



# Enterprise and Regulatory Reform Act 2013

## 2013 CHAPTER 24

### PART 4

#### COMPETITION REFORM

### CHAPTER 3

#### ANTI-TRUST

##### *Investigation powers*

### 39 Investigations: power to ask questions

- (1) Part 1 of the Competition Act 1998 (“the 1998 Act”) (competition) is amended as follows.
- (2) After section 26 (powers when conducting investigations) insert—

#### “26A Investigations: power to ask questions

- (1) For the purposes of an investigation, the CMA may give notice to an individual who has a connection with a relevant undertaking requiring the individual to answer questions with respect to any matter relevant to the investigation—
  - (a) at a place specified in the notice, and
  - (b) either at a time so specified or on receipt of the notice.
- (2) The CMA must give a copy of the notice under subsection (1) to each relevant undertaking with which the individual has a current connection at the time the notice is given to the individual.

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- (3) The CMA must take such steps as are reasonable in all the circumstances to comply with the requirement under subsection (2) before the time at which the individual is required to answer questions.
- (4) Where the CMA does not comply with the requirement under subsection (2) before the time mentioned in subsection (3), it must comply with that requirement as soon as practicable after that time.
- (5) A notice under subsection (1) must be in writing and must indicate—
  - (a) the subject matter and purpose of the investigation, and
  - (b) the nature of the offence created by section 44.
- (6) For the purposes of this section—
  - (a) an individual has a connection with an undertaking if he or she is or was—
    - (i) concerned in the management or control of the undertaking, or
    - (ii) employed by, or otherwise working for, the undertaking, and
  - (b) an individual has a current connection with an undertaking if, at the time in question, he or she is so concerned, is so employed or is so otherwise working.
- (7) In this section, a “relevant undertaking” means an undertaking whose activities are being investigated as part of the investigation in question.”
- (3) For the heading of section 26 substitute “Investigations: powers to require documents and information”.
- (4) Section 30A (use of statements in prosecution) is amended as follows.
- (5) The existing text becomes subsection (1).
- (6) In subsection (1), for “26 to 28A” substitute “26 and 27 to 28A”.
- (7) After that subsection insert—
  - “(2) A statement by an individual in response to a requirement imposed by virtue of section 26A (a “section 26A statement”) may only be used in evidence against the individual—
    - (a) on a prosecution for an offence under section 44, or
    - (b) on a prosecution for some other offence in a case falling within subsection (3).
  - (3) A prosecution falls within this subsection if, in the proceedings—
    - (a) in giving evidence, the individual makes a statement inconsistent with the section 26A statement, and
    - (b) evidence relating to the section 26A statement is adduced, or a question relating to it is asked, by or on behalf of the individual.
  - (4) A section 26A statement may not be used in evidence against an undertaking with which the individual who gave the statement has a connection on a prosecution for an offence unless the prosecution is for an offence under section 44.

- (5) For the purposes of subsection (4), an individual has a connection with an undertaking if he or she is or was—
- (a) concerned in the management or control of the undertaking, or
  - (b) employed by, or otherwise working for, the undertaking.”

#### **40 Civil enforcement of investigation powers**

- (1) Part 1 of the 1998 Act (competition) is amended as follows.
- (2) After section 40 insert—

##### *“Civil sanctions*

#### **40A Penalties: failure to comply with requirements**

- (1) Where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement imposed on the person under section 26, 26A, 27, 28 or 28A, it may impose a penalty of such amount as it considers appropriate.
- (2) The amount may be—
  - (a) a fixed amount,
  - (b) an amount calculated by reference to a daily rate, or
  - (c) a combination of a fixed amount and an amount calculated by reference to a daily rate.
- (3) A penalty imposed under subsection (1) must not—
  - (a) in the case of a fixed amount, exceed such amount as the Secretary of State may by order specify;
  - (b) in the case of an amount calculated by reference to a daily rate, exceed such amount per day as the Secretary of State may so specify;
  - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed such fixed amount and such amount per day as the Secretary of State may so specify.
- (4) The fixed amount specified for the purposes of subsection (3)(a) or (c) may not exceed £30,000.
- (5) The amount per day specified for the purposes of subsection (3)(b) or (c) may not exceed £15,000.
- (6) In imposing a penalty by reference to a daily rate—
  - (a) no account is to be taken of any days before the service of the notice under section 112 of the Enterprise Act 2002 (as applied by subsection (9)) on the person concerned, and
  - (b) unless the CMA determines an earlier date (whether before or after the penalty is imposed), the amount payable ceases to accumulate at the beginning of the earliest of the days mentioned in subsection (7).
- (7) The days are—
  - (a) the day on which the requirement concerned is satisfied;

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- (b) the day on which the CMA makes a decision (within the meaning given by section 31(2)) or terminates the investigation in question without making such a decision;
  - (c) if the Secretary of State has made an order under section 31F(1)(b) imposing a time-limit on the making of such a decision, the latest day on which such a decision may be made as a result of the investigation in question.
- (8) Before making an order under subsection (3), the Secretary of State must consult the CMA and such other persons as the Secretary of State considers appropriate.
- (9) Sections 112 to 115 of the Enterprise Act 2002 (supplementary provisions about penalties) apply in relation to a penalty imposed under subsection (1) as they apply in relation to a penalty imposed under section 110(1) of that Act.

#### **40B Statement of policy on penalties**

- (1) The CMA must prepare and publish a statement of policy in relation to the use of its powers under section 40A.
  - (2) The CMA must, in particular, include a statement about the considerations relevant to the determination of the nature and amount of any penalty imposed under section 40A.
  - (3) The CMA may revise its statement of policy and, where it does so, it must publish the revised statement.
  - (4) The CMA must consult such persons as it considers appropriate when preparing or revising its statement of policy.
  - (5) If the proposed statement of policy or revision relates to a matter in respect of which a regulator exercises concurrent jurisdiction, those consulted must include that regulator.
  - (6) In deciding whether and, if so, how to proceed under section 40A, the CMA must have regard to the statement of policy which was most recently published under this section at the time when the failure concerned occurred.”
- (3) Section 38 (guidance about appropriate level of penalties under section 36) is amended as follows.
- (4) In subsection (1), after “under this Part” insert “in respect of an infringement of the Chapter 1 prohibition, the Chapter 2 prohibition, the prohibition in Article 81(1) or the prohibition in Article 82”.
- (5) In subsection (1A), for “a penalty under this Part” substitute “such a penalty”.
- (6) In subsection (8), after “under this Part” insert “in respect of an infringement of a kind mentioned in subsection (1)”.
- (7) Section 42 (offences of failure to comply with requirements imposed in investigations and obstruction) is amended as follows.
- (8) Omit subsections (1) to (4).
- (9) In subsection (6), omit “(1) or”.

**41 Extension of powers to issue warrants to CAT**

Schedule 13 (which amends the 1998 Act to extend the powers under that Act to issue warrants to the Competition Appeal Tribunal) has effect.

**42 Part 1 of the 1998 Act: procedural matters**

(1) Part 1 of the 1998 Act (competition) is amended as follows.

(2) After section 25 (power to investigate) insert—

**“25A Power of CMA to publish notice of investigation**

(1) Where the CMA decides to conduct an investigation it may publish a notice which may, in particular—

- (a) state its decision to do so;
- (b) indicate which of subsections (2) to (7) of section 25 the investigation falls under;
- (c) summarise the matter being investigated;
- (d) identify any undertaking whose activities are being investigated as part of the investigation;
- (e) identify the market which is or was affected by the matter being investigated.

(2) Section 57 does not apply to a notice under subsection (1) to the extent that it includes information other than information mentioned in that subsection.

(3) Subsection (4) applies if—

- (a) the CMA has published a notice under subsection (1) which identifies an undertaking whose activities are being investigated, and
- (b) the CMA subsequently decides (without making a decision within the meaning given by section 31(2)) to terminate the investigation of the activities of the undertaking so identified.

(4) The CMA must publish a notice stating that the activities of the undertaking in question are no longer being investigated.”

(3) Schedule 9 (examples of provision that may be made in rules) is amended as follows.

(4) After paragraph 1 insert—

**“Delegation of functions**

1A (1) Rules may provide for the exercise of a function of the CMA under this Part on its behalf—

- (a) by one or more members of the CMA Board (see Part 2 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013);
- (b) by one or more members of the CMA panel (see Part 3 of that Schedule to that Act);
- (c) by one or more members of staff of the CMA;
- (d) jointly by one or more of the persons mentioned in paragraph (a), (b) or (c).

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(2) Sub-paragraph (1) does not apply in relation to any function prescribed in regulations made under section 7(1) of the Civil Aviation Act 1982 (power for Secretary of State to prescribe certain functions of the Civil Aviation Authority which must not be performed on its behalf by any other person).”

(5) After paragraph 13 insert—

*“Oral hearings: procedure*

13A (1) Rules may make provision as to the procedure to be followed by the CMA in holding oral hearings as part of an investigation.

(2) Rules may, in particular, make provision as to the appointment of a person mentioned in sub-paragraph (3) who has not been involved in the investigation in question to—

- (a) chair an oral hearing, and
- (b) prepare a report following the hearing and give it to the person who is to exercise on behalf of the CMA its function of making a decision (within the meaning given by section 31(2)) as a result of the investigation.

(3) The persons are—

- (a) a member of the CMA Board;
- (b) a member of the CMA panel;
- (c) a member of staff of the CMA.

(4) The report must—

- (a) contain an assessment of the fairness of the procedure followed in holding the oral hearing, and
- (b) identify any other concerns about the fairness of the procedure followed in the investigation which have been brought to the attention of the person preparing the report.”

(6) After paragraph 13A insert—

*“Procedural complaints*

13B (1) Rules may make provision as to arrangements to be made by the CMA for dealing with complaints about the conduct by the CMA of an investigation.

(2) Rules may, in particular, make provision as to—

- (a) the appointment of a person mentioned in sub-paragraph (3) who has not been involved in the investigation in question to consider any such complaint;
- (b) the time-table for the consideration of any such complaint.

(3) The persons are—

- (a) a member of the CMA Board;
- (b) a member of the CMA panel;
- (c) a member of staff of the CMA.”

(7) After paragraph 13B insert—

*“Settling cases*

13C Rules may make provision as to the procedure to be followed in a case where, during an investigation, one or more persons notify the CMA that they accept that there has been an infringement of a kind to which the investigation relates.”

*Interim measures and other sanctions*

**43 Threshold for interim measures**

In section 35 of the 1998 Act (interim measures), in subsection (2)(a), for “serious, irreparable damage” substitute “significant damage”.

**44 Penalties: guidance etc.**

(1) Part 1 of the 1998 Act (competition) is amended as follows.

(2) In section 36 (penalties), after subsection (7) insert—

“(7A) In fixing a penalty under this section the CMA must have regard to—

- (a) the seriousness of the infringement concerned, and
- (b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from—
  - (i) entering into agreements which infringe the Chapter 1 prohibition or the prohibition in Article 81(1), or
  - (ii) engaging in conduct which infringes the Chapter 2 prohibition or the prohibition in Article 82.”

(3) In section 38 (guidance on level of penalties), in subsection (8), before “must have regard” insert “and the Tribunal”.

*Miscellaneous*

**45 Power for Secretary of State to impose time-limits on investigations etc.**

After section 31E of the 1998 Act insert—

**“31F Power for Secretary of State to impose time-limits on investigations etc.**

- (1) The Secretary of State may by order impose time-limits in relation to—
  - (a) the conduct by the CMA of investigations or investigations of a description specified in the order;
  - (b) the making by the CMA of decisions (within the meaning given by section 31(2)) as a result of investigations or investigations of such a description.

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- (2) Before making an order under subsection (1), the Secretary of State must consult the CMA and such other persons as the Secretary of State considers appropriate.”

**46 Review of operation of Part 1 of 1998 Act**

- (1) The Secretary of State must—
- (a) review the operation of Part 1 of the 1998 Act, and
  - (b) prepare and publish a report on the outcome of the review.
- (2) The report must be published before the end of the period of 5 years beginning with the day on which Part 1 of Schedule 5 (which transfers the functions of the Office of Fair Trading under Part 1 of the 1998 Act to the Competition and Markets Authority) comes into force.
- (3) The Secretary of State must lay the report before Parliament.