

**Memorandum of Understanding between the Office of Fair Trading and the Competition Commission on the variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Enterprise Act 2002**

**Version 2  
10 March 2011**

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**Background and statutory roles**

1. Undertakings and orders are the primary means by which remedies are given effect following the determination of merger and market investigation references under the Enterprise Act 2002 (the Act), as they were for merger and monopoly references under the Fair Trading Act 1973 (FTA). Under the Act, undertakings are accepted or orders imposed by the Competition Commission (CC).<sup>1,2</sup>
2. The Office of Fair Trading (OFT) has a statutory duty<sup>3</sup> to keep under review undertakings and orders under the FTA and the Act. From time to time, the OFT must consider whether, by reason of any change of circumstances, the set of

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<sup>1</sup>Under the FTA the Secretary of State accepted undertakings or imposed orders to remedy the adverse effects identified during a reference. Under the Act the Secretary of State is responsible for accepting undertakings or imposing orders in certain public interest cases. This Memorandum of Understanding (MoU) does not relate to the process by which the OFT provides advice to the Secretary of State in these instances.

<sup>2</sup>Under the Act, where the conditions for a reference are met, the OFT may accept binding undertakings as an alternative to making a reference. Such undertakings (undertakings in lieu of reference) are not dealt with further in this MoU.

<sup>3</sup>Under sections 92(1),(2) and (3) and 162 (1), (2) and (3) of the Act; sections 88(4) and (5) of the FTA (as preserved in schedule 24 of the Act).

undertakings or order is no longer appropriate and needs to be varied or terminated<sup>4</sup> and give the CC such advice as it considers appropriate.<sup>5</sup>

3. Responsibility for deciding on variation or termination of undertakings or orders lies with the CC in all but a very limited number of undertakings and orders.<sup>6</sup>

### **Aims and scope of this Memorandum of Understanding**

4. This MoU has been agreed in recognition that the OFT and the CC have interlinked, albeit distinct, statutory roles in relation to the variation and termination of undertakings and orders. Its aims are to:
  - promote effective cooperation between the OFT and the CC in the consideration of variation and termination of undertakings and orders by establishing a clear framework for interaction and understanding of the processes to be followed;<sup>7</sup> and
  - ensure that the process for the variation and termination of undertakings and orders is communicated effectively to stakeholders to aid transparency.
5. This MoU relates to the consideration of variation and termination of undertakings and orders, and does not cover other areas of OFT and CC interaction. It applies to monopoly, market and merger undertakings and orders under both the FTA and the Act, unless stated otherwise.
6. This MoU updates Version 1, issued in February 2009.<sup>8</sup>

### **The roles of the OFT and the CC in considering variation and termination of undertakings and orders**

7. In considering variation and termination of undertakings and orders, the OFT will consider whether there has been a change of circumstances. If there has, the OFT may then consider what action should be taken. The precise nature of the change of circumstances will entirely depend on the individual circumstances affecting a particular undertaking or order. However, if it is to lead to advice to the CC to vary or terminate, the change of circumstances must be such that the undertaking or order is no longer appropriate in dealing with the adverse effects which it was designed to remedy. This might be, for example, where market circumstances have evolved such that the adverse effects which the undertaking or order was designed to address no longer exist or where a party that is party to the undertaking or subject to the order has ceased to exist or ceased to own the relevant business.
8. The CC will take its decision on variation and termination of undertakings and orders in the light of the OFT's advice and any analysis it has undertaken.<sup>9</sup>

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<sup>4</sup>Variation and termination has been used as shorthand throughout this document. The statutory language in sections 92(2) and 162(2) of the Act refers to the release, variation or superseding of undertakings; and the variation or revocation of orders.

<sup>5</sup>In a small number of instances the OFT retains a duty to advise the Secretary of State on FTA orders and undertakings which have not been transferred from the Secretary of State to the CC by statutory instrument. This MoU does not relate to the process by which the OFT provides advice to the Secretary of State in these instances.

<sup>6</sup>Such as in public interest cases (see footnote 1) or FTA orders and undertakings which have not been transferred to the CC (see footnote 5).

<sup>7</sup>The statutory roles of the OFT and the CC are set out in the relevant Acts. This MoU aims to define more closely the practical aspects of the working relationship between these two bodies.

<sup>8</sup>This MoU is without prejudice to any institutional reform measures relating to the CC and the OFT.

<sup>9</sup>In the case of orders under the Act, the CC cannot vary or revoke an order unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances (sections 83(6), 84(4), 160(6) and 161(5) of the Act).

## Reviews of undertakings and orders

9. There is a wide range of changes of circumstances that might be identified by the OFT. These may include, for example, undertakings or orders that have time-expired or clearly become obsolete; undertakings or orders that are affected by new legislation; and undertakings or orders that may no longer be appropriate given changes in market conditions. The CC's and OFT's experience of reviews of undertakings and orders suggests that the complexity of analysis required varies significantly depending on the change of circumstances identified. In some cases, there may be a complex change of circumstances necessitating a complex variation to the undertakings or order; in other cases, both the change of circumstances and variation or termination may be straightforward.
10. The process of review of undertakings and orders at the OFT and then at the CC is described below. This section sets out:
  - (a) the ways in which a review may be initiated;
  - (b) the OFT's advice to the CC;
  - (c) the CC's process, including its assessment; timescale; provisional and final decisions and the implementation of any variation or termination both in complex and less complex cases; and the conclusion of a review; and
  - (d) the streamlined procedure for dealing with undertakings or orders that are time-expired or obsolete.

### ***The ways in which a review may be initiated***

11. Parties who have given undertakings or who are subject to orders are entitled to request that such measures be varied or terminated by reason of a change of circumstances. Such parties should submit their application to the OFT. This is because, although the CC is the decision-maker, it takes its decision in the light of advice from the OFT. Where parties submit their application to the OFT, without first advising the CC, the OFT will notify the CC of the receipt of the application. If the CC receives applications directly, it will forward them as soon as practicable to the OFT to consider. On receiving an application for a variation or termination of an undertaking or an order, the OFT will assess the application and decide whether a review should take place at a particular point in time. In doing so it will generally act in accordance with its published Prioritisation Principles.<sup>10</sup>
12. Where appropriate, the OFT may publish information about an application for review. The form of publication and extent of detail will depend on the circumstances of the case. This could range from publication of the non-confidential elements of the application itself, to a statement confirming that the OFT is conducting a review.
13. The OFT is also able to begin a review on its own initiative, without any party having made an application. In deciding whether to initiate a review in this way, the OFT will generally act in accordance with its published Prioritisation Principles. This may mean that the OFT will not necessarily be able to initiate reviews within time frames recommended in advance (eg in CC reports).

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<sup>10</sup>Further details on the OFT Prioritisation Principles can be found at: [www.of.gov.uk/advice\\_and\\_resources/publications/corporate/general/of953](http://www.of.gov.uk/advice_and_resources/publications/corporate/general/of953). Chapter 3 of the OFT Prioritisation Principles states that 'The OFT generally prioritises its work according to the principles. Where appropriate, the OFT may also take account of other relevant factors. All relevant principles will be balanced in the round'.

14. The OFT will keep the CC apprised of any reviews it expects to conduct and will provide information to the CC on applications for variation or termination that it has received. The OFT will inform the CC as soon as practicable of its intention to commence a review, either as a result of an application or on its own initiative. The OFT will also inform the CC as soon as possible of any intention not to commence a review that the CC had expected at a particular point in time (eg because a review within a particular timescale had been recommended in a CC report).

### ***The OFT's advice to the CC***

15. At the start of most market and monopoly reviews of undertakings and orders the OFT and the CC will meet to discuss the OFT's intended approach to the review, the scope of the review and any other relevant issues.<sup>11</sup> Such an initial meeting may also be appropriate in complex merger reviews.
16. During the course of a review the OFT will keep the CC informed on a regular basis about its progress. The level of interaction between the OFT and the CC during the course of a review will depend on the complexity of the issues raised in any individual review.
17. In conducting its review, the OFT will seek to ensure a sound evidential basis for the change of circumstances it has identified. In most cases, the OFT will not replicate the depth of the analysis completed as part of a market investigation or merger reference (although specific features of the analysis completed during the reference may be replicated). This reflects the OFT's role in reviewing the continued appropriateness of an undertaking or order, rather than the CC's more comprehensive consideration in its merger and market investigations of the impact of a merger or the operation of a particular market. The precise nature of the analysis conducted in any individual review will depend on the individual circumstances of the market or merger concerned.<sup>12</sup>
18. Where a review takes place following an application by the parties subject to the remedy, the OFT's review is not confined to either approval or denial of the application. If the OFT thinks it appropriate to provide advice outside the scope of the application it can advise that the CC take action not envisaged in the application. For example, an application for release from undertakings might lead the OFT to advise that the CC vary or retain rather than terminate them.
19. Where a remedy under review relates to a regulated sector, and especially where a sectoral regulator has a role in monitoring compliance with the remedy, the OFT will liaise with the relevant sectoral regulator as appropriate. In relation to merger undertakings or orders or in other cases where sectoral regulators do not have concurrent powers of review, the relevant sectoral regulator may make a submission to the OFT on the matter.
20. In advance of the OFT submitting its advice to the CC, the OFT will provide the CC with information on its proposed conclusion. This may be in the form of a draft version of the advice. This information will be used as the basis of a discussion between the OFT and the CC, which shall take place at an appropriate point in time

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<sup>11</sup>In the case of some smaller reviews of orders and undertakings the OFT and the CC may agree that such an initial meeting may not be necessary.

<sup>12</sup>It is likely, for example, that in the case of orders and undertakings where the change of circumstances and its impact on the continued appropriateness of the order and undertaking is clear cut (such as the exit from the market of a signatory to an undertaking or the transformation of market circumstances since the reference) the depth of analysis conducted is likely to be less than that conducted where the issues are more complex.

to enable the OFT to consider any comments which the CC raises on the OFT's proposed conclusion, or the evidence and analysis which provides the basis of the conclusion.

21. A review by the OFT may lead to a number of alternative outcomes, including:
  - (a) If the OFT finds that a change of circumstances has occurred by reason of which variation or termination is appropriate, it will provide advice to the CC. Where the OFT's review commenced following an application for review, the OFT's advice to the CC will be accompanied by the original application. The OFT will also forward to the CC any further submissions from the applicants as well as any third parties' comments it has received.
  - (b) If the OFT finds either that there has not been a change of circumstances or that a change of circumstances has occurred but that variation or termination is not justified, it will inform the CC and provide its reasoning, but will generally not provide formal advice to the CC.
22. The OFT may publish its advice on its website following the submission of that advice to the CC. In some cases this may not be appropriate, in which case the OFT will normally publish its advice on its website to coincide with the publication of the CC's provisional decision. A non-exhaustive list of circumstances in which publication of the OFT's advice may be appropriate at this later date includes:
  - where the early publication of the OFT's advice is likely to lead to a change of behaviour in the relevant market(s) which could be damaging to consumers; and
  - where the OFT's advice includes commercially sensitive material which cannot satisfactorily be redacted from its advice.
23. Where the OFT has carried out a review of undertakings or orders under section 162 of the Act, and as part of that review has considered making a market investigation reference to the CC under section 131 of the Act, it may publish its advice for consultation in advance of providing it to the CC. This will be the case whether or not the OFT has decided to make a market investigation reference.
24. Where applications have been made to the OFT for a variation or termination, the OFT will inform the main parties involved in the review that it has submitted its advice to the CC and will provide these parties with an appropriate contact at the CC.<sup>13</sup> Following submission of its advice, the OFT will refer any procedural questions raised by parties regarding the decision-making process to the CC.

### ***The CC's process***

25. The CC's process of reviewing undertakings or an order begins when it receives the OFT's advice and, where applicable, the original application and any submissions made by any relevant party.
26. The CC will initially decide who will be the 'relevant group' to conduct the review. The 'relevant group' will be either the CC's Remedies Standing Group<sup>14</sup> or a group

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<sup>13</sup>This will typically include the parties which are subject to an undertaking or an order.

<sup>14</sup>More information about the Remedies Standing Group can be found at:  
[www.competition-commission.org.uk/about\\_us/our\\_organisation/workstreams/remedies.htm](http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/remedies.htm).

specifically appointed by the Chairman of the CC to be responsible for the conduct of a particular case. The relevant group will be advised by CC staff.

### *Timescale*

27. Once the relevant group has been appointed, it will decide upon an appropriate timetable for the review. The timetable will initially be informed by the CC's assessment of whether the OFT's advice and any supporting documentation are sufficient to allow it to reach a provisional decision (see paragraph 30).
28. The OFT and the CC will endeavour to conduct their reviews as efficiently as possible. However, the time taken to conduct a review will vary depending on the complexity of the issues involved, the available resources at the time and the extent to which parties engage in a timely manner.
29. Publication on the CC's website of the CC's administrative timetable for the review will assist in providing an indication of the expected time frame for the CC's review. The administrative timetable will set out what documents the CC expects to publish and when. The administrative timetable may be revised during the course of the review.

### *The CC's assessment*

30. As part of the CC's assessment it will first consider whether the OFT's advice and any supporting documentation are sufficient to allow it to reach a provisional decision:
  - (a) If the CC considers that the OFT's advice contains sufficient analysis and information, it will provisionally decide whether as a result of that analysis and information the undertakings or order should be varied or terminated, and if so, how (see paragraphs 33 to 43 for the process thereafter).
  - (b) If the CC finds that further information and/or analysis is necessary before it can reach a decision, it will consider what steps should be undertaken and how the further information and/or analysis required affects the timetable for the review.
31. Where the CC has identified the need for further information and/or analysis, it may invite or request submissions from either those parties subject to the undertakings or order or interested third parties. In certain circumstances, particularly complex reviews, the CC may consider it necessary to hold a hearing with relevant parties. Parties should not resubmit evidence or restate arguments that have already been submitted to the OFT. Any representations to the CC regarding circumstances arising after the OFT's report should be made in writing.
32. During the period of assessment by the CC, OFT staff involved in the production of the OFT's advice will be available to meet with the CC<sup>15</sup> to explain the reasoning and analysis underlying the advice. The OFT will also provide to the CC such further information as the CC may request and which is readily available to the OFT. The CC will keep the OFT apprised of its progress during its review.

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<sup>15</sup>Such meetings may not be appropriate in the case of smaller reviews of orders and undertakings, where the issues are clear cut.

## *Provisional and final decisions*

33. The number and scope of documents published during the course of the CC's review will depend upon the complexity of the review.

### *Complex reviews*

- *Provisional decision*

34. Once the CC has gathered sufficient information and completed its analysis, the relevant group will make a provisional decision which will be published for consultation on the CC's website. The consultation allows interested parties to comment on the CC's provisional decision. The consultation period will depend on the circumstances of the case but will usually be two to three weeks.
35. In complex reviews the CC's provisional decision will state what decision the CC proposes to take and the reasons underpinning it. It will also usually contain sufficient detail on the nature and scope of any proposed variations to provide a firm basis for subsequent implementation. If appropriate, for example where the CC has followed the OFT's advice, these reasons may be expressed by reference to the OFT's advice.
36. In complex cases where the proposed outcome is to vary the undertakings or order, the precise nature of the variation may not have been decided upon at the time of making the provisional decision.
- (a) There may be some circumstances in which the party or parties subject to the undertakings or order have not engaged in discussion of possible variations prior to the publication of the CC's provisional decision. In these circumstances, the CC may consider it appropriate to consult on a range of possible variations and will publish a notice of possible variations at the same time as its provisional decision.<sup>16</sup> The notice of possible variations will set out those variations which the CC is considering given the change of circumstances identified. The CC will consider variations proposed by parties as well as its own proposals. Parties will be expected to demonstrate that their proposed variations will effectively address the competition problem and its adverse effects. If necessary, the CC may set out a time limit within which any proposed variations must be submitted.
- (b) There may be other circumstances where the CC has provisionally decided upon the substance of the variation but wants to seek views on the proposed variation prior to drafting the text of revised undertakings or a revised order. In these circumstances the CC may consider it appropriate to consult on the substance of its proposed variation before drafting the text of revised undertakings or a revised order.<sup>17</sup> A notice of intention to vary the undertakings or order (with the accompanying text of the revised undertakings or revised order) will be given later in the review process (see paragraph 40). The CC will seek the OFT's views on any amendments to the text of the undertakings or order during its review.
37. The CC will consider any responses it receives to the public consultation of its provisional decision. The CC may wish to put points raised during the consultation process to the OFT for comment. This may occur, for example, where the OFT is able to provide views on the effectiveness of possible variations.

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<sup>16</sup>This process was adopted, for example, in the review of ITV's Contracts Rights Renewal undertakings.

<sup>17</sup>This process was adopted, for example, in the review of the Northern Ireland PCA Banking Market Investigation Order.

38. Following consultation, if the CC materially changes its provisional decision, it will reach a revised provisional decision, which it will publish for further consultation.
- *Final decision*
39. After careful consideration of any comments received during the consultation period, the CC will publish its final decision and the reasons for it. This will include the CC's response to any material points received during the consultation.
- *Implementation of any variation or termination*
40. At the same time as the CC's final decision or as soon as possible thereafter, the CC will give notice of intention to vary or terminate the undertakings or order. Such notice shall be given in accordance with the procedural requirements set out in Schedule 10 to the Act. Changes to undertakings will be consulted upon for a minimum of 15 days and changes to an order will be consulted upon for a minimum of 30 days.
41. The CC will have regard to any representations made in response to the notice and may make modifications to the proposed revised undertakings or order as a result. If the CC considers that any representation necessitates material change to the proposed revised undertakings or order, it will give notice of the proposed modifications.
42. In the absence of any written representations, or in the event that the CC decides on consideration of representations made not to amend materially the revised undertakings or order, it will accept the revised undertakings or make the revised order. Similarly, in the absence of any written representations to a notice of intention to terminate, the CC will proceed with releasing the undertakings or revoking the order.

#### *Less complex reviews*

43. In less complex reviews, the termination or precise nature of the variation may have been decided upon at the time of making the provisional decision. In these circumstances the CC may be in a position to draft the text of revised undertakings or a revised order at the same time as its provisional decision. The CC may therefore decide to set out its provisional decision and reasoning as part of a notice of intention to vary or terminate the undertakings or order.<sup>18</sup> Such a notice will normally be given in accordance with the procedural requirements set out in Schedule 10 to the Act (see paragraphs 40 to 42).

#### *Conclusion of a review*

44. If a separate group has been appointed it will normally be disbanded following the conclusion of the CC's review.<sup>19</sup>
45. When the CC gives notice of varying or terminating undertakings or an order, the OFT will make any appropriate amendment to its register of orders and undertakings. The OFT is responsible for monitoring and enforcing any remedies that remain in force, except where specifically indicated otherwise.

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<sup>18</sup>This process was adopted, for example, in the reviews of the Store cards and Home credit market investigation orders.

<sup>19</sup>The CC's Remedies Standing Group is a permanent group. See footnote 14.

### ***Streamlined procedure where undertakings or orders are time-expired or obsolete***

46. There may be cases in which undertakings or orders are time-expired. For example, where undertakings or an order contain within them a time period for their application which has ended or where undertakings or orders contained an expiry date which has passed.
47. In the case of such time-expired undertakings or orders, the OFT will advise the CC at the time of the expiry and remove these from its register of orders and undertakings. This will not constitute advice to the CC under sections 92(3) or 162(3) of the Act.
48. There may also be cases in which undertakings or an order have become obsolete. This might be the case where the subject of or basis for the undertakings or order has ceased to exist, for example where the product subject to a remedy is no longer produced.
49. In cases where it considers undertakings or an order have clearly become obsolete, the OFT will advise the CC of the relevant change of circumstances in a short letter which will include a clear exposition of the relevant evidence of the change. This will constitute advice to the CC under sections 92(3) or 162(3) of the Act, or sections 88(4) or 88(5) of the FTA.<sup>20</sup> The CC will then make its decision in light of this advice without necessarily conducting any evidence gathering or analysis of its own.
50. The streamlined procedure will not be used where the OFT is recommending the continuation or alteration (as opposed to the removal) of undertakings or an order in whole or in part.

### **Contact beyond specific reviews**

51. In addition to the discussions between the OFT and the CC in relation to specific individual reviews, CC and OFT staff primarily responsible for merger, monopoly and market remedies will meet on a regular basis to discuss issues relating to remedies generally. To the extent that policy issues arise in relation to variation and termination of orders and undertakings they may be discussed in such forums.

### **Revisions to this Memorandum of Understanding**

52. This MoU may be revised by agreement of the OFT and the CC at any time. If this MoU is revised a new version will be published on the OFT and CC websites. Any comments on this MoU should be submitted to:

Graeme Reynolds  
Director of Remedies and Business Analysis  
Competition Commission  
Victoria House, Southampton Row, London WC1B 4AD

Grahame Horgan  
Assistant Director, Markets Policy and Remedies  
Office of Fair Trading  
Fleetbank House, 2–6 Salisbury Square, London EC4Y 8JX

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<sup>20</sup>As carried on in force by paragraph 14(1) of Schedule 24 to the Act.