

## The new CMA: changes to the UK merger control

The new Competition and Markets Authority (CMA) came into existence as an independent legal entity on 1 October 2013. It will operate in “shadow form” until the new UK competition regime comes into force on 1 April 2014, and will replace the competition functions and some of the consumer protection functions of the Office of Fair Trading (OFT) and the Competition Commission (CC).

This article, the first in a three-part series on the new UK competition regime and the role of the CMA, outlines the new UK merger control regime (the new regime), which will be effective from 1 April 2014.

### The new regime

The new regime introduces mainly procedural, rather than substantive, reforms (see box “Key features retained”). The CMA will also have wider procedural powers than the OFT and the CC. The new regime is intended, among other things, to make merger reviews faster and more efficient. However, it is questionable whether the new procedures will lead to shorter proceedings.

For example, although there will be a binding timetable, the draft filing forms published by the CMA require large volumes of information to be provided, which may lead to prolonged pre-notification waiver discussions even before the formal binding review timetable is triggered. In addition, the CMA may exercise “stop the clock” powers if parties do not comply with information request notices.

### New binding timetables

Phase I decisions will be taken by the CMA board. Phase II decisions will be made by an inquiry group of at least three people, selected for each case from the independent experts appointed to the CMA’s panel by the Secretary of State.

The standard timeframe for the CMA to decide whether to refer a merger for a Phase II investigation will be up to 40 working days. However, if the CMA decision is anything other than clearance, Phase I proceedings may continue for another 50 working days, and this may be extended further by up to 40 working days.

### Key features retained

Some key features of the current merger control regime will remain unchanged under the new regime, for example:

- Filings will remain voluntary and non-suspensory.
- There will still be a two-stage review process (Phase I and Phase II).
- The substantive test for deciding whether a merger will result in a substantial lessening of competition will remain the same.
- The statutory tests for determining whether to refer a merger for a Phase II investigation, or whether remedies are required, will remain the same.

Phase II inquiry groups will have to reach a decision on the existence or absence of a substantial lessening of competition (SLC) within a 24-week period, which will be extendable by up to eight weeks. Where remedies are required, these must be implemented within a 12-week period, extendable by a further six weeks. In total, Phase II investigations may therefore last up to 50 weeks.

### New remedy procedures

Under the current regime, remedy procedures have sometimes been perceived as unfair due to a lack of transparency. Under the new system, remedies may be discussed only after the CMA has set out grounds for a Phase II review and, during Phase II proceedings, the remedy procedure will begin only after a provisional finding of an SLC.

### New power to order interim measures

The CMA will be able to require merging businesses to be operated independently during the review process. For anticipated mergers, the CMA will be able to suspend all integration steps before clearance. For completed mergers, the CMA will be able to

reverse integration steps that have already taken place. Interim measures orders will stay in place until the end of the investigation, subject to variation, release or revocation by the CMA. The CMA has indicated in its draft guidance that, in exceptional circumstances, it may issue orders prohibiting parties from closing their transactions during a Phase I review ([www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212288/CMA4con\\_-\\_Administrative\\_penalties.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212288/CMA4con_-_Administrative_penalties.pdf)).

These new powers will be supported by the CMA’s ability to impose heavy financial penalties for a breach of interim measures (up to 5% of the aggregate turnover of the enterprises owned or controlled by the party in breach).

### New information gathering powers

The CMA will be able to request from the notifying parties the attendance of witnesses and the production of documents at all stages of the merger control investigation; from before the Phase I statutory timetable starts to the implementation and monitoring of remedies at the end of a Phase II investigation. Under the current regime, these powers are available only to the CC during the course of Phase II investigations.

The CMA will be able to fine a party if it fails to comply with an information request notice without a reasonable excuse. The CMA will determine the amount of the fine, which may be fixed (up to £30,000) or a daily penalty of up to £15,000.

### Higher filing fees

Filing fees will be significantly higher under the new regime, particularly due to the introduction of a new highest band where the UK turnover of the target exceeds £120 million, in which case the filing fee will be £160,000 (an increase of £70,000). Other bands will also see an increase, with the lowest filing fee being £40,000 (an increase of £10,000).

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