

# **ENTERPRISE AND REGULATORY REFORM ACT 2013**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

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

#### **Part 3: the Competition and Markets Authority**

#### ***Schedule 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 Departments<sup>1</sup> 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.
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

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<sup>1</sup> Code of good practice, 2011 [http://www.hm-treasury.gov.uk/d/corporate\\_governance\\_good\\_practice\\_guidance\\_july2011.pdf](http://www.hm-treasury.gov.uk/d/corporate_governance_good_practice_guidance_july2011.pdf)

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.