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

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 1: Mergers

Summary and Background

224. The main provisions of this Chapter:

- introduce statutory time limits and information gathering powers for all parts of the merger review process;
- introduce a time limited period after the Phase 1 decision where merging parties can offer and negotiate undertakings in lieu ("UILs") of a referral;
- strengthen the voluntary notification regime by giving the CMA the ability to suspend all integration steps in completed and anticipated mergers;
- clarify the type and range of measures that the CMA can take at Phase 1 and Phase 2 to prevent pre-emptive action; and
- introduce financial penalties for breach of CMA interim measures.

Investigatory powers

Section 29: Investigation powers: mergers

225. Currently under the EA 2002 the OFT and CC have some powers to require persons to give evidence and provide specified documents and information needed for the purposes of a merger inquiry, but these do not extend across the whole mergers process. The introduction of statutory time limits in section 32 and Schedule 8 will mean that the CMA will require appropriate investigatory powers during all phases of its investigation to be able to carry out its functions within the statutory time scale.

226. This section extends these investigatory powers so that the CMA will have a single set of powers that can be used consistently across the whole of the merger investigation process.

227. Section 29(2) amends section 109 of the EA 2002 to set out the permitted purposes for which the CMA can use the information gathering powers. These are: assisting the CMA in carrying out any functions relating to a matter which is the subject of, or is the possible subject of, a reference under section 22 or 33 of the EA 2002 (completed or anticipated mergers) i.e. to assist the CMA during Phase 1 and Phase 2 merger

investigations (new 109(A1)(a)); and assisting the CMA or the Secretary of State to undertake any functions relating to a matter which is the subject of, or is the possible subject of, a reference under section 45 or 62 of the EA 2002 i.e. investigations where public interest issues are relevant (new 109(A1)(b)).

228. New section 109(A1) also enables the CMA to exercise the investigatory powers during any period of monitoring and enforcement relating to any remedies implemented following an investigation, including UILs implemented instead of a reference. New subsection 109(8A) sets out the enforcement functions that are covered by these powers.

229. The CMA will be able to use these investigation powers before it begins a Phase 1 merger investigation (i.e. before the initial period, set out in Schedule 8 paragraph 4, begins) if the functions for which it is exercising the powers fall into the permitted purposes outlined above. For example, if the CMA has reason to believe that a merger may be in the process of being completed and it is preparing to launch an investigation it may want to exercise its information powers for the purposes of preventing pre-emptive action being taken by the parties. The CMA will have to use the powers proportionately.

230. A similar extension of investigatory powers will operate in market investigations (see section 36 and Schedule 11).

231. *Subsection (11)* of section 29 provides for when the powers cease to become exercisable. It amends section 110 of the EA 2002 to align enforcement provisions for the investigation powers with the changes described above. It enables the CMA to enforce the investigatory powers up to 4 weeks after the investigatory powers cease to operate.

Interim measures

Section 30: Interim measures: pre-emptive action: mergers and Schedule 7 Mergers: Interim Measures

232. This section strengthens the interim measures powers available to the CMA by making it easier for the CMA to suspend the integration of companies involved in a merger during a Phase 1 investigation. It is intended to provide a solution to the current difficulties that the OFT and CC face in reviewing and dealing with the effects of completed mergers.

233. This section changes the mechanism through which, at Phase 1, the CMA can prevent pre-emptive action from taking place in completed and anticipated mergers. At the moment, in completed mergers, merging parties are often unwilling to sign up to initial undertakings (permitted by section 71 of the EA 2002 and referred to colloquially as "hold separates") until they have agreed with the OFT derogations from its standard template undertakings. This process can take time and integration can continue until undertakings are in place. This section enables the CMA to pause integration of companies involved in a merger immediately and then consider with the parties whether any further integration should be allowed through derogations.

234. Currently the OFT can only make a section 72 order in Phase 1 in completed merger cases. Under this section the CMA will be able to make a section 72 order in Phase 1 in both anticipated and completed mergers. The CMA may do so when it suspects that two or more enterprises have ceased to be distinct. Or, in the case of anticipated mergers, where arrangements are in progress or contemplation that will result in two or more enterprises ceasing to be distinct. The CMA will no longer need to satisfy itself that it is or may be the case that a relevant merger situation has been created. This will enable the CMA to issue an interim measures order under section 72 of the EA 2002 earlier in the process because it will no longer have to satisfy itself that the turnover and/or share of supply tests have been met. In practice, the powers are only likely to be used in exceptional cases in anticipated mergers.

235. *Subsection (5)* and paragraphs 2(3) and 3(3) of Schedule 7 clarify that interim measure powers at Phase 1 (section 72 of the EA 2002) and Phase 2 (sections 80 and 81 of the EA 2002) can be used to require merger parties to reverse steps that have already been taken (or to reverse the effects of such steps) where the CMA has reasonable grounds for suspecting that pre-emptive action has or may have occurred. This is an additional requirement to having reasonable grounds to suspect that two or more enterprises have ceased to be distinct.

236. *Subsection (6)* and paragraphs 2(4) and 3(4) of Schedule 7 enable the CMA to consent to derogations from an interim measures order in both Phase 1 and Phase 2 in relation to specific actions, or by providing a more general derogation for actions of a particular type. For example, an order might require the acquirer company not to dispose of any assets other than in the ordinary course of business. A general derogation might provide that the acquirer may dispose of assets in relation to a distinct activity of the business where there is no overlap with the target's business. Other examples of derogations from issued interim measures might be allowing the utilisation of the acquirer's accountancy staff for the target business in circumstances where no such staff have been transferred with the target business. Another might be allowing aggregated financial information concerning the performance of the target business to be passed to the acquirer's group board for supervisory reasons or to allow for compliance with financial disclosure obligations. The suitability and relevance of these examples will depend on whether the CMA considers this appropriate in the particular circumstances.

237. Schedule 7 amends the provisions in sections 80 and 81 of the EA 2002 (interim undertakings and interim orders in Phase 2) to make them consistent with the equivalent powers in Phase 1. It does this by clarifying that the interim measure powers can be used to require merger parties to reverse steps that have already been taken (or to reverse the effects of such steps) where the steps constitute pre-emptive action. The Schedule does not repeal section 80 of the EA 2002 (interim undertakings) given that a different dynamic exists at the point of a reference to Phase 2 (as Phase 1 measures to prevent pre-emptive action are typically already in place at that point that can be adopted at Phase 2). Phase 1 interim measures will continue to apply in Phase 2 unless new measures are made under sections 80 or 81 of the EA 2002 at Phase 2 (new section 72(6)(a)(i) in paragraph 5(3) of Schedule 7 provides that Phase 1 measures lapse when a Phase 2 measure is made).

238. For the purpose of public interest mergers, paragraph 4 of Schedule 7 gives the Secretary of State Phase 1 interim powers equivalent to those of the CMA.

Section 31: Interim measures: financial penalties: mergers

239. Section 31 inserts a new section 94A. It enables the CMA to impose a financial penalty on a person who, without a reasonable excuse, fails to comply with interim measures at either Phase 1 (section 72 of the EA 2002) or Phase 2 (section 80 and section 81 of the EA 2002). The level of the penalty is capped at 5% of the aggregate turnover of the enterprises owned or controlled by that person. The purpose is to incentivise compliance with the strengthened interim measures powers.

240. Subsection (3) of new section 94A enables the Secretary of State, by order, to determine when an enterprise is deemed to be controlled by a person, and to make provisions which calculate the turnover of an enterprise. This is often a complex matter and therefore this power provides for order(s) which will set out in detail how these calculations should be undertaken. The intention is to capture the aggregate worldwide turnover of all enterprises owned or controlled by the person who fails to comply with the measure.

241. The existing procedural requirements at section 112 of the EA 2002 will apply to these penalties. These include the CMA notifying the amount of the penalty, justification for it, and the date(s) by which it must be paid. This new penalty will apply alongside the existing civil enforcement mechanism for failure to comply with interim measures

under section 94 of the EA 2002. As a result, a person could potentially be liable to damages under section 94 and a financial penalty under new section 94A.

242. Subsection (6) enables the Secretary of State, by order, to reduce the maximum level of the financial penalty to below 5% of turnover. This gives flexibility to amend the penalty in light of experience of how the deterrence is operating in practice. The financial penalty of 5% of the aggregate turnover could be potentially large in some cases and the Secretary of State will have the power to reduce this if that proves to be the case.

243. The CMA will be required by new section 94B to prepare and publish a statement of policy on how it will use its powers to impose financial penalties and how it will determine the level of penalty imposed.

Time limits

Section 32: Time-limits etc: mergers and Schedule 8: Mergers: time-limits

244. These provisions introduce statutory timescales to all parts of the two-phase merger process. By virtue of new section 34ZA(3), Phase 1 will have a new 40 working day statutory timescale. Where a merger is notified by way of a merger notice, new section 34ZA(3) provides that the statutory timescale will start to run on the first working day after the receipt of a satisfactory merger notice. Where the CMA decides to investigate a merger but the parties do not submit a merger notice, the clock will start on the first working day after the CMA has informed the merging parties that it has sufficient information to begin its investigation. This section makes amendments to the current statutory merger notice which has a statutory timescale of 20 working days which can be extended by 10 working days, but which was available only in the case of anticipated mergers.

245. New section 34ZB(1) states that the CMA may extend the 40 day statutory timescale if merging parties have failed to provide information. This is colloquially known as "stopping the clock" and an equivalent power currently exists in Phase 2 by virtue of section 39(4) of the EA 2002. In addition (or in the alternative) where an intervention notice is in place (public interest mergers) the statutory timescale can be extended once by up to 20 working days, as set out in new 34ZB(4). In Phase 2, the statutory timetable can be extended for 'special reasons' under section 39(3) of the EA 2002. This will continue to apply for Phase 2. Unlike Phase 2, the Phase 1 statutory timescale will not be capable of extension for special reasons.

246. New section 34ZC(6) enables the Secretary of State, by order, to reduce the length of the new statutory timescales that this Schedule introduces.

247. Paragraph 7 of Schedule 8 introduces a new process for consideration of UILs to make this process more transparent and to introduce statutory timescales. It enables merging parties to offer UILs after they have seen the CMA's reasoned decision that the duty to refer would arise but for the possibility of acceptable UILs being offered, and the CMA does not consider it appropriate to apply any of the other available exceptions to the duty to refer in Phase 1. This is different to the current practice where UILs are offered by merger parties while the OFT is considering whether or not the duty to refer arises and before the OFT announces its decision.

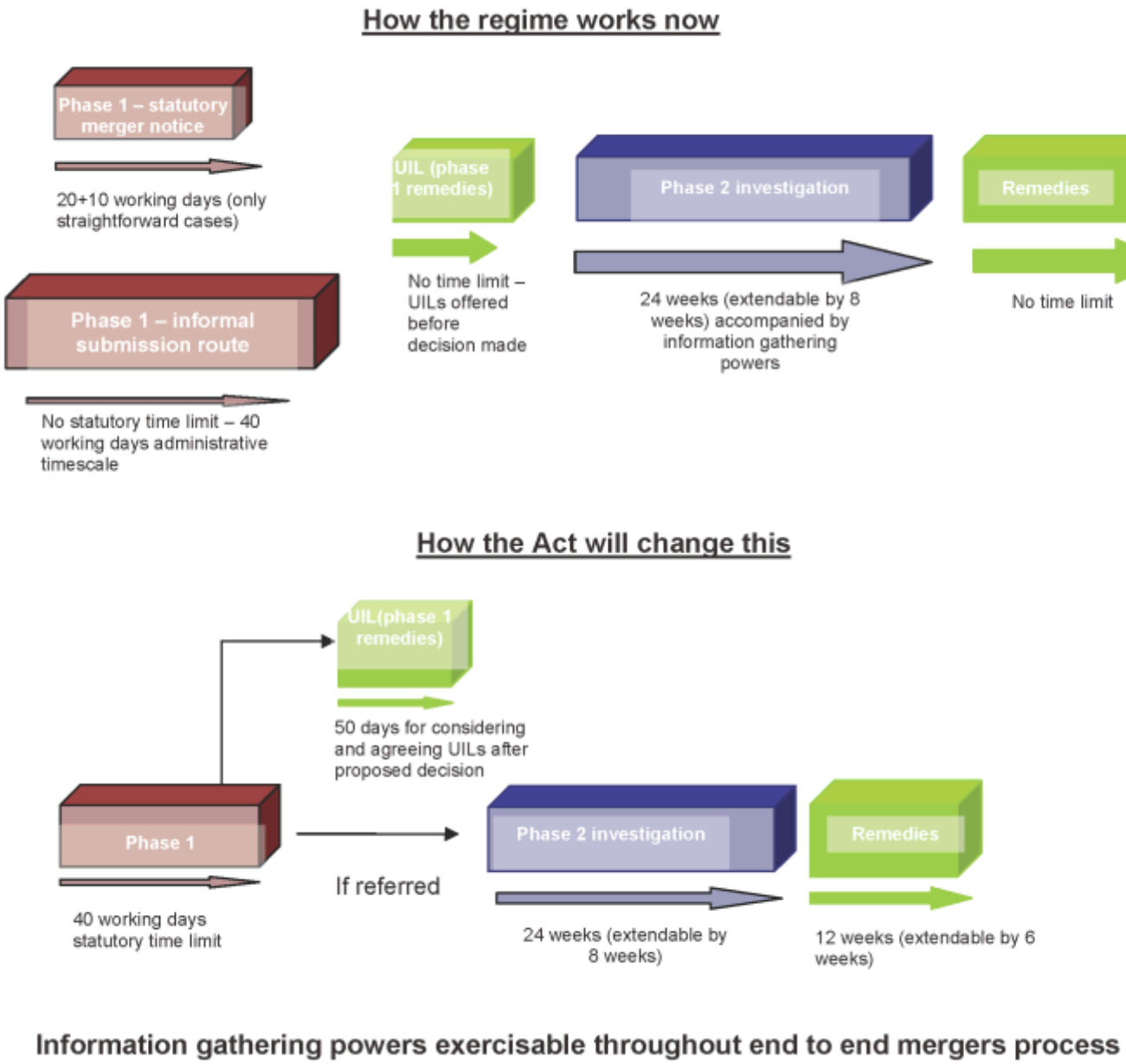
248. On announcement of its Phase 1 decision, the CMA can decide that there are no possible UILs that would address the competition concerns. If the CMA does not make that decision, merging parties will have 5 working days to offer UILs after the CMA announces its Phase 1 decision. The CMA will then have up to the tenth working day after the date of the decision to consider the UILs as proposed by the parties. So, for example, if the parties offer UILs on the third working day after the Phase 1 decision is taken, the CMA will have a further 7 working days to consider the UIL. If it considers that the UIL, or a modified version of the UIL, might be acceptable it must then publish a notice stating this. The CMA must then decide whether to accept the

UIL or a modified set of such UIL within 50 days beginning with the date the Phase 1 decision is announced. This period can be extended once by up to 40 working days where there are special reasons. It is expected that such an extension will be primarily used in cases where the CMA requires the identification and conditional commitment of a suitable purchaser before it will agree an undertaking. The CMA will be required to publish reasons for the use of the extension.

249. Paragraph 5 of Schedule 8 provides that the CMA can suspend its investigation for a period of up to 3 weeks at the beginning of a Phase 2 investigation if merging parties request this and if the CMA considers that there is a possibility that the merger will be abandoned. The purpose of this is to prevent nugatory work by the CMA and information requests on merging parties and third parties. If the CMA suspends the investigation, it must at the end of the period of suspension publish a notice stating that the power was used.

250. Paragraph 6 of Schedule 8 introduces a statutory timescale of 12 weeks for the implementation of remedies at the end of Phase 2. This can be extended by up to 6 weeks if there are special reasons. There are also "stop-the-clock" powers for failures to comply with CMA's investigative powers.

Figure 1: A flowchart of the current regime and the proposed regime



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). 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.

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 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).

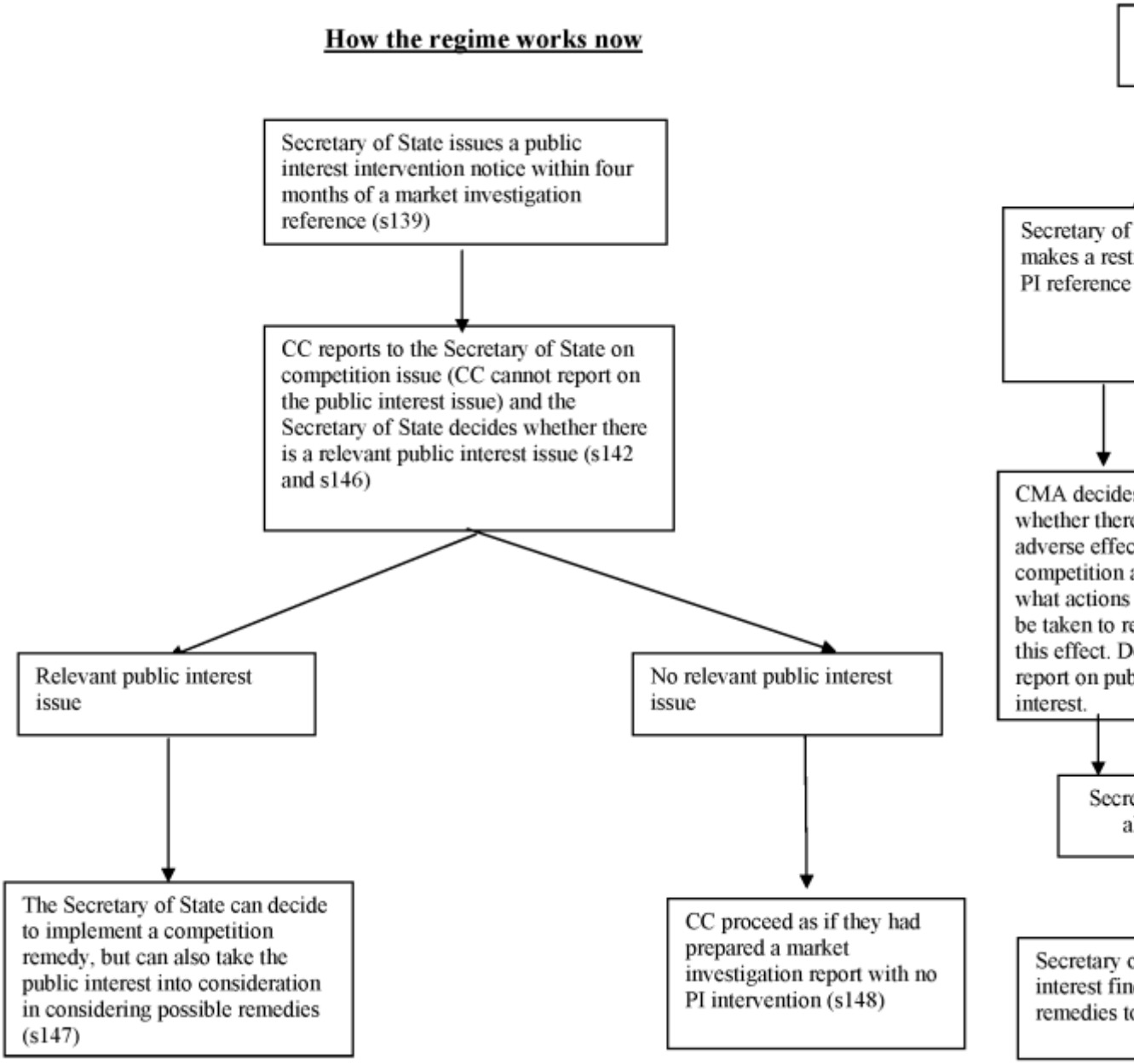
277. Where the Secretary of State appoints public interest expert(s), the CMA must take their views into account and include a summary of the views of the expert(s) in its market investigation report.

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.

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.

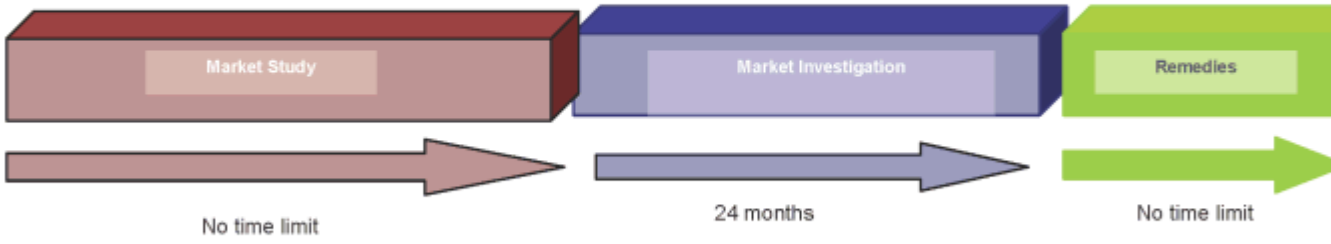
310. The Schedule also provides for the Secretary of State, by order, to vary the timescales set out above. However, these can not be increased to more than 6 months, for the original implementation of remedies phase, and more than 4 months for an extension where there are special reasons. Therefore 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.

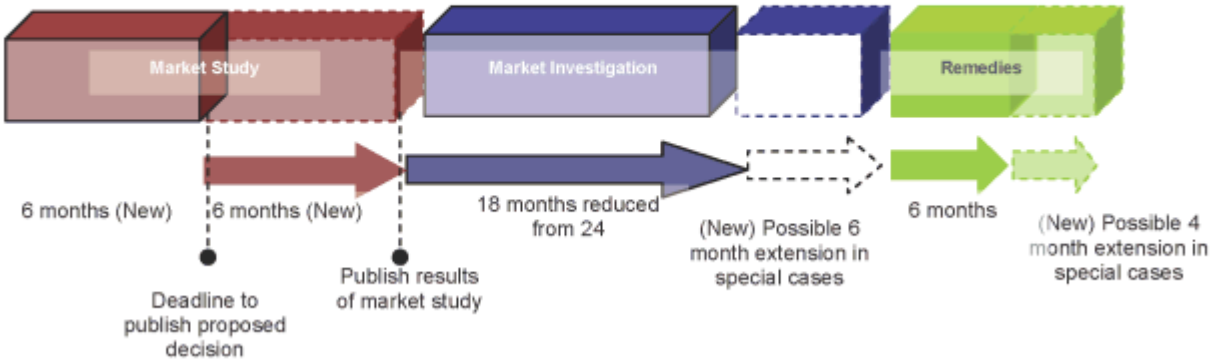
312. Schedule 12 also makes various other amendments to Part 4 which are consequential on the new statutory timescales.

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

How the regime works now



How the Act will change this



Chapter 3: Anti-Trust

Summary and Background

313. Following the Government's response of March 2012 to the consultation on Competition Reform changes are being introduced to improve the efficiency of investigations and the quality of decision-making on enforcement of the anti-trust prohibitions. Part 1 of the CA 1998, which is amended by this Part, provides for infringements of the prohibitions against certain anti-competitive agreements (in Chapter 1 of Part 1 of the CA 1998 and Article 101 of the TFEU) and the abuse of a dominant position (in Chapter 2 of Part 1 of the CA 1998 and Article 102 of the TFEU) to be investigated and penalised.

314. The main provisions of this Chapter provide for:

- giving the CMA a new power to require individuals to answer questions as part of an investigation under the CA 1998;
- replacing the current criminal sanctions for failing to comply with investigations with civil sanctions;
- adding the CAT to the High Court and Court of Session as the judicial bodies able to issue warrants allowing an investigation officer to enter premises as part of an investigation;

- giving the CMA a new power to publish a notice of investigation to which absolute privilege against defamation would attach;
- making further provision concerning the rules on procedural and other matters which may be made by the CMA under the power to make procedural rules in section 51 of the CA 1998. The rules will expressly be able to provide: for the exercise of the CMA's anti-trust functions on its behalf by one or more members of the CMA Board, the CMA panel or one or more members of staff or jointly by one or more such persons; for the procedures for oral hearings; and for the procedures for dealing with complaints and settling cases;
- lowering the threshold before the CMA will be able to impose interim measures under section 35 of the CA 1998;
- introducing new statutory considerations to which the CMA must have regard in fixing a financial penalty under the CA 1998 for the infringement of an anti-trust prohibition and requiring the CAT to have regard to the statutory guidance on the appropriate amount of a penalty when fixing a penalty;
- introducing a new power in the CA 1998 enabling the Secretary of State to impose time limits in relation to the conduct by the CMA of investigations and the making by the CMA of a decision as to whether one of the anti-trust prohibitions has been infringed; and
- requiring the Secretary of State to review the operation of Part 1 of the CA 1998 (which makes provision for the enforcement of the anti-trust prohibitions and related matters) and to lay before Parliament a report on the outcome of the review within 5 years of the coming into force of the provisions transferring the functions under Part 1 of the CA 1998 from the OFT to the CMA.

Investigation powers

Section 39: Investigations: power to ask questions

315. This section amends the CA 1998 to provide the CMA[1] with a new power to require individuals to answer questions as part of an investigation under that Act. It places limits on the use in criminal proceedings of answers as evidence against either the individual or an undertaking with which they are connected.

316. *Subsection (2)* of section 39 inserts a new section 26A into the CA 1998, which sets out the new power, which is similar to that in section 193(1) of the EA 2002 in relation to cartel offence investigations. The new power complements the CMA's existing powers under section 26 of the CA 1998.

317. Section 26A(1) enables the CMA to give notice to an individual with a connection to a relevant undertaking (which, by virtue of section 26A(7), is one subject to the investigation concerned) requiring him to answer relevant questions at a place specified in the notice and either at a time so specified or on receipt of the notice. Under section 26A(6) a connection involves being (or having been) concerned in the undertaking's management or control or being (or having been) employed by or working for it. This includes volunteers and contractors. This restriction to individuals connected to relevant undertakings does not apply to the power under section 26 of the CA 1998, where the CMA's power to require the production of specified documents and information applies to any person (including a company or other legal person).

318. Section 26A(2) requires a copy of the notice to be given to each relevant undertaking with which the individual has a current connection. This ensures that companies are

1 Except where specifically noted otherwise, all the powers which are described in the Explanatory Notes for this Chapter of this Part as being exercisable by the CMA may also be exercised by the sector regulators with concurrent powers.

able to offer legal support to individuals who may be asked questions about them, and that they are aware that such questions are being asked.

319. Section 26A(3) and (4) requires the CMA to take reasonable steps to ensure that the notice is given to such undertakings before the individual is questioned or as soon as possible afterwards.

320. Section 26A(5) specifies that the notice must set out the subject-matter and purpose of the investigation. It must also indicate the nature of the offence in section 44 of the CA 1998 of providing false or misleading information as a prosecution for that offence could result if the individual gave false or misleading answers.

321. Section 39 also amends section 30A of the CA 1998, which concerns the use of statements in prosecutions, extending that section to cover information provided under the new section 26A in certain circumstances. There are no changes to the way information provided under section 26 is treated.

322. *Subsection (7)* inserts new provisions in section 30A, listing the circumstances in which statements in answer to questions under the new section 26A may be used as evidence against the individual concerned or the undertakings with which the individual is connected. Under new subsection (2) such use as evidence is only possible in a prosecution for the section 44 offence or, in a prosecution for any other offence, only if the individual gives evidence inconsistent with any answer given under section 26A, or if the individual adduces evidence or asks questions about the statement given under section 26A or this is done on his behalf. A section 26A statement may, only be used in evidence against the undertaking with which the individual has a connection on a prosecution for a criminal offence if the prosecution is for the section 44 offence.

323. Section 30A(5) provides that the definition of an individual having 'a connection' with an undertaking is the same as that used in section 26(A).

Section 40: Civil enforcement of investigation powers

324. This section substitutes civil sanctions for the current criminal sanctions available to the CMA for failures to comply with investigations.

325. The intention of allowing civil sanctions is to provide a more effective deterrent to failing to co-operate with an investigation. Bringing criminal cases can be complex, costly and time-consuming for an enforcer.

326. *Subsection (2)* inserts new sections 40A and 40B into the CA 1998. These sections create a system of civil penalties for failing to comply with investigations which is similar to the system of civil penalties for failing to comply with merger investigations under the EA 2002.

327. New section 40A sets out the civil penalties for failure to comply with requirements. As with section 111 of the EA 2002 (which concerns the merger regime), a penalty may take the form of a fixed financial penalty, a daily penalty which increases with the delay in complying with the requirement concerned, or a combination of the two. The maximum amount for such penalties is to be determined in an order made by the Secretary of State and cannot exceed £30,000 (for a fixed penalty) or £15,000 per day (for a daily penalty). This is the same as in the EA 2002 for failing to comply with merger investigations. Section 40A(6) and (7) set out what days should be included in determining the daily rate. The requirement under section 40A(8) to consult on the cap on monetary penalties mirrors a similar requirement under the EA 2002.

328. Subsection (9) of the new section 40A provides that sections 112 to 115 of the EA 2002 apply in relation to a penalty under this section as they apply to a penalty under section 110(1) of that Act, which concerns failure to comply with a notice concerning attendance of witnesses and production of documents etc. Sections 112 to 115 of the EA 2002 set out the procedural requirements for the CMA to give notice when it will apply a

monetary penalty, the system for payments and interest by instalments and the right for a full merits appeal to the CAT for parties who are required to pay a monetary penalty. A party can appeal where it is aggrieved by the imposition of the penalty, the amount of the penalty, or the date by which the penalty is required to be paid. The requirement to pay a penalty is suspended until the case is determined. The CAT may cancel or reduce (not increase) the penalty or amend the date or dates by which penalties have to be paid.

329. Section 40B is similar to section 116 of the EA 2002. It requires the CMA[2] to consult on and then to publish a statement of policy in relation to the use of its powers under section 40A. This statement of policy will include the considerations that will be relevant to determining the nature and amount of any monetary penalty. These considerations will be for the CMA to identify, but it is envisaged that they could include:

- the nature and gravity of the omission;
- the size and financial resources of the defaulter;
- the size of penalty that will encourage the party to co-operate; and
- the scale of costs and other disbenefits that will be incurred by the CMA if an inquiry has to be extended to take account of information provided late.

330. *Subsections (3)* to *(6)* amend section 38 of the CA 1998. These amendments ensure that the rules for guidance on penalties under section 36 of the CA 1998 for infringements of the anti-trust prohibitions do not extend to cover the monetary penalties imposed under section 40A of that Act.

331. *Subsections (7)* to *(9)* repeal the criminal offence for not complying with a criminal investigation in the areas subject to civil penalties under the new section 40A. Intentionally obstructing an investigating officer remains a criminal offence. The penalty for this offence is a fine, imprisonment or both.

Section 41: Extension of powers to issue warrants to the Competition Appeal Tribunal and Schedule 13: Extension of powers to issue warrants under the Competition Act 1998 to the Competition Appeal Tribunal

332. This section introduces Schedule 13, which amends the CA 1998 in various places to extend to the CAT various powers to issue warrants to enter premises. The powers in question are those under sections 28, 28A, 62, 62A, 63, 65G and 65H of the CA 1998. The effect is to allow the CAT (as well as the High Court or the Court of Session) to issue warrants allowing an investigation officer to enter premises as part of an investigation. The amendments maintain the requirement for applications for a warrant to be made in accordance with rules of court if they are made to a court, and specify that applications to the CAT must be made in accordance with the equivalent CAT rules (made under section 15 of the EA 2002). Similar provision to this section, enabling the CAT to issue warrants to enter premises when investigating suspected infringements of the cartel offence under section 188 of the EA 2002 is made by section 48.

Section 42: Part 1 of the Competition Act 1998: procedural matters

333. This section makes amendments to the CA 1998 in order to effect certain procedural changes.

334. First, the section introduces a new section 25A giving the CMA a power to publish a notice of investigation. It may choose to publish a notice stating its decision to conduct an investigation, indicating which of the anti-trust prohibitions (either the Chapter 1 or Chapter 2 prohibitions in the CA 1998 or Article 101 or Article 102 of the TFEU) are suspected to have been infringed, summarising the matter under investigation (i.e. the

2 This provision is not exercisable concurrently by the sector regulators: see Schedule 15 to the Act.

nature of the suspected infringement) and identifying any undertakings whose activities are being investigated and any market affected.

335. Under section 57 of the CA 1998 absolute privilege against defamation attaches to any advice, notice or direction given, or decision made by the OFT, in the exercise of its functions under Part 1 of the Act. Subsection (2) of the new section 25A provides that section 57 does not apply to a notice under this section to the extent it includes information other than that mentioned in subsection (1). Such other information would not therefore benefit from absolute privilege.

336. Where the CMA has published a notice identifying an undertaking under investigation and subsequently decides to terminate the investigation, subsection (4) provides that it must publish a notice stating that the undertaking's activities are no longer being investigated.

337. The second set of procedural changes made by section 42 involves Schedule 9 to the CA 1998, which illustrates and makes further provision concerning the rules on procedural and other matters which may be made by the OFT (and in future the CMA)[3] under section 51 of the CA 1998 (without restricting the powers under that section).

338. The section inserts a new paragraph 1A into Schedule 9 which provides that the rules may provide for the exercise of the CMA's functions under Part 1 of the CA 1998 on its behalf by one or more members of the CMA Board, the CMA panel or one or more members of staff, or jointly by one or more such persons. The purpose of this is to allow the rules to provide for a case to be taken over after the initial investigation by a new set of persons (either CMA Board members, CMA panellists or CMA staff or a mix of those) and for them to be responsible for decisions on the case (such as deciding whether or not an anti-trust prohibition had been infringed). This does not affect any functions of the Civil Aviation Authority which the Secretary of State under the Civil Aviation Act 1982 prescribes must not be delegated.

339. The section then provides for the rules to make provision for three further matters: the procedure for oral hearings (new paragraph 13A), procedural complaints (new paragraph 13B) and settling cases (new paragraph 13C). The rules may in particular make provision for the appointment of a member of the CMA Board or a member of the CMA Panel or a member of the CMA's staff who has not been involved in the investigation in question to consider procedural complaints about the conduct of an investigation, to chair an oral hearing and to prepare a report for the decision-maker assessing the fairness of the procedure followed.

Interim measures and other sanctions

Section 43: Threshold for interim measures

340. This section lowers the threshold which determines when the CMA will be able to impose interim measures under section 35 of the CA 1998.

341. Section 35 currently enables the OFT, when it has begun but not completed an anti-trust investigation and considers that it is necessary for it to act as a matter of urgency for the purpose of preventing serious, irreparable damage to a person or category of person, or of protecting the public interest, to give such directions as it considers appropriate for that purpose. This section substitutes 'significant damage' for 'serious, irreparable damage' in the test in section 35 which the CMA must consider is satisfied before it can give directions.

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3 The OFT's powers under section 51 are not exercisable concurrently by the sector regulators but the rules made under the section bind them as they bind the OFT (and will bind the CMA).

Section 44: Penalties; guidance etc.

342. This section firstly introduces new statutory considerations to which the CMA must have regard in fixing a financial penalty under section 36 of the CA 1998 in respect of infringements of the anti-trust prohibitions and secondly it requires the CAT to have regard to the statutory guidance on the appropriate amount of a penalty when fixing a penalty.

343. Under section 36 of the CA 1998 the OFT may impose a financial penalty on an undertaking which may not exceed 10% of the undertaking's turnover. This section amends section 36 by requiring that, in fixing a penalty, the CMA must have regard to the seriousness of the infringement concerned and the desirability of deterring both the undertaking on whom the penalty is imposed and others from entering into agreements which infringe the Chapter 1 (CA 1998) or Article 101 (TFEU) prohibitions or engaging in conduct that infringes the Chapter 2 (CA 1998) or Article 102 (TFEU) prohibitions.

344. Under section 38 of the CA 1998 the OFT must prepare and publish guidance as to the appropriate amount of any penalty (which must be approved by the Secretary of State before it is published). By virtue of section 38(8) the OFT must have regard to the guidance for the time being in force when setting a penalty. This section extends this obligation to the CAT (to which persons may, under section 46 of the CA 1998, appeal certain decisions including the imposition, or the amount, of a penalty).

Miscellaneous

Section 45: Power for Secretary of State to impose time-limits on investigations etc.

345. This section inserts a new power in the CA 1998 enabling the Secretary of State by order to impose time limits in relation to the conduct by the CMA of anti-trust investigations and the making by the CMA of decisions as to whether one of the anti-trust prohibitions has been infringed. The time limits could only be set in relation to investigations in general or in relation to particular types of investigation specified in the order, not individual cases.

346. The Secretary of State must consult the CMA and any other such persons he/she considers appropriate before making an order.

347. By virtue of section 71(5) of the CA 1998, an order imposing time limits would be subject to the negative resolution procedure.

348. There are at present no time limits for the conduct of anti-trust investigations. Time limits are imposed under the EA 2002 for investigations and reports in respect of merger (Part 3) and market (Part 4) cases.

Section 46: Review of operation of Part 1 of the Competition Act 1998

349. This section requires the Secretary of State to review the operation of Part 1 of the CA 1998 (which makes provision for the enforcement of the anti-trust prohibitions and related matters), as amended by the Act, and to lay before Parliament a report on the outcome of the review. He/she is required to do this within 5 years of the coming into force of Part 1 of Schedule 5 which transfers the OFT's functions under Part 1 of the CA 1998 to the CMA.

Chapter 4: Cartels

Summary and Background

350. The main provisions of this Chapter of the Act provide for the removal of the dishonesty element in the cartel offence and the introduction of new circumstances in which the offence is not committed if certain persons are notified of relevant information or if that information is published in a prescribed manner. Individuals are given a defence

if they did not intend that the nature of the cartel arrangements would be concealed from customers or the CMA, and the CMA is required to prepare, consult upon and publish guidance on the principles to be applied in determining whether to prosecute the cartel offence.

351. Sections 188 to 202 of the EA 2002 make provision, in relation to the criminal offence, for individuals who dishonestly agree to engage in cartel arrangements. Such arrangements, when carried out by undertakings (i.e companies or other entities engaged in economic activities) may also infringe the prohibitions in the CA 1998, which imposes civil sanctions on the undertakings concerned.

352. The offence is defined in sections 188 and 189 and occurs when an individual dishonestly agrees with one or more others that two or more undertakings will engage in one or more of the prohibited cartel activities. The offence only applies in respect of horizontal agreements (i.e. agreements relating to products or services at the same level in the supply chain - for example, agreements between car manufacturers, as opposed to vertical agreements between a manufacturer and a car dealership). The offence is committed irrespective of whether or not the agreement reached between the individuals is implemented by the undertakings, and irrespective of whether or not they have authority to act on behalf of the undertaking at the time of the agreement.

353. The prohibited activities (listed in section 188(2)) are price-fixing, limiting production or supply, market-sharing and bid-rigging. These activities comprise the most serious forms of anti-competitive activity and as such are a sub-set of the practices for which undertakings may be pursued under the civil provisions of the CA 1998. Price-fixing is defined so as to include the direct or indirect fixing of prices.

354. Section 188(3) requires that, in the case of price-fixing or limiting or preventing production or supply, and for the offence to be committed, the arrangements must also involve the other party reciprocally engaging in one of these activities. This means that arrangements are not criminal where they only require one party to fix prices or limit production or supply as defined. This additional requirement does not apply in the case of market-sharing and bid-rigging where the activities are by definition reciprocal.

355. Section 188(5) and (6) provide a definition of the activities that constitute bid-rigging for the purposes of the criminal offence. The effect of subsection (6) is that a person would not be guilty of the offence if the person requesting bids would (under the arrangements) be aware of them when the bid is made.

Section 47: Cartel offence

356. Section 47 amends section 188 by removing the requirement that an individual must be acting dishonestly. It then omits *subsection (6)* of section 188. This section introduces new disclosure provisions for all of the four categories of prohibited cartel activity compliance with which will take a person outside the criminal offence, and which in the case of bid-rigging largely replicate the effect of subsection (6).

357. A new section 188A sets out the circumstances in which the cartel offence is not committed. It provides that a person does not commit the cartel offence if, in the case of arrangements affecting the supply of a product or service, the customers would be given ‘relevant information’ before supply is agreed; or, in the case of bid-rigging, the person requesting bids would be given ‘relevant information’ before the time when a bid was made; or, in any case, ‘relevant information’ about the arrangements would be published before the arrangements were implemented in a manner specified in an order made by the Secretary of State. It would be for the prosecution to prove that these circumstances do not apply in relation to the arrangements.

358. Subsection (2) of the new section 188A defines ‘relevant information’. It is the names of the undertakings to which the arrangements relate, a description of the nature of

the arrangements and the products or services to which they relate, and such other information as may be specified in an order made by the Secretary of State.

359. Subsections (3) and (4) of the new section 188A provide that an individual also does not commit the cartel offence when the agreement is made in order to comply with a legal requirement. A legal requirement in this context (and in relation to the exclusion from the Chapter 1 and Chapter 2 prohibitions in the CA 1998) means one imposed by or under an enactment in force in the UK, or by or under the TFEU or the European Economic Area Agreement and having effect in the UK without further enactment, or imposed by or under the law in force in another Member State and having legal effect in the UK.

360. Subsections (5) and (6) of the new section 188A make provision for the Secretary of State's order-making power in *subsection (2)(c)*. The power is exercisable by statutory instrument subject to the negative resolution procedure. It may be exercised so as to make different provision for different cases or different purposes, and may make such incidental, transitory, transitional or saving provision as the Secretary of State considers appropriate.

361. The new section 188B provides defences to commission of the cartel offence. An individual will have a defence where he or she can show that (1) at the time of making the agreement he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service; or (2) at the time of making the agreement he or she did not intend that the nature of the arrangements would be concealed from the CMA; or (3) before making the agreement he or she took reasonable steps to ensure the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or their implementation.

362. The new section 190A requires the CMA to prepare and publish (in such manner as it considers appropriate) guidance on the principles to be applied in determining, in any case, whether proceedings for an offence under section 188(1) should be instituted. In preparing the guidance the CMA is required to consult the Director of the Serious Fraud Office, the Lord Advocate and such other persons as it considers appropriate.

363. *Subsection (8)* of section 47 makes transitional provision for agreements effective before the coming into force of the new section. It provides that the amendments made by subsections (1) to (6) of the section only apply to agreements falling within section 188(1) which are made after the commencement of the new section and which relate to arrangements made or to be made afterwards. This means that existing agreements and those made before commencement will continue to be subject to the cartel offence as currently enacted. Agreements made after commencement which relate to arrangements made before commencement will also continue to be subject to the current law.

Section 48: Extension of power to issue warrants to the Competition Appeal Tribunal

364. This section allows the CAT to issue warrants allowing a named officer of the CMA to enter premises as part of the investigation of a suspected cartel offence under section 188 of the EA 2002. At present, the power to issue warrants under section 194 of the EA 2002 is reserved to the High Court or, in Scotland, to a sheriff. The amendments to section 194 maintain the requirement for applications for a warrant to be made in accordance with rules of court if they are made to a court, and specify that applications to the CAT must be made in accordance with the equivalent CAT rules. The section also makes changes to Schedule 4 to the EA 2002 (which deals with the CAT's procedures) consequent upon this section and section 41 and Schedule 13 which make corresponding provision extending to the CAT various powers to issue warrants to allow an investigation officer to enter premises as part of an investigation under the CA 1998. The changes enable the CAT's rules to make provision for certain matters

relating to the manner in which proceedings concerning applications for a warrant are to be conducted, including for the Tribunal dealing with the proceedings to consist only of the President of the CAT or a member of the panel of chairmen. The current provisions under Schedule 4 relating to the enforcement of decisions, the institution of proceedings and the conduct of a hearing are disapplied in respect of proceedings in relation to warrants.

Chapter 5: Miscellaneous

Enforcement orders: markets and mergers

Section 49: Enforcement orders: monitoring compliance and determination of disputes

365. Section 49 amends Schedule 8 of the EA 2002, which sets out the kinds of provisions which can be included in enforcement orders made by the CMA or the Secretary of State in both the mergers and markets regimes. The new paragraph 20C will enable the CMA to appoint a third party expert to monitor the implementation of remedies, including compliance with orders and to determine disputes. New paragraph 20C(2) also requires an enforcement order which makes provision for the appointment of a third party expert, to make provision about his or her terms of appointment. This is intended to allow the order to require the parties subject to it to remunerate the appointed third party. Currently the appointment of third parties relies on the agreement of the parties. For example, the Adjudicator – Broadcast Transmission Services was created as a result of undertakings arising from the merger of Macquarie UK Broadcast Ventures and National Grid Wireless Group. ITV's Contracts Rights Renewal Undertakings were accepted following the merger of Carlton and Granada. The purpose of these provisions is to increase the range of remedies available to the CMA so that the most proportionate and effective remedy can be applied to address an Adverse Effect on Competition.

Section 50: Enforcement orders: provision of information

366. Section 50 amends Schedule 8 of the EA 2002 to provide that the CMA or the Secretary of State will be able to require parties to publish non-pricing information without also having to require parties to publish pricing information. There are some instances in which the publication of certain information unrelated to prices may be an effective and proportionate remedy, for example information telling customers how they may switch supplier. The current position (under paragraph 15 of Schedule 8 of the EA 2002) is that, if the CMA were to put in place such a remedy by means of an order, it would also have to require price information to be published.

Concurrency

Summary and Background

367. The OFT has the economy wide function of enforcing anti-trust provisions (Part 1 of the CA 1998) and has market investigation reference powers (Part 4 of the EA 2002).

368. Alongside the OFT are the sector regulators whose functions include promotion of competition or dealing with anti-competitive practices. The regulators also have competition powers concurrently with the OFT. The sector regulators with concurrent powers, and the areas in relation to which they have those powers, are:

- the Civil Aviation Authority ("CAA"): air traffic services and airport operation services, both in the United Kingdom;
- Monitor: healthcare services in England (and there is a power for the Secretary of State to extend these powers to the area of social care in England);
- the Northern Ireland Authority for Utility Regulation ("NIAUR"): gas, electricity, water and sewerage services in Northern Ireland;

- the Office of Rail Regulation ("ORR"): railway services in Great Britain;
- the Office of Communications ("Ofcom"): electronic communications, broadcasting and postal services in the United Kingdom;
- the Office of Gas and Electricity Markets ("Ofgem"): gas and electricity in Great Britain; and
- the Water Services Regulation Authority ("Ofwat"): water and sewerage England and Wales.

369. The sector regulators can take a range of approaches to promote competition, including imposing and enforcing licence conditions using powers under their own sectoral legislation. In addition, the regulators share the OFT's powers to enforce Part 1 of the CA 1998 and make market investigation references to the CC under Part 4 of the EA 2002.

370. The Act largely retains the existing concurrency provisions, but strengthens the role of the CMA and enhances the emphasis on early and proper consideration of the use of anti-trust powers (under Part 1 of the CA 1998) by the sector regulators.

371. The Act amends the concurrency arrangements in five respects:

- sector regulators will have an explicit requirement to consider the anti-trust powers under CA 1998 before using their own sector powers;
- the Secretary of State can currently make regulations about the procedures for the competition authorities to decide which body will lead on a CA 1998 case where concurrent powers apply. As a result of the amendments, the Secretary of State will be able to make regulations which provide that the CMA may in particular decide, in certain circumstances, that it (rather than a sector regulator) will exercise the concurrent functions in a CA 1998 case;
- the Secretary of State will have the power to make regulations requiring arrangements to be made for the sharing of information between the CMA and the sector regulators in connection with cases in respect of which concurrent powers arise;
- there will be a new requirement that the CMA will publish an annual report covering the use of competition powers by it and the sector regulators; and
- the Secretary of State will have the power to remove concurrent competition functions of certain sector regulators.

372. These changes are intended to give the CMA a leadership role in the concurrency arrangements and it will be expected to work closely with the sector regulators.

Section 51: Powers of sectoral regulators and Schedule 14: Regulators: use of powers under 1998 Act

373. Section 51 amends the powers of the Secretary of State under section 54 of the CA 1998 to make regulations governing the operation of concurrency.

374. *Subsection (2)(a)* amends section 54(6) to allow regulations made by the Secretary of State to set out the circumstances in which the CMA may decide that it will undertake a case under the CA 1998 rather than the regulator with concurrent functions. *Subsection (3)* inserts a subsection (6A) clarifying that such regulations must require the CMA to consult the regulator before taking over a case and to have the consent of the regulator if it wants to take over a case after the regulator has issued a notice stating that it proposes to make a decision as to whether there has been a relevant infringement (in other words, after a draft decision has been issued).

375. *Subsection (2)(b)* allows regulations made by the Secretary of State to provide for the CMA as well as the Secretary of State to decide questions about which of the competition authorities should undertake a CA 1998 case.

376. *Subsection (4)* inserts new subsections (6B) and (6C) into section 54. These provide for regulations made by the Secretary of State to include requirements for information sharing arrangements to be put in place between "competent persons", i.e. the regulators with concurrent CA 1998 powers and the CMA ("competent person" is defined in section 54(7)). The information that may be covered by these arrangements includes information in connection with cases being conducted by them under the CA 1998 and cases which a regulator decides to undertake using powers under the sector-specific legislation, even though it considers that it would also have been open to it to proceed with the case under the CA 1998.

377. *Subsection (5)* introduces Schedule 14 which amends the sector-specific legislation to clarify the relationship between the powers of the regulators under that legislation and their powers under the CA 1998. Schedule 14 therefore amends the following legislation:

CAA	Transport Act 2000
Monitor	Health and Social Care Act 2012
NIAUR	The Energy (Northern Ireland) Order 2003
	The Water and Sewerage Services (Northern Ireland) Order 2006
Ofcom	Communications Act 2003
	Postal Services Act 2011
Ofgem	Gas Act 1986
	Electricity Act 1989
Ofwat	Water Industry Act 1991
ORR	Railways Act 1993

378. The amendments made by Schedule 14 re-frame the existing duties on the sector regulators to consider using their powers under the CA 1998 to deal with anti-competitive practices. Currently, these duties generally require that a regulator may not take the relevant kind of enforcement action in a case in which it decides that a more appropriate way of proceeding would be under its CA 1998 powers. This means there is at present an implicit requirement for sector regulators to consider the CA 1998 before using their sector powers. Under the amendments made by Schedule 14 there will be an explicit duty on each regulator to consider whether a more appropriate way of proceeding would be under the CA 1998 before using its sector-specific powers. The intention behind this change in emphasis is to encourage regulators to turn their minds to the question of whether the CA 1998 route is more appropriate at an earlier stage.

379. Ofcom's current duty in broadcasting (as opposed to electronic communications and postal services) and the CAA's duties under the Civil Aviation Act 2012 to consider relying on the CA 1998 are not amended by Schedule 14 as these already are framed in terms of the regulator having first to consider the CA 1998.

380. In addition, Schedule 14 amends certain provisions of the Electricity Act 1989 and the Electricity (Northern Ireland) Order 1992 relating to the determination of questions arising as to whether the powers under the CA 1998 are exercisable by a regulator in a particular case. In order to create greater consistency, the amendments align the wording of some of these provisions with the general approach in the equivalent provision in the other sectoral legislation listed above.

381. Paragraph 16 of Schedule 4 is also relevant to the provisions made by section 51 and Schedule 14 in that it requires the CMA to publish an annual report outlining co-operation between the CMA and the sector regulators and the use of competition powers by it and regulators in the sectors where concurrent powers apply.

Section 52: Power to remove concurrent competition functions of sectoral regulators

382. Section 52 introduces a reserve power for the Secretary of State to remove concurrent powers from sector regulators in future.

383. *Subsection (1)* provides that the Secretary of State may by order made by statutory instrument amend any enactment to remove from a sectoral regulator either its functions under Part 1 of the CA 1998 Act or its functions under Part 4 of the EA 2002, or both (a "sectoral regulator order"). The Secretary of State has the power to make a sectoral regulator order where he considers that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the United Kingdom, for the benefit of consumers. *Subsection (3)* provides that a sectoral regulator order may also amend any enactment the Secretary of State considers appropriate as a consequence of the removal of the specified functions (for example, removing a regulator's duty to consider Competition Act enforcement.) *Subsection (6)* provides that the statutory instrument containing a sectoral regulator order is subject to the affirmative resolution procedure in Parliament.

Section 53: Orders under section 52: procedural requirements

384. Section 53 sets out the procedural requirements in relation to a sectoral regulator order. Where the Secretary of State proposes to make a sectoral regulator order, he is required under *subsection (1)* to consult the regulator whose functions would be removed by the order, the CMA (or the OFT, before the CMA's duty and powers are commenced), and devolved administrations where they have a role in relation to an affected regulator. Where, following this first stage consultation, the Secretary of State still proposes to make a sectoral regulator order, the Secretary of State is required under *subsection (3)* to consult: the bodies consulted in the first stage consultation; consumer and business groups who represent those whose interests are affected; and such other persons he considers appropriate. The Secretary of State is required to explain to the persons consulted which powers of the regulator are subject to the proposed order and the reasons for removing them.

385. The following are the sector regulators with concurrent competition powers under Part 1 of the CA 1998 and Part 4 of the EA 2002 that may be affected by a sectoral regulator order:

a) Ofcom;

b) Ofgem;

c) Ofwat;

d) ORR

e) NIAUR

f) CAA

Miscellaneous

Section 54: Recovery of CMA's costs in respect of price control references

386. This section amends the Communications Act 2003 to provide that the CMA will have the power to recover its costs in respect of a price control reference from parties

appealing price control decisions under section 193 of that Act, to the extent that their appeal was unsuccessful. The CMA may also recover costs from interveners, but not from Ofcom.

387. A requirement to pay the CMA's costs will only take effect after the CAT has made its decision on the case and only if the Tribunal decides in accordance with the CMA's determination. This requirement is because the allocation of costs between parties must take into account the extent to which the appeal was successful, meaning that if the Tribunal decides the case differently the original cost order will no longer be appropriate.

388. If the Tribunal does decide differently, the CMA has the power to make a new cost order that reflects the Tribunal's decision. The date on which this new cost order would take effect would be specified in the order.

389. The CMA's decision to make a cost order can be appealed to the CAT (see amendments to sections 192 to 195 of the Act of 2003 in Schedule 15).

Section 55: Disclosure etc. of information: offences

390. This section amends section 241 of the EA 2002 to provide expressly that a person to whom information is disclosed under that section cannot, unless the information has been made available to the public, use that information for any purpose other than is mentioned in section 241(1). Section 241(1) enables a public authority to disclose information in order to facilitate the exercise of the disclosing authority's statutory functions. Section 241 is one of the gateways for the disclosure of information in Part 9 of the EA 2002. Disclosing or using information in breach of the provisions of Part 9 is a criminal offence under section 245 of that Act.

Section 56: Review of certain provisions of Chapters 1 and 2

391. This section requires the Government to review certain provisions of the Act every 5 years, with the first review taking place no later than 5 years after these provisions come into force. The Government's policy of sunset and review of regulations can be found in *Sunsetting Regulations: Guidance* (2011)[4].

392. In accordance with this guidance, the new provisions to which this section applies are the information gathering powers for merger and market investigations as well as the enforcement of these powers (contained in sections 29, 36 and Schedule 11); statutory timescales for mergers and markets (contained in section 32, Schedule 8, section 38 and Schedule 12); and strengthened interim measures for merger investigations (contained in section 30 and Schedule 7).

Section 57: Minor and consequential amendments and Schedule 15: Minor and consequential amendments: Part 4

393. Section 57 gives effect to Schedule 15, which makes minor and consequential amendments to the CA 1998, the EA 2002 and various other Acts as a result of changes being made by Part 4 of this Act.

Schedule 15: Minor and Consequential Amendments

394. Paragraph 1 amends paragraph 15 of Schedule 1 to the Civil Aviation Act 1982 (which provides for the CAA to authorise certain persons to perform its functions) so as to make the provision subject to rules made under section 51 of the CA 1998 by virtue of the new paragraph 1A of Schedule 9 to the CA 1998 inserted by section 42(4) of the Act. New paragraph 1A of Schedule 9 enables the rules to provide for the exercise of functions under Part 1 of the CA 1998 to be exercised by Board members, members of the CMA

4 http://www.bis.gov.uk/assets/biscore/better-regulation/docs/s/11-682-sunsetting-regulations-guidance.pdf

panel, members of staff or jointly by several of these persons. Equivalent provision to paragraph 1 of this Schedule is made to other legislation by paragraph 6 (in respect of Ofwat and the Water Industry Act 1991), paragraph 13 (in respect of Ofgem and the Utilities Act 2000), paragraph 40 (Office of Communications Act 2002), paragraph 41 (in respect of the ORR and the Railways and Transport Safety Act 2003), paragraph 49 (in respect of Monitor and the Health and Social Care Act 2012), and paragraph 55 (the NIAUR and the Energy (Northern Ireland) Order 2003).

395. Paragraph 2 amends the Gas Act 1986 so as to make it clear that the new obligation of the CMA (provided by the new section 40B of the CA 1998 inserted by section 40 of the Act) to prepare and publish a statement of policy on penalties for failure to comply with certain requirements is not exercisable concurrently by Ofgem. Similar amendments are made to other sectoral legislation, in respect of the relevant sectoral regulator, by paragraph 3 (Electricity Act 1989), paragraph 5 (Water Industry Act 1991), paragraph 7 (Railways Act 1993), paragraph 14 (Transport Act 2000), paragraph 46 (Communications Act 2003), paragraph 48 (Health and Social Care Act 2012), paragraphs 51 and 52 (Civil Aviation Act 2012), paragraph 53 (Electricity (Northern Ireland) Order 1992), and paragraph 54 (Gas (Northern Ireland) Order 1996).

396. Paragraphs 8 to 12 of Schedule 15 deal with amendments to the CA 1998.

397. Paragraph 9 deletes the reference to the section 42 (offences) in section 26 (powers when conducting investigations), subsection (3)(b). This is a consequential amendment resulting from the repeal of the criminal offence in section 42(1), which is replaced with civil sanctions for failing to comply with investigations. This substantive change is made in section 40(7) to (9)..

398. Paragraph 10 corrects a reference to ‘an appeal tribunal’ in section 38(9) to refer to the CAT. This amendment was missed as a consequential change resulting from the EA 2002 that established the CAT.

399. Paragraph 11 replaces references in section 54 to the ‘Director General of Electricity Supply for Northern Ireland’ and ‘Director General of Gas for Northern Ireland’ with ‘the Northern Ireland Authority for Utility Regulation’. The functions of the Directors are now exercised by the Northern Ireland Authority for Utility Regulation.

400. Paragraph 12 changes references to the CC in connection with protected agreements (Schedule 1, paragraph 5, of the EA 2002) to the CMA. These are consequential on to the transfer of the CC’s merger functions to references to the CMA, set out in detail in Schedule 5.

401. Paragraphs 15 to 39 of Schedule 15 deal with amendments to the EA 2002.

402. Paragraphs 16, 17, 18, 26, 28, 29 and 35 make consequential amendments resulting from changes to the CMA’s investigation powers in relation to its mergers functions, set out in section 29, subsection (2). They repeal section 31 (information powers in relation to completed mergers), section 32(1) to (3) (supplementary provision for the purposes of sections 25 and 31) and section 99(2) to (4) (functions in relation to merger notices) of the EA 2002, and provide for consequential amendments as a result of the repeal of those sections.

403. Paragraphs 19 to 21, 23 and 24 are consequential to amendments to mergers investigative powers (section 29) in cases referred to the CMA by the European Commission. Specifically the provisions make clear that the extended information gathering powers (amended section 109) are exercisable in relation to cases referred by the European Commission and that existing sections 34B and 46C (existing information gathering powers) are repealed. Paragraphs 19(2) and (3), and 21(2) and (4), provide that 'stop the clock' powers in the case of a matter referred by the European Commission can only be triggered if a person carrying on the enterprise concerned fails to comply with an information request.

404. Paragraph 22 makes a consequential amendment to section 46 resulting from changes to statutory timescales set out in Schedule 8.

405. Paragraphs 25, 27, 30 to 34, and 38 make consequential amendments resulting from changes to the CMA's interim powers set out in sections 30 and 31.

406. Paragraph 36 makes consequential amendments to provisions concerning the requirements on the CMA to publicise its decisions, to ensure they are consistent with new investigation powers in section 29 and new statutory timescales set out in section 32 and Schedule 8.

407. Paragraph 37 removes the reference to 'Undertakings under paragraph 1 of Schedule 1' from the index of defined expressions in section 130 of the EA 2002. This is consequential on changes to Schedule 7 to the EA 2002 (enforcement regime for public interest and special public interest cases) as a result of Schedule 7, new interim measures provisions for the mergers regime.

408. Section 241(3) of the EA 2002 provides that specified information held by public authorities can be disclosed (notwithstanding the general restriction on disclosure under section 237) to any person for the purpose of facilitating the exercise of any function that person has under that Act and any Acts specified in Schedule 15 to that Act. Paragraph 39 adds the Health and Social Care Act 2012 to the list in Schedule 15 to the EA 2002.

409. Paragraphs 42 to 46 make consequential amendments to the Communications Act 2003 arising out of the new section 193A inserted into that Act by section 54. The new section gives the CMA power to recover its costs in respect of price control references made to it, as set out in section 54.