

Competition and Markets Authority (CMA)

Towards the CMA

CMA Guidance

15 July 2013

CMA1

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This publication is also available from our website at: www.gov.uk/cma

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1 PREFACE

- 1.1 The Competition and Markets Authority (CMA) will be established under the Enterprise and Regulatory Reform Act 2013 (ERRA13) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and many of the functions of the Office of Fair Trading (OFT) will be transferred to the CMA and these bodies abolished. The CMA's primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA Transition Team is working collectively with the OFT and CC and other stakeholders to ensure a smooth transition from the current landscape to a single, streamlined organisation. As part of this process, a number of guidance documents are being drafted which will set out how the CMA will operate and how it will interact with the business community, legal practitioners and individuals.
- 1.3 This document sets out the consultation process for the CMA's guidance documents, as well as providing an overview of how we envisage the CMA will approach the objectives set out in the Government's response to the consultation on *A Competition Regime for Growth*.¹

¹ See Growth, Competition and The Competition Regime: Government response to consultation, March 2012, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf

2 FOREWORD BY DAVID CURRIE, CMA CHAIRMAN DESIGNATE

- 2.1 The creation of the Competition and Markets Authority is an important development in strengthening the UK competition and consumer enforcement regime. It will bring together the OFT and Competition Commission, two bodies rated amongst the best internationally, into a new organisation that we intend will be very much more than the sum of its parts. I am honoured to become the founding Chairman of the CMA, and with my Chief Executive, Alex Chisholm, and the newly announced non-executive members of the CMA Board to lead the process of making a truly world class leader internationally. The CMA will play a vital role in promoting competition and consumer protection across the UK, making markets work better for consumers and helping to foster innovation, growth and enterprise, the key to the delivery of future consumer benefit.
- 2.2 I have had the privilege over the past two decades of interacting with most aspects of the competition, consumer protection and regulatory regime, working sometimes with the regulators and on other occasions with business seeking to work with the regime. My business experience has made me sensitive to the burdens that regulation can impose on business. My regulatory experience has made me aware that effective, proportionate regulation can be a real force for good, delivering tangible benefit to consumers and business. The challenge that faces me, Alex Chisholm, and the CMA Board is to build a high performance Competition and Markets Authority which can make the UK competition and markets regime work well to the benefit of UK consumers and business. To that challenge, I bring the benefit of observing many at close quarters, very different, organisations during my business school career, and of leading the creation of Ofcom from five separate regulators. Each such integration process is different, but having experienced the challenges before is undoubtedly helpful. Key is the choice of Chief Executive, and Alex Chisholm's appointment in this role should give great confidence. He has early experience in Government and the OFT, played private sector leadership roles, and has most recently headed the Irish communications regulator during a period of significant change and achievement, including integrating the staff and responsibilities of another agency. His skills and diversity of experience will serve the CMA well.
- 2.3 The process of building the new organisation is advancing well. We have announced our Board, which has responsibility for driving the formation and development of the CMA (a draft of the proposed CMA structure is set out in **Annexe A**). We are busy planning the move and integration of the new organisation into its designated home in Victoria House, the current location of

the Competition Commission and the Competition Appeal Tribunal. We are also managing numerous other matters (HR, IT, document management, project management, communications etc) that are key to the CMA ambition to be best in international class.

- 2.4 An important part of the transition to the new regime is the necessary changes to the guidance that we provide to those interacting with the new Authority. This document and the accompanying consultation represent the first step in setting out how the CMA will work in practice and how it will interact with business and individuals across the range of its powers and responsibilities. The success of the CMA will depend to a considerable extent on ensuring that we get these relationships right, striking the correct balance between the need to take strong enforcement action and the need to help business to stay on the right side of the law.
- 2.5 In producing the draft guidance, we have taken into account responses provided to the Government's previous consultation on the future of the competition regime. We are, however, keen to have as much input from those who will be working with the CMA as possible as to how it should carry out its work. With that in mind, I would strongly encourage you to consider the draft guidance published alongside this document and later in the year, and to give us your feedback on these documents.
- 2.6 This consultation is happening ahead of the CMA coming into legal existence in October, but is helpfully being conducted on behalf of the embryonic CMA. This will allow the CMA Board, when it comes into shadow form in October, to make well-informed and timely decisions on how the new arrangements will work and in the light of an extensive public consultation. This highlights the importance of this consultation and of you actively contributing to it to ensure that the CMA Board benefits from widespread and high quality input to its decisions.
- 2.7 We have much work to do to after the CMA initially comes into being in shadow form in October 2013 and before the CMA becomes fully operational in April 2014. Nevertheless, I am confident that we can build on the work of the OFT and the CC to make an even greater contribution to the working of more effective and efficient markets in the UK and to economic growth. The contribution of all those with an interest in the UK competition and consumer regimes will be vital in helping us to achieve this aim, and we very much look forward to working with you.

3 INTRODUCTION BY ALEX CHISHOLM, CMA CHIEF EXECUTIVE DESIGNATE

3.1 The Government has made the establishment of the CMA the centrepiece of its reform of the competition landscape. It is a privilege to have the opportunity to join David Currie in leading this new institution in its formative period. When I took up the post some four months ago it was quickly clear to me that we needed to do two things very well:

- to preserve the considerable strengths of the existing competition institutions, particularly the talented staff and the accumulated know-how and robust procedural framework; and
- to take full advantage of the potential offered by the new unitary authority within a reformed landscape.

3.2 This has led to a period of intense engagement and analysis with OFT and CC staff, and the wider consumer, business, legal, economic and political communities. From this process David Currie and I, with the help of the CMA Transition Team formed by BIS, OFT, CC and elsewhere, have been able to develop our initial thinking about we want from the CMA. While fully recognising that these are early days, and that the CMA Board when legally formed will want to form its own views on the priorities and strategies — and to conduct a public consultation on these — we want to set out here a high level summary of some of this provisional thinking, to provide a context in which to consider the draft guidance published today.

3.3 In essence we see this as a tremendous opportunity to build a high performance institution to drive the competition agenda in the UK. We want to build on and reinforce the capabilities and processes of the OFT and CC to deliver a more focused, efficient and impactful regime for competition and markets in the UK.

Determined and effective enforcement agency

3.4 It is essential that competition and consumer laws are upheld by the CMA as the public enforcement agency, and that infringements are met with appropriate sanctions. The CMA will make use of the various legal reforms made by the ERRA13 to help us in gathering relevant information and conducting cases in a timely and effective manner, using both our criminal and civil powers, as appropriate.

Single powerful competition advocate

- 3.5 The Government has said it wants a single powerful voice to advocate competition, both within the UK and abroad. This can manifest itself in multiple ways. We can address the needs of business for guidance on how to comply with competition law. We can make interventions to help consumers benefit fully from competition. We can advise the Government on how its own policies can facilitate the development of competition or on where its policies risk constraining such development. Finally, we can promote open and competitive regimes in our trading partners.
- 3.6 Regulated sectors represent an important part of our economy, accounting for some 25% of the economy. The new regime provides for more effective working in partnership with sector regulators and other enforcement agencies, with an expectation from Government that there will be a step-up in the promotion of competition, and application of general competition law, in the areas covered by sectoral regulation. Guidance on how the CMA envisages the use of concurrent competition powers will be coordinated, and cooperation with the regulators strengthened, will be set out in our Concurrency guidance which we will consult on in September.
- 3.7 In addition to concurrent regulators, it will be imperative for the CMA to cooperate effectively with a range of partners across its areas of responsibility. These include the Financial Conduct Authority, which has a duty to promote competition but no competition powers as such. Within the context of the reformed consumer landscape², we need to work with our fellow members of the Consumer Protection Partnership (CPP), including BIS, Trading Standards and the Citizen's Advice Service, to share intelligence and inform our collective consumer activities and provide accountability for the national consumer protection system. We will work closely with members of the CPP, to produce guidance on the CMA's approach to consumer protection work, which will also be consulted upon in September.
- 3.8 The quality of our interactions with these agencies and partners will make a real difference to the effectiveness of the CMA. We are already reaching out to these other agencies to explore how best we can work productively

² Empowering and Protecting Consumers: Government response to the consultation on institutional reform, April 2012, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31397/12-510-empowering-protecting-consumers-government-response.pdf

together. Moreover, the ERRA13 requires the CMA to report each year on the concurrency regime.

- 3.9 In terms of international presence, the OFT and the CC have already set the bar high in terms of international cooperation and engagement with counterparts overseas. We envisage that the CMA will continue to play a prominent and effective role in the OECD, ECN, ICN, ICPEN³ and the various other international fora, sharing knowledge and enforcement skills and actively engaging and cooperating on cases.

Faster, less burdensome and more transparent

- 3.10 We will want to focus on pursuing cases effectively, learning from previous experiences and using our new powers and speeding up our work by removing duplication and streamlining processes. It is clear that the business community attaches great importance to the speed, transparency and predictability of the competition regime, and progress in these areas also brings greater value to taxpayers. With the creation of the single Authority, bringing under one roof initial and in-depth investigations, we have the opportunity to refine further our approaches to mergers (Phases 1 and 2) and market studies/investigations. We would expect that as a result of this, for example, the CMA will be better able to choose the right markets for its attention, and where necessary to fine-tune the most appropriate remedies.
- 3.11 Moreover, in order to achieve greater throughput of cases, we need to put into place new timetables and powers and to handle phase transitions differently. We plan to do this through tighter management of investigations — now subject to shorter statutory timetables in a number of areas; smoother interchange between the two Phases; and to a certain extent, use of some of the same personnel across both phases.
- 3.12 However, whilst we will be under one roof, we must fully respect the importance of:
- keeping a clear distinction between the two Phases,
 - preserving the objectivity of the Panel system of independent Members, and
 - safeguarding the process from confirmation bias.

³ Organisation for Economic Co-operation and Development (OECD), European Competition Network (ECN), International Competition Network (ICN), International Consumer Protection and Enforcement Network (ICPEN).

- 3.13 We consider the CMA should aim to be open and transparent in its work and engagement with parties, while retaining the ability to act efficiently and more rapidly, and continuing to respect fully genuine confidentiality concerns. These aims are reflected in the draft guidance on Transparency and Disclosure.
- 3.14 To achieve all of the aspirations above, the CMA will need to retain and attract professional and dedicated staff, equipped with the skills and knowledge to be able to take sound decisions and tackle complex investigations. Accordingly, the CMA will need to build on the high quality human capital of its predecessor organisations. It will need to be a dynamic but flexible organisation, committed to developing individuals and building high performance teams. The CMA will place a premium on agility and team-working where resources are allocated flexibly across the Authority.

Robust decision-making

- 3.15 The creation of the CMA is also an opportunity to build on and evolve internal decision-making structures across its tools and ensure that these are consistent, where appropriate. We are considering adopting the high level principle that all first phase decisions will be taken by a senior member of CMA staff, supported and challenged (with a degree of engagement that is greater and/or more formalised than the current internal process) by a further two CMA individuals with the appropriate level of skill and expertise, ultimately resulting in a well-reasoned decision by the Authority. The details of this decision-making structure and other related enhancements will be set out in the second set of guidance, which will be published in September.

Feedback

- 3.16 We invite reactions to this initial statement of intent, as well as to the detailed draft guidance we are publishing today. In the meantime, we will continue to work up our thinking on procedures and structures, as well as our strategic priorities, on which we plan to consult in October.

4 THE COMPETITION AND MARKETS AUTHORITY (CMA)

4.1 On 1 April 2014, the ERA13 will transfer the functions of the CC and many of the functions of the OFT to the CMA. The CMA will have a range of tools to use in addressing competition and consumer problems. For example, the CMA will be able to:

- investigate under the Enterprise Act 2002 (EA02) mergers that could potentially give rise to a substantial lessening of competition, and specify measures that the merging parties must take to prevent or unwind integration between them while the investigation takes place
- conduct studies and investigations under the EA02 into particular markets where there are suspected competition and/or consumer problems, or into practices that impact more than one market, and to require market participants to take steps to address these problems
- investigate individual businesses to determine whether they have breached UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position under the Competition Act 1998 (CA98)
- bring criminal proceedings against individuals who commit cartel offences under the EA02
- enforce a range of consumer protection legislation, and bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), and
- conduct regulatory appeals and references in relation to price controls, terms of licences or other regulatory arrangements under sector specific legislation (gas, electricity, water, post, communications, aviation, rail and health).

A table setting out the CMA's functions is contained in **Annexe B**.

4.2 The ERA13 also implements a number of enhancements to the CMA's statutory powers to improve the robustness of decision-making, increase the speed and consistency of the CMA's activities, and strengthen the UK's competition regime as a whole.

4.3 The OFT and the CC have previously published guidance on their policies and procedures, which are affected in different ways by the ERA13. We have chosen an approach to renewing guidance that covers the things we think it

essential to say publicly at this stage, in order to give stakeholders the best possible understanding of how the CMA will exercise its powers and interact with them. In light of this, our starting point has been to adopt the existing content of the OFT and CC's current guidance and to amend them as required to reflect the changes introduced by ERRA13, developments in the cases, experience and incremental improvements made to policies and procedures, where possible. A table setting out the CMA's new/enhanced powers is contained in **Annexe C**.

- 4.4 CMA guidance documents will replace or supplement OFT and CC guidance in some areas, but will need to be read alongside other underlying OFT and CC guidance documents. Each guidance documents will contain an annexe setting out which related/relevant pre-existing OFT and CC guidance will be put to the CMA Board for adoption.
- 4.5 After April 2014, the CMA will undertake an exercise to review all OFT and CC guidance to see whether there should be further amendments and/or whether certain guidance should be revoked. There will be a separate consultation on this process.
- 4.6 Save for some exceptions, the CMA's procedures and new powers will take effect from 1 April 2014. The exceptions to this general position will be set out in the individual consultation documents.

The Consultation Process

- 4.7 In order to ensure a smooth transition to a single, streamlined organisation, we have been working with the OFT and CC to draft guidance documents on how the CMA will operate so that business, legal practitioners and individuals understand what will change in their interactions with the CMA.
- 4.8 We have identified the following 10 areas of guidance that are required in order to explain changes made to current OFT and CC procedures as a result of the ERRA13 and therefore need to be in place prior to April 2014. In order to give stakeholders the best possible opportunity to consider the consultation documents and to have their views heard, we have split the guidance documents into two tranches and will be consulting on them over two eight weeks periods—16 weeks in total.

Tranche 1 (consultation commences on Monday 15 July 2013 and closes on Friday 6 September 2013)

- Mergers: Guidance on the CMA's jurisdiction and procedure

- Market Studies and Market Investigations: Supplemental guidance on the CMA's approach
- Administrative Penalties: Statement of policy on the CMA's approach
- Cost recovery in telecoms price control references: Guidance on the CMA's approach, and
- Transparency and disclosure: Statement of the CMA's policy and approach.

Tranche 2 (consultation commences on Tuesday 17 September 2013 and closes on Monday 11 November 2013)

- Consumer Protection: Guidance on the CMA's approach to use of its consumer powers
- Competition Act 1998: Guidance on the CMA's investigation procedures, and the CMA's Competition Act 1998 Rules (two separate documents, but combined for the consultation)
- Cartel Offence: Prosecution Guidance
- Regulated Industries: Guidance on concurrent application of competition law to regulated industries, and
- Remedies: CMA Guidance on the variation and termination of merger, monopoly and markets undertakings and orders.

4.9 The consultation on the CMA guidance will run in parallel with consultations by BIS (the BIS consultations will begin and end at the same time as the CMA consultations). The first BIS consultation will cover:

- A draft Ministerial Statement of Strategic Priorities for the CMA
- The CMA (Penalties) Order 2014 – on maximum penalties that can be imposed by the CMA for breach of information gathering requirements in markets, mergers and antitrust cases
- Mergers – the Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014, establishing legal rules to determine when an enterprise is to be treated as controlled by a person and the turnover of an

enterprise for the purpose of the new administrative penalty for failure to comply with interim measures

- Mergers – the Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014, to modify the scheme dealing with public interest concerns in ‘European relevant merger situations’, and
- Mergers – the Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014, to alter the timing of merger fee payments so that in all cases they will be payable once the CMA has published its decision following a ‘Phase 1’ investigation.

4.10 The second BIS consultation will cover:

- An Order under s.188A of EA02 to prescribe how information is to be disclosed for the purposes of the defence to the criminal cartel offence
- New regulations on the coordination of concurrent CA98 Part 1 powers made under s.54 of CA98, and
- An Order making Rules for the Competition Appeal Tribunal (CAT) on obtaining a warrant from the CAT to enter business premises.

5 RESPONDING TO THE CONSULTATION

- 5.1 Consultation on the five guidance documents in Tranche 1 commences on Monday 15 July 2013 and closes on Friday 6 September 2013. Consultation on Tranche 2 documents commences on Tuesday 17 September 2013 and closes on Monday 11 November 2013.
- 5.2 We are running these consultations over two periods of eight weeks each (rather than one period of twelve weeks) in the interests of giving respondents more time overall to consider the documents and meeting the short timetable for the establishment of the CMA. It should also be remembered that many of the issues covered were also part of the Government's consultations on reforms to the competition and consumer regimes, and we have built on responses to those consultations to inform these guidance documents.
- 5.3 When responding to this consultation please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.
- 5.4 The consultation is available electronically on: www.gov.uk/cma (until the consultation closes). Responses can be submitted by email or by letter to:
- The BIS CMA Transition Team on behalf of the CMA
(c/o Xinru Li and Easha Lam)
Department of Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
London
SW1H 0ET
- Tel: 020 7215 2078 (Xinru Li) / 020 7215 2044 (Easha Lam)
Email: cmaconsultation@bis.gsi.gov.uk
- 5.5 You may make printed copies of this document without seeking permission. Other versions of the document in Braille, other languages or audio-cassette are available on request.

Next steps

- 5.6 After the consultation, we will decide whether any changes are necessary to the draft guidance documents that we have published in this consultation, and publish the final version of the revised guidance on our website www.gov.uk/cma. We will also publish a summary of the responses received during the consultation.

6 CONFIDENTIALITY AND DATA PROTECTION

- 6.1 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
- 6.2 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding.

7 FEEDBACK ABOUT THIS CONSULTATION

- 7.1 If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please contact:

Mr John Conway

Consultant Coordinator

Department for Business, Innovation and Skills

Victoria Street

London SW1H 0ET

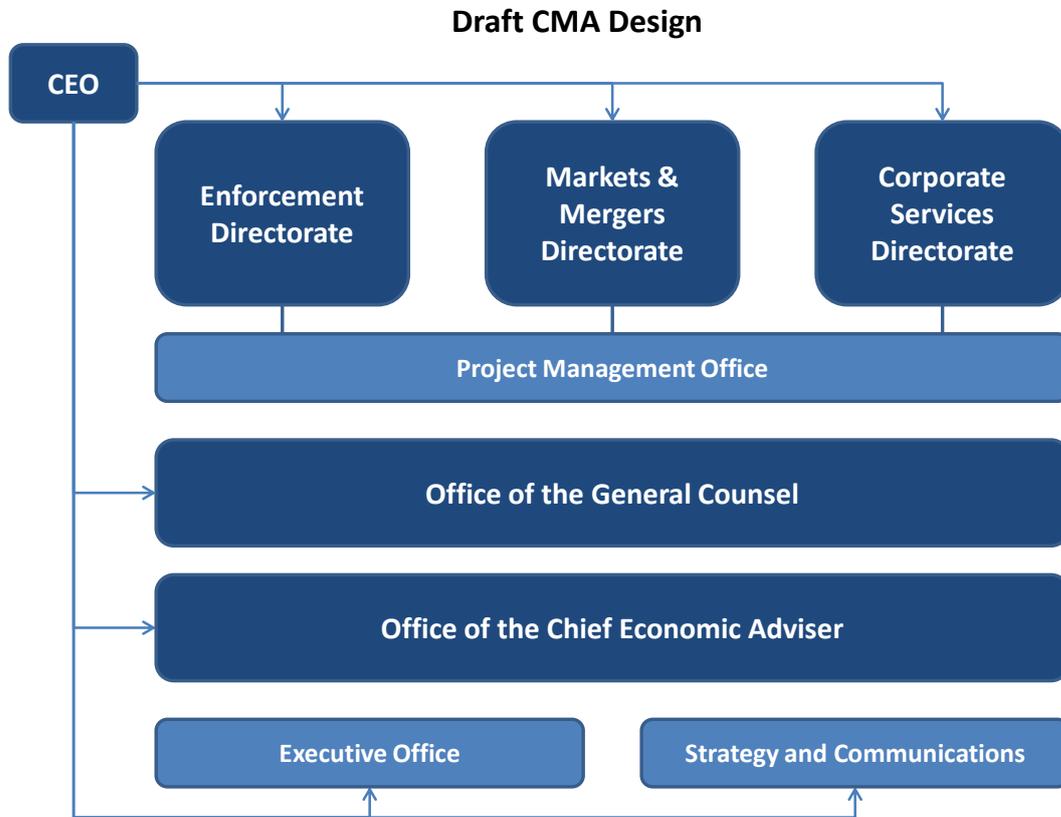
Telephone John on 020 7215 6402 or e-mail to: john.conway@bis.gsi.gov.uk

- 7.2 The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles. A copy of the Cabinet Office's Consultation Principles can be found at:
<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

ANNEXES

- A CMA structure
- B The CMA's functions
- C The CMA's new and/or enhanced powers

Annexe A: CMA Structure



9 July 2013, subject to review by the CMA Board

Annexe B: The CMA's functions

CMA FUNCTION	SUMMARY
Investigating mergers	Under the EA02, the CMA will be able to investigate mergers which could potentially give rise to a substantial lessening of competition and , and specify measures that the merging parties must take to prevent or unwind integration between them while the investigation takes place
Investigating markets	The EA02 will also enable the CMA to conduct market studies and investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify. This will include the power to conduct investigations of practices that impact on more than one market
Antitrust enforcement	Under the CA98, the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position
Criminal cartels	The CMA will be able to bring criminal proceedings against individuals who commit the cartel offence under the EA02
Consumer protection	The CMA will also have powers to enforce a range of consumer protection legislation (either directly or through Part 8 of the EA02) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
Concurrent powers with sector regulators	The CMA will cooperate with the sector regulators, encouraging the regulators to be more proactive in their use of the concurrent competition powers. As part of its enhanced leadership role, the CMA will have the power to decide which body should lead on a case
Regulatory references and appeals and other functions of the OFT and CC	The CC's role in determining regulatory references and appeals will be transferred to the CMA, as will the ancillary competition roles of the CC and OFT

Annexe C: The CMA's new/enhanced powers

Antitrust investigations
Compulsory interview power
Power to publish a notice of investigation, which may name a party or parties to an investigation
Lowering of the threshold before interim measures can be imposed
Extended powers to impose civil financial penalties for failure to comply with investigatory powers
Power to make express provision in the CMA Rules for decision-making procedures, oral hearings, procedural complaints and the settlement of antitrust investigations
Power enabling the Secretary of State to impose time limits in relation to the conduct of antitrust investigations and making of antitrust infringement decisions by the CMA
Market studies and market investigations
Powers to investigate practices across markets
Powers to investigate public interest issues alongside competition issues
Extending formal information gathering powers to Phase 1 (market studies) as presently exist only at Phase 2 (market investigations)
Extended powers to impose civil financial penalties for failure to comply with investigatory powers (at Phases 1 and 2)
Power to require parties to appoint and remunerate an independent third party to monitor and/or implement remedies and to deal with disputes
Power to require parties to publish certain non-price information without also being required to publish price information
Power to take steps to require parties to reverse any action that has already occurred before interim measures have been put in place (after a market investigation report has been published but before final remedies have been implemented)
Mergers
Extending formal information gathering powers to all stages of the CMA's merger review process (i.e. Phase 1 as well as Phase 2)
Extended powers to impose civil financial penalties for failure to comply with investigatory powers (at both Phases 1 and 2)
Extended powers to agree or impose interim measures
Power to impose financial penalties on parties failing to comply with interim measures of up to 5% of turnover
Power to suspend an investigation for up to three weeks at the start of Phase 2 if the parties

request it and the CMA considers abandonment of the merger to be a possibility
Concurrency and Sector Regulators
Power to decide, following consultation with the relevant regulator(s), which body should lead on a case
In certain circumstances, the CMA may exercise its functions in respect of a case which has been allocated to a regulator
Cost recovery (price control appeals under section 193 of Communications Act 2003)
Power to recover the costs that the CMA incurs in connection with a price control reference from parties to the appeal (other than Ofcom).