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

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

Part 4: Competition Reform

Chapter 1: Mergers

Summary and Background

224. The main provisions of this Chapter:

- introduce statutory time limits and information gathering powers for all parts of the merger review process;
- introduce a time limited period after the Phase 1 decision where merging parties can offer and negotiate undertakings in lieu ("UILs") of a referral;
- strengthen the voluntary notification regime by giving the CMA the ability to suspend all integration steps in completed and anticipated mergers;
- clarify the type and range of measures that the CMA can take at Phase 1 and Phase 2 to prevent pre-emptive action; and
- introduce financial penalties for breach of CMA interim measures.

Investigatory powers

Section 29: Investigation powers: mergers

225. Currently under the EA 2002 the OFT and CC have some powers to require persons to give evidence and provide specified documents and information needed for the purposes of a merger inquiry, but these do not extend across the whole mergers process. The introduction of statutory time limits in section 32 and Schedule 8 will mean that the CMA will require appropriate investigatory powers during all phases of its investigation to be able to carry out its functions within the statutory time scale.

226. This section extends these investigatory powers so that the CMA will have a single set of powers that can be used consistently across the whole of the merger investigation process.

227. Section 29(2) amends section 109 of the EA 2002 to set out the permitted purposes for which the CMA can use the information gathering powers. These are: assisting the CMA in carrying out any functions relating to a matter which is the subject of, or is the possible subject of, a reference under section 22 or 33 of the EA 2002 (completed or anticipated mergers) i.e. to assist the CMA during Phase 1 and Phase 2 merger

investigations (new 109(A1)(a)); and assisting the CMA or the Secretary of State to undertake any functions relating to a matter which is the subject of, or is the possible subject of, a reference under section 45 or 62 of the EA 2002 i.e. investigations where public interest issues are relevant (new 109(A1)(b)).

228. New section 109(A1) also enables the CMA to exercise the investigatory powers during any period of monitoring and enforcement relating to any remedies implemented following an investigation, including UILs implemented instead of a reference. New subsection 109(8A) sets out the enforcement functions that are covered by these powers.

229. The CMA will be able to use these investigation powers before it begins a Phase 1 merger investigation (i.e. before the initial period, set out in Schedule 8 paragraph 4, begins) if the functions for which it is exercising the powers fall into the permitted purposes outlined above. For example, if the CMA has reason to believe that a merger may be in the process of being completed and it is preparing to launch an investigation it may want to exercise its information powers for the purposes of preventing pre-emptive action being taken by the parties. The CMA will have to use the powers proportionately.

230. A similar extension of investigatory powers will operate in market investigations (see section 36 and Schedule 11).

231. *Subsection (11)* of section 29 provides for when the powers cease to become exercisable. It amends section 110 of the EA 2002 to align enforcement provisions for the investigation powers with the changes described above. It enables the CMA to enforce the investigatory powers up to 4 weeks after the investigatory powers cease to operate.

Interim measures

Section 30: Interim measures: pre-emptive action: mergers and Schedule 7 Mergers: Interim Measures

232. This section strengthens the interim measures powers available to the CMA by making it easier for the CMA to suspend the integration of companies involved in a merger during a Phase 1 investigation. It is intended to provide a solution to the current difficulties that the OFT and CC face in reviewing and dealing with the effects of completed mergers.

233. This section changes the mechanism through which, at Phase 1, the CMA can prevent pre-emptive action from taking place in completed and anticipated mergers. At the moment, in completed mergers, merging parties are often unwilling to sign up to initial undertakings (permitted by section 71 of the EA 2002 and referred to colloquially as "hold separates") until they have agreed with the OFT derogations from its standard template undertakings. This process can take time and integration can continue until undertakings are in place. This section enables the CMA to pause integration of companies involved in a merger immediately and then consider with the parties whether any further integration should be allowed through derogations.

234. Currently the OFT can only make a section 72 order in Phase 1 in completed merger cases. Under this section the CMA will be able to make a section 72 order in Phase 1 in both anticipated and completed mergers. The CMA may do so when it suspects that two or more enterprises have ceased to be distinct. Or, in the case of anticipated mergers, where arrangements are in progress or contemplation that will result in two or more enterprises ceasing to be distinct. The CMA will no longer need to satisfy itself that it is or may be the case that a relevant merger situation has been created. This will enable the CMA to issue an interim measures order under section 72 of the EA 2002 earlier in the process because it will no longer have to satisfy itself that the turnover and/or share of supply tests have been met. In practice, the powers are only likely to be used in exceptional cases in anticipated mergers.

235. *Subsection (5)* and paragraphs 2(3) and 3(3) of Schedule 7 clarify that interim measure powers at Phase 1 (section 72 of the EA 2002) and Phase 2 (sections 80 and 81 of the EA 2002) can be used to require merger parties to reverse steps that have already been taken (or to reverse the effects of such steps) where the CMA has reasonable grounds for suspecting that pre-emptive action has or may have occurred. This is an additional requirement to having reasonable grounds to suspect that two or more enterprises have ceased to be distinct.

236. *Subsection (6)* and paragraphs 2(4) and 3(4) of Schedule 7 enable the CMA to consent to derogations from an interim measures order in both Phase 1 and Phase 2 in relation to specific actions, or by providing a more general derogation for actions of a particular type. For example, an order might require the acquirer company not to dispose of any assets other than in the ordinary course of business. A general derogation might provide that the acquirer may dispose of assets in relation to a distinct activity of the business where there is no overlap with the target's business. Other examples of derogations from issued interim measures might be allowing the utilisation of the acquirer's accountancy staff for the target business in circumstances where no such staff have been transferred with the target business. Another might be allowing aggregated financial information concerning the performance of the target business to be passed to the acquirer's group board for supervisory reasons or to allow for compliance with financial disclosure obligations. The suitability and relevance of these examples will depend on whether the CMA considers this appropriate in the particular circumstances.

237. Schedule 7 amends the provisions in sections 80 and 81 of the EA 2002 (interim undertakings and interim orders in Phase 2) to make them consistent with the equivalent powers in Phase 1. It does this by clarifying that the interim measure powers can be used to require merger parties to reverse steps that have already been taken (or to reverse the effects of such steps) where the steps constitute pre-emptive action. The Schedule does not repeal section 80 of the EA 2002 (interim undertakings) given that a different dynamic exists at the point of a reference to Phase 2 (as Phase 1 measures to prevent pre-emptive action are typically already in place at that point that can be adopted at Phase 2). Phase 1 interim measures will continue to apply in Phase 2 unless new measures are made under sections 80 or 81 of the EA 2002 at Phase 2 (new section 72(6)(a)(i) in paragraph 5(3) of Schedule 7 provides that Phase 1 measures lapse when a Phase 2 measure is made).

238. For the purpose of public interest mergers, paragraph 4 of Schedule 7 gives the Secretary of State Phase 1 interim powers equivalent to those of the CMA.

Section 31: Interim measures: financial penalties: mergers

239. Section 31 inserts a new section 94A. It enables the CMA to impose a financial penalty on a person who, without a reasonable excuse, fails to comply with interim measures at either Phase 1 (section 72 of the EA 2002) or Phase 2 (section 80 and section 81 of the EA 2002). The level of the penalty is capped at 5% of the aggregate turnover of the enterprises owned or controlled by that person. The purpose is to incentivise compliance with the strengthened interim measures powers.

240. Subsection (3) of new section 94A enables the Secretary of State, by order, to determine when an enterprise is deemed to be controlled by a person, and to make provisions which calculate the turnover of an enterprise. This is often a complex matter and therefore this power provides for order(s) which will set out in detail how these calculations should be undertaken. The intention is to capture the aggregate worldwide turnover of all enterprises owned or controlled by the person who fails to comply with the measure.

241. The existing procedural requirements at section 112 of the EA 2002 will apply to these penalties. These include the CMA notifying the amount of the penalty, justification for it, and the date(s) by which it must be paid. This new penalty will apply alongside the existing civil enforcement mechanism for failure to comply with interim measures

under section 94 of the EA 2002. As a result, a person could potentially be liable to damages under section 94 and a financial penalty under new section 94A.

242. Subsection (6) enables the Secretary of State, by order, to reduce the maximum level of the financial penalty to below 5% of turnover. This gives flexibility to amend the penalty in light of experience of how the deterrence is operating in practice. The financial penalty of 5% of the aggregate turnover could be potentially large in some cases and the Secretary of State will have the power to reduce this if that proves to be the case.

243. The CMA will be required by new section 94B to prepare and publish a statement of policy on how it will use its powers to impose financial penalties and how it will determine the level of penalty imposed.

Time limits

Section 32: Time-limits etc: mergers and Schedule 8: Mergers: time-limits

244. These provisions introduce statutory timescales to all parts of the two-phase merger process. By virtue of new section 34ZA(3), Phase 1 will have a new 40 working day statutory timescale. Where a merger is notified by way of a merger notice, new section 34ZA(3) provides that the statutory timescale will start to run on the first working day after the receipt of a satisfactory merger notice. Where the CMA decides to investigate a merger but the parties do not submit a merger notice, the clock will start on the first working day after the CMA has informed the merging parties that it has sufficient information to begin its investigation. This section makes amendments to the current statutory merger notice which has a statutory timescale of 20 working days which can be extended by 10 working days, but which was available only in the case of anticipated mergers.

245. New section 34ZB(1) states that the CMA may extend the 40 day statutory timescale if merging parties have failed to provide information. This is colloquially known as "stopping the clock" and an equivalent power currently exists in Phase 2 by virtue of section 39(4) of the EA 2002. In addition (or in the alternative) where an intervention notice is in place (public interest mergers) the statutory timescale can be extended once by up to 20 working days, as set out in new 34ZB(4). In Phase 2, the statutory timetable can be extended for 'special reasons' under section 39(3) of the EA 2002. This will continue to apply for Phase 2. Unlike Phase 2, the Phase 1 statutory timescale will not be capable of extension for special reasons.

246. New section 34ZC(6) enables the Secretary of State, by order, to reduce the length of the new statutory timescales that this Schedule introduces.

247. Paragraph 7 of Schedule 8 introduces a new process for consideration of UILs to make this process more transparent and to introduce statutory timescales. It enables merging parties to offer UILs after they have seen the CMA's reasoned decision that the duty to refer would arise but for the possibility of acceptable UILs being offered, and the CMA does not consider it appropriate to apply any of the other available exceptions to the duty to refer in Phase 1. This is different to the current practice where UILs are offered by merger parties while the OFT is considering whether or not the duty to refer arises and before the OFT announces its decision.

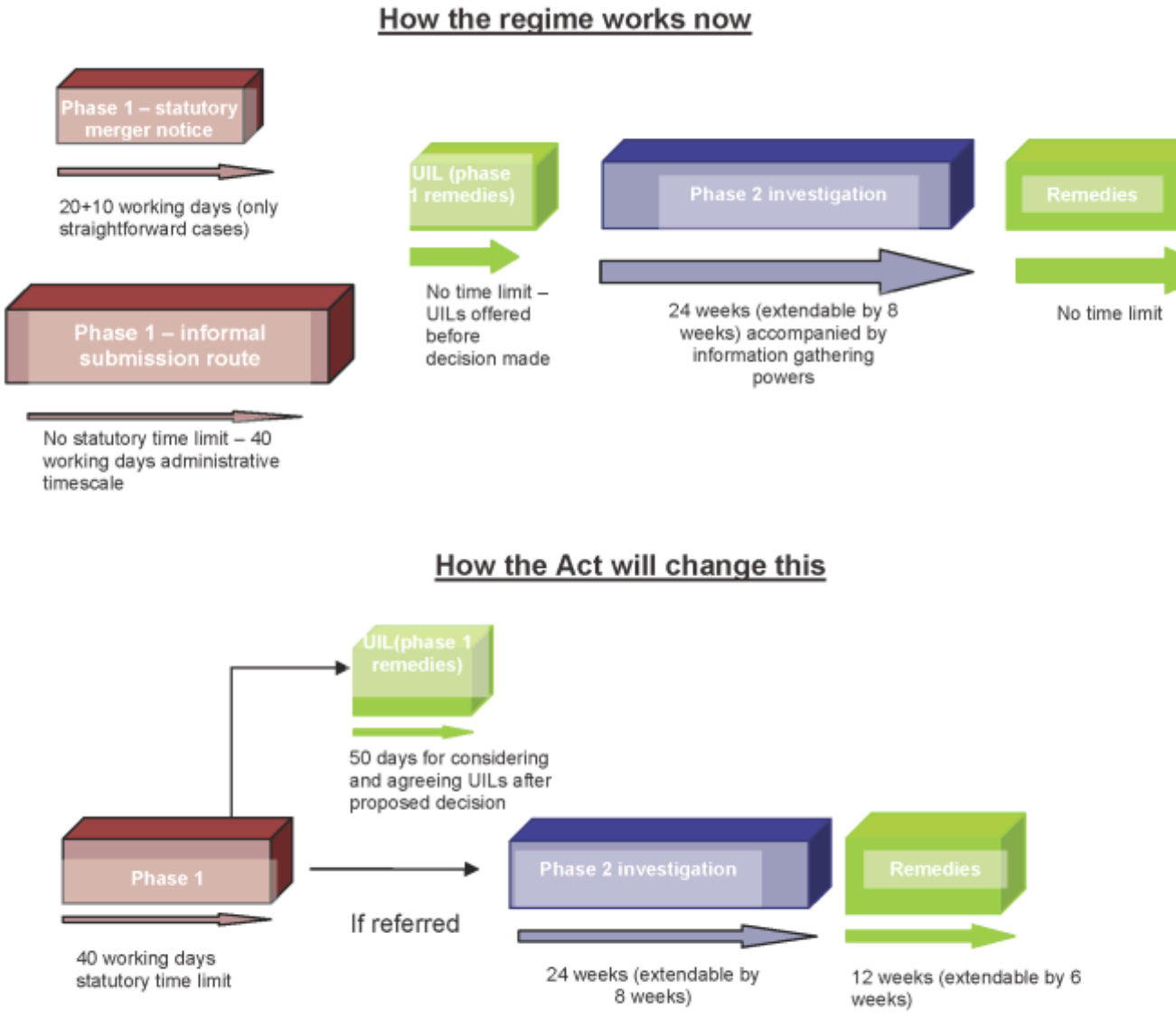
248. On announcement of its Phase 1 decision, the CMA can decide that there are no possible UILs that would address the competition concerns. If the CMA does not make that decision, merging parties will have 5 working days to offer UILs after the CMA announces its Phase 1 decision. The CMA will then have up to the tenth working day after the date of the decision to consider the UILs as proposed by the parties. So, for example, if the parties offer UILs on the third working day after the Phase 1 decision is taken, the CMA will have a further 7 working days to consider the UIL. If it considers that the UIL, or a modified version of the UIL, might be acceptable it must then publish a notice stating this. The CMA must then decide whether to accept the

UIL or a modified set of such UIL within 50 days beginning with the date the Phase 1 decision is announced. This period can be extended once by up to 40 working days where there are special reasons. It is expected that such an extension will be primarily used in cases where the CMA requires the identification and conditional commitment of a suitable purchaser before it will agree an undertaking. The CMA will be required to publish reasons for the use of the extension.

249. Paragraph 5 of Schedule 8 provides that the CMA can suspend its investigation for a period of up to 3 weeks at the beginning of a Phase 2 investigation if merging parties request this and if the CMA considers that there is a possibility that the merger will be abandoned. The purpose of this is to prevent nugatory work by the CMA and information requests on merging parties and third parties. If the CMA suspends the investigation, it must at the end of the period of suspension publish a notice stating that the power was used.

250. Paragraph 6 of Schedule 8 introduces a statutory timescale of 12 weeks for the implementation of remedies at the end of Phase 2. This can be extended by up to 6 weeks if there are special reasons. There are also "stop-the-clock" powers for failures to comply with CMA's investigative powers.

Figure 1: A flowchart of the current regime and the proposed regime


How the regime works now
Phase 1 – statutory merger notice
20+10 working days (only straightforward cases)
Phase 1 – informal submission route
No statutory time limit – 40 working days administrative timescale
UIL (phase 1 remedies)
No time limit – UILs offered before decision made
Phase 2 investigation
24 weeks (extendable by 8 weeks) accompanied by information gathering powers
Remedies
No time limit
How the Act will change this
UIL(phase 1 remedies)
50 days for considering and agreeing UILs after proposed decision
Phase 1
40 working days statutory time limit
If referred
Phase 2 investigation
24 weeks (extendable by 8 weeks)
Remedies
12 weeks (extendable by 6 weeks)
Information gathering powers exercisable throughout end to end mergers process