

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: the Competition and Markets Authority and Part 4: Competition Reform

Part 4: Competition Reform

Chapter 5: Miscellaneous

Enforcement orders: markets and mergers

Section 49: Enforcement orders: monitoring compliance and determination of disputes

365. **Section 49** amends Schedule 8 of the EA 2002, which sets out the kinds of provisions which can be included in enforcement orders made by the CMA or the Secretary of State in both the mergers and markets regimes. The new paragraph 20C will enable the CMA to appoint a third party expert to monitor the implementation of remedies, including compliance with orders and to determine disputes. New paragraph 20C(2) also requires an enforcement order which makes provision for the appointment of a third party expert, to make provision about his or her terms of appointment. This is intended to allow the order to require the parties subject to it to remunerate the appointed third party. Currently the appointment of third parties relies on the agreement of the parties. For example, the Adjudicator – Broadcast Transmission Services was created as a result of undertakings arising from the merger of Macquarie UK Broadcast Ventures and National Grid Wireless Group. ITV's Contracts Rights Renewal Undertakings were accepted following the merger of Carlton and Granada. The purpose of these provisions is to increase the range of remedies available to the CMA so that the most proportionate and effective remedy can be applied to address an Adverse Effect on Competition.

Section 50: Enforcement orders: provision of information

366. **Section 50** amends Schedule 8 of the EA 2002 to provide that the CMA or the Secretary of State will be able to require parties to publish non-pricing information without also having to require parties to publish pricing information. There are some instances in which the publication of certain information unrelated to prices may be an effective and proportionate remedy, for example information telling customers how they may switch supplier. The current position (under paragraph 15 of Schedule 8 of the EA 2002) is that, if the CMA were to put in place such a remedy by means of an order, it would also have to require price information to be published.

Concurrency Summary and Background

*These notes refer to the Enterprise and Regulatory Reform Act
2013 (c.24) which received Royal Assent on 25 April 2013*

367. The OFT has the economy wide function of enforcing anti-trust provisions (Part 1 of the CA 1998) and has market investigation reference powers (Part 4 of the EA 2002).
368. Alongside the OFT are the sector regulators whose functions include promotion of competition or dealing with anti-competitive practices. The regulators also have competition powers concurrently with the OFT. The sector regulators with concurrent powers, and the areas in relation to which they have those powers, are:
- the Civil Aviation Authority (“CAA”): air traffic services and airport operation services, both in the United Kingdom;
 - Monitor: healthcare services in England (and there is a power for the Secretary of State to extend these powers to the area of social care in England);
 - the Northern Ireland Authority for Utility Regulation (“NIAUR”): gas, electricity, water and sewerage services in Northern Ireland;
 - the Office of Rail Regulation (“ORR”): railway services in Great Britain;
 - the Office of Communications (“Ofcom”): electronic communications, broadcasting and postal services in the United Kingdom;
 - the Office of Gas and Electricity Markets (“Ofgem”): gas and electricity in Great Britain; and
 - the Water Services Regulation Authority (“Ofwat”): water and sewerage England and Wales.
369. The sector regulators can take a range of approaches to promote competition, including imposing and enforcing licence conditions using powers under their own sectoral legislation. In addition, the regulators share the OFT’s powers to enforce Part 1 of the CA 1998 and make market investigation references to the CC under Part 4 of the EA 2002.
370. The Act largely retains the existing concurrency provisions, but strengthens the role of the CMA and enhances the emphasis on early and proper consideration of the use of anti-trust powers (under Part 1 of the CA 1998) by the sector regulators.
371. The Act amends the concurrency arrangements in five respects:
- sector regulators will have an explicit requirement to consider the anti-trust powers under CA 1998 before using their own sector powers;
 - the Secretary of State can currently make regulations about the procedures for the competition authorities to decide which body will lead on a CA 1998 case where concurrent powers apply. As a result of the amendments, the Secretary of State will be able to make regulations which provide that the CMA may in particular decide, in certain circumstances, that it (rather than a sector regulator) will exercise the concurrent functions in a CA 1998 case;
 - the Secretary of State will have the power to make regulations requiring arrangements to be made for the sharing of information between the CMA and the sector regulators in connection with cases in respect of which concurrent powers arise;
 - there will be a new requirement that the CMA will publish an annual report covering the use of competition powers by it and the sector regulators; and
 - the Secretary of State will have the power to remove concurrent competition functions of certain sector regulators.
372. These changes are intended to give the CMA a leadership role in the concurrency arrangements and it will be expected to work closely with the sector regulators.

Section 51: Powers of sectoral regulators and Schedule 14: Regulators: use of powers under 1998 Act

373. **Section 51** amends the powers of the Secretary of State under section 54 of the CA 1998 to make regulations governing the operation of concurrency.
374. *Subsection (2)(a)* amends section 54(6) to allow regulations made by the Secretary of State to set out the circumstances in which the CMA may decide that it will undertake a case under the CA 1998 rather than the regulator with concurrent functions. *Subsection (3)* inserts a subsection (6A) clarifying that such regulations must require the CMA to consult the regulator before taking over a case and to have the consent of the regulator if it wants to take over a case after the regulator has issued a notice stating that it proposes to make a decision as to whether there has been a relevant infringement (in other words, after a draft decision has been issued).
375. *Subsection (2)(b)* allows regulations made by the Secretary of State to provide for the CMA as well as the Secretary of State to decide questions about which of the competition authorities should undertake a CA 1998 case.
376. *Subsection (4)* inserts new subsections (6B) and (6C) into section 54. These provide for regulations made by the Secretary of State to include requirements for information sharing arrangements to be put in place between “competent persons”, i.e. the regulators with concurrent CA 1998 powers and the CMA (“competent person” is defined in section 54(7)). The information that may be covered by these arrangements includes information in connection with cases being conducted by them under the CA 1998 and cases which a regulator decides to undertake using powers under the sector-specific legislation, even though it considers that it would also have been open to it to proceed with the case under the CA 1998.
377. *Subsection (5)* introduces Schedule 14 which amends the sector-specific legislation to clarify the relationship between the powers of the regulators under that legislation and their powers under the CA 1998. Schedule 14 therefore amends the following legislation:

CAA	Transport Act 2000
Monitor	Health and Social Care Act 2012
NIAUR	The Energy (Northern Ireland) Order 2003
	The Water and Sewerage Services (Northern Ireland) Order 2006
Ofcom	Communications Act 2003
	Postal Services Act 2011
Ofgem	Gas Act 1986
	Electricity Act 1989
Ofwat	Water Industry Act 1991
ORR	Railways Act 1993

378. The amendments made by Schedule 14 re-frame the existing duties on the sector regulators to consider using their powers under the CA 1998 to deal with anti-competitive practices. Currently, these duties generally require that a regulator may not take the relevant kind of enforcement action in a case in which it decides that a more appropriate way of proceeding would be under its CA 1998 powers. This means there is at present an implicit requirement for sector regulators to consider the CA 1998 before using their sector powers. Under the amendments made by Schedule 14 there will be an explicit duty on each regulator to consider whether a more appropriate way of proceeding would be under the CA 1998 before using its sector-specific powers. The

intention behind this change in emphasis is to encourage regulators to turn their minds to the question of whether the CA 1998 route is more appropriate at an earlier stage.

379. Ofcom's current duty in broadcasting (as opposed to electronic communications and postal services) and the CAA's duties under the Civil Aviation Act 2012 to consider relying on the CA 1998 are not amended by Schedule 14 as these already are framed in terms of the regulator having first to consider the CA 1998.
380. In addition, Schedule 14 amends certain provisions of the Electricity Act 1989 and the Electricity (Northern Ireland) Order 1992 relating to the determination of questions arising as to whether the powers under the CA 1998 are exercisable by a regulator in a particular case. In order to create greater consistency, the amendments align the wording of some of these provisions with the general approach in the equivalent provision in the other sectoral legislation listed above.
381. Paragraph 16 of Schedule 4 is also relevant to the provisions made by section 51 and Schedule 14 in that it requires the CMA to publish an annual report outlining co-operation between the CMA and the sector regulators and the use of competition powers by it and regulators in the sectors where concurrent powers apply.

Section 52: Power to remove concurrent competition functions of sectoral regulators

382. **Section 52** introduces a reserve power for the Secretary of State to remove concurrent powers from sector regulators in future.
383. **Subsection (1)** provides that the Secretary of State may by order made by statutory instrument amend any enactment to remove from a sectoral regulator either its functions under Part 1 of the CA 1998 Act or its functions under Part 4 of the EA 2002, or both (a "sectoral regulator order"). The Secretary of State has the power to make a sectoral regulator order where he considers that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the United Kingdom, for the benefit of consumers. **Subsection (3)** provides that a sectoral regulator order may also amend any enactment the Secretary of State considers appropriate as a consequence of the removal of the specified functions (for example, removing a regulator's duty to consider Competition Act enforcement.) **Subsection (6)** provides that the statutory instrument containing a sectoral regulator order is subject to the affirmative resolution procedure in Parliament.

Section 53: Orders under section 52: procedural requirements

384. **Section 53** sets out the procedural requirements in relation to a sectoral regulator order. Where the Secretary of State proposes to make a sectoral regulator order, he is required under **subsection (1)** to consult the regulator whose functions would be removed by the order, the CMA (or the OFT, before the CMA's duty and powers are commenced), and devolved administrations where they have a role in relation to an affected regulator. Where, following this first stage consultation, the Secretary of State still proposes to make a sectoral regulator order, the Secretary of State is required under **subsection (3)** to consult: the bodies consulted in the first stage consultation; consumer and business groups who represent those whose interests are affected; and such other persons he considers appropriate. The Secretary of State is required to explain to the persons consulted which powers of the regulator are subject to the proposed order and the reasons for removing them.
385. The following are the sector regulators with concurrent competition powers under Part 1 of the CA 1998 and Part 4 of the EA 2002 that may be affected by a sectoral regulator order:
 - a) Ofcom;
 - b) Ofgem;

- c) Ofwat;
- d) ORR
- e) NIAUR
- f) CAA

Miscellaneous

Section 54: Recovery of CMA's costs in respect of price control references

386. This section amends the Communications Act 2003 to provide that the CMA will have the power to recover its costs in respect of a price control reference from parties appealing price control decisions under section 193 of that Act, to the extent that their appeal was unsuccessful. The CMA may also recover costs from interveners, but not from Ofcom.
387. A requirement to pay the CMA's costs will only take effect after the CAT has made its decision on the case and only if the Tribunal decides in accordance with the CMA's determination. This requirement is because the allocation of costs between parties must take into account the extent to which the appeal was successful, meaning that if the Tribunal decides the case differently the original cost order will no longer be appropriate.
388. If the Tribunal does decide differently, the CMA has the power to make a new cost order that reflects the Tribunal's decision. The date on which this new cost order would take effect would be specified in the order.
389. The CMA's decision to make a cost order can be appealed to the CAT (see amendments to sections 192 to 195 of the Act of 2003 in Schedule 15).

Section 55: Disclosure etc. of information: offences

390. This section amends section 241 of the EA 2002 to provide expressly that a person to whom information is disclosed under that section cannot, unless the information has been made available to the public, use that information for any purpose other than is mentioned in section 241(1). Section 241(1) enables a public authority to disclose information in order to facilitate the exercise of the disclosing authority's statutory functions. Section 241 is one of the gateways for the disclosure of information in Part 9 of the EA 2002. Disclosing or using information in breach of the provisions of Part 9 is a criminal offence under section 245 of that Act.

Section 56: Review of certain provisions of Chapters 1 and 2

391. This section requires the Government to review certain provisions of the Act every 5 years, with the first review taking place no later than 5 years after these provisions come into force. The Government's policy of sunset and review of regulations can be found in *Sunsetting Regulations: Guidance* (2011)¹.
392. In accordance with this guidance, the new provisions to which this section applies are the information gathering powers for merger and market investigations as well as the enforcement of these powers (contained in sections 29, 36 and Schedule 11); statutory timescales for mergers and markets (contained in section 32, Schedule 8, section 38 and Schedule 12); and strengthened interim measures for merger investigations (contained in section 30 and Schedule 7).

¹ <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/s/11-682-sunsetting-regulations-guidance.pdf>

Section 57: Minor and consequential amendments and Schedule 15: Minor and consequential amendments: Part 4

393. **Section 57** gives effect to Schedule 15, which makes minor and consequential amendments to the CA 1998, the EA 2002 and various other Acts as a result of changes being made by Part 4 of this Act.

Schedule 15: Minor and Consequential Amendments

394. **Paragraph 1** amends paragraph 15 of Schedule 1 to the Civil Aviation Act 1982 (which provides for the CAA to authorise certain persons to perform its functions) so as to make the provision subject to rules made under section 51 of the CA 1998 by virtue of the new paragraph 1A of Schedule 9 to the CA 1998 inserted by section 42(4) of the Act. New paragraph 1A of Schedule 9 enables the rules to provide for the exercise of functions under Part 1 of the CA 1998 to be exercised by Board members, members of the CMA panel, members of staff or jointly by several of these persons. Equivalent provision to paragraph 1 of this Schedule is made to other legislation by paragraph 6 (in respect of Ofwat and the Water Industry Act 1991), paragraph 13 (in respect of Ofgem and the Utilities Act 2000), paragraph 40 (Office of Communications Act 2002), paragraph 41 (in respect of the ORR and the Railways and Transport Safety Act 2003), paragraph 49 (in respect of Monitor and the Health and Social Care Act 2012), and paragraph 55 (the NIAUR and the Energy (Northern Ireland) Order 2003).
395. **Paragraph 2** amends the Gas Act 1986 so as to make it clear that the new obligation of the CMA (provided by the new section 40B of the CA 1998 inserted by section 40 of the Act) to prepare and publish a statement of policy on penalties for failure to comply with certain requirements is not exercisable concurrently by Ofgem. Similar amendments are made to other sectoral legislation, in respect of the relevant sectoral regulator, by paragraph 3 (Electricity Act 1989), paragraph 5 (Water Industry Act 1991), paragraph 7 (Railways Act 1993), paragraph 14 (Transport Act 2000), paragraph 46 (Communications Act 2003), paragraph 48 (Health and Social Care Act 2012), paragraphs 51 and 52 (Civil Aviation Act 2012), paragraph 53 (Electricity (Northern Ireland) Order 1992), and paragraph 54 (Gas (Northern Ireland) Order 1996).
396. **Paragraphs 8 to 12** of Schedule 15 deal with amendments to the CA 1998.
397. **Paragraph 9** deletes the reference to the section 42 (offences) in section 26 (powers when conducting investigations), subsection (3)(b). This is a consequential amendment resulting from the repeal of the criminal offence in section 42(1), which is replaced with civil sanctions for failing to comply with investigations. This substantive change is made in section 40(7) to (9)..
398. **Paragraph 10** corrects a reference to ‘an appeal tribunal’ in section 38(9) to refer to the CAT. This amendment was missed as a consequential change resulting from the EA 2002 that established the CAT.
399. **Paragraph 11** replaces references in section 54 to the ‘Director General of Electricity Supply for Northern Ireland’ and ‘Director General of Gas for Northern Ireland’ with ‘the Northern Ireland Authority for Utility Regulation’. The functions of the Directors are now exercised by the Northern Ireland Authority for Utility Regulation.
400. **Paragraph 12** changes references to the CC in connection with protected agreements (Schedule 1, paragraph 5, of the EA 2002) to the CMA. These are consequential on to the transfer of the CC’s merger functions to references to the CMA, set out in detail in Schedule 5.
401. **Paragraphs 15 to 39** of Schedule 15 deal with amendments to the EA 2002.
402. **Paragraphs 16, 17, 18, 26, 28, 29 and 35** make consequential amendments resulting from changes to the CMA’s investigation powers in relation to its mergers functions, set out in section 29, subsection (2). They repeal section 31 (information powers in

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relation to completed mergers), section 32(1) to (3) (supplementary provision for the purposes of sections 25 and 31) and section 99(2) to (4) (functions in relation to merger notices) of the EA 2002, and provide for consequential amendments as a result of the repeal of those sections.

403. Paragraphs 19 to 21, 23 and 24 are consequential to amendments to mergers investigative powers (section 29) in cases referred to the CMA by the European Commission. Specifically the provisions make clear that the extended information gathering powers (amended section 109) are exercisable in relation to cases referred by the European Commission and that existing sections 34B and 46C (existing information gathering powers) are repealed. Paragraphs 19(2) and (3), and 21(2) and (4), provide that 'stop the clock' powers in the case of a matter referred by the European Commission can only be triggered if a person carrying on the enterprise concerned fails to comply with an information request.
404. Paragraph 22 makes a consequential amendment to section 46 resulting from changes to statutory timescales set out in Schedule 8.
405. Paragraphs 25, 27, 30 to 34, and 38 make consequential amendments resulting from changes to the CMA's interim powers set out in sections 30 and 31.
406. Paragraph 36 makes consequential amendments to provisions concerning the requirements on the CMA to publicise its decisions, to ensure they are consistent with new investigation powers in section 29 and new statutory timescales set out in section 32 and Schedule 8.
407. Paragraph 37 removes the reference to 'Undertakings under paragraph 1 of Schedule 1' from the index of defined expressions in section 130 of the EA 2002. This is consequential on changes to Schedule 7 to the EA 2002 (enforcement regime for public interest and special public interest cases) as a result of Schedule 7, new interim measures provisions for the mergers regime.
408. Section 241(3) of the EA 2002 provides that specified information held by public authorities can be disclosed (notwithstanding the general restriction on disclosure under section 237) to any person for the purpose of facilitating the exercise of any function that person has under that Act and any Acts specified in Schedule 15 to that Act. Paragraph 39 adds the Health and Social Care Act 2012 to the list in Schedule 15 to the EA 2002.
409. Paragraphs 42 to 46 make consequential amendments to the Communications Act 2003 arising out of the new section 193A inserted into that Act by section 54. The new section gives the CMA power to recover its costs in respect of price control references made to it, as set out in section 54.