

Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders

Summary of responses to the consultation

© Crown copyright 2014

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, Richmond, Surrey, TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Any enquiries regarding this publication should be sent to us at: Policy, Precedent and Procedures Unit, Competition and Markets Authority, Victoria House, 37 Southampton Row, London, WC1B 4AD or by email to guidance@cma.gsi.gov.uk.

This publication is also available at: www.gov.uk/cma.

Contents

	<i>Page</i>
1 Introduction and summary	1
2 Changes introduced by the ERRA 13	5
3 Simplified approach to reviewing undertakings and orders.....	6
4 Adoption of existing OFT and CC guidance documents	9
5 User friendliness of the Guidance.....	11
 ANNEXE	 14
A. List of Respondents.....	15

1 INTRODUCTION AND SUMMARY

Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's competition and consumer authority. The CMA will take on the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT). The CMA was established on 1 October 2013 and will gain its full functions and powers on 1 April 2014, when the OFT and the CC will be abolished. The CMA will be a single centre of expertise in UK markets focusing on public competition and consumer enforcement, guidance, advocacy and leadership for the UK. Its primary duty will be to seek to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. *Remedies: Guidance on the approach to the variation and termination of merger, monopoly and market undertakings and orders* (CMA11con) (Draft Guidance) was one of a number of draft guidance documents published for public consultation on 17 September 2013 (Consultation).¹ The Draft Guidance covered the CMA's approach to the variation and termination of merger, monopoly and market final undertakings and orders.

Key changes

- 1.3 Under the Enterprise Act 2002 (EA02), the OFT presently has a statutory duty to keep under review undertakings and orders made under the Fair Trading Act 1973 (FTA) and under the EA02. From time to time, the OFT is required to consider whether, by reason of any change of circumstances, the set of undertakings or order is no longer appropriate and needs to be varied or terminated and to give the CC such advice as it considers appropriate. Responsibility for deciding on variation or termination of undertakings or orders lies with the CC in respect of all but a very limited number of undertakings and orders.

¹ These documents are available at www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-2

- 1.4 The ERRA13 did not change the substantive test provided for in the EA02 for considering reviews of undertakings and orders. However, the existing approach needed to be changed in order to reflect the abolition of the OFT and the CC and the creation of a single authority, the CMA. Such institutional reform brought about the opportunity to simplify and streamline the current review process by removing duplication or inefficiency.
- 1.5 The Draft Guidance sought to build on the existing text of the OFT and the CC's Memorandum of Understanding (MOU)² on the variation and termination of merger, monopoly and market undertakings and orders, whilst at the same time streamlining the process.

Purpose of this document

- 1.6 The consultation document accompanying the Draft Guidance (Consultation Document) set out a series of specific questions on which views of respondents were sought. This document sets out a summary of responses received to the questions in the Consultation Document, and the CMA's views on those responses.

Responses to the Consultation

- 1.7 The Consultation closed on 11 November 2013. Three written responses to the Consultation Document were received.³ The Draft Guidance was also discussed at a launch event for the CMA draft guidance in the Consultation on 1 October 2013 attended by members of the legal, academic and business communities.

² The OFT and the CC's *Memorandum of Understanding (MOU) on the variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Enterprise Act 2002*, Version 2, published 10 March 2011.

³ Annexe A provides a full list of respondents.

Consultation Document questions

- 1.8 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised.

Question		Chapter
1.	Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the review of final undertakings and orders under the EA02? If not, what aspects do you think are missing?	2
2.	Do you agree with the proposed simplified approach to the reviews of undertakings and orders, as set out in the Draft Guidance?	3
3.	Do you agree with the list in Annexe B of the Draft Guidance of existing related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?	4
4.	Do you consider that the Draft Guidance is user friendly in terms of its content and language?	5
5.	Do you have any other comments on the Draft Guidance?	6

- 1.9 This document should be read in conjunction with the Consultation Document. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on www.gov.uk/cma. Nor is this Summary of Responses a definitive statement of or a substitute for the law itself and should not be relied on upon as an alternative to seeking appropriate legal advice. Parties seeking guidance on those procedures should refer to the final published version of *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* (CMA11) (Guidance) itself, also available on www.gov.uk/cma. The Guidance will supersede the *Memorandum of Understanding between the Office of Fair Trading and the Competition Commission on the variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Enterprise Act 2002*, Version 2, published 10 March 2011.

- 1.10 Please see *Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14), chapter 6 for information on the applicable transitional arrangements.

2 CHANGES INTRODUCED BY THE ERRA 13

Question 1: Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the review of final undertakings and orders under the EA02? If not, what aspects do you think are missing?

2.1 The CMA sought respondents' views on how the Draft Guidance dealt with the changes introduced by the ERRA13.

Summary of responses

2.2 The respondents that answered this question agreed that the main changes were dealt with in a satisfactory manner.

2.3 One respondent sought clarity around the responsibilities of the Secretary of State in deciding on the variation or termination of undertakings and orders given in relation to certain public interest cases.

The CMA's views

2.4 The CMA clarifies that the Secretary of State is responsible for varying or terminating undertakings or orders in such cases. This is the existing position under the EA02 and has not been changed by the ERRA13. The Draft Guidance has been amended to make this clear.

3 SIMPLIFIED APPROACH TO REVIEWING UNDERTAKINGS AND ORDERS

Question 2: Do you agree with the proposed simplified approach to the reviews of undertakings and orders, as set out in the Draft Guidance?
--

3.1 The CMA asked for respondents' views about the approach it had proposed to take to reviews of undertakings and orders.

Summary of responses

3.2 Respondents agreed that the creation of the CMA provided an opportunity to simplify and streamline the process of reviewing undertakings and orders. In general, respondents considered that the Draft Guidance achieved this.

3.3 However, some questions were raised around:

- the CMA's prioritisation principles. In particular, respondents asked how the decision on whether or not to undertake a review would be made in light of the CMA's prioritisation principles. One respondent also asked whether the CMA would prioritise cases where the change of circumstances might lead to a potential breach of the undertakings or order. Another respondent asked whether the CMA would always consider whether to conduct a review within any timeframes specified in the final report on the merger inquiry or market investigation in question
- the process for handling a request for review from a third party. One respondent said that the CMA should specifically provide for reviews initiated by other interested parties and allow those affected by the undertakings or order to be given a chance to comment prior to any public consultation (so as to allow for a more effective consultation)
- the CMA's approach to commercially sensitive information
- the length of consultation periods, and
- what notification the CMA would give when undertakings or orders are varied or terminated.

The CMA's views

- 3.4 The CMA has considered carefully the respondents' comments and paragraphs 3.5 to 3.11 set out where the CMA has sought to amend the Draft Guidance to accommodate these comments. In other cases where the CMA has decided not to change the Draft Guidance, the CMA considers that the extent of guidance currently provided is appropriate and proportionate to the nature of the guidance or that it is more appropriate to consider in future, once it has greater practical experience of applying its new processes and procedures, providing guidance that reflects the benefits of that experience.

Prioritisation principles

- 3.5 As set out in the CMA's *Vision, Values and Strategy for the CMA* consultation document⁴, the principles that the CMA applies in its prioritisation decisions, will build on the OFT's existing prioritisation principles⁵, which the CMA does not propose to change at this stage but will interpret in light of the Government's strategic steer and that consultation document⁶, and may review in the light of experience in the future. These prioritisation principles will be published in due course.
- 3.6 The CMA has amended the Draft Guidance to make clear that in their submissions to the CMA when requesting a review, parties should state why a review of the undertakings or order meets the CMA's published principles. In particular, where the change of circumstances indicated by parties is such that it would be likely to lead to a breach of the undertakings or order, parties can assist the CMA by giving notice of such changes of circumstances in good time so as to allow the CMA to prioritise such cases and avoid parties being placed in potential breach.
- 3.7 Where a recommended date for a review has been specified in a final report of the Monopolies and Mergers Commission (MMC), CC, or CMA, the CMA will typically consider whether or not to conduct a review on an own-initiative basis within the recommended timeframes and will apply the CMA's prioritisation principles in deciding whether or not to do so.

⁴ *Vision, Values and Strategy for the CMA* (CMA13con), 1 October 2013.

⁵ *OFT Prioritisation Principles* (OFT953), October 2008.

⁶ *Competition Regime: Consultation on CMA priorities and draft secondary legislation*, 15 July 2013.

Process for handling a request for review from a third party

- 3.8 The CMA has amended the Draft Guidance to allow for situations in which other interested parties may request a review. However, the CMA expects such occurrences to be rare in light of the experiences of the OFT and the CC in previous years. The process for such review of requests from third parties also allows for some informal consultation with affected parties prior to the invitation to comment. This process will be primarily to ensure an effective public consultation is carried out.

Commercially sensitive information

- 3.9 The CMA notes the queries regarding handling of commercially sensitive information and wishes to clarify that in relation to all reviews it will have regard to the CMA's disclosure guidance: *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6).

Length of consultation periods

- 3.10 The CMA has set out in the Guidance, where relevant, the typical length of consultation periods (for example, on Invitations to Comment and on draft varied undertakings and orders).

Variation or termination of undertakings or orders

- 3.11 The CMA has amended the Draft Guidance to clarify that Notices of variation or termination will be published when undertakings or orders are varied or terminated. For time-expired, lapsed or superseded undertakings or orders, the relevant parties will be notified of that expiry, lapse or supersession.

4 ADOPTION OF EXISTING OFT AND CC GUIDANCE DOCUMENTS

Question 3: Do you agree with the list in Annexe B of the Draft Guidance of existing related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?

- 4.1 The CMA sought views on the list of OFT and CC guidance documents that it proposed to adopt.

Summary of responses

- 4.2 One respondent requested that the document *Merger Remedies: Competition Commission Guidelines* (November 2008, CC8) be added to the list in Annexe B of the Draft Guidance. Otherwise respondents felt the list was sensible and correct.

The CMA's views

- 4.3 The CMA has carefully considered the respondent's view and is content to include CC8 in the list but the CMA notes that CC8 had already been proposed for adoption by the CMA in CMA2con (and will be adopted in CMA2).
- 4.4 Annexe B of the Draft Guidance proposed that the *CC Rules of procedure for merger reference groups, market reference groups and special reference groups* (CC1) would be put to the CMA Board for adoption. However, the CMA considers it would be helpful to make some minor revisions to CC1 to reflect recent changes to legislation and current CC practice. It therefore proposes to conduct a short consultation, prior to April 2014, on the minor revisions it proposes to the rules in CC1. The proposed rules are referred to in the Guidance as 'Rules of procedure for CMA Groups'.
- 4.5 In light of there being no other objections to the list of guidance in Annexe B of the Draft Guidance (now Annexe A in the Guidance), the CMA has chosen not to make any further amendments to that list. To that end, the guidance documents in Annexe A of the Guidance (and identified in the column 'Adopted by the CMA Board') have now been adopted by the CMA Board.
- 4.6 The CMA is mindful of the need to minimise risks of confusion arising from the continued existence of guidance which does not take account of the creation of the CMA or the other changes to the mergers regime introduced by the ERRA13. The CMA will therefore seek, when making such documents

available on www.gov.uk/cma, to state clearly the basis on which those documents should be read (including adding 'health warnings' to those documents where appropriate).

5 USER FRIENDLINESS OF THE GUIDANCE

Question 4: Do you consider that the Draft Guidance is user friendly in terms of its content and language?

5.1 The CMA sought responses around the ease of use for businesses of the Draft Guidance.

Summary of responses

5.2 Generally the respondents agreed the guidance was clear and easy to navigate. However some respondents sought further clarification through examples.

The CMA's views

5.3 The CMA notes that the desire of respondents to see more examples in the Guidance. The CMA notes that all cases will turn on their own facts but has, where relevant and helpful, added examples to illustrate the points being made.

6 OTHER ISSUES

Question 5: Do you have any other comments on the Draft Guidance?

6.1 Respondents were given the opportunity to comment on any other aspects of the guidance, falling outside the scope of Questions 1 – 4 in the Consultation Document.

Summary of responses

6.2 Respondents raised three other issues:

- one respondent suggested that the Guidance should state that the CMA, when considering a variation proposed by parties, would take into account the proportionality as well as effectiveness of such a variation. That respondent considered that this would be consistent with the requirements in sections 35(4) and 36(3) of the EA02 ‘to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it’
- one respondent sought more information around the use of consultants and contractors to undertake information gathering and market review processing,
- one respondent said that the CMA should have regard to the costs incurred by all parties as a result of their participation in a review.

The CMA’s views

6.3 The CMA notes these three other comments.

- on proportionality, the CMA has amended the Draft Guidance to clarify that variations proposed by parties will be considered by reference to relevant remedies guidance (for example, *Merger Remedies: Competition Commission Guidelines (CC8)*). However, where a party subject to undertakings or an order is proposing a variation, the CMA would not normally expect that party to propose a variation that is ineffective and/or disproportionate
- on use of consultants and contractors, this may be a consideration for the CMA in many areas of its work and the CMA considers that specific guidance is not required for reviews of undertakings and orders. In the

event that the CMA were expecting to use such consultants or contractors in a review, the CMA may if appropriate discuss their use with parties,

- on the costs incurred by all parties, the CMA is aware of the costs for parties of involvement in its cases and will consider the nature of its requests for information carefully when sending them to parties.

ANNEXE(S)

A. List of Respondents

- Allen and Overy LLP
- Ashurst LLP
- Herbert Smith Freehills LLP