COMPETITION REGIME: CONSULTATION ON CMA PRIORITIES AND DRAFT SECONDARY LEGISLATION

15 JULY 2013

Contents

Foreword from the Minister for Employment Relations and Consumer Affairs

The UK competition regime enjoys a world-class reputation. It creates an environment that encourages business to invest in new and better ideas, driving growth and delivering better and cheaper products and services for consumers. The Coalition Government believes that we should strive to make the regime even more effective and so brought forward the Enterprise and Regulatory Reform Act 2013 which will reform the regime.

We are creating a new Competition and Markets Authority to replace the existing competition authorities, and are introducing a set of reforms to give the CMA stronger powers and speed up its cases. As a single competition authority, the CMA will be more flexible and responsive in its use of competition tools and resources to tackle competition problems. It will help to create the right conditions for business to thrive and enter new markets and deliver better outcomes for consumers. We have already taken significant steps in the transition to the new CMA through the appointment of the Chair and Chief Executive designates, who are working to ensure that it has the capability to achieve this vision.

This consultation sets out the draft Ministerial statement of strategic priorities for the CMA (the Steer) and some of the secondary legislation required to provide detail on the revised competition regime. Independence of competition authorities is crucial to their success. We therefore want to be transparent about the way we engage with the CMA, and the Steer publicly outlines the long term goals of the Coalition Government in relation to competition and growth without interfering with the CMA's operational independence.

Alongside this consultation, the CMA transition team are also consulting on the CMA's draft Guidance, which will explain the revised legislative framework and set out how the CMA will exercise its functions in practice. You may find it useful to consider this document and the draft Guidance together, and to offer your views on the draft Guidance in parallel.

This exercise will be followed in September by a further tranche of consultations on draft statutory instruments and CMA Guidance. Taken together, these consultations will clarify the framework set out in primary legislation and how the regime will work in future. I encourage you to get involved in the important work to establish this reformed and stronger competition regime.

Jo Swinson MP
Minister for Employment Relations and Consumer Affairs

Executive Summary

Competitive markets are a key driver of productivity, innovation and economic growth, providing greater choice and other benefits for consumers. The Enterprise and Regulatory Reform Act 2013 (ERRA13) was enacted in April. This will create the Competition and Markets Authority (CMA) as a new single competition authority, succeeding the Office of Fair Trading (OFT) and Competition Commission (CC), and introduce a number of reforms to further strengthen the competition regime.

Much of the important detail of how the CMA will carry out their functions will be in the secondary legislation made under the reformed statutory framework, and the new CMA Guidance.

This document invites comments on a **draft ministerial statement of strategic priorities for the CMA (the Steer)** and certain key pieces of secondary legislation:

- **Markets, Mergers and Antitrust – Competition and Markets Authority (Penalties) Order 2014**, made under s.40A of the Competition Act 1998 (CA98), as amended, and s.174D of the Enterprise Act 2002 (EA02). The Order raises the maximum fixed penalty to £30,000 and the maximum daily penalty to £15,000.

- **Mergers – the Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014** made under new s.94A of EA02, as added by ERRA13, establishing legal rules to determine when an enterprise is to be treated as controlled by a person and the turnover of an enterprise for the administrative penalty for failure to comply with interim measures.

- **Mergers – the Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014** made under s.68 of EA02 to replace references to OFT and CC with references to the CMA and to modify the scheme dealing with public interest concerns in 'European relevant merger situations' so that it takes account of amendments made by ERRA13 to the mergers provisions of EA02.

- **Mergers – the Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014** made under s.28 and s.121 of EA02 to alter the timing of merger fee payments so that in all cases they will be payable once the CMA has made a decision following a 'Phase 1' investigation.

Detailed information on the Steer and these instruments is set out in this document and drafts of each are attached at Annexes 1 – 5.

Next steps

The purpose of this consultation is to seek views on the draft texts of the Steer and key statutory instruments. This document contains the first of two tranches of draft statutory instruments, together with the Steer, and will be followed by a second BIS consultation document in mid September 2013 that will provide further draft statutory instruments.

We invite you to consider these drafts alongside the parallel consultation on the CMA's new Guidance, which will explain how the CMA will apply and give effect to the statutory framework. The BIS consultation can be found at http://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation and the Consultation on the CMA's Guidance can be found at http://www.gov.uk/cma.

We will consider responses in making amendments to the draft text before the Ministerial Strategic Steer is published on 1 October 2013 and the statutory instruments are laid in Parliament next year for commencement in April 2014.

We welcome views on these drafts from all interested parties. There is a full list of consultation questions on page 24. Written responses should be sent by 6 September 2013.

How to respond

This stage of the consultation will begin on 15 July 2013 and will run for 8 weeks, closing on 6 September 2013.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

The consultation response form is available electronically on the consultation web page: http://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation

The form can be submitted online/by email or by letter or fax to:
competition.consultation@bis.gsi.gov.uk
Xinru Li
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
SW1H 0ET

Tel: 020 7215 2078
Fax: 020 7215 0235

A list of those organisations and individuals consulted is in Annex 7. We would welcome suggestions of others who may wish to be involved in this consultation process.

You may make printed copies of this document without seeking permission.

Other versions of the document in Braille, other languages or audio-cassette are available on request.

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries about the policy issues raised in the document can be addressed to:
Xinru Li
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
SW1H 0ET

Tel: 020 7215 2078
Fax: 020 7215 0235
Email: competition.consultation@bis.gsi.gov.uk

The consultation principles are attached in Annex 6.

What Happens Next

Following the close of the consultation period, the Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).

The response to the consultation will take the form of decisions made in light of the consultation, a summary of the views expressed and reasons given for decisions finally taken. This document will be published on the BIS website with paper copies available on request.

1. Introduction

1.1 Competitive markets are a key driver of productivity, innovation and economic growth, providing greater choice and other benefits for consumers. To strengthen the competition regime, the Enterprise and Regulatory Reform Act 2013 (ERRA13) creates a new single Competition and Markets Authority (CMA) and gives it enhanced powers. The CMA, which will bring together the functions of the Competition Commission (CC) and the competition and certain other functions of the Office of Fair Trading (OFT), will be legally established in October 2013 and will take on its full functions in April 2014.

1.2 The CMA will be the UK's single competition authority with a duty under s.25 of ERRA13 to seek to promote competition for the benefit of consumers. It will be a powerful advocate for competition across the UK economy, Europe and globally. Institutional change will streamline handover processes and increase flexibility in resource allocation, making competition enforcement more effective. ERRA13 also introduces a number of reforms to further strengthen the UK's competition regime and improve speed and predictability for business such as:

- giving the CMA discretion to suspend all integration steps in a proposed merger; and clarifying that the CMA will be able to reverse integration steps that have already taken place;
- introducing, harmonising or shortening statutory time limits for mergers and markets cases;
- extending information gathering powers throughout a market study and throughout all stages of a merger investigation;
- providing strengthened powers and more robust decision-making in the enforcement of the antitrust prohibitions in the Competition Act 1998 (CA98);
- making it easier to prosecute the criminal cartel office by removing the 'dishonesty' element while introducing new circumstances in which the cartel offence is not committed; and
- strengthening the concurrency regime by giving economic regulators an explicit duty to consider CA98 enforcement before taking enforcement action under their regulatory powers and strengthening the CMA's powers to coordinate CA98 enforcement.

1.3 The framework for these reforms is set out in the primary legislation, but much of the important detail of how that framework will be implemented will be contained in secondary legislation and the CMA's own Guidance. The Government has also committed to issuing a non-statutory statement of strategic priorities for the CMA (the Steer), which sets out how the Government envisages the competition regime will fit into wider government economic policy.

1.4 In parallel to the preparation of the secondary legislation, the CMA's Guidance is being consulted on. The new CMA Guidance will explain the legal framework and

set out how the CMA will carry out its responsibilities under it. The consultation exercise forms part of a complex transition programme and therefore BIS will consult on the Steer and secondary legislation and the CMA Transition Team will consult on its guidance in two tranches (with the BIS and CMA guidance consultation tranches running in parallel).

1.5 In this document, which forms the first tranche of the BIS consultation, we invite your views on the Steer, the final version of which will be published alongside the creation of CMA on 1 October 2013, and four key statutory instruments. Guiding principles for the Steer and information on its background are set out in **Chapter 2.** The draft Steer itself is set out in Annex 1.

1.6 Explanations of four statutory instruments are set out in the Chapters below, with drafts of each attached at Annexes 2-5. The instruments are to be made under the following provisions:

- **Chapter 3: Markets, Mergers and Antitrust – Competition and Markets Authority (Penalties) Order 2014**, made under s.40A of the Competition Act 1998 (CA98), as amended, and s.174D of the Enterprise Act 2002 (EA02). The Order raises the maximum fixed penalty to £30,000 and the maximum daily penalty to £15,000.

- **Chapter 4: Mergers – the Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014** made under new s.94A of EA02, added by ERRA13, establishing legal rules to determine when an enterprise is to be treated as controlled by a person and the turnover of an enterprise for the purposes of the new administrative penalty for failure to comply with interim measures.

- **Chapter 5: Mergers – the Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014** made under s.68 of EA02 to replace references to OFT and CC with references to the CMA and to modify the scheme dealing with public interest concerns in 'European relevant merger situations' so that it takes account of amendments made by ERRA13 to the mergers provisions of EA02.

- **Chapter 6: Mergers – the Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014** made under s.28 and s.121 of EA02 to alter the timing of merger fee payments so that in all cases they will be payable once the CMA has made a decision following a Phase 1 investigation.

1.7 The second tranche of the BIS consultation will invite your views on further key instruments:

- An Order under s.188A of EA02 specifying the manner in which relevant information about arrangements is to be published for the purposes of taking a person outside the criminal cartel offence.

- New regulations on the coordination of concurrent CA98 Part 1 powers made under s.54 of CA98.

- An Order making Rules for the Competition Appeal Tribunal (CAT) on obtaining a warrant from the CAT to enter business premises.

1.8 The CMA is also seeking views on its first tranche of draft Guidance documents by 6 September. These will cover:

- Mergers: Guidance on the CMA's jurisdiction and procedure.

- Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach.

- Administrative Penalties: Statement of Policy on the CMA's approach.

- Telecoms price control references: Statement of the CMA's policy and approach.

- Transparency and disclosure: Statement of the CMA's policy and approach.

1.9 The CMA's second tranche of Guidance documents, to be published mid-September, will cover:

- Consumer Protection: Guidance on the CMA's approach.

- Competition Act 1998: Guidance on the CMA's investigation procedures, including the CMA's Competition Act 1998 Rules.

.

- Cartel Offence: Prosecution Guidance.

- Regulated Industries: Guidance on concurrent application of competition law to regulated industries.

- CMA Guidance on the variation and termination of merger, monopoly and markets undertakings and orders.

1.10 The transitional arrangements dealing with the commencement of provisions within ERRA13 on 1 April 2014, when the CMA will take on its full functions, will be published as part of the CMA Guidance consultations. As a general principle, the government intends that all powers and procedures should be capable of coming into effect as of 1 April 2014 and should be applied prospectively, and not retroactively. Detailed transitional arrangements for ERRA13 provisions will be included in a Commencement Order and transitional arrangements for statutory instruments made under ERRA13 will be made in those instruments. For example, the Government considers it important for the new strengthened investigation powers to be available not only in cases which begin under the new statutory timescales but also for all cases which are ongoing as at 1 April 2014. The

Government intends that the transitional provisions for merger inquiries by the CMA will be mirrored as closely as possible for public interest cases where the Secretary of State has given an intervention notice.

1.11 The measures in this document do not impose regulatory burdens on business beyond what was outlined in the impact assessment for the Enterprise and Regulatory Reform Bill.

2. The Strategic Steer for the Competition and Markets Authority

Introduction

2.1 The independence of the CMA is important and as a Non Ministerial Department the CMA will have freedom to prioritise its own resources and annual plans of activity. However it will be accountable to Parliament, and will be required, publically, to set out and consult on its annual plan for the coming year. It will also have to report at the end of the year on how it has performed. The Government is keen to increase transparency in the way in which it engages with the CMA and therefore committed that it would consult on, and publish, a high level statement of strategic priorities (the Steer) for the CMA to have regard to. This Steer will outline the long term goals of the Government in relation to competition and growth and provides an open and transparent statement which the CMA can reflect upon, but is not bound by – the Government will not seek to reduce the independence of the CMA or dictate its day to day work.

Guiding principles

2.2 Four guiding principles inform the Steer for the CMA:

- **Strategic priorities:** The Steer should support the CMA in selecting markets for scrutiny and deciding its own approach to maximise its impact. The Steer should focus on strategic priorities, setting out medium to long-term problems and high-level policy goals. It should focus on issues which affect the whole economy or on improvements across the regime.
- **Independence:** The Steer should avoid being perceived as compromising the independence of the CMA in how it achieves outcomes, its choice of cases or final decisions.
- **Accountability:** The Steer should feed into the broader accountability framework.
- **Transparency:** The Steer should provide an open and transparent mechanism by which Ministers can openly provide a high level direction of travel to the CMA, thus further building the credibility of the regime.

Question 1: Do you have any comments on the proposed Steer for the CMA?

Background

2.3 The Steer is part of an overall accountability framework which also comprises the legal and performance management frameworks, e.g. the CMA's duty to 'promote competition, both within and outside the UK, for the benefit of consumers'.

2.4 Statements in the Steer are of a 'have regard' nature so as not to unduly constrain the CMA's ability to prioritise its activities, develop improved processes or be seen as biasing its case decisions. We have sought to guard against it becoming either a 'shopping list' or becoming so high level that it loses its impact. The independence of the CMA is important so that it can: (i) determine its own expert view of priorities and the appropriate tool to use in particular circumstances; (ii) retain freedom to innovate; and (iii) maintain clear lines of accountability. Providing competition regimes with more independence has been a key part of reform in the UK and elsewhere in recent years and stakeholders continue to regard independence as one of the key elements of an effective regime.

2.5 The Steer also includes statements on how the work of the CMA should support the Government's overarching priorities, given current economic circumstances. It includes statements on the importance of taking a dynamic approach to competition and reflecting how consumers behave in practice, as well tackling particular sorts of economic problems. It also sets out what sort of institutional improvements the government wants in the new regime, e.g. the need to 'have regard to the need to improve transparency and certainty for business, including in setting prioritisation principles for the organisation'.

2.6 We have considered the extent to which the use of particular tools or problems in particular sectors (or markets within them) could be emphasised without undermining the CMA's independence. It is reasonable to say that the Government would like the CMA's work to support its approach to growth, and to set out that the Government considers that improved competition in particular sectors, e.g. financial services and infrastructure (such as energy), is important to this. It is also reasonable to suggest the CMA should carry out a balanced portfolio of different types of work across the economy or improve enforcement activity. This would be done without specifically stating targets for different types of activity. The appropriate balance of activity would be a judgement call for the CMA between enforcement and non enforcement activity, to ensure that effective deterrence is created alongside addressing market problems in the absence of a competition infringement or merger.

2.7 It would not, however, be appropriate to specify particular tools that should be used in particular sectors or markets (e.g. 'increased antitrust or cartel enforcement in the high tech, finance or energy sectors).

2.8 The Steer should not be so restrictive as to preclude the CMA from undertaking other competition (or consumer) work. It should also recognise that there will be lumpiness and evolution in the different types of work, some of which is demand led, and give the CMA flexibility to develop new approaches. The CMA will be accountable to Parliament for its overall success and will report to it annually.

2.9 Additionally, the Steer needs to fit as far as possible into the framework provided by the Principles of Economic Regulation. Those principles were aimed at providing more clarity for the economically regulated sectors and for the economic regulators, but they can also be adopted to apply clarity in areas like the role of Government and the CMA.

2.10 In the Government response to the consultation on competition reform “Growth, Competition and the Competition Regime”, published March 2012, we set out that the Steer should be updated once a Parliament. The Government now proposes that a three year period would provide a better balance between ensuring the Steer remains relevant to current economic priorities and competition practice while not varying too frequently.

2.11 The Steer is being consulted on alongside BIS consultations on the first tranche of new and revised statutory instruments and parallel consultations on the new CMA Guidance. The Government will publish the final Steer when the CMA is established on October 1st. The proposed Steer is set out at Annex 1.

3. Competition and Markets Authority (Penalties) Order 2014

3.1 This Order specifies the maximum amounts that the CMA may impose as a penalty where a person has failed, without reasonable excuse, to comply with certain requirements of the EA02 (relating to both mergers and markets investigations) and the CA98 (relating to antitrust investigations). In all cases, the maximum amounts specified are £30,000 in relation to a fixed penalty and £15,000 in relation to a daily penalty (including in the cases where a combination of a fixed penalty and a daily penalty may be imposed). These are, in each case, the maximum amounts the relevant provisions allow the Secretary of State to specify.

3.2 The Order revokes the Competition Commission (Penalties) Order 2003 (SI 2003/1371) which currently specifies the maximum amounts of a penalty which may be imposed under Phase 2 of the merger regime. The maximum amounts specified in that Order are £20,000 in relation to a fixed penalty and £5,000 in relation to a daily penalty (including in the cases where a combination of a fixed penalty and a daily penalty may be imposed).

3.3 We would be particularly interested in views on the level of maximum penalties to be set. In favour of raising the maximum amounts from those specified in the 2003 Order are the points that:

- Those amounts are relatively low – both when set against the turnovers of many businesses which engage with the competition regime and in relation to the penalties that may be imposed by overseas competition authorities. For example, the European Commission may impose a fixed penalty of up to 1% of worldwide turnover in the preceding business year and daily penalties of up to 5% of the average daily turnover in the preceding business year.

- Inflation has significantly eroded the value of the maximum amounts since 2003.

- In some cases, these civil penalties have replaced criminal penalties for failure to comply with certain requirements of the competition authorities. Arguably, in these cases this represents a dilution in the penalty regime (although civil sanctions may be easier to impose than criminal sanctions, which was the argument for making the change) which it is appropriate to counter by raising the maximum penalties.

- The ERRA13 was intended to facilitate better and swifter decision-making by the new CMA. Prompt and complete provision of information is fundamental to the quality and timeliness of decisions and it is appropriate therefore that non-compliance be deterred by the maximum possible penalties.

3.4 Arguments for keeping the current levels are that:

- No penalties have been imposed under the current Order, nor were criminal sanctions invoked where they applied. Arguably, therefore, the current levels have not been shown to be too low.

- The ERRA 2013 did not raise the maximum penalties the Secretary of State could specify under these order-making powers. Parliament did not therefore signal a general need to raise penalty levels when it confirmed and extended the civil enforcement regime (although Parliament confirmed that specifying penalty maximum levels, within the statutory caps, is a discretionary matter for the Secretary of State).

Question 2: What is your view on the proposed maximum penalty levels?

Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?

Question 4: Do you have any other comments on the draft Order?

Background

3.5 The ERRA13 amends the EA02 and the CA98 to give the CMA power to impose civil financial penalties for failure to comply with certain formal information requests across both Phase 1 and 2 of mergers and markets investigations and with any of the CMA's formal investigatory requests in CA98 cases. As a result of these changes, the CMA will have greater power to impose financial penalties for failures to comply than the OFT or CC currently have. The criminal sanctions which currently apply are removed (save in the case of such offences as obstructing an officer exercising powers to enter premises or destroying or falsifying documents or giving false or misleading information).

3.6 The CMA may impose such financial penalty as it considers appropriate, subject to statutory maxima set by the Secretary of State. Where the failure is intentionally obstructing or delaying another person in copying documents produced to them (in respect of mergers and markets investigations), the penalty must be a fixed amount. For other failures, committed without reasonable excuse, the penalty may be:

- A fixed amount;

- An amount calculated by reference to a daily rate; or

- A combination of a fixed amount and an amount calculated by reference to a daily rate.

3.7 The CMA may not impose a penalty exceeding the amount the Secretary of State may by order specify. The Secretary of State may not specify penalties exceeding

£30,000 in the case of a fixed penalty or £15,000 per day in the case of penalties calculated by reference to a daily rate. Where the CMA is entitled to impose both a fixed and daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty.

4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014

4.1 Section 71 of EA02 provides for initial undertakings in respect of completed mergers. The provision has, however, proved inadequate, as (in practice) it relies on adaptation of a standard form template – a process that often proves lengthy, but during which the integration process is free to continue. As a consequence, even if divestment is subsequently ordered, there has still been the opportunity to impede a final order.

4.2 Historically, the OFT has considered it disproportionate and unreasonable to move beyond s.71 and to impose an initial enforcement order under s.72 of the 2002 Act in such circumstances where the parties have indicated a willingness to engage through the process of providing s 71 undertakings.

4.3 The ERRA13 addresses this gap and strengthens the regime as follows.

- Section 30 ('Interim measures: pre-emptive action: mergers') of ERRA13 repeals the existing provisions on interim measures in s.71 that provide for initial undertakings in respect of completed mergers.

- Section 30 further permits the CMA (or the Secretary of State in respect of public interest mergers under paragraph 2 of Schedule 7 to EA02) to issue a s.72 order to suspend the integration of companies in respect of both anticipated and completed mergers. It also clarifies that the 'Phase 1' interim measures powers in s.72 and the 'Phase 2' powers in s.80 and 81 of EA02 can be used to reverse steps, or the effects of steps, already taken.

- Section 31 ('Interim measures: financial penalties: mergers') inserts a new s.94A into the EA02 to enable the CMA or (where the order was made by the Secretary of State) the Secretary of State to impose a new administrative penalty for a fixed amount that it considers appropriate on a person who – without reasonable excuse – fails to comply with either a Phase 1 or Phase 2 interim measure. This will be capped at 5 percent of the aggregate worldwide turnover of the enterprises owned or controlled by the person subject to the penalty; and will exist alongside the existing civil enforcement procedures in Part 3 of EA02.

4.4 To that end, s.94A enables the Secretary of State to make an Order establishing the legal rules for determining:

- when an enterprise is to be treated as controlled by a person; and

- the turnover of an enterprise – including what is and is not to be included in the calculation; and the date(s) by reference to which turnover is to be determined.

4.5 Additionally, s.94A(6) permits the Secretary of State – in the light of experience of the deterrent effect of the new enforcement regime – to make an Order to reduce the maximum percentage of turnover under s.94A(2).

4.6 The existing procedural requirements in sections 112 to 115 of EA02 will apply to these penalties – including requirements for the CMA to notify:

- the amount of the penalty;
- the justification for it; and
- the date by which it must be paid.

4.7 Section 31 also inserts a new s.94B ('Statement of Policy in relation to powers under sections 94 and 94A') into EA02, which requires the CMA to prepare and publish (following the approval of the Secretary of State) a statement of policy on the use of these powers to impose a financial penalty for breach of interim measures – in particular including a statement of the considerations relevant to determining the amount of a penalty under s.94A.

Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?

Question 6: Do you have any further comments on the draft Order?

5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014

5.1 This Order makes consequential amendments to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 ("the PLO Order") to reflect the abolition of the Office of Fair Trading (OFT) and the Competition Commission (CC) as provided for in Part 3 of ERRA13 and the transfer of competition functions to the new CMA; and to modify the scheme for dealing with public interest concerns in the UK where there is a 'European relevant merger situation' and the EU has sole jurisdiction over the competition issues under the EU Merger Regulation. Modifications to the PLO Order are required in the light of amendments made to EA02 by ERRA13 – particularly amendments made to the provisions of EA02 dealing with public interest interventions and special public interest interventions in merger cases.

5.2 The PLO Order contains (in articles 3 to 14) provisions which largely correspond to provisions in sections 43 to 55, 60 to 66 and 107 of EA02 (providing, for example, for the Secretary of State to make a reference to the Competition Commission – in future the CMA – in cases where he has issued an intervention notice). The EA02 provisions have been amended by ERRA13, and the draft Order makes amendments to the PLO Order to take account of, and where appropriate mirror, those changes. The PLO Order (Schedules 1 and 3) also applies various specified provisions of EA02 (with modifications) to European relevant merger situations, and the draft Order makes amendments to the PLO Order to take account of the changes made to those provisions by ERRA13 – for example adopting the strengthened information-gathering powers provided for by amended s.109 of EA02. Schedule 2 to the PLO Order provides enforcement powers to the Secretary of State, and is closely modelled on Schedule 7 to EA02. Schedule 7 has been amended by ERRA13, and the draft Order makes amendments to Schedule 2 to the PLO Order to reflect those changes – for example the changes to interim measures powers.

Question 7: Do you have any comments on the draft Order?

Background

5.3 The public interest merger regime established under the EA02 permits the Secretary of State to issue an Intervention Notice in respect of three types of merger investigations:

i) a 'relevant merger situation' under s.42 of EA02;
ii) a 'special merger situation' under s.59 of EA02; and
iii) a 'European relevant merger situation' under s.67 of EA02.

5.4 The draft Order is concerned only with 'European relevant merger situations'. These are defined by s.67 of EA02 as (broadly speaking) a merger that – while it satisfies the jurisdictional thresholds for domestic investigation – is subject to review by the European Commission under the EU Merger Regulation. In these situations, the EU has sole jurisdiction over the competition issues. However, the EU Merger Regulation allows Member States to take appropriate measures to protect certain 'legitimate interests'.

5.5 Accordingly, s.67 of EA02 permits the Secretary of State to issue an Intervention Notice to 'claw back' into domestic jurisdiction, for this purpose, merger cases that would otherwise fall within the jurisdiction of the EU in order to protect the 'legitimate interests' of the UK. The PLO Order, made under s.68, provides for the detailed scheme for addressing adverse public interest effects in the UK, and sets out the respective functions of the Secretary of State, the OFT and the CC in such circumstances.

5.6 Article 21(4) of the EU Merger Regulation states that public security, plurality of the media and prudential rules shall be regarded as 'legitimate interests'; and that other 'legitimate interests' may be recognised by the European Commission, provided that they are regarded as compatible with the general principles and other provisions of EU law.

5.7 The abolition of the OFT and of the CC and the transfer of their competition functions to the CMA, and the amendments made by ERRA13 to various provisions of EA02, have necessitated consequential amendments to the 2003 Order to reflect the new regulatory landscape.

6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014

6.1 This draft Order amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 to provide that merger fees will be payable in all cases once the CMA has made a decision following a Phase 1 investigation; and to ensure that the Order is consistent with other changes to the regulatory regime made by the ERRA13.

6.2 Schedule 8 to the ERRA13 amends EA02 to remove the existing dual route for the notification of a merger (statutory merger notice and informal notification) and replaces it with a single merger notice process for all merger cases subject to statutory deadlines. The CMA will be required to announce its Phase 1 decision on the duty to refer within 40 working days. As a consequence of the introduction of these statutory time limits into Phase 1 of the merger process under s.34ZA of EA02, all merger investigations initiated by the parties will now begin when a statutory merger notice is submitted and the CMA confirms that it meets the requirements for merger notices under the Act.

6.3 There will, however, be some mergers where the parties will argue that they do not qualify as a relevant merger situation, and where they will therefore argue that they should not have to pay the fee up front – as is currently the requirement for pre-notified mergers.

6.4 The Government therefore intends to take this opportunity to make the system consistent; and in all cases to require payment of the merger fee once a decision has been made. This change delivers a simplification of the current arrangements. Other elements of the wider merger fees policy – relating to the circumstances in which certain fees are not payable; the amount of fees; the person by whom fees are payable; and the current limited exemption for acquisitions for SMEs – will not be affected.

Question 8: Do you have any comments on the draft Order?

Background

6.5 The current legal position on the payment of merger fees is set out in the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 under powers in s.28 and s.121 of the EA02. The Order states that, subject to some limited exceptions, any merger that qualifies for reference to the Competition Commission is subject to a fee, irrespective of whether a reference is made.

6.6 The main exception is where the interest acquired or being acquired is less than a controlling interest and a merger notice has not been submitted in relation to the

acquisition. In addition, a fee is not payable when the acquirer is a small or medium sized enterprise (as defined by provisions of the Companies Act 2006).

6.7 There are, however, a complex set of rules governing when the fee becomes payable, depending on the nature of the merger – so that currently:

- For pre-notified mergers using a statutory merger notice, payment must be submitted with the completed notice, and the period for considering the notice does not begin until the first working day after the completed form and the correct fee has been received. The fee must be repaid if the OFT subsequently decides that the notified arrangements would not result in a relevant merger situation.

- For other mergers (including anticipated mergers that are not notified by means of a statutory merger notice) which involve the acquisition of a controlling interest, the fee becomes payable on the announcement of the OFT's decision (or Secretary of State's in public interest cases) whether or not to refer the merger to the Competition Commission. No fee is payable if the OFT finds that the case does not qualify as a relevant merger situation.

- For cases resolved through undertakings in lieu, the fee becomes payable when the OFT loses its duty to refer as a result of its formal acceptance of undertakings in lieu.

- For public interest cases decided by the Secretary of State, the fee becomes payable to the OFT when the Secretary of State publishes a reference decision under s.45 of EA02 or publishes any decision not to make such a reference. No fee is payable if the case does not qualify as a relevant merger situation.

7. Consultation Questions

Chapter 2. The Strategic Steer to the Competition and Markets Authority

Question 1: Do you have any comments on the proposed Steer for the CMA?

Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014

Question 2: What is your view on the proposed maximum penalty levels?

Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?

Question 4: Do you have any other comments on the draft Order?

Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014

Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?

Question 6: Do you have any further comments on the draft Order?

Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014

Question 7: Do you have any comments on the draft Order?

Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014

Question 8: Do you have any comments on the draft Order?

Annex 1: Strategic Steer for the Competition and Markets Authority 2014-17

1. Securing strong, sustainable economic growth is the Government's central priority and open and fair competition is a vital ingredient in achieving this. The threat of new entry and development of new business models forces firms to innovate and puts them in the best position to compete internationally. Consumers benefit through greater choice, better quality, lower prices and innovation.

2. The Government has undertaken a series of reforms to the law and competition institutions aimed at strengthening the regime through stronger powers and more robust decision making and increasing its agility, speed and predictability for business.

3. This steer to the new Competition and Markets Authority (CMA) sets out how the competition regime fits within the Government's wider economic priorities and the CMA's single primary duty to 'promote competition, both within and outside the UK, for the benefit of consumers'. It supports the CMA's status as a strong, independent competition authority.

4. The steer sits alongside the legal framework that sets out the functions, duties and governance arrangements of the CMA and its Performance Management Framework established by HM Treasury and BIS. The CMA will be expected to have regard to the steer but retains full independence in how it approaches its work, and in its selection of cases and the tools it uses to tackle them.

The Steer

5. The Government considers that the central task of the CMA will be to ensure that the forces of competition are fully harnessed to support the return to strong and sustained growth. In particular:

6. The CMA should **identify markets where competition is not working well** and tackle the constraints on competition in these cases. In doing so,

   - the CMA should take account of consumer behaviour particularly in markets where there are information problems and asymmetries. Markets sometimes fail to work effectively not because of lack of competition but because consumers struggle to compare products or face costs of switching. The Government considers that these consumer behavioural issues should be central to the CMA's analysis of whether markets are working well, and should inform the remedies it puts in place

   - the CMA should take account of longer-term dynamic competition through innovation and the development of new business models, as well as short-term competition in the market. The CMA should consider whether there are

appropriate structures in place to support sustainable competition, consistent with long-run growth;

- as part of this, the CMA should be willing to consider potential competition concerns in business-to-business markets, including the effects of differences in bargaining power between firms in a supply chain, and whether firms' buyer power is distorting competitive outcomes;

- the CMA should assess specific sectors where enhanced competition could contribute to faster growth (for example, knowledge intensive sectors, financial services and infrastructure sectors including energy) – working with the responsible regulator where appropriate; and

- in carrying out this work the CMA should address emerging competition problems early and increase the number and speed of cases, to the benefit of consumers and the wider economy while avoiding undue burdens on business. The CMA should have regard to the need to improve transparency and certainty for business, including in setting prioritisation principles for the organisation.

7. The CMA should be a strong defender of fair competition and **enforce antitrust rules** robustly where they are breached so sending the message that the UK will not allow infringements against competition law that harm consumers:

    - the CMA should select and conclude an appropriate mix of complex and simpler enforcement cases to maximise its impact, end abuse and create a credible deterrent effect to anticompetitive behaviour across the whole economy;

    - the CMA should seek to conclude cases more swiftly while maintaining fairness and ensure its decisions are robust to achieve a greater number of successfully concluded cases and investigations, as compared to the historical record; and

    - the CMA should act as an effective advocate to ensure that business of all sizes and in all sectors have an appropriate understanding of competition law, the sanctions and what they need to do to comply.

8. The Government recognises that it can affect markets through regulation, procurement and other activities, and sees the **CMA playing a key role in challenging government** where it is inadvertently creating barriers to competition. The Government will be open to new ways of delivering services or intervening in the economy and commits to accept the CMA's recommendations for improving competition. There will be a presumption that all recommendations will be accepted unless there are strong policy reasons not to do so. The CMA should also assist Government in implementing its recommendations.

9. The CMA is the single expert UK-wide competition agency and as such it has been given an important role to play in providing leadership across the economy and

working with and through partner agencies to deliver positive competition outcomes:

- the CMA should engage in a broad strategic dialogue with the regulators and look for opportunities to promote effective competition through either carrying out it own work or actively supporting regulators' analysis, enforcement and markets activity;

- the CMA should work with sector regulators, including the Financial Conduct Authority, to build up its sector capabilities and continuing to share competition expertise, including through joint enforcement work, training and research; and

- competition and markets issues often have an international dimension and the openness to competition of markets outside the UK can benefit UK firms. The CMA should therefore maintain and enhance its leadership position in the EU and internationally.

Conclusion

10. The Government has created the CMA and given it stronger powers as strengthening the competition regime will help promote growth. The Steer sits alongside other elements of the CMA's accountability and performance frameworks. By providing a transparent statement of Government priorities it strengthens the CMA's status as a strong, independent competition authority.

11. The Government considers that the central task of the CMA will be to ensure that competition supports growth and that it should identify and tackle constraints in markets where competition is not working well. In doing so it should take account of consumer behaviour and longer-term dynamic competition through innovation and the development of new business models, and consider potential competition concerns in business-to-business markets. The CMA should also enforce antitrust rules robustly, challenge government where it is creating barriers to competition and work with and through partner agencies to deliver positive competition outcomes.

Annex 2: Competition and Markets Authority (Penalties) Order 2014

STATUTORY INSTRUMENTS

2014 No. XXXX

COMPETITION

Competition and Markets Authority (Penalties) Order 2014

Made - - - -	***
Laid before Parliament	***
Coming into force - -	***

Whereas the Secretary of State, as required by section 111(8) and 174D(7) of the Enterprise Act 2002(**a**) ("the EA 2002") and section 40A(8) of the Competition Act 1998(**b**) ("CA 1998"), has consulted the Competition and Markets Authority and such other persons as he considers appropriate;

And whereas the Secretary of State has considered the representations received;

Now, therefore, the Secretary of State in exercise of the powers conferred on him by 111(4) and (6) and section 174A(1) and (3) of the EA 2002 and section 40A(1) and (3) CA 1998 including those subsections as applied by section 11B(1) of the Competition Act 1980, section 44B(1) of the Airports Act 1986(**c**), section 41EB(1) of the Gas Act 1986(**d**), 56CB(1) of the Electricity Act 1989(**e**), sections 16B(6), including that section as applied by section 12(3B), 14B(1), 17M(1) and 17Q(6) of and paragraph 1 of Schedule 4ZA to the Water Industry Act 1991(**f**), Article 15B(1) of the Electricity (Northern Ireland) Order 1992(**g**), sections 13B(1) and 15C(2D) and paragraphs 10A(1) and 15(2D) of Schedule 4A to the Railways Act 1993(**h**), Article 15B(1) of the Gas (Northern Ireland) Order 1996(**i**) and sections 12B(1) and 18(6) of the Transport Act 2000(**j**), Article 5 of the Water Services Scotland Act 2005 (Consequential Provisions and Modifications) Order 2005(**k**), Article 23 Water and Sewerage Services (Northern Ireland) Order 2006(**l**), section 60 of the Legal Services

(**a**) 2002 c.40.
(**b**) 1980 c.21.
(**c**) 1986 c.31.
(**d**) 1986 c.44.
(**e**) 1989 c.29.
(**f**) 1991 c.56; sections 12(3B) and 16B were inserted by sections 54 and 55 of the Water Act 2003 (c.37) respectively; sections 17M and 17Q were inserted by section 56 of, and by paragraphs 1 and 2 of Schedule 4 to, that Act; Schedule 4ZA was inserted by section 70 of, and Schedule 6 to, the Enterprise Act 2002.
(**g**) S.I. 1992/231 (N.I. 1).
(**h**) 1993 c.43.
(**i**) S.I. 1996/275 (N.I. 2).
(**j**) 2000 c.38.
(**k**) S.I. 2005/3172.
(**l**) S.I. 2006/3336 (N.I.21).

Act 2007(**a**), section 60 of the Postal Services Act 2011(**b**) and Article 3 of the Postal Services (Appeals to the CMA) (Investigations and Extension of Time Limits) Order 2011(**c**), paragraph 10 of Schedule 10 of the Health and Social Care Act 2012(**d**) hereby makes the following Order:

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Competition and Markets Authority (Penalties) Order 2014 and shall come into force on 1 April 2014.

(2) In this Order "the EA 2002" means the Enterprise Act 2002.

(3) In this Order "the CA 1998" means the Competition Act 1998.

The Specified Amounts: Mergers

2.—(1) For the purposes of section 111(4)(a) of the EA 2002 the fixed amount specified shall be [£30,000].

(2) For the purposes of section 111(4)(b) of the EA 2002 the amount per day specified shall be [£15,000].

(3) For the purposes of section 111(4)(c) of the EA 2002 the fixed amount specified shall be [£30,000] and the amount per day specified shall be [£15,000].

(4) For the purposes of section 111(6) of the EA 2002 the fixed amount specified shall be [£30,000].

The Specified Amounts: Markets

3.—(1) For the purposes of section 174D(4)(a) of the EA 2002 the fixed amount specified shall be [£30,000].

(2) For the purposes of section 174D(4)(b) of the EA 2002 the amount per day specified shall be [£15,000].

(3) For the purposes of section 174D(4)(c) of the EA 2002 the fixed amount specified shall be [£30,000] and the amount per day specified shall be [£15,000].

(4) For the purposes of section 174D(5) of the EA 2002 the amount specified shall be [£30,000].

The Specified Amounts: Anti-trust

4.—(1) For the purposes of section 40A(3)(a) of the CA 1998 the fixed amount specified shall be [£30,000].

(2) For the purposes of section 40A(3)(b) of the CA 1998 the amount per day specified shall be [£15,000].

(3) For the purposes of section 40A(3)(c) of the CA 1998 the fixed amount shall be £30,000 and the amount per specified shall be [£15,000].

Revocation

5. The following Orders are revoked –

(1) Competition Commission (Penalties) Order 2003(**e**) and

(**a**) 2007 c.29.
(**b**) 2011 c.5.
(**c**) 2011 c.2749.
(**d**) 2012 c.7.
(**e**) S.I. 2003/1371.

(2) Competition Commission (Water Industry) Penalties Order 2007(**a**).

Name
Title
Date Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Order)

This Order specifies the maximum amounts that the Competition and Markets Authority ("the CMA") may impose as a penalty under section 110(1) or (3) of the Enterprise Act 2002 ("EA 2002"). Section 110(1) of the EA 2002 permits the CMA to impose a penalty where a person has failed, without reasonable excuse to comply with a notice under section 109 of the EA 2002. Section 110(3) of the Act permits the CMA to impose such a penalty where it considers that a person has intentionally obstructed or delayed another person in the exercise of his powers under section 109(6) EA 2002.

A Penalty imposed under section 110(1) of the EA 2002 may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. Where the penalty comprises or includes a fixed amount, the maximum fixed amount is [£30,000]. Where the penalty comprises or includes an amount calculated by reference to a daily rate, the maximum rate at which the penalty may increase is [£15,000] per day.

A penalty imposed under section 110(3) of the Act must be a fixed amount. The maximum amount of such a penalty is [£30,000].

Sections 110 and 111 apply for the purposes of references to the CMA or investigations by the CMA for the purpose of exercising functions under the following statutory provisions as they apply for merger references under Part 3 of the EA 2002: section 11 of the Competition Act 1980, section 43 of the Airports Act 1986, 41E of the Gas Act 1986, sections 12, 14A and 56C of the Electricity Act 1989, section 14 of the Water Industry Act 1991, Article 15 of the Electricity (Northern Ireland) Order 1992, sections 13, 15A and 15B of and paragraphs 9, 13 and 14 of Schedule 4A to the Railways Act 1993, Article 15 of the Gas (Northern Ireland) Order 1996 and sections 12, 15 and 16 of the Transport Act 2000, Article 5 of the Water Services Scotland Act 2005 (Consequential Provisions and Modifications) Order 2005, Article 23 Water and Sewerage Services (Northern Ireland) Order 2006, section 60 of the Legal Services Act 2007, section 60 of the Postal Services Act 2011 and Article 3 of the Postal Services (Appeals to the CMA) (Investigations and Extension of Time Limits) Order 2011, paragraph 10 of Schedule 10 of the Health and Social Care Act 2012.

This Order also specifies the maximum amounts that the CMA may impose as a penalty under section 174A(1) or (3) of the Enterprise Act 2002 ("EA 2002"). Section 174A(1) of the Act permits the CMA to impose a penalty where a person has failed, without reasonable excuse, to comply with a notice under section 174 of the EA 2002. Section 174A(3) of the Act permits the CMA to impose such a penalty where it considers that a person has intentionally obstructed or delayed another person in the exercise of his powers under section 174(7) of the EA 2002.

A penalty imposed under section 174D(4) of the EA 2002 may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. Where the penalty comprises or includes a fixed amount, the maximum fixed amount is [£30,000]. Where the penalty comprises or includes an amount calculated by reference to a daily rate, the maximum rate at which the penalty may increase is [£15,000] per day.

(**a**) S.I. 2007/431.

A penalty imposed under section 174D(5) of the Act must be a fixed amount. The maximum amount of such a penalty is [£30,000].

This Order also specifies the maximum amounts that the CMA may impose as a penalty under sections 26, 26A, 27, 28 and 28A of the Competition Act 1998 ("CA 1998"). Section 40A(1) of the CA 1998 permits the CMA to impose a penalty where a person has failed to comply with a requirement imposed on the person under section 26 (to produce a specified document or to provide specified information), 26A (answer questions with respect to any matter relevant to the investigation), 27 (allow a CMA officer to enter premises without a warrant), 28 (allow a CMA officer to enter premises with a warrant) or 28A (allow a CMA officer to enter domestic premises with a warrant). As the powers of the CMA under Part 1 of the CA1998 are exercisable concurrently by the Regulators, officers of the Gas and Electricity Markets Authority, Water Services Regulation Authority, Office of Rail Regulation, Northern Ireland Authority for Utility Regulation, Civil Aviation Authority and Monitor have the powers afforded under section 27, 28 and 28A of the CA 1998.

A penalty imposed under section 40A(3) of the Act may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. Where the penalty comprises or includes a fixed amount, the maximum fixed amount is [£30,000]. Where the penalty comprises or includes an amount calculated by reference to a daily rate, the maximum rate at which the penalty may increase is [£15,000] per day.

Annex 3: The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014

STATUTORY INSTRUMENTS

2014 No. XXXX

COMPETITION

The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014

Made - - - -	*2014*
Laid before Parliament	*2014*
Coming into force - -	*[1st April] 2014*

The Secretary of State makes the following Order in exercise of the powers conferred by sections 94A(3), (4) and (5) and 124(2) of the Enterprise Act 2002(**a**), including those sections as applied by article 15 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003(**b**).

Citation, commencement and interpretation

1. —(1) This Order may be cited as the Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 and comes into force on [1st April] 2014.

(2) In this Order as it applies for the purposes of section 94A of the Enterprise Act 2002 as applied by the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003, "the appropriate authority" means the Secretary of State.

Control of an enterprise

2.—(1) For the purposes of section 94A(2) of the Enterprise Act 2002 (penalty for breach of interim undertakings and orders), an enterprise is to be treated as controlled by a person (P) where—

(a) the enterprise is carried on by P otherwise than in partnership or as a member of an unincorporated association or group of persons;

(b) the enterprise is carried on by a body corporate in which P has a controlling interest;

(**a**) 2002 c. 40. Section 94A was inserted by section 31 of the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**b**) S.I. 2003/1592; amended by S.I. 2003/3180, S.I. 2013/610, S.I. 2014/[XXXX].

(c) the enterprise is carried on by a body corporate, and P is able directly or indirectly to control or materially to influence the policy of that body corporate without having a controlling interest in that body corporate;

(d) the enterprise is carried on by a partnership or by an unincorporated association or group of persons, and P (whether or not P is a member of that partnership, association or group) is able directly or indirectly to control or materially to influence the policy of that partnership, association or group in carrying on the enterprise; or

(e) the enterprise is carried on by an individual, and P is able directly or indirectly to control or materially to influence the policy of that individual in carrying on the enterprise.

(2) For the purposes of paragraph (1)(b) and (c), P has a controlling interest in a body corporate if P—

(a) is a parent undertaking of that body corporate within the meaning of section 1162 of the Companies Act 2006(**a**); or

(b) would be a parent undertaking of that body corporate within the meaning of that section if P were an undertaking within the meaning of section 1161 of that Act.

(3) For the purposes of paragraph (2), subsections (2)(c) and (4)(a) of section 1162 of the Companies Act 2006 are to be disregarded.

(4) For the purposes of paragraph (1)(c), (d) and (e) the appropriate authority may, having regard to all the circumstances, determine whether any person is able directly or indirectly to control or materially to influence the policy of a body corporate or the policy of an individual or a partnership or an unincorporated association or group of persons in carrying on an enterprise.

(5) References in this article to a body corporate include a body incorporated outside the United Kingdom; and references to a partnership or an unincorporated association or group of persons include a partnership or unincorporated association or group of persons formed or established, or having any members incorporated, formed or established, outside the United Kingdom.

Turnover of an enterprise

3.—(1) For the purposes of section 94A(2) of the Enterprise Act 2002 (penalty for breach of interim undertakings and orders), the turnover of an enterprise is the turnover of the enterprise in its relevant accounting period, determined in accordance with the Schedule.

(2) An enterprise's "relevant accounting period" is its accounting period immediately preceding the date on which the interim measure in question came into force.

(3) An "accounting period" of an enterprise is a period of more than six months in respect of which the business whose activities (or part of whose activities) constitute the enterprise in question prepares or is required to prepare accounts relating to those activities.

(4) Where for the purposes of paragraph (1) the figures necessary for the appropriate authority to calculate the turnover of an enterprise in its relevant accounting period are not available to the appropriate authority when the appropriate authority decides to impose the penalty under section 94A(1) of the Enterprise Act 2002, the turnover of the enterprise is its turnover in its accounting period immediately preceding its relevant accounting period, determined in accordance with the Schedule.

(5) Where paragraph (4) applies but the figures necessary for the appropriate authority to calculate the turnover of an enterprise in its accounting period immediately preceding its relevant accounting period are not available to the appropriate authority when the appropriate authority decides to impose the penalty under section 94A(1) of the Enterprise Act 2002, the turnover of the enterprise for the purposes of section 94A(2) of the Enterprise Act 2002 is its turnover, determined in accordance with the Schedule, in the period beginning

(**a**) 2006 c. 46.

with the day after the last day of its relevant accounting period and ending with the date on which the interim measure in question came into force.

(6) Where paragraph (4) applies but the enterprise has no accounting period immediately preceding its relevant accounting period, the turnover of the enterprise for the purposes of section 94A(2) of the Enterprise Act 2002 is its turnover, determined in accordance with the Schedule, in the period beginning with the date on which the activities constituting the enterprise began to be carried on and ending with the date on which its relevant accounting period began.

(7) Where paragraph (6) applies but the figures necessary for the appropriate authority to calculate the turnover of the enterprise in the period beginning with the date on which the activities constituting the enterprise began to be carried on and ending with the date on which its relevant accounting period began are not available to the appropriate authority, the turnover of the enterprise for the purposes of section 94A(2) of the Enterprise Act 2002 is its turnover, determined in accordance with the Schedule, in the period beginning with the day after the last day of its relevant accounting period and ending with the date on which the interim measure in question came into force.

(8) Where for the purposes of paragraph (1) an enterprise has no relevant accounting period, the turnover of the enterprise for the purposes of section 94A(2) of the Enterprise Act 2002 is its turnover, determined in accordance with the Schedule, in the period beginning with the date on which the activities constituting the enterprise began to be carried on and ending with the date on which the interim measure in question came into force.

[*Name]*
[Title]
[Date] Department for Business, Innovation and Skills

SCHEDULE

Article 3

TURNOVER OF AN ENTERPRISE

Interpretation

1.—(1) In this Schedule—

"credit institution" means a credit institution for the purposes of Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions(**a**);

"financial institution" means a financial institution for the purposes of Article 4(5) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions; and

"insurance undertaking" means—

(a) an insurance undertaking carrying on the business of direct insurance of a class set out in the Annex to Council Directive (EEC) 73/239 the First Council Directive on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance(**b**) or in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5th November 2002 concerning life assurance(**c**); or

(**a**) OJ No L771, 30.6.06, p 1; relevant amendments were made by Directive 2007/64/EC (OJ No L319, 5.12.07, p 1) and Directive 2009/111/EC (OJ No L267, 10.10.09, p 7).
(**b**) OJ No L228, 16.8.73, p 3; relevant amendments were made by Council Directive 84/641/EEC (OJ No L339, 27.12.84, p 21).
(**c**) OJ No L345, 19.12.02, p 1.

(b) a reinsurance undertaking carrying on the business of reinsurance under Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance(**a**) or an equivalent undertaking having its head office outside the European Union.

(2) Expressions used in this Schedule in relation to the determination of turnover in respect of the activities of a credit institution, a financial institution or an insurance undertaking have (except where the contrary intention appears) the same meaning as in the relevant Directive.

(3) The provisions of this Schedule shall be interpreted in accordance with generally accepted accounting principles and practices.

Turnover: general

2.—(1) The turnover of an enterprise is its turnover both in and outside the United Kingdom.

(2) Except to the extent that sub-paragraph (6) applies, the turnover of an enterprise is the sum of all amounts derived from the sale of products and the provision of services falling within the ordinary activities of the enterprise to businesses or consumers, after the deduction of sales rebates, value added tax and other taxes directly related to turnover.

(3) The turnover of an enterprise also includes any aid granted by a public body (in or outside the United Kingdom) to the business, where—

(a) the aid relates to the ordinary activities of the business;

(b) the business is itself the recipient of the aid; and

(c) the aid is directly linked to the sale of products or the provision of services by the business and is therefore reflected in the price of those products or services.

(4) Where the person on whom a penalty under section 94A(1) of the Enterprise Act 2002 is imposed owns or controls more than one enterprise, the turnover of those enterprises does not include amounts derived from the sale of products or the provision of services between them.

(5) Where the enterprise's relevant accounting period, or other period in which the turnover of the enterprise is required to be determined by article 3, does not equal 12 months, the turnover of the enterprise in that period is the amount which bears the same proportion to the turnover of the enterprise in that period as 12 months does to that period.

(6) Where all or any of the activities constituting an enterprise are the activities of a credit institution, a financial institution or an insurance undertaking, sub-paragraph (1), (3), (5), (7) and (8) of this paragraph and paragraph 3 or (as the case may be) 4 apply to determine the turnover of the enterprise in respect of those activities.

(7) Where in the accounts or other information used by the appropriate authority to calculate the turnover (or any part of the turnover) of an enterprise any figure is expressed in a currency other than sterling, the appropriate authority may determine the equivalent in sterling, applying whatever rate or rates of exchange the authority considers appropriate and rounding the resulting figure up or down as it considers appropriate.

(8) Where an acquisition or divestment or other transaction or event has occurred since the end of the enterprise's relevant accounting period which the appropriate authority considers may have a significant impact on the turnover of the enterprise, the appropriate authority may take account of that transaction or event if it considers it appropriate to do so and accordingly increase or (as the case may be) reduce by such amount as it considers appropriate the amount which would otherwise constitute the enterprise's turnover for the purposes of section 94A(2) of the Enterprise Act 2002.

(**a**) OJ No L323, 9.12.05, p 1; amended by Directive 2007/44/EC (OJ No L247, 21.9.07, p 1) and Directive 2008/37/EC (OJ No L81, 20.3.08, p 71).

Income included in turnover of an enterprise which is a credit institution or financial institution

3. The turnover of an enterprise in respect of the activities of a credit institution or financial institution is the sum of the following income as defined in Council Directive (EEC) 86/635(**a**) received by the institution, after deduction of value added tax and other taxes directly related to the income in question:

(a) interest income and similar income;

(b) the following income from securities—

(i) income from shares and other variable yield securities;

(ii) income from participating interests;

(iii) income from shares in affiliated undertakings;

(c) commissions receivable;

(d) net profit on financial operations;

(e) other operating income.

Income included in turnover of an enterprise which is an insurance undertaking

4. The turnover of an enterprise in respect of the activities of an insurance undertaking is the total value of gross premiums received, comprising all amounts received and receivable in respect of insurance contracts issued by or on behalf of the undertaking, including outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums.

(**a**) OJ No L372, 31.12.86, p1; amended by Directives 2001/65/EC (OJ No L283, 27.10.01, p 28), 2003/51/EC (OJ No L178, 17.7.03, p 16) and 2006/46/EC (OJ No L224, 16.8.06, p 1).

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made under section 94A(3), (4) and (5) of the Enterprise Act 2002 (c. 40) ("the Enterprise Act"). Section 94A was inserted by the Enterprise and Regulatory Reform Act 2013 (c. 24) ("the 2013 Act").

The 2013 Act made changes to the law on merger control under Part 3 of the Enterprise Act. Among other things it abolished the Office of Fair Trading and the Competition Commission, transferring their competition functions to the Competition and Markets Authority (CMA), and strengthened the provisions of the Enterprise Act relating to interim measures in merger inquiries (sections 71 and 72, sections 80 and 81 and paragraph 2 of Schedule 7). As part of this reform of the law on interim measures the 2013 Act inserted new section 94A, which enables the CMA or (depending on the circumstances) the Secretary of State to impose a financial penalty where a person has failed, without reasonable excuse, to comply with an interim measure. Section 94A provides that the penalty must not exceed 5% of the total value of the turnover (both in an outside the United Kingdom) of the enterprises owned or controlled by the person in question. For these purposes, section 94A(3), (4) and (5) confers power on the Secretary of State to make provision, by order, for determining when an enterprise is to be treated as controlled by a person, and for determining the turnover (both in and outside the United Kingdom) of an enterprise. "Enterprise" is defined in section 129(1) of the Enterprise Act.

Article 2 of this Order makes provision for determining when an enterprise is to be treated as controlled by a person.

Article 3 of, and the Schedule to, this Order make provision for determining the turnover of an enterprise, both in and outside the United Kingdom.

The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (S.I. 2003/1592), as amended by the Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014 (S.I. 2014/XXXX), also applies section 94A of the Enterprise Act to cases covered by that Order. This Order accordingly also applies to determine control and turnover for the purposes of financial penalties imposed for breach of interim measures under that 2003 Order.

Annex 4: The Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014

Draft Order laid before Parliament under section 68(6) of the Enterprise Act 2002, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2014 No. XXXX

COMPETITION

The Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014

Made - - - - *2014*

Coming into force - - *[1st April] 2014*

The Secretary of State makes the following Order in exercise of the powers conferred by sections 68 and 124(2) and (4) of the Enterprise Act 2002(**a**).

In accordance with section 68(6) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

Citation and commencement

1. This Order may be cited as the Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014 and comes into force on [1st April] 2014.

Amendments to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003

2. The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003(**b**) is amended as follows.

3. In article 1(2), in the definition of "a European intervention notice", for "OFT" substitute "CMA".

4. In article 3—

(a) in paragraph (2)(a), for "OFT" substitute "CMA"; and

(b) in paragraph (2)(d) and (e), for "Commission" (in each place where it occurs) substitute "CMA".

(**a**) 2002 c.40; section 68 was amended by paragraph 17 of Schedule 16 and paragraph 1 of Schedule 19 to the Communications Act 2003 (c. 21), paragraph 111 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24), paragraph 2(21) of Schedule 1 to the EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079) and article 6(2)(a) of the Treaty of Lisbon (Changes in Terminology) Order 2011 (S.I. 2011/1043).

(**b**) S.I. 2003/1592; amended by S.I. 2003/3180, 2013/610.

5. In article 4—

(a) in paragraphs (2), (3), (4), (4A) and (6), for "OFT" (in each place where it occurs) substitute "CMA"; and

(b) in the heading, for "OFT" substitute "CMA".

6. In article 5—

(a) in paragraph (1)(b), for "OFT" substitute "CMA";

(b) in paragraphs (2) and (3), for "the Commission" (in each place where it occurs) substitute "the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013(**a**)"; and

(c) in paragraph (5), for "OFT" substitute "CMA".

7. After article 5 insert—

"**Functions to be exercised by CMA groups**

5A. Where a reference is made to the chair of the CMA under article 5 for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013, the functions of the CMA under or by virtue of the following provisions in relation to the matter concerned are to be carried out on behalf of the CMA by the group so constituted—

(a) articles 6 to 11;

(b) article 14, so far as relating to anything done on behalf of the CMA by the group;

(c) where a reference is treated by virtue of article 7(4) as having been made under article 5(2), paragraph (ab) of section 23(9) of the Act as applied by article 2;

(d) sections 104(**b**) and 104A(**c**) of the Act as applied by article 15;

(e) section 109(**d**) of the Act as applied by article 15, where the permitted purpose relates to a function that (by virtue of this article) is being or is to be carried out on behalf of the CMA by the group;

(f) sections 110 to 115(**e**) of the Act as applied by article 15, so far as relating to a notice given under section 109 (as so applied) on behalf of the CMA by the group;

(g) section 118(4)(**f**) of the Act as applied by article 15;

(h) section 120(5)(b)(**g**) of the Act as applied by article 15, so far as relating to a decision of the group."

8. In article 6, for "Commission" (in each place where it occurs) substitute "CMA".

9. In article 7—

(a) in paragraphs (1) to (4), for "Commission" (in each place where it occurs) substitute "CMA";

(b) in paragraph (5)—

(i) for "Commission" substitute "CMA"; and

(ii) omit "1,";

(c) in paragraph (6)—

(**a**) 2013 c.24.
(**b**) Section 104 was amended by paragraph 135 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**c**) Section 104A was inserted by section 381 of the Communications Act 2003 (c. 21) and amended by paragraph 136 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**d**) Section 109 was amended by section 29 of and paragraph 143 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**e**) Sections 110 and 111 were amended by section 29 of and (respectively) paragraphs 144 and 145 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24). Section 110A was inserted by section 29 of that Act. Sections 112, 113, 114 and 115 were amended by (respectively) paragraphs 146, 147, 148 and 149 of Schedule 5 to that Act.
(**f**) Section 118 was amended by paragraph 152 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**g**) Section 120 was amended by section 31(2) of and paragraph 155 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).

(i) for the words from "any undertaking" to "that Schedule," substitute "any order made under paragraph 2 of Schedule 2"; and

(ii) for "Commission" substitute "CMA";

(d) in paragraph (7)—

(i) omit "undertaking or" (in each place where it occurs);

(ii) omit "accepted or" (in each place where it occurs); and

(iii) omit ", superseded, released"; and

(e) in paragraphs (9) to (11), for "Commission" (in each place where it occurs) substitute "CMA".

10. In article 8, for "Commission" (in each place where it occurs) substitute "CMA".

11. In article 9—

(a) in paragraphs (1) to (3) and (7), for "Commission" (in each place where it occurs) substitute "CMA"; and

(b) in the heading, for "Commission" substitute "CMA".

12. In article 11, for "Commission" (in each place where it occurs) substitute "CMA".

13. In article 12(1) to (5) and (8), for "Commission" (in each place where it occurs) substitute "CMA".

14. In article 13(2), for "OFT" substitute "CMA".

15. In article 14—

(a) in paragraph (1), in the words before sub-paragraph (a), for "Commission" substitute "CMA";

(b) in paragraph (2)—

(i) in sub-paragraph (b), for "OFT" substitute "CMA";

(ii) in sub-paragraph (e), for "Commission" substitute "CMA"; and

(iii) omit sub-paragraphs (g) and (h);

(c) in paragraph (7)—

(i) in sub-paragraph (a), for "OFT" substitute "CMA"; and

(ii) in sub-paragraph (b), for "Commission" substitute "CMA"; and

(d) in paragraph (8), for "Commission's" substitute "CMA's".

16.—(1) Schedule 1 is amended as follows.

(2) In paragraph (a), for "OFT, the Commission" substitute "CMA".

(3) In paragraph (d), in the provisions treated as substituted for section 23(9)(a) of the Enterprise Act 2002—

(a) in sub-paragraph (aa), for "OFT" substitute "CMA"; and

(b) in sub-paragraph (ab), for "Commission" substitute "CMA".

(4) In paragraph (e), for "OFT" substitute "CMA".

(5) In paragraph (f) –

(a) for "OFT" substitute "CMA"; and

(b) for "sections 25(1) to (3), (6) and (8) and 31" substitute "section 25(1) to (3), (6) and (8)"(**a**).

(6) In paragraph (g), for "OFT" substitute "CMA".

(7) In paragraph (i), in the subsection (5A) treated as inserted after section 25(5) of the Enterprise Act 2002, for "may be ceased" substitute "may have ceased".

(**a**) Section 25 of the Enterprise Act 2002 (c. 40) was amended by paragraph 70 of Schedule 5 and paragraph 16 of Schedule 15 to the Enterprise and Regulatory Reform Act 2013 (c. 24). Section 25(6) was amended by paragraph 2(5) of Schedule 1 to the EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079).

(8) In paragraph (k), for OFT substitute "CMA".

(9) In paragraph (l)—

(a) omit "and the power to request information under section 31(1)"; and

(b) for "OFT" substitute "CMA".

(10) Omit paragraphs (o) and (q).

17.—(1) Schedule 2 is amended as follows.

(2) Omit paragraph 1.

(3) In the italic heading before paragraph 1, omit "undertakings and".

(4) In paragraph 2—

(a) after sub-paragraph (2) insert—

"(2A) Sub-paragraph (2B) applies where—

(a) a European intervention notice is in force; and

(b) the Secretary of State has reasonable grounds for suspecting that pre-emptive action has or may have been taken.

(2B) The Secretary of State may by order, for the purpose of restoring the position to what it would have been had the pre-emptive action not been taken or otherwise for the purpose of mitigating its effects—

(a) do anything mentioned in sub-paragraph (2)(b) to (d);

(b) impose such other obligations, prohibitions or restrictions as the Secretary of State considers appropriate for that purpose.

(2C) A person may, with the consent of the Secretary of State, take action or action of a particular description where the action would otherwise constitute a contravention of an order under this paragraph.";

(b) in sub-paragraph (4), omit "1 or";

(c) in sub-paragraph (6), after "unless" insert—

"—

(a) the Secretary of State has reasonable grounds for suspecting that it is or may be the case that two or more enterprises have ceased to be distinct or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct; or

(b) "; and

(d) after sub-paragraph (7) insert—

"(8) In this paragraph "pre-emptive action" means action which might prejudice the reference or possible reference concerned under article 5 or impede the taking of any action under this Order which may be justified by the Secretary of State's decisions on the reference."

(5) In paragraph 3—

(a) in sub-paragraph (1), for "Commission" substitute "CMA"; and

(b) in sub-paragraph (3), for "OFT" substitute "CMA".

(6) In paragraph 4(2), for "OFT" substitute "CMA".

(7) In paragraph 5(1)(b) and (6), for "OFT" (in each place where it occurs) substitute "CMA".

(8) In paragraph 7—

(a) for sub-paragraph (1)(b) substitute—

"(b) no orders under paragraph 2 are in force in relation to the European relevant merger situation concerned."; and

(b) in sub-paragraph (8)(a) and (b), for "Commission" (in each place where it occurs) substitute "CMA".

(9) In paragraph 8—

(a) for sub-paragraph (1)(b) substitute—

"(b) no orders under paragraph 2 are in force in relation to the European relevant merger situation concerned.";

(b) in sub-paragraph (7)(a) and (b), for "Commission" (in each place where it occurs) substitute "CMA"; and

(c) in sub-paragraph (10)(b), for "OFT" substitute "CMA".

(10) In paragraph 10(1)(b) and (6), for "OFT" (in each place where it occurs) substitute "CMA".

(11) In paragraph 11(5), for "OFT" substitute "CMA".

18.—(1) Schedule 3 is amended as follows.

(2) In paragraph 1(1)—

(a) omit paragraph (a);

(b) in paragraphs (g) and (h), for "OFT" (in each place where it occurs) substitute "CMA";

(c) after paragraph (i) insert—

"(ia) section 94A (interim undertakings and orders: penalties)(**a**);";

(d) in paragraph (m), for "OFT and Commission" substitute "CMA";

(e) after paragraph (p) insert—

"(pa) section 110A (restriction on powers to impose penalties under section 110)(**b**);

(pb) section 110B (section 110A: supplemental provision)(**c**);" and

(f) in paragraph (y), for "Commission" substitute "CMA".

(3) Omit paragraph 1(2).

(4) In paragraph 1(5)(a), for "section 71" substitute "section 73".

(5) In paragraph 1(6)—

(a) in paragraph (b)(i), for "Commission" substitute "CMA"; and

(b) omit paragraph (c).

(6) In paragraph 1(7), omit paragraphs (b) and (c).

(7) In paragraph 1(8), omit paragraphs (a), (c) and (d).

(8) Omit paragraph 1(9)(a).

(9) After paragraph 1(9) insert—

"(9A) Section 94A(**d**) shall apply as if—

(a) in subsection (1)—

(i) for the words "the appropriate authority" there were substituted "the Secretary of State"; and

(ii) for the word "it" (in both places where it occurs) there were substituted "the Secretary of State";

(b) in subsection (5), for "the appropriate authority" there were substituted "the Secretary of State";

(c) in subsection (7), for the words "the person who imposed the penalty under this section" there were substituted "the Secretary of State"; and

(d) for subsection (8) there were substituted—

(**a**) Section 94A was inserted by section 31 of the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**b**) Section 110A was inserted by section 29 of the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**c**) Section 110B was inserted by section 29 of the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**d**) Section 94A was inserted by section 31 of the Enterprise and Regulatory Reform Act 2013 (c. 24).

"(8) In this section, "interim measure" means an order under paragraph 2 of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.""

(10) In paragraph 1(12)—

(a) omit paragraph (b);

(b) for paragraph (c) substitute—

"(c) for paragraph (a) in the definition of "relevant decision" there were substituted—

"(a) in the case of the CMA, any decision by the CMA on the questions mentioned in article 6 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;";" and

(c) omit paragraph (d).

(11) In paragraph 1(12A)(a), for "Commission" substitute "CMA".

(12) In paragraph 1(13A)(a), in paragraph (a) of the subsection treated as substituted for section 106B(1) of the Enterprise Act 2002(**a**), for "Commission" substitute "CMA".

(13) For paragraph 1(15) substitute—

"(15) Section 109(**b**) shall apply as if—

(a) for subsection (A1) there were substituted—

"(A1) For the purposes of this section, the permitted purposes are assisting the CMA or the Secretary of State in carrying out any functions, including enforcement functions, of the CMA or (as the case may be) the Secretary of State under or by virtue of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 in connection with a matter that is or has been the subject of a reference or possible reference under article 5 of that Order."; and

(b) in subsection (8A)—

(i) paragraph (a)(ii) were omitted;

(ii) in paragraph (a)(iii), the words "75, 76, 83 or" were omitted; and

(iii) in paragraph (b)(iii), for the words "Schedule 7" there were substituted "Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003"."

(14) After paragraph 1(16) insert—

"(16A) Section 110A(**c**) shall apply as if—

(a) subsections (5) and (6) were omitted;

(b) in subsections (7) and (8)—

(i) for the words "section 109(A1)(b)" (in both places where those words occur) there were substituted "section 109(A1)"; and

(ii) for the words "section 45 or 62" (in both places where those words occur) there were substituted "article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003".

(16B) Section 110B(**d**) shall apply as if—

(a) subsections (1) and (2) were omitted;

(b) in subsection (3), in the words before paragraph (a), for the words "section 45 or 62" there were substituted "article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003";

(c) in subsection (3)(b), for the words "Schedule 7" there were substituted "Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003";

(**a**) Section 106B was inserted by section 384 of the Communications Act 2003 (c. 21) and amended by paragraph 140 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**b**) Section 109 was amended by section 29 of and paragraph 143 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**c**) Section 110A was inserted by section 29 of the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**d**) Section 110B was inserted by section 29 of the Enterprise and Regulatory Reform Act 2013 (c. 24).

(d) in subsection (3)(c), for the words "Schedule 7" there were substituted "Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003";

(e) subsection (3)(d) were omitted;

(f) in subsection (4), in the words before paragraph (a), for the words "section 45 or 62" there were substituted "article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003";

(g) subsection (4)(d) were omitted; and

(h) for subsections (5) and (6) there were substituted—

"(5) Paragraph 7(8) and (9) of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 applies for deciding if and when a reference under article 5(2) of that Order is finally determined for the purpose of section 110A(8) as it applies for deciding those questions for the purpose of paragraph 7 of that Schedule.

(6) Paragraph 8(7) and (8) of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 applies for deciding if and when a reference under article 5(3) of that Order is finally determined for the purpose of section 110A(8) as it applies for deciding those questions for the purpose of the definition of "relevant period" in paragraph 8(6) of that Schedule."."

(15) Omit paragraph 1(17).

(16) In paragraph 1(19), before paragraph (a) insert—

"(aa) in subsection (1)(aa)(**a**) for the words "section 44A or 61A" there were substituted "article 4A of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;".

(17) In paragraph 1(22)(c), in the words treated as substituted for section 124(5) of the Enterprise Act 2002, after "section 28," insert "94A(3) or (6),".

(18) In paragraph 2(3)(c), for the words "the OFT, the Commission or (as the case may be)" substitute "the CMA or (as the case may be)".

Name
Title
Date Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (S.I. 2003/1592) ("the 2003 Order").

The 2003 Order was made under section 68 of the Enterprise Act 2002 (c. 40) ("the Enterprise Act"). Section 67 of the Enterprise Act and the 2003 Order provide a scheme for preventing, mitigating or remedying adverse public interest effects resulting from, or which may result from, the creation of a "European relevant merger situation". A "European relevant merger situation" is a merger situation engaging competition issues over which the European Union has sole jurisdiction by virtue of Council Regulation (EC) No. 139/2004 of 20th January 2004 on the control of concentrations between undertakings ("the EU Merger Regulation"). Although the European Union has sole jurisdiction in such cases, the EU Merger Regulation permits Member States to take appropriate measures to protect certain legitimate interests.

(**a**) Section 118(1)(aa) of the Enterprise Act 2002 (c. 40) was inserted by paragraph 21 of Schedule 16 to the Communications Act 2003 (c. 21).

Section 67 of the Enterprise Act accordingly enables the Secretary of State to serve a "European intervention notice" in prescribed circumstances and this triggers the procedures under the 2003 Order. The 2003 Order follows (with appropriate modifications) provisions of Part 3 of the Enterprise Act relating to public interest and special public interest interventions in merger cases (respectively sections 43 to 55 and sections 60 to 66, together with provisions about publication in section 107). These provisions of the Enterprise Act have been amended by the Enterprise and Regulatory Reform Act 2013 (c. 24) which, among other things, abolishes the Office of Fair Trading ("the OFT") and the Competition Commission and transfers the competition functions of these bodies to the Competition and Markets Authority ("the CMA") and strengthens investigatory powers and powers to deal with pre-emptive action. This Order amends the 2003 Order to take account of the amendments to the Enterprise Act.

Articles 3 to 14 of the 2003 Order make provision largely corresponding to that made by sections 43 to 55, 60 to 66 and 107 of the Enterprise Act. Among other things they currently provide for an initial report by the OFT to the Secretary of State, and enable the Secretary of State to make a reference to the Competition Commission and to take enforcement action. Articles 2 to 15 of this Order amend these provisions of the 2003 Order to take account of amendments made to the Enterprise Act by the Enterprise and Regulatory Reform Act 2013. Among other things account is taken of the way in which, under amended sections 45 and 62 of the Enterprise Act, references are made by the Secretary of State to the chair of the CMA for the constitution of a CMA panel group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013. The panel group considers the reference, and exercises various other associated powers, on behalf of the CMA. This is reflected in the amendments made to the 2003 Order by articles 6 and 7 of this Order.

Article 2 of and Schedule 1 to the 2003 Order apply (with modifications) provisions of the Enterprise Act concerned with determining whether a "relevant merger situation" has been or will be created. Under section 67 the Secretary of State must, before serving a European intervention notice, have (among other things) reasonable grounds for suspecting that a "relevant merger situation" has been or will be created. Article 16(1) to (6) and (8) to (10) of this Order amends article 2 of and Schedule 1 to the 2003 Order to take account of amendments made by the Enterprise and Regulatory Reform Act 2013 to the applied provisions of the Enterprise Act. Article 16(7) corrects an error in paragraph (i) of Schedule 1 to the 2003 Order.

Article 17 of this Order amends Schedule 2 to the 2003 Order. That Schedule provides for enforcement action which may be taken by the Secretary of State. It is closely modelled on the enforcement regime for public interest and special public interest cases in Schedule 7 to the Enterprise Act. Schedule 7 has been amended by the Enterprise and Regulatory Reform Act 2013, and this Order makes amendments to Schedule 2 to the 2003 Order to take account of the changes. In particular, powers to make orders dealing with pre-emptive action are strengthened and provision for the acceptance of undertakings from the parties to prevent pre-emptive action is revoked.

Article 18 of this Order amends Schedule 3 to the 2003 Order. That Schedule applies various other provisions of the Enterprise Act, with modifications. Many of the relevant provisions of the Enterprise Act have been amended, and some have been replaced or added to, by the Enterprise and Regulatory Reform Act 2013. Article 18 is largely concerned with making amendments to take account of the changes. In particular, it applies newly inserted provisions of the Enterprise Act enabling financial penalties to be imposed for failure to comply with interim measures (section 94A) and adopts amendments made to the Enterprise Act which strengthen information-gathering powers (now found in amended section 109).

Article 18(2)(a) revokes a provision applying section 69 of the Enterprise Act, because section 69 was repealed by the Communications Act 2003 (c. 21).

Article 18(16) further modifies section 118 of the Enterprise Act as it applies for the purposes of the 2003 Order, enabling the Secretary of State to exclude matters from reports by OFCOM under article 4A of the 2003 Order when published under article 14(2)(ba) of that Order.

Annex 5: The Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014

STATUTORY INSTRUMENTS

2014 No. XXXX

COMPETITION

The Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014

Made - - - -	*2014*
Laid before Parliament	*2014*
Coming into force - -	*[1st April] 2014*

The Secretary of State makes the following Order in exercise of the powers conferred by sections 28, 121 and 124(2) of the Enterprise Act 2002(**a**).

Citation and commencement

1. This Order may be cited as the Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014 and comes into force on [1st April] 2014.

Amendments to the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003

2. The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003(**b**) is amended as follows.

3. For article 2(d) substitute the following—

"(d) "merger reference" means a reference by the CMA to its chair under section 22(**c**) or 33(**d**) of the Act or section 32 of the Water Industry Act 1991(**e**), or a reference by the Secretary of State to the chair of the CMA under section 45 of the Act; and".

4. In article 3—

(**a**) 2002 c. 40; sections 28 and 121 were amended by, respectively, paragraph 71 and paragraph 156 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).
(**b**) S.I. 2003/1370; relevant amending instruments are S.I. 2004/1079, 2004/3204.
(**c**) Section 22 of the Enterprise Act 2002 (c. 40) was amended by paragraph 67 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24). There are other amendments to section 22 which are not relevant.
(**d**) Section 33 was amended by paragraph 72 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24). There are other amendments which are not relevant.
(**e**) 1991 c. 56; section 32 was substituted by section 70(1) of the Enterprise Act 2002 (c. 40) and amended by [*insert citation of Enterprise and Regulatory Reform Act Consequential Amendments Order 2014*].

(a) omit paragraph (a);

(b) in paragraphs (b) and (d), for "OFT" substitute "CMA"; and

(c) in paragraph (d), omit "to the Commission".

5. In article 4—

(a) for paragraph (1) substitute the following—

"(1) Except where the decision in respect of which a fee is payable under article 3(b) or (c) is made in relation to arrangements or proposed arrangements of which the CMA was given notice under section 96(**a**) of the Act (merger notices), a fee shall not be payable under article 3(b) or (c) where the creation or possible creation of the relevant merger situation depends or would depend on the operation of section 26(3) or (4)(b) of the Act."; and

(b) in paragraph (2), for the words from "the OFT decides" to the end substitute "the CMA decides pursuant to section 33(2)(b)(**b**) of the Act that the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a merger reference."

6. In article 5(1), in the words before sub-paragraph (a), for "article 3(a) to (c)" substitute "article 3(b) or (c)".

7. In article 6, for paragraphs (1) and (2) substitute the following—

"(1) Where the decision in respect of which a fee is payable under article 3(b) or (c) is made in relation to arrangements or proposed arrangements of which the CMA was given notice under section 96 of the Act (merger notices), the fee is payable by the person who gave the notice.

(2) In any other case, the fee payable under article 3 is payable by the acquirer."

8. In article 7(1), for the words before sub-paragraph (a) substitute "In a case falling within article 6(1) no fee is payable by the person who gave the merger notice where—".

9. For article 7(2) substitute the following—

"(2) In any other case, no fee is payable under article 3 by the acquirer where the acquirer qualifies as small or medium sized."

10. In article 7(3) —

(a) in the words before sub-paragraph (a), for "enterprise" substitute "acquirer"; and

(b) for sub-paragraphs (a) and (b) substitute the following—

"(a) it satisfies the requirements to be small set out in section 382(3) to (6) of the Companies Act 2006(**c**) or the requirements to be medium-sized set out in section 465(3)(**d**) to (6) of that Act in its most recent financial year, whether or not the acquirer is a company; and

(b) where it is a member of a group as defined in section 474 of the Companies Act 2006 (whether or not the acquirer is a company), that group qualifies as small within the meaning of section 383(4)(**e**) to (7) of that Act or as medium-sized within the meaning of section 466(4)(**f**) to (7) of that Act in its most recent financial year. "

11. In article 8, for "OFT" substitute "CMA".

(**a**) Section 96 of the Enterprise Act 2002 (c. 40) was amended by paragraph 132 of Schedule 5 and paragraph 8 of Schedule 8 to the Enterprise and Regulatory Reform Act 2013 (c. 24).

(**b**) Section 33(2) of the Enterprise Act 2002 (c. 40) was amended by paragraph 72(3) of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).

(**c**) 2006 c. 46; section 382 was amended by regulation 3(1) of the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

(**d**) Section 465(3) was amended by regulation 4(1) of the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

(**e**) Section 383(4) was amended by regulation 3(2) of the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

(**f**) Section 466(4) was amended by regulation 4(2) of the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

12. In article 9—

(a) omit paragraph (1); and

(b) in paragraph (2), for "OFT" substitute "CMA".

13. Omit article 10.

Transitional provision

14.—(1) This article applies where a fee has been paid pursuant to an obligation under the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 which arose before [*insert coming-into-force date of this Order*] in respect of the giving of a merger notice under section 96 of the Enterprise Act 2002.

(2) In this article "the notified arrangements" means the proposed arrangements in relation to which that merger notice was given.

(3) No fee is payable to the CMA under article 3(b) or (c) of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 where the CMA or (as the case may be) the Secretary of State makes, or decides not to make, a merger reference in relation to the notified arrangements.

(4) No fee is payable to the CMA under article 3(b) or (c) of that Order where—

(a) the CMA or (as the case may be) the Secretary of State makes, or decides not to make, a merger reference in relation to the creation, or possible creation, of a relevant merger situation resulting from the carrying into effect of the notified arrangements; and

(b) that reference, or decision not to make a reference, is made within six months of the date when the obligation to pay the fee in respect of the giving of the merger notice arose.

(5) The CMA must repay the fee paid in respect of the giving of the merger notice where—

(a) the CMA decides not to make a merger reference because it does not believe that it is or may be the case that the notified arrangements would, if carried into effect, result in the creation of a relevant merger situation;

(b) the CMA rejects the merger notice under section 99(5)(d)(**a**) of the Enterprise Act 2002 (rejection of merger notice where notified arrangements are or would result in a concentration with a Community dimension); or

(c) the CMA decides not to make a merger reference because section 22(3)(e)(**b**) or 33(3)(e)(**c**) of the Enterprise Act 2002 applies (request to European Commission pursuant to article 22(1) of the EU Merger Regulation).

[*Name]*
[Title]
Department for Business, Innovation and Skills

[Date]

(**a**) Section 99(5) was amended by paragraph 133(3) of Schedule 5, paragraph 10(3) of Schedule 8 and paragraph 35(3) of Schedule 15 to the Enterprise and Regulatory Reform Act 2013 (c. 24).

(**b**) Section 22(3(e) was amended by paragraph 2(3) of the Schedule to the EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079). Section 22 was amended by paragraph 67 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24). There are other amendments to section 22 which are not relevant.

(**c**) Section 33(3)(e) was amended by paragraph 2(6) of the Schedule to the EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079). Section 33 was amended by paragraph 72 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24). There are other amendments to section 33 which are not relevant.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (S.I. 2003/1370) ("the 2003 Order"). The 2003 Order relates to the functions of the Secretary of State, the Office of Fair Trading ("the OFT") and the Competition Commission under Part 3 of the Enterprise Act 2002 (c. 40) (functions in relation to completed and anticipated mergers). Among other things, the 2003 Order provides for the payment to the OFT of fees in connection with the exercise of certain of these functions.

As a result of the Enterprise and Regulatory Reform Act 2013 (c. 24), the merger functions of the OFT and the Competition Commission have transferred to the Competition and Markets Authority ("the CMA"). Articles 3, 4(c) and (d), 5(b), 11 and 12(b) make consequential amendments to the 2003 Order.

This Order also amends the 2003 Order to change the time when the fee is payable in cases where a merger notice is given under section 96 of the Enterprise Act 2002, taking account of the fact that amendments made to section 96 by the Enterprise and Regulatory Reform Act 2013 enable merger notices to be given in respect of both anticipated mergers and completed mergers. This change to the 2003 Order is made by articles 4(a) and 12(a), and consequential amendments to the 2003 Order are made by articles 5(a), 6, 7 to 9 and 13 of this Order. Instead of the fee being payable at the time when the merger notice is given, the fee will be payable (as in other cases) when the CMA or, as the case may be, the Secretary of State publishes either a merger reference in relation to the notified arrangements or its decision not to make a merger reference. The fee will be payable in respect of a decision by the CMA or (as the case may be) the Secretary of State that it is or may be the case that a relevant merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation. The 2003 Order currently provides for the fee to be paid when the merger notice is given and to be repaid if the OFT concludes that the notified arrangements would not, if carried into effect, result in the creation of a relevant merger situation.

Article 10 makes amendments to article 7(3) of the 2003 Order consequential on provision made by the Companies Act 2006 (c. 46). It also makes clear that references in article 7(3) of the 2003 Order to the "enterprise" are references to the acquirer.

Article 14 makes transitional provision.

Annex 6: Consultation Principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.
http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf

Comments or complaints on the conduct of 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:
John Conway,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

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

However if you wish to comment on the specific policy proposals you should contact the policy lead (see p.7).

Annex 7: List of individuals/organisations consulted

39 Essex Street Chambers
Addleshaw Goddard LLP
Administrative Justice & Tribunals Council
Advertising Standards Association
Allen & Overy LLP
Arnold & Porter
Amazon
Asda
Ashurst
Association of Convenience Stores
Association of General Counsel & Company Secretaries
Attorney General's Office
Australian Competition & Consumer Commission
Baker & McKenzie LLP
Bar Council
Boots
Barclays Bank Plc
Berwin Leighton Paisner LLP
Bingham McCutcheon
Bird & Bird LLP
Black Stone Chambers
Brick Court Chambers
Bristows
British Airways
British Bankers Association
British Chambers of Commerce
British Council of Shopping Centres
British Institute of International and Comparative Law
British Petroleum
British Retail Consortium
BSkyB
Burges Salmon LLP
Cabinet Office
Centrica/British Gas
Charles River Associates International
Charles Russell
Citizens Advice
Citizens Advice Scotland
City of London Corporation
City of London Law Society
Civil Aviation Authority
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
CMS Cameron McKenna LLP
Compass Lexecon
Competition Appeal Tribunal
Competition Commission
Competition Law Association
Confederation of British Industry
Consumer and Competition Commission New Zealand
Consumer Council for Northern Ireland
Consumer Futures
Credit Suisse
Crown Office and Procurator Fiscal Service
Deloitte
Denton Wilde Sapte LLP
Department for Culture, Media & Sport
Department for Environment, Food and Rural Affairs
Department for Energy & Climate Change

Department of Enterprise, Trade and Investment NI

Department of Regional Development NI

Department for Transport

Department of Health

DLA Piper

Dundas & Wilson LLP

Edwards Angell Palmer & Dodge

Ernst & Young

ESRC Centre for Competition Policy

European Property Finance Limited

European Commission

European Policy Forum

Eversheds

Everything Everywhere

Faculty of Advocates

Federal Ministry of Food, Agriculture and Consumer Protection (DE)

Federal Trade Commission (USA)

Federation of Small Businesses

Field Fisher Waterhouse LLP

Financial Conduct Authority

Financial Ombudsman Service

FIPRA

Forum for Private Business

Freshfields Bruckhaus Deringer LLP

Frontier Economics Limited

French Ministry for Competition, Consumer Affairs and Anti-Corruption (DGCCRF)

FTI Consulting

GlaxoSmithKline

Goldman Sachs

Google

Hausfeld LLP

Herbert Smith Freehills LLP

Hill Dickinson LLP

HM Treasury

Hogan Lovells

HSBC

Information Commissioner's Office

In-house Competition Lawyers Association

Institute of Directors

International Airline Group

International Bar Association

International Chambers of Commerce

Irish Competition Authority

Joint Working Party of the Bars and the Law Societies of the United Kingdom

Kings College London

Kirkland & Ellis LLP

KPMG

Land and Property Services

Land Registry

LEGG Ltd

LEK Consulting LLP

Linklaters LLP

Lloyds Banking Group

Local Better Regulation Office

Local Government Association

London School of Economics

Macfarlanes LLP

Maclay Murray and Spens LLP

Matrix Chambers

Mayer Brown International LLP

McGrigors LLP

McGuire Woods LLP

Microsoft

Ministry of Justice

Monckton Chambers
Monitor
Nabarro Nathanson LLP
National Audit Office
National Economic Research Associates
National Federation of Property Professionals
Northern Ireland Assembly
Northern Ireland Executive
Northern Ireland Utility Regulator
Norton Rose Fulbright LLP
O2/Telefonica
Ofcom
Office of Fair Trading
Office of Fair Trading Scottish Representative
Office of Rail Regulation
Ofgem
Ofwat
Olswang
One Essex Court
Orrick, Herrington & Sutcliffe LLP
Osborne Clarke
Oxera
Oxford University (St John's College)
Oxford University (All Souls)
Oxford University (Oriel College)
Oxford Law
PhonePayPlus
Pinsent Masons
Postal Services Commission
Trading Standards Institute
Travers Smith LLP
Postwatch
PPL
Provident Financial
RBB Economics
Reed Smith LLP
Registers of Scotland
Regulatory Policy Institute
ResPublica
Rothschild
Royal Institute of Chartered Surveyors
Rio Tinto
Sainsbury's
Salans LLP
Scottish Assembly
Scottish Competition Law Forum
Serious Fraud Office
Shearman & Sterling LLP
Shell
Shepherd and Wedderburn LLP
Simmons & Simmons
SJ Berwin LLP
Slaughter and May
Speechly Bircham LLP
Squire Saunders Dempsey LLP
Symantec
TalkTalk
Taylor Wessing LLP
Tesco
Three
The City of London Law Society
The Law Society of England and Wales
The Law Society of Northern Ireland
The Law Society of Scotland
The Work Foundation

Unilever
University of East Anglia
University of Exeter
Virgin Media
Visa Europe
Vodafone
Water Industry Commission for Scotland
Watson, Farley & Williams
Welsh Assembly
Which?
White & Case LLP
Wilmer Cutler Pickering Hale and Dorr LLP
Wragge & Co.

Annex 8: Response Form

Name:
Organisation (if applicable):
Address:

Please return completed forms to:
Xinru Li
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
WC1H 0ET

Telephone: 020 7215 2078
Fax: 020 7215 0235
email: competition.consultation@bis.gsi.gov.uk

The closing date for this consultation is **6 September 2013**.

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

Please tick a box from the list of options below that best describes you as a respondent.

	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe)

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

Chapter 2. The Strategic Steer to the Competition and Markets Authority

Question 1: Do you have any comments on the proposed Steer for the CMA?

Comments:

Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014

Question 2: What is your view on the proposed maximum penalty levels?

Comments:

Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?

Comments:

Question 4: Do you have any other comments on the draft Order?

Comments:

Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014

Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?

Comments:

Question 6: Do you have any further comments on the draft Order?

Comments:

Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014

Question 7: Do you have any comments on the draft Order?

Comments:

Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014

Question 8: Do you have any comments on the draft Order?

Comments:

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☐ Yes ☐ No

This publication is also available on our website at www.bis.gov.uk

Any enquiries regarding this publication should be sent to:
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN BIS/13/1022