

Draft Order laid before Parliament under section 124(6) of the Enterprise Act 2002, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2014 No. XXXX

COMPETITION

The Enterprise Act 2002 (Protection of
Legitimate Interests) (Amendment) Order 2014

Made - - - - ***
Coming into force - - 1st April 2014

The Secretary of State makes the following Order in exercise of the powers conferred by sections 68 and 124(2) and (4) of the Enterprise Act 2002(1).

In accordance with section 124(6) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

Citation and commencement

1. This Order may be cited as the Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014 and comes into force on 1st April 2014.

Amendments to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003

2. The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003(2) is amended as follows.

3. In article 1(2), in the definition of “a European intervention notice”, for “OFT” substitute “CMA”.

4. In article 3—

(a) in paragraph (2)(a), for “OFT” substitute “CMA”; and

(b) in paragraph (2)(d) and (e), for “Commission” (in each place where it occurs) substitute “CMA”.

(1) 2002 c.40. Section 68 was amended by paragraph 17 of Schedule 16 and paragraph 1 of Schedule 19 to the Communications Act 2003 (c. 21), paragraph 111 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24), paragraph 2(21) of Schedule 1 to the EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079) and article 6(2)(a) of the Treaty of Lisbon (Changes in Terminology) Order 2011 (S.I. 2011/1043). Section 124(4) was amended by paragraph 13(2) of Schedule 8 to the Enterprise and Regulatory Reform Act 2013.

(2) S.I. 2003/1592; amended by S.I. 2003/3180, 2013/610.

5. In article 4—
- (a) in paragraphs (2), (3), (4), (4A) and (6), for “OFT” (in each place where it occurs) substitute “CMA”; and
 - (b) in the heading, for “OFT” substitute “CMA”.
6. In article 5—
- (a) in paragraph (1)(b), for “OFT” substitute “CMA”;
 - (b) in paragraphs (2) and (3), for “the Commission” (in each place where it occurs) substitute “the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013(3)”; and
 - (c) in paragraph (5), for “OFT” substitute “CMA”.
7. After article 5 insert—

“Functions to be exercised by CMA groups

5A. Where a reference is made to the chair of the CMA under article 5 for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013, the functions of the CMA under or by virtue of the following provisions in relation to the matter concerned are to be carried out on behalf of the CMA by the group so constituted—

- (a) articles 6 to 11;
 - (b) article 14, so far as relating to anything done on behalf of the CMA by the group;
 - (c) where a reference is treated by virtue of article 7(4) as having been made under article 5(2), paragraph (ab) of section 23(9) of the Act as applied by article 2;
 - (d) sections 104(4) and 104A(5) of the Act as applied by article 15;
 - (e) section 109(6) of the Act as applied by article 15, where the permitted purpose relates to a function that (by virtue of this article) is being or is to be carried out on behalf of the CMA by the group;
 - (f) sections 110 to 115(7) of the Act as applied by article 15, so far as relating to a notice given under section 109 (as so applied) on behalf of the CMA by the group;
 - (g) section 118(4)(8) of the Act as applied by article 15;
 - (h) section 120(5)(b)(9) of the Act as applied by article 15, so far as relating to a decision of the group.”
8. In article 6, for “Commission” (in each place where it occurs) substitute “CMA”.
9. In article 7—
- (a) in paragraphs (1) to (4), for “Commission” (in each place where it occurs) substitute “CMA”;
 - (b) in paragraph (5)—

(3) 2013 c.24.

(4) Section 104 was amended by paragraph 135 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

(5) Section 104A was inserted by section 381 of the Communications Act 2003 and amended by paragraph 136 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

(6) Section 109 was amended by section 29 of and paragraph 143 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

(7) Sections 110 and 111 were amended by section 29 of and (respectively) paragraphs 144 and 145 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013. Sections 110A and 110B were inserted by section 29 of that Act. Sections 112, 113, 114 and 115 were amended by (respectively) paragraphs 146, 147, 148 and 149 of Schedule 5 to that Act.

(8) Section 118 was amended by paragraph 152 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

(9) Section 120 was amended by section 31(2) of and paragraph 155 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

- (i) for “Commission” substitute “CMA”; and
 - (ii) omit “1.”;
 - (c) in paragraph (6)—
 - (i) for the words from “any undertaking” to “that Schedule,” substitute “any order made under paragraph 2 of Schedule 2”; and
 - (ii) for “Commission” substitute “CMA”;
 - (d) in paragraph (7)—
 - (i) omit “undertaking or” (in each place where it occurs);
 - (ii) omit “accepted or” (in each place where it occurs); and
 - (iii) omit “, superseded, released”; and
 - (e) in paragraphs (9) to (11), for “Commission” (in each place where it occurs) substitute “CMA”.
- 10.** In article 8, for “Commission” (in each place where it occurs) substitute “CMA”.
- 11.** In article 9—
- (a) in paragraphs (1) to (3) and (7), for “Commission” (in each place where it occurs) substitute “CMA”; and
 - (b) in the heading, for “Commission” substitute “CMA”.
- 12.** In article 11, for “Commission” (in each place where it occurs) substitute “CMA”.
- 13.** In article 12(1) to (5) and (8), for “Commission” (in each place where it occurs) substitute “CMA”.
- 14.** In article 13(2), for “OFT” substitute “CMA”.
- 15.** In article 14—
- (a) in paragraph (1), in the words before sub-paragraph (a), for “Commission” substitute “CMA”;
 - (b) in paragraph (2)—
 - (i) in sub-paragraph (b), for “OFT” substitute “CMA”;
 - (ii) in sub-paragraph (e), for “Commission” substitute “CMA”; and
 - (iii) omit sub-paragraphs (g) and (h);
 - (c) in paragraph (7)—
 - (i) in sub-paragraph (a), for “OFT” substitute “CMA”; and
 - (ii) in sub-paragraph (b), for “Commission” substitute “CMA”; and
 - (d) in paragraph (8), for “Commission’s” substitute “CMA’s”.
- 16.**—(1) Schedule 1 is amended as follows.
- (2) In paragraph (a), for “OFT, the Commission” substitute “CMA”.
 - (3) In paragraph (d), in the provisions treated as substituted for section 23(9)(a) of the Enterprise Act 2002—
 - (a) in sub-paragraph (aa), for “OFT” substitute “CMA”; and
 - (b) in sub-paragraph (ab), for “Commission” substitute “CMA”.
 - (4) In paragraph (e), for “OFT” substitute “CMA”.
 - (5) In paragraph (f) –

- (a) for “OFT” substitute “CMA”; and
 - (b) for “sections 25(1) to (3), (6) and (8) and 31” substitute “section 25(1) to (3), (6) and (8)”**(10)**.
- (6) In paragraph (g), for “OFT” substitute “CMA”.
- (7) In paragraph (i), in the subsection (5A) treated as inserted after section 25(5) of the Enterprise Act 2002, for “may be ceased” substitute “may have ceased”.
- (8) In paragraph (k), for “OFT” substitute “CMA”.
- (9) In paragraph (l)—
- (a) omit “and the power to request information under section 31(1)”; and
 - (b) for “OFT” substitute “CMA”.
- (10) Omit paragraphs (o) and (q).
- 17.—**(1) Schedule 2 is amended as follows.
- (2) Omit paragraph 1.
- (3) In the italic heading before paragraph 1, omit “undertakings and”.
- (4) In paragraph 2—
- (a) after sub-paragraph (2) insert—
 - “(2A) Sub-paragraph (2B) applies where—
 - (a) a European intervention notice is in force; and
 - (b) the Secretary of State has reasonable grounds for suspecting that pre-emptive action has or may have been taken.

(2B) The Secretary of State may by order, for the purpose of restoring the position to what it would have been had the pre-emptive action not been taken or otherwise for the purpose of mitigating its effects—

 - (a) do anything mentioned in sub-paragraph (2)(b) to (d);
 - (b) impose such other obligations, prohibitions or restrictions as the Secretary of State considers appropriate for that purpose.

(2C) A person may, with the consent of the Secretary of State, take action or action of a particular description where the action would otherwise constitute a contravention of an order under this paragraph.”;
- (b) in sub-paragraph (4), omit “1 or”;
- (c) in sub-paragraph (6), after “unless” insert—
 - “—
 - (a) the Secretary of State has reasonable grounds for suspecting that it is or may be the case that two or more enterprises have ceased to be distinct or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct; or
 - (b)”;
 - and
- (d) after sub-paragraph (7) insert—

(10) Section 25 of the Enterprise Act 2002 (c. 40) was amended by paragraph 70 of Schedule 5 and paragraph 16 of Schedule 15 to the Enterprise and Regulatory Reform Act 2013. Section 25(6) was amended by paragraph 2(5) of Schedule 1 to the EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079).

“(8) In this paragraph “pre-emptive action” means action which might prejudice the reference or possible reference concerned under article 5 or impede the taking of any action under this Order which may be justified by the Secretary of State’s decisions on the reference.”

- (5) In paragraph 3—
 - (a) in sub-paragraph (1), for “Commission” substitute “CMA”; and
 - (b) in sub-paragraph (3), for “OFT” substitute “CMA”.
- (6) In paragraph 4(2), for “OFT” substitute “CMA”.
- (7) In paragraph 5(1)(b) and (6), for “OFT” (in each place where it occurs) substitute “CMA”.
- (8) In paragraph 7—
 - (a) for sub-paragraph (1)(b) substitute—
 - “(b) no orders under paragraph 2 are in force in relation to the European relevant merger situation concerned.”; and
 - (b) in sub-paragraph (8)(a) and (b), for “Commission” (in each place where it occurs) substitute “CMA”.
- (9) In paragraph 8—
 - (a) for sub-paragraph (1)(b) substitute—
 - “(b) no orders under paragraph 2 are in force in relation to the European relevant merger situation concerned.”;
 - (b) in sub-paragraph (7)(a) and (b), for “Commission” (in each place where it occurs) substitute “CMA”; and
 - (c) in sub-paragraph (10)(b), for “OFT” substitute “CMA”.
- (10) In paragraph 10(1)(b) and (6), for “OFT” (in each place where it occurs) substitute “CMA”.
- (11) In paragraph 11(5), for “OFT” substitute “CMA”.

18.—(1) Schedule 3 is amended as follows.

- (2) In paragraph 1(1)—
 - (a) omit paragraph (a);
 - (b) in paragraphs (g) and (h), for “OFT” (in each place where it occurs) substitute “CMA”;
 - (c) after paragraph (i) insert—
 - “(ia) section 94A (interim undertakings and orders: penalties)(**11**);”;
 - (d) in paragraph (m), for “OFT and Commission” substitute “CMA”;
 - (e) after paragraph (p) insert—
 - “(pa) section 110A (restriction on powers to impose penalties under section 110)(**12**);
 - (pb) section 110B (section 110A: supplemental provision)(**13**);” and
 - (f) in paragraph (y), for “Commission” substitute “CMA”.
- (3) Omit paragraph 1(2).
- (4) In paragraph 1(5)(a), for “section 71” substitute “section 73”.

(11) Section 94A was inserted by section 31 of the Enterprise and Regulatory Reform Act 2013.

(12) Section 110A was inserted by section 29 of the Enterprise and Regulatory Reform Act 2013.

(13) Section 110B was inserted by section 29 of the Enterprise and Regulatory Reform Act 2013.

- (5) In paragraph 1(6)—
- (a) in paragraph (b)(i), for “Commission” substitute “CMA”; and
 - (b) omit paragraph (c).
- (6) In paragraph 1(7), omit paragraphs (b) and (c).
- (7) In paragraph 1(8), omit paragraphs (a), (c) and (d).
- (8) Omit paragraph 1(9)(a).
- (9) After paragraph 1(9) insert—
- “(9A) Section 94A(14) shall apply as if—
 - (a) in subsection (1)—
 - (i) for the words “the appropriate authority” there were substituted “the Secretary of State”; and
 - (ii) for the word “it” (in both places where it occurs) there were substituted “the Secretary of State”; - (b) in subsection (5), for “the appropriate authority” there were substituted “the Secretary of State”;
 - (c) in subsection (7), for the words “the person who imposed the penalty under this section” there were substituted “the Secretary of State”; and
 - (d) for subsection (8) there were substituted—
 - “(8) In this section, “interim measure” means an order under paragraph 2 of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.””
- (10) In paragraph 1(12)—
- (a) omit paragraph (b);
 - (b) for paragraph (c) substitute—
 - “(c) for paragraph (a) in the definition of “relevant decision” there were substituted—
 - “(a) in the case of the CMA, any decision by the CMA on the questions mentioned in article 6 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;”” and - (c) omit paragraph (d).
- (11) In paragraph 1(12A)(a), for “Commission” substitute “CMA”.
- (12) In paragraph 1(13A)(a), in paragraph (a) of the subsection treated as substituted for section 106B(1) of the Enterprise Act 2002(15), for “Commission” substitute “CMA”.
- (13) For paragraph 1(15) substitute—
- “(15) Section 109(16) shall apply as if—
 - (a) for subsection (A1) there were substituted—
 - “(A1) For the purposes of this section, the permitted purposes are assisting the CMA or the Secretary of State in carrying out any functions, including enforcement functions, of the CMA or (as the case may be) the Secretary of State under or by virtue of the Enterprise Act 2002 (Protection of Legitimate

(14) Section 94A was inserted by section 31 of the Enterprise and Regulatory Reform Act 2013.

(15) Section 106B was inserted by section 384 of the Communications Act 2003 and amended by paragraph 140 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

(16) Section 109 was amended by section 29 of and paragraph 143 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

Interests) Order 2003 in connection with a matter that is or has been the subject of a reference or possible reference under article 5 of that Order.”; and

- (b) in subsection (8A)—
 - (i) paragraph (a)(ii) were omitted;
 - (ii) in paragraph (a)(iii), the words “75, 76, 83 or” were omitted; and
 - (iii) in paragraph (b)(iii), for the words “Schedule 7” there were substituted “Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003”.

(14) After paragraph 1(16) insert—

“(16A) Section 110A(17) shall apply as if—

- (a) subsections (5) and (6) were omitted;
- (b) in subsections (7) and (8)—
 - (i) for the words “section 109(A1)(b)” (in both places where those words occur) there were substituted “section 109(A1)”; and
 - (ii) for the words “section 45 or 62” (in both places where those words occur) there were substituted “article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003”.

(16B) Section 110B(18) shall apply as if—

- (a) subsections (1) and (2) were omitted;
- (b) in subsection (3), in the words before paragraph (a), for the words “section 45 or 62” there were substituted “article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003”;
- (c) in subsection (3)(b), for the words “Schedule 7” there were substituted “Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003”;
- (d) in subsection (3)(c), for the words “Schedule 7” there were substituted “Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003”;
- (e) subsection (3)(d) were omitted;
- (f) in subsection (4), in the words before paragraph (a), for the words “section 45 or 62” there were substituted “article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003”;
- (g) subsection (4)(d) were omitted; and
- (h) for subsections (5) and (6) there were substituted—

“(5) Paragraph 7(8) and (9) of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 applies for deciding if and when a reference under article 5(2) of that Order is finally determined for the purpose of section 110A(8) as it applies for deciding those questions for the purpose of paragraph 7 of that Schedule.

(6) Paragraph 8(7) and (8) of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 applies for deciding if and when a reference under article 5(3) of that Order is finally determined for the purpose

(17) Section 110A was inserted by section 29 of the Enterprise and Regulatory Reform Act 2013.

(18) Section 110B was inserted by section 29 of the Enterprise and Regulatory Reform Act 2013.

of section 110A(8) as it applies for deciding those questions for the purpose of the definition of “relevant period” in paragraph 8(6) of that Schedule.””

(15) Omit paragraph 1(17).

(16) In paragraph 1(19), after paragraph (a) insert—

“(aa) in subsection (1)(aa)(19) for the words “section 44A or 61A” there were substituted “article 4A of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003”.”

(17) In paragraph 1(22)(c), in the words treated as substituted for section 124(5) of the Enterprise Act 2002, after “section 28,” insert “94A(3) or (6).”

(18) In paragraph 2(3)(c), for the words “the OFT, the Commission or (as the case may be)” substitute “the CMA or (as the case may be)”.

19.—(1) Schedule 4 is amended as follows.

(2) In paragraph 3(2), for “Competition Commission” substitute “Competition and Markets Authority”.

(3) In paragraph 7(1), in the words before paragraph (a), for “Competition Commission” substitute “Competition and Markets Authority”.

(4) Omit paragraph 15(2) and (3).

(5) After paragraph 17 insert—

“Enterprise and Regulatory Reform Act 2013 (c.24)

18. In Schedule 4 to the Enterprise and Regulatory Reform Act 2013 (the Competition and Markets Authority)—

(a) in paragraph 35(3) the reference in the definition of a “newspaper merger reference” to section 45 of the Enterprise Act 2002 shall have effect as if it included a reference to article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

(b) the reference in paragraph 47(1) to section 64(1) of the Enterprise Act 2002 shall have effect as if it included a reference to article 7(1) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

(c) the reference in paragraph 47(2) to section 62A of the Enterprise Act 2002 shall have effect as if it included a reference to article 5A of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

(d) the reference in paragraph 51(6)(b) to section 62 of the Enterprise Act 2002 shall have effect as if it included a reference to article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

(e) in paragraph 53(9) the reference in the definition of “merger investigation” to section 62 of the Enterprise Act 2002 shall have effect as if it included a reference to article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

(f) paragraph 56(1) shall have effect as if it also provided that paragraph 56(4) also applies for the purposes of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003; and

(g) in paragraph 56(4)—

(19) Section 118(1)(aa) of the Enterprise Act 2002 was inserted by paragraph 21 of Schedule 16 to the Communications Act 2003.

- (i) a reference to section 63 of the Enterprise Act 2002 shall have effect as if it included a reference to article 6 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003; and
- (ii) a reference to a special merger situation shall have effect as if it included a reference to a European relevant merger situation.”

Transitional provision and savings: general

20.—(1) Anything which was, immediately before 1st April 2014, in the process of being done by or in relation to the transferor may, so far as it relates to a transferred function, be continued by or in relation to the transferee.

(2) Anything done (or having effect as if done) by or in relation to the transferor for the purposes of or in connection with a transferred function, and which was in force or effective immediately before 1st April 2014, has effect as if done by or in relation to the transferee so far as that is required for continuing its effect on or after that date.

(3) In the application of paragraph (1) or (2)—

(a) any reference made before 1st April 2014 to the Competition Commission under article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 is to be treated, so far as provided by those paragraphs, as a reference under that article to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013; and

(b) any authorisation given before 1st April 2014, so far as it authorises a named member or member of staff of the Office of Fair Trading or the Competition Commission, continues to authorise that individual (but no other) on or after that date if, and only if, the individual is a member or (as the case may be) a member of staff of the CMA.

(4) Where, in the application of paragraph (1) or (2), any functions exercisable immediately before 1st April 2014 by a Commission group are to be exercisable on or after that date by a CMA group—

(a) any person who, immediately before that date, was a member of the Commission group is to be treated, on or after that date, as a member of the CMA group concerned if the person is a member of the CMA panel;

(b) any person who, immediately before that date, was the chairman of the Commission group is to be treated, on or after that date, as the chair of the CMA group if the person is a member of the CMA panel; and

(c) the persons treated as mentioned in sub-paragraph (a) or (b) are to be treated, on or after that date, as if they have been constituted in accordance with Part 3 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 as the chair and other members of the CMA group (and that Part applies accordingly in relation to the operation of the group).

(5) So far as necessary for the purposes or in consequence of paragraphs (1) to (4), any notice, order, undertaking or other instrument or document given, accepted or made before 1st April 2014 has effect as if any references (however expressed) to the transferor were references to the transferee.

(6) The following are to have effect, so far as they continue to have effect by virtue of article 22 or 23, as if any references (however expressed) to the transferor were references to the transferee—

(a) any provision of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 as it was in force immediately before 1st April 2014;

(b) any notice, undertaking or other document given, accepted or made before that date.

(7) In this article—

“CMA Board” means the Board constituted under Part 2 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013;

“CMA chair” means the person appointed to chair the CMA and the CMA Board under paragraph 1(1)(a) of Schedule 4 to that Act;

“CMA group” means a group constituted in accordance with Part 3 of Schedule 4 to that Act;

“CMA panel” means the panel constituted in accordance with Part 3 of Schedule 4 to that Act;

“Commission group” means a group constituted under paragraph 15 of Schedule 7 to the Competition Act 1998⁽²⁰⁾ to perform functions of the Competition Commission under the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

“transferee” means the CMA, the CMA Board, a CMA group, the CMA chair, another member of the CMA or (as the case may be) a member of staff of the CMA;

“transferor” means the Office of Fair Trading, the Competition Commission, a Commission group, the chair of the Office of Fair Trading or Competition Commission, another member of the Office of Fair Trading or Competition Commission or a member of staff of the Office of Fair Trading or the Competition Commission; and

“transferred function” means a function conferred by this Order on the transferee which was immediately before 1st April 2014 conferred by the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 on the transferor.

(8) References in this article to things done include references to things omitted to be done.

Transitional provision and savings: general provision about effect of amendments in relation to existing matters

21.—(1) The amendments made by articles 3 to 15, 17, 18(2)(c) and (e), (9), (14), (15) and (17) and 19 apply in relation to—

(a) any reference under article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 made before 1st April 2014, or

(b) any possible reference under article 5 of that Order which arose before that date,

as they apply in relation to any such reference made, or arising, on or after that date.

(2) In particular those amendments apply in relation to investigations begun, notices given, undertakings accepted and orders made before 1st April 2014 as they apply to investigations begun, notices given, undertakings accepted and orders made on or after that date.

(3) Paragraph (2) is without prejudice to the generality of paragraph (1).

(4) This article is subject to articles 22 and 23.

Transitional provision and savings: investigation powers

22.—(1) The amendments made by article 16(5)(b), (9)(a) and (10) do not apply in relation to any notice given before 1st April 2014 under section 31 of the Enterprise Act 2002⁽²¹⁾ as applied by the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.

(2) The amendments made by article 18(2)(e) and (13) to (15) do not apply in relation to any notice given before 1st April 2014 under section 109 of that Act⁽²²⁾ as applied by that Order.

⁽²⁰⁾ 1998 c.41. Paragraph 15 was amended by paragraph 10 of Schedule 11 and paragraph 1 of Schedule 26 to the Enterprise Act 2002 and repealed by paragraph 222 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

⁽²¹⁾ Section 31 was repealed by paragraph 17 of Schedule 15 to the Enterprise and Regulatory Reform Act 2013.

⁽²²⁾ Section 109 was amended by section 29 of and paragraph 143 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

Transitional provision and savings: interim undertakings and orders

23.—(1) The amendments made by articles 9(b)(ii), (c)(i) and (d), 15(b)(iii) and 17(2), (3), (4)(b), (8)(a) and (9)(a) do not apply in relation to undertakings accepted under paragraph 1 of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 before 1st April 2014.

(2) In its continued application by virtue of paragraph (1), paragraph 1 of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 has effect as if it contained no power for an undertaking accepted under that paragraph to be varied or superseded.

(3) Any provision of the Enterprise Act 2002 applied by the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 which—

- (a) was applied by that Order immediately before 1st April 2014, and
- (b) as so applied referred to an undertaking accepted under paragraph 1 of Schedule 2 to that Order, but
- (c) as a result of an amendment made to the provision by the Enterprise and Regulatory Reform Act 2013, ceased to refer to such an undertaking

is, in relation to an undertaking accepted before that date, to be treated in its application by that Order as continuing to refer to such an undertaking despite that amendment.

(4) The amendments made by article 18(2)(c), (9) and (17) do not apply in relation to a failure to comply with an order under paragraph 2 of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 which—

- (a) occurred before 1st April 2014, and
- (b) did not continue on or after that date,

but otherwise do apply in relation to such orders made before that date.

Date

Name
Parliamentary Under-Secretary of State for
Employment Relations and Consumer Affairs
Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 ([S.I. 2003/1592](#)) (“the 2003 Order”).

The 2003 Order was made under section 68 of the Enterprise Act 2002 (“the Enterprise Act”). Section 67 of the Enterprise Act and the 2003 Order provide a scheme for preventing, mitigating or remedying adverse public interest effects resulting from, or which may result from, the creation of a “European relevant merger situation”. A “European relevant merger situation” is a merger situation engaging competition issues over which the European Union has sole jurisdiction by virtue of Council Regulation ([EC](#)) No. 139/2004 of 20th January 2004 on the control of concentrations between undertakings (OJ No L24, 29.1.04, p. 1) (“the EU Merger Regulation”). Although the European Union has sole jurisdiction in such cases, the EU Merger Regulation permits Member States to take appropriate measures to protect certain legitimate interests.

Section 67 of the Enterprise Act accordingly enables the Secretary of State to serve a “European intervention notice” in prescribed circumstances and this triggers the procedures under the 2003 Order. The 2003 Order follows (with modifications) provisions of Part 3 of the Enterprise Act relating to public interest and special public interest interventions in merger cases (respectively sections 43 to 55 and sections 60 to 66, together with provisions about publication in section 107). These provisions of the Enterprise Act have been amended by the Enterprise and Regulatory Reform Act 2013 which, among other things, abolishes the Office of Fair Trading (“the OFT”) and the Competition Commission and transfers the competition functions of these bodies to the Competition and Markets Authority (“the CMA”) and makes changes to investigatory powers and powers to deal with pre-emptive action. This Order amends the 2003 Order to take account of the amendments to the Enterprise Act.

Articles 3 to 14 of the 2003 Order make provision largely corresponding to that made by sections 43 to 55, 60 to 66 and 107 of the Enterprise Act. Among other things they currently provide for an initial report by the OFT to the Secretary of State, and enable the Secretary of State to make a reference to the Competition Commission and to take enforcement action. Articles 2 to 15 of this Order amend articles 3 to 14 of the 2003 Order to take account of amendments made to the Enterprise Act by the Enterprise and Regulatory Reform Act 2013. Among other things account is taken of the way in which, under amended sections 45 and 62 of the Enterprise Act, references are made by the Secretary of State to the chair of the CMA for the constitution of a CMA panel group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013. The panel group considers the reference, and exercises various other associated powers, on behalf of the CMA. This is reflected in the amendments made to the 2003 Order by articles 6 and 7 of this Order.

Article 2 of and Schedule 1 to the 2003 Order apply (with modifications) provisions of the Enterprise Act concerned with determining whether a “relevant merger situation” has been or will be created. Under section 67 the Secretary of State must, before serving a European intervention notice, have (among other things) reasonable grounds for suspecting that a “relevant merger situation” has been or will be created. Article 16(1) to (6) and (8) to (10) of this Order amends article 2 of and Schedule 1 to the 2003 Order to take account of amendments made by the Enterprise and Regulatory Reform Act 2013 to the applied provisions of the Enterprise Act. Article 16(7) corrects an error in paragraph (i) of Schedule 1 to the 2003 Order.

Article 17 of this Order amends Schedule 2 to the 2003 Order. That Schedule provides for enforcement action which may be taken by the Secretary of State. It is closely modelled on the

enforcement regime for public interest and special public interest cases in Schedule 7 to the Enterprise Act. Schedule 7 has been amended by the Enterprise and Regulatory Reform Act 2013, and this Order makes amendments to Schedule 2 to the 2003 Order to take account of the changes. In particular, powers to make orders dealing with pre-emptive action are amended and provision for the acceptance of undertakings from the parties to prevent pre-emptive action is revoked.

Article 18 of this Order amends Schedule 3 to the 2003 Order. That Schedule applies various other provisions of the Enterprise Act, with modifications. Many of the relevant provisions of the Enterprise Act have been amended, and some have been replaced or added to, by the Enterprise and Regulatory Reform Act 2013. Article 18 is largely concerned with making amendments to take account of the changes. In particular, it applies newly inserted provisions of the Enterprise Act enabling financial penalties to be imposed for failure to comply with interim measures (section 94A) and adopts amendments made to the Enterprise Act to information-gathering powers (now found in amended section 109).

Article 18(2)(a) revokes a provision applying section 69 of the Enterprise Act, because section 69 was repealed by the Communications Act 2003 (c. 21).

Article 18(16) further modifies section 118 of the Enterprise Act as it applies for the purposes of the 2003 Order, enabling the Secretary of State to exclude matters from reports by OFCOM under article 4A of the 2003 Order when published under article 14(2)(ba) of that Order.

Article 19 makes consequential amendments to Schedule 4 to the 2003 Order, which itself makes consequential modifications to various pieces of legislation.

Articles 20 to 23 make transitional provision and savings relating to the amendments made by this Order. Transitional provision and savings are also made, in relation to amendments made by the Enterprise and Regulatory Reform Act 2013 to provisions of the Enterprise Act applied by the 2003 Order, by the Enterprise and Regulatory Reform Act 2013 (Commencement No. 6, Transitional Provisions and Savings) Order 2014 (S.I. 2014/416 (C.17)).