

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

Section 25: The Competition and Markets Authority

147. This section establishes the CMA to perform functions on behalf of the Crown and gives effect to Schedule 4.
148. **Section 25** also sets out the CMA's duty to seek to promote competition for the benefit of consumers. This duty reflects the CMA's position as the UK's principal competition authority, its leadership role in tackling anti-competitive behaviour as part of ensuring markets work well for consumers, and its domestic and international advocacy role. In its approach to promoting competition for the benefit of consumers, it will be concerned with how firms interact with each other (the supply side) and how firms interact with customers (the demand side).
149. The general duty does not mean that the CMA may only act where doing so would promote competition. For example, it does not constrain the proper exercise of its function of determining licence modification references and appeals, and Energy Code modification appeals. Nor does the general duty constrain the proper exercise of the CMA's consumer functions.

Schedule 4: The Competition and Markets Authority

150. **Schedule 4** makes provision for the governance and decision making structure of the CMA.
151. **Schedule 4** provides the CMA with a corporate governance structure that ensures independence of its decision making from Government and from the regulators against whose decisions it may hear appeals. This structure also provides for the separation and independence of decision making within the CMA so that certain decisions are taken by the CMA's Board and others are taken by groups of independent members drawn from the CMA's panel. This reflects the two phases of decision-making in merger and markets cases and the CMA's role in relation to regulatory appeals and references.
152. In the current regime, the OFT decides whether to refer a merger or a market for further investigation and the CC carries out that investigation. Decisions made by the OFT are made by its Board or staff where authority has been delegated to them by the Board. The CC's decision-making functions on mergers cases, market investigations and regulatory appeals/references are exercised by inquiry groups of members drawn from a pool of panel members appointed by the Secretary of State. These groups exercise the functions of the CC for the purposes of the inquiries on which they are appointed.

Part 1: General

Membership

153. Paragraph 1 of Schedule 4 provides for the membership of the CMA, with all types of member being appointed by the Secretary of State. The CMA will consist of a chair, Board members, and panel members. The Secretary of State will consult the chair before appointing the other members. At least 5 members must be appointed to the Board (of which the chair will also be a member). At least one of the Board members must also be a panel member. Paragraph 1(5) provides that of the members of the CMA Board appointed under paragraph 1(1)(b), not more than half may be members of staff of the CMA. This provision has the effect of ensuring that a majority of the members of the CMA Board, which also includes the chair, will not be members of the CMA's staff.
154. Paragraph 1(7) and paragraph 11 have the effect of preventing a person holding office in the CAT from being appointed as a member of the CMA or as its chief executive or another member of its staff. Paragraph 2 provides for the terms and conditions of the members of the CMA to be determined by the Secretary of State.

Appointment and re-appointment

155. Paragraphs 3 and 4 set out the terms of appointment and re-appointment to the membership of the CMA. The term of appointment of the CMA chair and Board members is to be for a maximum period of 5 years.
156. Appointment to the CMA panel is to be for a maximum period of 8 years, and is not renewable except for the purpose of seeing out an inquiry to which the panellist has been appointed before the expiry of their original 8 year term. This is to ensure that panel members are not influenced by the prospect of re-appointment in taking their decisions. The provision on re-appointments replicates the current provision in the CA 1998 (paragraph 6 of Schedule 7) and allows for consistency of decision making throughout the investigation process, including the remedies stage and where an investigation has been remitted to the CMA following an appeal. A CMA panel member is not prevented from being appointed or re-appointed as a member of the Board during or after his or her term as a CMA panel member. Office of the Commissioner of Public Appointments guidance will apply to the appointment process and length of tenure of members of the CMA.
157. Paragraph 5 provides that the CMA must pay members remuneration, pension allowances and where required, compensation for loss of office, as specified by the Secretary of State.
158. Paragraph 6 provides that members of the CMA may resign by notifying the Secretary of State. A panel member who is a member of both the CMA Board and CMA panel can resign one of these appointments whilst remaining in the other. Paragraph 7 provides that a member of the CMA may be removed from office by the Secretary of State on the grounds of incapacity, misbehaviour or failure to carry out their duties.

Status

159. Paragraph 8 provides that, in performing its functions, the CMA acts on behalf of the Crown.

Chief executive and other staff

160. Paragraphs 9 and 10 make provisions for the appointment of a chief executive and staff to the CMA. The Secretary of State is to appoint a chief executive as a member of staff of the CMA following consultation with the chair of the CMA, for a term of no longer than 5 years. This term is renewable. The chief executive and other members of

staff may be Board members of the CMA, but neither the chief executive nor any other member of staff may be the chair of the CMA or a panel member.

161. The CMA may appoint additional staff, but the number of other staff and their conditions of service must be approved by the Minister for the Civil Service. Members of staff of the CMA are to be regarded as civil servants.

Annual plan

162. [Paragraph 12](#) provides that the CMA will, before each financial year, publish an annual plan that sets out its main objectives, priorities and resource allocation among the activities to be carried out for the year ahead, and lay the plan before Parliament. These requirements are similar to those for the OFT set out in section 3 of the EA 2002, but aim to provide additional transparency on how the CMA intends to allocate resources against its objectives before each financial year. It does not prevent the CMA from re-allocating resources to respond to issues emerging in the course of the year. [Paragraph 13](#) provides for the CMA to consult on its proposals for the annual plan.

Performance report

163. [Paragraph 14](#) provides that, after the end of each financial year, the CMA will publish an annual report on its activities and performance, and lay the report before Parliament. It stipulates that the annual report will include a survey of developments in respect of matters falling within the scope of the OFT's functions; an assessment of progress against the year's annual plan prepared under [paragraph 12](#); a summary of the CMA's significant decisions, investigations and activities; a summary of how the CMA has allocated resources; and an assessment of its activities relating to enforcement functions. This is the minimum that must be included in the report; it is open for the CMA to include more information if it wishes. The CMA may also, as [paragraph 15](#) makes clear, prepare and publish other reports on any matters relating to its functions.

Concurrency report

164. [Paragraph 16](#) provides that the CMA will publish an annual report on how arrangements for co-operation between the CMA and the sectoral regulators with concurrent competition powers have worked. The report must include information about the use by the CMA and sector regulators of their anti-trust powers (under Part 1 of the CA 1998) and market investigation referral powers (under Part 4 of the EA 2002) and any decision of a regulator that its CA 1998 powers were applicable but that it was more appropriate for it to use its other powers.

Documents

165. [Paragraph 17](#) provides for the authentication of the CMA's seal by a member of the CMA Board or by a person authorised for that purpose and for the admissibility in evidence of documents executed under the CMA's seal. Where a document is to be signed in accordance with Scottish law this provision does not apply.

Members of committees and sub-committees

166. [Paragraph 18](#) provides that committees and sub-committees of the CMA may include people who are not members of the CMA and that sub-committees of the CMA may include people who are not members of the committee that established the sub-committee. [Paragraph 29\(3\)](#) provides that the CMA Board may not delegate anything that it is required or permitted to do to committees and sub-committees that include people who are not members of the CMA or staff.

Additional Powers

167. **Paragraph 19** makes provision for the CMA to take an international role as regards certain matters, including consumer matters. The provision will enable the CMA to represent the UK Government in international *fora* in any field connected to its functions when requested by the Secretary of State. The provision also enables the CMA to assume the OFT's role in promoting good consumer practice outside the UK, for example as a member of the International Consumer Protection and Enforcement Network and the London Action Plan (which seeks to promote international spam enforcement cooperation and address spam related problems).
168. **Paragraph 20** makes provision for supplementary powers that are necessary or appropriate for the CMA to carry out its functions. Both the CC and OFT have similar powers (paragraph 8 of Schedule 7 to the CA 1998; and paragraph 13 of Schedule 1 to the EA 2002 respectively). Typically these powers have been used by the CC to conduct preliminary work on competition cases, and to carry out post inquiry evaluations of the impact of their decisions.

Consequential amendments (Public records, Parliamentary Commissioner, Disqualification, Freedom of information, and Equality)

169. **Paragraphs 21 to 26** make consequential amendments to a number of Acts to make them applicable to the CMA. These are: the Public Records Act 1958, the Parliamentary Commissioner Act 1967, the House of Commons Disqualification Act 1975, the Northern Ireland Assembly Disqualification Act 1975, the Freedom of Information Act 2000, and the Equality Act 2010.

Part 2: The Competition and Market Authority Board

170. **Part 2** of the Schedule provides for the CMA Board. The Board, in line with general corporate governance standards, and the Treasury/Cabinet Office Guidance on Corporate Governance in Central Government Departments¹ in particular, will be responsible for the strategy and performance of the CMA and oversight of staff as well as being responsible for particular decisions (e.g. Phase 1 merger, Phase 1 markets and anti-trust cases). The Board will also be responsible for making rules of procedure and may issue guidance.
171. **Paragraph 27** provides that the CMA Board (as distinguished from the CMA, which also includes the panel) will consist of the chair, and the Board members, at least one of whom will also be a member of the panel. The chief executive may be a Board member, but is not required to be.
172. **Paragraph 28** provides that the functions of the CMA will be exercisable by the Board, except where expressly provided otherwise. The result of this approach is that, where an enactment confers functions on the CMA that are to be performed by a CMA group, the enactment in question specifically provides that those functions are to be exercised by a group.
173. **Paragraph 29** provides that the Board may delegate any of its functions to particular members of the Board, or to staff, or a committee. This power to delegate does not apply, however, to decisions at key steps of the market study and market investigation processes.
174. **Paragraph 30** provides that the Board's power to delegate in relation to certain anti-trust functions is subject to rules made under the CA 1998.
175. **Paragraph 31** provides that the CMA Board may make its own rules of procedure. These rules might for instance include rules about Board members deputising for the chair.

¹ Code of good practice, 2011 http://www.hm-treasury.gov.uk/d/corporate_governance_good_practice_guidance_july2011.pdf

176. [Paragraph 32](#) provides that a defective appointment to the Board or a vacancy does not by itself make its actions or decisions invalid.
177. [Paragraph 33](#) provides for a recusal mechanism for Board members where the Board has to consider whether a matter should be referred to the chair for the chair to constitute a group to investigate the matter. The object behind this is to ensure independence of Phase 1 and Phase 2 decision making. Before the Board considers whether to refer the matter, the chair must consider whether a member of the Board who is also a member of the panel might be a member of the group responsible for the investigation. If so, this person cannot take part in the Board's deliberations. This ensures that the same person cannot take part in a referral decision at Phase 1 and also decisions at Phase 2 in the same case.

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.

Part 4: Interpretation and transitional and transitory provision

190. [Paragraphs 59 and 60](#) interpret certain terms used in Schedule 4.
191. [Paragraphs 61 to 63](#) restrict the eligibility of CC panel members and former CC panel members to be appointed to the CMA panel. Paragraph 62 provides that an existing or former member of the CC panel may not be appointed to the CMA panel, but paragraph 61 provides two exceptions to this rule. The first is that an existing CC panel member may be appointed to the CMA panel before the abolition of the CC if his or her term of office as a CC panel member is not due to expire before the abolition of the CC. The second exception is that a former CC panel member may be appointed to the CMA panel after the abolition of the CC if he or she was still a CC panel member immediately before the CC was abolished. However, in these cases the terms of the person's appointment to the CMA panel must not be such that his or her total period of service as a member of the CC and CMA panels exceeds eight years. For that purpose, any period when the person holds office both as a CC panel member and as a CMA panel member is not counted towards his period of service as a CC panel member.

192. [Paragraph 61](#) also allows transitional provision to be made (by order) relating to appointments of CC panel members to the CMA panel, and for their re-appointment. The other provisions of paragraph 61 do not restrict the transitional provision which may be made under this power. Among other things, this ensures that provision could be made for the appointment to the CMA panel of individuals who have already served the maximum eight year term as members of the CC panel but who need to be temporarily appointed to the CMA panel in order to complete inquiries on which they began work as members of the CC panel.
193. [Paragraphs 64 and 65](#) make provision about the CMA's first and following financial years and its first annual plan.

Section 26: Abolition of the Competition Commission and the Office of Fair Trading

194. This section abolishes the CC and the OFT. The section also gives effect to Schedules 5 and 6.
195. [Schedule 5](#) amends the CA 1998 and the EA 2002 to make provision for the transfer of the current relevant functions of the OFT and the CC to the CMA where these are not otherwise transferred under the Act. [Schedule 6](#) amends other enactments to make provision for the transfer of functions, predominantly regulatory appeals and ancillary functions, from the CC and OFT to the CMA.

Section 27: Transfer schemes

196. [Section 27](#) confers power on the Secretary of State to make schemes to transfer property, rights and liabilities from the CC and the OFT to the CMA. Such schemes may be made in connection with the establishment of the CMA, the abolition of the OFT or the CC, or the transfer of functions from the OFT or CC to the CMA. Section 27 also makes provision for transfers to a Minister of the Crown, as well as to the CMA so that, for example, the Secretary of State can dispose of property liabilities in relation to the CC offices, OFT offices, or both.
197. [Subsection \(4\)](#) lists the types of provision that may be made in a transfer scheme. These include making provision the same as or similar to the [Transfer of Undertakings \(Protection of Employment\) Regulations 2006 \(SI 2006/246\)](#).
198. [Subsection \(6\)](#) makes provision in relation to individuals holding employment in the civil service to ensure that the schemes can deal with the position of those civil servants who do not have contracts of employment.

Section 28: Transitional provision: consultation

199. Provisions of the Act, and provisions added to other legislation by the Act, provide for the CMA to consult other persons when it prepares particular rules, statements of policy, guidance or general advice and information. Section 28 allows the OFT or the CC (or both jointly) to carry out any such consultation before the provision in question comes into force and, once the provision has come into force, allows the CMA to treat the consultation as having been carried out by the CMA. This will enable consultations to take place on behalf of the CMA on such matters as CMA guidance before the CMA becomes fully operational. [Subsection \(4\)](#) also enables the Secretary of State to direct the CC or the OFT (or both jointly) to carry out such consultations.

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:

*These notes refer to the Enterprise and Regulatory Reform Act
2013 (c.24) which received Royal Assent on 25 April 2013*

- 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,² 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. 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

² Consultation on Empowering and Protecting Consumers, Government Response, April 2012

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.

Schedule 6: Regulatory appeals etc: minor and consequential amendments

Summary and Background

216. This Schedule relates to the CC's current regulatory appeals and reference functions under sector specific legislation (e.g. gas, water, rail) and to the OFT's and CC's current ancillary competition functions under other legislation. It provides for the transfer of these functions, not substantially changed, from the CC and the OFT to the CMA.
217. Under current legislation, the CC receives broadly seven types of reference of regulatory matters from these regulators. These are:
- licence modification references and appeals (for gas, electricity, health, water and sewerage, rail, air traffic and airport operation services);
 - references of non-licensable activities in the gas and electricity sectors and on a levy on health providers;
 - energy code appeals;
 - price control references, in the energy, health, water and communications sectors;
 - price control appeals in postal services;
 - airport charges, conduct and licence condition references; and
 - access charges references in the railways sector.

*These notes refer to the Enterprise and Regulatory Reform Act
2013 (c.24) which received Royal Assent on 25 April 2013*

218. In each of these, the issues that the CC must take into consideration in carrying out its inquiry are adapted according to the particular regulatory regime and usually reflect the considerations to which the relevant regulator is required to have regard in reaching the decision that is subject to the reference or appeal.
219. The CC and/or the OFT also have ancillary functions under other legislation (the Legal Services Act 2007, the Legal Services (Scotland) Act 2010, the Financial Services and Market Act 2000, the Payment Services Regulations 2009, the Competition Act 1980 and the Transport Act 2000), including with regards to local bus schemes or agreements.
220. The current statutory provisions affected by this Schedule are:

<i>Licence modification references/appeals</i>	
Gas	Gas Act 1986
	Gas (Northern Ireland) Order 1996
	Energy (Northern Ireland) Order 2003
Electricity	Electricity Act 1989
	Electricity (Northern Ireland) Order 1992
	Energy (Northern Ireland) Order 2003
Water and sewerage	Water Industry Act 1991
	Water and Sewerage Services (Northern Ireland) Order 2006
	Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005
Rail	Railways Act 1993
Air traffic services	Transport Act 2000
Airport operation services	Civil Aviation Act 2012
Health	Health and Social Care Act 2012
<i>Non-licensable activities</i>	
Gas	Gas Act 1986
Electricity	Electricity Act 1989
Energy code appeals	Energy Act 2004 (read with the Electricity and Gas Appeals (Designation and Exclusion) Order 2005, and the Electricity and Gas Appeals (Designation and Exclusion) Order 2009)
<i>Price control references</i>	
Water	Water Industry Act 1991
	Water and Sewerage Services (Northern Ireland) Order 2006
	Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005
Electronic communications	Communications Act 2003
Postal services price control	Postal Services Act 2011

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Health	Health and Social Care Act 2012
<i>Levy on providers reference</i>	
Health	Health and Social Care Act 2012
<i>Railway access charges</i>	
Rail	Railways Act 1993
<i>Other related minor amendments</i>	
Gas and Electricity	Utilities Act 2000
<i>Ancillary Competition Functions</i>	
Legal Services	Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, Legal Services Act 2007, Legal Services (Scotland) Act 2010, the Solicitors (Scotland) Act 1980
Transport	Transport Act 2000
Public bodies and transport	Competition Act 1980

221. The Schedule makes consequential amendments to the sectoral legislation to accommodate the bringing together of the OFT and CC into a single body. In particular, where the CMA decides on references or appeals currently decided by the CC, a group appointed by the CMA's chair – in other words, an independent decision making group – rather than the CMA Board will make these decisions. This is to ensure that these functions are carried out by groups with sufficient expertise and which are independent of the CMA's executive, any overriding duties of the CMA and the CMA's relationship with regulators under their concurrent anti-trust and market investigation referral powers. Further explanation of the CMA's governance structure can be found in the Explanatory Notes on Schedule 4.
222. Where a function under certain sectoral enactments is currently exercisable by the chair of the CC before a group has been constituted, that function will now be exercisable by any member of the CMA Board who is also a member of the CMA panel or any member of the CMA panel authorised by the Secretary of State to exercise that function. For example, with respect to gas licence modification appeals, the definition of 'authorised member of the Competition Commission' in paragraph 13(1) of Schedule 4A to the Gas Act 1986 is amended to effect this change. Unlike the chair of the CC, the chair of the CMA will not be authorised, prior to a group being constituted, to decide on whether permission should be given to hear an appeal. Similar provision is made in respect of the power to issue notices regarding written documents or oral hearings in respect of certain sectoral appeals and references. Schedule 6 sets out the specific variations that apply to each type of regulatory appeal or reference.
223. The Schedule also makes analogous amendments to those Acts under which the CC and OFT currently have ancillary competition functions. Amendments to the Payment Services Regulations 2009 will be made through secondary legislation.