

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: the Competition and Markets Authority and Part 4: Competition Reform

Part 4: Competition Reform

Chapter 2: Markets

Investigatory powers

Section 36: Investigation powers: markets

280. Currently under the EA 2002 the OFT has powers to require persons to give evidence and provide specific documents and information, but can only require information where it already believes it has power to make a market investigation reference. This criterion prevents the OFT requiring the information during the early stages of a market study. The introduction of statutory time limits for market studies and implementation of remedies will mean that the CMA will require appropriate investigatory powers throughout the entire markets process.
281. This section extends the CC's existing investigatory powers so that the CMA will have a single set of powers that can be used consistently across the whole of the end to end markets process.
282. *Subsection (2)* amends section 174 of the EA 2002 to set out the range of permitted purposes for which the CMA can use the information gathering powers. These are: assisting the CMA in undertaking a market study (amended 174(1)(a)); assisting the CMA in carrying out any functions relating to a case which the CMA or Secretary of State is either considering referring, including any period of considering UILs, or where a reference has been made i.e. to assist the CMA during the market investigation (amended 174(1)(b)). Amended 174(1)(c) enables the CMA or the Secretary of State to use the powers to assist in any functions relating to a restricted or full PI reference, including any period considering UILs instead of any PI reference.
283. New subsections (1)(b) and (c) of section 174 also enable the CMA, or the Secretary of State where relevant, to exercise the investigatory powers during any period of monitoring and enforcement relating to any remedies implemented either following a market investigation, or UILs implemented instead of a reference. New subsection (9A) of section 174 sets out the enforcement functions that are covered by these powers.
284. The CMA will not be able to use these investigation powers before publishing a market study notice. It will not be able to use the powers in relation to its other functions under section 5, if these are not a market study and no market study notice has been published.

*These notes refer to the Enterprise and Regulatory Reform Act
2013 (c.24) which received Royal Assent on 25 April 2013*

285. The CC's existing investigatory powers set out in section 176 of the EA 2002 will be repealed and replaced with these amendments to section 174 of the EA 2002 to provide harmonised information gathering powers across the markets process.
286. A similar extension of investigatory powers will operate in mergers inquiries (see section 29).

Schedule 11: Investigatory powers: markets

287. This Schedule makes provision for the enforcement of investigatory powers under section 174 of the EA 2002. The intention is to align the enforcement of information gathering powers relating to the markets process with those relating to the mergers process.
288. Under existing section 175 of the EA 2002 failure to comply with an information request from the OFT in relation to a potential market reference is a criminal offence. This differs to civil penalties that apply in failing to comply with a CC information request relating to either mergers (section 109) or markets (section 176) inquiries.
289. [Paragraph 3](#) of the Schedule repeals section 175 of the EA 2002 so that failure to comply with a section 174 request will no longer be a criminal offence. However, paragraph 1 of the Schedule extends the existing civil enforcement for Phase 2 requests so that financial penalties can be imposed if there is a failure to comply with investigatory requests at any stage of the markets process. This aligns the civil enforcement and penalties across mergers and markets processes.
290. The level of penalty imposed is described in new 174D, set out in paragraph 1 of Schedule 11.
291. Penalties for non-compliance can continue to be imposed up to 4 weeks after the investigatory powers cease to be exercisable for the purpose for which, in that case, they were exercised.
292. Under the existing section 176(1)(b) (markets) and section 110(5) (mergers) of the EA 2002 it is a criminal offence to intentionally alter, suppress or destroy any document which is required to be produced as a result of information gathering powers for Phase 2 investigations (mergers and markets). Paragraph 4 of the Schedule repeals section 176 of the EA 2002, and paragraph 1 replaces it, mirroring the provisions set out in section 110 of the EA 2002. The result is that the application of the criminal offence described here is consistent with the extended investigatory powers and will apply to the end to end markets process.