



# 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, ”.

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- (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.

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- (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—

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- (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 ”.

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### Commencement Information

**II** [S. 29](#) in force at 1.4.2014 by [S.I. 2014/416](#), [art. 2\(1\)\(b\)](#) (with [Sch.](#))

### *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.”

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(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.

#### Commencement Information

**I2** [S. 30](#) in force at 1.4.2014 by [S.I. 2014/416](#), [art. 2\(1\)\(b\)](#) (with [Sch.](#))

### 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—

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“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),”.

#### **Commencement Information**

**I3** S. 31 partly in force; s. 31 in force for specified purposes at Royal Assent, see s. 103(1)(i)

**I4** S. 31 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

#### *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”.

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- (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.

#### Commencement Information

- I5** [S. 32](#) partly in force; [s. 32](#) in force for specified purposes at Royal Assent, see [s. 103\(1\)\(i\)](#)  
**I6** [S. 32](#) in force at 1.4.2014 in so far as not already in force by [S.I. 2014/416](#), [art. 2\(1\)\(b\)](#) (with [Sch.](#))

## CHAPTER 2

### MARKETS

#### *Cross-market investigations*

#### **33 Power of CMA to make cross-market references**

- (1) Section 131 of the 2002 Act (power to make market investigation references) is amended as follows.
- (2) After subsection (2) insert—
- “(2A) In a case where the feature or each of the features concerned falls within subsection (2)(b) or (c), a reference under subsection (1) may be made in relation to more than one market in the United Kingdom for goods or services.”
- (3) In subsection (4)(a), for “section 156(1)” substitute “ section 156(A1) or (1) ”.
- (4) In subsection (6)—
- (a) before the definition of “market in the United Kingdom” insert—
- ““cross-market reference” means a reference under this section which falls within subsection (2A) or a reference under section 132 which falls within subsection (3A) of that section (and see section 140A);”,
- and
- (b) after the definition of “market investigation reference” insert—
- ““ordinary reference” means a reference under this section or section 132 which is not a cross-market reference (and see section 140A);”.

#### Commencement Information

- I7** [S. 33](#) in force at 1.4.2014 by [S.I. 2014/416](#), [art. 2\(1\)\(b\)](#) (with [Sch.](#))

#### **34 Ministerial power to make cross-market references**

- (1) Section 132 of the 2002 Act (ministerial power to make market investigation references) is amended as follows.
- (2) After subsection (3) insert—



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“(3A) In a case where the feature or each of the features concerned falls within section 131(2)(b) or (c), a reference under subsection (3) may be made in relation to more than one market in the United Kingdom for goods or services.”

(3) In subsection (4), for “section 156(1)” substitute “ section 156(A1) or (1) ”.

(4) Schedule 9 (which contains amendments of Part 4 of the 2002 Act which are consequential on section 33 and this section) has effect.

#### Commencement Information

**I8** S. 34 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### *Public interest interventions*

## **35 Public interest interventions in markets investigations**

(1) Part 4 of the 2002 Act (market investigations) is amended as follows.

(2) Section 139 (power of Secretary of State to give public interest intervention notices) is amended as follows.

(3) For subsection (1) substitute—

“(A1) This section applies where—

- (a) the CMA has published a market study notice in relation to a matter; or
- (b) the CMA has begun the process of consultation under section 169 in respect of a decision of the kind mentioned in subsection (6)(a)(i) of that section.

(1) The Secretary of State may, within the permitted period, give a notice to the CMA if the Secretary of State believes that it is or may be the case that one or more than one public interest consideration is relevant to the matter.

(1A) For the purposes of subsection (1), the permitted period, in a case to which this section applies by virtue of paragraph (a) of subsection (A1), is the period beginning with the publication of the market study notice and ending with—

- (a) the acceptance by the CMA of an undertaking under section 154 instead of the making of a reference under section 131 in relation to the matter;
- (b) the publication of notice of the fact that the CMA has otherwise decided not to make such a reference in relation to the matter;
- (c) the making of such a reference in relation to the matter; or
- (d) in a case where the period permitted by section 131B for the preparation and publication by the CMA of the market study report in relation to the matter has expired and no such report has been prepared or published, the end of that period.

(1B) For the purposes of subsection (1), the permitted period, in a case to which this section applies by virtue of paragraph (b) of subsection (A1), is the period

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beginning with the date on which the CMA begins the process of consultation concerned and ending with—

- (a) the acceptance by the CMA of an undertaking under section 154 instead of the making of a reference under section 131 in relation to the matter concerned;
- (b) the publication of notice of the fact that the CMA has otherwise decided not to make such a reference in relation to the matter; or
- (c) the making of such a reference in relation to the matter.”

(4) In subsection (2)—

- (a) in the words before paragraph (a), after “may” insert “, within the permitted period, ”,
- (b) in paragraph (a)(i), after “131” insert “ in relation to the matter ”, and
- (c) in paragraph (c), for “case” (in the second place where it occurs) substitute “ proposal to accept the undertaking ”.

(5) After subsection (2) insert—

“(2A) For the purposes of subsection (2), the permitted period is—

- (a) where the CMA publishes a notice under section 155(1), the period within which representations may be made in relation to the proposed undertaking (as to which, see section 155(2)(f));
- (b) where the CMA publishes a notice under section 155(4), the period within which representations may be made in relation to the proposed modifications to the proposed undertaking (as to which, see section 155(5)(c)).”

(6) For subsection (4) substitute—

- “(4) No more than one intervention notice shall be given under subsection (1) in relation to the same matter.
- (4A) An intervention notice shall not be given under subsection (2) in relation to a proposal to accept an undertaking if the proposal relates to a matter in respect of which an intervention notice under subsection (1) has already been given.
- (4B) No more than one intervention notice shall be given under subsection (2) in relation to the same proposed undertaking or in relation to proposed undertakings which do not differ from each other in any material respect.”

(7) After subsection (4B) insert—

“(4C) In this section, a reference to the acceptance of an undertaking shall, in a case where the CMA has accepted a group of undertakings under section 154, be treated as a reference to the acceptance of the last undertaking in the group; but undertakings which vary, supersede or revoke earlier undertakings shall be disregarded for the purposes of this section.”

(8) After section 140 insert—

**“140A Section 139(1) intervention notices: Secretary of State's duty to refer**

(1) This section applies where—

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- (a) the CMA has prepared a market study report in relation to a matter within the period permitted by section 131B(4);
  - (b) an intervention notice under section 139(1) is in force in relation to the matter at the time when the CMA would (but for this section) be required to publish the report; and
  - (c) the report contains the decision of the CMA that it should make an ordinary reference or a cross-market reference in relation to the matter under section 131.
- (2) This section also applies where—
  - (a) the CMA has conducted a consultation under section 169 in respect of a decision of the kind mentioned in subsection (6)(a)(i) of that section;
  - (b) the CMA has decided that it should make an ordinary reference or a cross-market reference in relation to the matter concerned under section 131; and
  - (c) an intervention notice under section 139(1) is in force in relation to the matter at the time when the CMA makes that decision.
- (3) The CMA—
  - (a) shall not exercise the power under section 131 to refer the matter;
  - (b) in a case falling within subsection (1), shall not publish the market study report under section 131B(4) and shall instead, within the period mentioned in section 131B(4), give the report to the Secretary of State; and
  - (c) in a case falling within subsection (2), shall give to the Secretary of State a document containing—
    - (i) its decision and the reasons for its decision; and
    - (ii) such information as the CMA considers appropriate for facilitating a proper understanding of the reasons for its decision.
- (4) The Secretary of State shall decide whether any public interest consideration which was mentioned in the intervention notice is relevant to the matter in question.
- (5) Where the Secretary of State decides that there is no relevant public interest consideration—
  - (a) the Secretary of State shall (in accordance with the CMA's decision) make a reference in relation to the matter to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013; and
  - (b) the reference is to be treated for the purposes of this Part as an ordinary reference or (as the case may be) a cross-market reference made under section 131 in accordance with the requirements imposed by this Part.
- (6) Where the Secretary of State decides that there is one or more than one relevant public interest consideration, the Secretary of State shall (in accordance with the CMA's decision) make a reference in relation to the matter to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013.
- (7) The Secretary of State shall specify in a reference made under subsection (6) —

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- (a) the relevant public interest consideration or considerations; and
    - (b) whether the reference is a restricted PI reference or a full PI reference (as to which, see sections 141 and 141A respectively).
  - (8) Where the Secretary of State makes a full PI reference under subsection (6), the reference shall also specify whether the Secretary of State proposes to appoint a public interest expert under section 141B.
  - (9) For the purposes of this Part, a reference under subsection (6) is to be treated—
    - (a) in a case where the decision of the CMA was that it should make an ordinary reference, as an ordinary reference;
    - (b) in a case where the decision of the CMA was that it should make a cross-market reference, as a cross-market reference.
  - (10) In a case falling within subsection (1), the Secretary of State shall publish the market study report concerned at the same time as the Secretary of State makes a reference under this section.
  - (11) In a case falling within subsection (2), the Secretary of State shall publish the document given to the Secretary of State by the CMA under subsection (3)(c), at the same time as the Secretary of State makes a reference under this section.
  - (12) In this Part—
    - “full PI reference” means a reference made by the Secretary of State under subsection (6) which specifies that it is a full PI reference;
    - “restricted PI reference” means a reference made by the Secretary of State under subsection (6) which specifies that it is a restricted PI reference.”
- (9) After section 141 insert—

**“141A Full PI references: questions to be decided by CMA**

- (1) This section applies where the Secretary of State makes a full PI reference.
- (2) The CMA shall, on an ordinary reference, decide whether any feature, or combination of features, of each relevant market (within the meaning given by section 134(3)) prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (3) The CMA shall, on a cross-market reference, decide in relation to each feature and each combination of the features specified in the reference, whether the feature or combination of features, as it relates to goods or services of one or more than one of the descriptions so specified, prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (4) The CMA shall, if it has decided that there is an adverse effect on competition, decide whether, taking account only of any adverse effect on competition and the admissible public interest consideration or considerations concerned, any feature or combination of features which gave rise to an adverse effect on competition operates or may be expected to operate against the public interest.

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- (5) The CMA shall, if it has decided that any such feature or combination of features operates or may be expected to operate against the public interest, also decide separately the following additional questions—
- (a) whether action should be taken by the Secretary of State under section 147A for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest concerned;
  - (b) whether the CMA should recommend the taking of other action by the Secretary of State, or action by persons other than itself and the Secretary of State, for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest concerned; and
  - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (6) The CMA shall, if it has decided that there is an adverse effect on competition, also decide separately the following questions (on the assumption that it is proceeding as mentioned in section 148A(2))—
- (a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
  - (b) whether the CMA should recommend the taking of action by other persons for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
  - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (7) In a case where the Secretary of State has appointed a public interest expert under section 141B in relation to a full PI reference, the CMA shall, in deciding the questions mentioned in subsections (4) and (5), have regard, in particular, to the views of the expert.
- (8) In deciding the questions mentioned in subsection (5), the CMA shall, in particular, have regard to—
- (a) the need to achieve as comprehensive a solution as is reasonable and practicable to the effects adverse to the public interest concerned; and
  - (b) any detrimental effects on customers so far as resulting from those effects.
- (9) In deciding the questions mentioned in subsection (6), the CMA shall, in particular, have regard to—
- (a) the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned; and
  - (b) any detrimental effects on customers so far as resulting from it.
- (10) In deciding the questions mentioned in subsections (5) and (6), the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market or markets concerned.

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (11) In this section, “admissible public interest consideration” means any public interest consideration specified in the reference concerned and which the CMA is not under a duty to disregard.

#### **141B Full PI references: power of Secretary of State to appoint expert**

- (1) This section applies where the Secretary of State makes a full PI reference.
  - (2) The Secretary of State may appoint one or more than one person to advise the CMA on the questions mentioned in subsections (4) and (5) of section 141A in relation to the reference.
  - (3) A person so appointed shall be a person who appears to the Secretary of State to have particular knowledge of, or expertise in, matters relating to a public interest consideration specified in the reference.
  - (4) Each person so appointed is referred to in this Part as a “public interest expert”.
  - (5) The terms and conditions of appointment of a public interest expert (including, in particular, as to remuneration) are to be determined by the Secretary of State.
  - (6) Any appointment of a public interest expert under this section shall be made within the period of 2 months beginning with the date of the reference concerned.
  - (7) Before appointing a public interest expert the Secretary of State shall consult the chair of the CMA.”
- (10) Schedule 10 (which contains amendments of Part 4 of the 2002 Act which are consequential on or otherwise related to this section) has effect.

#### **Commencement Information**

**19** S. 35 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### *Investigation powers*

## **36 Investigation powers: markets**

- (1) Section 174 of the 2002 Act (investigation powers) is amended as follows.
- (2) For subsections (1) and (2) substitute—
  - “(1) For the purposes of this section, the permitted purposes are the following—
    - (a) assisting the CMA in carrying out its functions under section 5 in relation to a matter in a case where it has published a market study notice;
    - (b) 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 under section 131 or 132 or possible reference under section 131;

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**Changes to legislation:** There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (c) 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 under section 140A(6) or possible reference under section 140A(5) or (6).
- (2) The CMA may exercise any of the powers in subsections (3) to (5) for a permitted purpose.”
- (3) In subsection (6), after “shall” insert “—
  - (a) specify the permitted purpose for which the notice is given, including the function or functions in question; and
  - (b)”.
- (4) After subsection (6) insert—
 

“(6A) The CMA or any person nominated by it for the purpose may, for a permitted purpose, take evidence on oath and for that purpose may administer oaths.”
- (5) In subsection (7), for “the purpose mentioned in subsection (1)” substitute “ a permitted purpose ”.
- (6) After subsection (9) insert—
 

“(9A) In subsection (1), “enforcement functions” means—

  - (a) in relation to the CMA—
    - (i) functions conferred by virtue of section 164(2)(b) 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 160 or 162 in relation to enforcement undertakings or enforcement orders;
  - (b) in relation to the Secretary of State—
    - (i) functions conferred by virtue of section 164(2)(b) 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 section 160 in relation to enforcement undertakings or enforcement orders.”
- (7) For the heading substitute “ Attendance of witnesses and production of documents etc. ”.
- (8) Schedule 11 (which makes provision about the enforcement of the powers under section 174 of the 2002 Act, as amended by this section, and which makes consequential amendments of that Act) has effect.

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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#### Commencement Information

**I10** S. 36 partly in force; s. 36 in force for specified purposes at Royal Assent, see s. 103(1)(i)

**I11** S. 36 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### *Interim measures*

#### **37 Interim measures: pre-emptive action: markets**

(1) Part 4 of the 2002 Act (market investigations) is amended as follows.

(2) In section 157 (interim undertakings: Part 4), after subsection (2) insert—

“(2A) Subsection (2B) applies where—

- (a) subsection (1)(a) to (c) applies; and
- (b) the relevant authority has reasonable grounds for suspecting that pre-emptive action has or may have been taken.

(2B) The relevant authority may, 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, accept, from such persons as the relevant authority considers appropriate, undertakings to take such action as the relevant authority considers appropriate.”

(3) After subsection (2B) of that section insert—

“(2C) A person may, with the consent of the relevant authority, take action of a particular description where the action would otherwise constitute a contravention of an undertaking accepted under this section.”

(4) In section 158 (interim orders: Part 4), after subsection (2) insert—

“(2A) Subsection (2B) applies where—

- (a) subsection (1)(a) to (c) applies; and
- (b) the relevant authority has reasonable grounds for suspecting that pre-emptive action has or may have been taken.

(2B) The relevant authority 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.”

(5) After subsection (2B) of that section insert—

“(2C) A person may, with the consent of the relevant authority, take action of a particular description where the action would otherwise constitute a contravention of an order under this section.”



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**Changes to legislation:** There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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#### Commencement Information

**I12** S. 37 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### *Time-limits and procedure*

## **38 Market studies and market investigations: consultation and time-limits**

Schedule 12 (which makes provision about consultation in relation to decisions whether to make a market investigation reference and about time-limits in relation to the conduct of market studies and the markets investigation reference regime under Part 4 of the 2002 Act) has effect.

#### Commencement Information

**I13** S. 38 partly in force; s. 38 in force for specified purposes at Royal Assent, see s. 103(1)(i)

**I14** S. 38 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

## **CHAPTER 3**

### **ANTI-TRUST**

### *Investigation powers*

## **39 Investigations: power to ask questions**

- (1) Part 1 of the Competition Act 1998 (“the 1998 Act”) (competition) is amended as follows.
- (2) After section 26 (powers when conducting investigations) insert—

### **“26A Investigations: power to ask questions**

- (1) For the purposes of an investigation, the CMA may give notice to an individual who has a connection with a relevant undertaking requiring the individual to answer questions with respect to any matter relevant to the investigation—
  - (a) at a place specified in the notice, and
  - (b) either at a time so specified or on receipt of the notice.
- (2) The CMA must give a copy of the notice under subsection (1) to each relevant undertaking with which the individual has a current connection at the time the notice is given to the individual.
- (3) The CMA must take such steps as are reasonable in all the circumstances to comply with the requirement under subsection (2) before the time at which the individual is required to answer questions.

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**Changes to legislation:** There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (4) Where the CMA does not comply with the requirement under subsection (2) before the time mentioned in subsection (3), it must comply with that requirement as soon as practicable after that time.
- (5) A notice under subsection (1) must be in writing and must indicate—
  - (a) the subject matter and purpose of the investigation, and
  - (b) the nature of the offence created by section 44.
- (6) For the purposes of this section—
  - (a) an individual has a connection with an undertaking if he or she is or was—
    - (i) concerned in the management or control of the undertaking, or
    - (ii) employed by, or otherwise working for, the undertaking, and
  - (b) an individual has a current connection with an undertaking if, at the time in question, he or she is so concerned, is so employed or is so otherwise working.
- (7) In this section, a “relevant undertaking” means an undertaking whose activities are being investigated as part of the investigation in question.”
- (3) For the heading of section 26 substitute “ Investigations: powers to require documents and information ”.
- (4) Section 30A (use of statements in prosecution) is amended as follows.
- (5) The existing text becomes subsection (1).
- (6) In subsection (1), for “26 to 28A” substitute “ 26 and 27 to 28A ”.
- (7) After that subsection insert—
  - “(2) A statement by an individual in response to a requirement imposed by virtue of section 26A (a “section 26A statement”) may only be used in evidence against the individual—
    - (a) on a prosecution for an offence under section 44, or
    - (b) on a prosecution for some other offence in a case falling within subsection (3).
  - (3) A prosecution falls within this subsection if, in the proceedings—
    - (a) in giving evidence, the individual makes a statement inconsistent with the section 26A statement, and
    - (b) evidence relating to the section 26A statement is adduced, or a question relating to it is asked, by or on behalf of the individual.
  - (4) A section 26A statement may not be used in evidence against an undertaking with which the individual who gave the statement has a connection on a prosecution for an offence unless the prosecution is for an offence under section 44.
  - (5) For the purposes of subsection (4), an individual has a connection with an undertaking if he or she is or was—
    - (a) concerned in the management or control of the undertaking, or
    - (b) employed by, or otherwise working for, the undertaking.”

### Commencement Information

**I15** S. 39 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

## 40 Civil enforcement of investigation powers

(1) Part 1 of the 1998 Act (competition) is amended as follows.

(2) After section 40 insert—

### *“Civil sanctions*

#### **40A Penalties: failure to comply with requirements**

- (1) Where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement imposed on the person under section 26, 26A, 27, 28 or 28A, it may impose a penalty of such amount as it considers appropriate.
- (2) The amount may be—
  - (a) a fixed amount,
  - (b) an amount calculated by reference to a daily rate, or
  - (c) a combination of a fixed amount and an amount calculated by reference to a daily rate.
- (3) A penalty imposed under subsection (1) must not—
  - (a) in the case of a fixed amount, exceed such amount as the Secretary of State may by order specify;
  - (b) in the case of an amount calculated by reference to a daily rate, exceed such amount per day as the Secretary of State may so specify;
  - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed such fixed amount and such amount per day as the Secretary of State may so specify.
- (4) The fixed amount specified for the purposes of subsection (3)(a) or (c) may not exceed £30,000.
- (5) The amount per day specified for the purposes of subsection (3)(b) or (c) may not exceed £15,000.
- (6) In imposing a penalty by reference to a daily rate—
  - (a) no account is to be taken of any days before the service of the notice under section 112 of the Enterprise Act 2002 (as applied by subsection (9)) on the person concerned, and
  - (b) unless the CMA determines an earlier date (whether before or after the penalty is imposed), the amount payable ceases to accumulate at the beginning of the earliest of the days mentioned in subsection (7).
- (7) The days are—
  - (a) the day on which the requirement concerned is satisfied;

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (b) the day on which the CMA makes a decision (within the meaning given by section 31(2)) or terminates the investigation in question without making such a decision;
  - (c) if the Secretary of State has made an order under section 31F(1)(b) imposing a time-limit on the making of such a decision, the latest day on which such a decision may be made as a result of the investigation in question.
- (8) Before making an order under subsection (3), the Secretary of State must consult the CMA and such other persons as the Secretary of State considers appropriate.
- (9) Sections 112 to 115 of the Enterprise Act 2002 (supplementary provisions about penalties) apply in relation to a penalty imposed under subsection (1) as they apply in relation to a penalty imposed under section 110(1) of that Act.

#### **40B Statement of policy on penalties**

- (1) The CMA must prepare and publish a statement of policy in relation to the use of its powers under section 40A.
  - (2) The CMA must, in particular, include a statement about the considerations relevant to the determination of the nature and amount of any penalty imposed under section 40A.
  - (3) The CMA may revise its statement of policy and, where it does so, it must publish the revised statement.
  - (4) The CMA must consult such persons as it considers appropriate when preparing or revising its statement of policy.
  - (5) If the proposed statement of policy or revision relates to a matter in respect of which a regulator exercises concurrent jurisdiction, those consulted must include that regulator.
  - (6) In deciding whether and, if so, how to proceed under section 40A, the CMA must have regard to the statement of policy which was most recently published under this section at the time when the failure concerned occurred.”
- (3) Section 38 (guidance about appropriate level of penalties under section 36) is amended as follows.
- (4) In subsection (1), after “under this Part” insert “ in respect of an infringement of the Chapter 1 prohibition, the Chapter 2 prohibition, the prohibition in Article 81(1) or the prohibition in Article 82 ”.
- (5) In subsection (1A), for “a penalty under this Part” substitute “ such a penalty ”.
- (6) In subsection (8), after “under this Part” insert “ in respect of an infringement of a kind mentioned in subsection (1) ”.
- (7) Section 42 (offences of failure to comply with requirements imposed in investigations and obstruction) is amended as follows.
- (8) Omit subsections (1) to (4).
- (9) In subsection (6), omit “(1) or”.

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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#### Commencement Information

- I16** S. 40 partly in force; s. 40 in force for specified purposes at Royal Assent, see s. 103(1)(i)  
**I17** S. 40 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### 41 Extension of powers to issue warrants to CAT

Schedule 13 (which amends the 1998 Act to extend the powers under that Act to issue warrants to the Competition Appeal Tribunal) has effect.

#### Commencement Information

- I18** S. 41 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### 42 Part 1 of the 1998 Act: procedural matters

- (1) Part 1 of the 1998 Act (competition) is amended as follows.
- (2) After section 25 (power to investigate) insert—

#### “25A Power of CMA to publish notice of investigation

- (1) Where the CMA decides to conduct an investigation it may publish a notice which may, in particular—
  - (a) state its decision to do so;
  - (b) indicate which of subsections (2) to (7) of section 25 the investigation falls under;
  - (c) summarise the matter being investigated;
  - (d) identify any undertaking whose activities are being investigated as part of the investigation;
  - (e) identify the market which is or was affected by the matter being investigated.
- (2) Section 57 does not apply to a notice under subsection (1) to the extent that it includes information other than information mentioned in that subsection.
- (3) Subsection (4) applies if—
  - (a) the CMA has published a notice under subsection (1) which identifies an undertaking whose activities are being investigated, and
  - (b) the CMA subsequently decides (without making a decision within the meaning given by section 31(2)) to terminate the investigation of the activities of the undertaking so identified.
- (4) The CMA must publish a notice stating that the activities of the undertaking in question are no longer being investigated.”
- (3) Schedule 9 (examples of provision that may be made in rules) is amended as follows.
- (4) After paragraph 1 insert—

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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### 1A “Delegation of functions

- (1) Rules may provide for the exercise of a function of the CMA under this Part on its behalf—
  - (a) by one or more members of the CMA Board (see Part 2 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013);
  - (b) by one or more members of the CMA panel (see Part 3 of that Schedule to that Act);
  - (c) by one or more members of staff of the CMA;
  - (d) jointly by one or more of the persons mentioned in paragraph (a), (b) or (c).
- (2) Sub-paragraph (1) does not apply in relation to any function prescribed in regulations made under section 7(1) of the Civil Aviation Act 1982 (power for Secretary of State to prescribe certain functions of the Civil Aviation Authority which must not be performed on its behalf by any other person).”
- (5) After paragraph 13 insert—

### 13A “Oral hearings: procedure

- (1) Rules may make provision as to the procedure to be followed by the CMA in holding oral hearings as part of an investigation.
- (2) Rules may, in particular, make provision as to the appointment of a person mentioned in sub-paragraph (3) who has not been involved in the investigation in question to—
  - (a) chair an oral hearing, and
  - (b) prepare a report following the hearing and give it to the person who is to exercise on behalf of the CMA its function of making a decision (within the meaning given by section 31(2)) as a result of the investigation.
- (3) The persons are—
  - (a) a member of the CMA Board;
  - (b) a member of the CMA panel;
  - (c) a member of staff of the CMA.
- (4) The report must—
  - (a) contain an assessment of the fairness of the procedure followed in holding the oral hearing, and
  - (b) identify any other concerns about the fairness of the procedure followed in the investigation which have been brought to the attention of the person preparing the report.”
- (6) After paragraph 13A insert—

### 13B “Procedural complaints

- (1) Rules may make provision as to arrangements to be made by the CMA for dealing with complaints about the conduct by the CMA of an investigation.

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (2) Rules may, in particular, make provision as to—
- (a) the appointment of a person mentioned in sub-paragraph (3) who has not been involved in the investigation in question to consider any such complaint;
  - (b) the time-table for the consideration of any such complaint.
- (3) The persons are—
- (a) a member of the CMA Board;
  - (b) a member of the CMA panel;
  - (c) a member of staff of the CMA.”
- (7) After paragraph 13B insert—

### 13C “Settling cases

Rules may make provision as to the procedure to be followed in a case where, during an investigation, one or more persons notify the CMA that they accept that there has been an infringement of a kind to which the investigation relates.”

#### Commencement Information

- I19** S. 42 partly in force; s. 42 in force for specified purposes at Royal Assent, see s. 103(1)(i)  
**I20** S. 42 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### *Interim measures and other sanctions*

## 43 Threshold for interim measures

In section 35 of the 1998 Act (interim measures), in subsection (2)(a), for “serious, irreparable damage” substitute “significant damage”.

#### Commencement Information

- I21** S. 43 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

## 44 Penalties: guidance etc.

- (1) Part 1 of the 1998 Act (competition) is amended as follows.
- (2) In section 36 (penalties), after subsection (7) insert—
- “(7A) In fixing a penalty under this section the CMA must have regard to—
- (a) the seriousness of the infringement concerned, and
  - (b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from—
    - (i) entering into agreements which infringe the Chapter 1 prohibition or the prohibition in Article 81(1), or

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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(ii) engaging in conduct which infringes the Chapter 2 prohibition or the prohibition in Article 82.”

(3) In section 38 (guidance on level of penalties), in subsection (8), before “must have regard” insert “ and the Tribunal ”.

#### Commencement Information

**I22** S. 44 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

#### Miscellaneous

### 45 Power for Secretary of State to impose time-limits on investigations etc.

After section 31E of the 1998 Act insert—

#### “31F Power for Secretary of State to impose time-limits on investigations etc.

- (1) The Secretary of State may by order impose time-limits in relation to—
  - (a) the conduct by the CMA of investigations or investigations of a description specified in the order;
  - (b) the making by the CMA of decisions (within the meaning given by section 31(2)) as a result of investigations or investigations of such a description.
- (2) Before making an order under subsection (1), the Secretary of State must consult the CMA and such other persons as the Secretary of State considers appropriate.”

#### Commencement Information

**I23** S. 45 partly in force; s. 45 in force for specified purposes at Royal Assent, see s. 103(1)(i)

**I24** S. 45 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### 46 Review of operation of Part 1 of 1998 Act

- (1) The Secretary of State must—
  - (a) review the operation of Part 1 of the 1998 Act, and
  - (b) prepare and publish a report on the outcome of the review.
- (2) The report must be published before the end of the period of 5 years beginning with the day on which Part 1 of Schedule 5 (which transfers the functions of the Office of Fair Trading under Part 1 of the 1998 Act to the Competition and Markets Authority) comes into force.
- (3) The Secretary of State must lay the report before Parliament.



**Commencement Information**

**I25** S. 46 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

**CHAPTER 4****CARTELS****47 Cartel offence**

- (1) Section 188 of the 2002 Act (cartel offence) is amended as follows.
- (2) In subsection (1), omit “dishonestly”.
- (3) Omit subsection (6).
- (4) After subsection (7) insert—
 

“(8) This section is subject to section 188A.”
- (5) After that section insert—

**“188A Circumstances in which cartel offence not committed**

- (1) An individual does not commit an offence under section 188(1) if, under the arrangements—
  - (a) in a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected,
  - (b) in the case of bid-rigging arrangements, the person requesting bids would be given relevant information about them at or before the time when a bid is made, or
  - (c) in any case, relevant information about the arrangements would be published, before the arrangements are implemented, in the manner specified at the time of the making of the agreement in an order made by the Secretary of State.
- (2) In subsection (1), “relevant information” means—
  - (a) the names of the undertakings to which the arrangements relate,
  - (b) a description of the nature of the arrangements which is sufficient to show why they are or might be arrangements of the kind to which section 188(1) applies,
  - (c) the products or services to which they relate, and
  - (d) such other information as may be specified in an order made by the Secretary of State.
- (3) An individual does not commit an offence under section 188(1) if the agreement is made in order to comply with a legal requirement.

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (4) In subsection (3), “legal requirement” has the same meaning as in paragraph 5 of Schedule 3 to the Competition Act 1998.
- (5) A power to make an order under this section—
  - (a) is exercisable by statutory instrument,
  - (b) may be exercised so as to make different provision for different cases or different purposes, and
  - (c) includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate.
- (6) A statutory instrument containing an order under this section is subject to annulment in pursuance of a resolution of either House of Parliament.”
- (6) After section 188A (as inserted by subsection (5) above) insert—

**“188B Defences to commission of cartel offence**

- (1) In a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, it is a defence for an individual charged with an offence under section 188(1) to show that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service.
- (2) It is a defence for an individual charged with an offence under section 188(1) to show that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from the CMA.
- (3) It is a defence for an individual charged with an offence under section 188(1) to show that, before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.”
- (7) After section 190 of the 2002 Act insert—

**“190A Cartel offence: prosecution guidance**

- (1) The CMA must prepare and publish guidance on the principles to be applied in determining, in any case, whether proceedings for an offence under section 188(1) should be instituted.
- (2) The CMA may at any time issue revised or new guidance.
- (3) Guidance published by the CMA under this section is to be published in such manner as it considers appropriate.
- (4) In preparing guidance under this section the CMA must consult—
  - (a) the Director of the Serious Fraud Office;
  - (b) the Lord Advocate; and
  - (c) such other persons as it considers appropriate.”

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**Changes to legislation:** There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (8) The amendments made by subsections (1) to (6) apply only in relation to agreements falling within section 188(1) of the 2002 Act which—
- (a) are made after the commencement of this section, and
  - (b) relate to arrangements made or to be made after that commencement.

#### Commencement Information

**I26** S. 47 partly in force; s. 47 in force for specified purposes at Royal Assent, see s. 103(1)(i)

**I27** S. 47 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

### 48 Extension of power to issue warrants to CAT

- (1) Section 194 of the 2002 Act (power to enter premises under a warrant) is amended as follows.
- (2) In subsection (1), for the words from the beginning to “if he is satisfied” substitute “On an application made to it by the CMA or, in Scotland, the procurator fiscal, the appropriate body may issue a warrant if it is satisfied”.
- (3) After subsection (1) insert—
- “(1A) In subsection (1), “appropriate body” means—
- (a) in England and Wales and Northern Ireland, the High Court or the Competition Appeal Tribunal;
  - (b) in Scotland, the sheriff.”
- (4) After subsection (4) insert—
- “(4A) An application for a warrant under this section must be made—
- (a) in the case of an application to the High Court or the sheriff, in accordance with rules of court;
  - (b) in the case of an application to the Competition Appeal Tribunal, in accordance with rules made under section 15.”
- (5) In Schedule 4 to that Act, before paragraph 11, but after the cross-heading immediately preceding it, insert—
- “10A (1) Tribunal rules may make provision as to proceedings on an application for a warrant under section 194 of this Act or section 28, 28A, 62, 62A, 63, 65G or 65H of the 1998 Act, including provision—
- (a) for the Tribunal dealing with the proceedings to consist only of the President or a member of the panel of chairmen;
  - (b) as to the manner in which the proceedings are to be conducted, including provision—
    - (i) for such applications to be determined without a hearing;
    - (ii) in cases where there is a hearing, for it to be held in private if the Tribunal considers it appropriate because it is considering information of a kind mentioned in paragraph 1(2);

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- (c) as to the persons entitled to be heard in such proceedings (where there is a hearing);
  - (d) for requiring persons to attend to give evidence and produce documents, and for authorising the administration of oaths to witnesses;
  - (e) as to the evidence which may be required or admitted and the extent to which it should be oral or written;
  - (f) allowing the Tribunal to fix time-limits with respect to any aspect of the proceedings and to extend any time-limit (before or after its expiry).
- (2) Paragraphs 2 to 8, and 11 to 17, of this Schedule do not apply in relation to the institution or conduct of proceedings for a warrant mentioned in sub-paragraph (1).”
- (6) In section 14 of that Act (constitution of Tribunal for particular proceedings and its decisions), in subsection (5), for “paragraph 18” substitute “ paragraphs 10A(1)(a) and 18 ”.

#### Commencement Information

**I28** S. 48 partly in force; s. 48 in force for specified purposes at Royal Assent, see s. 103(1)(i)

**I29** S. 48 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

## CHAPTER 5

### MISCELLANEOUS

#### *Enforcement orders: markets and mergers*

#### **49 Enforcement orders: monitoring compliance and determination of disputes**

In Schedule 8 to the 2002 Act (provision that may be contained in certain enforcement orders made under Part 3 or 4 of that Act), after paragraph 20B insert—

##### **“Monitoring of compliance and determination of disputes**

- 20C (1) An order may provide for the appointment of one or more than one person (referred to in this paragraph as an “appointee”) by the relevant authority or by such other persons as may be specified or described in the order to—
- (a) monitor compliance with such terms of the order as are so specified or described or terms of any directions given under the order;
  - (b) determine any dispute between persons who are subject to the order about what is required by any such terms.
- (2) An order made by virtue of this paragraph must make provision as to the terms of an appointee's appointment.
- (3) A determination made by virtue of an order under this paragraph is binding on—

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- (a) any person who is subject to the order;
- (b) the relevant authority; and
- (c) in the case where the relevant authority is the Secretary of State, the CMA.”

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**Commencement Information**

- I30** S. 49 partly in force; s. 49 in force for specified purposes at Royal Assent, see s. 103(1)(i)  
**I31** S. 49 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

**50 Enforcement orders: provision of information**

- (1) Schedule 8 to the 2002 Act (provision that may be contained in certain enforcement orders made under Part 3 or 4 of that Act) is amended as follows.
- (2) Omit paragraph 15 (publication etc. of price information).
- (3) Paragraph 17 (publication etc. of other information) is amended as follows.
- (4) In sub-paragraph (1)—
  - (a) in the words before paragraph (a), after “publish” insert “ or otherwise notify”, and
  - (b) after paragraph (c) insert—
    - “(d) information in relation to prices of the goods or services supplied;
    - (e) such other information in relation to the goods or services supplied as the relevant authority considers appropriate.”
- (5) After sub-paragraph (1) insert—
  - “(1A) An order may prohibit the publication or other notification of information falling within sub-paragraph (1)(a) to (e) by a person supplying goods or services.”
- (6) In paragraph 18 (supplementary provision about orders under paragraphs 15 and 17), omit “15 or”.

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**Commencement Information**

- I32** S. 50 partly in force; s. 50 in force for specified purposes at Royal Assent, see s. 103(1)(i)  
**I33** S. 50 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)

*Concurrency*

**51 Powers of sectoral regulators**

- (1) Section 54 of the 1998 Act (concurrent powers for regulators) is amended as follows.
- (2) In subsection (6)—
  - (a) after “may” insert “—

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- (a) prescribe circumstances in which the CMA may decide that, in a particular case, it is to exercise Part 1 functions in respect of the case rather than a regulator;
  - (b)”,  
and
  - (b) after “Secretary of State” insert “, the CMA ”.
- (3) After subsection (6) insert—
  - “(6A) Where the regulations make provision as mentioned in subsection (6)(a), they must—
    - (a) include provision requiring the CMA to consult the regulator concerned before making a decision that the CMA is to exercise Part 1 functions in respect of a particular case, and
    - (b) provide that, in a case where a regulator has given notice under section 31(1) that it proposes to make a decision (within the meaning given by section 31(2)), the CMA may only decide that it is to exercise Part 1 functions in respect of the case rather than the regulator if the regulator consents.”
- (4) After subsection (6A) insert—
  - “(6B) The Secretary of State may by regulations make provision requiring arrangements to be made for the sharing of information between competent persons in connection with concurrent cases.
  - (6C) For the purposes of subsection (6B), “a concurrent case” is a case in respect of which—
    - (a) the CMA considers that Part 1 functions are, or (but for provision made under subsection (5)(e)) would be, exercisable by both it and any regulator;
    - (b) any regulator considers that Part 1 functions are, or (but for provision made under subsection (5)(e)) would be, exercisable by it.”
- (5) Schedule 14 (which makes provision governing the relationship between the powers of regulators under the 1998 Act and those under sector-specific legislation) has effect.

#### Commencement Information

- I34** S. 51 partly in force; s. 51(1)-(4) in force for specified purposes at Royal Assent, see s. 103(1)(i)
- I35** S. 51(1)-(4) in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(b) (with Sch.)
- I36** S. 51(5) in force at 1.4.2014 for specified purposes by S.I. 2014/416, art. 2(1)(b) (with Sch.)

## 52 Power to remove concurrent competition functions of sectoral regulators

- (1) The Secretary of State may make a sectoral regulator order if the Secretary of State 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.
- (2) A sectoral regulator order is an order that amends one or more enactments so as to remove from a sectoral regulator either or both of the following—

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- (a) all the functions of the regulator under Part 1 of the 1998 Act that are exercisable concurrently by the regulator and the Competition and Markets Authority (“the CMA”) or that would be so exercisable but for provision made by virtue of section 54(5)(e) of that Act;
  - (b) all the functions of the regulator under Part 4 of the 2002 Act that are exercisable concurrently by the regulator and the CMA.
- (3) A sectoral regulator order may make such other amendments of any enactment as the Secretary of State considers appropriate in consequence of the removal of the functions.
- (4) Each of the following is a sectoral regulator—
- (a) the Office of Communications;
  - (b) the Gas and Electricity Markets Authority;
  - (c) the Water Services Regulation Authority;
  - (d) [<sup>F1</sup>the Office of Rail and Road] ;
  - (e) the Northern Ireland Authority for Utility Regulation;
  - (f) the Civil Aviation Authority.
  - [<sup>F2</sup>(g) the Payment Systems Regulator established under section 40 of the Financial Services (Banking Reform) Act 2013.]
  - [<sup>F3</sup>(h) the Financial Conduct Authority.]
- (5) A sectoral regulator order may include transitional, transitory or saving provision.
- (6) A statutory instrument containing a sectoral regulator order is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (7) In this section—
- “amend” includes repeal or revoke;
  - “enactment” includes—
- (a) an enactment contained in subordinate legislation (within the meaning of the Interpretation Act 1978),
  - (b) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament,
  - (c) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales, and
  - (d) an enactment contained in, or in an instrument made under, Northern Ireland legislation.
- (8) The references to the CMA in subsection (2) are to be read, in relation to any time before the commencement of section 25(3), as references to the Office of Fair Trading.

#### Textual Amendments

- F1** Words in s. 52(4)(d) substituted (16.10.2015) by [The Office of Rail Regulation \(Change of Name\) Regulations 2015 \(S.I. 2015/1682\)](#), reg. 1(2), **Sch. para. 4(v)(i)**
- F2** S. 52(4)(g) inserted (1.4.2014) by [Financial Services \(Banking Reform\) Act 2013 \(c. 33\)](#), **ss. 67(4), 148(5)**; [S.I. 2014/823](#), art. 2(g)
- F3** S. 52(4)(h) inserted (1.4.2015) by [Financial Services \(Banking Reform\) Act 2013 \(c. 33\)](#), s. 148(5), **Sch. 8 para. 11**; [S.I. 2014/2458](#), art. 3(b)(v)

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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### 53 Orders under section 52: procedural requirements

- (1) If the Secretary of State proposes to make a sectoral regulator order, the Secretary of State must carry out the first stage consultation.
- (2) The first stage consultation is consultation with—
  - (a) the regulator whose functions would be removed by the order,
  - (b) the Competition and Markets Authority,
  - (c) where the regulator is [<sup>F4</sup>the Office of Rail and Road], the Scottish Ministers,
  - (d) where the regulator is the Northern Ireland Authority for Utility Regulation, the Department of Enterprise, Trade and Investment in Northern Ireland and the Department for Regional Development in Northern Ireland, and
  - (e) where the regulator is the Water Services Regulation Authority, the Welsh Ministers.
- (3) If (following the first stage consultation) the Secretary of State still proposes to make a sectoral regulator order, the Secretary of State must carry out the second stage consultation.
- (4) The second stage consultation is consultation with—
  - (a) the persons consulted at the first stage,
  - (b) any bodies who appear to the Secretary of State to represent the interests of persons in respect of whom the functions that would be removed by the order are exercisable (“regulated providers”),
  - (c) any bodies who appear to the Secretary of State to represent the interests of persons who use the services supplied by regulated providers, and
  - (d) such other persons as the Secretary of State considers appropriate.
- (5) The Secretary of State must give the following information to each of the persons consulted as part of the first stage or second stage consultation—
  - (a) an explanation as to whether the Secretary of State is proposing to remove the functions of the regulator mentioned in subsection (2)(a) of section 52, the functions of the regulator mentioned in subsection (2)(b) of that section or both sets of functions;
  - (b) the reasons why the Secretary of State considers it appropriate to make the order.
- (6) The reference to the Competition and Markets Authority in subsection (2) is to be read, in relation to any time before the commencement of section 25(3), as a reference to the Office of Fair Trading.
- (7) In this section, “sectoral regulator order” has the same meaning as in section 52.

#### Textual Amendments

- F4** Words in s. 53(2)(c) substituted (16.10.2015) by [The Office of Rail Regulation \(Change of Name\) Regulations 2015 \(S.I. 2015/1682\)](#), reg. 1(2), [Sch. para. 4\(v\)\(ii\)](#)



### Miscellaneous

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

After section 193 of the Communications Act 2003 (reference of price control matters) insert—

### “193A Recovery of CMA's costs in respect of price control references

- (1) Where a determination is made on a price control matter referred by virtue of section 193, the CMA may make an order in respect of the costs incurred by it in connection with the reference (a “costs order”).
- (2) A costs order may require the payment to the CMA of some or all of those costs by such parties to the appeal which gave rise to the reference, other than OFCOM, as the CMA considers appropriate.
- (3) A costs order must—
  - (a) set out the total costs incurred by the CMA in connection with the reference, and
  - (b) specify the proportion of those costs to be paid by each party to the appeal in respect of whom the order is made.
- (4) In deciding on the proportion of costs to be paid by a party to the appeal the CMA must, in particular, consider—
  - (a) the extent to which the determination on the reference upholds OFCOM's decision in relation to the price control matter in question,
  - (b) the extent to which the costs were attributable to the involvement in the appeal of the party, and
  - (c) the conduct of the party.
- (5) A costs order—
  - (a) must be made as soon as reasonably practicable after the making of the determination on the reference, but
  - (b) does not take effect unless the Tribunal, in deciding the appeal which gave rise to the reference, decides the price control matter which is the subject of the reference in accordance with the determination of the CMA (see section 193(6)).
- (6) In a case where the Tribunal decides the price control matter in question otherwise than as mentioned in subsection (5)(b), the CMA may make an order under this subsection in respect of the costs incurred by it in connection with the reference.
- (7) Subsections (2) to (4) apply in relation to an order under subsection (6) as they apply in relation to an order under subsection (1); but for that purpose the reference in subsection (4)(a) to the determination on the reference is to be read as a reference to the decision of the Tribunal mentioned in subsection (6).
- (8) An order under subsection (6) must be made as soon as reasonably practicable after the decision of the Tribunal mentioned in that subsection.

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*Changes to legislation:* There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (9) An amount payable to the CMA by virtue of an order made under this section is recoverable summarily as a civil debt (but this does not affect any other method of recovery).
- (10) The CMA must pay any sums it receives by virtue of this section into the Consolidated Fund.
- (11) The functions of the CMA under this section, other than those under subsections (9) and (10), are to be carried out on behalf of the CMA by the group constituted by the chair of the CMA in relation to the reference in question.”

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**Commencement Information**

**I37** S. 54 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

**55 Disclosure etc. of information: offences**

In section 241 of the 2002 Act (disclosure of information for the purpose of exercise of statutory functions), after subsection (2) insert—

“(2A) Information disclosed under subsection (1) so that it is not made available to the public must not be used by the person to whom it is disclosed for any purpose other than that mentioned in subsection (1).”

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**Commencement Information**

**I38** S. 55 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

**56 Review of certain provisions of Chapters 1 and 2**

- (1) The Secretary of State must, before the end of each review period—
  - (a) carry out a review of the provisions of this Part mentioned in subsection (2), and
  - (b) prepare and publish a report setting out the conclusions of the review.
- (2) The provisions of this Part are—
  - (a) sections 29 and 36 and Schedule 11 (investigation powers: mergers and markets),
  - (b) section 30 and Schedule 7 (interim measures and pre-emptive action: mergers), and
  - (c) sections 32 and 38 and Schedules 8 and 12 (time-limits etc: mergers and markets).
- (3) The report must in particular—
  - (a) set out the objectives intended to be achieved by the provisions,
  - (b) assess the extent to which those objectives have been achieved, and
  - (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved in another way which imposed less regulation.
- (4) The Secretary of State must lay the report before Parliament.

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**Changes to legislation:** There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4. (See end of Document for details)

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- (5) Each of the following is a review period for the purposes of this section—
- (a) the period of 5 years beginning with the first day on which any of the provisions mentioned in subsection (2) comes into force (whether wholly or partly), and
  - (b) each successive period of 5 years.

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**Commencement Information**

**I39** S. 56 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

**57 Minor and consequential amendments**

Schedule 15 (which makes minor and consequential amendments related to this Part) has effect.

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**Commencement Information**

**I40** S. 57 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

**58 Interpretation**

In this Part—

- “the 1998 Act” means the Competition Act 1998;
- “the 2002 Act” means the Enterprise Act 2002.

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**Commencement Information**

**I41** S. 58 in force at 1.4.2014 by S.I. 2014/416, art. 2(1)(b) (with Sch.)

**Changes to legislation:**

There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, PART 4.