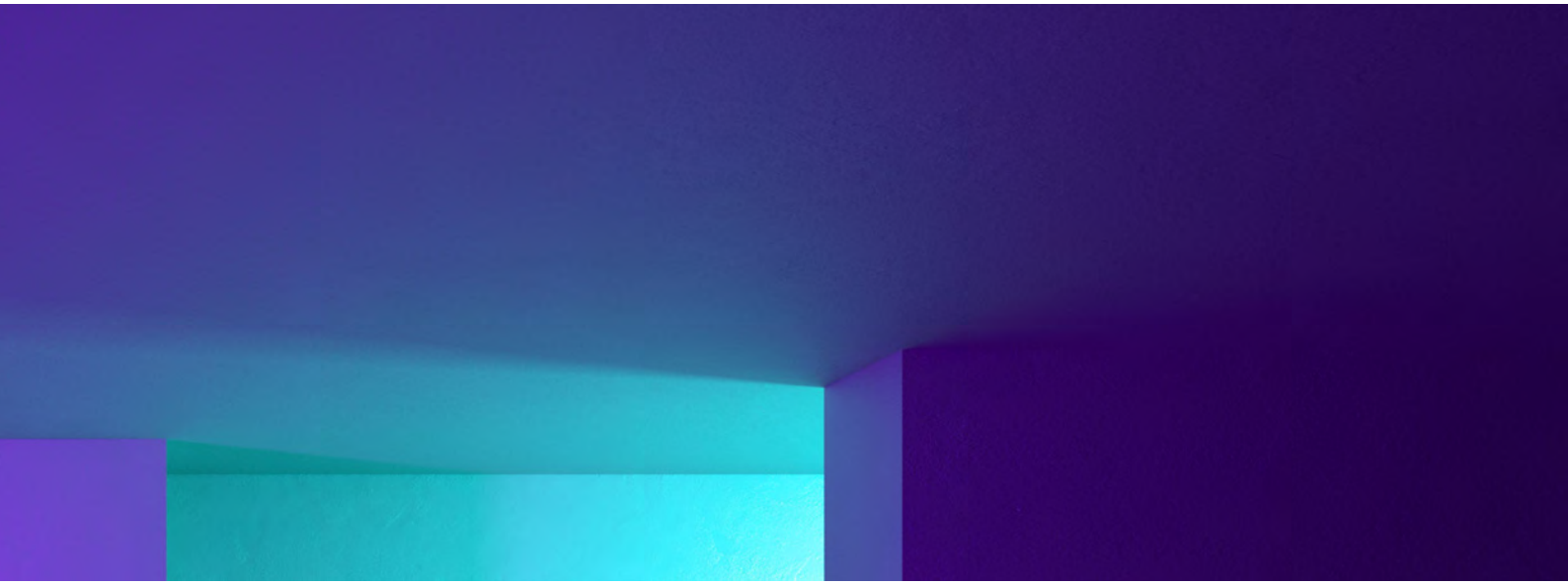
Date: 2017-2021. Set aside on appeal in August 2022

The CAT resoundingly upheld Compare the Market's appeal on 5 out of 6 grounds, overturning the CMA's decision that found a "by effect" restriction of competition from Compare the Market's use of wide most favoured nation ("**MFN**") clauses.

In a judgment highly critical of the CMA's assessment, the CAT found that:

- the market definition in the decision was materially wrong and the process by which the CMA arrived at the market definition was flawed;
- the CMA failed to establish that wide MFNs had the anti-competitive effects alleged in its decision;
- the evidence relied on by the CMA was anecdotal, and lacked depth and consistency with the CMA's theory of harm; and
- the evidence was considered untestable by Compare the Market and the CAT.

The CAT ultimately concluded that there was no reliable evidence to establish the existence of the alleged anti-competitive effects.



Hydrocortisone cartel infringement appeal

Date: 2016-2021. CAT judgments in September 2023 and March 2024, which were successfully appealed to the Court of Appeal in September 2024

The cartel aspects of this case provide an example of where the CAT initially overruled the CMA but the CMA ultimately prevailed in the Court of Appeal. Nonetheless, this will still influence the way the CMA prosecutes cases going forward.

The CAT published two judgments relating to the cartel infringements in *Hydrocortisone*. In its judgment on the substance, the CAT "provisionally" found that all of the companies' grounds of appeal had failed. The CAT made this finding on a factual basis that went beyond the CMA's decision.

However, in a further unanticipated judgment, the CAT found that the CMA had failed to put its adverse findings to a key witness who had been called to give evidence at the trial. The CAT found that this failure of due process fatally undermined the conclusion that there was sufficient material to uphold the CMA's decision.

These judgments show the extent to which the CAT was prepared to intervene to ensure the CMA had met its obligation to put its central case to a key witness, with it being prepared to reverse a substantive finding of infringement on account of a procedural error.

On 6 September 2024,the Court of Appeal overturned the CAT's judgment, finding that the CAT had incorrectly understood the CMA's case and had followed an inappropriate procedure in issuing a provisional judgment to the parties.

But this series of judgments will still give rise to important learnings in terms of the implications of making allegations of dishonesty and how a case should be put to witnesses.

It seems highly likely that the CAT will continue to play a significant role in scrutinising the CMA enforcement activity in the coming years – in terms of its jurisdiction, approach to investigations, and both its factual and legal assessments. The CMA will need to ensure the robustness of its future decisions to withstand these types of challenges.

Methodology

The data used for this report has been gathered from case information published on the CMA (including the historic OFT) and CAT websites. This data has not been supplemented by information from other sources or knowledge of cases from within the CMS Competition Team. We have not considered the decisions issued by any of the concurrent regulators who have powers to apply CA98 in specific sectors (such as the FCA, Ofcom and Ofgem).

The OFT and CMA decisions analysed encompass ongoing, case closure, no issues, commitments, interim measures and infringement decisions from the period March 2000 to 31 May 2024. Appeals to the CAT of these decisions have also been reviewed.

Analysing the information contained within these decisions is, in part, a subjective exercise and the following methodology has been used:

— We have treated decisions exempting Chapter I CA98 conduct under the previous OFT notification regime as "no issues" decisions.

— It has not been possible to determine all data points from the published text of OFT and CMA decisions. Therefore, some graphs do not include data for all decisions within a category. Where a detailed decision has been published by the OFT or CMA, some assumptions have been made – for example – where a case does not refer to employee interviews, it is assumed that none have taken place, or where an investigation follows a market study, it is assumed that there has been no "Type A" leniency.

— Where a case has commenced off the back of another OFT/CMA investigation or merger inquiry, this has been counted as a "regulator tip-off".

— We have used the term "dawn raid" to cover all inspections of business premises with or without notice at any point in an investigation. We have not recorded inspections at domestic properties.

— Judgement has been required in categorising the infringement types, in particular when classifying Chapter II CA98 abuse types as exclusionary and/or exploitative. Our assessment of the type of infringement covers both ongoing and closed cases, and is based on the conduct under investigation rather than the CMA's ultimate finding.

— Some cases cover multiple types of infringing conduct, for example, both market sharing and information exchange, or both exclusionary and exploitative conduct. As a result, the graphs setting out the types of infringement are partially distorted towards investigated conduct that involves multiple types of infringing behaviours. We have only listed a case as involving information exchange where it is specifically referred to in the decision, not just where it is inherent in the nature of the infringement (for example, price fixing, bid-rigging and RPM inevitably involve some level of information exchange).

— The duration of cases has been determined based on whole months, rather than specific dates. This will slightly lengthen the stated duration of some investigations.

— We have only counted employee interviews where these have been carried out in relation to the investigated parties, rather than third parties.

— In determining the involvement of director and/or senior management in cases, we have considered whether the text of an OFT/CMA decision indicates that individuals with relevant job titles have been involved in the investigated activities. This is broader than the OFT/ CMA's assessment of "senior management/director involvement" at Step 3 of its penalty calculations and relies on the OFT/ CMA's description of individuals' roles.

— OFT "early resolution" agreements have been counted as settlement.

— We have considered whether a settlement is "hybrid" at the point at which the infringement decision is issued (i.e. where at the point of the decision, at least one party has settled the case with the CMA and at least one party has not entered into a settlement agreement, albeit it may have been granted leniency). Cases where all parties settle, but at different times prior to the issue of an infringement decision, are therefore not recorded as hybrid. Hybrid settlements have not been recorded for Chapter II CA98 cases.

— The grant of leniency is recorded separately to settlements and covers all types of leniency marker. We have also recorded "Type A" leniency separately. In some decisions, it is not clear what marker was granted to the leniency applicant and so we have assumed leniency markers to be "Type A" where they have been granted prior to the opening of the CMA's formal investigation and where they have resulted in total immunity from the penalty.

— Where a decision has been remitted to the CMA, we have not counted this as a separate investigation. The length of the investigation is based on the original investigation only and does not take into account any subsequent period following remittal. Penalty amounts are based on the remittal decision, i.e. the penalty that is ultimately imposed by the CMA.

— Our assessment of penalty amounts refers to the total amount imposed on all parties to an infringement.

— An appeal is deemed partially successful if the appellant wins (i) on one ground of substantive appeal but not another, (ii) on penalty and on one ground of substantive appeal but not on another, or (iii) on penalty but not on any substantive grounds.

— All percentages included in charts throughout this report have been rounded to the nearest whole number. This may mean that the total percentage included in a chart may equal 99%, 100% or 101%.

Antitrust, competition and trade at CMS

The CMS UK Antitrust, Competition and Trade team advises across the full range of UK and EU antitrust, competition and trade matters.

Based in London, Edinburgh, Glasgow and Brussels, we advise businesses and their boards on all aspects of merger control, competition and regulatory investigations, market studies/inquiries and compliance.

We also advise extensively on Foreign Direct Investment controls, including the National Security and Investment Act, UK subsidy control, EU State aid, digital and sectoral regulation, competition litigation, consumer protection and public procurement.

We are part of the CMS Global Antitrust, Competition and Trade Group, with over 225 competition lawyers and 70 competition partners in over 40 countries across the world.

Our size and geographical footprint enable us to handle all antitrust, competition and trade matters irrespective of international dimension. Where necessary, we cooperate with long established contacts from our wider network of law firms across the world.

Get in touch

Brian Sher
Partner, Head of Antitrust, Competition and Trade, CMS UK
T +44 20 7524 6453
E brian.sher@cms-cmno.com

Neil Baylis
Partner
T +44 20 7067 3457
E neil.baylis@cms-cmno.com

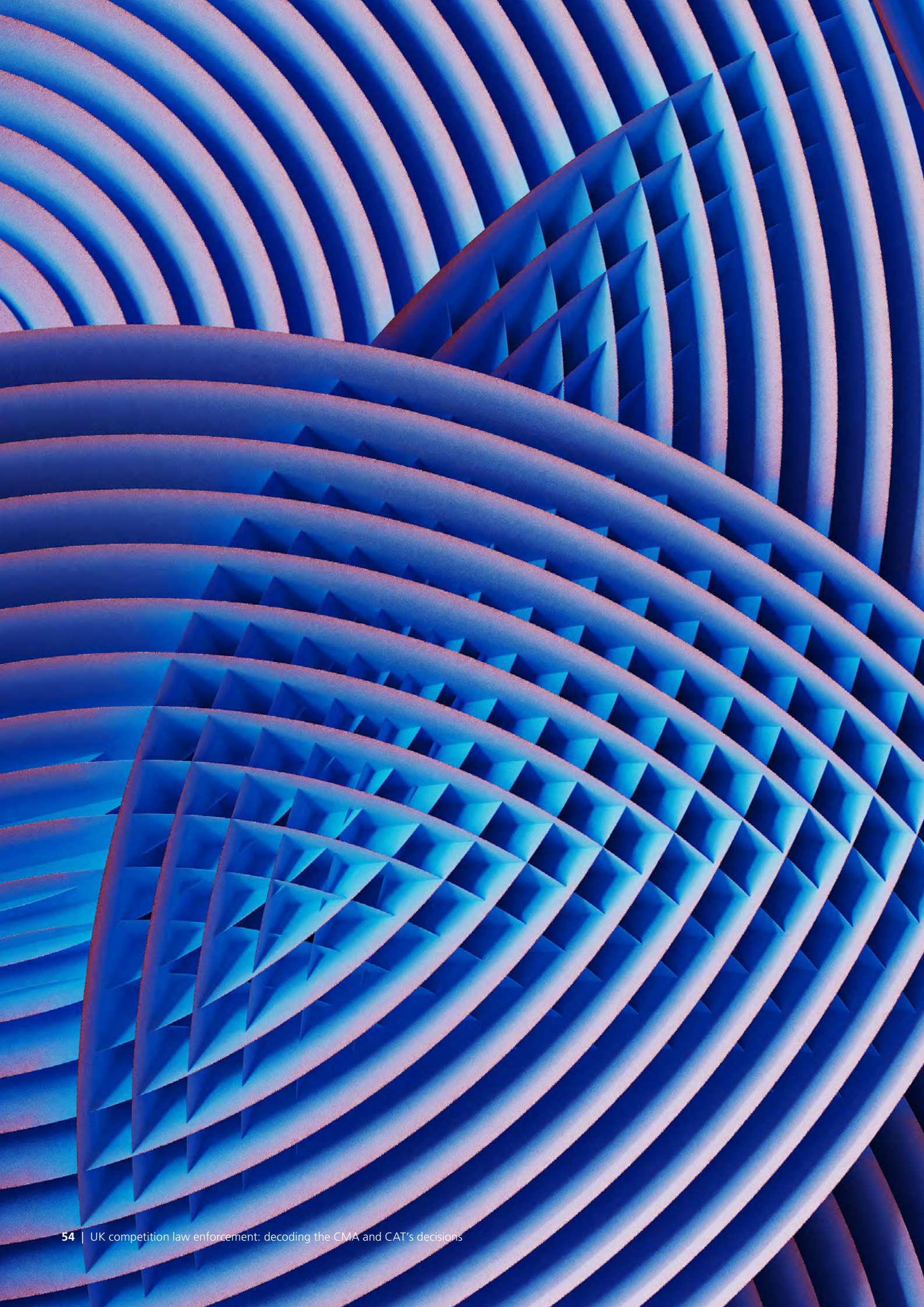
Russell Hoare
Partner
T +44 20 7524 6787
E russell.hoare@cms-cmno.com

Jacqueline Vallat
Partner
T +44 20 7367 2819
E jacqueline.vallat@cms-cmno.com

Graeme Young
Partner
T +44 20 7367 2906
E graeme.young@cms-cmno.com

Rhiannon Pugh
Senior Associate
T +44 20 7367 2672
E rhiannon.pugh@cms-cmno.com

Lucy Charatan
Associate
T +44 7367 3664
E lucy.charatan@cms-cmno.com



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