

# **Competition and Markets Authority (CMA)**

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

**Consultation document**

September 2013

CMA11con

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Any enquiries regarding this publication should be sent to us at: The Transition Team on behalf of the CMA, Department for Business, Innovation and Skills, 3<sup>rd</sup> Floor, Orchard 2, 1 Victoria Street, London SW1H 0ET, or email: [cmaconsultation@bis.gsi.gov.uk](mailto:cmaconsultation@bis.gsi.gov.uk).

This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## **Scope of this consultation**

### **Topic of this consultation**

This consultation seeks the views of interested parties on the attached draft guidance (the Draft Guidance) which the Transition Team (the Transition Team) (on behalf of the Competition and Markets Authority (CMA) and in consultation with the Office of Fair Trading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 (ERRA13) to the way in which reviews of final undertakings and orders are conducted under the Enterprise Act 2002 (EA02). 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This consultation and the accompanying Draft Guidance have been drafted by the Transition Team which has been appointed by the CMA Chair Designate and Chief Executive Designate, and consists of individuals from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.<sup>1</sup>

### **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 the variation and termination of merger, monopoly and market final undertakings and orders. 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We would welcome your comments on any aspect of the Draft Guidance contained in this document.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.

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<sup>1</sup> Pending formal creation of the CMA on 1 October 2013, the OFT and CC act on behalf of the CMA through the Transition Team.

You can respond to this consultation:

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

By post to:

The Transition Team on behalf of the CMA  
Department for Business, Innovation and Skills  
3<sup>rd</sup> 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 Easha Lam on the email address above or by telephone on 020 7215 2044.

## **Closing date**

Responses should be received by 5pm on 11 November 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](mailto: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.

**CMA11con**

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# 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 take on the CC's powers and duties in relation to the conduct of appeals regarding regulatory determinations such as under section 193 of the Communications Act 2003
  - the CMA will also be able to bring criminal proceedings against individuals who commit the cartel offence under section 188 of the EA02, 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 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.<sup>1</sup> 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 CMA's approach to reviews of final undertakings and orders conducted under sections 92 and 162 of the EA02 and section 88 of the Fair Trading Act 1973 (as preserved in Schedule 24 of the EA02) . It is intended that the Draft Guidance will replace and supersede the existing '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'.<sup>2</sup>

1.5 This Draft Guidance does not cover the variation or termination of initial and interim undertakings or orders, such as undertakings under section 80 or orders under section 72 or 81 of the Enterprise Act 2002 (EA02).<sup>3</sup>

1.6 The Transition Team is consulting separately (see CMA12con) on its proposal to put existing OFT and CC guidance documents to the CMA Board (once established) for adoption.<sup>4</sup> Annexe B of the Draft Guidance lists the existing OFT and CC guidance documents relevant to the subject of this consultation that it is currently proposed will be put to the CMA Board for adoption.<sup>5</sup> Those adopted guidance documents will however be kept under

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<sup>1</sup> An overview of the changes is contained in CMA1: Towards the CMA.

<sup>2</sup> OFT1060, Version 2 published on 10 March 2011.

<sup>3</sup> In the case of mergers, guidance for variation of initial and interim undertakings or orders is available in 'Mergers: guidance on the CMA's jurisdiction and procedure (CMA2)' [currently in draft and being consulted on].

<sup>4</sup> 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 as referring in each case to the CMA). See further Annexe A of the Draft Guidance.

<sup>5</sup> 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

review once the CMA is in operation, in the light of its developing practice and case experience.

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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 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.

## 2 SUMMARY OF CHANGES TO THE CURRENT POSITION

### Roles of the OFT and the CC to be brought together

- 2.1 Under the 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.
- 2.2 The ERR13 has not changed the substantive test in the EA02 for considering reviews of undertakings and orders.<sup>6</sup> However, the ERR13 brings together the roles of the OFT and the CC in the review process into the CMA. The existing approach to reviews will therefore need to be changed in order to reflect the abolition of the OFT and the CC and the creation of a single authority, the CMA. The institutional reform brought about by the ERR13 also provides an opportunity to simplify and streamline the review process, through removing any duplication or inefficiency from the current participation of two authorities in the process. This reform will facilitate more timely consideration of variation and termination requests, generally within a published administrative timetable.
- 2.3 The proposed streamlined process is set out in the Draft Guidance. In summary, in considering variation and termination of final undertakings and orders, either upon request from a party or under the CMA's own initiative, the CMA will consider whether there has been a change of circumstances. If there has, the CMA will then consider what action, if any, should be taken.

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<sup>6</sup> The government consulted on proposals to introduce statutory timescales and information-gathering powers for this process but decided these reforms were not a priority at this time (See 'Growth, Competition and the Competition Regime: Government Response to the Consultation' dated March 2012).

## **Cases raising public interest issues**

- 2.4 Under the EA02, the Secretary of State is responsible for accepting undertakings or imposing orders in certain public interest cases.
- 2.5 In addition, in a small number of instances the CMA retains a duty to advise the Secretary of State on FTA orders and undertakings which have not been transferred from the Secretary of State to the CMA by statutory instrument. This Draft Guidance does not relate to the process by which the CMA provides advice to the Secretary of State in these instances.<sup>7</sup>

## **Transitional arrangements**

- 2.6 The Draft Guidance will take effect on 1 April 2014, the date on which the OFT's and CC's functions transfer to the CMA. The new approach set out in the Draft Guidance will apply to all ongoing and future cases, except those expressly out of scope of the Draft Guidance. Specific guidance on how reviews at the OFT stage at the effective date will be dealt with are set out in Annexe A of the Draft Guidance. Although the Draft Guidance will apply to ongoing cases, when conducting its assessment, the CMA will build upon the information submitted by parties, and any analysis undertaken by the OFT and/or the CC, prior to 1 April 2014.

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<sup>7</sup> Section 92(3) of the EA02, as amended by the ERRA13.

## ANNEXES

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## **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 review of final undertakings and orders under the EA02? If not, what aspects do you think are missing?**
- 2. Do you agree with the proposed simplified approach to the reviews of undertakings and orders, as set out in the Draft Guidance?**
- 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. 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](http://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)**

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

[2014]

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# 1 INTRODUCTION

- 1.1 This guidance covers the Competition and Markets Authority's (CMA's) approach to the variation and termination of merger, monopoly and market final undertakings and orders.<sup>1</sup>
- 1.2 This guidance does not cover variation or termination of initial and interim undertakings or orders, such as undertakings under section 80 or orders under section 72 or 81 of the Enterprise Act 2002 (EA02).<sup>2</sup> Accordingly, unless otherwise specified, the term "undertaking or order" in this guidance should be read as referring only to final undertakings and orders.
- 1.3 Further, in a small number of instances, the CMA retains a duty to advise the Secretary of State on orders and undertakings made under the Fair Trading Act 1973 (FTA) which have not been transferred from the Secretary of State to the CMA by statutory instrument. This guidance does not relate to the process by which the CMA provides advice to the Secretary of State in these instances.<sup>3</sup>
- 1.4 This guidance supersedes 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 (the MoU).
- 1.5 The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when it deals with reviews of undertakings and orders but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.
- 1.6 This document is not a definitive statement of, or a substitute for, the law itself and should not be relied upon as an alternative to seeking appropriate legal advice.

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<sup>1</sup> Variation and termination has been used as shorthand throughout this document. The statutory language in sections 92(2) and 162(2) of the EA02 refers to the release, variation or superseding of undertakings; and the variation or revocation of orders. See paragraph 2.2 below.

<sup>2</sup> In the case of mergers, guidance for variation of initial and interim undertakings or orders is available in 'Mergers: guidance on the CMA's jurisdiction and procedure' (CMA2) [currently in draft and being consulted on].

<sup>3</sup> Sections 92(3) and 162(3) of the EA02, as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13).

- 1.7 This guidance sets out the CMA's intended practice as of 1 April 2014. Transitional arrangements are set out in Annexe A. Please refer to the CMA website to ensure you have the latest version of this guidance as it may be revised from time to time to reflect changes in best practice or the law and our developing experience.
- 1.8 You may find it useful to read this document alongside other documents published by the CMA or adopted by its Board, including 'Merger Assessment Guidelines' (OFT1254/CC2), 'Guidelines for market investigations' (CC3) and 'Guidance on Disclosure of Information in Merger and Market Inquiries' (CC7). To the extent that any conflict arises between the content of such existing guidance documents and this guidance, the content of this guidance will prevail. Annexe B sets out the status of the Office of Fair Trading (OFT) and Competition Commission (CC) guidance documents and publications that are relevant to the variation and termination of undertakings and orders and that had been published and were in effect prior to the transfer of the mergers and markets functions to the CMA on 1 April 2014.

## 2 THE CMA'S STATUTORY ROLE

- 2.1 Undertakings and orders are the primary means by which remedies are implemented following the determination of merger and market investigation references under the Enterprise Act 2002 (EA02), as amended by the Enterprise and Regulatory Reform Act (ERRA13). Under the EA02,<sup>4</sup> undertakings are accepted or orders imposed by the CMA,<sup>5</sup> except in certain public interest cases where the Secretary of State is responsible for accepting undertakings or imposing orders.<sup>6</sup>
- 2.2 The CMA has a statutory duty<sup>7</sup> to keep under review undertakings and orders made under the FTA and under the EA02. From time to time, the CMA must consider whether, by reason of any change of circumstances:
- undertakings are no longer appropriate and need to be varied, superseded or released, and
  - an order is no longer appropriate and needs to be varied or revoked.<sup>8</sup>
- 2.3 Responsibility for deciding on variation or termination of undertakings or orders lies with the CMA in respect of all but a very limited number of undertakings and orders (see paragraph 1.3).

### **Substantive test in considering variation and termination of undertakings and orders**

- 2.4 In considering variation and termination of undertakings and orders, either upon request from a party or under the CMA's own initiative (see paragraphs 3.2 to 3.8), the CMA will consider whether there has been a change of circumstances. If there has, the CMA will then consider what action, if any, should be taken.

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<sup>4</sup> Prior to the EA02, under the FTA, the Secretary of State accepted undertakings or imposed orders to remedy the adverse effects identified during a merger and monopoly reference.

<sup>5</sup> Under the EA02, the CMA may accept undertakings or impose orders (sections 82 and 84 of the EA02 (mergers) and sections 159 and 161 of the EA02 (markets)), and, where the conditions for a reference are met, the CMA may accept binding undertakings as an alternative to making a reference (section 73 of the EA02 (mergers) and section 154 of the EA02 (markets)).

<sup>6</sup> Sections 55 and 66 and Schedule 7 of the EA02 (mergers) and sections 139, 147 and 159 of the EA02 (markets).

<sup>7</sup> Under sections 92(1), (2) and (3) and 162 (1), (2) and (3) of the EA02; sections 88(4) and (5) of the FTA (as preserved in Schedule 24 of the EA02).

<sup>8</sup> See footnote 1 above.

- 2.5 The precise nature of the CMA's consideration of any change of circumstances will depend entirely on the individual circumstances affecting a particular undertaking or order. However, the change of circumstances must be such that the undertaking or order is no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy, if it is to lead to either variation or termination.
- 2.6 Types of circumstances that have led to variation or termination in the past include:
- undertakings or orders that have time-expired or clearly become obsolete (see for example, the review of Provident's trading checks undertakings (2012), where Provident was found no longer to provide trading checks and such products were not likely to re-emerge)
  - undertakings or orders that are affected by new legislation (see, for example, the review of the Northern Ireland PCA Banking Market Investigation Order 2008 (2011), where the coming into force of two EU directives—the Payment Services Directive and the Consumer Credit Directive, both of which had been implemented into UK law—included articles that either were duplicated by the same subject matter or were different from requirements in the order), and
  - undertakings or orders that are affected by changes in market conditions (see, for example, the review of Yellow Pages undertakings (2013), where increased internet access and usage by both consumers and advertisers had had a significant effect on the constraints faced, such that the owner of Yellow Pages was no longer able to operate as a price setter independent of the behaviour of competitors).
- 2.7 Experience of reviews of undertakings and orders suggests that the complexity of analysis required in a review varies significantly depending on the change of circumstances identified and the characteristics of the market. In some cases, detailed investigation may be required in order to evaluate whether there has been a change of circumstances and, if so, what, if any, changes to undertakings or an order may be justified.

### **3 PROCESS FOR REVIEWS OF UNDERTAKINGS AND ORDERS**

3.1 This section sets out the process for reviews of undertakings and orders. It sets out:

- (a) initial screening, including the ways in which a review may be initiated and deciding whether to conduct a review
- (b) the process for a review, including: timescale, the CMA's assessment, the key stages of the CMA's decision-making process, and the conclusion of a review, and
- (c) the procedure for dealing with undertakings or orders that are time-expired, lapsed or superseded by new CMA undertakings or orders.

#### **Initial screening**

##### **The ways in which a review may be initiated**

3.2 There are two ways in which a review may be initiated – (i) at the request of parties who have given undertakings or who are subject to orders, or other interested parties; or (ii) by the CMA on its own initiative.

##### Requests from parties

3.3 Parties may request that undertakings or orders be varied or terminated by reason of a change of circumstances. Any submission making such a request should set out clearly and with supporting evidence:

- what the change of circumstances is
- how and why this makes it appropriate to vary or terminate the undertakings or order, and
- the possible consequences for consumers and businesses impacted by the remedy.

3.4 It is open to the parties to approach the CMA prior to submitting a request in order to discuss what sort of evidence would be expected to be included in any request.

3.5 Parties should provide both a confidential and a non-confidential version of their submission.



- 3.6 The CMA will typically, upon receipt of a request for a review, issue an invitation to comment by publishing information about the request for review. The form of publication and extent of detail will depend on the circumstances of the case. This could range from publication of the non-confidential elements of the submission itself, to a statement confirming that the CMA is considering whether to conduct a review.<sup>9</sup> The CMA will typically invite third parties to comment on the request for review and to submit any relevant evidence.

#### CMA own-initiative activity

- 3.7 The CMA is also able to begin a review on its own initiative, without any person having made a request. In practice, the CMA is likely to do so when, based on its own intelligence, it has identified possible changes of circumstances analogous to those referred to at paragraph 2.6 above.
- 3.8 If the CMA is intending to conduct a review on its own initiative it will typically issue an invitation to comment to relevant parties, asking for their view as to whether such a review should take place and to submit any relevant evidence. As noted at paragraph 3.6 above, the form of publication will depend on the circumstances of the case.

#### **Deciding whether to conduct a review**

- 3.9 The CMA will assess the request for a review and the responses to any consultation on the request, or the responses to a consultation on whether the CMA should conduct an own-initiative review. The CMA will then decide whether a review should take place at a particular point in time. This decision will be taken by a senior member of CMA staff, supported and challenged by a further two individuals with the appropriate level of skill and expertise. The decision-maker may also consult [the CMA's Remedies, Undertakings and Commitments Committee (RUCC)] to seek views on any policy issues arising out of the proposed decision.
- 3.10 In deciding whether to conduct a review, the CMA will act in accordance with its published [prioritisation principles].<sup>10</sup> This may mean that the CMA will choose not to initiate a review within time frames recommended by the Monopolies and Mergers Commission (MMC), CC or CMA report in which the remedy was originally determined. Factors relevant in deciding whether to

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<sup>9</sup> In exceptional circumstances, publication of an invitation to comment may not occur if, for example, the CMA believes that the claimed change of circumstances, in and of itself, constitutes specified information which needs to be excluded from disclosure (Part 9 of the EA02).

<sup>10</sup>[Revised prioritisation principles to be finalised by April 2014].

conduct a review will include whether there is a realistic prospect of finding a change of circumstances.

- 3.11 If the CMA decides not to proceed with a review, it will inform the relevant parties that a review will not take place. If particular parties made a request for a review, the CMA will typically set out briefly its reasons for not conducting a review. This decision will typically be published, although the CMA will have due regard to its obligation not to disclose certain specified information, as set out in Part 9 of the EA02.
- 3.12 If, on the other hand, the CMA decides to undertake a review, it will appoint a 'relevant group' to conduct the review. Each group will be appointed by the Chair of the CMA<sup>11</sup> to be responsible for the conduct of a particular case.<sup>12</sup> A group may be comprised of members of [the RUCC] and/or other CMA panel members, as the case requires. Each group will be advised by a case team of CMA staff.
- 3.13 The CMA will inform relevant parties as soon as practicable of its intention to commence a review. At the same time, or as soon as practicable thereafter, the CMA will also provide them with the following information:
- a brief description of the case, the relevant legislation, the industry sector concerned and the CMA's reasons for commencing a review. The level of information may vary according to the circumstances of the case
  - an indicative timetable showing the anticipated dates of key milestones (see paragraph 3.18 below), and
  - the contact details for the main CMA contacts for the case including specifying the first point of contact for general queries and submission of information.
- 3.14 The CMA will place a review opening announcement on its website announcing its decision to commence a review (except if to do so would prejudice the case or would otherwise be inappropriate). At the same time as

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<sup>11</sup> Under the ERRA13, the Chair of the CMA is responsible for identifying and appointing the group of members that will conduct a particular inquiry and for selecting one of them to act as chair of the group. In practice, the Chair of the CMA will delegate these responsibilities to the CMA Panel Chair (or one of the CMA Deputy Panel Chairs). The CMA Panel Chair is a member of the CMA Board.

<sup>12</sup> The appointment of members to form groups will be conducted in a manner consistent with the ['Rules of Procedures' (CC1) – which are to be revised].

or following the public announcement, the CMA will also publish, if and as soon as reasonably practicable, the information referred to in paragraph 3.13.

- 3.15 The CMA will review from time to time the information provided and consider whether it is appropriate to update the information provided to the parties directly involved or the published information.
- 3.16 Where undertakings or orders under review relate to a regulated sector, and especially where a sectoral regulator has a role in monitoring compliance with the undertakings or order,<sup>13</sup> the CMA will liaise with the relevant sectoral regulator as appropriate.<sup>14</sup> In other cases, for example, when reviewing merger undertakings or orders the relevant sectoral regulator may make a submission to the CMA setting out its views and any supporting evidence on the possible variation or termination.<sup>15</sup>

## The process for a review

### Timescale

- 3.17 Once the relevant group has been appointed, it will decide upon an appropriate timetable for the review. The CMA will endeavour to conduct its review as efficiently as possible. However, the time taken to conduct a review will vary depending on the complexity of the issues involved, the available resources at the time and the extent to which parties engage in a timely manner.
- 3.18 The CMA will publish on its website an administrative timetable for the review that will assist in providing an indication of the expected time frame for the review. The administrative timetable will set out the key stages of the review, including what documents the CMA expects to publish and when. The administrative timetable may be revised during the course of the review.

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<sup>13</sup> For example, the Office of Rail Regulation (ORR) in the Rolling Stock Leasing Market Investigation Order 2009.

<sup>14</sup> The CMA's approach to the disclosure of specified information to other public authorities, including sectoral regulators, is explained in more detail in section 6 of Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) [currently in draft and being consulted on].

<sup>15</sup> The CMA's approach to information received from sectoral regulators is set out at paragraphs 6.20 and 6.21 of the 'Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973' (April 2013, CC7 (Revised)).

## The CMA's assessment

- 3.19 As part of the CMA's assessment it will first consider whether the initial submissions from all relevant parties are sufficient to allow it to reach a provisional decision:
- (a) If the CMA considers that relevant parties have had sufficient opportunity to make their case and the initial submissions indicate a clear change of circumstances and clear cut grounds for variation or termination, it will provisionally decide whether the undertakings or order should be varied or terminated and, if so, how (see paragraphs 3.24 to 3.30 for the process thereafter). This approach is likely to be used in only the most straightforward of cases, such as where no material concerns have been expressed by third parties in response to the invitation to comment (see paragraph 3.6).
  - (b) If the CMA considers that further information and/or analysis is necessary before it can reach a decision, it will consider what steps should be undertaken and how the further information and/or analysis required affects the timetable for the review. This approach is likely to be required in most reviews.
- 3.20 Where the CMA has identified the need for further information and/or analysis, it may invite or request submissions from those parties subject to the undertakings or order and/or interested third parties, including those that have not responded to any initial invitation to comment (see paragraph 3.6). In certain circumstances, particularly complex reviews, the CMA may consider it necessary to hold a hearing with relevant parties.
- 3.21 The timing and manner of engagement with relevant parties will vary depending on the type of work involved in any given review. The CMA will have regard to the need to ensure due process for both parties directly involved and other interested persons. The CMA will also have regard to the need to conduct reviews effectively and efficiently, and the need to reach properly reasoned decisions.
- 3.22 Where the CMA wishes to test some of its initial thinking on the review, the CMA may decide to disclose working papers or sections of working papers to parties for comment. The CMA will take a flexible approach to sharing its developing thinking and/or evidence with parties directly involved and other interested persons, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of the review.

In most cases, however, the process of putting back materials to parties will be primarily to comment on factual accuracy and commercial sensitivity.

- 3.23 When considering what documents may be disclosed during the course of a review, CMA will have regard to the 'Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973' (April 2013, CC7 (Revised)). The *Chairman's Guidance* also provides information to parties on how information and submissions received by the CMA during its review will typically be disclosed, the usual form being the incorporation of relevant material into the CMA's published documents, including the provisional decision, final decision and/or notice of intention to vary or terminate a remedy.<sup>16</sup>

### **Key stages of the CMA's decision-making process**

- 3.24 The CMA's decision-making process will typically comprise the following three key stages:
- a provisional decision (see paragraphs 3.25 to 3.30)
  - a final decision (see paragraphs 3.31 to 3.32), and, as necessary,
  - implementation notices and documents – a Notice of intention to vary or terminate and a Notice of variation or termination (see paragraphs 3.33 to 3.35).

#### **Provisional decision**

- 3.25 Before reaching a final decision, the relevant group will make a provisional decision on which it will consult. The provisional decision will be published on the CMA's website. The consultation period will depend on the circumstances of the case but will typically be 21 days from the date of the provisional decision, and will be no less than 14 days.<sup>17</sup>
- 3.26 The CMA's provisional decision will state what decision the CMA proposes to take and the reasons underpinning it. The provisional decision will address the question of whether there has been a change of circumstances. If the CMA is proposing a variation to the terms of the undertaking or order, at the time of

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<sup>16</sup> Part 9 of the *Chairman's Guidance* (CC7 (Revised)) explains the practical aspects of handling information received and requests for confidentiality, including the presentation of data in aggregated form in CMA documents.

<sup>17</sup> See [Statutory Instrument].

publishing the provisional findings it will also seek views on the nature and scope of the proposed variation either as part of the provisional decision (see paragraphs 3.28 and 3.29) or in a separate notice of possible variation (see paragraph 3.30).

- 3.27 The CMA will consider variations proposed by parties (if any) as well as its own proposals. Parties will be expected to demonstrate that their proposed variations will effectively address the competition problem and its adverse effects in light of the change of circumstances provisionally identified. The CMA will normally set out a time limit within which any proposed variations must be submitted.
- 3.28 Usually the CMA will form a provisional decision on the substance of the necessary variation at the same time as the change of circumstances and will seek views on the proposed variation prior to consulting on the text of revised undertakings or a revised order. In these cases, the provisional decision will therefore also contain sufficient detail on the nature and scope of any proposed variations (if variation is appropriate) to provide a firm basis for subsequent implementation (see paragraphs 3.33 to 3.35).
- 3.29 In some reviews, the case for termination or the precise nature of the appropriate variation may be sufficiently clear at the time of making the provisional decision that the CMA may be in a position to draft the text of revised undertakings or a revised order at the same time as its provisional decision. The CMA may therefore decide to set out its provisional decision and reasoning as part of a notice of intention to vary or terminate the undertakings or order.<sup>18</sup> Such a notice will be given in accordance with the procedural requirements set out in Schedule 10 to the EA02 (see paragraphs 3.33 to 3.35).
- 3.30 At the time of consultation on the provisional decision, the precise nature of the variation may not always, however, have been decided upon. For example, there may be some circumstances in which the party or parties subject to the undertakings or order have not engaged in discussion of possible variations prior to the publication of the CMA's provisional decision.<sup>19</sup> In these circumstances, the CMA may consider it appropriate to consult on a range of possible variations. In order to do so, the CMA will publish a

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<sup>18</sup>This process was adopted, for example, in the reviews of the Store cards and Home credit market investigation orders (final decisions in both cases published in 2011).

<sup>19</sup> This might be because the question of whether or not there is a change of circumstances is not clear cut and hence the CMA will need to reach a view on that first before engaging in discussions on possible variations.

separate notice of possible variations at the same time as its provisional decision (which would focus on the change of circumstances only).<sup>20</sup> This separate notice of possible variations will set out the range of possible variations which the CMA is considering given the change of circumstances identified.

#### Final decision

- 3.31 The CMA will consider all submissions received during the consultation period before reaching a final decision. The final decision and the reasons for it will be published.
- 3.32 If the final decision is that there has been no change of circumstances, or that the change of circumstances is not sufficient to warrant any variation or termination, the existing undertakings or order remain in force and continue to bind the parties.

#### Documents relating to implementation of any variation or termination

- 3.33 If the final decision is that there has been a change of circumstances and that variation or termination is appropriate, at the same time as the CMA's final decision or as soon as possible thereafter the CMA will give notice of its intention to vary or terminate the undertakings or order (unless the process has already been commenced, see paragraph 3.29). Such notice shall be given in accordance with the procedural requirements set out in Schedule 10 to the EA02. Changes to undertakings will be consulted upon for at least 15 days and changes to an order will be consulted upon for at least 30 days.<sup>21</sup>
- 3.34 The CMA will have regard to any representations made in response to the notice and may make modifications to the proposed revised undertakings or order as a result. If the CMA considers that any representation necessitates material change to the proposed revised undertakings or order, it will give notice of the proposed modifications.
- 3.35 In the absence of any representations, or in the event that the CMA decides on consideration of representations made not to amend materially the revised undertakings or order, it will proceed with accepting revised undertakings or making a revised order. Similarly, in the absence of any representations to a

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<sup>20</sup> This process was adopted, for example, in the review of ITV's Contracts Rights Renewal undertakings (2010).

<sup>21</sup> Schedule 10, paragraph 7(2) of the EA02.

notice of intention to terminate the undertakings or order, the CMA will proceed with releasing parties from the undertakings or revoking the order.

### **Conclusion of a review**

- 3.36 The CMA's review concludes either once a final decision has been made that there is no change of circumstances (see paragraph 3.32) or once the undertakings or order have been varied or terminated (see paragraph 3.35).<sup>22</sup>
- 3.37 The group appointed to undertake the review will normally be disbanded following the conclusion of the CMA's review.<sup>23</sup>
- 3.38 When the CMA gives notice of varying or terminating undertakings or an order, it will make any appropriate amendment to its published register of orders and undertakings. The CMA is responsible for monitoring and enforcing any undertakings and orders that remain in force, except where specifically indicated otherwise.

### **Procedure where undertakings or orders are time-expired, lapsed or superseded by new CMA undertakings or orders**

- 3.39 There may be cases in which undertakings or orders are time-expired or have lapsed as the result of a predetermined event, or where they have been superseded by new CMA undertakings or orders. For example:
- where undertakings or an order contain within them a time period for their application which has ended or where undertakings or orders contain an expiry date which has passed
  - where undertakings or an order specify that they will expire upon a certain event happening, or
  - where they are superseded by new undertakings or a new order resulting from a new CMA inquiry.<sup>24</sup>

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<sup>22</sup> A review may also be concluded if a new market investigation reference is made under section 131 of the EA02 by the CMA Board, or by the Secretary of State (sections 132 and 140A of the EA02), or by a sectoral regulator, which relates to the existing undertakings or order under review. In these exceptional circumstances, the CMA will notify relevant parties that this action is being taken and publish the fact the review is concluding on its website. The existing undertakings or order remain in force and continue to bind the parties unless or until such time as varied or terminated following the market investigation.

<sup>23</sup> See paragraph 3.12.



3.40 In the case of such time-expired, lapsed or superseded undertakings or orders, there is no requirement for further investigation or consultation, as the undertakings or orders will already have time-expired, lapsed or been superseded. In such circumstances, the CMA will remove the undertakings or orders from its register of orders and undertakings and publish a notice that the order or undertakings have been removed.

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<sup>24</sup> For example, as was the case in the groceries market where the Groceries Supply Code of Practice superseded the Supermarkets Code of Practice.

## ANNEXE A – TRANSITIONAL ARRANGEMENTS

1. This guidance sets out the CMA's intended practice as of 1 April 2014. It will apply to all ongoing and/or future cases, except those expressly out of scope of this guidance (see paragraphs 1.2 and 1.3). Cases are deemed to be 'ongoing' for the purposes of this guidance if, as at 1 April 2014, the date on which the OFT's and CC's functions transfer to the CMA (the effective date):
  - the OFT has either: (i) received a request for review; or (ii) commenced a review on its own initiative, under section 92 or section 162 of the EA02, and
  - the case has not come to an end as a result of a final decision by the CC.
2. In relation to applications for review which have been sent to the OFT but have not yet been acted upon as at the effective date, the CMA will follow the process in paragraph 3.6 by issuing an invitation to comment.
3. In relation to ongoing cases which are being considered by the OFT as at the effective date, the CMA will decide as soon as possible after the effective date or once any ongoing invitation to comment has closed whether to conduct a review, consistent with the process in paragraph 3.9.
4. In relation to ongoing cases which are being considered by the CC as at the effective date, the existing group appointed to carry out the review will remain in place and will complete the review.
5. Although this guidance will apply to ongoing cases on and from the effective date, when conducting its assessment (see paragraph 3.19ff) the CMA will build upon the information submitted by parties, and any analysis undertaken by the OFT and/or the CC, prior to the effective date.

## ANNEXE B – STATUS OF OFT AND CC GUIDANCE DOCUMENTS AND PUBLICATIONS

The table below indicates the status of OFT and CC documents and publications that are relevant to the variation and termination of merger, monopoly and market undertakings and orders and that had been published and were in effect prior to the transfer of the mergers and markets 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 mergers and markets regime, and to minimise disruption to parties and the CMA.

OFT/CC CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>1</sup>	Adopted by the CMA Board <sup>2</sup>
OFT1060	Memorandum of understanding between the OFT and the CC on the variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Enterprise Act 2002	✓	-
CC1	Competition Commission: Rules of Procedure [to be revised]	-	✓
OFT1254/ CC2	Merger Assessment Guidelines	-	✓
CC3	Guidelines for Market Investigations	-	✓
CC7	Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973	-	✓
OFT953	Prioritisation principles	✓	-

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

<sup>2</sup> 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).

Parties should refer to those documents listed above as having been adopted by the CMA board (the adopted guidance) for further details on the substance and procedure around the variation and termination of merger, monopoly and market undertakings and orders. This is subject, in particular, to the following general limitations:

- all references in the adopted guidance listed above to issues regarding the variation and termination of undertakings and orders or jurisdiction or procedure in mergers and markets cases must be read in the light of this guidance and 'Mergers: Guidance on the CMA's jurisdiction and procedure' (CMA2) [currently in draft and being consulted on] and 'Market studies and market investigations: Supplemental guidance on the CMA's approach' (CMA3) [currently in draft and being consulted on]
- in the cases of conflict between this guidance and the adopted guidance, this guidance prevails, and
- all the adopted guidance 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) of a case for a Phase 2 investigation involving an Inquiry 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
  - 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.