

# **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 4: Competition Reform**

#### ***Chapter 5: Miscellaneous***

#### **Miscellaneous**

#### ***Section 54: Recovery of CMA's costs in respect of price control references***

386. This section amends the Communications Act 2003 to provide that the CMA will have the power to recover its costs in respect of a price control reference from parties appealing price control decisions under section 193 of that Act, to the extent that their appeal was unsuccessful. The CMA may also recover costs from interveners, but not from Ofcom.
387. A requirement to pay the CMA's costs will only take effect after the CAT has made its decision on the case and only if the Tribunal decides in accordance with the CMA's determination. This requirement is because the allocation of costs between parties must take into account the extent to which the appeal was successful, meaning that if the Tribunal decides the case differently the original cost order will no longer be appropriate.
388. If the Tribunal does decide differently, the CMA has the power to make a new cost order that reflects the Tribunal's decision. The date on which this new cost order would take effect would be specified in the order.
389. The CMA's decision to make a cost order can be appealed to the CAT (see amendments to sections 192 to 195 of the Act of 2003 in Schedule 15).

#### ***Section 55: Disclosure etc. of information: offences***

390. This section amends section 241 of the EA 2002 to provide expressly that a person to whom information is disclosed under that section cannot, unless the information has been made available to the public, use that information for any purpose other than is mentioned in section 241(1). Section 241(1) enables a public authority to disclose information in order to facilitate the exercise of the disclosing authority's statutory functions. Section 241 is one of the gateways for the disclosure of information in Part 9 of the EA 2002. Disclosing or using information in breach of the provisions of Part 9 is a criminal offence under section 245 of that Act.

***Section 56: Review of certain provisions of Chapters 1 and 2***

391. This section requires the Government to review certain provisions of the Act every 5 years, with the first review taking place no later than 5 years after these provisions come into force. The Government's policy of sunset and review of regulations can be found in *Sunsetting Regulations: Guidance* (2011)<sup>1</sup>.
392. In accordance with this guidance, the new provisions to which this section applies are the information gathering powers for merger and market investigations as well as the enforcement of these powers (contained in sections 29, 36 and Schedule 11); statutory timescales for mergers and markets (contained in section 32, Schedule 8, section 38 and Schedule 12); and strengthened interim measures for merger investigations (contained in section 30 and Schedule 7).

***Section 57: Minor and consequential amendments and Schedule 15: Minor and consequential amendments: Part 4***

393. **Section 57** gives effect to Schedule 15, which makes minor and consequential amendments to the CA 1998, the EA 2002 and various other Acts as a result of changes being made by Part 4 of this Act.

***Schedule 15: Minor and Consequential Amendments***

394. **Paragraph 1** amends paragraph 15 of Schedule 1 to the Civil Aviation Act 1982 (which provides for the CAA to authorise certain persons to perform its functions) so as to make the provision subject to rules made under section 51 of the CA 1998 by virtue of the new paragraph 1A of Schedule 9 to the CA 1998 inserted by section 42(4) of the Act. New paragraph 1A of Schedule 9 enables the rules to provide for the exercise of functions under Part 1 of the CA 1998 to be exercised by Board members, members of the CMA panel, members of staff or jointly by several of these persons. Equivalent provision to paragraph 1 of this Schedule is made to other legislation by paragraph 6 (in respect of Ofwat and the Water Industry Act 1991), paragraph 13 (in respect of Ofgem and the Utilities Act 2000), paragraph 40 (Office of Communications Act 2002), paragraph 41 (in respect of the ORR and the Railways and Transport Safety Act 2003), paragraph 49 (in respect of Monitor and the Health and Social Care Act 2012), and paragraph 55 (the NIAUR and the Energy (Northern Ireland) Order 2003).
395. **Paragraph 2** amends the Gas Act 1986 so as to make it clear that the new obligation of the CMA (provided by the new section 40B of the CA 1998 inserted by section 40 of the Act) to prepare and publish a statement of policy on penalties for failure to comply with certain requirements is not exercisable concurrently by Ofgem. Similar amendments are made to other sectoral legislation, in respect of the relevant sectoral regulator, by paragraph 3 (Electricity Act 1989), paragraph 5 (Water Industry Act 1991), paragraph 7 (Railways Act 1993), paragraph 14 (Transport Act 2000), paragraph 46 (Communications Act 2003), paragraph 48 (Health and Social Care Act 2012), paragraphs 51 and 52 (Civil Aviation Act 2012), paragraph 53 (Electricity (Northern Ireland) Order 1992), and paragraph 54 (Gas (Northern Ireland) Order 1996).
396. **Paragraphs 8 to 12** of Schedule 15 deal with amendments to the CA 1998.
397. **Paragraph 9** deletes the reference to the section 42 (offences) in section 26 (powers when conducting investigations), subsection (3)(b). This is a consequential amendment resulting from the repeal of the criminal offence in section 42(1), which is replaced with civil sanctions for failing to comply with investigations. This substantive change is made in section 40(7) to (9)..

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<sup>1</sup> <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/s/11-682-sunsetting-regulations-guidance.pdf>

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

398. [Paragraph 10](#) corrects a reference to ‘an appeal tribunal’ in section 38(9) to refer to the CAT. This amendment was missed as a consequential change resulting from the EA 2002 that established the CAT.
399. [Paragraph 11](#) replaces references in section 54 to the ‘Director General of Electricity Supply for Northern Ireland’ and ‘Director General of Gas for Northern Ireland’ with ‘the Northern Ireland Authority for Utility Regulation’. The functions of the Directors are now exercised by the Northern Ireland Authority for Utility Regulation.
400. [Paragraph 12](#) changes references to the CC in connection with protected agreements (Schedule 1, paragraph 5, of the EA 2002) to the CMA. These are consequential on to the transfer of the CC’s merger functions to references to the CMA, set out in detail in Schedule 5.
401. [Paragraphs 15 to 39](#) of Schedule 15 deal with amendments to the EA 2002.
402. [Paragraphs 16, 17, 18, 26, 28, 29](#) and [35](#) make consequential amendments resulting from changes to the CMA’s investigation powers in relation to its mergers functions, set out in section 29, subsection (2). They repeal section 31 (information powers in relation to completed mergers), section 32(1) to (3) (supplementary provision for the purposes of sections 25 and 31) and section 99(2) to (4) (functions in relation to merger notices) of the EA 2002, and provide for consequential amendments as a result of the repeal of those sections.
403. [Paragraphs 19 to 21, 23](#) and [24](#) are consequential to amendments to mergers investigative powers (section 29) in cases referred to the CMA by the European Commission. Specifically the provisions make clear that the extended information gathering powers (amended section 109) are exercisable in relation to cases referred by the European Commission and that existing sections 34B and 46C (existing information gathering powers) are repealed. Paragraphs 19(2) and (3), and 21(2) and (4), provide that ‘stop the clock’ powers in the case of a matter referred by the European Commission can only be triggered if a person carrying on the enterprise concerned fails to comply with an information request.
404. [Paragraph 22](#) makes a consequential amendment to section 46 resulting from changes to statutory timescales set out in Schedule 8.
405. [Paragraphs 25, 27, 30 to 34](#), and [38](#) make consequential amendments resulting from changes to the CMA’s interim powers set out in sections 30 and 31.
406. [Paragraph 36](#) makes consequential amendments to provisions concerning the requirements on the CMA to publicise its decisions, to ensure they are consistent with new investigation powers in section 29 and new statutory timescales set out in section 32 and Schedule 8.
407. [Paragraph 37](#) removes the reference to ‘Undertakings under paragraph 1 of Schedule 1’ from the index of defined expressions in section 130 of the EA 2002. This is consequential on changes to Schedule 7 to the EA 2002 (enforcement regime for public interest and special public interest cases) as a result of Schedule 7, new interim measures provisions for the mergers regime.
408. Section 241(3) of the EA 2002 provides that specified information held by public authorities can be disclosed (notwithstanding the general restriction on disclosure under section 237) to any person for the purpose of facilitating the exercise of any function that person has under that Act and any Acts specified in Schedule 15 to that Act. Paragraph 39 adds the Health and Social Care Act 2012 to the list in Schedule 15 to the EA 2002.
409. [Paragraphs 42 to 46](#) make consequential amendments to the Communications Act 2003 arising out of the new section 193A inserted into that Act by section 54. The new section gives the CMA power to recover its costs in respect of price control references made to it, as set out in section 54.