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

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.