

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 3: Anti-Trust

Summary and Background

313. Following the Government's response of March 2012 to the consultation on Competition Reform changes are being introduced to improve the efficiency of investigations and the quality of decision-making on enforcement of the anti-trust prohibitions. Part 1 of the CA 1998, which is amended by this Part, provides for infringements of the prohibitions against certain anti-competitive agreements (in Chapter 1 of Part 1 of the CA 1998 and Article 101 of the TFEU) and the abuse of a dominant position (in Chapter 2 of Part 1 of the CA 1998 and Article 102 of the TFEU) to be investigated and penalised.
314. The main provisions of this Chapter provide for:
- giving the CMA a new power to require individuals to answer questions as part of an investigation under the CA 1998;
 - replacing the current criminal sanctions for failing to comply with investigations with civil sanctions;
 - adding the CAT to the High Court and Court of Session as the judicial bodies able to issue warrants allowing an investigation officer to enter premises as part of an investigation;
 - giving the CMA a new power to publish a notice of investigation to which absolute privilege against defamation would attach;
 - making further provision concerning the rules on procedural and other matters which may be made by the CMA under the power to make procedural rules in section 51 of the CA 1998. The rules will expressly be able to provide: for the exercise of the CMA's anti-trust functions on its behalf by one or more members of the CMA Board, the CMA panel or one or more members of staff or jointly by one or more such persons; for the procedures for oral hearings; and for the procedures for dealing with complaints and settling cases;
 - lowering the threshold before the CMA will be able to impose interim measures under section 35 of the CA 1998;

- introducing new statutory considerations to which the CMA must have regard in fixing a financial penalty under the CA 1998 for the infringement of an anti-trust prohibition and requiring the CAT to have regard to the statutory guidance on the appropriate amount of a penalty when fixing a penalty;
- introducing a new power in the CA 1998 enabling the Secretary of State to impose time limits in relation to the conduct by the CMA of investigations and the making by the CMA of a decision as to whether one of the anti-trust prohibitions has been infringed; and
- requiring the Secretary of State to review the operation of Part 1 of the CA 1998 (which makes provision for the enforcement of the anti-trust prohibitions and related matters) and to lay before Parliament a report on the outcome of the review within 5 years of the coming into force of the provisions transferring the functions under Part 1 of the CA 1998 from the OFT to the CMA.

Investigation powers

Section 39: Investigations: power to ask questions

315. This section amends the CA 1998 to provide the CMA¹ with a new power to require individuals to answer questions as part of an investigation under that Act. It places limits on the use in criminal proceedings of answers as evidence against either the individual or an undertaking with which they are connected.
316. *Subsection (2)* of section 39 inserts a new section 26A into the CA 1998, which sets out the new power, which is similar to that in section 193(1) of the EA 2002 in relation to cartel offence investigations. The new power complements the CMA's existing powers under section 26 of the CA 1998.
317. Section 26A(1) enables the CMA to give notice to an individual with a connection to a relevant undertaking (which, by virtue of section 26A(7), is one subject to the investigation concerned) requiring him to answer relevant questions at a place specified in the notice and either at a time so specified or on receipt of the notice. Under section 26A(6) a connection involves being (or having been) concerned in the undertaking's management or control or being (or having been) employed by or working for it. This includes volunteers and contractors. This restriction to individuals connected to relevant undertakings does not apply to the power under section 26 of the CA 1998, where the CMA's power to require the production of specified documents and information applies to any person (including a company or other legal person).
318. Section 26A(2) requires a copy of the notice to be given to each relevant undertaking with which the individual has a current connection. This ensures that companies are able to offer legal support to individuals who may be asked questions about them, and that they are aware that such questions are being asked.
319. Section 26A(3) and (4) requires the CMA to take reasonable steps to ensure that the notice is given to such undertakings before the individual is questioned or as soon as possible afterwards.
320. Section 26A(5) specifies that the notice must set out the subject-matter and purpose of the investigation. It must also indicate the nature of the offence in section 44 of the CA 1998 of providing false or misleading information as a prosecution for that offence could result if the individual gave false or misleading answers.
321. *Section 39* also amends section 30A of the CA 1998, which concerns the use of statements in prosecutions, extending that section to cover information provided under

¹ Except where specifically noted otherwise, all the powers which are described in the Explanatory Notes for this Chapter of this Part as being exercisable by the CMA may also be exercised by the sector regulators with concurrent powers.

the new section 26A in certain circumstances. There are no changes to the way information provided under section 26 is treated.

322. *Subsection (7)* inserts new provisions in section 30A, listing the circumstances in which statements in answer to questions under the new section 26A may be used as evidence against the individual concerned or the undertakings with which the individual is connected. Under new subsection (2) such use as evidence is only possible in a prosecution for the section 44 offence or, in a prosecution for any other offence, only if the individual gives evidence inconsistent with any answer given under section 26A, or if the individual adduces evidence or asks questions about the statement given under section 26A or this is done on his behalf. A section 26A statement may, only be used in evidence against the undertaking with which the individual has a connection on a prosecution for a criminal offence if the prosecution is for the section 44 offence.
323. Section 30A(5) provides that the definition of an individual having ‘a connection’ with an undertaking is the same as that used in section 26(A).

Section 40: Civil enforcement of investigation powers

324. This section substitutes civil sanctions for the current criminal sanctions available to the CMA for failures to comply with investigations.
325. The intention of allowing civil sanctions is to provide a more effective deterrent to failing to co-operate with an investigation. Bringing criminal cases can be complex, costly and time-consuming for an enforcer.
326. *Subsection (2)* inserts new sections 40A and 40B into the CA 1998. These sections create a system of civil penalties for failing to comply with investigations which is similar to the system of civil penalties for failing to comply with merger investigations under the EA 2002.
327. New section 40A sets out the civil penalties for failure to comply with requirements. As with section 111 of the EA 2002 (which concerns the merger regime), a penalty may take the form of a fixed financial penalty, a daily penalty which increases with the delay in complying with the requirement concerned, or a combination of the two. The maximum amount for such penalties is to be determined in an order made by the Secretary of State and cannot exceed £30,000 (for a fixed penalty) or £15,000 per day (for a daily penalty). This is the same as in the EA 2002 for failing to comply with merger investigations. Section 40A(6) and (7) set out what days should be included in determining the daily rate. The requirement under section 40A(8) to consult on the cap on monetary penalties mirrors a similar requirement under the EA 2002.
328. Subsection (9) of the new section 40A provides that sections 112 to 115 of the EA 2002 apply in relation to a penalty under this section as they apply to a penalty under section 110(1) of that Act, which concerns failure to comply with a notice concerning attendance of witnesses and production of documents etc. Sections 112 to 115 of the EA 2002 set out the procedural requirements for the CMA to give notice when it will apply a monetary penalty, the system for payments and interest by instalments and the right for a full merits appeal to the CAT for parties who are required to pay a monetary penalty. A party can appeal where it is aggrieved by the imposition of the penalty, the amount of the penalty, or the date by which the penalty is required to be paid. The requirement to pay a penalty is suspended until the case is determined. The CAT may cancel or reduce (not increase) the penalty or amend the date or dates by which penalties have to be paid.
329. Section 40B is similar to section 116 of the EA 2002. It requires the CMA² to consult on and then to publish a statement of policy in relation to the use of its powers under section 40A. This statement of policy will include the considerations that will be relevant to determining the nature and amount of any monetary penalty. These

² This provision is not exercisable concurrently by the sector regulators: see Schedule 15 to the Act.

considerations will be for the CMA to identify, but it is envisaged that they could include:

- the nature and gravity of the omission;
- the size and financial resources of the defaulter;
- the size of penalty that will encourage the party to co-operate; and
- the scale of costs and other disbenefits that will be incurred by the CMA if an inquiry has to be extended to take account of information provided late.

330. *Subsections (3) to (6)* amend section 38 of the CA 1998. These amendments ensure that the rules for guidance on penalties under section 36 of the CA 1998 for infringements of the anti-trust prohibitions do not extend to cover the monetary penalties imposed under section 40A of that Act.

331. *Subsections (7) to (9)* repeal the criminal offence for not complying with a criminal investigation in the areas subject to civil penalties under the new section 40A. Intentionally obstructing an investigating officer remains a criminal offence. The penalty for this offence is a fine, imprisonment or both.

Section 41: Extension of powers to issue warrants to the Competition Appeal Tribunal and Schedule 13: Extension of powers to issue warrants under the Competition Act 1998 to the Competition Appeal Tribunal

332. This section introduces Schedule 13, which amends the CA 1998 in various places to extend to the CAT various powers to issue warrants to enter premises. The powers in question are those under sections 28, 28A, 62, 62A, 63, 65G and 65H of the CA 1998. The effect is to allow the CAT (as well as the High Court or the Court of Session) to issue warrants allowing an investigation officer to enter premises as part of an investigation. The amendments maintain the requirement for applications for a warrant to be made in accordance with rules of court if they are made to a court, and specify that applications to the CAT must be made in accordance with the equivalent CAT rules (made under section 15 of the EA 2002). Similar provision to this section, enabling the CAT to issue warrants to enter premises when investigating suspected infringements of the cartel offence under section 188 of the EA 2002 is made by section 48.

Section 42: Part 1 of the Competition Act 1998: procedural matters

333. This section makes amendments to the CA 1998 in order to effect certain procedural changes.

334. First, the section introduces a new section 25A giving the CMA a power to publish a notice of investigation. It may choose to publish a notice stating its decision to conduct an investigation, indicating which of the anti-trust prohibitions (either the Chapter 1 or Chapter 2 prohibitions in the CA 1998 or Article 101 or Article 102 of the TFEU) are suspected to have been infringed, summarising the matter under investigation (i.e. the nature of the suspected infringement) and identifying any undertakings whose activities are being investigated and any market affected.

335. Under section 57 of the CA 1998 absolute privilege against defamation attaches to any advice, notice or direction given, or decision made by the OFT, in the exercise of its functions under Part 1 of the Act. Subsection (2) of the new section 25A provides that section 57 does not apply to a notice under this section to the extent it includes information other than that mentioned in subsection (1). Such other information would not therefore benefit from absolute privilege.

336. Where the CMA has published a notice identifying an undertaking under investigation and subsequently decides to terminate the investigation, subsection (4) provides that

it must publish a notice stating that the undertaking's activities are no longer being investigated.

337. The second set of procedural changes made by section 42 involves Schedule 9 to the CA 1998, which illustrates and makes further provision concerning the rules on procedural and other matters which may be made by the OFT (and in future the CMA)³ under section 51 of the CA 1998 (without restricting the powers under that section).
338. The section inserts a new paragraph 1A into Schedule 9 which provides that the rules may provide for the exercise of the CMA's functions under Part 1 of the CA 1998 on its behalf by one or more members of the CMA Board, the CMA panel or one or more members of staff, or jointly by one or more such persons. The purpose of this is to allow the rules to provide for a case to be taken over after the initial investigation by a new set of persons (either CMA Board members, CMA panellists or CMA staff or a mix of those) and for them to be responsible for decisions on the case (such as deciding whether or not an anti-trust prohibition had been infringed). This does not affect any functions of the Civil Aviation Authority which the Secretary of State under the Civil Aviation Act 1982 prescribes must not be delegated.
339. The section then provides for the rules to make provision for three further matters: the procedure for oral hearings (new paragraph 13A), procedural complaints (new paragraph 13B) and settling cases (new paragraph 13C). The rules may in particular make provision for the appointment of a member of the CMA Board or a member of the CMA Panel or a member of the CMA's staff who has not been involved in the investigation in question to consider procedural complaints about the conduct of an investigation, to chair an oral hearing and to prepare a report for the decision-maker assessing the fairness of the procedure followed.

Interim measures and other sanctions

Section 43: Threshold for interim measures

340. This section lowers the threshold which determines when the CMA will be able to impose interim measures under section 35 of the CA 1998.
341. **Section 35** currently enables the OFT, when it has begun but not completed an anti-trust investigation and considers that it is necessary for it to act as a matter of urgency for the purpose of preventing serious, irreparable damage to a person or category of person, or of protecting the public interest, to give such directions as it considers appropriate for that purpose. This section substitutes 'significant damage' for 'serious, irreparable damage' in the test in section 35 which the CMA must consider is satisfied before it can give directions.

Section 44: Penalties; guidance etc.

342. This section firstly introduces new statutory considerations to which the CMA must have regard in fixing a financial penalty under section 36 of the CA 1998 in respect of infringements of the anti-trust prohibitions and secondly it requires the CAT to have regard to the statutory guidance on the appropriate amount of a penalty when fixing a penalty.
343. Under section 36 of the CA 1998 the OFT may impose a financial penalty on an undertaking which may not exceed 10% of the undertaking's turnover. This section amends section 36 by requiring that, in fixing a penalty, the CMA must have regard to the seriousness of the infringement concerned and the desirability of deterring both the undertaking on whom the penalty is imposed and others from entering into agreements

³ The OFT's powers under section 51 are not exercisable concurrently by the sector regulators but the rules made under the section bind them as they bind the OFT (and will bind the CMA).

which infringe the Chapter 1 (CA 1998) or Article 101 (TFEU) prohibitions or engaging in conduct that infringes the Chapter 2 (CA 1998) or Article 102 (TFEU) prohibitions.

344. Under section 38 of the CA 1998 the OFT must prepare and publish guidance as to the appropriate amount of any penalty (which must be approved by the Secretary of State before it is published). By virtue of section 38(8) the OFT must have regard to the guidance for the time being in force when setting a penalty. This section extends this obligation to the CAT (to which persons may, under section 46 of the CA 1998, appeal certain decisions including the imposition, or the amount, of a penalty).

Miscellaneous

Section 45: Power for Secretary of State to impose time-limits on investigations etc.

345. This section inserts a new power in the CA 1998 enabling the Secretary of State by order to impose time limits in relation to the conduct by the CMA of anti-trust investigations and the making by the CMA of decisions as to whether one of the anti-trust prohibitions has been infringed. The time limits could only be set in relation to investigations in general or in relation to particular types of investigation specified in the order, not individual cases.
346. The Secretary of State must consult the CMA and any other such persons he/she considers appropriate before making an order.
347. By virtue of section 71(5) of the CA 1998, an order imposing time limits would be subject to the negative resolution procedure.
348. There are at present no time limits for the conduct of anti-trust investigations. Time limits are imposed under the EA 2002 for investigations and reports in respect of merger (Part 3) and market (Part 4) cases.

Section 46: Review of operation of Part 1 of the Competition Act 1998

349. This section requires the Secretary of State to review the operation of Part 1 of the CA 1998 (which makes provision for the enforcement of the anti-trust prohibitions and related matters), as amended by the Act, and to lay before Parliament a report on the outcome of the review. He/she is required to do this within 5 years of the coming into force of Part 1 of Schedule 5 which transfers the OFT's functions under Part 1 of the CA 1998 to the CMA.