

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

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.

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.

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

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 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

