

**Competition and Markets
Authority (CMA)**

**Market Studies and Market
Investigations:
Supplemental guidance on
the CMA's approach**

Consultation document

July 2013

CMA3con

© Crown copyright 2013

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: 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, or email: cmaconsultation@bis.gsi.gov.uk

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

Scope of this consultation

Topic of this consultation

This consultation seeks the views of interested parties on the attached draft supplemental guidance (the Draft Guidance) which the BIS CMA Transition Team (the Transition Team) (on behalf of the Competition and Markets Authority (CMA) and in consultation with the Office of Fair Trading (OFT) and Competition Commission (CC)) proposes to issue in order to explain the changes that are introduced by the Enterprise and Regulatory Reform Act 2013 to the way in which market studies and market investigations are conducted under the Enterprise Act 2002. These changes come into force on 1 April 2014.

This consultation and the accompanying Draft Guidance have been drafted by the Transition Team which has been appointed by the CMA Chair Designate and Chief Executive Designate, and consists of individuals from the OFT, the CC and elsewhere.

Geographical scope

The geographical dimension to this consultation is primarily the UK.

Impact assessment

Not applicable for this consultation.

Basic information

This consultation is aimed at all those who have an interest in market studies and market investigations. In particular, it may be of interest to businesses and their legal and other advisors, and to organisations representing consumers' interests.

How to respond

We would welcome your comments on any aspect of the Draft Guidance contained in this document. Annexe A contains the specific questions on which your feedback is sought. Please respond to as many questions as you are able and provide supporting evidence for your views where appropriate.

You can respond to this consultation:

By email to: cmaconsultation@bis.gsi.gov.uk

By post to:

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

When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Please also indicate whether you are happy for your response to be made available on the CMA's website. Further information regarding our use of data received during this consultation is provided below.

Enquiries

If you have any queries regarding the content of the consultation please contact Xinru Li or Easha Lam on the email address above or by telephone on 020 7215 2078 or 020 7215 2044.

Closing date

Responses should be received by 5pm on Friday, 6 September 2013.

Next steps

The Transition Team will consider the responses to this consultation document and make amendments to the Draft Guidance where appropriate. The CMA Board (once established) will make the decisions on the matters being consulted on and the content of the final guidance, to be published in advance of 1 April 2014.

Compliance with the Cabinet Office Consultation Principles

This consultation complies with the Cabinet Office Consultation Principles. A list of the key criteria, along with a link to the full document, can be found at Annexe B.

Consultation Period

The deadline for responses to this consultation is eight weeks. While this represents an expedited consultation period, we note that the in-depth Government consultation exercise which led to the decision to create the CMA asked a number of questions and yielded a number of valuable responses on issues related to this consultation, which have informed the contents of the Draft Guidance. Furthermore, the timetable for the formation of the CMA requires that consultation exercises on numerous proposed guidance documents need to be carried out within a very short period of time. We feel that, given these considerations, the eight week consultation period is an appropriate one to obtain responses from interested parties.

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mr John Conway

Consultation Coordinator

1 Victoria Street

London SW1H 0ET

Telephone John on 020 7215 6402 or email to: john.conway@bis.gsi.gov.uk

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to publish or refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information

under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

CMA3con

CONTENTS

Chapter/Annexe	Page
1 Introduction	1
2 Summary of changes to the current position	3
3 Structure of the Draft Guidance.....	5

ANNEXES

A. Consultation questions.....	9
B. Consultation criteria	10
C. Draft Guidance	11

1 INTRODUCTION

Background

1.1 The CMA will be established under the Enterprise and Regulatory Reform Act 2013 (ERRA13) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the CC and many of the functions of the OFT will be transferred to the CMA and these bodies abolished. The CMA's primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.

1.2 The CMA will have a range of statutory powers to address problems in markets:

- under the Enterprise Act 2002 (EA02), the CMA will be able to investigate mergers which could potentially give rise to a substantial lessening of competition and specify measures which the merging parties must take to protect competition between them while the investigation takes place
- the EA02 will also enable the CMA to conduct market studies and market investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
- the CMA will have powers to enforce a range of consumer protection legislation (either directly or through Part 8 of the EA02) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
- the CMA will also be able to bring criminal proceedings against individuals who commit the cartel offence under the EA02,¹ and
- finally, under the Competition Act 1998 (CA98) the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.

1.3 The ERRA13 implements a number of enhancements to these statutory powers (compared to the powers available to the CC and OFT), in order to

¹ See section 188 of the EA02.

improve the robustness of decision-making, increase the speed and predictability of the CMA's activities, and strengthen the UK's competition regime as a whole.² The Transition Team has produced a series of draft guidance documents to assist the business and legal communities and other interested parties in their interactions with the CMA, and is consulting publicly on them.

Purpose of this consultation

1.4 The purpose of this document is to consult on Draft Guidance which explains the changes that are introduced by the ERRA13 to the way in which market studies and market investigations are conducted under the EA02. It is intended that the Draft Guidance will supplement the existing guidance on the markets regime, which includes:

- *Market studies: guidance on the OFT approach* (OFT519)
- *Market investigation references* (OFT511), and
- *Guidelines for market investigations* (CC3 (revised)).

1.5 These existing markets guidance documents will – together with other relevant existing OFT and CC guidance documents – be put to the CMA Board (once established) for adoption.³ Those adopted guidance documents will however be kept under review once the CMA is in operation, in the light of its developing practice and case experience.

1.6 Annexe B of the Draft Guidance lists the existing markets-related OFT and CC documents that it is currently proposed will be put to the CMA Board for adoption.⁴

² An overview of the changes is contained in CMA1: Towards the CMA, published alongside this consultation document.

³ As those pre-existing documents were published prior to the amendments to the EA02 made by the ERRA13, they will (if and when adopted) need to be read subject to the Draft Guidance and to certain other 'global' changes resulting from the coming into force of the ERRA13 (for example, reading references to the OFT and CC as referring in each case to the CMA). See further Annexes A and B of the Draft Guidance.

⁴ For completeness, it is noted that Annexe B has been drafted (in common with the remainder of the Draft Guidance) as assuming that the CMA has been established and that the existing OFT and CC documents listed have been adopted by the CMA Board. Notwithstanding this drafting, the list represents only the Transition Team's current proposal as to which documents will be put to the

2 SUMMARY OF CHANGES TO THE CURRENT POSITION

Introduction

- 2.1 The ERRA13 makes a number of changes to the way in which market studies and market investigations are carried out under the EA02. The following paragraphs summarise the main changes to the current position. The Draft Guidance explains these changes in greater detail and includes references to the relevant provisions of the EA02 and the ERRA13.

Time limits

- 2.2 No statutory time limits currently apply to market studies that are carried out by the OFT. The ERRA13 introduces a new requirement for the CMA to launch a market study by publishing a market study notice, and requires the CMA to publish a market study report setting out its findings and proposed action (if any) within 12 months of publication of the market study notice.
- 2.3 In addition, the ERRA13 amends the existing time limit for completion of a market investigation from 24 months to 18 months, and introduces a new time limit of six months from publication of the market investigation report for the CMA to implement remedies where it has decided to take action itself. These statutory time limits may be extended in certain limited circumstances.

Investigatory powers

- 2.4 The OFT currently has mandatory investigatory powers during the market study process only where it believes that it has the power to make a market investigation reference. The ERRA13 extends these investigatory powers to make them available to the CMA throughout the 'end-to-end' markets process commencing with publication of a market study notice, including during market studies, market investigations and remedies implementation stages. The ERRA13 also aligns the sanctions for non-compliance with the CMA's investigatory powers so that the same sanctions apply throughout the markets process.

CMA Board for adoption. It (and any other references in the Draft Guidance to OFT/CC documents having been adopted by the CMA) is therefore provisional and subject to change.

Cross-market references

- 2.5 Currently under the EA02 the OFT is able to conduct market studies into features that are common to a number of markets. It cannot however make a reference to the CC to investigate those features without also referring the whole of each market concerned.
- 2.6 The ERRA13 gives the CMA a new power to make a cross-market reference: that is, a power to refer a specific feature (or combination of features) existing in more than one market without also having to refer the whole of each market concerned.

Cases raising public interest issues

- 2.7 Currently under the EA02 the Secretary of State has the ability to intervene in market investigations to investigate defined public interest issues that are relevant to the case, whilst the CC investigates the competition issues. An intervention must be made during a defined period following reference.
- 2.8 The ERRA13 amends the procedure for public interest interventions by the Secretary of State by specifying a defined period before reference during which interventions must be made. The ERRA13 also introduces a new power for the Secretary of State to require the CMA to investigate public interest issues alongside competition issues during a market investigation.

Remedial powers

- 2.9 The ERRA13 extends the scope of the CMA's order-making powers following an adverse report. The CMA will be able to require parties to publish certain non-price information without also publishing price information, and to require parties to appoint and remunerate independent third parties to monitor remedies and deal with disputes.
- 2.10 In addition, the ERRA13 clarifies that after a market investigation report has been published, but before final remedies have been implemented, the CMA has the power to take steps to require parties to reverse any action that has already occurred before interim measures have been put in place.

3 STRUCTURE OF THE DRAFT GUIDANCE

Introduction

3.1 The Draft Guidance provides an overview of the changes that are introduced by the ERRA13 to the conduct of market studies and market investigations under the EA02. It outlines:

- the legal framework that applies to market studies and market investigations
- the decision-making processes that apply to market studies and market investigations, and
- key procedural aspects of market studies and market investigations.

Structure of the Draft Guidance

3.2 The following paragraphs summarise how the Draft Guidance is structured.

3.3 Chapter 1 explains what a market study is and what a market investigation is. It outlines the roles played by the CMA, the Secretary of State and sectoral regulators in conducting markets cases. It also explains the decision-making processes that are introduced by the ERRA13 to take account of the fact that the CMA is assuming responsibility for the conduct of both market studies and market investigations, which were previously carried out by the OFT and the CC respectively.

3.4 Chapter 2 explains the changes to the market study process that are introduced by the ERRA13. These are, in summary:

- changes to the requirements for commencing a market study
- the introduction of a statutory time limit within which market studies must be completed, and
- changes to the powers of investigation available to the CMA in relation to market studies, and to the sanctions for non-compliance.

3.5 Chapter 2 also explains that a market investigation is one possible outcome of a market study, and sets out the changes to the market investigation reference process that are introduced by the ERRA13. These are, in summary:

- changes to the way in which cases raising public interest issues are handled in the pre-reference period and during the reference process, and
 - the introduction of a new power to make cross-market references.
- 3.6 Chapter 3 explains the changes to the market investigation stage following reference that are introduced by the ERRA13. These are, in summary:
- changes to the statutory time limits within which market investigations must be completed
 - changes to the way in which cases raising public interest issues are handled, and
 - the introduction of a new power to conduct investigations following a cross-market reference.
- 3.7 Chapter 4 explains the changes that are introduced by the ERRA13 to the remedies implementation stage following a market investigation report finding an adverse effect on competition (AEC). These are, in summary:
- the introduction of statutory time limits within which remedies must be implemented by the CMA
 - the introduction of mandatory investigatory powers for the CMA during the remedies implementation and subsequent monitoring periods, and
 - changes to the powers available to the CMA to impose remedies by order, and clarification of the powers available to the CMA following a report to reverse pre-emptive action that has been taken.
- 3.8 Chapter 5 explains the transitional arrangements that will apply to market studies and market arrangements that are ongoing as at 1 April 2014 (see further paragraph 3.11 below).
- 3.9 Annexe A lists, in tabular form, those sections of the three main existing markets guidance documents that are significantly amended or superseded by the changes that are introduced by the ERRA13, with cross-references to the relevant sections of the supplemental guidance.
- 3.10 Annexe B lists, in tabular form, the existing markets-related OFT and CC guidance documents that it is proposed will be put to the CMA Board (once established) for adoption.

Transitional arrangements

- 3.11 The proposed transitional arrangements dealing with the commencement of provisions within the ERA13 on 1 April 2014 (when the CMA will take on its full functions) are set out in chapter 5 of the Draft Guidance. Whilst the policy of these transitional arrangements forms part of the CMA guidance consultations, the Secretary of State is responsible for incorporating the transitional arrangements in law where necessary. The legislative drafting will reflect the proposed arrangements as set out in the Draft Guidance. As a general principle, all powers and/or procedures will come into force as of 1 April 2014 and will be applied prospectively.

ANNEXES

A. CONSULTATION QUESTIONS

The purpose of this consultation is to obtain feedback on how the Draft Guidance is presented and how clear the content is so that we can ensure its usefulness to its audience. To this end, the consultation questions are as follows:

- 1. Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?**
- 2. Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?**
- 3. 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?**
- 4. Do you consider that the Draft Guidance is user friendly in terms of its content and language?**
- 5. Do you have any other comments on the Draft Guidance?**

The format of the final guidance may be different from that of the Draft Guidance. For example, footnotes that appear at the bottom of pages in this document may be placed in the side margins, and headings and sub-headings may appear in a different colour. If you have any formatting suggestions that will improve how the guidance is presented, please provide them in your response to this consultation.

B. CONSULTATION CRITERIA

[The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focusing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before
- departments will need to give more thought to how they engage with and consult with those who are affected
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy, and
- the principles of the Compact between Government and the voluntary and community sector will continue to be respected.

The full Cabinet Office Consultation Principles can be found on the Cabinet Office website at: www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

C. DRAFT GUIDANCE

Competition and Markets Authority (CMA)

Market Studies and Market Investigations

**Supplemental guidance on the CMA's
approach**

[2014]

CMA3con

© Crown copyright 2013

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: BIS CMA Transition Team on behalf of the CMA, Department for Business, Innovation and Skills, 3rd Floor, Orchard 2, 1 Victoria Street, London SW1H 0ET, or email: cmaconsultation@bis.gsi.gov.uk

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

PREFACE

The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and many of the functions of the Office of Fair Trading (OFT) were transferred to the CMA and those bodies abolished. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.

The ERRA13 also made a number of changes to the markets regime by amending the Enterprise Act 2002 (EA02).¹

This guidance is being issued in order to explain the changes introduced to the markets regime by the ERRA13. It supplements the existing guidance on the markets regime² and should be read in conjunction with that guidance. Where sections of the three existing main markets guidance documents are significantly amended or superseded by the changes that are outlined in this guidance, these are listed in Annexe A to this guidance. Annexe B indicates which existing markets-related guidance documents have been adopted by the CMA Board. To the extent that any conflict arises between the content of such existing guidance and this guidance, the content of this guidance will prevail.

This guidance sets out the CMA's practice (and intended future practice) as from 1 April 2014. The new powers and procedures set out in it will apply to all cases, subject to the transitional arrangements provided for by the Secretary of State that are set out in chapter 5 for market studies and market investigations that are ongoing as at 1 April 2014.

This guidance reflects the views of the CMA as at 1 April 2014 and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This guidance may in due course be supplemented, revised or replaced. The CMA's website will always display the latest version of the guidance.

¹ References in this guidance are to the EA02 as amended by the ERRA13 unless otherwise stated.

² There are three main existing guidance documents that relate to the markets regime: *Market studies: Guidance on the OFT approach* (OFT519), *Market investigation references* (OFT511), and *Guidelines for market investigations* (CC3 (revised)). Other guidance documents also contain information relevant to markets cases, including: *Super-complaints: guidance for designated consumer bodies* (OFT514) and *Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries* (CC7). See further Annexes A and B, which explain the status of OFT and CC markets-related guidance.

Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this guidance makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the EA02 and the regulations and orders made under the EA02, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice.

The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when handling market studies and market investigations under the EA02, but that, when the facts of a case reasonably justify it, the CMA may adopt a different approach.

DRAFT

CONTENTS

Chapter/Annexe	Page
1 Introduction	6
2 Market studies.....	14
3 Market investigations	23
4 Implementation of remedies.....	28
5 Transitional arrangements	32
Annexe A: Key changes to existing markets guidance.....	34
Annexe B: Status of existing OFT and CC guidance.....	37

DRAFT

1 INTRODUCTION

Scope of this guidance

- 1.1 This guidance provides an overview of the changes to the markets regime introduced by the ERA13. It outlines:
- the legal framework that applies to market studies and market investigations, including the roles of the CMA, the Secretary of State, and sectoral regulators
 - the decision-making processes that apply to market studies and market investigations, and
 - key procedural aspects of market studies and market investigations.
- 1.2 The main body of this guidance is structured to reflect the key stages of a market study that results in undertakings in lieu (UILs) of a market investigation or in a market investigation.³ Chapter 2 addresses the market study stage and the reference process; chapter 3 addresses the in-depth market investigation stage that follows a reference; and chapter 4 addresses the remedies implementation stage following a finding of an adverse effect on competition (AEC).
- 1.3 Chapter 5 explains the transitional arrangements that apply to market studies and market investigations that are ongoing as at 1 April 2014.
- 1.4 Where sections of the three main existing markets guidance documents are significantly amended or superseded by the changes that are outlined in this guidance, these are listed in Annexe A to this guidance. Annexe B explains which existing OFT or CC guidance documents containing information relevant to markets cases have been adopted by the CMA Board, and which documents have been replaced or rendered obsolete by CMA guidance or publication.

What is a market study?

- 1.5 Market studies are one of a number of tools at the CMA's disposal to address competition or consumer protection problems, alongside its enforcement and advocacy activities. They are examinations into the causes of why particular

³ The various possible outcomes of a market study are outlined in paragraph 1.6.

markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour.⁴

1.6 Market studies may lead to a range of outcomes, including:

- a clean bill of health
- actions which improve the quality and accessibility of information to consumers
- encouraging businesses in the market to self-regulate
- making recommendations to the Government to change regulations or public policy
- taking competition or consumer enforcement action, and
- making a market investigation reference, or accepting UILs.⁵

1.7 Market studies are conducted under the CMA's general review function in section 5 of the EA02.⁶ The ERRA13 introduces a formal requirement for a market study to be commenced by the issuing of a market study notice when the CMA exercises its function under section 5 for certain specified purposes.⁷ This guidance explains the process for issue of a market study notice and the consequences that follow from it. These include statutory time limits and formal investigatory powers for the CMA.

Other work carried out under section 5 of the EA02

1.8 The CMA also carries out a range of other work under its general review function in section 5 of the EA02. This work may lead to the launch of a market study, or it may form the basis of other action to be taken by the CMA. Such work does not itself constitute a market study.

1.9 For example, in some circumstances the CMA might take work forward by way of a call for information. The main purpose of a call for information is to enhance the CMA's understanding of a preliminary concern in a particular market or markets, and this may incorporate consideration of whether there is scope subsequently for related work by the CMA. A call for information will not

⁴ For a more detailed explanation of the purpose of market studies, see chapter 2 of OFT519.

⁵ The range of possible outcomes of a market study is considered further in chapter 5 of OFT519.

⁶ See chapter 3 of OFT519 for an explanation of how market studies are chosen.

⁷ See paragraph 2.6.

necessarily lead to immediate intervention in the market, and it may lead to no further action being taken. Calls for information may be conducted in a variety of ways including requests for information (both open and tailored to key stakeholders) and hosting roundtable type discussions. The CMA has no powers to compel parties to provide information during a call for information.

Preliminary work leading to a market study

- 1.10 Where the CMA has a more developed view of the concerns in relation to a market or markets but considers that it may be helpful to seek views of stakeholders in advance of the launch of a market study, the CMA may ask for views from parties, in particular regarding the appropriate scope of a study. The CMA may announce its intentions in a press release on its website, following which it will contact key stakeholders directly as well as inviting submissions from other interested parties.
- 1.11 Other steps which will generally be undertaken prior to the launch of a market study include:
- developing possible theories of harm and the potential for remedies
 - considering the scope for the project to reduce consumer detriment, and making an impact estimation plan⁸
 - producing a project plan
 - developing a stakeholder management and communications strategy, and
 - identifying the risks affecting the study and agreeing the actions required to mitigate those risks.
- 1.12 Preparatory work undertaken by the CMA in advance of the launch of a market study does not fall within the scope of the statutory time limits which apply once a market study notice has been issued.⁹ Where the CMA undertakes calls for information and other preliminary work (particularly where stakeholders have been consulted) this may however enable the CMA to reduce the time taken to complete the market study. The ability of the CMA to

⁸ An impact estimation measures the effect which interventions by the CMA are envisaged to have on reducing consumer detriment and is a component of all market studies. For further information see chapter 6 of OFT519.

⁹ These time limits are set out in paragraph 2.9.

do this will depend on a variety of factors such as the scale and complexity of the market, the number of stakeholders involved, and the level of their engagement during the pre-launch process.¹⁰

What is a market investigation?

1.13 When the findings of a market study give rise to reasonable grounds for suspecting that a feature or combination of features¹¹ of a market or markets in the UK prevents, restricts or distorts competition, and a market investigation reference appears to be an appropriate and proportionate response, the CMA is able to make such a reference.¹² Market investigations are more detailed examinations into whether there is an AEC in the market(s) referred, and if so, what remedial action may be appropriate.

Types of market investigation reference

1.14 The following types of market investigation reference may be made by the CMA:

- **ordinary references** (these are references which are not cross-market references and do not raise public interest issues),¹³ and
- **cross-market references** (this is a new type of reference in respect of specific features or combinations of features that exist in more than one market).¹⁴

1.15 The following types of market investigation reference may be made by the Secretary of State in cases that raise defined public interest issues:¹⁵

- **restricted public interest references** (these are references that require the CMA to investigate competition issues, while the Secretary of State

¹⁰ Further information on the management of market studies is contained in chapter 4 of OFT519.

¹¹ Subsection 131(2) of the EA02 sets out what is to be construed as a feature for the purposes of Part 4 of the EA02.

¹² Section 131 of the EA02 sets out the power of the CMA to make references. A market study is not a prerequisite to a reference: references may be made of matters which have not been the subject of a market study (for example, following a super-complaint), provided the statutory reference thresholds are satisfied. Further information on the reference process and application of the reference test is contained in OFT511.

¹³ This is a form of reference that existed under the EA02 prior to 1 April 2014.

¹⁴ Cross-market references are considered further in paragraphs 2.30 to 2.36.

¹⁵ Section 140A of the EA02. The Secretary of State also has a Ministerial reserve power to make ordinary and cross-market references under section 132 of the EA02.

investigates defined public interest issues in relation to the matter referred),¹⁶ and

- **full public interest references** (this is a new type of reference requiring the CMA to investigate defined public interest issues alongside competition issues in relation to the matter referred).¹⁷

Who does what

1.16 The ERA13 assigns distinct roles to the CMA, the Secretary of State and the sectoral regulators in relation to the markets regime. These roles are summarised in the following paragraphs.

The CMA

- 1.17 The CMA replaced the OFT and the CC on 1 April 2014 as part of the reforms to the UK competition regime introduced by the ERA13. The CMA is responsible for conducting both market studies and market investigations.
- 1.18 The ERA13 introduces revised processes for making decisions during market studies and market investigations to take account of the formation of the CMA. These are described further below.

Sectoral regulators

1.19 Market investigation references may also be made by sectoral regulators (the regulators) in accordance with the applicable sector-specific legislation. As at 1 April 2014 the regulators are the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), the Northern Ireland Authority for Utility Regulation (URegNI), the Office of Rail Regulation (ORR), the Civil Aviation Authority (CAA), and Monitor.¹⁸

¹⁶ This is a form of public interest reference that existed under the EA02 prior to 1 April 2014.

¹⁷ Public interest references may be made on an ordinary or cross-market basis. Public interest cases are considered further in paragraphs 2.17 to 2.29 and 3.8 to 3.15.

¹⁸ This guidance applies to the regulators insofar as it relates to their concurrent powers to apply part 4 of the EA02. The section 5 of the EA02 function is specific to the CMA; however, in accordance with [Statutory Instrument], certain of the sectoral market review functions of the regulators are treated as being equivalent to section 5, such that the powers and obligations that are triggered by the CMA's exercise of its section 5 function for specified purposes can also be triggered by the regulators' exercise of the market review functions in their respective sectors. These powers and obligations include the duty to publish a market study notice and consequential time limits, and the

The Secretary of State

1.20 The Secretary of State has the power to intervene in certain markets cases which raise defined public interest issues (see chapters 2 and 3). The Secretary of State is also able to modify certain provisions of the EA02, for example, the time limits that apply to market studies, market investigations and the remedies implementation period.

Decision-making by the CMA in markets cases

1.21 The ERRA13 introduces decision-making processes which take account of the fact that the CMA is now responsible for the conduct of both market studies and market investigations. These processes are outlined below. They ensure that key decisions in market studies and subsequent market investigations are made by separate groups within the CMA.

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.

Market studies and market investigation references

1.23 The CMA Board¹⁹ is responsible for key decisions relating to market studies and the making of market investigation references. These decisions cannot be delegated. They include decisions as to:

- whether the duty to publish a market study notice applies²⁰
- whether to propose to make, or to make, a market investigation reference
- whether to consult relevant persons on such a proposal, and

availability of formal information gathering powers. They are explained further in chapter 2 of this guidance. Further information on the operation of the concurrency regime is contained in [Regulated Industries: Guidance on concurrent application of competition law to regulated industries][to be consulted on in due course].

¹⁹ The CMA Board consists of a Chair and at least five other persons appointed by the Secretary of State.

²⁰ The CMA must publish a market study notice when it proposes to carry out its functions under section 5 of the EA02 for certain specified purposes. This is explained further in paragraph 2.6.

- whether to accept UILs instead of making a reference, and whether to vary, supersede or release UILs that have been given.²¹

1.24 If the CMA Board decides that a market investigation reference is to be made, it refers the matter to the CMA Chair, who is responsible under the ERA13 for constituting the market reference group that will undertake the market investigation. In practice, the CMA Chair will delegate these responsibilities to the CMA Panel Chair (or one of the Deputy Panel Chairs).²² The CMA Panel Chair must ensure that any Board member who might reasonably be expected to be a member of the market reference group does not participate in the Board's consideration of whether to refer the matter.²³

Market investigations

1.25 The market reference group appointed by the CMA Panel Chair is responsible for the conduct of a market investigation. The group must consist of at least three members selected from the CMA panel.²⁴

1.26 The market reference group is required to decide whether there is an AEC in the market(s) referred and, if so, what remedial action is appropriate.²⁵ In order to make a valid finding of an AEC that can be subject to remedial action, a decision must be taken by at least a two-thirds majority of the market reference group.²⁶ The group oversees the implementation of remedies up to the point at which the reference is finally determined.²⁷

1.27 The CMA Board is required to make rules of procedure for market reference groups. Subject to these rules groups can decide their own procedures.²⁸ The CMA Board may also issue guidance on market investigation procedures, to

²¹ Paragraph 29 of schedule 4 to the ERA13.

²² The CMA Panel Chair is a member of the CMA Board.

²³ Paragraph 33 of schedule 4 to the ERA13.

²⁴ Paragraph 38 of schedule 4 to the ERA13. The CMA panel is a panel of persons available for selection as members of a group in accordance with part 3 of schedule 4 to the ERA13.

²⁵ The statutory questions that the group must decide on ordinary and restricted public interest references are explained at paragraph 28 of CC3. See paragraphs 3.10 and 3.17 in relation to the questions that the group must decide on full public interest references and cross-market references respectively.

²⁶ Paragraphs 55 to 58 of schedule 4 to the ERA13.

²⁷ See paragraph 91 of CC3 which explains the process for any further remedies implementation that may be required once the group has been disbanded.

²⁸ Paragraph 51 of schedule 4 to the ERA13. See also *Competition Commission Rules of Procedure* (CC1).

which market reference groups must have all due regard when conducting market investigations.²⁹

DRAFT

²⁹ Paragraph 52 of schedule 4 to the ERA13.

2 MARKET STUDIES

- 2.1 Market studies are 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. 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 ERRA13 that are explained in this guidance. Annexe A to this guidance lists the parts of OFT519 that are significantly amended, or superseded, by those changes.
- 2.2 This chapter explains the changes to the market study process that take effect on 1 April 2014. These are, in summary:
- changes to the requirements for commencing a market study
 - the introduction of a statutory time limit within which market studies must be completed, and
 - changes to the powers of investigation available to the CMA in relation to market studies, and to the sanctions for non-compliance.
- 2.3 As explained in chapter 1, one possible outcome of a market study is a market investigation reference. Guidance on the market investigation reference process is contained in *Market investigation references* (OFT511). OFT511 remains applicable after 1 April 2014, subject to the changes set out in the ERRA13 that are explained in this guidance. Annexe A to this guidance lists the parts of OFT511 that are significantly amended, or superseded, by those changes.
- 2.4 Accordingly, this chapter also explains the changes to the market investigation reference process that take effect on 1 April 2014. These are, in summary:
- changes to the way in which cases raising public interest issues are handled, and
 - the introduction of a new power to make cross-market references.
- 2.5 Each of these changes to market studies and market investigation references is explained below.

Market study notices

2.6 A market study formally begins with publication of a market study notice by the CMA.³⁰ A market study notice must be published where the CMA is proposing to carry out its functions under section 5 of the EA02 for the following purposes:

- to consider the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the UK has or may have effects adverse to the interests of consumers, and
- to assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.³¹

2.7 The CMA Board is responsible for deciding whether the duty to publish a market study notice applies in a particular case. It is therefore the CMA Board that will decide whether to launch a market study in a particular case.

2.8 A market study notice must contain the following information:

- the scope of the market study
- the period during which representations may be made to the CMA in relation to the study, and
- the timescales within which the study will be completed.³²

Proposed decision and market study report

2.9 Publication of a market study notice triggers the following statutory time limits:³³

³⁰ Chapter 4 of OFT519 explains the typical project stages of a market study. See also paragraphs 1.10 to 1.12 which outline the preliminary work that may be undertaken before a market study is launched.

³¹ Section 130A of the EA02. Prior to this, the OFT would usually publish a press release accompanied by a short document describing the market study in more detail (although it was not required to do so).

³² Subsection 130A(3) of the EA02. The CMA will continue the existing practice of publishing a timetable and high level milestones for market studies, as outlined in paragraph 4.8 of OFT519, and will include the timetable in the market study notice.

³³ As explained in paragraphs 2.11 to 2.15 publication of a market study notice also triggers the CMA's ability to exercise its mandatory investigatory powers.

- where the CMA proposes to make a market investigation reference in relation to the subject matter of a market study, it must publish notice of its proposed decision and begin the process of consulting relevant persons within six months of publication of the market study notice³⁴
- where the CMA does not propose to make a market investigation reference, but has received (non-frivolous) representations in response to a market study notice arguing that a reference should be made, it must publish notice of its proposed decision and begin the process of consulting relevant persons within six months of publication of the market study notice³⁵
- the CMA must within 12 months of publication of a market study notice publish a market study report setting out its findings with reasons and the action (if any) it proposes to take,³⁶ and
- where a market study report sets out a decision to make a market investigation reference, the reference must be made at the same time as the report is published.³⁷

2.10 The statutory upper time limits³⁸ that apply to the market study process³⁹ are set out below in simplified diagrammatic form:

³⁴ Subsection 131B(1) of the EA02.

³⁵ Subsection 131B(1) of the EA02.

³⁶ Subsections 131B(4) and (5) of the EA02. The six and 12 month periods are upper time limits and may be adjusted downwards by order. If the Secretary of State proposes to make an order adjusting these periods, he/she must consult the CMA and other relevant persons before doing so.

³⁷ Subsection 131B(6) of the EA02.

³⁸ These time limits are the statutory maxima: to the extent possible, the CMA aims to complete the market study process in a shorter period of time.

³⁹ The procedures and time limits differ in a case where a public interest intervention notice has been issued by the Secretary of State. See paragraphs 2.17 to 2.29.



Investigatory powers for market studies

2.11 Publication of a market study notice triggers the CMA’s ability to exercise statutory investigatory powers to assist it in carrying out its functions under section 5 of the EA02.⁴⁰ The powers are:

- to give notice requiring any person to attend a specified place to give evidence to the CMA or a person nominated for the purpose
- to give notice requiring any person to produce specified documents or categories of documents that are in that person’s custody or under his control, and
- to give notice requiring any person carrying on business to supply specified forecasts, estimates, returns or other information in a specified form and manner.⁴¹

2.12 The CMA has the same investigatory powers available to assist it in monitoring and enforcing compliance with UILs that it has accepted instead of making a reference.⁴² These powers are also available during the market investigation and remedies implementation stages (see chapters 3 and 4).

2.13 The sanctions for non-compliance with requests made by the CMA using its statutory investigatory powers are:

⁴⁰ Subsection 174(1)(a) of the EA02.

⁴¹ Subsections 174(3) to (5) of the EA02.

⁴² Subsections 174(1)(b) and (c) of the EA02. Further information on the process for acceptance of UILs is contained in chapter 2 of OFT511.

- non-compliance, either intentionally or without reasonable excuse, with a mandatory request allows the CMA to impose a financial penalty (non-compliance includes failures to attend interviews or meetings with the CMA, failures to provide evidence, and failures to produce documents required by the CMA), and
- it is a criminal offence for a person intentionally to alter, suppress or destroy information that he/she has been required by notice to produce.⁴³

2.14 Financial penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts are set by order and are, as at 1 April 2014, £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily penalty).⁴⁴ Persons committing a criminal offence are liable, on summary conviction, to a fine not exceeding the statutory maximum, and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.⁴⁵

2.15 The CMA will use its statutory investigatory powers where necessary to ensure that information requests are answered completely and in a timely manner. It will adopt a flexible approach – the form of engagement with parties may differ depending on the individual circumstances (for example, the extent of informal co-operation achieved or the nature of the information requested).

Market investigation references

2.16 As explained in chapter 1, market investigation references are one possible outcome of a market study. The ERA13 makes changes to the reference process in certain cases, by:

- amending the process for intervention by the Secretary of State in cases raising public interest issues, and
- introducing a new power to make cross-market references.

The following sections explain these changes.

⁴³ Section 174A of the EA02.

⁴⁴ See the Competition and Markets Authority (Penalties) Order 2014 and CMA4con: Administrative Penalties: Statement of policy on the CMA's approach [currently in draft and being consulted on].

⁴⁵ Subsection 174A(6) of the EA02.

Cases raising public interest issues

- 2.17 The Secretary of State may intervene in markets cases that raise defined public interest issues but is expected to do so only on extremely rare occasions. In these cases, where the CMA decides that a reference (ordinary or cross-market) should be made on competition grounds, the Secretary of State assumes responsibility for deciding whether the defined public interest issues are relevant to the case and, if so, the type of public interest reference that should be made.
- 2.18 There are two types of public interest reference, both of which are initiated by the Secretary of State giving a public interest intervention notice to the CMA before a reference is made:⁴⁶
- a full public interest reference, where the Secretary of State requests the CMA to investigate the defined public interest issues alongside the competition issues, and
 - a restricted public interest reference, where the Secretary of State retains the ability to consider the defined public interest issues him/herself whilst requesting the CMA to investigate the competition issues.⁴⁷
- 2.19 The ability of the Secretary of State to make full public interest references on extremely rare occasions gives the Government the option of drawing on the CMA's investigative expertise to look across markets cases at issues that relate to competition and go wider, rather than having to create independent inquiry bodies.
- 2.20 As at 1 April 2014, national security is the only specified public interest consideration in relation to the markets regime. Other public interest considerations may be specified in future by order.⁴⁸

⁴⁶ Under the provisions of the EA02 that applied prior to 1 April 2014, public interest interventions could only be made during a specified period commencing on the date of the reference.

⁴⁷ Under the provisions of the EA02 that applied prior to 1 April 2014 the Secretary of State only had the ability to investigate public interest issues him/herself, under what is now termed the restricted public interest reference procedure. The full public interest reference procedure is introduced by the ERRA13.

⁴⁸ Section 153 of the EA02.

Issuing intervention notices

- 2.21 The Secretary of State may give an intervention notice to the CMA if he/she believes that one or more public interest considerations may be relevant to the matter being investigated by the CMA.⁴⁹ The CMA has a corresponding duty to bring to the attention of the Secretary of State any case that it believes raises a specified public interest consideration.⁵⁰
- 2.22 The notice must be issued within the period commencing on the publication by the CMA of a market study notice⁵¹ and ending once a reference has been made, UILs accepted or upon publication of the CMA's decision not to make a reference.⁵² Intervention notices cannot be issued after this period.
- 2.23 Intervention notices contain certain prescribed information, including⁵³
- the subject matter of the market study
 - the date of publication of the market study notice, and
 - the public interest consideration(s) that may be relevant to the case.
- 2.24 Intervention notices must be published by the Secretary of State.⁵⁴
- 2.25 Where an intervention notice is in force and the CMA proposes to make a market investigation reference, the CMA cannot itself make the reference or publish its market study report. In such cases, the CMA is instead required to provide its market study report⁵⁵ to the Secretary of State within 12 months from the date of publication of the market study notice.⁵⁶
- 2.26 The Secretary of State decides whether the public interest consideration stated in the intervention notice is relevant to the matter and, if so, whether to make a restricted public interest reference or a full public interest reference. If

⁴⁹ Subsection 139(1) of the EA02.

⁵⁰ Subsection 152(1) of the EA02.

⁵¹ If the CMA has not published a market study notice, the period from which an intervention notice may be issued commences with the CMA's consultation on whether to make a market investigation reference.

⁵² Subsection 139(1A) of the EA02.

⁵³ Subsection 140(1) of the EA02. The required information differs slightly in cases where a market study notice has not been published: see subsections 140(1)(a) and (b) of the EA02.

⁵⁴ Subsection 172(3)(c) of the EA02.

⁵⁵ In a case where no market study notice has been issued this is the document containing the CMA's reasons for its decision. In such cases, the 12 month time limit does not apply.

⁵⁶ Subsection 140A(3) of the EA02.

the Secretary of State decides to make a full public interest reference, he/she must also decide whether to appoint one or more persons with relevant expertise in relation to the public interest issue in question (public interest expert(s)) to advise the CMA during the market investigation stage.⁵⁷

2.27 If the Secretary of State decides that there is no public interest consideration relevant to the matter, he/she will make a market investigation reference which will follow the normal procedure. In this case the CMA will conduct its investigation into the competition issues with no further involvement of the Secretary of State.

2.28 The reference decision of the Secretary of State must be published, together with the market study report of the CMA.⁵⁸

2.29 The procedures that apply to the CMA's conduct of cases during the market investigation stage following a full public interest reference are outlined in chapter 3.

Cross-market references

2.30 The ERA13 gives the CMA the power to make a cross-market reference: that is, to refer a specific feature (or combination of features) existing in more than one market without also having to refer the whole of each market concerned.⁵⁹

2.31 In order to make a cross-market reference the CMA must have reasonable grounds for suspecting that a feature, or combination of features, of more than one market in the UK prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK.⁶⁰ Only features that relate to conduct can be the subject of a cross-market reference.⁶¹

2.32 A cross-market reference must specify:

- the enactment under which it is made and the date on which it is made, and

⁵⁷ Subsections 140A(4) to (12) of the EA02.

⁵⁸ Subsections 140A(10) and 172(1)(da) of the EA02.

⁵⁹ Subsections 131(2A) and (6) of the EA02.

⁶⁰ Section 131 of the EA02.

⁶¹ Subsections 131(1) and 131(2A) of the EA02.

- the feature or features concerned and the descriptions of goods or services to which it or they relate.⁶²
- 2.33 The same procedural provisions apply to market studies which result in cross-market references as they do to market studies which result in ordinary references. These provisions include: the requirement to publish a market study notice, statutory time-limits, decision-making procedures, and the CMA's investigatory and enforcement powers. Public interest interventions may also be made in relation both to cross-market references and to ordinary references.
- 2.34 Where the CMA accepts UILs in a case instead of making a cross-market reference, no ordinary or cross-market reference can be made for a period of 12 months that relates to or includes the same feature(s) in relation to the same market(s) as those covered by the UILs.⁶³
- 2.35 The types of issue for which cross-market references are likely to be most useful include:
- features that do not fit neatly within one market (for example, the collective licensing of public performance and broadcasting rights in sound recordings), and
 - recurring sources of consumer complaint or identified detriment which have the potential to affect competition adversely across multiple, distinct markets (for example, the sale of secondary products at particular points of sale).
- 2.36 The CMA will seek to ensure a targeted use of the cross-market reference power with a clear delineation of scope in each case, in order that its interventions across markets are made only where they are needed, and to avoid imposing unnecessary burdens on businesses involved.

⁶² Subsection 133(1) of the EA02. See also paragraph 3.11 of OFT511 which explains the requirements in relation to ordinary references.

⁶³ Section 156 of the EA02. The prohibition on reference does not apply where there has been a breach of UILs, or where false or misleading information has been supplied by the person giving the UILs.

3 MARKET INVESTIGATIONS

- 3.1 Market investigations are detailed examinations into whether there is an AEC in the market(s) referred and, if so, what remedial action may be appropriate.
- 3.2 As explained in chapters 1 and 2, a market investigation is one possible outcome of a market study. It is commenced by the making of a market investigation reference. The CMA may make a reference where it has reasonable grounds for suspecting that any feature, or combination of features, of a market or markets in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.⁶⁴
- 3.3 When a competition problem is identified, a wide range of legally enforceable remedies is available, aimed at making the market(s) more competitive in future. Guidance on the substantive and procedural aspects of market investigations and possible outcomes is contained in *Guidelines for market investigations* (CC3 (revised)). CC3 remains applicable after 1 April 2014, subject to the changes set out in the ERRA13, as explained in this guidance. Annexe A to this guidance lists the parts of CC3 that are significantly amended, or superseded, by those changes.
- 3.4 This chapter explains the changes to the market investigation stage following reference that take effect on 1 April 2014. These are, in summary:
- changes to the statutory time limits within which market investigations must be completed
 - changes to the way in which cases raising public interest issues are handled, and
 - the introduction of a new power to conduct investigations following a cross-market reference.

Each of these changes is explained below.

⁶⁴ Section 131 of the EA02.

Time limits and procedure

- 3.5 The CMA publishes an administrative timetable setting out the key stages in the market investigation process. There is also a statutory time limit on completion of this process. A market investigation must be completed and the report published within 18 months of the date of reference.⁶⁵
- 3.6 The CMA may extend this period by up to a further six months if it considers that there are special reasons why the investigation cannot be completed and the report published within 18 months. Only one extension is possible. A decision to extend the timetable must be published.⁶⁶
- 3.7 The power to extend the timetable is most likely to be used in complex cases (for example, where there are multiple parties, issues and/or markets), in order to ensure a thorough and fair consideration of the issues raised and proper engagement with parties. It should generally be clear by the time of the provisional findings⁶⁷ how likely it is that an extension will be needed.⁶⁸

Cases raising public interest issues

- 3.8 As outlined in chapter 2, if the Secretary of State decides during the market study stage that one or more specified public interest consideration(s) are relevant to a matter, he/she may decide to make a full public interest reference, in which case the CMA is required to consider the public interest issues alongside the competition issues.⁶⁹
- 3.9 A market investigation following a full public interest reference follows the same main procedural steps as a market investigation that addresses

⁶⁵ Section 144 of the EA02. Under the EA02 prior to amendment the statutory time limit was 24 months. This time limit differs for full public interest references where the Secretary of State proposes to appoint a public interest expert to assist the CMA. In such cases, the 18 month period runs from the earliest of: the date of the expert's appointment, the Secretary of State giving notice that he/she does not intend to appoint an expert, or the period ending two months from the date of reference.

⁶⁶ Subsection 172(2)(za) of the EA02.

⁶⁷ Paragraph 55 of CC3 explains that provisional findings are typically published in months 11 to 12 of an 18 month market investigation.

⁶⁸ The 18-month and additional six month periods set out above are upper limits, and may be adjusted downwards by order. If the Secretary of State proposes to make an order adjusting those periods, he/she must consult the CMA and other relevant persons before doing so.

⁶⁹ See paragraph 1.15.

competition issues only.⁷⁰ There are however certain differences in relation to the questions that must be decided by the CMA following a full public interest reference, and the subsequent reporting and remedies implementation processes that must be followed. These differences are outlined below.

Questions to be decided on a full public interest reference

3.10 Following a full public interest reference, the CMA is required to decide:

- whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK,⁷¹ and
- if so, whether, taking into account only any AEC and the admissible public interest consideration(s), the feature or features which gave rise to the AEC operate(s) or may be expected to operate against the public interest.⁷²

3.11 If the CMA finds that there is an adverse effect on the public interest, it must advise on what (if any) action should be taken by the Secretary of State to remedy that effect.⁷³ If the CMA does not find any adverse effect on the public interest, but finds an AEC, it must decide what competition remedies it or others should undertake.⁷⁴

Reporting procedure following a full public interest reference

3.12 Following its investigation, the CMA prepares a market investigation report containing its conclusions on both competition issues and public interest issues.

3.13 Where the CMA finds an adverse effect on the public interest, it cannot publish its market investigation report itself. In such cases, it is instead required to provide the report to the Secretary of State. If the Secretary of State has appointed a public interest expert to assist the CMA, the CMA must also take the expert's views into account and include a summary of the

⁷⁰ The main stages of an investigation are explained in paragraphs 62 to 87 of CC3.

⁷¹ Subsection 141A(2) of the EA02. This relates to an ordinary reference. The first question that the CMA is required to decide differs slightly in relation to a cross-market reference, as explained in paragraph 3.17.

⁷² Subsection 141A(4) of the EA02.

⁷³ Subsection 141A(5) of the EA02.

⁷⁴ Subsection 141A(6) of the EA02.

expert's views in the report. The report must be provided to the Secretary of State within 18 months of the date of reference.⁷⁵

- 3.14 Having received the report, the Secretary of State decides whether to make an adverse public interest finding and, if so, how the adverse effects should be remedied, taking into account the recommendations included in the CMA's report on the matter. The Secretary of State must accept the CMA's findings and remedies in relation to competition issues. The Secretary of State's decision must be made and published within 90 days of receipt of the CMA's market investigation report.⁷⁶
- 3.15 Where the CMA does not find an adverse effect on the public interest, it publishes the market investigation report itself. If the CMA finds an AEC and identifies remedial action to be taken by it, the remedies implementation process follows the normal procedure with no further involvement of the Secretary of State.

Cross-market references

- 3.16 As explained in chapter 2, the CMA has the power to refer a specific feature (or combination of features)⁷⁷ existing in more than one market without also having to refer the whole of each market concerned. This is called a cross-market reference.
- 3.17 The statutory questions to be decided by the CMA in a cross-market investigation differ from the question to be decided following an ordinary reference.⁷⁸ In a cross-market investigation, the CMA must 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,

⁷⁵ Subject to the possibility of an extension of up to six months as explained in paragraph 3.6. The starting date for the 18 month period may be later in cases where the Secretary of State has proposed to appoint a public interest expert, as explained in footnote 65.

⁷⁶ Subsection 146A(6) of the EA02.

⁷⁷ Only features that relate to conduct can be the subject of a cross-market reference. See paragraph 2.31.

⁷⁸ See footnote 71 above.

prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.⁷⁹

- 3.18 If the CMA reaches an adverse finding following a cross-market reference, it must also consider remedies (see chapter 4).
- 3.19 The same procedural provisions (including statutory time limits) apply to cross-market investigations as to ordinary market investigations, and the CMA's investigatory and enforcement powers are the same in relation to both reference types.

DRAFT

⁷⁹ Subsection 134(1A) of the EA02.

4 IMPLEMENTATION OF REMEDIES

4.1 If, following any type of market investigation, the CMA finds an AEC, it is required to consider whether remedies are appropriate. In ordinary and cross-market references it must decide the following questions:

- whether action should be taken by it for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the AEC
- whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on consumers so far as it has resulted from, or may be expected to result from, the AEC, and
- in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.⁸⁰

4.2 If the CMA has decided to take action itself to remedy, mitigate or prevent an adverse effect on competition, it has the choice of accepting undertakings from the relevant parties and/or of making an order.

4.3 The period following publication of the final report during which the CMA puts in place its remedies is known as the remedies implementation stage.

4.4 This chapter explains the changes that will take effect on 1 April 2014 to the remedies implementation stage following a market investigation report finding an AEC. These changes are, in summary:

- the introduction of statutory time limits within which remedies must be implemented by the CMA
- the introduction of mandatory investigatory powers for the CMA during the remedies implementation and subsequent monitoring periods, and

⁸⁰ Subsection 134(4) of the EA02. In full public interest references, the CMA is additionally required to decide whether (and, if so, what) action should be taken by the Secretary of State to remedy, mitigate or prevent any adverse public interest effects that have been identified. In cases where the Secretary of State makes an adverse public interest finding, he/she may take action to remedy, mitigate or prevent any of the adverse effects identified.

- changes to the powers available to the CMA to impose remedies by order, and clarification of the powers available to the CMA following a report to reverse pre-emptive action that has been taken.

Each of these changes is explained below.

Time limits and procedure

- 4.5 The CMA publishes an administrative timetable for the implementation of those remedies where it has decided to take action itself. With effect from 1 April 2014 the ERA13 introduces statutory time limits for the implementation of remedies by the CMA to address findings from a market investigation. The CMA must accept final undertakings or make a final order within six months of the date of publication of the market investigation report.⁸¹ This six month period includes a period of formal public consultation.
- 4.6 The CMA may extend the six-month period by up to a further four months if it considers that there are special reasons why final undertakings cannot be accepted or a final order made within the statutory deadline. Only one extension is possible.⁸² A decision to extend the timetable must be published.⁸³
- 4.7 The power to extend the timetable is most likely to be used in more complex cases, for example where consumer testing of the detailed implementation of remedies is necessary, where proposed remedies give rise to complex practical issues, or where an additional consultation is required to address material changes arising from comments made in earlier consultations.
- 4.8 During the period covered by the statutory timetable for remedies implementation, the CMA has investigatory powers.⁸⁴ In addition to the ability to impose penalties in some circumstances, the CMA has the ability to ‘stop the clock’ if it considers that any person has failed adequately to respond to

⁸¹ Section 138A of the EA02. These time limits do not apply to any further implementation required after final undertakings have been accepted or a final order made.

⁸² The six month and additional four month periods set out above are upper time limits, and may be adjusted downwards by order. If the Secretary of State proposes to make an order adjusting those periods, he/she must consult the CMA and other relevant persons before doing so.

⁸³ Subsection 172(2)(zb) of the EA02.

⁸⁴ Subsection 174(1)(b) of the EA02. The scope of these powers and sanctions for non-compliance are explained in paragraphs 2.11 to 2.15. The powers remain available to the CMA in relation to the enforcement and monitoring of remedies that have been implemented, and in relation to its remedies monitoring function.

any of its mandatory investigatory powers (for example, a request for information).⁸⁵ In this case, the time limits set out above are extended. In effect, the timetable is suspended either until the information requested is provided to the satisfaction of the CMA, or until the CMA publishes a notice to cancel the extension. The extension periods described in this paragraph and in paragraph 4.6 can be used together if necessary, in which case the extension periods are added together.⁸⁶

Scope of the CMA's order-making powers

4.9 The CMA's decision as to whether to implement remedies by means of accepting undertakings or making an order is determined on a case-by-case basis. It is informed both by the scope of the CMA's order-making powers under schedule 8 to the EA02 and by practical issues such as the number of parties concerned and their willingness to negotiate and agree undertakings.

4.10 With effect from 1 April 2014 the CMA has additional flexibility and stronger enforcement powers under schedule 8 in two respects:

- parties may be required to publish certain non-price information without also being required to publish price information,⁸⁷ and
- parties may be required to appoint and remunerate an independent third party to monitor and/or implement remedies and to deal with disputes.⁸⁸

Interim measures

4.11 After the CMA has published its final report but before the reference has been finally determined (by final undertakings being accepted or a final order made), the CMA has the power to prevent pre-emptive action that might impede the taking of final action in relation to the investigation. It may do so by accepting from the parties concerned interim undertakings to take such action as the CMA thinks is appropriate or by making an interim order.⁸⁹

⁸⁵ Subsections 138A(3) to (5) of the EA02.

⁸⁶ Section 138B of the EA02.

⁸⁷ Under the EA02 prior to amendment a remedy implemented by means of order could require publication of non-price information only together with price information.

⁸⁸ Under the EA02 prior to amendment the appointment of third parties and the terms of such appointment relied on the parties' agreement.

⁸⁹ Sections 157 and 158 of the EA02.

4.12 The CMA can take steps to require parties to reverse any action that has already occurred before any interim measures have been put in place.⁹⁰ The intention behind this clarification is to make clear the powers available to the CMA, once a report has been published, to prevent the effectiveness of any ultimate remedy being jeopardised through pre-emptive action by the parties.

DRAFT

⁹⁰ Subsections 157(2B) and 158(2B) of the EA02.

5 TRANSITIONAL ARRANGEMENTS

5.1 This chapter explains the transitional arrangements that apply to market studies and market investigations that are ongoing as at 1 April 2014.⁹¹ In this chapter:

- the old law means the EA02 and any related provision of law prior to amendment by the ERRA13
- the new law means the EA02 and any related provision of law as amended by the ERRA13, and
- the effective date means 1 April 2014.

5.2 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 5.4)⁹²
- 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 5.5).⁹³

5.3 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.

Ongoing market studies

5.4 The new law will apply to ongoing market studies with the exception of the following provisions, which will not apply:

⁹¹ The transitional provisions are set out in [Statutory Instrument].

⁹² For the purposes of this chapter 'ongoing' 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.

⁹³ For the purposes of this chapter 'ongoing' 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 EA02 as at the effective date.

- the requirement to publish a market study notice on commencement of a market study⁹⁴
- the statutory time limits for the market study process that are triggered by publication of a market study notice,⁹⁵ and
- the investigatory powers that are triggered by publication of a market study notice.⁹⁶

Ongoing market investigations

5.5 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 process⁹⁷
- the revised maximum penalty amounts for non-compliance with investigatory powers will not apply where investigatory powers are exercised prior to the effective date,⁹⁸ and
- the statutory time limits for completion of the remedies implementation process⁹⁹ will not apply to investigations that are in the remedies implementation stage as at the effective date.¹⁰⁰

⁹⁴ See paragraphs 2.6 to 2.8.

⁹⁵ See paragraphs 2.9 to 2.10.

⁹⁶ See paragraphs 2.11 to 2.15.

⁹⁷ See paragraphs 3.5 to 3.7.

⁹⁸ See paragraph 2.14.

⁹⁹ See paragraphs 4.5 to 4.6.

¹⁰⁰ For the purposes of this chapter, these are investigations in relation to which the final report has been published but where the reference has not been finally determined.

ANNEXE A: KEY CHANGES TO EXISTING MARKETS GUIDANCE

The following table lists those sections of the three existing main markets guidance documents¹⁰¹ that are significantly amended or superseded by the changes that are outlined in this guidance. It is not intended to provide a comprehensive list of all changes, nor does it address all existing guidance documents which may be of relevance to the markets regime. Note also the following general limitations which apply to all existing OFT and CC markets-related guidance documents that are listed in Annexe B as having been adopted by the CMA Board (the adopted guidance):

- in the case of conflict between this guidance and the adopted guidance, this guidance prevails
- the original text of the adopted guidance has been retained unamended: as such, that text does not reflect or take account of developments in case law, legislation or practice since its original publication, and
- all existing guidance documents should be read subject to the following cross-cutting amendments:
 - references to the OFT or CC (except where referring to specific past OFT or CC practice or case law) should be read as referring to the CMA
 - references to 'referral to the CC' or 'a reference to the CC' should be read as referring to the referral of a case by the CMA (or Secretary of State) for a market investigation by a market reference group of CMA panel members
 - references to articles of the EC Treaty should be read as referring to the equivalent articles of the Treaty on the Functioning of the European Union (TFEU)
 - certain OFT or CC departments, teams or individual roles may not be replicated in the CMA, or may have been renamed. A copy of the CMA's organisational chart is available on the CMA's website, and
 - parties should check any contact details against those listed on the CMA's website, which will be the most up to date.

¹⁰¹ OFT519, OFT511 and CC3 (revised).

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
Paragraph 4.8	Should be read in conjunction with paragraph 2.6 which explains the requirement to publish a market study notice. From 1 April 2014 market studies are launched within the meaning of paragraph 4.8 by publication of a market study notice
Paragraph 4.10 (footnote 12)	The last two sentences of footnote 12 are superseded by paragraphs 2.11 to 2.15 which explain the investigatory powers available to the CMA and when they are available in relation to market studies
Paragraphs 4.21 and 4.22	Should be read in conjunction with paragraph 2.9 which explains the requirement on the CMA to publish a market study report within the statutory timeframe
Paragraph 5.13	The last two sentences of this paragraph are superseded by paragraphs 2.9 and 2.10 which sets out the statutory timescales and consultation process that apply when the CMA proposes to make a reference
Market investigation references (OFT511)	
Paragraph 1.6	Should be read in conjunction with paragraphs 1.21 to 1.24 which explain how the reference process is changed to take account of the formation of the CMA
Paragraph 1.7	Should be read in conjunction with paragraph 2.31 which explains that only features relating to conduct can be the subject of a cross-market reference
Paragraph 2.19	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
Paragraphs 3.1 to 3.3	These paragraphs are superseded by paragraphs 2.11 to 2.15 which explain the investigatory powers available to the CMA and when they are available in relation to market studies
Paragraphs 3.6 to 3.9	Should be read in conjunction with paragraph 2.9 which sets out the statutory timescales and consultation process that apply when the CMA proposes to make a reference
Paragraph 3.10	This paragraph is superseded by paragraphs 2.17 to 2.29 which explain the changes made to the procedure for making public interest interventions

EXISTING GUIDANCE REFERENCE	SUPPLEMENTAL GUIDANCE REFERENCE
Guidelines for market investigations (CC3 (revised))	
Paragraphs 22 and 46 to 48	Should be read in conjunction with paragraphs 1.23 to 1.27 which explain how the reference process and appointment of the reference group are changed to take account of the formation of the CMA
Paragraph 25	This paragraph is superseded by paragraphs 3.12 to 3.15 which explain the changes made in relation to how cases raising specified public interest considerations are handled during the market investigation stage
Paragraph 54	The first sentence of this paragraph is superseded by paragraphs 3.5 to 3.7 which explain the shorter statutory timescales that apply to the market investigation stage
Paragraph 89	Should be read in conjunction with paragraphs 4.5 to 4.7 which explain the statutory timescales applicable to the remedies implementation period

DRAFT

ANNEXE B: STATUS OF EXISTING OFT AND CC GUIDANCE

The table below indicates the status of OFT and CC markets-related guidance documents and publications that had been published and were in effect prior to the transfer of their market study and market investigation functions to the CMA on 1 April 2014. Certain of those documents have been adopted by the CMA Board in order to facilitate transition to the new UK markets regime, and to minimise disruption to the parties and the CMA.

OFT/CC CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/ obsolete ¹	Adopted by the CMA Board ²
OFT511	Market investigation references	-	✓
OFT514	Super-complaints: guidance for designated consumer bodies	-	✓
OFT518	Overview of the Enterprise Act	✓	-
OFT519	Market studies: guidance on the OFT approach	-	✓
OFT530	Practical information – everything you need to know about the Enterprise Act	✓	-
OFT548	Super-complaint concurrent duties	-	✓
OFT1060	Memorandum of understanding between the OFT and the CC on the variation and termination of merger and market undertakings and orders	✓	-
CC1	Competition Commission rules of procedure for merger reference groups, market reference groups and special reference groups	-	✓
CC3	Market investigation references: Competition Commission guidelines	-	✓
CC4	Competition Commission: general advice and information	✓	-
CC5	Statement of policy on penalties	✓	-
CC6	Competition Commission: guidance to merger reference groups, market reference groups and special reference groups	✓	-
CC7	Chairman's guidance on disclosure of information in	-	✓

OFT/CC CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/ obsolete ¹	Adopted by the CMA Board ²
	merger and market inquiries		
CC12	Disclosure of information by the CC to other public authorities	✓	-
	Competition Commission: suggested best practice for submissions of technical economic analysis	-	✓
	Competition Commission: guidance on outside interests of members, staff and external advisors	✓	-

¹ OFT and CC publications listed in this column have, as at date of publication of this guidance, been replaced, or rendered obsolete, by CMA guidance or publications.

² OFT and CC publications listed in this column have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future). See Annexe A above for the general limitations that apply to the adopted guidance.