

# CMA rules of procedure for merger, market and special reference groups

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

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## Part 1: General

### 1. Introduction

- 1.1 These rules of procedure of the Competition and Markets Authority (CMA) are those referred to in, and required by, paragraph 51 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 (the ERR Act). These rules supersede the *Competition Commission Rules of Procedure 2006*.
- 1.2 Before making these rules the CMA Board consulted such persons as it considered appropriate.<sup>1</sup>

### 2. Application of the rules

- 2.1 The rules shall apply from 1 April 2014.
- 2.2 The rules shall apply in relation to merger reference groups and market reference groups.<sup>2</sup>
- 2.3 Where a special reference group is appointed, its procedure is provided for in [Part 7](#) of these rules.<sup>3</sup>

### 3. Effect of the rules

- 3.1 The rules are supplementary to those statutory provisions which apply to the CMA under any enactment, or instrument made thereunder, and, in the event of any conflict between the rules and any statutory provision, the latter shall prevail.
- 3.2 The rules are binding on:
- (a) the CMA Chair;
  - (b) a CMA panel chair;
  - (c) any group chair;
  - (d) any CMA group; and
  - (e) any member of the CMA panel.

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<sup>1</sup> This is required by paragraph 51(3) of [Schedule 4](#) to the ERR Act.

<sup>2</sup> Defined in paragraph 51(6) of [Schedule 4](#) to the ERR Act.

<sup>3</sup> Defined in paragraph 51(6) of [Schedule 4](#) to the ERR Act.

3.3 If, at any time, a group encounters a situation which is not provided for in these Rules, then it shall determine its own procedure, but before doing so it shall consult the Chair and shall have regard to any guidance issued by the CMA Board.<sup>4</sup>

## 4. Interpretation

4.1 In these rules:

- ‘the Act’ means the Enterprise Act 2002 as amended by the ERR Act;
- ‘Chair’ means the Chair of the CMA appointed under paragraph 1(1)(a) of Schedule 4 to the ERR Act or any CMA panel chair, as appropriate;
- ‘CMA’ means the Competition and Markets Authority;
- ‘CMA Board’ means the Chair and members appointed under paragraph 27 of Schedule 4 to the ERR Act;
- ‘CMA panel chair’ means a person who may, with the consent of the CMA Board, exercise a function of the Chair referred to in paragraph 48(4) of Schedule 4 to the ERR Act;
- ‘CMA panel’ means the panel of persons available for selection as members of a group constituted in accordance with Part 3 of Schedule 4 to the ERR Act;<sup>5</sup>
- ‘ERR Act’ means the Enterprise and Regulatory Reform Act 2013;
- ‘group’ means a group constituted by the Chair under Schedule 4 to the ERR Act;<sup>6</sup>
- ‘group chair’ means the member of a group appointed by the Chair to chair the group;<sup>7</sup>
- ‘main parties’ means, in the case of a merger reference, those parties which, in the opinion of the group, are the main parties to the reference;

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<sup>4</sup> See paragraph 52(1) of [Schedule 4](#) to the ERR Act.

<sup>5</sup> Paragraph 34 of [Schedule 4](#) to the ERR Act.

<sup>6</sup> Paragraph 36 of [Schedule 4](#) to the ERR Act.

<sup>7</sup> Paragraph 38(8) of [Schedule 4](#) to the ERR Act.

- ‘main parties’ means, in the case of a market investigation reference, those parties which, in the opinion of the group, are the main parties to the inquiry;
- ‘market reference group’, ‘merger reference group’ and ‘special reference group’ have the meanings given to them in paragraph 51(6) of Schedule 4 to the ERR Act;<sup>8</sup>
- ‘third parties’ means those parties which are not main parties but which, in the opinion of the group, have a sufficient interest in the subject matter of the reference or the inquiry to be treated as such; and
- ‘Ofcom price control reference’ means a reference made under section 193 of the Communications Act 2003.

## **5. Title**

- 5.1 These rules may be referred to as the Competition and Markets Authority Rules of Procedure for Merger, Market and Special Reference Groups 2014.

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<sup>8</sup> See the explanatory note in the Appendix.

## Part 2: Appointment and conduct of groups

### 6. Appointment and conduct

- 6.1 When a reference has been made to the Chair, the Chair shall promptly appoint members to form a group and a member of the group to be the group chair.<sup>9</sup>
- 6.2 In making appointments to a group, the Chair shall:
- (a) have regard to any guidance published by the CMA on handling conflicts of interest and take into account any other factors which, in their opinion, might prejudice the independence and impartiality of the group; and
  - (b) not appoint a member of the CMA panel to the group if that member participated in the CMA Board's consideration of whether to refer the matter to the Chair for the constitution of a group.
- 6.3 A group must consist of at least three members of the CMA panel.<sup>10</sup>
- 6.4 The group chair shall have a casting vote on any question to be decided by the group.<sup>11</sup>
- 6.5 In making decisions that a group is required or permitted to make by virtue of any enactment, it must act independently of the CMA Board.<sup>12</sup>
- 6.6 Rule 6.5 does not prevent:
- (a) the CMA Board from giving information in its possession to a group; or
  - (b) a group giving information in its possession to the CMA Board.<sup>13</sup>
- 6.7 Any reporting panel member<sup>14</sup> of the CMA panel who is not a member of the group may, at the invitation of the group chair, attend its meetings or otherwise

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<sup>9</sup> Where the CMA Board considers whether to make a reference to the Chair, before it does so, the Chair must determine whether a person who is a member of the CMA Board might reasonably be expected to be a member of a group constituted in connection with the matter (paragraph 33(2) of [Schedule 4](#) to the ERR Act). If the Chair determines that a person who is a member of the CMA Board might reasonably be expected to be a member of such a group, that person is not to participate in the CMA Board's consideration of whether to refer the matter to the Chair (paragraph 33(3) of [Schedule 4](#) to the ERR Act).

<sup>10</sup> Paragraph 38(1) of [Schedule 4](#) to the ERR Act.

<sup>11</sup> Paragraph 50 of [Schedule 4](#) to the ERR Act.

<sup>12</sup> Paragraph 49(1) of [Schedule 4](#) to the ERR Act.

<sup>13</sup> Paragraph 49(2) of [Schedule 4](#) to the ERR Act.

<sup>14</sup> See paragraph 35(2)(d) of [Schedule 4](#) to the ERR Act.

take part in its proceedings for the purpose of offering the group advice about the exercise of its functions.<sup>15</sup>

- 6.8 It shall be the duty of a group to have regard to any advice given to it by the member of the CMA panel referred to in Rule 6.7 but that member may not vote or have any statement of their dissent from a conclusion of the group included in the group's report.<sup>16</sup>
- 6.9 A group may consult any member of the CMA panel with respect to any matter or question with which the group is concerned but, before doing so, the group shall consult the group chair, to avoid any conflict of interest arising.<sup>17</sup>
- 6.10 All members of the group shall have regard to any guidance issued by the CMA Board under paragraph 52 of Schedule 4 to the ERR Act, the advice and information requirements in sections 106, and 171 of the Act and to the CMA's *Administrative penalties: statement of policy on the CMA's approach (CMA4)*<sup>18</sup> made under sections 94B(1), 116(1) and 174E(1) of the Act.
- 6.11 If, during the proceedings of a group:
- (a) a member of the group ceases to be a member of the CMA panel;
  - (b) the Chair is satisfied that a member of the group will be unable for a substantial period to perform their duties as a member of the group; or
  - (c) it appears to the Chair that because of a particular interest of a member of the group it is inappropriate for that member to remain in the group;
- the Chair may appoint a replacement.<sup>19</sup>

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<sup>15</sup> See paragraph 45(1) of [Schedule 4](#) to the ERR Act.

<sup>16</sup> Paragraph 45(2) of [Schedule 4](#) to the ERR Act.

<sup>17</sup> See paragraph 45(1) and (3) of [Schedule 4](#) to the ERR Act.

<sup>18</sup> [www.gov.uk/government/publications/administrative-penalties-statement-of-policy-on-the-cmas-approach](http://www.gov.uk/government/publications/administrative-penalties-statement-of-policy-on-the-cmas-approach).

<sup>19</sup> Paragraphs 40–43 of [Schedule 4](#) to the ERR Act.



## Part 3: Procedures for market and merger reference groups

### 7. Timetable

- 7.1 It shall be the duty of the group to comply with the relevant statutory timetable provided by the Act for the reference in question. After the group has been appointed, it shall, as soon as practicable, make arrangements for an administrative timetable to be drawn up which shall make provision for the major stages of the reference.
- 7.2 The major stages of the reference may include, in particular, the following:
- (a) gathering information;
  - (b) issuing questionnaires;
  - (c) hearing of witnesses;
  - (d) verifying information;
  - (e) providing a statement of issues;
  - (f) considering responses to a statement of issues;
  - (g) notifying provisional findings;
  - (h) notifying and considering possible remedies;
  - (i) considering exclusions from disclosure; and
  - (j) publishing reports;
- provided that these stages need not necessarily take place within the administrative timetable in the order in which they are mentioned in this rule.
- 7.3 The group shall, when drawing up the administrative timetable, have regard to any views which the main parties to the reference have submitted to it.
- 7.4 Once the administrative timetable has been produced, the group shall make such arrangements as it thinks appropriate in order for it to be notified to all parties to the reference and to the public. The CMA may publish the timetable on its website.
- 7.5 The group may proceed on the basis that the main parties to the reference will comply with the administrative timetable.

7.6 If, at any point during the reference, the group has reason to believe that the administrative timetable will not be met for any reason, including any unforeseen circumstance, any difficulty concerning any stage of it, or any change to the statutory timetable, then the group shall prepare a revised timetable to which the notification and publication requirements contained in Rule 7.4 shall apply.

## 8. Hearings

8.1 It shall be the duty of the group to decide which, if any, of its hearings are to be held in public.

8.2 In taking that decision, the group shall have regard to:

- (a) the views of the main and third parties;
- (b) the likelihood that a matter relating to the private affairs of an individual or body might be made known to the public and, being made known, might significantly harm the interests of that individual or body;
- (c) the extent to which an individual or body might be inhibited from providing information to the group if the hearing were to be held in public;
- (d) the extent to which an individual or body might be encouraged to provide information to the group if the hearing were to be held in public;
- (e) the efficient and proper conduct of the reference;
- (f) the administrative timetable;
- (g) the resource implications for the hearing; and
- (h) the transport implications of the location of the hearing.

8.3 If, during the course of any hearing in public, the group considers that it would be appropriate, having regard to the factors set out in Rule 8.2(b), (c), (d) and (e), that the hearing should no longer continue to be held in public, it shall hold the hearing in private, after having given its reasons in public for doing so.

8.4 The group may, if it considers that it would assist a proper consideration of the reference, hold joint hearings with one or more of the parties.

8.5 If the group decides to hold joint hearings then it shall be the duty of the group to consider which, if any of those joint hearings are to be held in public, and in taking that decision the group shall have regard to the factors described in Rule 8.2.

## **9. Appearances at hearings**

- 9.1 The group shall decide the extent, if any, to which persons interested or claiming to be interested in the subject matter of the reference are allowed:
- (a) to be present or to be heard, either by themselves or by their representatives;
  - (b) to cross-examine witnesses; and
  - (c) otherwise to take part.<sup>20</sup>
- 9.2 For the purpose of any investigation in connection with a reference, a group, or any person nominated by it, may take evidence on oath and for that purpose may administer oaths.<sup>21</sup>
- 9.3 Any person who objects to being sworn shall be permitted to make a solemn affirmation instead of taking an oath.

## **10. Investigation powers**

- 10.1 A group may during the course of its proceedings exercise any of the investigation powers contained in sections 109 to 117 and sections 174 to 174D of the Act.
- 10.2 Where a group is minded to impose a penalty under section 94A or section 110(1) or (3) or section 174A(1) or (3) of the Act, it shall have regard to the CMA's Statement of Policy on Approach to Administrative Penalties made under sections 94B(1), 116(1) and 174E(1) of the Act.
- 10.3 Where, at any stage of a reference, any individual or body has been asked to provide information within a reasonable period of time and has failed to do so, without a reasonable explanation, the group shall not be obliged to have regard to any information received from that person or body after the date specified.<sup>22</sup>

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<sup>20</sup> Paragraph 53(6) of [Schedule 4](#) to the ERR Act.

<sup>21</sup> Sections [109\(5\)](#) and [174\(6A\)](#) of the Act.

<sup>22</sup> Section 53(3) of [Schedule 4](#) to the ERR Act.

## Part 4: Findings on the terms of reference

### 11. Provisional findings

- 11.1 A group shall make provisional findings on any reference it has been appointed to determine.
- 11.2 Provisional findings shall include the group's provisional decisions on the statutory questions it has to decide in relation to mergers and market investigation references.
- 11.3 When a group makes provisional findings on any reference it shall notify the main parties to the reference as soon as practicable after it has made them.
- 11.4 The notice shall describe the group's provisional findings and give an explanation of its reasons for coming to them.
- 11.5 Every notice:
- (a) shall invite the main party affected, within such period being not less than 21 days as may be specified in the notice, to provide the group with its reasons in writing as to why such provisional findings should not become final (or, as the case may be, should be varied);
  - (b) shall, provided the group has formed a view, inform the main party affected of the procedure the group is minded to follow on receipt of such reasons; and
  - (c) shall not contain any information which the group considers should be excluded from the notice having regard to the three considerations set out in section 244 of the Act (specified information: considerations relevant to disclosure).
- 11.6 If any main party fails to provide reasons in writing by the date specified in the notice then the group shall not be obliged to take them into account.
- 11.7 A copy of any notice given under this rule shall be published on the CMA's website.

### 12. Remedies

- 12.1 A group shall have regard to the need to give as much notice as is practicable of the actions which it considers might be taken by the CMA for the purpose of remedying the effects of completed or anticipated mergers or

for the purpose of remedying the adverse effects found in a market investigation.

- 12.2 Any notice of those actions may be contained in the provisional findings but, if it is not, the group shall notify the main parties as soon as practicable after it has notified them of its provisional findings.
- 12.3 A copy of any notice given under this rule shall be published on the CMA's website.
- 12.4 Any notice under this rule published on the CMA's website shall not contain any information which the group considers should be excluded from the notice having regard to the three considerations set out in section 244 of the Act (specified information: considerations relevant to disclosure).
- 12.5 The group shall consult the parties upon whom it has given notice under this rule and have regard to any representations received from them.

### **13. Final findings**

- 13.1 Once the group has had regard to any reasons in writing or oral evidence submitted to or given to it following the notice of provisional findings then it shall take its final decisions on the statutory questions and actions, and proceed to make and publish the report as required by the Act.

## Part 5: Reports

### 14. Preparation

- 14.1 A group may, for the purpose of preparing its report, send any material which it has produced back to any person or body so that its accuracy can be verified.
- 14.2 A group may, for the purposes of Rule 14.1, ask any person or body to identify any matter which that person or body might wish to have excluded from its report.
- 14.3 Where the final decision of a group is taken by a majority then the report may contain a statement or statements from the member or members in the minority of their dissent from that decision.

### 15. Exclusion of matter

- 15.1 A group may exclude any matter from its report if it considers that publication of the matter would be inappropriate and in deciding what is inappropriate for this purpose the group shall have regard to the considerations mentioned in section 244 of the Act (specified information: considerations relevant to disclosure).

### 16. Publication

- 16.1 As soon as practicable after deciding which matter is to be excluded from the report, the group shall make arrangements for its publication in accordance with the provisions of sections 39, 137, 143, 143A and 144 of the Act.
- 16.2 A copy of the report shall be published on [www.gov.uk/cma](http://www.gov.uk/cma).

## Part 6: Undertakings and orders

### 17. Consideration of actions

- 17.1 In any case where the report of a group contains a decision that, in the case of a merger reference, there is or may be a substantial lessening of competition, or, in the case of a market investigation, that there is one or more than one adverse effect on competition, and that remedial action should be taken, the group shall, in accordance with sections 41, 41A, 138 and 138A of the Act, consider what further reasonable and practicable actions it should take.<sup>23</sup>
- 17.2 As part of its considerations the group shall consult any individual or undertaking likely to be affected by those actions and shall have regard to any representations submitted to it by them.<sup>24</sup>
- 17.3 After the consultation has taken place, the group shall proceed to consider whether to accept an undertaking under sections 82 and 159 of the Act or to make an order under sections 84 and 161 of the Act, as the case may be.

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<sup>23</sup> The order-making powers are set out in sections 84, 86, 87, 88, 161, 164, 165 of, and Schedule 8 to, the Act.

<sup>24</sup> Paragraph 2(f) and paragraph 5(c) of Schedule 10 to the Act.

## Part 7: Rules for special reference groups

### 18. Special reference groups

- 18.1 The rules in Parts 1, 2, 3, 5 and 6 shall apply to the procedure of special reference groups.
- 18.2 Instead of complying with Part 4, special reference groups shall determine their own procedures for findings on the reference but when doing so they shall have regard to any guidance issued by the CMA Board under paragraph 52(1) of Schedule 4 to the ERR Act.<sup>25</sup>
- 18.3 In their application to Ofcom price control references, these rules shall have effect subject to the rules made under section 15 of the Act (rules with respect to proceedings before the Competition Appeal Tribunal) and any directions given to the CMA by the Competition Appeal Tribunal in exercise of powers conferred by those rules.<sup>26</sup>

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<sup>25</sup> Given effect to by [section 25\(4\)](#) of the ERR Act.

<sup>26</sup> See [section 193](#) of the Communications Act 2003.



## Appendix: Explanatory note

*This note is not part of the rules.*

1. These rules replace *CC1, Competition Commission Rules of Procedure of 2006*.
2. The rules apply to merger reference groups, market reference groups and special reference groups as defined in paragraph 51 of Schedule 4 to the ERR Act:

‘market reference group’ means a CMA group constituted in connection with a reference under section 131, 132 or 140A of the Act.

‘merger reference group’ means a CMA group constituted in connection with a reference under section 32 of the Water Industry Act 1991 or section 22, 33, 45 or 62 of the Act.<sup>27</sup>

‘special reference group’ means a CMA group constituted in connection with a reference under:

- (a) section 11 of the Competition Act 1980
- (b) 41E of the Gas Act 1986
- (c) 56C of the Electricity Act 1989
- (d) section 12, 14 or 17K of the Water Industry Act 1991
- (e) Article 15 of the Electricity (Northern Ireland) Order 1992 (SI 1992/231 (NI 1))
- (f) section 13 of, or Schedule 4A to, the Railways Act 1993
- (g) Article 15 of the Gas (Northern Ireland) Order 1996 (SI 1996/275 (NI 2))
- (h) section 12 of the Transport Act 2000
- (i) section 193 of the Communications Act 2003
- (j) Article 3 of the Water Services etc (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 (SI 2005/3172)

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<sup>27</sup> The reference in this definition to [section 62](#) of the Act has effect as if it included a reference to Article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (SI 2003/1592), as amended by Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014.

3. Subject to any special or general directions given by the Secretary of State, and to any provision by or under any enactment, a CMA group that is not a merger reference group, market reference group or special reference group may determine its own procedure.<sup>28</sup>
4. As at the date of making these rules the CMA has made as procedural rules for other CMA groups the following rules (previously made by the Competition Commission):

CC10: The Energy Code Modification Rules

CC14: Competition Commission Energy Licence Modification Rules

CC16: Postal Services Appeal Rules

CC19: Competition Commission Airport Licence Condition Appeal Rules

CC21: National Tariff Methodology Reference Rules

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<sup>28</sup> See paragraph 54 of [Schedule 4](#) to the ERR Act.