

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

Summary and Background

251. The main provisions of this Chapter provide for:
- giving the CMA the power to carry out an investigation into practices across more than one market;
 - giving the Secretary of State the power to request the CMA to investigate public interest issues alongside competition issues as part of market investigations;
 - introducing and, in some cases, reducing statutory time limits and harmonising information gathering powers for all stages of the markets process;
 - removing the OFT's current duty to consult on decisions not to make a market investigation reference, except where there has been a request for a reference to be made during a market study; and
 - ensuring that the CMA may use interim measures to reverse as well as to prevent pre-emptive action during a market investigation.

Cross-market investigations

Section 33: Power of Competition and Markets Authority to make cross-market references and Section 34: Ministerial power to make cross-market references

252. Currently under the EA 2002 the OFT is able to carry out market studies into features that are common to a number of markets using its section 5 powers. It cannot, however, make a reference to the CC to investigate those features, without also referring the whole of each market concerned. Upon a reference, the CC assesses competition in the market referred, as a whole.
253. These sections amend sections 131 and 132 of the EA 2002 to enable the CMA (section 131), or the appropriate Minister in certain circumstances (section 132), where the feature or features they are concerned about is or are types of conduct (as opposed to structural features), to refer a specific feature, or combination of features, which exist in more than one market to be investigated, without the CMA having to investigate competition across the whole of each of these markets. These changes are intended to

enable a more targeted approach to recurring competition issues, and to provide the ability to investigate conduct which occurs within more than one market or sector, such as, for example, collective licensing of public performances and broadcasting rights in sound recording.

254. [Section 33](#) introduces new definitions for the two different types of reference that will now be possible. The form of reference currently permitted will be termed an ‘ordinary reference’ and the new reference covering a feature common to more than one market will be termed a ‘cross-market reference’.
255. It should be noted that while existing section 131(1) of the EA 2002 refers to features of ‘a market’, in practice this may constitute more than one economic market and is more akin to a description of goods or services. Section 133(1)(c) of the EA 2002 sets out that a reference under section 131 must include a description of the goods or services to which the feature concerned relates (as opposed to a description of the market). The new provisions do not make any change to these arrangements. Rather they provide for a reference of a feature which is common to the supply or acquisition of a number of different goods or services, each of which may, in fact, cover more than one economic market.

Schedule 9: Markets: cross-market references

256. [Schedule 9](#) contains amendments which are consequential to the introduction of a cross-market reference.
257. [Paragraph 2](#) of the Schedule amends section 133 of the EA 2002 to specify the content of a cross-market reference, in particular that this type of reference needs to set out each description of goods and services to which it relates and the feature or features concerned. Consistent with the existing provisions on ordinary references, it also enables a cross-market reference to be framed in such a way as to focus the CMA’s investigation into the effects of the conduct concerned in relation to supplies or acquisitions of goods or services by reference to persons or places.
258. [Paragraphs 3 and 5](#) contain amendments to sections 134 and 141 of the EA 2002 to make provision for the questions which the CMA must answer following a cross-market reference (including where such a reference has been made in a public interest intervention case). These questions are consistent with those the CMA must answer in relation to an ordinary reference, save that the CMA must limit itself to considering whether the feature identified in the cross-market reference, or any combination of the features identified, prevents, restricts or distorts competition, rather than (in the case of an ordinary reference) considering whether ‘any’ feature or combination of features prevents, restricts or distorts competition.
259. [Paragraph 8](#) contains amendments to section 156 of the EA 2002. Section 156 currently prevents (what will now be known as) an ordinary reference being made where UILs have already been accepted by the OFT in relation to the same goods or services in the past 12 months. The amendments to section 156(1) set out in paragraph 8 clarify that, where UILs have been accepted in lieu of an ordinary reference in relation to goods of a particular description, no reference can be made relating to any feature relating to those goods in the following 12 months. So, for example, if UILs are accepted in lieu of an ordinary reference relating to feature A in market Z, then no ordinary reference can be made relating to any features (e.g. A, B or C) in relation to market Z in the following 12 months.
260. New subsection (A1) of section 156 provides for the following:
- i). where UILs have been accepted instead of a cross-market reference being made in relation to feature A in market Z, no ordinary reference can be made in the next 12 months relating to feature A in market Z;

- ii). where UILs have been accepted instead of a cross-market reference being made in relation to feature A in market Z, no cross-market reference can be made in the next 12 months which includes feature A in relation to market Z;
 - iii). where UILs have been accepted instead of an ordinary reference being made in relation to feature A in market Z, no cross-market reference can be made in the next 12 months which includes feature A in relation to market Z.
261. However, these provisions do not prevent cross-market references being made within the 12 months following the acceptance of undertakings relating to another cross-market reference, unless both the feature(s) and goods and/or services to which they relate are the same. So, for instance, if the CMA considers making a cross-market reference in relation to feature A in markets X and Y, but instead accepts UILs which address these issues, the CMA would still be able to make a cross-market reference in relation to feature A in markets P and Q within the next 12 months. Equally the CMA will still be able to make either an ordinary reference of market X or Y (relating to any feature(s) other than feature A), or a cross-market reference in relation to any other features (e.g. B and C) of markets X and/or Y in those 12 months.
262. [Schedule 9](#) also makes a number of other consequential amendments to ensure consistency between the two types of references under Part 4.

Public interest interventions

Section 35: Public interest interventions in markets investigations and Schedule 10: Markets: public interest interventions

263. Under section 139 of the EA 2002 the Secretary of State currently has the power to issue a public interest intervention notice after a market investigation reference has been made to the CC, or when the OFT is considering accepting UILs instead of a reference, when he/she considers a specified public interest consideration is relevant to the case. Following an intervention after a market investigation reference, the CC reports to the Secretary of State on the competition issues and proposed remedies. The Secretary of State must accept the CC's findings in respect of the competition issues. The Secretary of State must decide whether an eligible public interest consideration is relevant to the case and what action should be taken to remedy the competition issue in light of the public interest consideration. The CC currently has no role or powers to investigate and advise on remedies for the public interest issue; its role is limited to assessing competition issues.
264. This section and Schedule give the Secretary of State the power to request the CMA to investigate public interest issues alongside competition issues during a market investigation (Phase 2), and propose remedies which address any adverse effect on competition and any adverse public interest issue. The intention is to bring the public interest markets regime into line with the public interest mergers regime, and to provide a more holistic and expert assessment of the competition and public interest issues together.
265. The changes will not affect the list of specified public considerations under section 153 of the EA 2002 – the only specified public interest consideration will remain national security unless Parliament agrees to other public interest issues being specified in future.
266. Following an intervention on public interest grounds, the Secretary of State will be able to make a reference to the CMA to which the existing regime (restricted public interest (“PI”) reference) or the new regime (full PI reference) will apply. Under the first of these, the CMA must simply investigate the competition issues referred. The Secretary of State will consider the public interest issue. Under the second the CMA must, alongside the competition issues, investigate and report on the public interest issue.

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

267. To enable the CMA to investigate public interest issues alongside competition issues following a full PI reference in the new regime, the section and Schedule provide for a number of other amendments, including regarding the timing of the public interest intervention notice, the procedure for appointment by the Secretary of State and role of public interest experts to advise the CMA, the impact on the investigation and report, and the impact on the Secretary of State's decision-making role. These are explained in more detail below.
268. *Subsection (3)* amends the period in section 139 of the EA 2002 during which the Secretary of State can issue a public interest intervention notice. This will now need to be given during a defined period beginning with a publication of a market study notice, or, where there is no market study notice, during a defined period beginning with the start of the CMA's consultation on making a reference, but before a market investigation reference is made in each case. The intention is to provide sufficient notice to the CMA of the potential public interest issue, and to enable, for example, a public interest expert to be appointed in a timely manner so as not to prolong any market investigation.
269. *Subsection (8)* provides that, where an intervention notice is in force, the CMA must give the market study report or (in a case where there is no market study notice) a document containing its decision about whether a reference is necessary directly to the Secretary of State instead of publishing it. In those circumstances the CMA cannot itself make a reference under section 131 of the EA 2002. The Secretary of State must then decide whether the public interest consideration stated in the intervention notice is relevant to the matter in question and whether to make a restricted PI reference or a full PI reference to the CMA. If the Secretary of State decides to make a full PI reference he/she must also decide whether to appoint a public interest expert to advise the CMA.
270. Following the market study or (in a case where there is no market study notice) the consultation on the making of a reference, if the Secretary of State decides the public interest matter is not relevant, but the CMA has concluded that a reference should be made on competition grounds, then the Secretary of State must still make a market investigation reference which will then follow the normal markets process.
271. New section 141A set out in *subsection (9)* of section 35 sets out the questions that must be determined by the CMA following a full PI reference. In such cases, the CMA must decide whether or not there is any adverse effect on competition and, if so, whether, taking into account the relevant public interest consideration, the feature or features which gave rise to the adverse effect on competition operate(s) against the public interest. If the CMA finds that there is an adverse effect on the public interest the CMA must advise whether any action should be taken by the Secretary of State to remedy the effect on the public interest. If the CMA does not find any adverse effect on the public interest, but finds adverse effects on competition it must decide what competition remedies it or others should undertake.
272. New section 146A (in paragraph 14 of Schedule 10) sets out the decisions that the Secretary of State is required to make where the CMA has prepared a market investigation report in relation to a full PI reference. The CMA will prepare the report as set out above. On receiving the report the Secretary of State must decide whether to make an adverse public interest finding or whether there is no finding at all in the matter. The Secretary of State will make an adverse public interest finding if he/she decides that there is an adverse effect on competition (the Secretary of State must accept the decision of the CMA on this point), there are one or more relevant public interest considerations and, taken together, the feature or features which gave rise to the adverse effect on competition operate or may operate against the public interest.
273. The Secretary of State must make and publish this decision within 90 days from the date he/she receives the CMA's market investigation report.
274. Paragraph 16 of Schedule 10 sets out what action the Secretary of State may take if he/she makes an adverse public interest finding. In these cases the Secretary of State may

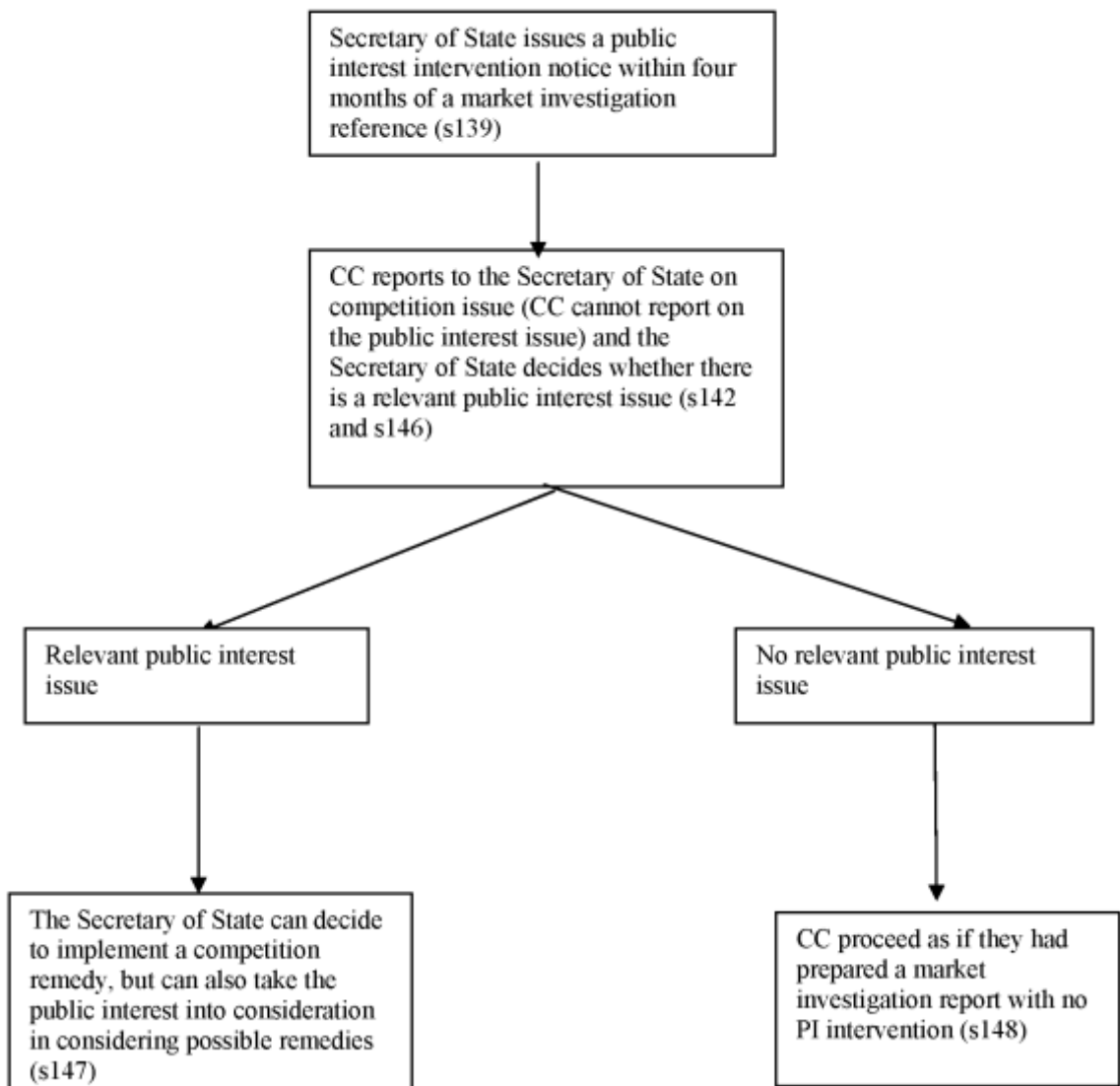
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accept any undertakings or make any orders he/she sees fit to remedy the adverse effects on the public interest. He/she must have regard to the recommendations included in the CMA's report in making any undertakings or orders.

275. Where the Secretary of State makes no finding at all i.e. he/she decides that there is no public interest consideration relevant to the matter, the case will revert to the CMA as if a reference had been made under section 131 of the EA 2002, and it had prepared its report by virtue of section 136 of the EA 2002. New section 148A (in paragraph 18 of Schedule 10) sets out further provisions around how the CMA must proceed in these instances, including where it is necessary to gain the consent of the Secretary of State (for example if he/she believes any remedies to the adverse effect on competition will operate against the public interest).
276. New section 141B set out in subsection (9) of section 35 sets out the role and certain terms of appointment of any public interest expert(s).
277. Where the Secretary of State appoints public interest expert(s), the CMA must take their views into account and include a summary of the views of the expert(s) in its market investigation report.
278. For cases where the Secretary of State appoints public interest expert(s), Schedule 10 (paragraph 11) amends section 144 of the EA 2002 to allow up to 2 months for the expert(s) to be appointed before the 18-month timescale for a market investigation begins. The investigation should therefore begin, and the timescale be triggered, on the date of the appointment of the public interest expert(s) or at the end of 2 months from the date of the reference, whichever is sooner.
279. The Schedule contains further consequential amendments to Part 4 as a result of these changes.

Figure 2 below sets out how the existing and new regimes will work.

How the regime works now



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.
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.

Interim measures

Section 37: Interim measures: pre-emptive action: markets

293. The purpose of this section is to ensure that the CMA's powers to impose interim measures include the power to require parties to take steps to reverse pre-emptive action taken, or to reverse the effects of such action, following a market investigation reference being made. The intent is to prevent parties from taking pre-emptive action which may impede implementation of measures required by the CMA following a market investigation.
294. The section enables the CMA to order actions to be taken which may either restore the position to what it otherwise would have been, or, if this is not possible, to mitigate the effects of the pre-emptive action.
295. *Subsections (2) and (3)* apply to interim undertakings (section 157 of the EA 2002) and *subsections (4) and (5)* to interim orders (section 158 of the EA 2002), so enforcement action can flow from a failure to comply with an interim order or an interim undertaking. The powers only apply to actions taken after the order (or undertaking) has been issued.
296. The powers will also apply in cases where the Secretary of State is the relevant authority, that is, if he/she has made a market investigation reference under the new section 140A in a case where he/she gave a public interest intervention notice.

Time limits and procedure

Section 38: Market studies and market investigations: consultation and time-limits and Schedule 12: Markets: time-limits

297. Under the EA 2002 there are no time limits on the OFT undertaking a market study, or on the CC implementing remedies. There is a 24 month time limit for completion of a market investigation by the CC. This section and Schedule introduce statutory time limits for all stages of the markets process and specify circumstances in which extensions to those time limits are permitted. These are explained in more detail below. The introduction of time limits should be considered together with the extension of investigatory powers through section 36 and Schedule 11, and are also mirrored in a similar way for the mergers regime. Taken together, these sections limit the time period during which parties may be subject to markets work, but give the CMA a strengthened ability to gather information in order that the timescales can be met.
298. New section 130A, set out in paragraph 1 of Schedule 12, introduces a requirement on the CMA to publish a market study notice on commencement of a market study under section 5 of the EA 2002 and to set out the timescales in which that study will be completed, the scope of the study, and the period during which representations may be

made to the CMA in relation to the matter (this is additional to any specific information requests the CMA makes to specific parties which will detail the particular requirements and timescales around which these requests are to be fulfilled). The publication of the market study notice triggers the start of a new statutory time period for completion of the market study, which is set out in new section 131B, in paragraph 2 of the Schedule. Information powers provided for by section 36 and Schedule 11 are triggered when a market study notice is published.

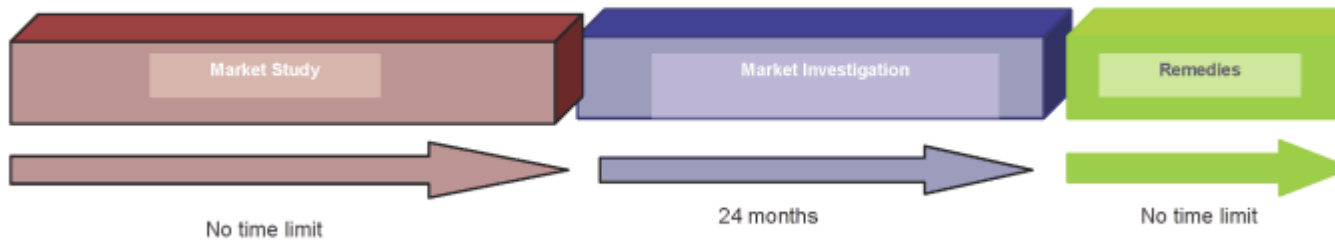
299. It should be noted that the CMA will continue to carry out a wider range of work under section 5 of the EA 2002 than just market studies – for example, economic research and calls for evidence. However, none of these will be termed a market study and will not trigger the market study notice requirement, statutory timeframes or information gathering powers under section 174.
300. Paragraph 2 of the Schedule sets out new section 131A which contains provisions for consulting on whether or not to make a reference. Section 169 of the EA 2002 currently contains a duty on the OFT, CC, and Ministers to consult on ‘relevant decisions’, which include decisions on whether or not to make a market investigation reference. This paragraph varies the duty to consult so that it only applies to proposals to make a reference, or proposals not to make a market investigation reference where third parties request that such a reference be made during the period set out in the market study notice for representations.
301. The intention is to ensure that representations are made in good time to enable the CMA to fully consider them as part of the market study, and to make clear to parties the timetable on which they are expected to make their representations. Where no representations are made during the specified period requesting that a reference be made, the CMA must, if it decides not to make a reference, publish its decision within 6 months of the market study notice being published, and it is not required to consult on this decision (see section 131B(2) and (3)).
302. Where the CMA is required to consult on its proposed decision around whether to make a reference or not, the new timescales state that it must publish its proposal within 6 months of a market study notice being published. At the same time it must also initiate a consultation on this proposed decision, although it is not required to complete this consultation within the 6 month period.
303. New section 131B requires the CMA to publish a market study report setting out its findings and actions (if any) which will be taken as a result of the study, within 12 months of the original market study notice being published. Any consideration required of actions to be taken, including completing the consultation described above and negotiating and agreeing any UILs, must be completed within this 12 month period and detailed in the market study report. In cases where a market investigation reference is to be made this should be made at the same time as the market study report is published, within the 12 month deadline.
304. In the case of a public interest intervention the timescales will still apply to the CMA in terms of its initial proposal on whether to make a reference or not after 6 months, and to prepare its market study report within 12 months. However, the CMA’s duty to make a reference within that period falls away in such a case (since in a public interest intervention it is the Secretary of State who makes a reference).
305. New section 131C provides for the Secretary of State, by order, to vary the timescales set out above. However, these cannot be increased beyond 6 months for the initial notice of whether or not the CMA intends to make a reference, and beyond 12 months for publication of the final market study report. Therefore the timescales can be reduced and subsequently increased back up to these limits only. Where the Secretary of State considers that, for example, the CMA ought to be tasked with completing market studies more quickly, s/he could use these powers.

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306. Under section 137 of the EA 2002 a market investigation and its report must be completed within 2 years. Paragraph 3 of Schedule 12 reduces this to 18 months. It also allows for the CMA to extend this deadline by up to a further 6 months if there are special reasons why it cannot publish its report within the original 18 month period.
307. Paragraph 3(4) of the Schedule also provides for the Secretary of State, by order, to vary the timescales set out above. However, these cannot be increased to more than 18 months, for a market investigation, and more than 6 months for an extension where there are special reasons. Therefore the timescales can be reduced and increased back up to these limits only. Where the Secretary of State considers that, for example, the CMA ought to be tasked with completing Phase 2 market investigations more quickly, he/she could use these powers.
308. Paragraphs 4 and 5 of Schedule 12 introduce time limits for the CMA's implementation of remedies to address findings from a market investigation. The amendments in the Schedule require the CMA to accept final undertakings or make a final order, within 6 months of the date of publication of its market investigation report. Consultation on the proposed remedies will need to happen during this 6 month period.
309. The CMA may extend this period by up to 4 months, but only if there are deemed to be special reasons for doing so. The CMA may also extend this period if it believes that a person has failed to adequately respond to any investigatory powers under section 174 of the EA 2002. The extension will last for the time it takes for the person to provide the information requested to the satisfaction of the CMA, or until the CMA publishes a notice to cancel it. These two extensions can be used together if circumstances allow, and the extension periods should be added together.
310. The Schedule also provides for the Secretary of State, by order, to vary the timescales set out above. However, these can not be increased to more than 6 months, for the original implementation of remedies phase, and more than 4 months for an extension where there are special reasons. Therefore the timescales can be reduced and increased back up to these limits only.
311. Paragraph 6 of Schedule 12 mirrors the amended 18 month timescale for market investigations in cases where there is a public interest intervention. It enables the CMA to extend for an additional 6 months in cases where there are special reasons why the original 18 month timescale cannot be met.
312. [Schedule 12](#) also makes various other amendments to Part 4 which are consequential on the new statutory timescales.

Figure 3 below sets out how the existing and new regimes will work.

How the regime works now



How the Act will change this

