

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: the Competition and Markets Authority and Part 4: Competition Reform

Part 3: the Competition and Markets Authority

Schedule 4: The Competition and Markets Authority

Part 3: The Competition and Market Authority panel

178. **Part 3** of Schedule 4 provides for the establishment of a panel of independent experts to undertake Phase 2 merger and markets inquiries and carry out the CMA's regulatory appeal/reference functions and those ancillary functions that are currently the responsibility of the CC. The panel is another key feature of the governance arrangements intended to ensure robustness and fairness of decisions. The provisions are similar to provisions in Schedule 7 to the CA 1998.
179. **Paragraph 35** provides that the CMA panel members are to be available to become members of groups which carry out certain functions. The panellists are categorised as "newspaper panel members" who are available to deal with newspaper merger references, "specialist communications panel members" who deal with certain communications matters, "specialist utility panel members" who deal with utilities matters under various sectoral enactments, and "reporting panel members" who are otherwise appointed to the panel (but may, in accordance with the specific rules on their formulation, sit on any group). There is also provision for panellists to be appointed for the purposes of certain Northern Ireland utility functions. A panellist may be appointed in more than one of these capacities.
180. **Paragraph 36** provides that the chair of the CMA is responsible for constituting a group when required under the EA 2002 or other legislation. The constitution of the group must be done in accordance with this Part of this Schedule and other sectoral legislation where applicable.
181. **Paragraphs 37 and 38** set out rules on the constitution of groups. The chair of the CMA shall select the members of groups and shall appoint a group's chair. Furthermore, subject to any applicable enactment (and there are certain specific requirements in legislation governing the regulated sectors), each CMA group is to consist of at least three members of the CMA panel. If the group's functions relate to a newspaper merger, then at least one newspaper panel member must be appointed to the group, and any members of the group who are not newspaper panel members must be reporting panel members. If the group's functions relate to the specified communications matters, then at least one specialist communications panel member must be appointed. If its functions relate to the specified utility matters, then at least one of the specialist utility panel members must be appointed. These provisions, and the related sectoral provisions,

ensure that where expertise in newspaper or communications or particular utilities matters is required, a specific type of member of the panel is available to provide it to the group. Under paragraph 39 the validity of anything done by a group is not affected by a defective appointment.

182. [Paragraph 41](#) allows the chair of the CMA to remove a group member from a group where they are either not able to carry out the work of the group, or where the member has a conflict of interest. In these circumstances, or if a member leaves a group for any other reason, the chair of the CMA may replace a member (paragraph 43). This latter provision also ensures the chair of the CMA has the power to fulfil his/her duties under paragraph 36 to ensure groups remain properly constituted. Under paragraph 42 a person is automatically no longer a member of the group if they are no longer a member of the panel unless re-appointed under paragraph 4.
183. [Paragraphs 46 and 47](#) provide that prior to a group being constituted the chair of the CMA may take steps to enable the group to carry out its work. These powers allow, for example, the chair of the CMA to make administrative preparations for the work of the group whilst it is being constituted (but this does not extend to doing anything the group could not itself do once constituted and is aimed at facilitating the group's work). But the chair can, at any time before the group concerned has first met, cancel a merger reference if it appears the proposed merger has been abandoned and so no inquiry is required.
184. [Paragraph 49](#) provides that groups must act independently of the CMA Board in taking any decision required or permitted under any enactment. The requirement for groups to take independent decisions does not, however, prevent the Board from giving information to a group or a group from giving information to the Board.
185. [Paragraph 50](#) gives the group chair a casting vote if the group's vote on a decision is tied.
186. [Paragraph 51](#) requires the CMA Board to make, following a consultation process and subject to the provisions made by or under any enactment, rules of procedure for groups that undertake market investigations, merger inquiries and appeal/reference functions under legislation governing the regulated sectors. Further detail on how the Act affects the OFT and CC's current regulatory appeal, reference and ancillary functions is contained in the Explanatory Notes on Schedule 6. Detailed provisions on the CMA Board's rule making powers are contained in paragraph 53.
187. [Paragraph 51\(5\)](#) provides that subject to rules made under paragraph 51, and the provisions of any legislation, groups may also decide their own procedure. The CMA Board may also issue guidance on procedure (paragraph 52), on which the Board must also consult, and groups must take this guidance into account when deciding on their own procedures.
188. [Paragraph 54](#) allows a group which is not a group that undertakes a market investigation, merger inquiry and appeal/reference functions under various sectoral legislation specified in paragraph 51 to make its own rules of procedure, subject to any direction given by the Secretary of State and the provisions of any legislation. Paragraph 54(3) requires groups to have regard to any guidance issued by the Board in deciding their own procedures.
189. [Paragraphs 55 to 58](#) provide that, for the purposes of specified decisions in merger inquiries and market investigations, group decisions are required to have been agreed by at least a two-thirds majority of the group to be valid.