

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

© Crown copyright 2014

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

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

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

Contents

	<i>Page</i>
1 Introduction.....	1
2 The CMA’s statutory role	3
3 Process for reviews of undertakings and orders	5
A. Status of the OFT and the CC guidance documents and publications	16

1 INTRODUCTION

- 1.1 This guidance covers the Competition and Markets Authority's (CMA's) approach to the variation and termination of merger, monopoly and market final undertakings and orders.¹
- 1.2 This guidance does not cover variation or termination of initial and interim undertakings or orders, such as undertakings under section 80 or orders under section 72 or 81 of the Enterprise Act 2002 (EA02).² Accordingly, unless otherwise specified, the term 'undertaking or order' in this guidance should be read as referring only to final undertakings and orders.
- 1.3 Further, in a small number of instances, the CMA retains a duty to advise the Secretary of State on orders and undertakings made under the Fair Trading Act 1973 (FTA) which have not been transferred from the Secretary of State to the CMA by statutory instrument. The Secretary of State is also responsible for varying or terminating undertakings or orders given following public interest cases.³ This guidance does not relate to the process by which the CMA provides advice to the Secretary of State in these instances.⁴
- 1.4 This guidance supersedes the *Memorandum of Understanding between the Office of Fair Trading and the Competition Commission on the variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Enterprise Act 2002*, Version 2, published 10 March 2011 (the MoU).
- 1.5 The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when it deals with reviews of undertakings and orders but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.

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

² In the case of mergers, guidance for variation of initial and interim undertakings or orders is available in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2).

³ Sections 159 and 161 of the EA02.

⁴ Sections 92(3) and 162(3) of the EA02, as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13).

- 1.6 This document is not a definitive statement of, or a substitute for, the law itself and should not be relied upon as an alternative to seeking appropriate legal advice.
- 1.7 This guidance sets out the CMA's practice as of 1 April 2014. Please see *Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14), chapter 6 for information on the applicable transitional arrangements. Please refer to www.gov.uk/cma to ensure you have the latest version of this guidance as it may be revised from time to time to reflect changes in best practice or the law and our developing experience.
- 1.8 You may find it useful to read this document alongside other documents published by the CMA or adopted by its Board, including *Merger Assessment Guidelines* (OFT1254/CC2), *Guidelines for market investigations* (CC3 (revised)), *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)) and *Merger Remedies: Competition Commission Guidelines* (CC8). To the extent that any conflict arises between the content of such existing guidance documents and this guidance, the content of this guidance will prevail. Annexe A sets out the status of the Office of Fair Trading (OFT) and the Competition Commission (CC) guidance documents and publications that are relevant to the variation and termination of undertakings and orders and that had been published and were in effect prior to the transfer of the mergers and markets functions to the CMA on 1 April 2014.

2 THE CMA'S STATUTORY ROLE

- 2.1 Undertakings and orders are the primary means by which remedies are implemented following the determination of merger and market investigation references under the EA02, as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13). Under the EA02,⁵ undertakings are accepted or orders imposed by the CMA,⁶ except in certain public interest cases where the Secretary of State is responsible for accepting undertakings or imposing orders.⁷
- 2.2 The CMA has a statutory duty⁸ to keep under review undertakings and orders made under the FTA and under the EA02. From time to time, the CMA must consider whether, by reason of any change of circumstances:
- undertakings are no longer appropriate and need to be varied, superseded or released, and
 - an order is no longer appropriate and needs to be varied or revoked.⁹
- 2.3 Responsibility for deciding on variation or termination of undertakings or orders lies with the CMA in respect of all but a very limited number of undertakings and orders (see paragraph 1.3).

Substantive test in considering variation and termination of undertakings and orders

- 2.4 In considering variation and termination of undertakings and orders, either upon request from a party or under the CMA's own initiative (see paragraphs 3.2 to 3.8), the CMA will consider whether there has been a change of

⁵ Prior to the EA02, under the FTA, the Secretary of State accepted undertakings or imposed orders to remedy the adverse effects identified during a merger and monopoly reference.

⁶ Under the EA02, the CMA may accept undertakings or impose orders (sections 82 and 84 of the EA02 (mergers) and sections 159 and 161 of the EA02 (markets)), and, where the conditions for a reference are met, the CMA may accept binding undertakings as an alternative to making a reference (section 73 of the EA02 (mergers) and section 154 of the EA02 (markets)).

⁷ Sections 55 and 66 and Schedule 7 of the EA02 (mergers) and sections 139, 147 and 159 of the EA02 (markets).

⁸ Under sections 92(1), (2) and (3) and 162 (1), (2) and (3) of the EA02; sections 88(4) and (5) of the FTA (as preserved in Schedule 24 of the EA02).

⁹ See footnote 1 above.

circumstances. If there has, the CMA will then consider what action, if any, should be taken.

2.5 The precise nature of the CMA's consideration of any change of circumstances will depend entirely on the individual circumstances affecting a particular undertaking or order. However, the change of circumstances must be such that the undertaking or order is no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy, if it is to lead to either variation or termination.

2.6 Types of circumstances that have led to variation or termination in the past include:

- undertakings or orders that have time-expired or clearly become obsolete (see for example, the review of Provident's trading checks undertakings (2012), where Provident was found no longer to provide trading checks and such products were not likely to re-emerge)
- undertakings or orders that are affected by new legislation (see, for example, the review of the Northern Ireland PCA Banking Market Investigation Order 2008 (2011), where the coming into force of two EU directives—the Payment Services Directive and the Consumer Credit Directive, both of which had been implemented into UK law—included articles that either were duplicated by the same subject matter or were different from requirements in the order), and
- undertakings or orders that are affected by changes in market conditions (see, for example, the review of Yellow Pages undertakings (2013), where increased internet access and usage by both consumers and advertisers had had a significant effect on the constraints faced, such that the owner of Yellow Pages was no longer able to operate as a price setter independent of the behaviour of competitors).

2.7 Experience of reviews of undertakings and orders suggests that the complexity of analysis required in a review varies significantly depending on the change of circumstances identified and the characteristics of the market. In some cases, detailed investigation may be required in order to evaluate whether there has been a change of circumstances and, if so, what, if any, changes to undertakings or an order may be justified.

3 PROCESS FOR REVIEWS OF UNDERTAKINGS AND ORDERS

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

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

Initial screening

The ways in which a review may be initiated

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

Requests from parties

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

- what the change of circumstances is
- how and why this makes it appropriate to vary or terminate the undertakings or order
- the possible consequences for consumers and businesses impacted by the remedy¹⁰
- why a review of the order and undertakings meets the CMA's published prioritisation principles, and

¹⁰ Where the request is made by other interested parties (that is, those not subject to the undertakings or order), they should explain their interest in the undertakings or order.

- whether the request is being raised in order to avoid a breach of the undertakings or order.¹¹
- 3.4 It is open to parties to approach the CMA prior to submitting a request in order to discuss what sort of evidence would be expected to be included in any request.
- 3.5 Parties should provide both a confidential and a non-confidential version of their submission.
- 3.6 The CMA will typically, upon receipt of a request for a review, issue an invitation to comment by publishing information about the request for review. The CMA will typically invite interested parties to comment on the request for review and to submit any relevant evidence.¹² The consultation period for the invitation to comment will typically be three weeks. The form of publication and extent of detail will depend on the circumstances of the case. This could range from publication of the non-confidential elements of the submission itself, to a statement confirming that the CMA is considering whether to conduct a review. In exceptional circumstances, publication of an invitation to comment may not occur if, for example, the CMA believes that the claimed change of circumstances, in and of itself, constitutes specified information which needs to be excluded from disclosure.¹³

The CMA's own-initiative activity

- 3.7 The CMA is also able to begin a review on its own initiative, without any person having made a request. In practice, the CMA is likely to do so when, based on its own intelligence, it has identified possible changes of circumstances analogous to those referred to at paragraph 2.6 above, or where the Monopolies and Mergers Commission (MMC), the CC or the CMA

¹¹ Where the possible change of circumstances is such that it would lead to a breach of the undertakings or order, the CMA will consider it as quickly as possible. However, parties can assist the CMA by giving it notice of such changes of circumstances in good time and thereby avoid being placed in potential breach.

¹² Where the request for a review has been made by other interested parties (that is, those not subject to the undertakings or order) or the review is an own-initiative CMA review (see paragraphs 3.7 and 3.8 ANNEXE(S)3.8), and in order to ensure an effective public consultation and to establish whether such a public consultation can take place, the CMA will normally consult informally with those directly affected by the undertakings or order prior to the public consultation. This informal consultation is likely to be a short period of no more than two weeks.

¹³ See Part 9 of the EA02. See paragraph 3.23 ANNEXE(S)3.23 for further discussion of the CMA's approach to disclosure.

has recommended a timeframe for review in the report in which the remedy was originally determined (see also paragraph 3.10).

- 3.8 If the CMA is intending to conduct a review on its own initiative it will typically issue an invitation to comment to all parties affected by the undertakings or order, asking for their view as to whether such a review should take place and to submit any relevant evidence. As noted at paragraph 3.6 above, the form of publication will depend on the circumstances of the case and the consultation period will typically be three weeks.

Deciding whether to conduct a review

- 3.9 The CMA will assess the request for a review and the responses to any consultation on the request, or the responses to a consultation on whether the CMA should conduct an own-initiative review. The CMA will then decide whether a review should take place at a particular point in time. This decision will be taken by a senior member of CMA staff, supported and challenged by a further two individuals with the appropriate level of skill and expertise. The decision-maker may also consult the CMA's Case and Policy Committee to seek views on any policy issues arising out of the proposed decision on whether or not to conduct a review.
- 3.10 In deciding whether to conduct a review, the CMA will act in accordance with its published prioritisation principles. This may mean that the CMA will choose not to conduct a review within time frames recommended by a MMC, CC or CMA report in which the remedy was originally determined. Factors relevant in deciding whether to conduct a review will include whether there is a realistic prospect of finding a change of circumstances.
- 3.11 If the CMA decides not to proceed with a review, it will inform the relevant parties that a review will not take place. If particular parties made a request for a review, the CMA will typically set out briefly its reasons for not conducting a review. This decision will typically be published, although the CMA will have due regard to its obligation not to disclose certain specified information, as set out in Part 9 of the EA02.
- 3.12 If, on the other hand, the CMA decides to undertake a review, it will generally appoint a group of CMA panel members to conduct the review.¹⁴ In cases

¹⁴ The appropriate approach may vary from case to case. For example, minor issues may be dealt with by CMA staff without the need to appoint a group of panel members. The appointment of panel members to form groups will be conducted in a manner consistent with the Rules of Procedure for CMA Groups.

dealing with undertakings given or an order made under EA02, where the original group has ceased to exist, a group will generally be formed as a Remedy Group (RG).¹⁵ In cases dealing with undertakings given or orders made under the FTA, a group will be appointed by the Chair of the CMA.¹⁶ Each group will be advised by a case team of CMA staff.

3.13 The CMA will inform relevant parties as soon as practicable of its intention to commence a review. At the same time, or as soon as practicable thereafter, the CMA will also provide them with the following information:

- a brief description of the case, the relevant legislation, the industry sector concerned and the CMA's reasons for commencing a review. The level of information may vary according to the circumstances of the case
- an indicative timetable showing the anticipated dates of key milestones (see paragraph 3.18 below), and
- the contact details for the main CMA contacts for the case including specifying the first point of contact for general queries and submission of information.

3.14 The CMA will place a review opening announcement on www.gov.uk/cma announcing its decision to commence a review (except if to do so would prejudice the case or would otherwise be inappropriate). At the same time as or following the public announcement, the CMA will also publish, as soon as reasonably practicable, the information referred to in paragraph 3.13.¹⁷

3.15 The CMA will review from time to time the information provided and consider whether it is appropriate to update the information provided to the parties directly involved or the published information.

¹⁵ The RG will be a sub-committee of the Case and Policy Committee, accountable to the CMA Board. The RG will follow broadly the same approach to its decision making as other groups of panel members.

¹⁶ Under the ERRA13, the Chair of the CMA is responsible for identifying and appointing the group of members that will conduct a particular inquiry and for selecting one of them to act as chair of the group. In practice, the Chair of the CMA will delegate these responsibilities to the CMA Panel Chair (or one of the CMA Inquiry Chairs). The CMA Panel Chair is a member of the CMA Board.

¹⁷ There may be a delay between the public announcement and the publication of the information in paragraph 3.13 if, for example, the group has not yet been appointed.

- 3.16 Where undertakings or orders under review relate to a regulated sector, and especially where a sectoral regulator has a role in monitoring compliance with the undertakings or order,¹⁸ the CMA will liaise with the relevant sectoral regulator as appropriate.¹⁹ In other cases, for example, when reviewing merger undertakings or orders the relevant sectoral regulator may make a submission to the CMA setting out its views and any supporting evidence on the possible variation or termination.²⁰

The process for a review

Timescale

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

The CMA's assessment

- 3.19 As part of the CMA's assessment it will first consider whether the initial submissions from all relevant parties are sufficient to allow it to reach a provisional decision:
- if the CMA considers that relevant parties have had sufficient opportunity to make their case and the initial submissions indicate a

¹⁸ For example, the Office of Rail Regulation (ORR) in the Rolling Stock Leasing Market Investigation Order 2009.

¹⁹ The CMA's approach to the disclosure of specified information to other public authorities, including sectoral regulators, is explained in more detail in chapter 6 of *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6).

²⁰ The CMA's approach to information received from sectoral regulators is set out at paragraphs 6.20 and 6.21 of the *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (April 2013, CC7 (revised)).

clear change of circumstances and clear cut grounds for variation or termination, it will provisionally decide whether the undertakings or order should be varied or terminated and, if so, how (see paragraphs 3.24 to 3.30 for the process thereafter). This approach is likely to be used in only the most straightforward of cases, such as where no material concerns have been expressed by third parties in response to the invitation to comment (see paragraph 3.6). Where variations are minor or urgent, the CMA will seek to deal with these as swiftly as possible,²¹

- if the CMA considers that further information and/or analysis is necessary before it can reach a provisional decision, it will consider what steps should be undertaken and how the further information and/or analysis required affects the timetable for the review. This approach is likely to be required in most reviews.

3.20 Where the CMA has identified the need for further information and/or analysis, it may invite or request submissions from those parties subject to the undertakings or order and/or interested third parties, including those that have not responded to any initial invitation to comment (see paragraph 3.6). In certain circumstances, particularly complex reviews,²² the CMA may consider it necessary to hold a hearing with relevant parties.

3.21 The timing and manner of engagement with relevant parties will vary depending on the type of work involved in any given review. The CMA will have regard to the need to ensure due process for both parties directly involved and other interested persons. The CMA will also have regard to the need to conduct reviews effectively and efficiently, and the need to reach properly reasoned decisions.

3.22 Where the CMA wishes to test some of its initial thinking on the review, the CMA may decide to disclose working papers or sections of working papers to parties for comment. The CMA will take a flexible approach to sharing its developing thinking and/or evidence with parties directly involved and other interested persons, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of the review.

²¹ For example, the CC's review of FirstGroup's Scotrail undertakings in 2012 was completed in three months.

²² For example, where there are changes in market conditions which require detailed analysis or where the change of circumstances suggests a range of possible variations for the undertakings or order.

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

- 3.23 When considering what documents may be disclosed during the course of a review, the CMA will have regard to the *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)). The Chairman's Guidance also provides information to parties on how information and submissions received by the CMA during its review will typically be disclosed, the usual form being the incorporation of relevant material into the CMA's published documents, including the initial invitation to comment, provisional decision, final decision and/or notice of intention to vary or terminate a remedy.²³

Key stages of the CMA's decision-making process

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

Provisional decision

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

²³ Part 9 of CC7 (revised) explains the practical aspects of handling information received and requests for confidentiality, including the presentation of data in aggregated form in the CMA's documents.

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

- 3.27 The CMA will consider variations proposed by parties (if any) as well as its own proposals. Parties will be expected to explain how their proposed variations will effectively address the competition problem and its adverse effects in light of the change of circumstances provisionally identified.²⁴ The CMA will normally set out a time limit within which any proposed variations must be submitted.
- 3.28 Usually the CMA will form a provisional decision on the substance of the necessary variation at the same time as the change of circumstances and will seek views on the proposed variation prior to consulting on the text of revised undertakings or a revised order. In these cases, the provisional decision will therefore also contain sufficient detail on the nature and scope of any proposed variations (if variation is appropriate) to provide a firm basis for subsequent implementation (see paragraphs 3.33 to 3.35).
- 3.29 In some reviews, the case for termination or the precise nature of the appropriate variation may be sufficiently clear at the time of making the provisional decision that the CMA may be in a position to draft the text of revised undertakings or a revised order at the same time as its provisional decision. The CMA may therefore decide to set out its provisional decision and reasoning as part of a notice of intention to vary or terminate the undertakings or order.²⁵ Such a notice will be given in accordance with the procedural requirements set out in Schedule 10 to the EA02 (see paragraphs 3.33 to 3.35).
- 3.30 At the time of consultation on the provisional decision, the precise nature of the variation may not always, however, have been decided upon. For example, there may be some circumstances in which the party or parties subject to the undertakings or order have not engaged in discussion of possible variations prior to the publication of the CMA's provisional

²⁴ The CMA will have regard to its guidance for assessing remedies when considering variations (see *Guidelines for Market Investigations* (CC3 (revised)) and *Merger Remedies: Competition Commission Guidelines* (CC8)).

²⁵ This process was adopted, for example, in the reviews of the Store cards and Home credit market investigation orders (final decisions in both cases published in 2011).

decision.²⁶ In these circumstances, the CMA may consider it appropriate to consult on a range of possible variations. In order to do so, the CMA will publish a separate notice of possible variations at the same time as its provisional decision (which would focus on the change of circumstances only).²⁷ This separate notice of possible variations will set out the range of possible variations which the CMA is considering given the change of circumstances identified.

Final decision

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

Documents relating to implementation of any variation or termination

- 3.33 If the final decision is that there has been a change of circumstances and that variation or termination is appropriate, at the same time as the CMA's final decision or as soon as possible thereafter the CMA will give notice of its intention to vary or terminate the undertakings or order (unless the process has already been commenced, see paragraph 3.29). Such notice shall be given in accordance with the procedural requirements set out in Schedule 10 to the EA02. Changes to undertakings will be consulted upon for at least 15 days and changes to an order will be consulted upon for at least 30 days.²⁸
- 3.34 The CMA will have regard to any representations made in response to the notice and may make modifications to the proposed revised undertakings or order as a result. If the CMA considers that any representation necessitates material change to the proposed revised undertakings or order, it will give

²⁶ This might be because the question of whether or not there is a change of circumstances is not clear cut and hence the CMA will need to reach a view on that first before engaging in discussions on possible variations.

²⁷ This process was adopted, for example, in the review of ITV's Contracts Rights Renewal undertakings (2010).

²⁸ Schedule 10, paragraph 7(2) of the EA02.

notice of the proposed modifications with a further consultation period of no less than seven days.

- 3.35 In the absence of any representations, or in the event that the CMA decides on consideration of representations made not to amend materially the revised undertakings or order, it will proceed with accepting revised undertakings or making a revised order by issuing a Notice of variation. Similarly, in the absence of any representations to a Notice of intention to terminate the undertakings or order, the CMA will proceed with releasing parties from the undertakings or revoking the order by issuing a Notice of release or Notice of revocation.

Conclusion of a review

- 3.36 The CMA's review concludes either once a final decision has been made that there is no change of circumstances (see paragraph 3.32) or once the undertakings or order have been varied or terminated (see paragraph 3.35).²⁹
- 3.37 The group appointed to undertake the review will normally be disbanded following the conclusion of the CMA's review.³⁰
- 3.38 When the CMA gives notice of varying or terminating undertakings or an order, it will make any appropriate amendment to its published register of orders and undertakings. The CMA is responsible for monitoring and enforcing any undertakings and orders that remain in force, except where specifically indicated otherwise.

²⁹ A review may also be concluded if a new market investigation reference is made under section 131 of the EA02 by the CMA Board, or by the Secretary of State (sections 132 and 140A of the EA02), or by a sectoral regulator, which relates to the existing undertakings or order under review. In these exceptional circumstances, the CMA will notify relevant parties that this action is being taken and publish the fact the review is concluding on www.gov.uk/cma. The existing undertakings or order remain in force and continue to bind the parties unless or until such time as varied or terminated following the market investigation.

³⁰ See paragraph 3.12.

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

3.39 There may be cases in which undertakings or orders are time-expired or have lapsed as the result of a predetermined event, or where they have been superseded by new CMA undertakings or orders. For example:

- where undertakings or an order contain within them a time period for their application which has ended or where undertakings or orders contain an expiry date which has passed
- where undertakings or an order specify that they will expire upon a certain event happening, or
- where they are superseded by new undertakings or a new order resulting from a new CMA inquiry.³¹

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

³¹ For example, as was the case in the groceries market where the Groceries Supply Code of Practice superseded the Supermarkets Code of Practice.

A. Status of the OFT and the CC guidance documents and publications

A.1 The table below indicates the status of the OFT and the CC documents and publications that are relevant to the variation and termination of merger, monopoly and market undertakings and orders and that had been published and were in effect prior to the transfer of the mergers and markets functions to the CMA on 1 April 2014. Certain of those documents have been adopted by the CMA Board in order to facilitate transition to the new UK mergers and markets regime, and to minimise disruption to parties and the CMA.

OFT/CC Code	Title	Status of document	
		Replaced/obsolete ¹	Adopted by the CMA Board ²
OFT1060	Memorandum of understanding between the OFT and the CC on the variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Enterprise Act 2002	✓	-
CC1	Competition Commission: Rules of Procedure	✓	-
OFT1254/CC2	Merger Assessment Guidelines	-	✓
CC3 (revised)	Guidelines for Market Investigations	-	✓
CC7 (revised)	Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973	-	✓
CC8	Merger Remedies: Competition Commission Guidelines		✓
OFT953	Prioritisation principles	✓	-

¹ The OFT and the CC publications listed in this column have, with effect from 1 April 2014, been replaced, or rendered obsolete, by the CMA guidance or publications.

² The OFT and the CC publications listed in this column have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future).

A.2 Parties should refer to those documents listed above as having been adopted by the CMA Board (the adopted guidance) for further details on the substance and procedure around the variation and termination of merger, monopoly and market undertakings and orders. This is subject, in particular, to the following general limitations:

- all references in the adopted guidance listed above to issues regarding the variation and termination of undertakings and orders or jurisdiction or procedure in mergers and markets cases must be read in the light of this guidance and *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) and *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3)
- in the cases of conflict between this guidance and the adopted guidance, this guidance prevails, and
- all the adopted guidance should be read subject to the following cross-cutting amendments:
 - references to the 'OFT' or the 'CC' (except where referring to specific past OFT or CC practice or case law), should be read as referring to the CMA
 - references to 'referral to the CC' or 'a reference to the CC' should be read as referring to the referral of a case by the CMA (or Secretary of State) of a case for a Phase 2 investigation involving an Inquiry Group of the CMA panel members
 - references to articles of the EC Treaty should be read as referring to the equivalent articles of the Treaty on the Functioning of the European Union
 - certain OFT or CC departments, teams or individual roles may not be replicated in the CMA, or may have been renamed; a copy of the CMA's organisational chart is available on www.gov.uk/cma, and
 - parties should check any contact details against those listed on www.gov.uk/cma, which will be the most up to date.