



Enterprise and Regulatory Reform Act 2013

2013 CHAPTER 24

PART 4

COMPETITION REFORM

CHAPTER 1

MERGERS

Investigation powers

29 Investigation powers: mergers

- (1) Section 109 of the Enterprise Act 2002 (“the 2002 Act”) (investigation powers in connection with attendance of witnesses etc.) is amended as follows.
- (2) Before subsection (1) insert—
 - “(A1) For the purposes of this section, the permitted purposes are the following—
 - (a) assisting the CMA in carrying out any functions, including enforcement functions, exercisable by it under or by virtue of this Part in connection with a matter that is or has been the subject of a reference or possible reference under section 22 or 33;
 - (b) assisting the CMA or the Secretary of State in carrying out any functions, including enforcement functions, of the CMA or (as the case may be) the Secretary of State under or by virtue of this Part in connection with a matter that is or has been the subject of a reference or possible reference under section 45 or 62.”
- (3) In subsection (1), for the words from the beginning to “under this Part,” substitute “The CMA may, for a permitted purpose,”.

Status: This is the original version (as it was originally enacted).

- (4) In subsection (2), for the words from the beginning to “under this Part,” substitute “The CMA may, for a permitted purpose,”.
- (5) In subsection (3), for the words from the beginning to “under this Part,” substitute “The CMA may, for a permitted purpose,”.
- (6) In subsection (4), after “shall” insert “—
- (a) specify the permitted purpose for which the notice is given, including the function or functions in question; and
 - (b)”.
- (7) In subsection (5), for the words from the beginning to “under this Part,” substitute “The CMA, or any person nominated by it for the purpose, may for a permitted purpose”.
- (8) In subsection (6), for the words from “for the purpose of” to “under this Part” substitute “for a permitted purpose”.
- (9) After subsection (8) insert—
- “(8A) In subsection (A1), “enforcement functions” means—
- (a) in relation to the CMA—
 - (i) functions conferred by virtue of section 87 on the CMA by enforcement orders;
 - (ii) functions of the CMA in relation to the variation, supersession or release of enforcement undertakings or the variation or revocation of enforcement orders;
 - (iii) functions of the CMA under or by virtue of section 75, 76, 83 or 92 in relation to enforcement undertakings or enforcement orders;
 - (b) in relation to the Secretary of State—
 - (i) functions conferred by virtue of section 87 on the Secretary of State by enforcement orders;
 - (ii) functions of the Secretary of State in relation to the variation, supersession or release of enforcement undertakings or the variation or revocation of enforcement orders;
 - (iii) functions of the Secretary of State under or by virtue of paragraph 5, 6 or 10 of Schedule 7 in relation to enforcement undertakings or enforcement orders.”
- (10) In section 110 (enforcement of powers under section 109: general), omit subsection (4).
- (11) After section 110 insert—

“110A Restriction on powers to impose penalties under section 110

- (1) No penalty shall be imposed by virtue of section 110(1) or (3) if more than 4 weeks have passed since the day which is the relevant day in the case in question; but this subsection shall not apply in relation to any variation or substitution of the penalty which is permitted by virtue of this Part.

- (2) In the following provisions of this section, “the section 109 power” means the power under section 109 to which the failure or (as the case may be) the obstruction or delay in question relates.
- (3) Where the section 109 power is exercised in connection with an enforcement function (within the meaning of that section), the relevant day is the day when the enforcement undertaking concerned is superseded or released or (as the case may be) the enforcement order concerned is revoked.
- (4) Except where subsection (3) applies, the relevant day is the day determined in accordance with the following provisions of this section.
- (5) Where the section 109 power is exercised for the purpose mentioned in section 109(A1)(a) in connection with a matter that is the subject of a possible reference under section 22 or 33, the relevant day is the day when the CMA finally decides whether to make the reference.
- (6) Where the section 109 power is exercised for the purpose mentioned in section 109(A1)(a) in connection with a matter that is the subject of a reference under section 22 or 33, the relevant day is the day when the reference is finally determined (see section 79).
- (7) Where the section 109 power is exercised for the purpose mentioned in section 109(A1)(b) in connection with a matter that is the subject of a possible reference under section 45 or 62, the relevant day is the day when the Secretary of State finally decides whether to make the reference.
- (8) Where the section 109 power is exercised for the purpose mentioned in section 109(A1)(b) in connection with a matter that is the subject of a reference under section 45 or 62, the relevant day is the day when the reference is finally determined.

110B Section 110A: supplementary provision

- (1) For the purpose of section 110A(5), the CMA finally decides whether to make a reference under section 22 or 33 if—
 - (a) the CMA decides that the duty to make such a reference applies;
 - (b) the CMA accepts an undertaking under section 73;
 - (c) the CMA decides not to make such a reference (otherwise than because it has accepted an undertaking under section 73);
 - (d) the initial period for the purposes of section 34ZA expires without the CMA having complied with the duty under subsection (1) of that section;
 - (e) the preliminary assessment period for the purposes of section 34A expires without the CMA having complied with the duty under subsection (2) of that section;
 - (f) the period permitted by section 73A for the CMA to make a decision required by subsection (2)(a) or (3) of that section expires without the CMA having made the decision.
- (2) For the purpose of section 110A(5), the time when the CMA finally decides whether to make a reference under section 22 or 33 is—

Status: This is the original version (as it was originally enacted).

- (a) in a case falling within subsection (1)(a), the making of the decision that the duty to make such a reference applies;
 - (b) in a case falling within subsection (1)(b), the acceptance of the undertaking;
 - (c) in a case falling within subsection (1)(c), the making of the decision not to make the reference;
 - (d) in a case falling within subsection (1)(d), the expiry of the initial period;
 - (e) in a case falling within subsection (1)(e), the expiry of the preliminary assessment period;
 - (f) in a case falling within subsection (1)(f), the expiry of the period in question.
- (3) For the purpose of section 110A(7), the Secretary of State finally decides whether to make a reference under section 45 or 62 if—
- (a) the Secretary of State makes such a reference;
 - (b) the Secretary of State accepts an undertaking under paragraph 3 of Schedule 7;
 - (c) the Secretary of State decides not to make such a reference (otherwise than because of the acceptance of an undertaking under paragraph 3 of Schedule 7);
 - (d) the preliminary assessment period for the purposes of section 46A expires without the CMA having complied with the duty under subsection (2) of that section.
- (4) For the purpose of section 110A(7), the time when the Secretary of State finally decides whether to make a reference under section 45 or 62 is—
- (a) in a case falling within subsection (3)(a), the making of the reference;
 - (b) in a case falling within subsection (3)(b), the acceptance of the undertaking;
 - (c) in a case falling within subsection (3)(c), the making of the decision not to make the reference;
 - (d) in a case falling within subsection (3)(d), the expiry of the preliminary assessment period.
- (5) Paragraph 7(8) to (10) of Schedule 7 applies for deciding if and when a reference under section 45(2) or (3) or 62(2) is finally determined for the purpose of section 110A(8) as it applies for deciding those questions for the purpose of paragraph 7 of Schedule 7.
- (6) Paragraph 8(7) to (9) of Schedule 7 applies for deciding if and when a reference under section 45(4) or (5) or 62(3) is finally determined for the purpose of section 110A(8) as it applies for deciding those questions for the purpose of the definition of “relevant period” in paragraph 8(6) of that Schedule.”
- (12) In section 111 (penalties), in subsection (5)(b)—
- (a) in sub-paragraph (i), omit “or (as the case may be) the obstruction or delay is removed”, and
 - (b) in sub-paragraph (ii), for the words from “the day” to the end of the sub-paragraph substitute “the day which is the relevant day in the case in question for the purposes of section 110A”.

Interim measures

30 Interim measures: pre-emptive action: mergers

- (1) Omit section 71 of the 2002 Act (initial undertakings: completed mergers).
- (2) Section 72 of that Act (initial enforcement orders: completed mergers) is amended as follows.
- (3) For subsection (1) substitute—
 - “(1) Subsection (2) applies where—
 - (a) the CMA is considering whether to make a reference under section 22 or 33; and
 - (b) the CMA has reasonable grounds for suspecting that it is or may be the case that two or more enterprises have ceased to be distinct or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct.”
- (4) Omit subsection (3).
- (5) Before subsection (4) insert—
 - “(3A) Subsection (3B) applies where—
 - (a) subsection (1)(a) and (b) applies; and
 - (b) the CMA also has reasonable grounds for suspecting that pre-emptive action has or may have been taken.
 - (3B) The CMA may by order, for the purpose of restoring the position to what it would have been had the pre-emptive action not been taken or otherwise for the purpose of mitigating its effects—
 - (a) do anything mentioned in subsection (2)(b) to (d);
 - (b) impose such other obligations, prohibitions or restrictions as it considers appropriate for that purpose.”
- (6) After subsection (3B) insert—
 - “(3C) A person may, with the consent of the CMA, take action or action of a particular description where the action would otherwise constitute a contravention of an order under this section.”
- (7) In subsection (6), in each of paragraphs (a) and (d), after “section 22” insert “or 33”.
- (8) After subsection (7) insert—
 - “(8) In this section “pre-emptive action” means action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the CMA’s decisions on the reference.”
- (9) In the heading for “completed mergers” substitute “completed or anticipated mergers”.
- (10) Schedule 7 (which makes further provision about interim measures under Part 3 of the 2002 Act) has effect.

31 Interim measures: financial penalties: mergers

- (1) After section 94 of the 2002 Act (rights to enforce undertakings and orders under Part 3) insert—

“94A Interim undertakings and orders under this Part: penalties

- (1) Where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate.
- (2) A penalty imposed under subsection (1) shall not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom it is imposed.
- (3) For the purposes of subsection (2), the Secretary of State may by order make provision for determining—
 - (a) when an enterprise is to be treated as controlled by a person; and
 - (b) the turnover (both in and outside the United Kingdom) of an enterprise.
- (4) An order under subsection (3)(b) may, in particular, make provision as to—
 - (a) the amounts which are, or which are not, to be treated as comprising an enterprise’s turnover;
 - (b) the date or dates by reference to which an enterprise’s turnover is to be determined.
- (5) An order under subsection (3) may, in particular, make provision enabling the appropriate authority to determine matters of a description specified in the order (including any of the matters mentioned in paragraphs (a) and (b) of subsection (4)).
- (6) The Secretary of State may by order amend subsection (2) so as to alter the percentage for the time being mentioned there to any percentage not exceeding 5%.
- (7) Sections 112 to 115 apply in relation to a penalty imposed under subsection (1) as they apply in relation to a penalty of a fixed amount imposed under section 110(1), with the modification that any reference in those provisions to the CMA is to be read as a reference to the person who imposed the penalty under this section.
- (8) In this section—

“interim measure” means—

 - (a) an undertaking under section 80; or
 - (b) an order under section 72 or 81 or paragraph 2 of Schedule 7;

“appropriate authority” means—

 - (a) in relation to an interim measure which is an order made by the Secretary of State under paragraph 2 of Schedule 7, the Secretary of State;
 - (b) in relation to any other interim measure, the CMA.

94B Statement of policy in relation to powers under sections 94 and 94A

- (1) The CMA shall prepare and publish a statement of policy in relation to the use of its powers under—
 - (a) section 94, insofar as they relate to interim measures; and
 - (b) section 94A.
 - (2) The CMA shall, in particular, include a statement about the considerations relevant to the determination of the amount of any penalty imposed under section 94A.
 - (3) The CMA may revise its statement of policy and, where it does so, it shall publish the revised statement.
 - (4) The CMA shall consult the Secretary of State and such other persons as it considers appropriate when preparing or revising its statement of policy.
 - (5) A statement or revised statement of policy may not be published under this section unless the Secretary of State approves the statement.
 - (6) In this section, “interim measure” has the same meaning as in section 94A.”
- (2) In section 120 of that Act (review of decisions under Part 3), in subsection (2)(a), for “section 110(1) or (3)” substitute “section 94A(1) or 110(1) or (3)”.
 - (3) In section 124 of that Act (orders and regulations under Part 3)—
 - (a) in subsection (4), before “or 102” insert “, 94A(6)”, and
 - (b) in subsection (5), before “111(4) or (6),” insert “94A(3) or (6),”.

*Time-limits***32 Time-limits etc: mergers**

- (1) In section 103 of the 2002 Act (duty of expedition in relation to references), in subsection (1), for the words from the beginning to “the OFT” substitute “In making any decision for the purposes of its functions of making and determining references under this Part, the CMA”.
- (2) Schedule 8 (which makes provision about time-limits in relation to the mergers reference regime under Part 3 of the 2002 Act) has effect.