

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 5: Amendments related to Part 3

200. [Schedule 5](#) amends the CA 1998 and the EA 2002 to transfer the following functions from the CC and OFT to the CMA:
- powers relating to obtaining and reviewing information relating to any of its functions, providing information to the public to promote the benefits of competition, and the provision of information to Ministers on its functions;
 - functions in relation to investigating and enforcing prohibitions of anti-competitive agreements and abuse of a dominant position (anti-trust cases);
 - functions in relation to investigation and prosecution of the criminal cartel offence;
 - functions relating to Phase 1 and Phase 2 merger investigations; and
 - functions relating to market studies and market investigations.
201. The transfer of the CC's regulatory appeals and reference functions under sector specific legislation (e.g. gas, water, rail) are set out in [Schedule 6](#), which also transfers the various ancillary functions exercisable by it and by the OFT under other legislation (including in legal services).

Part 1: Transfer of functions under the Competition Act 1998 to the Competition and Markets Authority

202. [Part 1](#) of [Schedule 5](#) (paragraphs 1 to 58) provides for the transfer of all of the OFT's functions under the CA 1998 that is, its functions relating to the prohibitions against anti-competitive agreements (Chapter 1 of the Act and Article 101 of the Treaty on the Functioning of the European Union ("TFEU")) and abuse of a dominant position (Chapter 2 of the Act and Article 102 of the TFEU) to the CMA. These include, in particular, functions in relation to exemptions to the prohibitions on anti-competitive agreements and abuse of a dominant position; anti-trust investigation and enforcement functions; the OFT's rule making functions; and functions of assisting the EU Commission in carrying out its investigations under Part 2 of the CA 1998. The OFT's Board is responsible for decisions in relation to the OFT's functions under the CA 1998. These decisions will be taken by the CMA Board.

Part 2: Transfer of functions under the Enterprise Act 2002 to the Competition and Markets Authority

General functions

203. Paragraphs 60 and 61 transfer the general functions of the OFT in the EA 2002 to the CMA. These include the functions of obtaining and reviewing information about matters relating to the carrying out of its functions (currently section 5 of the EA 2002). This information gathering role, which the OFT currently relies on to carry out research and market studies, is with a view to the CMA having the information it needs to make decisions and carry out its functions. Also included in these general functions is the provision of information to the public (currently section 6 of the EA 2002), which enables the CMA to provide the public with information or advice on matters relating to its functions (including publishing guidance on compliance with competition law and educational literature).
204. Paragraph 62 transfers the OFT's function to provide information and advice to Ministers to the CMA (currently section 7 of the EA 2002). This enables the CMA to make proposals or give other information and advice to Government Ministers or public authorities on matters relating to its functions. Such advice may address the impact of future as well as existing legislation. In addition Government Ministers may also request proposals, information or advice from the CMA on matters relating to its functions.
205. Paragraph 63 provides for the repeal of section 8 of the EA 2002, which makes provision for the OFT to promote good practice in the carrying out of activities that may affect the economic interests of consumers in the UK, and includes the function of setting up and undertaking an enhanced role in respect of consumer codes of practice produced by a variety of bodies. As a result of changes announced on the consumer landscape,¹ the OFT's functions relating to consumer codes will be transferred to the Trading Standards Institute and Citizens Advice will lead on consumer advocacy.
206. The CMA will continue to provide information and education both in the UK and internationally by virtue of its duty to seek to promote competition for the benefit of consumers in section 25, and by virtue of paragraph 61 of this Schedule, which transfers the OFT's function to provide information to the public about ways in which competition may benefit consumers and information in respect to any of its functions. In addition, the CMA will assume the OFT's international role in promoting good consumer practice outside the UK (paragraph 19 of Schedule 4).
207. Paragraph 64 has the effect of transferring the OFT's super-complaint function to the CMA. This enables certain designated consumer bodies to make a 'super-complaint' where they consider that there is any market feature or combination of features, such as the structure of the market or the conduct of those operating within it, that may be harming consumers to a significant extent. Where a super-complaint is made, the CMA must respond within 90 days with a considered response to the super-complaint, setting out what action, if any, it proposes to take. The mechanism was designed to encourage groups who represent consumers to make relevant complaints on their collective behalf.

Competition and Markets Authority's powers to take interim action on anti-trust

208. Paragraph 66 is a consequential amendment arising from the transfer to the CMA of the OFT's powers to take interim action where they have begun an anti-trust investigation (section 35 of the CA 1998). Paragraph 22(2), Schedule 4 of the EA 2002 enables the CAT to be given powers similar to those of the OFT under section 35 of the CA 1998.

¹ Consultation on Empowering and Protecting Consumers, Government Response, April 2012

<http://www.bis.gov.uk/Consultations/empowering-and-protecting-consumers>

This reference is updated to reflect the fact that the CMA will assume the OFT's powers under that Act.

Competition and Markets Authority's functions in relation to mergers

209. [Paragraphs 67 to 162](#) deal with the transfer of the merger functions of the OFT and the CC to the CMA whilst preserving the two phase approach to decision making. The CMA's merger functions are to be carried out on behalf of its Board unless the Act specifies that functions will be carried out by groups. This approach is given effect by a general provision that CMA functions are to be the responsibility of the Board (contained in Schedule 4), unless specified as being the responsibility of a group. New section 34C (inserted by paragraph 74) sets out the functions that will be exercised by groups. These include the determination of references under sections 22 (completed mergers) or 33 (anticipated mergers). New section 46D (inserted by paragraph 88) provides for functions that will be exercised by groups in relation to references made under section 45 (public interest consideration) and new section 62A (inserted by paragraph 105) provides for functions that will be exercised by groups in relation to special public interest merger investigations.

Competition and Markets Authority's functions in relation to markets

210. [Paragraphs 163 to 209](#) deal with the transfer of the market investigation reference functions of the OFT and CC to the CMA, while preserving the two phase approach to decision-making. Responsibility for the markets functions in the CMA will generally fall to the CMA Board where the function is currently carried out by the OFT, and to groups constituted by the CMA chair where the function is currently carried out by the CC. Section 133A (inserted by paragraph 166) specifies various functions that are to be carried out by a group when a market investigation reference has been made. As set out above, the CMA Board is required to make rules for market reference groups.

Competition and Market Authority's functions in relation to cartels

211. [Paragraphs 210–216](#) deal with the transfer of the functions of the OFT in relation to the cartel offence, which is set out in section 188 of the EA 2002 to the CMA. As with anti-trust functions, the OFT's Board is responsible for decisions in relation to the OFT's functions on the cartels. This decision making power is also transferred to the CMA Board.

Interpretation

212. [Paragraph 217](#) amends the interpretation provisions of section 273 of the EA 2002 to substitute the CC with the CMA and omit the reference the OFT.

Part 3: Abolition of the Competition Commission

213. [Paragraphs 218 to 228](#) provide for amendments to the CA 1998 and the EA 2002 to reflect the abolition of the CC. In relation to the CA 1998 they provide for the repeal of section 45 (which establishes the CC), amend section 55 (relating to the interpretation of Part 1), and repeal Schedules 7 and 7A. They also repeal sections 185 to 187 of and Schedules 11 and 12 to the EA 2002, which set out the governance structure of the CC. Part 2 of Schedule 3 to the EA 2002 (which provides for the transfer of property between the CC and Competition Service) is also repealed.

Part 4: Abolition of the Office of Fair Trading

214. [Paragraph 229](#) provides for amendments to the EA 2002 to reflect the abolition of the OFT. It provides for the repeal of sections 1 to 4 and Schedule 1 on the establishment of the OFT.
215. Replacement provisions, on the governance of the CMA, are set out in Schedule 4.