

Rules of procedure for CMA groups

Summary of responses to the consultation

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Contents

| | <i>Page</i> |
|-------------------------------------|-------------|
| 1 Introduction and summary | 1 |
| 2 Comments on the Rules | 4 |

1 INTRODUCTION AND SUMMARY

Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (the ERR Act) established the Competition and Markets Authority (CMA) as the UK's economy-wide competition authority with a mission to make markets work well for consumers, businesses and the economy. 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 those bodies abolished.
- 1.2 Where merger and market investigation references are made to the Chair of the CMA or references or appeals are made to the CMA under various regulatory statutes, the Chair of the CMA must constitute a group under Schedule 4 of the ERR Act. A public consultation (the Consultation) was held in February/March 2014 to seek views on Draft Rules of procedure proposed by the CMA for merger reference groups, market reference groups, and special reference groups (under paragraph 51(1) of Schedule 4 to the ERR Act).¹
- 1.3 The Draft Rules proposed by the CMA were to replace the existing rules of the CC regulating such procedures; that is the CC Rules of Procedure (CC1) with effect from 1 April 2014. The Consultation sought views on those Draft Rules and invited comment on whether there are more substantive changes to the new rules beyond those proposed to be introduced from 1 April 2014 that the CMA should consider making in future as it gains experience of the operation of the new regime.

Key changes

- 1.4 The Draft Rules did not involve substantive changes to CC1 save to the extent necessary to recognise the statutory changes that are introduced by the ERR Act (and the separate adoption by the CMA of a policy on conflicts of interest that in substance replicates the policy of the CC). In particular:
 - **CMA panel chair:** Draft Rules 3.2 and 17.1 (now Rule 4.1)² amended CC1 to make clear that the Rules will bind the CMA Panel Chair³

¹ These groups will carry out most of the functions currently undertaken by CC groups; that is, Phase 2 merger inquiries, market investigations as well as some regulatory inquiries and appeals.

² Although the content has not been changed, the paragraph numbering in the published Rules does not always correspond to the numbering in the consultation draft due to the reordering of some sections.

- **Independent decision taking at phase 2:** Draft Rule 4.4 (now Rule 6.5) amended CC1 to reflect that decisions by groups must be taken acting independently of the CMA Board⁴
- **Conflicts of interest:** Draft Rule 4.2(a) (now Rule 6.2(a)) replaced the obligation under CC1 on the Chairman of the CC with an obligation on the Chair of the CMA (in practice, the CMA Panel Chair) to have regard to the published policies of the CMA on handling conflicts of interest.⁵ Draft Rule 4.2(b) (now Rule 6.2(b)) was a new provision but is substantially the same in its application to panel members as the current CC guidance on conflicts of interest
- **Removal of rule for standing group:** As set out in paragraphs 2.6 to 2.8 of the Consultation Document, the CMA does not expect that the CMA will need a 'standing group' of members, and accordingly the Draft Rules did not include an equivalent provision to Rule 5.1 of CC1

Purpose of this document

1.5 The consultation document accompanying the Draft Rules (Consultation Document) set out a series of specific questions on which views of respondents were sought. This document sets out a summary of responses received to the questions in the Consultation Document, and the CMA's views on those responses.

Response to the Consultation

1.6 The Consultation closed on 18 March 2014. Only one written response to the Consultation Document was received; this was from EDF Energy (the Respondent).

³ The ERR Act makes provision allowing the functions of the CMA Chair relating to groups, including those relating to the constitution of groups, to be exercised by a person who is a member of both the CMA panel and the CMA Board or a member of the CMA panel designated by the Secretary of State for this purpose (the 'CMA Panel Chair'). The intention of the current CMA Chair and CMA Board is that functions of the CMA Chair in relation to CMA groups should be performed and discharged by the CMA Panel Chair.

⁴ This is to reflect paragraph 49 of Schedule 4 to the ERR Act.

⁵ The published conflicts of interest policy of the CMA is Annex B to the CMA Board Rules of Procedure, available at: www.gov.uk/government/publications/cma-board-rules-of-procedure.

Consultation Document questions

- 1.7 The table below sets out the questions on which the Consultation Document sought views. The Respondent's comments and the CMA's views are set out in Section 2 below.

| Question | |
|-----------------|--|
| 1. | Do you consider that the Draft Rules are fit for the purpose of providing for the basic procedure of CMA groups from 1 April 2014? |
| 2. | Do you have any other comments on the Draft Rules? |
| 3. | Are there any additional areas where you believe the CMA should in due course consider making additional provision in its procedural rules for CMA groups? |

- 1.8 This document should be read in conjunction with the Consultation Document. It is not intended to be a comprehensive record of all views expressed by the Respondent: the Respondent's full response is available on www.gov.uk/cma. Nor is this summary a definitive statement of or a substitute for the law itself and should not be relied on upon as an alternative to seeking appropriate legal advice. Parties seeking guidance should refer to the final published version of the *CMA Rules of Procedure for Merger, Market and Special Reference Groups* (CMA17) (the Rules) itself, also available on www.gov.uk/cma. The Rules supersede CC1.

2 COMMENTS ON THE RULES

Summary of response

- 2.1 The Respondent agreed that the Rules should be extensively based on the existing CC rules of procedure. However, the Respondent highlighted that the Rules should be kept under review as experience of the new CMA governance framework is developed. The CMA's acknowledgement of this was welcomed.
- 2.2 The Respondent:
- suggested that the Rules concerning hearings should not be restricted to 'set piece hearings'; rather, an option to develop a dialogue between the CMA and industry members/consumer groups through consultation or meetings would be considered useful
 - highlighted the potential for a public hearing to produce a fundamentally different (and potentially costly) type of engagement with the CMA when compared with private hearings
 - believed that the Notice of Possible Remedies should identify how any remedies proposed would cure perceived competition problems so as to reflect a clear link between harm and remedies in the procedure
 - expressed a preference for a stronger obligation on the CMA, in preparing its reports, to send any material it has produced back to any person or body so as to allow for its accuracy to be verified.

The CMA's views

- 2.3 The CMA welcomes the Respondent's endorsement of its view that it is right to base the Rules on the existing CC1. The CMA considers the existing CC1 rules to be substantively 'fit for purpose' and that the reforms to the institutional structure made by the ERR Act are not intended to affect the structure of decision making at phase 2 by independent groups of panel members.
- 2.4 The specific suggestions that the Respondent has made are pertinent and helpful in the wider context of the CMA's operations, but the CMA does not consider it appropriate to reflect them through specific amendments to the Draft Rules, given the importance of ensuring that the Rules allow a degree of procedural flexibility for groups and allow the CMA to develop its procedures over time. The CMA further notes that: taken overall, the processes of the CC have in the past given parties significant opportunity to engage with both CC

staff and members outside formal hearings; the Rules do not require the holding of public hearings but rather provide for the group to consider whether public hearings should be held (in practice the CC has held them only rarely); the CMA has already published substantial guidance on the detailed approach it will adopt to the development of proposed remedies—see Section 13 of *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) and Section 4 of the CC's *Market Investigation Guidelines* (CC3 (Revised)), which the CMA has adopted);⁶ and the CMA expects to continue the existing practice of the CC with respect to putting material back to parties.⁷

- 2.5 As set out in the Consultation Document, the CMA will be able to review the Rules after 1 April 2014 if necessary as it gains experience of operating with groups of panel members in a unitary authority.

⁶ Both documents are available at www.gov.uk/cma.

⁷ Set out in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), paragraphs 12.5–12.9, and *Market Investigation Guidelines* (CC3 (Revised)), which the CMA has adopted), paragraphs 75 & 76. Both documents are available at www.gov.uk/cma.