



JONES DAY  
**COMMENTARY**

## THE UK'S NEW MARKET STUDIES AND MARKET INVESTIGATIONS REGIME

Following our *Commentary* titled “[The UK’s New Competition and Markets Authority: Reform of the UK Merger Control Regime](#),” which discusses the main changes to UK merger control, this *Commentary* addresses changes brought by the UK’s new competition enforcement regime to market studies and investigations. These studies and investigations are a powerful tool available to UK competition regulators to examine markets they believe may not function sufficiently well—even if there is no evidence of unlawful conduct—and to demand wide-ranging changes to how those markets operate, including requiring companies to divest parts of their businesses. Markets that are currently the subject of such investigations include private health care, cement/ready-mix concrete/aggregates, and statutory audit services.

Detailed guidance as to the new UK market studies and investigations process is set out in the Competition and Markets Authority (“CMA”)’s [Markets Studies and Market Investigations: Supplemental guidance on the CMA’s approach](#) (“Guidance”). The

Guidance explains the changes introduced to the markets regime by the reform.

The new regime introduces shortened time limits, new types of references, and wider powers for the CMA. This *Commentary* summarizes the main changes, which are effective from April 1.

### WHO WILL BE RESPONSIBLE FOR MARKET STUDIES AND INVESTIGATIONS?

Market studies and market investigations enable the competition authorities to examine any market in the UK, assess whether there are obstacles to competition functioning well in those markets, and propose actions (often wide-ranging, including business divestments) to address any such obstacles. Under the current regime, the Office of Fair Trading (“OFT”) (and sectoral regulators, such as Ofgem) carries out market studies and can refer markets to the Competition Commission (“CC”) for a market investigation. During market investigations, which are more detailed examinations into

particular markets, the CC must decide whether there is an adverse effect on competition in the markets in question and, if so, what remedial action is appropriate.

In the future, the CMA will take over the OFT's role in respect of market studies (Phase 1) as well as the CC's role in respect of market investigations (Phase 2). Sectoral regulators—such as Ofcom (communications), Ofgem (gas and electricity), and Monitor (health)—will continue to be able to ask a separate body to carry out an in-depth investigation into particular markets (that body used to be the CC and is now the CMA), and indeed **Ofgem has recently proposed** doing so in respect of the UK energy market.

The new regime has put safeguards in place to take account of the fact that the CMA will be responsible for the conduct of both phases. The decision to make a market investigation reference will be taken by the CMA board. The CMA chair then will be responsible for constituting the market reference group that will undertake the market investigation. The market reference group will consist of at least three members selected from the CMA panel. To guard against potential bias during the market investigation, the CMA chair will ensure that any board member who might reasonably be expected to be a member of a market reference group in the event of a referral does not participate in the board's consideration of whether to refer the matter.

## NEW STATUTORY TIME LIMITS

The new regime introduces new statutory time limits aimed at speeding up market studies and investigations.

### Market Studies

Under the current regime, the duration of market studies varied greatly, from a few months to more than a year (for example, the study of private health care).

Market studies will from April 1 have to be commenced by a market study notice, the issuing of which will trigger the following statutory time limits:

- The CMA will have six months from the publication of the market study notice to announce its proposed decision whether or not to make a reference and to start a consultation on that proposal.
- Within 12 months from the publication of the market study notice (i.e., within one year of commencing the market study), the CMA must publish its market study report setting out its findings and the action (if any) it proposes to take (make a reference, not make a reference, accept undertakings in lieu of a reference).

### Market Investigations

The time limit to conclude a market investigation has been reduced from the current 24 months to 18 months from the date of reference. This will result in a reduction in the length of market investigations since in practice, under the current regime, the CC has tended to use the full 24-month time limit. Although the CMA will be able to extend this 18-month period by up to a further six months if it considers that there are special reasons, we anticipate that this power will be narrowly interpreted, so that a de facto two-year time limit does not develop in practice.

Following the date of the market investigation report, the CMA will have six months (extendable by an additional four months for special reasons) to either accept final undertakings in lieu or make a final order. This six-month period includes a period of public consultation.

Those new statutory time limits should make market studies and investigations faster and provide greater transparency to parties. However:

- These new time limits are triggered by the issue of a market study notice only. The CMA will not be bound by them for pre-market studies such as “calls for information.” In such cases, and in order to ensure that the pre-market study phases do not undermine the government's objective of streamlining the markets regime through the introduction of statutory time limits, the CMA has committed to provide an indicative timetable.

- The CMA will have the ability to “stop the clock” if it considers that any person has failed (whether with or without reasonable excuse) to comply with any requirement of a notice issued by the CMA using its statutory investigatory powers (see below). However, as noted below, to dissuade parties from willfully delaying proceedings, the CMA will be able to impose significant fines for noncompliance.

The reform introduces two new types of market investigation references.

**Cross Market Investigations.** Under the current regime, the OFT already had the ability to conduct Phase 1 market studies to investigate anticompetitive features across markets. The new regime gives the CMA the power to make a cross-market reference, that is, to refer a specific feature (or combination of features) existing in more than one market without also having to refer the whole of each market concerned.

**Full Public Interest References.** The CMA will now be able to investigate public interest issues alongside competition issues during a Phase 2 investigation, pursuant to a request from the Secretary of State (“full public interest reference”). The possibility that exists under the current regime for the Secretary of State to consider public interest issues him/herself while requesting the CMA to investigate the competition issues remains (so-called “restricted public interest reference”). National security is currently the only specified public interest consideration in relation to the markets regime, but the Secretary of State may introduce new public interest considerations.

## POWERS OF INVESTIGATION AND SANCTIONS

The publication of a market study notice will also trigger the CMA’s ability to exercise statutory investigatory powers.

### Investigative Powers Available at an Early Stage

The CMA will be able to require any person to give evidence and produce documents. These powers will be available to the CMA as early as the market study stage, after the publication of the market study notice. Under the current regime, the OFT could only use such investigative powers when it

believed it had the power to make a market investigation reference, i.e., when it had reasonable grounds for suspecting that any feature of a market prevents, restricts, or distorts competition. The CC already had similar powers in market investigation references.

Such powers will also be available to the CMA to assist it in monitoring and enforcing compliance with any undertakings in lieu that it has accepted instead of making a reference, during market investigations and during the remedies implementation stage.

### Administrative Penalties

The CMA will have the power to impose financial penalties if it considers that a person has, without reasonable excuse, failed to comply with any of its requirements or intentionally obstructed or delayed another person in complying. Noncompliance includes failures to attend interviews or meetings with the CMA, failure to provide evidence, and failure to produce documents required by the CMA under its investigative powers.

Administrative penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts are set by order and will be, as at April 1, £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily penalty).

### Criminal Proceedings

In addition to administrative penalties, the CMA will have the power to bring criminal proceedings where a person (i) obstructs the CMA in the exercise of its powers to carry out inspections, (ii) intentionally or recklessly destroys or otherwise disposes of, falsifies, or conceals a document that he or she has been required to produce, or (iii) knowingly or recklessly provides false or misleading information to the CMA or another person in connection with the investigation.

Where a failure to comply with a request from the CMA consists of both a failure warranting an administrative penalty and a criminal offense, the CMA will have to choose either to impose a financial penalty or to bring criminal proceedings against the person involved; it cannot take both steps.

## Interim Measures

After the CMA has published its final report but before the reference has been finally determined (by final undertakings being accepted or a final order made), the CMA will have the power to make interim orders to prevent pre-emptive action that might impede the taking of final action in relation to the investigation.

The CMA will be able to require parties to reverse any action that has already occurred before any interim measures have been put in place.

## TRANSITIONAL ARRANGEMENTS

Two market studies—SME banking and property management services—still will be ongoing on April 1 and will be completed by the CMA. The new regime will apply to those two studies, except in respect of the statutory time limits and investigative powers, which remain subject to the old regime.

Several market investigations may also still be ongoing before the CC on April 1: payday lending, private motor insurance, privately funded health care, and cement and ready-mix concrete. The new regime will apply to them, except for the statutory time limits for completion of the market investigation process and for the completion of the remedies implementation. The revised maximum penalty amounts for noncompliance with investigatory powers will not apply where investigatory powers were exercised prior to April 1.

## CONCLUSION—IMPLICATIONS FOR BUSINESSES

The new regime should result in market studies and investigations being concluded more quickly than in the past—although this will depend on the CMA's use of its ability to “stop the clock.” The first market likely to be investigated by the CMA is the UK energy market. Upon hearing news of Ofgem's intention to refer that market to the CMA for an in-depth investigation (see above), some of the UK's leading energy providers noted that the uncertainty about the outcome of such an investigation (which is likely to last 18

months), in particular as regards whether companies may be forced to restructure or sell off parts of their businesses, may delay projects to build much-needed new electricity generation capacity in the UK. The CMA will therefore be under the spotlight from the outset and under pressure to show that the new regime will provide for a more efficient and effective market investigation process than has sometimes transpired in the past.

It is expected that the CMA will make use of its new investigative enforcement powers, especially since they will now be available as soon as a market study notice is published. Companies under investigation should therefore be mindful to comply with requests from the CMA from the outset of an investigation.

The new rules are unlikely to have a material impact on ongoing studies or investigations, since the main changes brought by the regime—statutory time limits and investigative powers in Phase 1—will not apply.

As described in our initial [Alert](#) on the changes to the UK competition law regime, we will issue further *Commentaries* in the coming days covering these developments.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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