

Transitional Arrangements: Guidance on the CMA's proposed approach - Part 1

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1 INTRODUCTION

- 1.1 This guidance explains the transitional arrangements that it is proposed will apply to the continuation by the Competition and Markets Authority (CMA) of certain investigations and work being undertaken by the Office of Fair Trading (OFT) or the Competition Commission (CC) as at 1 April 2014 (the Effective Date, being the date on which responsibility for undertaking such work and investigations transfers to the CMA).
- 1.2 These transitional arrangements were consulted on as part of the consultation on certain CMA guidance documents which ran between 15 July and 6 September 2013.¹ The responses received were supportive of the proposed arrangements so the proposals set out in this document are substantively unchanged from those which were consulted on.
- 1.3 The transitional arrangements described will, as necessary, be effected through secondary legislation. The Department for Business, Innovation and Skills (BIS) intends to make that relevant secondary legislation early in 2014, so that it comes into force on 1 April 2014.² This document reflects the approach which BIS is taking to the relevant secondary legislation but remains subject to possible change until that legislation has completed the legislative processes.
- 1.4 In the case of any future conflict between such secondary legislation and this document, the secondary legislation prevails.
- 1.5 This guidance covers transitional arrangements related to the exercise by the CMA of its:
 - merger control functions under Part 3 of the Enterprise Act 2002
 - market study and market investigation functions under Part 4 of the Enterprise Act 2002
 - powers to impose administrative penalties for failure to comply with certain requirements under sections 94A, 110, 174A and 174B of the Enterprise Act 2002 and section 40A of the Competition Act 1998

¹ With the exception of the transitional arrangements detailed in chapter 6 below, which were consulted on between 17 September and 11 November 2013.

² BIS will also be commencing the competition provisions in the Enterprise and Regulatory Reform Act 2013 (the ERRA13), together with detailed transitional and consequential provision, to take effect on 1 April 2014. These transitional arrangements are not covered in this Guidance.

- powers to make an order in respect of the costs it incurs in connection with a telecoms price control reference under section 193 of the Communications Act 2003, and
 - powers in relation to the variation and termination of merger, monopoly and market undertakings and orders.
- 1.6 Each chapter of this guidance should be read in conjunction with the relevant CMA published guidance documents on its approach to each of the powers and functions listed above.³
- 1.7 Unless otherwise stated or defined in this document, defined terms used in the chapters below have the meaning given to them in the guidance document referred to in that chapter.
- 1.8 The guidance documents referred to in the chapters below were published by the CMA in January 2014, together with *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6). There are no transitional arrangements relevant to CMA6 (which will have full effect from the Effective Date).
- 1.9 The CMA will publish separately details of transitional arrangements relating to other CMA functions in due course, as part of its publication of the guidance documents covering those functions.
- 1.10 This guidance is not a definitive statement of, or a substitute for, the law itself and should not be relied upon as an alternative to seeking appropriate legal advice.

³ The relevant guidance documents are referred to, as appropriate, in each chapter below, and are available at www.gov.uk/cma.

2 MERGERS

- 2.1 This chapter provides guidance on the transitional arrangements that apply to merger investigations that are ongoing as at the Effective Date, which is the date on which the OFT and CC's merger control functions transfer to the CMA.⁴
- 2.2 This chapter should be read in conjunction with *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) (the Mergers Guidance).⁵
- 2.3 The guidance in this chapter relates to the main transitional arrangements associated with the changes to the UK merger control regime made by the ERR13. Other new procedures and processes described in this chapter and being introduced by the CMA, which do not flow directly from changes mandated by the ERR13, are considered capable of application in all cases with effect from the Effective Date.

Interim measures and penalties for breach

- 2.4 Any undertakings accepted by the OFT or CC,⁶ or orders made by the OFT or CC,⁷ which are in force on the Effective Date, shall, from that date, be treated as having been given to, or made by, the CMA. The provisions of the Act (as amended) relating to the circumstances in which such undertakings or orders will cease to have effect⁸ will apply to those undertakings or orders as though they had been given or made by the CMA.⁹

⁴ This chapter does not detail necessary transitional arrangements in relation to matters which are not specific to merger cases, but are of more general application (for example the transfer of the OFT's rights and obligations to the CMA). These will be provided for by secondary legislation.

⁵ Available at www.gov.uk/cma. Defined terms used in this chapter (unless otherwise defined herein) have the meaning given to them in the Mergers Guidance.

⁶ This will not apply to undertakings accepted by the OFT under section 71. Section 71 is repealed and transitional provisions will provide for the relevant provisions of the Act applying prior to amendment by the ERR13 to continue to apply to determine the circumstances in which such undertakings cease to have effect.

⁷ Including initial orders made by the OFT under chapter 72 of the Act, or interim or final orders made by the CC under section 81 or 84 of the Act respectively.

⁸ For example, sections 72(4) and 72(6) of the Act.

⁹ As the Act (as amended by the ERR13) no longer includes provisions governing the expiry of initial undertakings by the CMA at Phase 1 (for example, the ERR13 revoked sections 71(4) and 71(5) of the Act), transitional arrangements will be introduced through secondary legislation to bring this into effect.

- 2.5 The extension to anticipated mergers of the CMA's powers to make an order under section 72 of the Act and related amendments to the Act (for example, the clarification of the CMA's power to reverse pre-emptive action) will apply in all cases from the Effective Date.
- 2.6 The CMA's new powers under section 94A of the Act to impose a penalty for failure to comply (without reasonable excuse) with an interim measure¹⁰ that is in force take effect in all cases on the Effective Date. However, the CMA will not be able to impose a penalty for a breach which occurred before the Effective Date.
- 2.7 Paragraphs 2.4 to 2.6 above apply equally to undertakings accepted by or orders made by the Secretary of State following the issuance of a public interest intervention notice, a special intervention notice, or a European intervention notice.

Investigatory powers and penalties for failure to comply

- 2.8 The amendments to the CMA's power to issue formal notices under section 109 of the Act¹¹ (section 109 notices) will take effect in all cases from the Effective Date.
- 2.9 The associated amended enforcement powers under sections 110 to 110B of the Act will apply only to failures to comply with a section 109 notice where that notice was issued after the Effective Date. Where the CC has issued a section 109 notice prior to the Effective Date, section 110 as in force prior to the Effective Date will determine the CMA's ability to take enforcement action in respect of that notice¹² (including where the failure to comply arises after the Effective Date).¹³

¹⁰ That is an undertaking given to the CC or the CMA under section 80 or an order under section 72 or 81 of or paragraph 2 of Schedule 7 to the Act.

¹¹ See paragraphs 7.2 to 7.5 of the Mergers Guidance.

¹² In doing so, the CMA will also apply the limitations on the level of administrative penalties that were in force prior to the Effective Date.

¹³ Similarly, where information has been requested at Phase 1 prior to the Effective Date, pursuant to provisions of Part 3 of the Act repealed by the ERA13 (for example sections 31 or 34B), those provisions will continue to be applied to enforcement of such information requests after the Effective Date.

Statutory time limits and other procedural changes introduced by the ERRA13

2.10 The table below explains when and how the new procedures introduced by the ERRA13 will apply to OFT and CC merger cases ongoing at the Effective Date. For these purposes, 'new procedures' is used to refer collectively to:

- the new 40 working day time limit (extendable in certain circumstances) for the CMA to decide whether its duty to refer for a Phase 2 investigation applies (including the provisions of the Act governing, for example, the commencement and suspension of that period) (see, for example, paragraph 4.42 and chapter 6 of the Mergers Guidance)
- the amended procedure for the making of voluntary notifications to the CMA under section 96 of the Act, including the revised form of merger notice to be used for such purposes (see paragraphs 6.49 to 6.58 of the Mergers Guidance and the template Merger Notice published on www.gov.uk/cma)
- the revised procedures and statutory time limits for the submission of UILs by merging parties, and consideration of these by the CMA (see chapter 8 of the Mergers Guidance and the Remedies Form published on www.gov.uk/cma)
- the new statutory deadlines (and associated procedures) for the CMA to implement remedies at both Phase 1¹⁴ and Phase 2¹⁵ (see paragraphs 8.22 to 8.39 and 14.3 of the Mergers Guidance), and
- the power for the CMA to suspend the Phase 2 investigation for a period of up to three weeks, if so requested by the parties and it believes there is a possibility that the merger will be abandoned.¹⁶

Conversely, the 'old procedures' refers to the equivalent provisions to those in the preceding paragraph that were in force and applied by the OFT and CC prior to the Effective Date. Other merger control procedures provided for

¹⁴ That is, the 50 working day period (extendable by 40 working days if there are special reasons) from notifying the parties of its Phase 1 SLC decision, within which the CMA has to decide whether to formally accept the proposed UILs (see section 73A of the Act).

¹⁵ That is, the period of 12 weeks (extendable by six weeks for special reasons) following publication of its final report that the CMA has to accept undertakings or make an order implementing its remedies (see section 41A of the Act).

¹⁶ See section 39(8A) of the Act.

in the Act (as amended by the ERRA13) that are not listed in the preceding paragraph, will apply in all cases from the Effective Date.¹⁷

2.11 Cases are deemed to be 'ongoing' for the purposes of this chapter if, as at the Effective Date:

- either: i) the OFT's statutory timetable has commenced following submission of a satisfactory merger notice¹⁸ in relation to the case (and that merger notice has not been rejected or withdrawn¹⁹); or ii) the OFT has commenced its 40 day administrative timetable; or iii) an intervention notice has been issued by the Secretary of State, and
- the case has not come to an end as a result of either:
 - an OFT decision not to refer the merger (either unconditionally, following acceptance of UILs, or because the merger is found not to qualify)
 - a decision of the Secretary of State not to refer the merger, or
 - a CC decision to clear unconditionally or prohibit the merger, to accept remedies from, or impose remedies on, the merging parties, or to cancel the reference.

¹⁷ These procedures are not substantively different from those in the Act prior to its amendment by the ERRA13.

¹⁸ That is, a merger notice meeting the requirements of section 96(2) of the Act (prior to the amendments made to that section by the ERRA13).

¹⁹ Under section 99(5) of the Act (rejection of Merger Notices) or Article 7 of the Enterprise Act 2002 (Merger Prenotification) Regulations 2003 SI 2003/1369 (as amended) (withdrawal of Merger Notices).

Application of transitional arrangements in merger cases

Position as at the Effective Date	Transitional arrangements
Phase 1	
Cases that are not yet ongoing. ²⁰	The new procedures will apply from the Effective Date.
The OFT's statutory or administrative timetable has commenced (and any statutory Merger Notice submitted has not been rejected or withdrawn), but no decision on the duty to refer has yet been taken by the OFT.	<p>The old procedures will continue to apply. If the CMA refers the case for a Phase 2 investigation, the new procedures will apply from the date of that reference decision.</p> <p>If the merger notice is rejected or withdrawn (including where this occurs after the Effective Date), the new procedures will apply from the date of such withdrawal or rejection. The CMA may, following such withdrawal or rejection, formally notify the parties pursuant to section 34ZA(3) of the Act that it has sufficient information to commence an investigation, and thus thereafter to proceed to reach a decision as to whether or not to refer the case.²¹</p>
<ul style="list-style-type: none"> - A concentration with an EU Dimension has been notified to the European Commission under Article 4(1) of the EU Merger Regulation (or a request made under Article 4(4) of that regulation), and - subsequently (either before or after the Effective Date) the case has been referred back to UK under Art 4(4) or 9 of the EU Merger Regulation). 	<p>The old procedures will continue to apply. If the CMA refers the case for a Phase 2 investigation, the new procedures will apply from the date of that reference decision.</p> <p>Where the concentration is notified or the Article 4(4) request made after the Effective Date, the new procedures apply.</p>
Phase 2	
The case has been referred by the OFT (or the Secretary of State) for a Phase 2 investigation, and the CC has yet to publish its final report. ²²	The new procedures will apply from the effective date (note that the ERRA13 did not make any substantive changes to the Phase 2 process prior to the publication of the CMA's final report).
The CC has published its final report, but has not yet accepted final remedial undertakings from, or made a final order in relation to, the parties.	The old procedures will continue to apply (again, given the limited changes made to the Phase 2 process by the ERRA13, the principal impact of this continuation of the old procedures is that the CMA will not be subject to the statutory time limits for agreeing remedies).
The CC has accepted final undertakings from, or made a final order in relation to, the parties.	Such cases are not considered to be ongoing for the purposes of this chapter. Insofar as is relevant, the new procedures will apply from the effective date.

²⁰ Including, but not limited to, those in which the merging parties have engaged with the OFT for the purposes of, for example, informal advice or pre-notification, or in which the OFT has sent an enquiry letter, but in which neither the OFT's statutory or administrative timetable has commenced.

²¹ If the CMA's investigation is well progressed at the time at which the Merger Notice is rejected or withdrawn, the CMA is likely, once it has informed the parties that it has sufficient information to investigate for the purposes of section 34ZA(3), to be able to reach a Phase 1 SLC decision in advance of the usual 40 working day deadline. However, parties should have no expectation that this will necessarily be the case, or that the CMA will reach its decision within 40 working days from the date of submission of the original Merger Notice.

²² Pursuant to section 38 of the Act.

3 MARKET STUDIES AND MARKET INVESTIGATIONS

- 3.1 This chapter provides guidance on the main transitional arrangements associated with the changes to the markets regimes made by the ERA13. It should be read in conjunction with *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3) (the Markets Guidance).²³
- 3.2 In this chapter:
- the Old Law means the ERA02 and any related provision of law prior to amendment by the ERA13, and
 - the New Law means the ERA02 and any related provision of law as amended by the ERA13.
- 3.3 Subject to the exceptions outlined below, the New Law will apply to:
- market studies that are commenced on or after the Effective Date
 - market studies that are ongoing as at the Effective Date (subject to paragraph 3.5 below)²⁴
 - market investigations where a reference is made on or after the Effective Date, and
 - market investigations that are ongoing as at the Effective Date (subject to paragraph 3.6 below).²⁵
- 3.4 Certain parts of the Old Law will continue to apply to cases that are ongoing as at the Effective Date. These are explained in the following paragraphs.

²³ Available on www.gov.uk/cma. Defined terms used in this chapter (unless otherwise defined herein) have the meaning given to them in the Markets Guidance.

²⁴ For the purposes of this chapter 'ongoing' in the context of market studies means that the market study has been publicly launched prior to the Effective Date and that the market study report has not yet been published as at the Effective Date.

²⁵ For the purposes of this chapter 'ongoing' in the context of market investigations means that the market investigation reference has been made prior to the Effective Date and that the reference has not been finally determined in accordance with subsections 183(3) to 183(6) of the ERA02 as at the Effective Date.

Ongoing market studies

- 3.5 The New Law will apply to ongoing market studies with the exception of the following provisions, which will not apply:
- the requirement to publish a market study notice on commencement of a market study²⁶
 - the statutory time limits for the market study process that are triggered by publication of a market study notice,²⁷ and
 - the investigatory powers that are triggered by publication of a market study notice.²⁸

Ongoing market investigations

- 3.6 The New Law will apply to ongoing market investigations with the exception of the following provisions, which will not apply:
- the statutory time limits for completion of the market investigation process²⁹
 - the revised maximum penalty amounts for non-compliance with investigatory powers will not apply where investigatory powers are exercised prior to the Effective Date, and
 - the statutory time limits for completion of the remedies implementation process³⁰ will not apply to investigations that are in the remedies implementation stage as at the Effective Date.³¹

²⁶ See paragraphs 2.6 to 2.8 of the Markets Guidance.

²⁷ See paragraphs 2.9 to 2.10 of the Markets Guidance.

²⁸ See paragraphs 2.11 to 2.15 of the Markets Guidance.

²⁹ See paragraphs 3.5 to 3.7 of the Markets Guidance.

³⁰ See paragraphs 4.5 to 4.6 of the Markets Guidance.

³¹ For the purposes of this section, these are investigations in relation to which the final report has been published but where the reference has not been finally determined.

4 ADMINISTRATIVE PENALTIES

- 4.1 This chapter provides guidance on the transitional arrangements that apply to the imposition of administrative penalties in mergers, markets and CA98 investigations that are ongoing as at the Effective Date (or which begin after the Effective Date) under the EA02 or the CA98 as amended by the ERA13 (the New Powers). It should be read in conjunction with *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4) (the Statement of Policy).³²
- 4.2 Subject to a number of exceptions, the penalty powers outlined in this Statement come into force at the same time that the substantive investigative and interim measures powers to which they relate come into force. The new provisions on enforcement of the powers will therefore **not** apply to notices issued before commencement, subject to an exception in relation to mergers interim measures. The position is broadly as follows:
- **Mergers investigatory and interim measures powers:** subject to a number of exceptions,³³ the New Powers will apply to merger investigations that are ongoing as at (or which commence on or after) the Effective Date but only where the relevant merger investigatory requirements or Merger IMs have been imposed after that date. The exception is in respect of interim measures, where the power to impose a financial penalty applies to:
 - breaches of measures imposed after the Effective Date, and
 - breaches **after** commencement of measures imposed before the Effective Date.
 - **Market investigatory powers:** subject to certain exceptions,³⁴ the New Powers will apply to market studies that are ongoing as at (or which commence on or after) the Effective Date and market investigations where a reference is made on or after that date or which are ongoing as at that date, and

³² Available at www.gov.uk/cma. Defined terms used in this chapter (unless otherwise defined herein) have the meaning given to them in the Statement of Policy.

³³ For further details, see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), available at www.gov.uk/cma.

³⁴ For further details, see *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3), available at www.gov.uk/cma.

- **CA98 investigatory powers:** subject to certain exceptions,³⁵ the New Powers will apply to CA98 investigations that are ongoing as at (or which commence on or after) the Effective Date but only where the relevant Investigatory Requirements have been imposed after that date.

³⁵ For further details, see *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), available at www.gov.uk/cma.

5 COST RECOVERY IN TELECOMS PRICE CONTROL REFERENCES

- 5.1 This chapter should be read in conjunction with *Cost recovery in telecoms price control references: Guidance on the CMA's approach* (CMA5).³⁶
- 5.2 The CMA's power to recover its costs in connection with a price control reference made under section 193 of the CA03 will apply to appeals lodged with the Competition Appeal Tribunal after the Effective Date.
- 5.3 Other functions exercisable by the CC in relation to price control references under section 193 of the CA03 will be exercised by the CMA in relation to all references after the Effective Date.

³⁶ Available at www.gov.uk/cma. Defined terms used in this chapter (unless otherwise defined herein) have the meaning given to them in *Cost recovery in telecoms price control references: Guidance on the CMA's approach* (CMA5).

6 VARIATION AND TERMINATION OF MERGER, MONOPOLY AND MARKET UNDERTAKINGS AND ORDERS

- 6.1 This chapter, which should be read in conjunction with *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* (CMA11) (the Remedies Guidance)³⁷ will apply to all ongoing and/or future cases, except those expressly out of scope of the Remedies Guidance.³⁸ Cases are deemed to be 'ongoing' for the purposes of this chapter if, as at the Effective Date:
- the OFT has either: (i) received a request for review; or (ii) commenced a review on its own initiative, under section 92 or section 162 of the EA02, and
 - the case has not come to an end as a result of a final decision by the CC.
- 6.2 In relation to applications for review which have been sent to the OFT but have not yet been acted upon as at the Effective Date, the CMA will follow the process in paragraph 3.6 of the Remedies Guidance by issuing an invitation to comment.
- 6.3 In relation to ongoing cases which are being considered by the OFT as at the Effective Date, the CMA will decide as soon as possible after the Effective Date or once any ongoing invitation to comment has closed whether to conduct a review, consistent with the process in paragraph 3.9 of the Remedies Guidance
- 6.4 In relation to ongoing cases which are being considered by the CC as at the Effective Date, the existing group appointed to carry out the review will remain in place and will complete the review.
- 6.5 Although the Remedies Guidance will apply to ongoing cases on and from the Effective Date, when conducting its assessment (see paragraph 3.19 of the Remedies Guidance) the CMA will build upon the information submitted by parties, and any analysis undertaken by the OFT and/or the CC, prior to the Effective Date.

³⁷ Available at www.gov.uk/cma. Defined terms used in this chapter (unless otherwise defined herein) have the meaning given to them in the Remedies Guidance.

³⁸ See paragraphs 1.2 and 1.3 of the Remedies Guidance (CMA11).