

The BIS CMA Transition Team on behalf of the CMA  
(c/o Xinru Li and Easha Lam)  
Department for Business, Innovation and Skills  
3rd Floor, Orchard 2  
1 Victoria Street  
London  
SW1H 0ET

By email to: [cmaconsultation@bis.gsi.gov.uk](mailto:cmaconsultation@bis.gsi.gov.uk)

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### **Competition Markets Authority (CMA) Market Studies and Market Investigations: Supplemental guidance on the CMA's approach**

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

We consider the draft guidelines are generally well written and adequately describe the changes made to the existing market studies and investigation arrangements in the Enterprise and Regulatory Reform Act 2013 (ERRA13). We would however request the CMA consider the following improvements-

- From a users perspective we believe additional detail on what to expect from the CMA if a party were either subject to or wanted to contribute to the scope of a market study (only very briefly mentioned in paragraph 1.10).
- The guidance is framed in such a way as to have a limited "shelf life" as it uses the system it replaces as the baseline to explain the change. This is sensible for now but not for a future reader. We see no reason why the CMA should not draft a stand alone document?
- It is not helpful that the older OFT market studies (OFT 519) and market investigation references (OFT 511) guidance remain applicable. It may be more efficient and transparent to combine the three papers into one guidance document rather than providing a supplement to the existing guidelines.

We note that during the debate over the ERRA 13 the issue of confirmation bias was discussed in the new unitary authority's institutional design as it is the investigator, prosecutor and judge. The guidance reveals that the CMA exposes itself to the behavioural risk that it will only collect evidence that supports its theory of harm which it has formulated *before* the investigation has been conducted. Furthermore, the CMA has stated that to avoid unnecessary duplication it aims to have a degree of case team continuity by retaining at least some of the market study case team to work on the larger investigations. Although this seems reasonable from an efficiency point of view it is however a major departure in the way cases have been investigated from the original OFT/

**EDF Energy**  
40 Grosvenor Place, Victoria  
London SW1X 7EN  
Tel +44 (0) 20 7752 2187

**edfenergy.com**  
EDF Energy plc.  
Registered in England and Wales.  
Registered No. 2366852.  
Registered office: 40 Grosvenor Place,  
Victoria, London SW1X 7EN

CC model. The new arrangements do not obviously invite challenge to the same degree as happened previously.

Our detailed responses are set out in the attachment to this letter. Should you wish to discuss any of the issues raised in our response or have any queries, please contact Sebastian Eyre on 020 7752 2167, or myself.

I confirm that this letter and its attachment may be published on BIS's website.

Yours sincerely,

A handwritten signature in blue ink, reading "Paul Delamare".

**Paul Delamare**  
**Head of Downstream Policy and Regulation**

## Attachment

### Competition Markets Authority (CMA) Market Studies and Market Investigations: Supplemental guidance on the CMA's approach

#### EDF Energy's response to your questions

**Q1. Do you consider that the Draft Guidance covers the main changes that are introduced by the ERR13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?**

EDF Energy considers that draft guideline cover the changes introduced by ERR13. We recognise that there is a balancing act between going into detail and providing a general overview of the topic. However, from a users perspective we believe additional detail should be provided on what to expect from the CMA if a party were either subject to or wanted to contribute to the scope of a market study (only very briefly mentioned in paragraph 1.10. This is probably the important aspect of this guidance if the new process is to work effectively as the CMA will be reliant on evidence from consumers and market players.

A key question for a reader is likely to be, what sort of issues and evidence would warrant an investigation under the new procedure? The guidance provides some general comments in terms of market studies such as they are an "examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour" but no more. It would have been useful to more precisely define what is new regarding the necessary supporting evidence that would lead to inciting a public interest or cross market investigation would look like.

**Q2. Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?**

In 2.1 p14 the guidance states that-

"Guidance on the conduct of market studies is contained in Market studies (OFT519). OFT519 remains applicable after 1 April 2014, subject to the changes set out in the ERR13 that are explained in this guidance. Annex A to this guidance lists the parts of OFT519 that are significantly amended, or superseded, by those changes. "

The guidance is framed in such a way as to cover the key changes in legislation from the ERR13, which is important, but this will have a rather limited "shelf life." It cannot be

assumed that any future reader would have knowledge of the old legal framework. Instead the future reader sees the existing system simply as a fact. During the course of time the document in its present form will have to be amended.

Furthermore, it is not helpful for the reader that the older OFT market studies (OFT 519) and market investigation references (OFT 511) guidance remain applicable after the 1st of April 2014. It might have been more efficient to combine the three papers rather than providing a supplement to the existing guidelines.

**Q3. Do you agree with the list in Annexe B of the Draft Guidance of existing markets-related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?**

No, we do not agree with the list in Annex B. As we have stated we would like to see a unified market investigation guidance document. We would therefore want OFT519 Market Studies Guidance and Market Investigation References (OFT 511) to be replaced. This is evidenced in the time consuming table on page 35 (see Qu 4 below)

We do not see a corresponding document on Guidelines on Outside Interests of Members and Staff and External Advisors. We would suggest a replacement document be drafted.

**Q4. Do you consider that the Draft Guidance is user friendly in terms of its content and language?**

The guidance is generally user friendly in terms of language. However the lengthy table on page 35 comparing the existing OFT guidelines which will be carried forward and the corresponding reference in the supplement is not user friendly

Figure 1 Extract from ANNEX B (p35)

EXISTING GUIDANCE REFERENCE	SUPPLEMENTAL GUIDANCE REFERENCE
Market studies (OFT519)	
Paragraph 4.4	Should be read in conjunction with paragraphs 2.6 to 2.10 which explain the requirement to publish a market study notice and the applicable timescales for the market study stage

**Q5. Do you have any other comments on the Draft Guidance?**

During the passage of ERA13 there was a concern that confirmation bias might exist in the unitary competition authority as it is the investigator, prosecutor and judge. On page 8 the guidance states that-

1.22 At operational (staff) level, in order to avoid unnecessary duplication and to facilitate an efficient end-to-end markets process, the CMA would normally expect to have a degree of case team continuity by retaining at least some of the market study case team to work on the larger market investigation case team when a matter is referred.

On administrative level we see this is perfectly sensible however, it should be noted that this represents a major departure in the way cases have been investigated from the original OFT/ CC model. The new arrangements do not obviously invite challenge to the same degree as happened previously. The CMA therefore exposes itself to the risk that it will only collect evidence that only supports its theory of harm which was formulated *before* the investigation has been conducted.

**EDF Energy**  
**September 2013**