

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

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 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

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

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).