

EXPLANATORY NOTES—DIGITAL MARKETS, COMPETITION AND CONSUMERS ACT 2024



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Digital Markets, Competition and Consumers Act 2024

Chapter 13

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DIGITAL MARKETS, COMPETITION AND CONSUMERS ACT 2024

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Act 2024 which received Royal Assent on 24 May 2024 (c. 13).

- These Explanatory Notes have been prepared by the Department for Business and Trade and the Department for Science, Innovation and Technology in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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Overview of the Act

- 1 The Digital Markets, Competition and Consumers Act ("the Act") creates a new regime to increase competition in digital markets by conferring powers and duties on the Competition and Markets Authority ("CMA") to regulate competition in these markets; updates powers to investigate and enforce competition law; updates and enhances powers to investigate and enforce consumer protection law and resolve consumer disputes; and gives consumers protections in respect of unfair commercial practices, subscription traps and prepayments to savings schemes.
- 2 The Act is in six Parts and has 30 Schedules. The general arrangement of the Act is as follows:

Part	Summary
Part 1 - Digital Markets, including Schedules 1-2	• Provides for the designation of undertakings as having strategic market status in respect of a digital activity. • Gives the CMA powers to impose conduct requirements on a designated undertaking and to take steps to promote competition through pro-competition interventions where it finds an adverse effect on competition in respect of a designated activity. • Introduces a duty to report possible mergers involving a designated undertaking or its corporate group. • Introduces a series of investigatory powers and requirements to produce compliance reports in respect of a designated activity. • Provides for enforcement, appeals and administrative matters relating to the CMA's powers and duties under the digital markets regime.
Part 2 - Competition, including Schedules 3-14	• Amends powers to investigate and enforce against (suspected) infringements of the Competition Act 1998 Chapter I and II prohibitions. • Makes changes to the Enterprise Act 2002 merger jurisdictional thresholds, as well as providing for some procedural changes to merger reviews. • Makes changes to the Enterprise Act 2002 to introduce a new regime to prevent foreign state control or influence over newspapers and periodic news magazines. • Makes changes to the procedures for market studies and investigations under the Enterprise Act 2002, including provision for a new power to conduct trials of certain remedies to determine their final format. • Amends the CMA's power to require the production of information held electronically and accessible from a premises when acting under a warrant during an investigation under section 192 of the Enterprise Act 2002. • Sets out miscellaneous provisions, including with regards to civil penalties and the extra-territorial reach of information notices in connection with competition matters.

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Act 2024 which received Royal Assent on 24 May 2024 (c. 13)

Part 3 - Enforcement of Consumer Protection Law, including Schedules 15-19	• Sets out the infringements that are in scope of the enforcement regimes provided by Part 3. • Replaces, simplifies and enhances the civil, court based enforcement regime for consumer protection law currently set out in Part 8 of the Enterprise Act 2002. This Part gives the courts powers to make consumer protection orders or for undertakings to be accepted as an alternative to these orders. It also gives the courts new powers to impose monetary penalties. • Gives the CMA new powers in respect of infringements of certain consumer protection laws, breach of undertakings and non-compliance with CMA directions, including powers to impose monetary penalties. • Amends Schedule 5 of the Consumer Rights Act 2015 to enhance the enforceability of statutory information notices given to a person under paragraph 14 of Schedule 5 and to clarify enforcers' ability, during onsite inspections, to access material which is held remotely.
Part 4 - Consumer Rights and Disputes, including Schedules 20-27	• Prohibits unfair commercial practices, replacing and updating the Consumer Protection from Unfair Trading Regulations 2008, subject to transitional provisions. • Prohibits the 'drip pricing' of unavoidable fees by requiring traders to set out in an invitation to purchase the total price of a product including any mandatory fees, taxes and charges that apply to the purchase of a product. • Adds a banned practice relating to fake consumer reviews to the Schedule 20 list of commercial practices which are in all circumstances considered unfair. Imposes duties on traders in relation to subscription contracts, provides rights for consumers if those duties are breached and provides rights for consumers to cancel subscription contracts during cooling-off periods. • Gives protections to consumers in respect of payments to consumer saving scheme contracts. • Prohibits alternative dispute resolution procedures for consumer contracts where the provider is not accredited nor exempt and makes provision for accreditation and exemption, related requirements and enforcement.
Part 5 - Miscellaneous, including Schedules 28-29	• Sets out miscellaneous provisions, including in respect of the provision of investigative assistance to overseas regulators; disclosing information overseas; and a duty of expedition on the CMA and sectoral regulators. • Provide the CMA with new information gathering powers for it to obtain specified information from undertakings involved in or connected with the distribution, supply or retail of motor fuel.

Part 6 – General, including Schedule 30	• Sets out general provisions, including interpretation; financial provision; power to make consequential provision; regulations; extent; commencement; and short title.
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Policy background

Digital Markets

- 3 Digital markets are markets where businesses develop and apply new technologies for the benefit of other businesses and consumers, or create brand new products and services using digital capabilities, connecting groups of users in new and innovative ways. This includes services such as social media, mobile applications and online shopping.¹ Businesses operating in digital markets make a very significant contribution to the UK economy.² However, it is the Government's view that the unprecedented market power, in relation to certain digital activities, of a small number of businesses, is holding back innovation and growth. Existing competition and consumer laws are not designed to address the unique barriers to competition in digital markets. In response, this Act establishes a new regime that is designed to boost competition in digital markets.

Expert advice and Market Studies

- 4 In 2018, the Government established a Digital Competition Expert Panel (the "Panel") to examine competition in digital markets. The Panel issued its final report in March 2019, which recommended the establishment of a digital markets unit equipped with tools and frameworks to support greater competition in digital markets.³ In March 2020, the Government announced it would accept all six of the report's strategic recommendations⁴ and committed to establishing a cross-regulator Digital Markets Taskforce to provide advice on the design and implementation of a competition regime for digital markets. In December 2020, the Digital Markets Taskforce recommended that the Government set up a digital markets unit with powers to designate an undertaking with Strategic Market Status, and that designated undertakings be subject to additional merger control requirements.⁵
- 5 The CMA agreed with the Panel's recommendation to launch a market study into online platforms and digital advertising. This Market Study was launched in July 2019 and the final report was published in July 2020.⁶ The report identified several characteristics of digital

¹ CMA, 2019. [The CMA's Digital Markets Strategy](#).

² DCMS Economic Estimates 2019: Gross Value Added (2020); DCMS Sectors Economic Estimates 2019: Employment (2020)

³ Digital Competition Expert Panel, 2019. [Unlocking digital competition](#).

⁴ HM Treasury, 2020. [Budget 2020: Delivering on Our Promises to the British People](#).

⁵ CMA, 2020. [A new pro-competition regime for digital markets: advice of the Digital Markets Taskforce](#).

⁶ CMA, 2020. [Online platforms and digital advertising: market study final report](#).

markets which can cause them to tip in favour of a small number of firms, including network effects and economies of scale which can act as a barrier to market entry, unequal access to user data, platforms' control over default settings and a lack of transparency around complex decision-making algorithms. In November 2020, the Government responded to the Market Study and committed to establishing and resourcing a new Digital Markets Unit within the CMA from April 2021 to oversee a regime designed to increase competition in digital markets.⁷

- 6 The CMA launched a second Market Study in June 2021 into mobile ecosystems in the UK. Its report found that Apple and Google have “substantial and entrenched market power” in mobile operating systems.⁸ The report emphasised the CMA's support for the Government's proposals to give it new powers to address competition issues in digital markets. In June 2022, the CMA announced a Market Investigation into mobile browsers and cloud gaming.

Digital Markets - public consultation

- 7 The Government set out its plans for the regime in detail in its public consultation which ran from July to October 2021.⁹ The consultation received 105 written submissions, with the majority of respondents signalling strong support for the proposals and a desire for them to be delivered quickly. In May 2022, the Government published its response to the consultation.¹⁰ The consultation response detailed the final policy positions for the new regime and how they had been developed in line with evidence received during consultation. It confirmed the Government's intention to enshrine the policies in law. The Government's policy is to:
 - 8 Empower the CMA to designate undertakings which are very powerful in particular digital activities, with Strategic Market Status in relation to those digital activities.
 - 9 Ensure that designated undertakings comply with rules (called conduct requirements) on how they treat consumers and other businesses in relation to the activities in which they have been designated. These conduct requirements could prevent a firm ranking its own products more highly in a search result where that harms consumers, for example.
 - Give the CMA powers to address proactively the root causes of competition issues in digital markets. It could intervene to impose interoperability obligations on designated undertakings to help new competitors enter the market, for example.

⁷ [Government response to the CMA's market study into online platforms and digital advertising](#), November 2020. The Digital Markets Unit is an administrative unit within the CMA. As a result of its legal status, the functions of the regime (being any powers or duties) are to be conferred upon the CMA.

⁸ CMA, 2022. [Mobile ecosystems: market study final report](#).

⁹ DCMS/BEIS (2021). [A new pro-competition regime for digital markets](#).

¹⁰ DCMS/BEIS, 2022. [Government response to the consultation on a new pro-competition regime for digital markets](#).

- Require designated undertakings to be more transparent about mergers which pose risks to competition.
- Allow the CMA to enforce obligations on designated undertakings and impose penalties including fines of up to 10 per cent of a firm's global turnover for breaches.
- Empower the CMA to resolve payment-related breaches of conduct requirements to deal on fair and reasonable terms through a backstop enforcement tool called the 'Final Offer Mechanism'.

Competition and Consumer Protection Law

- 10 Effective cross-economy competition and strong consumer protection are critical features of well-functioning markets. Competition stimulates innovation across the economy and helps to drive productivity growth, ultimately raising living standards. Strong consumer rights play an essential part in fair, free and competitive markets by providing consumers with the information and confidence to choose how and where to spend their money.
- 11 However, recent evidence suggests that UK competition and consumer law is failing to keep pace with market developments. Overall levels of competition may have declined since the legislative framework was last overhauled in 1998, and further since the 2008 financial crisis.¹¹

Establishing priorities for reform

- 12 In April 2018, the Government published the “Modernising Consumer Markets” Green Paper, which set out its ambition to ensure that modern consumer markets work for all and included a number of proposals aimed at safeguarding consumer rights, particularly in view of new technology and new business models, whilst strengthening competition.
- 13 In August 2018, the Secretary of State for Business, Energy and Industrial Strategy asked Lord Tyrie, then Chairman of the CMA, to make proposals on legislative and institutional reforms to safeguard the interests of consumers and to maintain and improve public confidence in markets. Lord Tyrie's response, published in February 2019, indicated that there was scope for strengthening and updating the UK's competition and consumer law framework, particularly in light of the economic and technological developments of recent years.¹² Lord Tyrie presented a series of proposals intended to focus the work of the CMA more directly on protecting the interests of the consumer, enabling the CMA to intervene earlier and more robustly to tackle consumer detriment and to penalise and deter wrongdoing when it occurs. Lord Tyrie also recommended a suite of measures to make the CMA's work generally more agile and efficient, including a reconsideration of all aspects of the competition regime, complemented by a statutory duty of expedition.

¹¹ [Competition and Markets Authority \(2022\), State of UK Competition Report 2022](#)

¹² [Letter from Andrew Tyrie to BEIS Secretary of State, February 2019](#)

- 14 In February 2020, the Government commissioned the CMA to produce a regular state of competition report to raise the collective understanding of the level of, and the trends in, competition across the UK economy.¹³ The CMA published their first report in November 2020, concluding that competition may have weakened over the previous two decades.¹⁴ Their report called for regulators and government to remain vigilant in protecting and promoting competition, especially as the UK prepared to emerge from the severe economic impact of the coronavirus pandemic. The CMA published their second state of competition report in April 2022, finding that market concentration remained higher than it was before the financial crisis of 2008, average markups had been increasing, and the biggest firms had been able to maintain their leading positions for longer.¹⁵

Reforming Competition and Consumer policy - public consultation

- 15 The Government set out its plans for reforming competition and consumer policy in detail in its public consultation which ran from July to October 2021.¹⁶ The consultation covered proposals relating to promoting competition, updating consumer rights and strengthening the enforcement of consumer law.
- 16 In April 2022, the Government published its response to the consultation.¹⁷ The key policy positions established were to:
- Introduce a rebalanced merger control system, stronger enforcement against anti-competitive conduct and a series of enhancements to the CMA's investigative and enforcement powers.
 - Introduce new penalty powers for the civil courts for consumer law breaches and out-of-court (administrative) powers for the CMA to determine and sanction breaches of certain consumer laws.
 - Prevent the restriction of consumer choice in relation to subscription contracts.
 - Strengthen the quality of alternative dispute resolution arrangements.
 - Protect consumer payments to Christmas saving clubs and other similar saving schemes.

¹³ [Letter from the Chancellor and BEIS Secretary of State to Andrea Coscelli, February 2020](#)

¹⁴ [Competition and Markets Authority \(2020\), State of UK Competition Report 2020](#)

¹⁵ [Competition and Markets Authority \(2022\), State of UK Competition Report 2022](#)

¹⁶ BEIS, 2022. Consultation on reforming competition and consumer policy

¹⁷ BEIS, 2022. Government response to the consultation on reforming competition and consumer policy

- 17 The Government set out plans for further consumer reforms in a public consultation: 'Smarter Regulation: Consultation on Improving Price Transparency and Product Information for Consumers' which ran from September to October 2023.¹⁸ In January 2024, the Government published a response setting out its intention to legislate to tackle drip pricing and fake reviews, and to extend powers to take down harmful digital content to all public enforcers of consumer law.¹⁹

Background to road fuel market study

- 18 In 2021 to 2022 the price of both petrol and diesel went up by 60 pence per litre, following the Russian invasion of Ukraine. Against this backdrop, the then Secretary of State for the Department for Business, Energy and Industrial Strategy asked the Competition and Markets Authority (CMA) to carry out an urgent review to consider the health and competition in the road fuel market, geographical factors, and further steps government could take to strengthen competition or increase price transparency for consumers.
- 19 The CMA reported their urgent review in July 2022 and found that while the retail road fuel market appeared relatively competitive, there were local variations in the price of road fuel, including pricing disparities between urban and rural areas.²⁰ Following the urgent review, the CMA undertook a 12-month market study to explore whether the retail market has adversely affected consumer interests, and to assess how far weakness in competition might be driving higher retail prices in certain parts of the UK.
- 20 The CMA published its final report of its market study on 3 July 2023 and found three areas of concern.²¹
- 21 At a national level: competition between fuel retailers has weakened since 2019, due to a decision by the historic price-leaders to take a less aggressive approach to pricing by significantly increasing their internal margins for fuel. This coupled with other retailers maintaining largely passive pricing policies, pricing by reference to local competitors rather than responding promptly to cost movement and/or trying to win market share. As a result, consumers are paying generally higher prices than would otherwise have been the case, with estimated financial impact of an increased average supermarket fuel margin resulting in a combined additional cost of £900 million for consumers of the four supermarket retailers in 2022 alone. In addition, during 2023, competition has been significantly weaker for diesel than petrol.
- 22 At a local level: the national level weakening of competition appears to have affected pricing in different parts of the UK in a similar way. However, longstanding patterns of variable pricing between different local areas remain, meaning that consumers in some areas can pay significantly more for fuel than in others.

¹⁸ DBT, 2023. 'Smarter Regulation: Consultation on Improving Price Transparency and Product Information for Consumers'

¹⁹ DBT, 2024. [Government response to consultation on 'Smarter Regulation: Improving consumer price transparency and product information for consumers'](#)

²⁰ CMA, 2022. [Road fuel review](#)

²¹ CMA, 2023. [Supply of road fuel in the United Kingdom market study: Final Report](#)

- 23 At motorway service areas (MSAs): Competition remains weak between MSA petrol filling stations (PFSs), meaning that consumers without access to fuel cards pay significantly more to buy fuel on the motorway than off it.
- 24 Given the findings in the CMA market study on the health of competition the CMA recommended that the Government introduce a statutory open data scheme for prices in the retail road fuel section. The CMA also recommended that government introduce an ongoing road fuels monitoring function to be housed within an appropriate public body and provide it with information gathering powers to monitor developments in the market, both nationally and locally, as we move through the net zero transition, provide ongoing scrutiny of prices, and consider whether further action may be needed to protect consumers.
- 25 Sections 311 to 318 provide the CMA with information gathering powers to establish a road fuels monitoring function. This will enable the CMA to request specified information from undertakings involved in the distribution, supply or retail of petrol and diesel. The CMA will use the information obtained to provide an ongoing assessment of competition in the retail road fuel market to government and provide advice on the need for further intervention to facilitate competition.

Background to Foreign State Intervention Regime

- 26 Under the Enterprise Act 2002, the Secretary of State has a quasi-judicial role in considering whether mergers raise media public interest concerns. The Secretary of State can intervene in a merger where they believe there may be a public interest concern.
- 27 A [debate was held in the House of Commons on 30 January 2024](#) about foreign state ownership of UK news media organisations. During that debate, concerns were raised by Members of Parliament about the risks that foreign state ownership of, or control or influence over, the UK's newspapers and news magazines could pose to democracy and free speech. Parliamentarians across both Houses continued to raise such concerns in the weeks following the debate in the Commons.
- 28 [On 13 March 2024, the Government responded to these concerns](#) by announcing that it would amend the media merger regime to create a new foreign state intervention regime for newspapers and periodic news magazines.
- 29 Under the new regime, the Secretary of State will be obliged to give the CMA a foreign state intervention notice where the Secretary of State has reasonable grounds to believe that a merger involving a UK newspaper or news magazine has given, or would give, a foreign power (or a person associated with a foreign power) control or influence over the policy of a person carrying on the newspaper enterprise. The CMA will be obliged to investigate and provide a report to the Secretary of State on the merger or potential merger. If the CMA concludes the merger has resulted or would result in a foreign state newspaper merger situation, the Secretary of State will be required to make an order to block or unwind the merger.

Legal background

Digital Markets

- 30 The new digital markets regime is a legal framework containing new functions for the CMA to impose ex ante regulation for digital markets. The exercise of these functions in practice will be overseen by the Digital Markets Unit, an administrative unit of the CMA. The regime builds on the UK's existing competition legislative framework, of which key sources of law include the Competition Act 1998, the Enterprise Act 2002 and the Enterprise and Regulatory Reform Act 2013. A fuller legislative history of the existing competition legislative framework appears below in the section about the competition provisions in Part 2 of the Act.
- 31 The design of the digital markets regime takes account of the interaction between the new CMA regime and existing functions of other regulators active in digital markets by requiring the CMA to consult those other regulators in certain circumstances where there may be an effect on or in relation to their relevant functions. The relevant functions of other regulators arise under other legislative regimes: the competition functions of the Financial Conduct Authority (in the Financial Services and Markets Act 2000) and the Office of Communications (in the Communications Act 2003); the functions of the Information Commissioner relating to the protection of personal data (under the Data Protection Act 2018 and other enactments); and the functions of the Bank of England relating to its financial stability objective as set out in section 2A of the Bank of England Act 1998.

Competition

- 32 Part 2 of the Act makes amendments across the UK's legislative framework regarding competition, set out in Part 1 of the Competition Act 1998, Parts 3, 4 and 6 of the Enterprise Act 2002 (concerning merger control, market studies and investigations, and the cartel offence respectively), and to a variety of other pieces of legislation in order to enhance the investigative and enforcement powers available for the purposes of the competition regime. The principal regulator responsible for the public enforcement of competition law is the Competition and Markets Authority (the CMA), which was established by the Enterprise and Regulatory Reform Act 2013, to replace the Office of Fair Trading and the Competition Commission.

Anti-competitive agreements and abuse of a dominant position in a market

- 33 The Competition Act 1998 replaced the Restrictive Practices Court Act 1976, the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the restrictive Trade Practices Act 1977. Part 1 of the Act established two central prohibitions: the Chapter I prohibition against anti-competitive agreements and the Chapter II prohibition against the abuse of a dominant position in a market which came into force on 1 March 2000.
- 34 Chapter 3 of Part 1 of the Competition Act 1998 makes provision regarding the investigation and enforcement of the prohibitions by the CMA. Amendments to provisions in Chapter 3 were made by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (S.I. 2004/1261) in order to implement EU obligations set out in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and for the alignment of the domestic competition regime with the new European regime. The majority of those amendments came into force on 1 May 2004.

- 35 Chapter 4 of Part 1 of the Competition Act 1998 deals with both appeals against CMA decisions, which are made to the Competition Appeal Tribunal (“the CAT”) and proceedings and settlements in relation to competition law. Private law claims may be pursued for breaches of the infringements and such claims may be made before the courts or the CAT. Amendments to provisions in Chapter 4 were made by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments)(Amendment) Regulations 2017 (S.I. 2017.385) in order to implement in part Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (“the Damages Directive”) and for the alignment of the domestic competition regime with the provisions in the Damages Directive.
- 36 Further amendments were made to both Chapters 3 and 4 of Part 1 of the Competition Act 1998 by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/93) to correct deficiencies arising as a result of the UK’s withdrawal from the European Union and ensure the domestic regime operates on a freestanding basis. These amendments took effect on Implementation Period Completion Day.
- 37 Part 6 of the Enterprise Act 2002 which came into force on 20 June 2003 makes provision for an offence relating to hard-core cartels. The offence may be committed by individuals who enter into serious cartel arrangements, that is if they agree with one or more other persons to make or implement certain prohibited cartel arrangements in relation to two or more undertakings, namely price fixing, market sharing, bid rigging and limiting output. Part 6 of the Enterprise Act 2002 contains specific provisions regarding investigation of the offence by the CMA and the powers available to it for that purpose. The offence was modified by the Enterprise and Regulatory Reform Act 2013 to remove a requirement that a person must act dishonestly in order to commit the offence, set out particular circumstances in which the offence is not committed and provide defences to the commission of the offence. The amendments further required the CMA to prepare and publish guidance on the principles to be applied to determine, in any case, whether proceedings for the offence should be instituted. Those amendments came into force on 1 April 2014.

Merger control

- 38 The UK’s merger control regime is set out in Part 3 of the Enterprise Act 2002. This replaced the previous public interest test which applied under the Fair Trading Act 1973, and made provision for decisions to be taken in most cases by an independent competition authority against a competition-based test, with a framework for intervention to be made and decision making to rest with the Secretary of State in cases involving a public interest consideration. As originally enacted, functions of the regulator were divided between the Office of Fair Trading and the Competition Commission; those functions now lie with the CMA.
- 39 Amendments to Part 3 of the Enterprise Act 2002 were made by the Enterprise and Regulatory Reform Act 2013 in order to introduce statutory time limits and information gathering powers for all parts of the merger review process, introduce a time limited period after a Phase 1 decision where merging parties can offer and negotiate undertakings in lieu of a referral for a more in depth investigation, 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 which the CMA may take to prevent pre-emptive action and introduce financial penalties for breach of CMA interim measures. Those amendments came into force on 1 April 2014.

- 40 The turnover and share of supply tests set out in Part 3 were amended by the Enterprise Act 2002 (Turnover Test)(Amendment) Order 2018 (S.I. 2018/593) and the Enterprise Act 2002 (Share of Supply Test)(Amendment) Order 2020 (S.I. 2020/763), the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (S.I. 2018/578) and the Enterprise Act 2002 (Share of Supply) (Amendment) Order 2020 (S.I. 2020/748) to create reduced or revised thresholds for businesses active in certain sectors relevant to national security. These amendments were subsequently repealed by the National Security and Investment Act 2021.
- 41 Further amendments were made to Part 3 of the Enterprise Act 2002 by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/93) to correct deficiencies arising as a result of the UK's withdrawal from the European Union and ensure the domestic regime operates on a freestanding basis. These amendments took effect on Implementation Period Completion Day.

Mergers involving newspaper enterprises and foreign states

- 42 Amendments to Part 3 of the Enterprise Act which require the Secretary of State to give an intervention notice to the CMA where they suspect it is or may be the case that a foreign state merger situation has been created – or will be created as a result of arrangements in progress or in contemplation – are modelled on existing procedures, also in Part 3, which apply to mergers involving media enterprises raising public interest considerations.
- 43 Whereas the Secretary of State has a discretion to intervene in public interest cases, and may accept undertakings or impose discretionary remedies to prevent a merger operating against the public interest, the Secretary of State is under an obligation to intervene in a suspected foreign state merger situation and to refer the merger CMA for investigation, and to make an Order to reverse or prevent the merger if the CMA concludes that a foreign state merger situation has resulted or would result if arrangements in progress or in contemplation were carried into effect.
- 44 A foreign state merger situation is created where there is a merger involving a newspaper enterprise which has resulted or would result in a foreign power having the ability to control or to influence the policy of the person carrying on the newspaper enterprise. The definition of “foreign power” is based on the definition in section 32 of the National Security Act 2023 but it has been expanded to capture a wider variety of actors including the head or senior members of a foreign government, or an agency or authority of a foreign government or the officers of the governing political party of a foreign government, acting in their private capacity, as well as persons associated with a foreign power, as defined in section 127 of the Enterprise Act 2002.

Market studies and market investigations

- 45 The legislative framework concerning the conduct of market studies and market investigations is set out in Part 4 of the Enterprise Act 2002 which came into force on 20 June 2003. Part 4 of the Enterprise Act 2002 replaced the monopoly inquiries regime in the Fair Trading Act 1973 and, as enacted, empowered the Office of Fair Trading, certain sector regulators and, under a reserve power, Ministers, to make a reference to the Competition Commission for a market investigation. As with merger functions, the regime provided for decisions to be taken in most cases by independent competition authorities against a competition-based test, with a framework for intervention to be made and decision making to rest with the Secretary of State in cases involving a public interest consideration.
- 46 Amendments to Part 4 made by the Enterprise and Regulatory Reform Act 2013 made provision for the introduction of cross market references, to give the Secretary of State power to request the CMA to investigate public interest issues alongside competition issues as part of

a market investigation, to introduce and in some cases, reduce statutory time limits and harmonise information gathering powers for all stages of the markets process, remove a duty to consult on a decision not to make a market investigation reference, other than where there has been a request for a reference to be made, and ensure that the CMA may use interim measures to reverse as well as prevent pre-emptive action during a market investigation. These amendments came into force on 1 April 2014.

The concurrency regime

47 While the CMA is the principal regulator with responsibility for the public enforcement of competition law, functions of the CMA under Part 1 of the Competition Act 1998, and in effect those functions under Part 4 of the Enterprise Act 2002 which relate to market studies and the making of a reference for a market investigation, are exercisable concurrently by sector regulators; Ofgem, Ofcom, Ofwat, the Northern Ireland Authority for Utility Regulation, the Office of Rail and Road, the Civil Aviation Authority, the Financial Conduct Authority and the Payment Systems Regulator. The regulators have these functions by virtue of provision made by the:

- Gas Act 1986;
- Electricity Act 1989;
- Water Industry Act 1991;
- Electricity (Northern Ireland) Order 1992;
- Railways Act 1993;
- Gas (Northern Ireland) Order 1996;
- Water and Sewerage Services (Northern Ireland) Order 2006
- Transport Act 2000;
- Financial Services and Markets Act 2000;
- Communications Act 2003;
- Civil Aviation Act 2012; and the
- Financial Services (Banking Reform) Act 2013.

Information

- 48 Part 9 of the Enterprise Act 2002 harmonised the gateways applicable to the disclosure of information relating to competition and consumer matters, making provision for the protection of “specified” information and setting out gateways allowing for disclosure. Specified information is information obtained by a public authority in connection with the exercise by it of any function it has under Parts, 1, 3, 4, 6, 7, or 8 of the Enterprise Act 2002, or any enactment listed in Schedule 14 to that Act, or which may be specified in secondary legislation by the Secretary of State.
- 49 As enacted, Part 9 made provision so that such information may be disclosed both within the UK and overseas to enable a public authority to facilitate the exercise of its own statutory functions, and certain statutory functions of other persons, and for the purposes of any criminal investigations or proceedings. It also provided for more limited disclosure to overseas authorities for the purpose of any criminal investigations or proceedings. However,

in relation to disclosure overseas for the purpose of civil proceedings, it provided for information to be disclosed only to those public bodies involved in the enforcement of consumer or competition legislation. In addition, competition information obtained under the Financial Services and Markets Act 2000 and certain sensitive commercial information (for example, information connected to market and merger investigations) was expressly excluded from the overseas gateway.

- 50 Amendments made since Part 9 was enacted include the addition of a gateway for disclosure for the purposes of prescribed civil proceedings by the Companies Act 2006, the removal of the gateway in relation to EU obligations by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/93), and the removal of the restriction on sending overseas information connected to a merger investigation by the National Security and Investment Act 2021. In addition, in particular through the subsequent addition of more enactments, such as legislation relating to the Pubs Code in England and Wales, to Schedule 14 of the Enterprise Act 2002, the range of information covered by the Part 9 gateways has been expanded beyond that obtained in connection with purely competition and consumer protection related functions.

Competition in the retail market for motor fuel

- 51 Chapter 1 of Part 5 introduces new information gathering powers for the CMA in relation to the monitoring of competition in the retail of motor fuel. These powers are similar to existing information gathering powers contained within the Enterprise Act 2002, in particular, those contained under section 174, but are focused to specifically address the retail of motor fuel.

Enforcement of Consumer Protection Law

- 52 Part 3 of the Fair Trading Act 1973 gave the Director General of Fair Trading the power to take action against traders who breached their legal obligations to the detriment of consumers.
- 53 The Stop Now Orders (E.C. Directive) Regulations 2001, which came into force on 1 June 2001, implemented Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests. The Regulations empowered certain public bodies (including the Director General of Fair Trading) to stop traders infringing listed UK legislation, which implemented specific EU consumer protection laws, where the breach harms the collective interest of consumers ('Community Infringements').
- 54 This resulted in two similar, but separate, regimes for the public enforcement of consumer protection law: a regime for breach of consumer protection laws of UK origin under Part 3 of the Fair Trading Act 1973 (FTA) and a regime for Community Infringements under the Stop Now Orders (E.C. Directive) Regulations 2001.
- 55 Part 8 of the Enterprise Act 2002 was enacted to provide for a court-based unified enforcement regime for the two categories of Community Infringements and infringements of consumer protection laws of UK origin, where there was harm to the collective interests of consumers (the "enforcement regime"). It replaced Part 3 of FTA 1973 and the Stop Now Orders (EC Directive) Regulations 2001, subject to transitional provisions.
- 56 Since its coming into force, Part 8 of the Enterprise Act 2002 has been amended many times. In particular:
- a. Section 79 and Schedule 7 of the Consumer Rights Act 2015 amended Part 8 to give the civil courts and public enforcers flexibility and powers to provide redress for consumers, to require positive, corrective action by traders and to broaden the extra-territorial extent of Part 8.

- b. The Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020/484 implemented certain provisions of Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on co-operation between national authorities responsible for the enforcement of consumer protection laws. In particular, the Regulations added additional EU Directives and Regulations into the scope of the enforcement regime and introduced new concepts of interim and final online interface orders into the enforcement regime.
 - c. The Consumer Protection (Enforcement) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/203) and the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2020. These gave effect to the implications for the enforcement regime resulting from the decision of the UK to leave the EU. As a result, with effect from 1 January 2021, the category of “Community Infringements” was replaced with “Schedule 13 infringements”. The category of “Community Infringements” continues to apply, however, in relation to conduct to the extent that it occurred before 11pm on 31 December 2020.
- 57 As a result of these changes, there are two categories of infringement to which the enforcement regime set out in Part 8 of the Enterprise Act 2002 applies:
- a. domestic infringements (consumer protection laws of UK origin) (section 211 of the Enterprise Act 2002), and
 - b. Schedule 13 Infringements (formerly Community infringements) (section 212 of the Enterprise Act 2002).
- 58 There are three categories of enforcer who can use the enforcement regime, although many enforcers feature in more than one category:
- a. General enforcers (section 213 (1) of the Enterprise Act 2002). General enforcers can use the enforcement mechanism in respect of any infringement, i.e. both kinds of infringement (domestic and Community infringements);
 - b. Designated enforcers (enforcers designated by order made under s.213(2) of the Enterprise Act 2002). A number of orders have been made under section 213: the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional provisions) Order S.I. 2003/1399, the Enterprise Act 2002 (Part 8) (Designation of the Consumers’ Association) Order S.I. 2005/917 and the Enterprise Act 2002 (Part 8) (Designation of the Financial Conduct Authority as a Designated Enforcer) Order S.I. 2013/478). These enforcers have all been designated as able to use the enforcement mechanism in relation to any infringement; and
 - c. Schedule 13 enforcers (section 213 (5A) of the Enterprise Act 2002) These are the enforcers designated under Regulation (EU) 2017/2394 or its predecessor and are able to use the enforcement mechanism in relation to Schedule 13 infringements only.
- 59 Part 3 of the Act replaces Part 8 of the Enterprise Act 2002 for conduct which takes place after commencement (subject to the additional transitional provisions made by Schedule 19 and through secondary legislation). It provides for a single category of infringement instead of the two categories of infringements, described above, which feature in Part 8 of the Enterprise Act 2002. Part 3 extends the power to apply to the courts for Online Interface Orders and Interim Online Interface Orders, previously limited to the CMA, to all public enforcers. It also makes additional incidental changes, as well as changes to simplify and consolidate Part 8 of the Enterprise Act 2002 and legislation made under it.

Investigatory powers for consumer protection law enforcement

- 60 Section 77 and Schedule 5 to the Consumer Rights Act 2015 make provision for the information gathering and investigatory powers of consumer law enforcers. They provide a generic set of powers, which were based on the powers previously set out in Part 4 of the Consumer Protection from Unfair Trading Regulations 2008.
- 61 There are three main types of investigatory powers:
- a. the power to send statutory notices to request information;
 - b. the power to purchase products and observe business; and
 - c. the power to gather evidence on premises.
- 62 Paragraphs 13 to 17 of Part 3 of Schedule 5 to the Consumer Rights Act 2015 provide consumer law enforcers with a power to request information by notice. These paragraphs set out the purposes for which the power can be used, the procedure to be followed when using it and how the power can currently be enforced, as well as limitations on the use of the information obtained.
- 63 Part 4 of Schedule 5 to the Consumer Rights Act 2015 contains further powers permitting entry to premises, under warrant and without a warrant, and the exercise of a range of powers while on the premises. The powers are only available to domestic enforcers and Schedule 13 enforcers, for specified purposes and on the conditions prescribed. The conditions on which a justice of the peace may issue a warrant include being satisfied of reasonable grounds for believing that on the premises are documents which an enforcement officer could require a person to produce.
- 64 The onsite investigatory powers available to enforcement officers include a power to require the production of, and take copies of, documents, including electronically recorded information. Documents can be seized where required as evidence in proceedings. The production and seizure powers may not be exercised in relation to material protected by legal professional privilege or confidentiality of communications. Furthermore, an enforcement officer may require a person on the premises to access any electronic device in which information may be stored or from which it may be accessed and (if the person fails to comply) to access such electronic device himself.
- 65 Currently, the four categories of enforcers with access to the investigatory powers are:
- a. domestic enforcers (paragraph 3 of Schedule 5);
 - b. Schedule 13 enforcers (paragraph 4 of Schedule 5);
 - c. public designated enforcers (paragraph 5 of Schedule 5); and
 - d. unfair contract terms enforcers (paragraph 6 of Schedule 5).
- 66 Many enforcers feature in more than one category, for example, the CMA is a domestic enforcer, Schedule 13 enforcer and unfair contract terms enforcer.
- 67 Section 208 and Schedule 17 amend Schedule 5 to the Consumer Rights Act 2015 to, amongst other changes, enhance the enforceability of statutory information notices given to a person under paragraph 14 of Schedule 5 and to set out the extra-territorial reach of enforcers' powers to request information by notice. The amendments abolish the legacy categories of Schedule 13 infringements and Schedule 13 enforcers throughout Schedule 5 to the Consumer Rights Act 2015.

Consumer Rights and Disputes

Protection from Unfair Trading

- 68 Chapter 1 of Part 4 replaces the Consumer Protection from Unfair Trading Regulations 2008 (with some amendments). In particular, Chapter 1 of Part 4 introduces more detailed provisions to address drip pricing (section 230) and practices related to fake reviews (at paragraph 13 of Schedule 20). Part 3 provides for the civil enforcement of Chapter 1 of Part 4 by authorised enforcers in order to prevent harm to the collective interests of consumers.
- 69 The Consumer Protection from Unfair Trading Regulations 2008 prohibit unfair commercial practices. A commercial practice is unfair if it contravenes the requirements of professional diligence so as to materially distort (or is likely to) the behaviour of the average consumer, is a misleading action, misleading omission, aggressive commercial practice or is listed in Schedule 1 to the Regulations. The Consumer Protection from Unfair Trading Regulations 2008 implemented Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. Notwithstanding the repeal of the European Communities Act 1972, the Consumer Protection from Unfair Trading Regulations 2008 continue in force, as a result of section 2 of the European Union (Withdrawal) Act 2018.
- 70 The Consumer Protection from Unfair Trading Regulations 2008 extend to England and Wales, Scotland and Northern Ireland.
- 71 The Consumer Protection from Unfair Trading Regulations 2008 can currently be enforced by authorised enforcers through the enforcement mechanism provided by Part 8 of the Enterprise Act 2002 in order to prevent harm to the collective interests of consumers.

Subscription Contracts

- 72 Chapter 2 of Part 4 provides consumers with significant new rights in relation to subscription contracts and, for these contracts, replaces the two main parts of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (“CCRs”) on pre-contract information and cooling-off cancellation rights with tailored provisions applicable to subscription contracts. Chapter 2 aims to create a new regime integrating consumers’ key rights under the CCRs with a set of new statutory rights so as to create a consolidated regime for the regulation of subscription contracts in one enactment. These private law rights are directly enforceable by consumers. In addition, Part 3 provides for the public civil enforcement of Chapter 2 of Part 4 by authorised enforcers in order to protect the collective interests of consumers.
- 73 In these Notes, the term “subscription contract” is used with the meaning given by section 254. There are several consumer protection enactments and rules of law which are relevant to subscription contracts as a category of consumer contracts, detailed below.
- 74 Firstly, the CCRs. These regulations apply to contracts between traders and consumers (apart from certain excluded contracts) and, in particular:
- a. require traders to provide certain pre-contract information to consumers and do so ‘in a clear and comprehensible manner’ before the consumer is bound by the contract. By virtue of provisions in Part 1 of the Consumer Rights Act 2015, this statutory pre-contractual information is to be treated as amounting to implied terms of the contract and is therefore legally binding on the trader in the same way as what is said in the contract itself, and

- b. provide consumers with cancellation rights to cancel so-called distance or off-premises contracts shortly after entering the contract (sometimes known as cooling-off cancellation rights) without giving any reason or incurring any costs other than those specified.
- 75 The CCRs implemented most of the provisions of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. Notwithstanding the repeal of the European Communities Act 1972, the CCRs continue in force, as a result of section 2 of the European Union (Withdrawal) Act 2018.
- 76 The CCRs extend to England and Wales, Scotland and Northern Ireland.
- 77 The CCRs contain provisions for civil enforcement by the specified enforcement authorities, as well as provision for criminal enforcement of specific requirements relating to the provision to consumers of pre-contract information on cooling-off cancellation rights in the case of off-premises contracts. In addition to these enforcement provisions, the requirements of the CCRs as a whole can currently be enforced by authorised enforcers through the enforcement mechanism provided by Part 8 of the Enterprise Act 2002 in order to prevent harm to the collective interests of consumers.
- 78 Secondly, the Consumer Protection from Unfair Trading Regulations 2008, which are replaced by Chapter 1 of Part 4. Further background in relation to the Consumer Protection from Unfair Trading Regulations 2008 is set out above.
- 79 Thirdly, the Consumer Rights Act 2015. Part 1 of the Consumer Rights Act 2015 implies terms into consumer contracts for the supply by traders to consumers of goods, digital content and services, which provide for a range of essential rights under such contracts including rights that the products supplied are of the agreed quality and description. Part 1 further confers on consumers a range of remedies where these rights are breached. Part 1 restricts traders from contracting out of these statutory rights or remedies. Part 2 of the Consumer Rights Act 2015 clarified and consolidated existing consumer legislation on unfair contract terms and notices and provides that terms in consumer contracts which are unfair according to the statutory test are not binding on consumers.
- 80 Apart from one section, Parts 1 and 2 of the Consumer Rights Act 2015 extend to the whole of the UK.
- 81 Parts 1 and 2 of the Consumer Rights Act 2015 can currently be enforced by authorised enforcers through the enforcement mechanism provided by Part 8 of the Enterprise Act 2002 in order to prevent harm to the collective interests of consumers. Part 2 and Schedule 3 to the Consumer Rights Act 2015 contain provisions for civil enforcement of Part 2 by the Competition and Markets Authority and other specified regulators.

Insolvency protection for consumer savings schemes

- 82 In the Government's view, consumer savings schemes are not regulated as deposit-takers and many are not subject to any other direct regulation. There is in general currently no legal obligation on these businesses to take steps to protect consumer payments.
- 83 Under insolvency law, when such a business becomes insolvent, its remaining assets must be distributed to creditors according to a strict statutory hierarchy. Most of the money will go to those towards the top of the list, such as employees and secured lenders, leaving very little for unsecured creditors such as consumers. Law Commission analysis, produced for the Government in 2016, which reviewed insolvent retailers found that distributions to unsecured creditors were extremely low. If consumers have to rely on receiving a dividend as an unsecured creditor, the return may barely cover the cost of applying for it.

- 84 Chapter 3 of Part 4 places a legal obligation on traders who enter into a consumer savings scheme contract to protect payments received from consumers under the contract by way of a trust or insurance, so that the consumer may receive the money back in full, in the event of the trader's insolvency.
- 85 In addition, Part 3 provides for civil enforcement of the relevant provisions of Chapter 3 of Part 4 by authorised enforcers in order to protect the collective interests of consumers.

Alternative dispute resolution ("ADR") for consumer contract disputes

- 86 Chapter 4 of Part 4 replaces the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542) ("the Regulations"). In addition, Part 3 provides for the civil enforcement of the relevant provisions of Chapter 4 of Part 4 by authorised enforcers in order to protect the collective interests of consumers.
- 87 The Regulations provide for the approval by competent authorities against the criteria in Schedule 3 of persons or bodies who seek to become entities accredited to provide ADR in disputes concerning consumer contracts, and ongoing reporting and monitoring of the ADR entities against the criteria. However, a key aspect of the Regulations is that they establish a largely voluntary system. An ADR provider does not have to be approved under the Regulations to offer ADR. The key change brought about by Chapter 4 of Part 4 is (subject to exceptions) to make accreditation compulsory.
- 88 The Regulations implemented the EU's Alternative Dispute Resolution Directive (2013/11/EU). The Regulations continued in force after EU exit, subject to amendment by regulation 9 of the Consumer Protection (Amendment etc) (EU Exit) Regulations 2018 (S.I. 2018/1326).
- 89 The Regulations extend to England and Wales, Scotland and Northern Ireland.

Territorial extent and application

- 90 Section 338 sets out the territorial extent of the Digital Markets, Competition and Consumers Act, that is the jurisdictions which the Act forms part of the law of. The extent of an Act can be different from its application. Application is about where an Act produces a practical effect rather than where it forms part of the law. The Digital Markets, Competition and Consumers Act extends and applies to the whole of the United Kingdom. Repeals and amendments made by the Act have the same territorial extent as the legislation that they are repealing or amending.
- 91 Consumer protection and its enforcement is a transferred matter in Northern Ireland and provisions in Parts 3, 4 and 5 are within the legislative competence of the Northern Ireland Assembly.
- 92 The Act provides for varying degrees of extraterritorial application in different areas and in relation to the different powers and sanctions it contains. Extra-territorial application is necessary in order to fulfil the Act's aim of protecting competition in markets within the UK, and UK consumers, and ensuring the regulators responsible for the enforcement of the relevant regimes have the powers they need to fulfil their functions. Details for particular parts of the Act are set out below:
- In relation to Part 1 of the Act, section 2 gives the CMA the power to designate an undertaking as having Strategic Market Status in respect of a digital activity carried out by that undertaking. An undertaking will only be able to be so designated where the CMA considers that the digital activity is linked to the UK. Section 4 sets the criteria for assessing whether a digital activity is so linked to the UK.
 - Section 111(1) makes provision so that unless stated otherwise, Part 1 of the Act applies in relation to persons outside the United Kingdom. Section 111(2) to (6) make provision regarding the ability to give notices (which include notices requiring the provision of information to the CMA for the purposes of Part 1) under Part 1 to a person outside the UK. Section 97 sets out limits to the extra-territorial jurisdiction applied in section 111 in relation to offences.
 - In relation to Part 2 of the Act, section 119 makes provision which extends the extra-territorial reach of the prohibition against anti-competitive agreements etc., set out at section 2 of the Competition Act 1998 so that it applies to agreements etc. which are likely to have a substantial, immediate and foreseeable effect on trade within the UK, even if such agreements were implemented outside the UK.
 - Section 144 and Schedule 13 make provision which amends the Competition Act 1998 and Enterprise Act 2002 to set out the circumstances in which information notices may be given to persons outside the United Kingdom.
 - In relation to Part 3 of the Act, section 148 makes provision in relation to a relevant infringement, that is a commercial practice which harm the collective interests of consumers, meets the UK connection test, and meets the specified prohibition condition, and which are then in scope for the court-based enforcement regime and new CMA direct enforcement regime set out in Part 3.

- Section 160 makes provision regarding the persons outside the UK in relation to whom a public designated enforcer can make an application to the court for online interface order and section 184 makes provision regarding the direct enforcement powers of the CMA to give an online interface notice to persons outside the UK.
- In relation to Part 4 of the Act, in particular sections 148 to 150 (in Part 3) ensure that the prohibitions on unfair commercial practices set out in Chapter 1 of Part 4, the consumer savings protections in Chapter 3 of Part 4 and the consumer protections provided by the alternative dispute resolution provisions in Chapter 4 of Part 4, can be enforced under Part 3 in the case that traders outside the UK target consumers in the UK.
- In addition, section 275 makes provision so that the new duties on traders and consumer rights in relation to subscription contracts set out in Chapter 2 of Part 4 applies to contracts that apply another law but which have a close connection with the UK.
- Section 208 and Schedule 17 make provision which amends Schedule 5 to the Consumer Rights Act 2015, including to set out the circumstances in which information notices may be given to persons outside the United Kingdom.

Commentary on provisions of Act

Part 1: Digital Markets

Chapter 1: Overview

Section 1: Overview

- 93 Section 1 sets out the subject matter of Part 1 of the Act, being the conferral of functions on the Competition and Markets Authority (CMA) in relation to the regulation of competition in digital markets, and related provision as described.

Chapter 2: Strategic Market Status

Power to designate undertaking as having SMS

Section 2: Designation of undertaking

- 94 This section gives the CMA the power to designate undertakings (as defined in section 118) as having strategic market status ("SMS") in respect of a digital activity. Only those undertakings designated with SMS will be subject to the digital markets regime.
- 95 Subsection (1) provides that the CMA may designate an undertaking as having SMS in respect of a digital activity carried out by the undertaking, where the CMA considers that the criteria listed in paragraphs (a) and (b) are met. These criteria are that the digital activity is linked to the UK (as set out in section 4) and that the undertaking meets the SMS conditions in respect of the digital activity.
- 96 Subsection (2) sets out the SMS conditions. The conditions are that the undertaking has, in respect of the digital activity, both substantial and entrenched market power (see section 5) and a position of strategic significance (see section 6).
- 97 Subsection (3) provides that the CMA's power to designate is subject to the turnover condition (in section 7).
- 98 Under subsection (4), the CMA may only make a designation after carrying out an SMS investigation in accordance with Chapter 2.

Section 3: Digital activities

- 99 This section sets out what constitutes a digital activity for the purposes of Part 1 of the Act.
- 100 Under subsection (1), a digital activity is the provision of a service by means of the internet, the provision of digital content, or any activity which is being carried out for the purposes of providing an internet service or digital content. Digital content is defined in section 330.
- 101 Under subsection (1), the provision of a service by means of the internet and the provision of digital content include services and digital content that are purchased and those that are delivered free of charge to users. Examples are social media platforms and e-commerce platforms. Paragraph (b) of subsection (1) does not restrict how digital content should be provided, meaning that the provision of digital content would include digital content, such as software, which is pre-installed on a device.
- 102 Subsection (2) sets out what "by means of the internet" includes for the purposes of section 3. It includes services provided by the internet as commonly understood, as well as services provided by a combination of the internet and electronic communication services as defined

in section 32(2) of the Communications Act 2003. For example, a service which is partly made available over the internet and partly by routing through the public switched telephone network would count as an internet service. This includes services accessed by a mobile phone application as well as those accessed via an internet web browser.

- 103 Subsection (3) gives the CMA the power to treat multiple digital activities carried out by a single undertaking as a single digital activity. For different activities to be grouped together, they must either:
- Have substantially the same or similar purposes; for example, a social media provider offering a number of internet services under different brands with a common function, allowing users, such as advertisers and publishers, to interact and communicate with each other, or
 - Be able to be carried out together to fulfil a specific purpose; for example, services and products that are part of the same supply chain, such as services selling advertisements and the provision of an advertising platform.
- 104 Subsection (4) sets out that where the CMA is required to give or publish a notice or other document under Part 1 of the Act, it may describe the digital activity by reference to the nature of that activity, brand names, or a combination of these.

Section 4: Link to the United Kingdom

- 105 This section sets out the ways in which a digital activity could be linked to the UK for the purposes of designation under section 2(1). At least one of the three criteria set out in paragraphs (a), (b) and (c) must be met.
- 106 Paragraph (a) refers to the activity having a significant number of UK users (“UK user” being defined in section 118). For example, provision of a search engine service, with some operations physically located elsewhere, could be linked to the UK if the activity had a significant number of UK users.
- 107 Paragraph (b) refers to where the undertaking that carries out the digital activity carries on business in the UK in relation to the digital activity.
- 108 Paragraph (c) refers to circumstances in which the digital activity, or the way in which the undertaking carries on the digital activity, is likely to have an immediate, substantial and foreseeable effect on trade in the UK.

Section 5: Substantial and entrenched market power

- 109 This section requires the CMA to look at a period of at least the next five years when assessing whether an undertaking has substantial and entrenched market power in respect of a digital activity. The underlying policy intent is that the CMA should be satisfied that the undertaking’s power and influence in the digital activity is neither small nor transient, based on their consideration of competitive conditions. However, the CMA is not required to demonstrate that the undertaking’s market power will definitely endure for a minimum period of five years. The intent is also that the CMA should not be prevented from considering past and present market conditions as part of this forward-looking assessment. This section does not require the CMA to undertake a formal market definition exercise as part of an SMS investigation.
- 110 When carrying out the forward-looking assessment, the CMA must take into account expected or foreseeable developments if the CMA did not designate the undertaking as having SMS in respect of the digital activity to which the investigation relates. For instance, where an

undertaking is already designated in respect of a digital activity, the CMA must consider what might happen if that designation and existing regulation relating to that designation (such as conduct requirements, described in Chapter 3 of this Part, or pro-competition interventions, described in Chapter 4 of this Part) were to be revoked; for example, a persistence in the undertaking's power in respect of the digital activity following revocation. Where relevant, this would include consideration of expected or foreseeable future developments resulting from other types of regulation that were not dependent on the designation; for example, conduct requirements relating to a different digital activity, or regulation under a different regime.

- 111 The CMA must consider whether the expected or foreseeable developments it has identified are capable of affecting the undertaking's conduct in carrying on the digital activity.

Section 6: Position of strategic significance

- 112 This section sets out when an undertaking has a position of strategic significance.
- 113 The section sets out four conditions, at least one of which must be met in order for an undertaking to have a position of strategic significance.
- 114 In paragraph (a), having a position of significant size could refer to the number of users in relation to the relevant digital activity. A position of significant size or scale may also depend on the undertaking's size relative to the digital activity. For example, if the total number of potential users of a digital activity is small (because the activity is relevant to businesses in a particular sector only) but the undertaking captures a large proportion of those users, it could be considered that the undertaking has achieved a position of significant scale in respect of the activity.
- 115 Paragraph (b) is intended to cover scenarios where the digital activity as carried out by the undertaking plays an important role in the day-to-day business or critical operations of a significant number of other undertakings which would be impacted by the undertaking's conduct of the digital activity. For example, this condition could capture a situation where large numbers of businesses advertise on a search engine to reach their customers or use particular software to carry on their activity.
- 116 Paragraph (c) is intended to cover circumstances in which the undertaking can use its position in the digital activity to leverage or expand into a range of other activities. For example, an undertaking with substantial and entrenched market power in the sale of operating systems may be able to use this power to bundle other services, such as its own online communication service, with its operating system, making it harder for users to switch.
- 117 Paragraph (d) is intended to cover scenarios where an undertaking's position enables it to determine or substantially influence how other undertakings operate (that is to say, to set the rules of the game). For example, if a search engine requires its customers to use certain mobile friendly formats to benefit from advantageous distribution, that may have important effects on how mobile webpages are designed across the internet.

Section 7: The turnover condition

- 118 This section is about the turnover condition.
- 119 Subsection (1) sets out that the turnover condition must be met for the CMA to be able to designate an undertaking as having SMS in respect of a digital activity.
- 120 Subsection (2) sets out that the turnover condition is met in relation to an undertaking if the CMA estimates that the undertaking's UK turnover in the relevant period exceeds £1 billion or that its global turnover in the relevant period exceeds £25 billion. Only one of these thresholds

needs to be met for the turnover condition to be met. If the undertaking is part of a group (see section 117), then the turnover of the whole group should be considered. For example, if the undertaking is part of a larger conglomerate, the CMA must estimate the turnover of the larger conglomerate. Where the undertaking or group engages in non-digital activities, the CMA will have to take the turnover from those activities into account (see paragraphs 34 and 35 below).

- 121 Subsection (3) gives the Secretary of State the power to amend the turnover thresholds in subsection (2). Subsection (4) provides that regulations made under subsection (3) are subject to the draft affirmative procedure (see section 337(3)).
- 122 Subsection (5) requires the CMA to keep the thresholds under review and, from time to time, advise the Secretary of State as to whether they are still appropriate.
- 123 Subsection (6) makes provision about the meaning of the “relevant period” and “relevant turnover”. Paragraph (a) sets out that the “relevant period” is either the most recent period of 12 months in respect of which the CMA considers it can estimate the undertaking or group’s relevant turnover, or the period of 12 months immediately before that if the CMA estimates that the undertaking’s or group’s relevant turnover was higher in that earlier period. Paragraph (b) sets out that the “relevant turnover” of the undertaking or group is either the UK turnover or the global turnover of the undertaking or group.

Section 8: Turnover of an undertaking

- 124 This section makes provision about the value of an undertaking’s or a group’s UK or global turnover in the relevant period for the purposes of the turnover condition.
- 125 Subsection (2) sets out that the total value of the undertaking’s or the group’s global turnover in the relevant period is the total value of turnover arising in connection with any of its activities.
- 126 Subsection (3) sets out that the total value of the undertaking’s or the group’s UK turnover in the relevant period is the total value of turnover arising in connection with any of its activities and relating to UK users or UK customers (as defined in section 118).
- 127 Subsection (4) gives the Secretary of State the power to make regulations providing further detail about how the total value of an undertaking’s or a group’s UK turnover or global turnover is to be estimated for the purposes of the turnover condition. Under subsection (5)(b), such regulations may confer on the CMA the power to determine certain matters, including which amounts are to be regarded as comprising the turnover of an undertaking or a group. Subsection (6) provides that regulations made under subsection (4) are subject to the negative procedure.

Procedure

Section 9: Initial SMS investigations

- 128 This section concerns initial SMS investigations.
- 129 Subsection (1) sets out that the CMA may begin an initial SMS investigation where it has reasonable grounds to consider that it may be able to designate an undertaking in accordance with section 2.
- 130 Subsection (2) sets out that an initial SMS investigation is an investigation into whether or not to designate an undertaking in respect of a digital activity in respect of which it is not already designated. This is subject to section 10(4) in relation to further SMS investigations. Where the CMA considers that the digital activity is similar or connected to a digital activity in respect of

which the undertaking is already designated, it may instead begin a further SMS investigation.

- 131 Subsection (3) clarifies that the CMA has the power to open a designation investigation in respect of a digital activity even if it has previously decided not to designate the undertaking as having SMS in respect of that particular digital activity. This would include circumstances in which a previous designation has been revoked, or where a previous decision had been taken not to designate the undertaking in respect of that digital activity.

Section 10: Further SMS investigations

- 132 This section concerns further SMS investigations. Further SMS investigations relate to existing SMS designations in respect of a digital activity.
- 133 Subsection (1) sets out that the CMA may begin a further SMS investigation in relation to a designation at any time during the designation period.
- 134 Subsection (2) sets out that the CMA must begin a further SMS investigation no later than nine months before the end of the 5-year designation period if it is not already carrying out a further investigation under subsection (1). This section will ensure that the CMA reviews all designations before the end of the 5-year designation period; the CMA may also exercise its discretion to begin a further SMS investigation at an earlier stage (see subsection (1)).
- 135 Subsection (3) sets out the various matters with which further investigations are concerned. A further SMS investigation is an investigation into whether to revoke a designation or to designate an undertaking again in respect of the same digital activity. It is also concerned with whether to make provision under section 17 in relation to existing obligations.
- 136 Subsection (4) sets out that a further investigation may also concern whether or not to designate an undertaking in respect of a digital activity that the CMA considers to be similar or connected to the relevant digital activity (as defined in section 118). This aspect of the investigation would be in addition to the matters listed in subsection (3). Designation in respect of a similar or connected digital activity could be instead of or in addition to the relevant digital activity.

Section 11: Procedure relating to SMS investigations

- 137 This section sets out how the CMA should carry out an SMS investigation. Under section 118, an SMS investigation means an initial SMS investigation and a further SMS investigation. This section therefore applies to both types of SMS investigation.
- 138 Subsection (1) requires the CMA, when beginning an investigation, to give an SMS investigation notice to the undertaking subject to the investigation.
- 139 Subsection (2) sets out what the SMS investigation notice must cover.
- 140 Subsection (3) sets out what the statement of the purpose and scope of the investigation must include. The investigation may relate to more than one digital activity.
- 141 Subsection (4) requires the CMA to give the undertaking a revised version of the SMS investigation notice if it changes its view of the purpose and scope of the investigation.
- 142 Subsection (5) sets out that as soon as reasonably practicable after giving an SMS investigation notice, or a revised version of the notice, the CMA must publish the notice and give a copy of the notice to the Financial Conduct Authority, the Office of Communications, the Information Commissioner, the Bank of England and the Prudential Regulation Authority.

Section 12: Closing an initial SMS investigation without a decision

- 143 This section is about the closure of an initial SMS investigation without a decision.
- 144 Subsection (1) sets out that the CMA may close an initial SMS investigation before and without reaching a final view on whether the undertaking should be designated in respect of a digital activity. This could, for example, cover a situation where the CMA has to prioritise other matters.
- 145 Subsections (2) to (4) set out that if the CMA decides to close an initial SMS investigation, it must give the undertaking under investigation notice of the closure (including reasons) and also, as soon as reasonably practicable, publish the notice.

Section 13: Consultation on proposed decision

- 146 This section requires the CMA to consult on any decision that it is considering making as a result of an SMS investigation.
- 147 Subsection (1) requires the CMA to carry out a public consultation and bring it to the attention of such persons as it considers appropriate.
- 148 Subsection (2) sets out that consultation under subsection (1) may be carried out at the same time as consultation under section 24 on proposed conduct requirements.
- 149 Section 113 sets out further procedural requirements relating to consultation under Part 1.

Section 14: Outcome of SMS investigations

- 150 This section sets out what the CMA must do at the end of an SMS investigation.
- 151 Subsection (1) sets out the decisions that the CMA must make. In the case of an initial investigation (save where it has been closed under section 12), the CMA must decide whether to designate the undertaking with SMS in respect of a digital activity to which the investigation relates. In the case of a further SMS investigation, the CMA must make a decision on the matters set out in section 10(3) and, where relevant, section 10(4).
- 152 Subsection (2) requires the CMA to give the undertaking a notice of its decisions on or before the last day of the SMS investigation period, and sets out that the period for the SMS investigation is nine months, beginning with the day on which the SMS investigation notice is given. Subsection (3) provides that if the SMS investigation notice is revised under section 11, the giving of a revised notice does not change the day on which the SMS investigation period begins. Subsection (4) states that the details of what an SMS decision notice should contain are set out in sections 15 and 16.
- 153 Subsection (5) sets out that, as soon as reasonably practicable after giving an SMS decision notice, the CMA must publish the notice.
- 154 Subsection (6) sets out what happens if the CMA does not give an SMS decision notice on or before the last day of the SMS investigation period. In the case of an initial investigation, it is as if the CMA had decided not to designate the undertaking in respect of any digital activity to which the investigation related. In the case of a further investigation, it is as if the CMA had decided to revoke the existing designation with effect from the end of the SMS investigation period.

Section 15: Notice requirements: decisions about whether to designate

- 155 This section sets out requirements for SMS decision notices in two situations. The first situation is where the CMA decides not to designate an undertaking following an initial SMS investigation. The second situation is where the CMA decides to designate an undertaking as having SMS in respect of a digital activity (whether or not the undertaking is already designated).
- 156 Subsection (1) requires the CMA to give reasons in the SMS decision notice when it decides not to designate an undertaking following an initial SMS investigation.
- 157 Where the CMA decides to designate an undertaking as having SMS in respect of a digital activity, subsection (3) sets out what the notice must include (for example, CMA's reasons for its decisions). The policy intent is that the descriptions of the designated undertaking and digital activity do not need to be exhaustive.
- 158 Subsection (4) gives the CMA the power to update its decision notice if it changes its view of the undertaking or of the digital activity, provided that the undertaking or digital activity remain substantially the same. For example, if a firm changes the brand name of a product in scope of the digital activity or undergoes a corporate restructuring but the activity or undertaking remains substantially the same.
- 159 Under subsection (5), a revised notice does not affect either the day on which the SMS designation begins, nor anything done by the CMA under its powers under Part 1 in relation to the designated undertaking.
- 160 Subsection (6) sets out that the CMA must publish the revised notice. This must be done reasonably practicable after giving the revised notice to the undertaking.

Section 16: Notice requirements: decisions to revoke a designation

- 161 This section sets out requirements for SMS decision notices where the CMA decides to revoke an existing designation as a result of a further SMS investigation.
- 162 Subsection (2) requires the notice to provide for the revocation to have effect. Revocation may have effect at the end of the day on which the notice is given (under section 16(2)(a)) or from an earlier date (under section 16(2)(b)); for example, where the undertaking has already ceased to engage in the relevant digital activity.
- 163 Subsection (3) sets out what the SMS decision notice must include.

Section 17: Existing obligations

- 164 An 'existing obligation' for the purposes of this section is defined in subsection (5), and it is any conduct requirement, enforcement order, final offer order, pro-competition order or commitment, applying at the time when a designation is revoked, or another designation is made, after a further SMS investigation.
- 165 Subsections (1) and (2) grant the CMA a power to make transitional, transitory or saving provisions when revoking a designation, in respect of an existing obligation to manage the impact of revocation on the obligation's beneficiaries, and in a way that appears fair and reasonable to the CMA. Subsection (2A) provides that the CMA's information gathering and enforcement powers in Chapters 6 and 7 in respect of designated undertakings also apply to undertakings still subject to obligations applied under section 17(1).
- 166 Subsections (3) and (4) set out that the CMA may continue any existing obligation in respect of a new designation, may modify that obligation in respect of the new designated activity, and may make transitional, transitory or saving provision in respect of that obligation. The digital

activity may be the same activity as under the previous designation, or a digital activity that the CMA considers to be similar or connected to the previously designated activity (see section 10(4)).

- 167 Subsection (6) sets out that decisions related to existing obligations must be included in the SMS decision notice.

Section 18: Designation period

- 168 This section sets out the length of the SMS designation period.
- 169 Subsection (2) refers to the circumstances in which the designation period may be extended and in which a designation may be revoked before the end of the designation period.

Chapter 3: Conduct Requirements Imposition of conduct requirements

Section 19: Power to impose conduct requirements

- 170 Subsections (1) and (2) give the CMA power to impose conduct requirements on a designated undertaking and vary existing conduct requirements, by giving a notice to the undertaking. Subsection (4) requires that the notice then be published as soon as reasonably practicable.
- 171 Subsection (3) explains that conduct requirements are requirements as to how a designated undertaking must behave in relation to the digital activity for which it has been designated.
- 172 Subsection (5) provides that the CMA may only impose conduct requirements if it considers it proportionate to do so for the purposes of one or more of the following objectives: fair dealing; open choices; and trust and transparency, having regard to what those conduct requirements are intended to achieve.
- 173 Subsections (6) to (8) set out what the objectives mean. The objectives are for the benefit of users and potential users of the relevant digital activity, meaning they will benefit both those who are interacting, and those who may interact in the future, with the relevant digital activity. The limbs within the fair dealing and trust and transparency objectives are not required to operate cumulatively.
- 174 The fair dealing objective is about fair treatment of users and potential users, including the ability to interact with the designated undertaking on reasonable terms. Reasonable terms that could be required by a conduct requirement for the purposes of this objective may include, for example, providing a clear appeals process for when a designated undertaking terminates a user's marketplace access.
- 175 The open choices objective is about enabling free and easy choices for users and potential users between the services and digital content offered by the designated undertaking (both within and outside of the designated activity) and those offered by other businesses. An example of conduct that a requirement under this objective could prohibit is a designated undertaking restricting the functionalities of web browsers that compete with its own.
- 176 The trust and transparency objective is about ensuring that those using or seeking to use the relevant digital activity have the information they need to understand how the activity is provided and that they are able to make informed decisions about their interactions with the designated undertaking.
- 177 Subsection (9) provides that a conduct requirement must be of a type permitted by section 20.
- 178 Subsection (10) provides that the CMA must consider the likely benefits for consumers when imposing conduct requirements. These consumer benefits could arise directly, as a result of

the requirement itself, or they may arise indirectly (for example, by creating benefits for a business user of a designated activity, which it may pass on to consumers). Consumer benefits could also arise in the short term and/or longer term (for example, as a result of improved competition).

179 Subsection (11) provides that the CMA has discretion over when conduct requirements come into force, and sets out when they cease to have effect.

180 When considering the imposition of conduct requirements the CMA will assess the information and factors that it considers relevant in each case. This could include (but is not limited to) considerations such as the impacts on competition, burdens on designated undertakings and third parties, freedom of contract and property rights, the safety and privacy of users, and innovation in digital markets.

Section 20: Permitted types of conduct requirement

181 This section sets out an exhaustive list of permitted types of conduct requirements. The CMA may only impose conduct requirements which fall within at least one of these permitted types.

182 Subsection (2) refers to requirements for the purpose of obliging particular conduct and subsection (3) refers to requirements for the purpose of preventing particular conduct. The specific conduct requirements imposed by the CMA may be framed as either obligations or restrictions, no matter whether they fall within types of requirements under subsection (2) or (3). For example, the CMA may impose a conduct requirement under section 20(3)(g) that prevents a designated undertaking from using data in a particular way or alternatively it may require the undertaking to keep two types of data separate.

183 Subsection (2), paragraph (a) refers to requirements to oblige the designated undertaking to trade on fair and reasonable terms. Unfair or unreasonable terms may include requiring users to sign up to terms that would unreasonably limit their legal or proprietary rights or imposing a price on users that is unfairly high or low. Trade is undefined, and in this context has a broad meaning that includes how the designated undertaking provides the relevant digital activity or otherwise interacts with users and potential users. This type of conduct requirement is relevant even if the designated undertaking is providing a service to users for free, if that is part of the undertaking's trade (for example the service may be monetised so that the undertaking gets the benefit of advertising revenue).

184 Subsection (2), paragraph (b) refers to requirements to oblige the designated undertaking to have effective processes for handling complaints and disputes. This may include requiring the designated undertaking to have an effective appeals process in place when terminating a user's access to a marketplace.

185 Subsection (2), paragraph (c) refers to requirements to oblige the designated undertaking to provide users of the relevant digital activity with clear, relevant, accurate and accessible information about the activity. This could include, for example, ensuring there is a clear application and review process in place for assessing whether an application will be included in a designated undertaking's application store.

186 Subsection (2), paragraph (d) refers to requirements to oblige the designated undertaking to give advance notice and explanations of changes in the way the designated undertaking proposes to carry out the relevant digital activity where those changes are likely to have a material impact on the users. For example, a designated undertaking could be required to ensure that undertakings that rely on its marketplace are made aware of, and receive an explanation of, upcoming changes to search algorithms which may have a significant impact on how users interact with the marketplace, and that they receive a reasonable period of notice ahead of the changes coming into effect.

- 187 Subsection (2), paragraph (e) refers to requirements to oblige the designated undertaking to present to users engaging with the relevant digital activity any options or default settings. This should be done in a way that allows those users to make informed and effective decisions about those options or settings in their own best interests. For example, where the relevant digital activity is a search engine, a designated undertaking could be required to make clear to users that this search engine is the default setting on a particular device and that there are other search engines available, and to ensure that information provided to users on how to switch search engines is clear and understandable.
- 188 Subsection (3), paragraph (a) refers to requirements to prevent the designated undertaking from applying terms, conditions or policies differently to different users or types of users. Discriminatory policies may include treating users more favourably if they purchase other products from the designated undertaking.
- 189 Subsection (3), paragraph (b) refers to requirements to prevent the designated undertaking from self-preferencing, i.e. treating its own products or services more favourably than those offered by other businesses.
- 190 Subsection (3), paragraph (c) refers to requirements to prevent the designated undertaking from carrying out activities in non-designated areas of its business in a way that is likely to materially enhance the undertaking's market power or position of strategic significance in relation to the relevant digital activity. This would include requirements to prevent the designated undertaking from carrying out non-designated activities in a way that is likely to reinforce or embed an undertaking's market power and/or position of strategic significance. This may include, for example, preventing an undertaking with strategic market status in video streaming from including a default setting in its search engine which automatically redirects users to the designated undertaking's video streaming service.
- 191 Subsection (3), paragraph (d) refers to requirements to prevent the designated undertaking from incentivising or requiring the use of its services or products alongside the use of the relevant service or digital content in the designated digital activity. This includes conduct which is sometimes referred to as 'tying' or 'bundling', and may include, for example, preventing the designated undertaking from refusing to extend warranty or after-sales services where bundled products are not purchased together. This permitted type also encompasses a situation where a designated undertaking requires or incentivises the use of one part of the designated activity (e.g. a payment service) alongside another part (e.g. an app store).
- 192 Subsection (3), paragraph (e) refers to requirements to prevent the designated undertaking from restricting the ability of the relevant digital activity offered by the designated undertaking to interact with and communicate with products offered by other undertakings. A designated undertaking could be prevented from, for example, restricting the functionality of certain applications on the designated undertaking's operating system for third party developers.
- 193 Subsection (3), paragraph (f) refers to requirements to prevent the designated undertaking from restricting whether or how users can access and use the designated digital activity. These restrictions could range from a blanket refusal to grant access to a particular platform to more implicit restrictions such as making access to a platform conditional on unfair terms.
- 194 Subsection (3), paragraph (g) refers to requirements to prevent the designated undertaking from using data unfairly. This may include, for example, prohibiting the provider of a designated digital marketplace from preventing a third party seller using that marketplace from accessing any data about how users engage with the third party's services or products, or prohibiting the designated digital marketplace provider from using third party sellers' data to develop competing products.

- 195 Subsection (3), paragraph (h) refers to requirements to prevent the designated undertaking from restricting the ability of their users to use products provided by other undertakings. This may include, for example, a designated undertaking restricting the functionalities of web browsers that compete with its own when using the designated undertaking's operating system.
- 196 Subsection (4) contains a delegated power for the Secretary of State to amend by regulation the list of types of permitted conduct requirement and subsection (5) clarifies that amending the list would be subject to the draft affirmative procedure, see section 337(3).

Section 21: Content of notice imposing a conduct requirement

- 197 This section sets out the information that the CMA is required to publish as part of the notice imposing or varying a conduct requirement.

Section 22: Revocation of conduct requirements

- 198 This section provides that the CMA has power to revoke a conduct requirement by way of notice to the designated undertaking. The notice must then be published as soon as reasonably practicable.

Section 23: Transitional provision relating to conduct requirements etc

- 199 Subsection (1) establishes that the CMA may impose transitional, transitory or saving provisions in relation to imposing, varying or revoking conduct requirements. An example would be if a conduct requirement was imposed as from a particular date, but some allowances were made in relation to certain aspects of that conduct requirement so that they had effect from a later date, to smooth the transition for the benefit of the designated undertaking. The CMA could undertake similar smoothing in relation to the ceasing of a conduct requirement, helping to ensure a smooth market transition for the undertaking and other market participants.
- 200 Subsection (2) allows the CMA to exercise its digital markets functions in relation to potential and actual breaches of conduct requirements where the conduct requirements are no longer in place. This enables the CMA to investigate and enforce against historic breaches.

Section 24: Consultation in relation to a conduct requirement

- 201 This section imposes a duty on the CMA to consult publicly before imposing, varying or revoking a conduct requirement. The consultation must be brought to the attention of such persons as the CMA considers appropriate.
- 202 The CMA is only able to impose conduct requirements on a designated undertaking, i.e. after designation of that undertaking with SMS, but subsection (3) provides that the CMA is allowed to carry out a consultation on proposed conduct requirements before it has made a decision on designation. This makes it possible for the CMA to impose conduct requirements at the same time as issuing a decision on designation or very shortly afterwards.

Section 25: Duty to keep conduct requirements under review etc

- 203 This section places a duty on the CMA to consider, on an ongoing basis, the effectiveness of any conduct requirements in place and how far the designated undertaking is complying with them. The CMA also needs to consider, on an ongoing basis, whether to impose, vary or revoke a conduct requirement, or whether it would be appropriate to take action against a breach of any conduct requirement.

Enforcement of conduct requirements

Section 26: Power to begin a conduct investigation

- 204 This section provides when and how the CMA can begin an investigation into a suspected breach of a conduct requirement (a conduct investigation). The CMA can use its investigatory and enforcement powers where a suspected breach has taken place during a period of designation or while transitional provisions under section 17 are or have been in place.
- 205 Subsection (1) outlines the threshold that the CMA must meet to open a conduct investigation. The CMA will decide on the basis of available evidence, such as that arising from complaints submitted by third parties or from the CMA's market monitoring, whether it has reasonable grounds to suspect that an undertaking has breached a conduct requirement.
- 206 Subsection (2) explains that a conduct investigation concerns both whether a breach of the conduct requirements has occurred and, if it has, what action the CMA should take in relation to the breach - for example, the imposition of penalties and/or enforcement orders.
- 207 Subsections (3) and (4) outline the requirement for the CMA to give a notice to the undertaking about the investigation (a conduct investigation notice) and set out the content required for that notice. A conduct investigation notice marks the start of the investigation and of the statutory conduct investigation period, which is a period of six months (see section 30(2)), although it can be extended in certain circumstances (see section 104).
- 208 Subsection (6) requires that the CMA must, as soon as reasonably practicable after giving a conduct investigation notice, publish a summary of the notice. This is to make those who may be interested aware of the ongoing investigation and could summarise the contents of the notice provided to the relevant designated undertaking, while allowing the CMA to redact some information for confidentiality purposes.

Section 27: Consideration of representations

- 209 This section provides that the CMA is required to consider representations that the undertaking being investigated makes during the period specified in the investigation notice for representations (see section 26(4)(c)), before making a decision on whether the undertaking has breached conduct requirements.

Section 28: Closing a conduct investigation without making a finding

- 210 This section provides that the CMA can choose to close a conduct investigation without making a decision about a breach, and sets out the process and timing for giving a notice to the undertaking about the closure and publishing a summary of the notice. This could summarise the contents of the notice provided to the relevant designated undertaking, while allowing the CMA to redact some information for confidentiality purposes.

Section 29: Countervailing benefits exemption

- 211 Subsection (1) provides that the CMA must close a conduct investigation where representations made by the designated undertaking under investigation lead the CMA to consider that overall the conduct results in benefits for users that outweigh the negative consequences for competition. There are similarities with the approach of section 9 of the Competition Act 1998 (agreements exempt from the Chapter 1 prohibition on anti-competitive agreements) and the relevant customer benefit test under section 134(7) of the Enterprise Act 2002.
- 212 Subsection (2) sets out the criteria for the exemption. The benefits need to be for the users or potential users of the digital activity to which the conduct investigation relates, and must outweigh any actual or potential harm to competition. Some examples of benefits may include

protecting user security or privacy, lower prices, higher quality goods or services, or greater innovation in relation to goods or services. It must not be possible to realise the benefits without the conduct. This means the CMA must be satisfied that there is no other reasonable or practical way for the designated undertaking to achieve the same benefits with less anti-competitive effect. The conduct must also be proportionate to the benefits, and must not eliminate or prevent effective competition, which means that the outcome must be that which is the least disruptive to competition.

- 213 Subsection (3) explains that where the exemption applies, the designated undertaking is to be treated as if the CMA had found that it had not breached the relevant conduct requirement.
- 214 In deciding whether the exemption applies, the CMA can consider evidence submitted by the undertaking under investigation, evidence submitted by third parties and evidence it has gathered itself. However it is incumbent on the designated undertaking to make representations to the CMA to establish that the exemption applies.

Example of a designated undertaking's claim of countervailing benefits

A conduct requirement is imposed on a designated undertaking requiring users to be allowed to make their own choice between internet browsers on their phone operating system (rather than using the undertaking's own default browser). If the undertaking rolled out an update to its operating system which changed the default internet browser back to the undertaking's own browser, the CMA could investigate the undertaking for breaching the conduct requirement. The undertaking could claim that the countervailing benefits exemption is engaged on the basis that the change benefits consumers because it is needed to apply critical security patches. The undertaking would need to demonstrate that the requirements of the countervailing benefits exemption are met, and the CMA would then close the conduct investigation in relation to the conduct requirement on default options.

Section 30: Notice of findings

- 215 This section outlines that the CMA must give a notice setting out its findings to the undertaking under investigation on or before the last day of the six month investigation period, and publish the notice as soon as reasonably practicable after that point, subject to necessary redactions for confidentiality reasons. The CMA is not required to give a notice of findings if it has closed the investigation without making a finding under section 28, or it has accepted under section 36 a commitment from the designated undertaking in relation to the behaviour under investigation.

Section 31: Enforcement orders

- 216 This section gives power to the CMA to impose obligations on an undertaking for the purpose of remedying a breach of the conduct requirements, by way of enforcement order. Enforcement orders are a key enforcement tool and sit alongside other means of enforcement set out in Chapter 7.
- 217 Where a provision refers to an "enforcement order" it is referring to both standard enforcement orders and enforcement orders made on an interim basis (set out in section 32 - "interim enforcement orders") unless otherwise specified.
- 218 Subsections (2) and (3) provide that enforcement orders may be varied, and may include transitional, transitory and saving provision.

- 219 Subsection (4) specifies information that the enforcement order must contain. The enforcement order must specify the breach (or in the case of an interim enforcement order, suspected breach, see section 32(2)) to which it relates. Subsection (5) provides that the CMA may consult such persons as it considers appropriate before making or varying an order.
- 220 Subsection (6) provides that where the CMA wishes to make an enforcement order (other than an interim enforcement order under section 32) it must do so as soon as is reasonably practicable after giving a notice of the conduct investigation findings under section 30. This is to make sure that the CMA acts swiftly where it wants to make an enforcement order after finding a breach of conduct requirements has occurred, while also providing it with flexibility to consult on a proposed order under subsection (5) where it considers that is appropriate.
- 221 Subsection (7) requires that, for reasons of public transparency, as soon as reasonably practicable after giving an undertaking an enforcement order the CMA must publish the order.
- 222 Subsection (8) enables the CMA to consent to an undertaking doing something that would otherwise constitute a breach of an enforcement order. This is to allow for flexibility in relation to particular circumstances. For example, an interim enforcement order may need to be introduced urgently to prevent immediate harm. The designated undertaking may be able to show that it should be able to continue particular aspects of its conduct which could breach the interim enforcement order, but which will not result in any harm.

Section 32: Interim enforcement orders

- 223 This section gives power to the CMA to make enforcement orders on an interim basis, i.e. interim enforcement orders. Interim enforcement orders can only be made during the breach investigation and in the limited circumstances set out in subsection (1)(b).
- 224 Subsections (2) to (8) explain the procedural requirements in relation to interim enforcement orders, including that the CMA must give an opportunity for the designated undertaking to make representations before introducing an interim enforcement order unless doing so would substantially reduce the effectiveness of the order. The procedural requirements outlined in section 31 also apply to interim enforcement orders unless otherwise specified.

Section 33: Duration of enforcement orders

- 225 This section makes provision for the coming into force of enforcement orders and interim enforcement orders and the circumstances in which they cease to have effect.
- 226 Subsection (4) allows the CMA to exercise its functions in relation to potential and actual breaches of enforcement orders where the enforcement orders are no longer in place. This enables the CMA to take action against historic breaches.

Section 34: Revocation of enforcement orders

- 227 This section gives power to the CMA to revoke an enforcement order or interim enforcement order, and to make transitional, transitory and saving provision in relation to revocation. It sets out the procedural requirements on the CMA for giving notice to the undertaking to whom the order applies and for ensuring public transparency, as well as giving power to the CMA to consult on the revocation.

Section 35: Duty to keep enforcement orders under review

- 228 This section provides that the CMA must keep the enforcement orders and interim enforcement orders it has made under review, including whether to vary or revoke them, and also the extent to which undertakings are complying with them and whether further enforcement action needs to be taken.

Example of an enforcement order

The CMA imposes a conduct requirement obliging the undertaking to make sure that users are not prevented from selecting alternative web browsers on the mobile operating system.

The CMA suspects that the undertaking has breached the conduct requirement by making it difficult for smartphone users to change their web browser. The CMA consequently opens a conduct investigation.

Having investigated and considered representations from the undertaking, the CMA concludes that the undertaking has breached the conduct requirement. The CMA gives the undertaking a notice containing its investigation findings setting out its decision and also makes an enforcement order and publishes a statement about the order. The order requires the undertaking to introduce effective and clear systems so users are able to choose freely between competing web browsers on the mobile operating system. The CMA then monitors the enforcement order and the undertaking's compliance.

Example of an enforcement order being varied

The CMA is monitoring the enforcement order introduced above. Over time it becomes apparent that the contents of the enforcement order is out of date because of changes in technology. The CMA varies the order by making a revised version of it, and issues the undertaking with the revised enforcement order, and then publishes a notice concerning the variation of the order.

Commitments relating to conduct requirements

Section 36: Commitments

- 229 This section provides that the CMA can accept binding voluntary commitments from an undertaking during a conduct investigation to bring the investigation to an end. Commitments are a common approach to solving competition issues, with similar provisions in the Competition Act 1998 for suspected breaches of the Chapter 1 and Chapter 2 prohibitions against anti-competitive agreements and abuse of dominant positions (see sections 31A to 31E and Schedule 6A).
- 230 Subsection (3) provides that when a commitment is accepted by the CMA the undertaking must comply with it and that the CMA may not issue a notice of findings under section 30 or make an enforcement order. The commitments in effect bring an end to the conduct investigation. Subsection (4) sets out that the CMA can accept a commitment that addresses part of the conduct under investigation while continuing the investigation into other conduct. It also sets out when the CMA can investigate the same behaviour again.
- 231 Subsections (5) and (6) make provision for the coming into force of commitments and the circumstances in which they cease to have effect. A commitment ceases to have effect when the first of the following occurs: its terms say it ends, the conduct requirement to which the commitment relates ceases to have effect or the CMA releases the undertaking from the requirement to comply with the commitment. Using the power contained in section 17, the

CMA may make transitional provisions in relation to a commitment when it revokes the relevant designation, or it may continue the commitment where it decides to designate the same, similar or connected activity.

- 232 Subsection (7) provides that the CMA may accept a variation to a commitment from time to time, provided that the commitment as varied remains appropriate, and subsection (8) enables the CMA to release an undertaking from a commitment.
- 233 Subsection (9) allows the CMA to exercise its functions in relation to potential and actual breaches of commitments where the commitments are no longer in place. This enables the CMA to take action against historic breaches.

Example of a commitment accepted by the CMA

The CMA imposes a conduct requirement that stipulates that an undertaking must make sure users are not prevented from using alternative internet browsers on their mobile operating system. The undertaking is suspected of stopping smartphone users from being able to access and operate competing internet browsers. The CMA therefore opens a conduct investigation.

During the investigation the undertaking offers commitments: it puts forward a proposal to introduce a specific system so users are permanently able to choose freely between competing internet browsers on the mobile operating system. The CMA reviews the offered commitments and thinks they are a likely effective solution to the potential breach of conduct requirement. The CMA therefore develops the commitments further with the undertaking. The CMA in the meantime continues with the breach investigation.

The CMA publishes the proposed commitments in a notice, and takes into account any representations made to it due to the publication of the proposed commitment. The CMA decides that the commitments given are appropriate and so publishes a notice on its decision to accept the commitments and what the commitments consist of. The commitments come into force and the undertaking alters its conduct in line with their direction.

Section 37: Duty to keep commitments under review etc

- 234 This section provides that the CMA has an ongoing duty to keep under review the commitments it accepts and the extent to which undertakings are complying with them, in the same way as it does for conduct requirements and enforcement orders.

Schedule 1: Procedure relating to commitments

- 235 Schedule 1 makes provision about the procedure for accepting or varying commitments with regard to conduct requirements (in Chapter 3 of Part 1 of the Act) and pro-competition orders (in Chapter 4 of Part 1), and for releasing undertakings from commitments.

Final offer mechanism

Section 38: Power to adopt final offer mechanism

- 236 This section provides the CMA with the power to use what is called the “final offer mechanism” (FOM) as a backstop tool to enforce conduct requirements to offer fair and reasonable payment terms.

- 237 Subsection (1) provides that the CMA can require the designated undertaking and invite a third party to submit what they consider to be fair payment terms for a transaction (their “final offer payment terms”), provided the CMA considers that three conditions are met.
- 238 The first condition, set out in subsection (2), requires the transaction to be a transaction in which the designated undertaking would either provide goods or services to the third party, acquire goods or services from the third party or use goods or services belonging to or produced by the third party. This includes situations where the parties are re-negotiating terms or agreeing terms in relation to a new transaction, including one which arises as a result of a newly established obligation to pay.
- 239 Subsection (3) sets out the second condition, which is that the designated undertaking has failed to agree fair and reasonable payment terms, and in doing so has breached an enforcement order relating to the breach of a conduct requirement to trade on fair and reasonable terms.
- 240 Subsection (4) sets out the third condition, which is that the CMA considers that it could not resolve the relevant breach satisfactorily and within a reasonable time period by exercising any of its other functions under the digital markets regime. These other functions could include further conduct requirements or PCIs, or other enforcement action by way of financial penalties, enforcement orders and court orders. The decision to adopt FOM does not preclude the CMA from concurrently exercising any of its other functions.
- 241 Subsection (5) provides that in subsection (1), “transaction” means not only a potential future transaction, but also the future performance of an ongoing transaction. This specifies that FOM is forward-looking, in the sense that it can apply either in relation to the renegotiation of an existing arrangement, or in relation to a new transaction (including one which arises as a result of a newly established obligation to pay).
- 242 Subsection (6) provides that the CMA can use its investigatory and enforcement powers where a suspected breach of a Final Offer Order occurred during a period of designation or while transitional provisions under section 17 are or have been in place.

Section 39: Collective submissions

- 243 This section sets out the situations in which two or more third parties may make a single submission of payment terms that they collectively regard as fair and reasonable during the Final Offer Mechanism (FOM) process. This is known as a collective submission. The provisions set out in this section do not preclude parties from engaging in collective bargaining at other stages in the enforcement process, within the confines of existing competition law.
- 244 Subsection (1) clarifies that, where a designated undertaking is involved in a single transaction involving two or more third parties, the CMA has discretion to invite – but not compel – the third parties in question to submit a single final offer of payment terms as a collective. For multiple parties to be able to submit a single bid, the usual conditions required for FOM (see section 38) apply, and the CMA must consider that the third parties are able to act jointly when submitting a final offer of payment terms. The CMA is not required to share the reasons behind their decision to allow a collective submission in the final offer initiation notice but may choose to do so.
- 245 Subsection (3) allows the CMA to invite two or more third parties to make collective submissions in situations where there are multiple transactions. The third parties can be invited to make a collective submission in relation to the transactions provided that the CMA considers the parties can act jointly and that the same terms as to payment could be applied to all the transactions in question. The ‘same terms as to payment’ does not necessarily mean the

same price applies for all the transactions; it also encompasses scenarios where, for example, a common formula for determining a price could apply to all the transactions. For example, a transaction entered into with one third party could be grouped with a different transaction entered into with another third party, or with multiple third parties.

- 246 Subsection (4) clarifies the situations in which the provisions in sections 39-44 apply to all the third parties/transactions subject to FOM, and when they could also apply to a smaller subset of them. This provides in particular for the possibility that some decisions taken by the CMA during the FOM process may not affect all members of a grouped third party.
- a. For example, the effect of subsection (4) is that section 43(3) requires the CMA to give notice to all the grouped third parties if it decides not to issue a final offer order, while section 40(4) provides that, for the purposes of information gathering, the CMA has discretion to require any one or more of the grouped third parties to provide information.

Section 40: Final offer mechanism

- 247 This section sets out the process the CMA must follow if it decides to use FOM.
- 248 Subsection (1) requires the CMA to give a notice (the “final offer initiation notice”) to the two parties of its decision to use FOM.
- 249 Subsection (2) sets out the information that must be contained in the notice, which includes a description of the enforcement order breach that has triggered FOM. Where multiple breaches of enforcement orders are found, either as a result of one investigation or several separate investigations, the CMA can choose to combine the breaches for the purposes of FOM, where appropriate. The notice must also specify the submission date on or before which final offer payment terms are to be submitted to the CMA.
- 250 Subsection (3) requires the CMA to publish a statement about the use of FOM in each particular case and sets out the contents for the statement. The statement must be published as soon as reasonably practicable after the final offer initiation notice is issued. It must specify if the CMA is considering taking any other action to address the underlying cause of the breach which led to the use of FOM. For example, a pro-competition order, instructing a designated undertaking to provide access for third parties to consumer data held by the undertaking, could also be used to rebalance bargaining power within that digital activity.
- 251 Subsection (4) provides that, after giving a final offer initiation notice, the CMA can subsequently revise certain details. It can change its view of the transaction or the third party, provided they remain substantially the same; it can update the list of joined or grouped third parties, if those parties are making a collective submission of payment terms; and it can change the date on or before which final offer payment terms need to be submitted to the CMA.
- 252 Subsection (5) requires the CMA to issue a revised version of the final offer initiation notice to the designated undertaking and the third party. Subsection (6) clarifies that “the third party” refers to the persons who were the joined or grouped third parties before the list was updated and any persons who are being added to the joined or grouped third parties.
- 253 Subsection (8) sets out the powers that the CMA has for the gathering and sharing of information between the designated undertaking and the third party to ensure that they can each submit well-informed final offer payment terms. Powers include requiring parties to provide information to the CMA, which may in turn be shared with the other party.

Section 41: Final offers: outcome

- 254 This section establishes the processes the CMA must follow with regards to the outcome of FOM. The CMA decides which final offer payment terms are to be given effect for the purposes of the transaction (or any other transaction that is substantially the same). The CMA cannot change the final offer payment terms put forward.
- 255 Subsection (1) provides that this section applies if the CMA has decided to use FOM, and at least the designated undertaking or the third party has submitted final offer payment terms to the CMA before the submission date. Here, ‘the third party’ refers to all the grouped/joined third parties in a scenario where a collective submission was to be made.
- 256 Subsection (2) requires the CMA to make a final offer order directing which final offer payment terms are to be given effect for the purposes of the transaction (or any other transaction that is substantially the same). This requirement is subject to section 43(1), which provides that the CMA can decide not to make a final offer order where it has reason to believe there has been a material change in circumstances. If the CMA does make a final offer order, the selected payment terms must be “given effect”, or implemented fully for the intended purpose. This means that the CMA will not require certain terms to be included verbatim in the transaction, but rather it will set out the outcome the designated undertaking must achieve in the transaction.
- 257 The final offer payment terms must also be given effect for the purposes of any other transaction that is “substantially the same” as the initial transaction, in order to prevent parties seeking to avoid the effects of the order for transactions that are, in essence, the same, by changing other terms. In the event that only one party submitted final offer payment terms, the CMA will have to choose those terms.
- 258 Subsection (3) establishes that the period within which the CMA must make its decision, the “final offer period”, is subject to a six-month statutory deadline, beginning with the day on which the final offer initiation notice is given to the parties.
- 259 Subsection (4) creates a power for the Secretary of State to amend the length of the final offer period. Under subsection (5), this power is subject to the draft affirmative procedure, see section 337(3).

Section 42: Final offer orders: supplementary

- 260 Subsection (1) provides that a final offer order must impose obligations on the designated undertaking that the CMA considers appropriate to ensure the final offer payment terms it has decided upon are given effect. Subsection (2) sets out the information that the CMA must give to the parties, by notice.
- 261 Subsection (3) requires the CMA to publish a statement summarising the contents of the final offer order and accompanying notice as soon as is reasonably practicable after the notice is given to the parties. The statement could summarise the contents of the order provided to the relevant designated undertaking, for example by redacting some information for confidentiality purposes.

Section 43: Decision not to make final offer order

- 262 Subsection (1) allows the CMA not to make a final offer order, and thereby stop the FOM process, if it has reasonable grounds to believe there has been a material change in circumstances. For example, the CMA could stop the FOM process if it has reasonable grounds to believe that one of the parties has submitted an offer under duress.

- 263 Subsection (2) provides that, for the purposes of this section and section 44(3), a material change of circumstances includes the parties coming to a mutual agreement in relation to payment terms.
- 264 Subsections (3) to (5) provide that, where the CMA decides not to make a final offer order, it must give a notice to the parties including the reasonable grounds for the belief of the change in circumstances and must publish a statement summarising the contents of the notice as soon as reasonably practicable after giving the notice.

Section 44: Duration and revocation of final offer orders

- 265 This section sets out when a final offer order comes into effect (subsection (1)) and the circumstances in which it ceases to have effect (subsection (2)). Subsection (3) also gives power to the CMA to revoke a final offer order when the CMA has reasonable grounds to believe there has been a material change in circumstances. Where collective submissions have been made, the CMA can also partially revoke a final offer order, e.g. revoke it in respect of some of the grouped third parties, but not others. A material change in circumstances includes, but is not limited to, the third party (or some of the grouped or joined third parties) coming to their own agreement with the designated undertaking in relation to payment terms (see section 43(2)). The CMA has power to make transitional, transitory or saving provisions in relation to revocation (or partial revocation) of a final offer order (subsection (6)).
- 266 The CMA must give a notice to the parties of the decision (including reasons) and publish a summary statement (subsections (4), (5) and (7)).
- 267 Subsection (8) allows the CMA to exercise its functions in relation to potential and actual breaches of a final offer order where the order is no longer in place. This enables the CMA to take action against historic breaches.

Section 45: Duty to keep final offer orders under review

- 268 This section requires that the CMA keep final offer orders, and compliance with them, under review.

Flowchart of the FOM process
A designated undertaking is instructed, as part of its conduct requirements, to offer fair and reasonable payment terms to a third party. (Sections 19 and 20)
The CMA has reason to believe the conduct requirement has been breached, and carries out an investigation, lasting a maximum of six months. (Section 26)
The CMA finds a breach. It makes an enforcement order to bring the undertaking's conduct in line with the requirement. (Section 31)
The CMA finds that the undertaking has breached the enforcement order, and is still not complying with the original conduct requirement. (Section 38(1))
The CMA considers whether using it could not satisfactorily address the breach within a reasonable time frame by exercising any of its other digital markets functions (Section 38(2)-(4))

Where appropriate, the CMA will also consider whether multiple third parties could be invited to make a collective submission of payment terms. (Section 39)
The CMA refers parties to the mechanism through a notice (a FOM initiation notice). (Section 40(1))
The CMA must state what other actions, if any, it is considering taking to address any underlying factor or combination of factors which contributed to the breach. (Section 40(3)(b))
The CMA facilitates evidence gathering and sharing between the two parties. (Section 40(4))
Both parties then prepare their 'final offer payment terms'. The exact amount of time parties will have to prepare their offers will be set by the CMA. (Section 40). The CMA must make an order on or before the last day of the "final offer period" of six months. (Section 41(3)).
The CMA must state which party's final offer payment terms are to be included in the transaction, unless there has been a material change in circumstances. (Section 41)
The CMA issues a final offer order to give effect to its decision. (Section 42(1))
The CMA publishes a statement explaining, amongst other details, why the winning bid was successful. (Section 42(3))
Parties will be able to appeal the outcome under judicial review principles, with the Competition Appeal Tribunal (CAT) reviewing the decision to adopt one of the offers. (Section 102)

- 269 The various timelines set out in this flowchart are subject to the CMA's power to extend deadlines under the circumstances in Section 103.

Chapter 4: Pro-Competition Interventions

Section 46: Power to make pro-competition interventions

- 270 This section sets out the CMA's power to remedy competition problems it finds in relation to relevant digital activities undertaken by designated undertakings by making "pro-competition interventions" (PCIs), and its power when doing so to address any associated consumer detriment.
- 271 Subsection (1) empowers the CMA to implement a PCI where it considers doing so would be proportionate to remedy, help remedy or mitigate an adverse effect on competition.
- 272 Subsection (2) provides that when deciding what, if any, action to take to address the factor or combination of factors having an adverse effect on competition, the CMA may consider any benefits to UK users and UK customers arising from those factors. The PCI provisions adopt the terms UK users and UK customer, the former term being defined in this Act and the latter using the customer definition set out in the Enterprise Act 2002.

Example (1): A consumer benefit in a PCI investigation

The CMA may conduct a PCI investigation into a suspected competition concern related to a designated undertaking's designated operating system (OS) for mobile devices. The OS pre-installs and makes the designated undertaking's own web browser the default on mobile devices that are powered by the OS. Users of mobile phones that use this OS rarely take the time to download alternative web browsers, or to set alternatives as the default. This makes it significantly harder for other web browsers to build market share and compete.

To remedy this, during the course of the investigation the CMA may propose a pro-competition order that prohibits the designated undertaking's OS from pre-installing a web browser on mobile phone devices. However, the designated undertaking may provide evidence that the pre-installed web browser on the device improves the quality of the product for consumers, as it makes setting up the new phone easier and quicker.

If the CMA accepted the evidence and took the view that it was appropriate to preserve the benefit, it could instead propose to introduce a different pro-competition order to preserve this benefit. It may instead propose to require the designated undertaking's OS to present users with a choice screen when setting up a device, with different options for setting the default web browser. This could remedy the competition concern by giving users an active choice in their preferred web browser, whilst preserving the consumer benefits of pre-installed web browsers.

- 273 Subsection (3) sets out how the CMA can implement a PCI. It can take the form of either - or both - an order imposing requirements on the designated undertaking, and non-binding recommendations to other persons exercising functions of a public nature on steps they should take. Other parties may include the Government or another independent regulator better placed to act (e.g. by way of statutory powers and expertise). The CMA can also implement a PCI in relation to any part of the designated undertaking's business, where the CMA decides that such requirements or non-binding recommendations would address the competition problem.

Example (2): A pro-competition order on an undertaking

The CMA may order a designated undertaking to make its designated social media service interoperable with other competitors' social media platforms, with features including cross-posting on multiple platforms, in order to allow competitors to overcome barriers to entry and expansion and facilitate greater competition.

Example (3): A recommendation to another party

The CMA may find that there is an adverse effect on competition relating to a designated undertaking's mobile operating system (OS). The OS restricts competitors' access to the technology needed to make contactless payments on the mobile devices that are powered by the designated OS. The CMA may recommend that the Financial Conduct Authority (FCA) intervenes to address some of the concerns, if it judged in the circumstances of the case that the FCA could be better placed to intervene due to its expertise as the conduct regulator for the UK's financial markets.

- 274 Subsection (4) provides that, while the PCI power primarily empowers the CMA to address an adverse effect on competition, a PCI may additionally make provision to remedy or minimise any related detrimental effects on UK users and UK customers. The CMA may take this detriment into account when deciding which PCI remedy to implement.
- 275 Subsection (5) defines an adverse effect on competition in the United Kingdom and provides that a factor or combination of factors associated with a designated digital activity causes adverse effects on competition where it prevents, restricts or distorts competition in connection with the relevant digital activity in the United Kingdom. These factors can be related to a designated undertaking's conduct (e.g. self-preferencing behaviour) or factors not caused by the designated undertaking's conduct (e.g. the designated undertaking benefits from network effects resulting from large numbers of users).
- 276 An adverse effect on competition can concern competition in relation to the relevant digital activity itself; or it may concern competition in relation to another activity, provided the effect is connected to the relevant digital activity.

Section 47: Power to begin a PCI investigation etc

- 277 This section gives the CMA the power to launch a formal evidence gathering process - a PCI investigation - where it suspects there is a competition problem related to an undertaking's relevant digital activity, and sets out its duties during the investigation. A PCI investigation may relate to one or more designated undertakings and multiple designated digital activities. The CMA will decide whether to open a PCI investigation on the basis of available evidence: this may include that arising from complaints submitted by third parties; evidence, where appropriate, from the CMA's other tools; or from referrals of information from other regulators.
- 278 Subsection (3) states that the CMA may launch a fresh PCI investigation in respect of a designated undertaking in cases where it had previously made a decision to not implement a PCI in relation to the undertaking for either the same digital activity or the same AEC.

Section 48: Procedure relating to PCI investigations

- 279 This section describes how and when the CMA should give notice to the relevant designated undertaking of the initiation of a PCI investigation. The CMA is under a duty to publish as soon as reasonably practicable a PCI investigation notice provided to the designated undertaking under investigation, subject to necessary redactions for confidentiality reasons.
- 280 Subsection (2) sets out the information that the PCI investigation notice must include. This includes a description of the CMA's grounds for suspecting that there is an adverse effect on competition and the purpose and scope of the investigation in relation to the designated undertaking and the digital activity.
- 281 Subsection (3) allows the CMA to update the PCI investigation notice if it has refined its view of the purpose and scope of the investigation, such as if the activity has changed since the earlier notice was given to the designated undertaking. For example, the CMA could give notice that it is narrowing or extending in a limited way an investigation in relation to the digital activity as a result of its assessment of evidence gathered during the investigation. This may not change the general nature of the scope and purpose of the investigation as a whole and does not change the date on which the investigation begins (see section 50(3)).
- 282 Subsection (4) places a duty on the CMA to publish a statement summarising the contents of the investigation notice as soon as reasonably practicable following the initiation of the investigation. This notice could summarise the contents of the notice provided to the relevant designated undertaking, for example by redacting some information for confidentiality purposes.

Section 49: Consultation on proposed PCI decision

- 283 This section sets out the process for how the CMA must publicly consult on its provisional findings before giving notice of its PCI decision under section 50. It requires the CMA to include in the consultation its findings from the PCI investigation as well as at least a description of any pro-competition orders the CMA proposes to make. The CMA may choose to consult on a draft pro-competition order as part of this consultation (see section 54(2)) but does not have to.

Section 50: PCI decision

- 284 This section describes the procedure for concluding a PCI investigation. The CMA must notify the designated undertaking of its decision before the end of the PCI investigation period (which is a period of nine months beginning with the day on which the PCI investigation notice is given to the undertaking under section 48), must publish that decision as soon as reasonably practicable afterwards, and then has a period of four months in which to consult and issue a pro-competition order(s) if it so chooses. Any recommendations being made in addition or in the alternative to pro-competition orders should also be made within the four-month period.
- 285 Subsections (6) and (7) set out that the CMA may subsequently decide not to make a pro-competition order after providing notice that it would. The CMA must inform the designated undertaking of this change and publish that notice.

Section 51: Pro-competition orders

- 286 This section provides for the remedies possible as part of a pro-competition order, including an order implemented on a trial basis. The CMA must state in the pro-competition order the date by which it must be reviewed, and the CMA is under a duty to publish a pro-competition order provided to the relevant designated undertaking, subject to necessary redactions for confidentiality reasons.

- 287 Subsections (1) provides that a pro-competition order following a PCI investigation, may implement the same remedies, including directions, that are provided for in Section 161 and Schedule 8 of the Enterprise Act 2002 following a market investigation reference. Schedule 8 of the Enterprise Act 2002 sets out a non-exhaustive list of structural and behavioural remedies that the CMA may implement as an order. These include:
- a. General restrictions on conduct e.g. a prohibition on combining user data collected from different activities that the undertaking carries out;
 - b. General obligations to be performed e.g. a requirement to make a service interoperable with a competitor's;
 - c. Acquisitions and divisions e.g. a requirement to divest an aspect of the business;
 - d. Supply and publication of information e.g. a requirement to supply a competitor with user data.
- 288 Subsection (1), as a consequence of sections 161 and 164 of the Enterprise Act 2002, allows the CMA to also be able to issue directions of the kind described in section 87 of the Enterprise Act 2002 in respect to compliance with pro-competition orders.
- 289 Subsection (2) makes necessary modifications to the wording of Schedule 8 to the Enterprise Act 2002 to achieve this.
- 290 Subsection (3) and (4) outline that the pro-competition order may require a designated undertaking to trial a remedy or remedies with subsets of, or all of, the designated undertaking's users following a PCI investigation, if it would help the CMA build evidence on an effective PCI remedy made on a non-trial basis. The CMA can choose to trial different remedies at the same time, or trial different versions of the same remedy in order to determine the effective remedy design. By their nature trials will be time limited.

Example (4): A trial pro-competition order

The CMA may conclude that, due to a competition concern, the designated undertaking's designated mobile operating system (OS) should show users a choice screen containing different search engine providers. The CMA may order the undertaking to run a trial of different choice screen layouts in order to determine which design is most effective at boosting competition. It could, for example, order the undertaking to run a 3-month trial, with 4 different choice screen layouts for 1% of its users. At the end of the 3-month trial, the CMA would analyse the results and determine the choice screen design that particularly encourages switching. The CMA would therefore vary the PCI trial order to become a long-term pro-competition order, requiring the SMS undertaking to show all UK users that particular choice screen layout.

- 291 Subsection (5) stipulates with reference to section 55(3) that the CMA must state in the pro-competition order a date by which it will carry out a review of that order. It must complete a review of the pro-competition order by this date and conclude whether the order should continue unchanged, be replaced (by way of section 52), or be revoked.

Section 52: Replacement of pro-competition orders

- 292 This section gives the CMA the power to replace a pro-competition order. This allows the CMA to effectively address competition problems identified during a PCI investigation, implementing targeted remedies through the iteration of pro-competition orders. The CMA may trial an intervention, or initially adopt lighter-touch pro-competition orders designed to

address the competition problem, before escalating them (for example, by including more onerous obligations, or greater detail in the order) where the CMA assesses it is appropriate to do so. This will include considerations of proportionality because of the requirement in section 46 that PCIs be proportionate.

- 293 Subsection (1) gives the CMA the power to replace a pro-competition order if it determines that it is appropriate to do so. The CMA will particularly have regard to the impact of the existing pro-competition order on the competition problem (and where relevant the related detriment to UK users or customers), and whether circumstances have changed since the existing order was made in a way which means alternative provision is now appropriate.
- 294 Subsection (2) makes express provision that pro-competition orders which made provision on a trial basis may be replaced to update the terms and parameters of the trial (e.g. the design of a trial, the length of the trial period), or to convert the trial into a pro-competition order that will address the competition problem on a non-trial basis. In doing so the CMA may have regard to that trial as well as other trials the CMA has conducted, including if that trial was done with a different designated undertaking.

Section 53: Duration and revocation etc of pro-competition orders

- 295 This section sets out the provisions for a pro-competition order ceasing to have effect, either by the CMA revoking the order, or by the designated undertaking's relevant digital activity ceasing to be designated with SMS.
- 296 Subsection (3) sets out that the CMA may revoke a pro-competition order where it considers it appropriate to do so. When considering whether it is appropriate to revoke a pro-competition order, the CMA must in particular have regard to where there have been changes in circumstances. For example, this could occur if new legislation which affects the carrying out of the pro-competition order were implemented. Section 54(3) requires the CMA to consult before revoking an order under this subsection.
- 297 Subsections (4), (5) and (6) set out that the CMA must give notice to the designated undertaking of its decision to revoke a pro-competition order. This includes details of any transitional, transitory or saving provision being made in relation to the revocation. The CMA must publish the notice as soon as reasonably practicable.
- 298 Subsection (7) provides that where a pro-competition order is revoked without being replaced, the CMA is not able to subsequently introduce another pro-competition order based on the initial PCI investigation. The CMA would need to carry out a new PCI investigation.
- 299 Subsection (8) allows the CMA to exercise its digital markets functions in relation to potential and actual breaches of a pro-competition order where the order is no longer in place. This enables the CMA to investigate and enforce against historic breaches.

Section 54: Consultation

- 300 This section requires the CMA to consult publicly on a pro-competition order before imposing it, replacing it, or revoking it (subsections (1) and (3)).
- 301 Subsection (2) provides an exception to the CMA's duty to consult on a pro-competition order if it consulted on a draft order which is materially the same as the final order.
- 302 To facilitate minor amendments from time to time, subsection (4) exempts the CMA of its duty to consult on a pro-competition order where the CMA judges that the replacement order is not materially different to the order it replaces.

Section 55: Duty to review pro-competition orders etc

- 303 This section requires the CMA to monitor the effectiveness of any pro-competition order it makes, whether it is being complied with, and if not whether to take enforcement action.
- 304 Subsections (1) to (3) set out the CMA's specific duty to include in each pro-competition order a date by which the CMA will conduct a formal review on whether to retain, replace or revoke it. This includes replacement pro-competition orders.
- 305 Subsection (4) provides that the CMA will additionally be under a general duty to keep pro-competition orders under review. Ongoing monitoring may inform the CMA's decision to conduct a formal review earlier than the date stipulated in the most recent order relating to the PCI.

Section 56: Commitments

- 306 This section gives the CMA the power to accept legally binding proposals ("commitments"), from a designated undertaking to address a possible competition problem that relates to a designated activity of that undertaking.
- 307 Subsections (2) and (3) outline that the CMA may accept a commitment if it considers that it would usefully address a competition problem; it does not necessarily need to comprehensively address the competition problem in order for the CMA to be able to accept it. Where an investigation has begun and commitments have been accepted, the CMA may choose to reduce the scope of the PCI investigation set out in the opening notice, or to close the investigation without making a PCI decision.
- 308 Subsection (5) provides that where the CMA accepts a commitment then this does not prevent the CMA continuing a PCI investigation in relation to other conduct from the designated undertaking. In addition, the CMA is able to start a new PCI investigation into the conduct related to the commitment if the CMA judges that there has been a change of circumstances following acceptance of the commitment, where the CMA has reasons to believe the designated undertaking has not complied with the commitment or where the CMA suspects that information that led to the acceptance of the commitment was false or misleading.
- 309 Subsection (6) makes provision for the coming into force of commitments.
- 310 Subsection (7) makes provision for the circumstances in which they cease to have effect. A commitment ceases to have effect when the first of the following events occurs: its terms say it ends, the SMS designation to which the commitment relates ceases to have effect or the CMA releases the undertaking from the commitment. Using the power contained in section 17, the CMA may make a transitional provision for a commitment when it revokes the relevant SMS designation, or it may continue the commitment where it decides to designate the same, similar or connected activity.
- 311 Subsection (7) requires the CMA to comply with the procedural provisions in sections 36 and 37 concerning the review, amendment and release of commitments in respect of PCI commitments. These are the same provisions and requirements set out for conduct requirements (see section 36).

Chapter 5: Mergers

- 312 Chapter 5 (Mergers) is concerned with imposing a duty on designated undertakings (or, where a designated undertaking is part of a larger corporate group, the whole group) to report certain possible mergers involving them to the CMA before they take place. It also requires designated undertakings (or, where there is a larger corporate group, the members of the group) not to allow a reported possible merger to take place until the report has been

accepted as sufficient by the CMA and then a period of five working days has elapsed. The purpose of these requirements is to ensure that the CMA is made aware of anticipated mergers involving designated undertakings (or larger corporate groups) that will be harmful to competition in the UK, and to give the CMA sufficient information and time to decide, before a reported possible merger takes place, whether to open an investigation into the possible merger under the merger control regime set out in Part 3 of the Enterprise Act 2002, and whether to impose restrictions on the possible merger (such as a block on the integration of the enterprises involved) while an investigation is ongoing, through an initial enforcement order under section 72 of that Act.

Section 57: Duty to report possible mergers

- 313 This section sets out the circumstances in which designated undertakings, or where a designated undertaking is part of a larger corporate group (see section 117), group members, will have a duty to report a possible merger involving them (a “reportable event”) to the CMA before it takes place.
- 314 There are two categories of reportable event. The first category is concerned with designated undertakings (or larger corporate groups collectively) reaching (whether through the acquisition of shares or voting rights or otherwise) certain percentage thresholds of the shares or voting rights held in certain bodies corporate with links to the UK. The second category is concerned with designated undertakings (or one or more members of a larger corporate group) forming certain joint venture vehicles (bodies corporate formed with an unconnected party or parties for the purpose of working together) that are intended or expected to have certain links to the UK. A minimum value requirement also applies in relation to the consideration provided by the designated undertaking (or larger corporate group collectively) for the relevant shares or voting rights, or in relation to the formation of the joint venture vehicle. The purpose of the reporting criteria is to target the “relevant merger situations” within the investigative jurisdiction of the CMA under the merger control regime that are most likely to raise competition concerns in the UK.
- 315 Subsection (2) sets out the first category of reportable event: those that result in a designated undertaking or (by virtue of section 61(2)) larger corporate group collectively having qualifying status (as defined in section 58(1)) in respect of shares or voting rights in relation to a UK-connected body corporate (as defined in subsections (5) and (6)), where the value of all consideration (as defined in section 59) provided by the undertaking or group for its shares or voting rights (whichever gives the undertaking or group qualifying status) is at least £25m.
- 316 Subsection (3) defines the second category of reportable event: those that involve a designated undertaking, or one or more members of a larger corporate group, forming a body corporate (a “joint venture vehicle”) with at least one other person (such as a company) that (as stipulated by subsection (7)) is not part of the undertaking or group, in circumstances where: the undertaking or (by virtue of section 61(2)) larger corporate group collectively acquires qualifying status (as defined in section 58(2)) in respect of shares or voting rights in relation to the joint venture vehicle; the undertaking or group members involved intend or expect the joint venture vehicle to become a UK-connected body corporate (as defined in subsections (5) and (6)); and, the total value of all capital and assets contributed to the joint venture vehicle by the undertaking or group, and of all other consideration provided by the undertaking or group in relation to the formation of the joint venture vehicle, is at least £25m.

Example 1: Reportable Event (categories 1&2)

Category 1:

If Designated Undertaking A already holds 20% of the shares in Company B, which carries on a digital advertising business in the UK, for which it has provided £20 million consideration, and then seeks to acquire an additional 10% for consideration of £10m, the proposed acquisition must be reported to the CMA prior to completion, as: B carries on activities in the UK and is therefore a UK-connected body corporate; the acquisition will take A from a shareholding in B of 25% or less (20%) to one of more than 25% (30%), giving it qualifying status; and the total consideration for the resulting shareholding will be above the £25 million value threshold (£30m), thus satisfying both limbs of the test in section 55(2).

Had A proposed to acquire the additional shareholding for consideration of only £4 million (rather than £10 million), it would not have had a duty to report the event, because the value threshold would not have been met.

Category 2:

Designated Undertaking A, which is not part of a larger corporate group, and Company B, which is not part of A, propose to establish Company C together, with A holding 51% of the shares and B the remainder. A and B intend for C to supply digital services to customers in the UK. A agrees to transfer a pre-existing business with a value of £20 million to C and also to pay £10 million to B in relation to it agreeing to establish C with A. A must report the proposal to establish C to the CMA before C is formed because: C will be a body corporate formed with an unconnected person B and therefore a joint venture vehicle; A will have qualifying status in respect of shares in relation to C, as it will own a percentage of the shares above the 15% threshold for qualifying status in relation to joint venture vehicles; A intends that C will supply services to persons in the UK and therefore that C will be a UK-connected body corporate; and the value of the consideration to be provided by A in relation to the formation of C will be above the £25 million threshold, including the capital and assets that will be contributed to C.

The creation of C would not need to have been reported had the consideration been less than £25 million or if A did not intend or expect C to carry on any activities in the UK or to supply goods or services to anyone in the UK.

- 317 Subsections (5) and (6) define “UK-connected body corporate” for the purposes of the first and second categories of reportable event. A body corporate is UK-connected if it, or any of its subsidiaries (which section 118(1) defines as having the same meaning as in section 1159 of the Companies Act 2006), carries on activities in the UK or supplies goods or services to a person or persons in the UK.
- 318 Subsection (7) clarifies that, in relation to the second category of reportable event, the formation of a joint venture vehicle solely by persons (such as companies) that make up a designated undertaking or larger corporate group is not in scope of the reporting duty.

- 319 Subsection (9) signposts two sections of the Enterprise Act 2002 that establish some of the more significant steps that the CMA may be in a position to take under the merger control regime (where the relevant statutory requirements are met) in relation to a possible merger that has not yet taken place, including one that has been reported under this section.

Section 58: Qualifying status

- 320 This section sets out the circumstances in which a designated undertaking or larger corporate group will have qualifying status in relation to a UK-connected body corporate or joint venture vehicle.
- 321 Subsection (1) provides that, for the purposes of the first category of reportable event, an event will result in qualifying status if it results in the undertaking or group increasing the percentage of shares or voting rights it holds in a UK-connected body corporate to or beyond any of the thresholds set out in paragraphs (a), (b) and (c).
- 322 Subsection (2) sets out that, for the purposes of the second category of reportable event, the undertaking or group will have qualifying status in relation to a joint venture vehicle if it acquires at least 15% of the shares or voting rights in the vehicle.
- 323 Subsections (3), (4) and (5) set out how the percentage of shares and voting rights held should be calculated, including in relation to bodies corporate that do not have a share capital or that do not have general meetings at which matters are decided by the exercise of voting rights.
- 324 Subsection (6) provides that a person (such as an undertaking or group member) should be treated as acquiring an interest (such as a shareholding) or right (such as voting rights) for the purposes of the duty to report where they come to hold the interest or right by virtue of any of the provisions in Schedule 2. For example, when a shareholding comes to be held jointly with another person or becomes subject to a joint arrangement with another person under which the parties are to exercise the rights granted by their shares in a coordinated way.

Section 59: Value of consideration

- 325 Subsection (1) explains how the value of consideration should be calculated for the purposes of the first category of reportable event. This is the value of all consideration provided by the undertaking or group, directly or indirectly, for shares or voting rights in the UK-connected body corporate in all transactions which result in the undertaking or group holding shares or voting rights in the body corporate.
- 326 Subsection (2) defines consideration for the purposes of the duty to report. The intention is for consideration to be given a very broad meaning, encompassing any benefit provided, any detriment suffered, any conditional consideration and any consideration that is deferred to after the relevant event.
- 327 Subsection (3) creates a delegated power for the Secretary of State to make regulations setting out further provision about how the value of consideration, capital or assets is to be calculated for the purposes of the duty to report. This power is subject to the negative procedure as per subsection (5).

Section 60: Content of report etc

- 328 Subsection (1) requires the CMA to set out, in a notice that must be published online (see section 113(3)), the required form and content of a report.
- 329 Subsection (2) prohibits the CMA from requiring information in a report beyond that which it considers necessary to decide, in relation to a reportable event, whether to begin an investigation (commonly known as a Phase 1 investigation) into whether it has a duty under section 33 of the Enterprise Act 2002 to refer the matter for an in-depth merger investigation

(commonly known as a Phase 2 investigation), or to make an initial enforcement order under section 72 of that Act.

Section 61: Application of the duty to report etc

- 330 This section explains how the duty to report in section 57(1) applies in cases where a designated undertaking is part of a larger corporate group (see section 117). It also sets out circumstances in which this Chapter will not apply or will cease to apply after a report has been made.
- 331 Subsection (2) provides that the members of the group are to be treated as acting, or failing to act, collectively. It also provides that the combined consideration provided by all members of the group is to be treated as provided by each member individually, and that each member is to be treated as holding the combined interests or rights of all members of the group. This means that if a report is provided to the CMA by one member of the group, all members are deemed to have provided the report. Equally, if one of the members of the group fails to provide a report when required to do so, then all members are deemed to have failed to meet this requirement.

Example 2: Application of the Duty to Report

Designated Undertaking X is part of a larger corporate group Group Y. Company 1, a member of Group Y, acquires a 15% shareholding in a body corporate for consideration of £15 million. At the same time, Company 2, another member of Group Y, acquires a 10% shareholding in the same body corporate for consideration of £10 million. Each and every member of Group Y is deemed for the purposes of the duty to report to have acquired a 25% shareholding in the body corporate for consideration of £25 million.

- 332 Subsection (3) refers to Schedule 2, which sets out further cases in which a person (such as an undertaking or group member) should be considered to hold an interest (such as a shareholding) or right (such as voting rights) for the purposes of the duty to report.
- 333 Subsection (4) sets out circumstances where the duty to report to the CMA will not apply:
- 334 Paragraph (a) provides that the duty to report does not apply in relation to an event where a report has already been provided in relation to another event which does not differ from it in a material respect;
- 335 Paragraph (b) provides that the duty to report does not apply in relation to an event where it, or arrangements which do not differ from it in a material respect, have already been notified to the CMA under the merger control regime set out in Part 3 of the Enterprise Act 2002;
- 336 Paragraph (c) provides that the duty to report does not apply in relation to an event where the person that would otherwise be required to report has been informed by the CMA that the event, or one that does not differ from it in a material respect, is already subject to a Phase 1 investigation under the merger control regime (see Section 60, subsection 2);
- 337 Paragraph (d) provides that the duty to report does not apply in relation to an event where it, or a situation that does not differ from it in a material respect, has been the subject of a public interest intervention notice issued by the Secretary of State under the merger control regime;
- 338 Paragraph (e) provides that the duty to report does not apply in relation to an event where it, or a situation that does not differ from it in a material respect, has been the subject of a special public interest intervention notice issued by the Secretary of State under the merger control regime.

- 339 Subsection (5) sets out circumstances where the requirements of this Chapter will cease to apply to an event after it has been reported to the CMA:
- 340 Paragraph (a) provides for the requirements to cease to apply where the Secretary of State issues a public interest intervention notice under the merger control regime in relation to the event or a situation that does not differ from it in a material respect.
- 341 Paragraph (b) provides for the requirements to cease to apply where the Secretary of State issues a special public interest intervention notice under the merger control regime in relation to the event or a situation that does not differ from it in a material respect.
- 342 Paragraph (c) provides for the requirements to cease to apply where the CMA makes an initial enforcement order under the merger control regime imposing obligations, prohibitions or restrictions in relation to the event.
- 343 Paragraph (d) provides for the requirements to cease to apply where the relevant undertaking ceases to be designated.

Section 62: Acceptance of report

- 344 This section explains how the CMA must proceed once a report has been received. It also provides for a person who has made a report to be able to withdraw it prior to it being accepted.

Section 63: Delay to possible mergers etc

- 345 This section sets out restrictions on reportable events taking place.
- 346 Subsection (1) provides that a designated undertaking or group member with a duty to report a reportable event (see section 57(1)) must not allow the event to take place until a report in relation to the event has been submitted to the CMA and the waiting period in relation to the event has expired.
- 347 Subsection (2) defines the waiting period as the period of 5 working days beginning with the first working day after the day on which the CMA gives notice to the reporting person that it accepts their report is sufficient. “Working day” is defined in section 330.
- 348 Subsection (3) provides that, where a reportable event takes place in breach of subsection (1), every person with a duty to report the event is to be treated as having breached subsection (1). This means that all members of a group will be treated as having failed to comply where one or some members have failed to do so.
- 349 Subsection (4) permits the CMA to give its consent to a reportable event happening before the end of the waiting period, including before a report has been accepted by the CMA or submitted to the CMA. The CMA may also revoke its consent before the event takes place.
- 350 Subsection (5) provides that the restrictions in subsection (1) do not apply in relation to a reportable event where the CMA gives and does not revoke its consent to the event taking place before the end of the waiting period.
- 351 Subsection (6) applies section 95 of the Enterprise Act 2002, which enables statutory restrictions under the merger control regime to be enforced through the courts, to the restrictions on reportable events taking place set out in subsection (1). This for example enables the CMA to apply for an injunction requiring a designated undertaking or group member to undo a reportable event that has taken place prior to the expiry of the waiting period and for the reporting requirements to be complied with before the event takes place again.

Section 64: Timing of a reportable event

- 352 This section provides that in certain cases a reportable event is considered to take place at the point there is an unconditional obligation to proceed with the event. That is, where a reportable event results from an agreement for a designated undertaking or group member to acquire shares or voting rights, or to form a joint venture vehicle, the event is to be treated as taking place for the purposes of the duty to report when the undertaking or group member becomes unconditionally obliged to acquire the shares or voting rights, or to form the joint venture vehicle. Unconditionally obliged means either that there are no conditions that need to be met for the agreement to be executed or that any such conditions have been met. This is to ensure that a reportable event that amounts to a merger is reported before it is treated as taking place under the merger control regime (see section 27 of the Enterprise Act 2002).

Section 65: Authorisation for one person to act for another

- 353 This section provides for a designated undertaking or group member with a duty to report a reportable event (see section 57(1)), to authorise another person (such as a legal representative) to report the event on its behalf.

Section 66: Applications for review of decisions relating to mergers

- 354 This section applies section 120 of the Enterprise Act 2002, which allows for review of certain decisions under the merger control regime by the Competition Appeal Tribunal, to non-penalty decisions made by the CMA in connection with its functions under this Chapter. This would include not only challenges to decisions made under this Chapter but also to the exercise of other functions under Part 1, such as a requirement to provide information under section 69, in relation to this Chapter. Section 89(1) provides for penalties imposed in connection with this Chapter to be subject to separate appeal arrangements.

Section 67: Regulations about duty to report

- 355 This section creates a delegated power for the Secretary of State to make regulations about the duty to report.
- 356 Subsection (3) sets out some of the provision that these regulations may include, including provision which amends this Chapter or Schedule 2.
- 357 Subsection (4) stipulates that regulations containing provision under any of paragraphs (a), (b), (c), (d), (e) or (h) of subsection (3), including regulations amending this Chapter or Schedule 2, are subject to the draft affirmative procedure (see section 337(3)).
- 358 Subsection (5) provides that any other regulations made under subsection (1) are subject to the negative procedure. This includes regulations under subsection (3)(f) which modify how section 332 applies for the purposes of this Chapter or Schedule 2. This is considered appropriate because these regulations would be of a supplementary procedural nature, limited to modifying the rules for the service of notices by the CMA in the context of merger reporting.

Section 68: Duty to keep compliance under review

- 359 This section places a duty on the CMA to monitor and enforce the merger reporting provisions. This duty goes no further than requiring the CMA to consider exercising its investigative and enforcement powers, as set out in section 63(6) and in Chapter 7 of Part 1, where it is aware of a basis for doing so.

Schedule 2: Mergers: Holding of Interests and Rights

- 360 In conjunction with sections 61(3) and 58(6) respectively, Schedule 2 sets out further circumstances in which interests (such as shareholdings) and rights (such as voting rights) are deemed to be held or acquired for the purposes of the duty to report, and therefore provides for further ways in which reportable events may take place.
- 361 Paragraph 1 provides that jointly held interests or rights are treated as held by each person that holds them.
- 362 Paragraph 2 provides that parties acting through joint arrangements are treated as holding the collective interests and rights that each party to that arrangement holds individually.
- 363 Paragraph 3 provides that where an interest is held by a nominee on behalf of another person, the interest is treated as held by that person. For example, where the legal owner of shares in a company (the person in whose name the shares are registered) holds the shares on behalf of the beneficial owner (the actual owner) under a declaration of trust, the shares are treated as held by the beneficial owner.
- 364 Paragraph 4 provides that a person who controls a right is deemed to hold that right. This means that the controller of the right - and not the holder unless they are also a controller - will be considered to hold the right. Paragraph 4(2) sets out that control can be held through an arrangement between a person and others (see paragraph 7, Schedule 2).
- 365 Paragraphs 5 and 6 provide for rights that are exercisable only in certain circumstances and rights attached to shares held by way of security respectively and replicate corresponding provisions in Schedule 1A to the Companies Act 2006.
- 366 Paragraph 7 defines an arrangement for the purposes of this Schedule in broad terms. In particular, an arrangement need not be legally enforceable but there must be a degree of stability about it.

Chapter 6: Investigatory Powers etc and Compliance Reports

Investigatory powers etc

Section 69: Power to require information

- 367 This section gives the CMA the power to require any person (subject to section 111 (Extra-territorial application)), including a designated undertaking and any other party believed to hold relevant material, to provide information needed for its operation of the regime. This includes information in any form, which might include data, correspondence, forecasts and estimates.
- 368 Subsection (1) sets out that the CMA can require any person, including a designated undertaking, to produce any information which the CMA considers relevant to its operation of the regime. Section 118(1) (General interpretation) defines “information”.
- 369 Subsection (3) sets out content requirements for an information notice. The notice must set out the time and place it requires the information to be produced as well as how it must be shared with the CMA. For example, a notice might specify the format in which a dataset should be provided and how it should be transferred (e.g. by hard drive or uploaded to a secure server). It must also set out the consequences of not complying with the notice, as a person could face penalties or prosecution for failing to comply.
- 370 Subsection (4) provides a non-exhaustive description of what the recipient of an information notice could be required to produce or generate.

- 371 Paragraph (a) covers copies of or extracts from information.
- 372 Paragraph (b) covers obtaining or generating information, including information that does not yet exist.
- 373 Paragraph (c) covers enabling the CMA to compel evidence collection by requiring a person to collect and retain information that it may not otherwise collect and retain.
- 374 Paragraph (d) imposes a duty on the recipient of an information notice - in cases where specified information is not given to the CMA - to explain where the requested information might be and why it has not been shared with the CMA.
- 375 Subsection (5) sets out how the CMA may require information to be obtained or generated under subsection (4) (b). Subsection (5) (a) specifies that the CMA can require an undertaking to amend its business processes, including processes that might affect its users, and report the outcomes. Subsection (5) (b) specifies that the CMA can require a person to carry out a specified demonstration or test. For example, under subsection (5) the CMA might require a designated undertaking to demonstrate a technical process with examples, such as how an algorithm operates, or to undertake testing or field trials of its algorithms and report the outcomes. This could include the CMA specifying relevant input data, parameters and other aspects of the test or demonstration.
- 376 Subsection (7) specifies that the CMA can require the recipient of an information notice to give the CMA information - either in physical or electronic form - which is located outside the United Kingdom.

Section 70: Requirement to name a senior manager

- 377 This section provides the CMA with the power to require, in an information notice, that a designated undertaking (and an undertaking subject to existing obligations under section 17(1)) or a previously-designated undertaking subject to a breach investigation names a relevant senior manager to be responsible for ensuring the undertaking complies with the notice. A penalty may be imposed on the named senior manager if the undertaking fails to comply with the notice (see section 87).

Section 71: Power of access

- 378 This section gives the CMA the power to require a designated undertaking (and an undertaking subject to existing obligations under section 17(1)) or an undertaking subject to a breach investigation to obtain, generate, collect or retain information (which includes information in any form) or to conduct a specified demonstration or test of a business system or process under the supervision of the CMA. This power can be exercised where the undertaking has failed to comply with a previous request for information under section 69 or it has failed to provide sufficient assistance to a skilled person under section 79.
- 379 Subsection (1) sets out the circumstances in which the CMA can exercise this power. The CMA can only use this power where a designated undertaking or an undertaking subject to a breach investigation has failed to comply with the requirements of an information notice under section 69, or has failed to comply with a duty to assist a skilled person under section 79. This might include situations where an undertaking has failed to provide the information requested, or has not carried out the request in the way specified in the information notice, or where information provided is incomplete or inaccurate.
- 380 Subsection (2) gives the CMA the power to require that an undertaking gives access to relevant business premises, equipment, services, information or individuals for the purpose of the CMA supervising the undertaking obtaining, generating, collecting or retaining information, or for the CMA to observe the operation of the undertaking's business process or

a specified demonstration or test of a system. For example, under this subsection the CMA could supervise a test or be provided with a demonstration of an undertaking's systems or technical processes (including algorithms), where an undertaking has failed to comply with a request to conduct a test itself and report the results to the CMA under sections 69 and 79. This could include the CMA specifying relevant input data, parameters and other aspects of the test or demonstration. Securing compliance for the purpose of this section includes the ability for the CMA to require information requested under sections 69 and 79 or to verify any reasons an undertaking has given for not complying with sections 69 and 79.

- 381 Subsection (3) requires that any notice given under subsection (2) must describe the access the CMA requires, and the date by and manner in which the undertaking must provide access to the CMA. The CMA could, for example, require that it supervise a test being carried out in the presence of an undertaking's engineers, either at the undertaking's business premises or remotely.
- 382 Subsection (4) imposes a duty on the undertaking to comply with the access required by the CMA.
- 383 Subsection (5) specifies that the CMA may only require access to premises, equipment or individuals which are located in the United Kingdom under subsection (2). However subsection (6) specifies that the CMA may require access to information or services under subsection (2) regardless of whether they are located in the United Kingdom or not.
- 384 Subsection (7) defines a "business premises" as a premises, or any part of premises, not used as a dwelling. This is the same definition as in section 27 of the Competition Act 1998.

Section 72: Power to interview

- 385 This section gives the CMA the power to require any individual to attend an interview and answer questions for the purposes of a digital markets investigation. This is consistent with the amendments to section 26A of the Competition Act 1998 made under section 141 of the Act, which enable the CMA to interview any individual for the purposes of an investigation. The CMA has existing powers under sections 109 and 174 of the Enterprise Act 2002 to require any person to attend an interview for the purpose of a mergers or markets inquiry.
- 386 Subsection (1) gives the CMA the power to give notice to any individual it considers has information relevant to a digital markets investigation requiring them to answer relevant questions at a place or in a manner specified in the notice, and either at a specified time or on receipt of the notice. This could include a remote interview.
- 387 Subsection (2) requires that the notice must set out the details of the investigation. It must also set out the consequences of failing to comply with the notice, as a person could face penalties for failing to comply, or prosecution for the offences under sections 93 or 94 of destroying or falsifying evidence or providing false or misleading evidence.
- 388 Subsection (3) requires that, where the individual subject to the notice under subsection (1) is connected to an undertaking subject to an SMS investigation, the CMA must also give a copy of the notice to that undertaking. Section 118(3) defines how a person can be "connected to" an undertaking.
- 389 Subsection (4) requires the CMA to give a copy of the notice to connected undertakings at the same time the notice is given to the individual, or as soon as possible afterwards.
- 390 Subsection (5) gives the CMA the power to interview individuals on oath in relation to digital markets investigations.
- 391 Subsection (6) specifies that the CMA cannot require an individual outside the United Kingdom to answer questions in relation to a digital markets investigation.

Section 73: Use of interview statements in prosecution

- 392 This section lists the circumstances in which interview statements in answer to questions under section 72 may be used as evidence against that individual in a criminal prosecution.
- 393 Subsections (1) and (2) provide that an interview statement required under section 72 may not be used as evidence against the individual who gave it in any criminal proceedings, except where that individual is being prosecuted for destroying or falsifying information under section 93 or for providing false or misleading information under section 94. The statement may also be used as evidence in a prosecution for any other criminal offence, but only where that individual gives evidence or asks questions about the statement given under section 72, or this is done on their behalf, and makes a statement inconsistent with it. Section 30A of the Competition Act 1998 places similar limits on the use of a statement given as evidence as part of an investigation under that Act in criminal proceedings against the individual who gave it.

Section 74: Power to enter business premises without a warrant

- 394 This section gives the CMA the power to enter business premises without a warrant for the purposes of a breach investigation. A breach investigation is defined in section 118(1), and includes an investigation into whether an undertaking is breaching or has breached a requirement. The power can be exercised both with and without notice. The CMA has existing powers of inspection without a warrant under section 27 of the Competition Act 1998.
- 395 Subsection (1) gives an investigating officer of the CMA the power to enter any business premises for the purposes of a breach investigation. The CMA must have reasonable grounds to suspect that information relevant to the breach investigation can be accessed from or on the premises.
- 396 Subsections (2) and (3) set out that an investigating officer must give notice prior to entry in all circumstances, except where they suspect that the premises are or have been occupied by the undertaking subject to the breach investigation, or where they have taken reasonable steps to give notice but have failed to do so.
- 397 Subsection (2) sets out that, where an investigating officer is required to give notice, the notice must give the occupier at least two working days' notice of entry and give details of the breach investigation. It must also indicate the consequences of failing to comply with the notice, as an individual could be subject to a penalty under sections 87(4) or prosecution under section 95 for obstructing an officer exercising their power of entry.
- 398 Subsection (4) sets out that, where an investigating officer is not required to give notice, the officer is required to produce, on entry, evidence of their authorisation by the CMA and a document specifying the same information that a notice would include under subsection (2), paragraphs (b) and (c).
- 399 Subsection (5) lists the powers an investigating officer has in addition to entering the business premises. This includes the power to take necessary equipment with them, to require any person on the premises to produce and explain relevant information, and take copies or extracts from any information given to them.
- 400 Subsection (6) specifies that any information given to an officer must be provided in a form in which it can be taken away and either is, or can easily be made, visible and legible. This includes the ability for the CMA to require information to be provided in electronic form.
- 401 Subsection (7) specifies that the CMA cannot enter premises outside the United Kingdom under this section. However, subsection (8) specifies that the CMA can access information regardless of where it is physically stored.

Section 75: Power to enter premises under a warrant

- 402 This section gives the CMA the power to enter business and domestic premises under a warrant, without notice and using reasonable force, for the purposes of a breach investigation. A breach investigation is defined in section 118(1), and includes an investigation into whether an undertaking is breaching or has breached a requirement. The CMA has existing powers of entry under a warrant under sections 28 and 28A of the Competition Act 1998.
- 403 Subsection (1) sets out the circumstances in which the High Court, the Court of Session or the CAT may issue a warrant to the CMA under this section. The CMA must prove that (a) there are reasonable grounds to suspect that there is information relevant to the breach investigation on or accessible from the premises, and (b) the CMA has already attempted to use another investigatory power to obtain the relevant information unsuccessfully, or suspects that no other investigatory power would enable it to obtain the relevant information it needs.
- 404 Subsection (2) lists the powers an authorised officer of the CMA, and any officers authorised to accompany them, has under a warrant issued under this Part of the Act. This includes the power to enter the premises using reasonable force, to search the premises for relevant information, to operate equipment to produce information, and to require assistance and explanations from any person on the premises. The officer has the power to require the production of any information which is accessible from the premises, including material stored remotely or online in electronic form. This includes the power to take copies of or extracts from, or take possession of, any relevant information that is given to them.
- 405 Subsection (3) specifies that any information given to an officer must be provided in a form in which it can be taken away and either is, or can easily be made, visible and legible. This includes the ability for the CMA to require information to be provided in electronic form.
- 406 Subsection (4) provides that a warrant may also authorise people who are not employees of the CMA to accompany and assist the authorised officer who is exercising the powers under this section. This might include individuals who have expertise that is not available within the CMA but is required to fully carry out the terms of the warrant (e.g. technical or IT experts).
- 407 Subsection (7) defines “domestic premises” in relation to the premises the CMA is empowered to enter, and “occupier” and “premises” for the purposes of this section and section 76.

Section 76: Power to enter premises under a warrant: supplementary

- 408 This section sets out supplementary requirements for the exercise of the power under section 75 to enter premises under a warrant.
- 409 Subsection (1) requires the warrant to set out the subject matter and purpose of the breach investigation. It must also indicate the consequences of obstructing an officer exercising their power of entry, as a person could be subject to a penalty under section 87(4) or prosecution under section 95 for obstructing an officer.
- 410 Subsection (2) provides that an authorised officer must have a warrant to exercise the powers listed under section 75.
- 411 Subsections (3) and (4) apply when there is no one at the premises when the authorised officer proposes to execute the warrant. Subsection (3) requires an authorised officer to take reasonable steps to inform the occupier of entry and give them, or a representative, a reasonable opportunity to be present before executing the warrant. Subsection (4) requires the officer to leave a copy of the warrant in a prominent place on the premises if they are unable to inform the occupier prior to entry.

- 412 Subsection (6) specifies that the CMA cannot enter premises outside the United Kingdom under section 75. However subsection (7) specifies that the CMA can access information under section 75 regardless of where it is physically stored.

Section 77: Amendments to the Criminal Justice and Police Act 2001

- 413 This section amends sections 50, 57, 63, 64, 65, 66 and Part 1 of Schedule 1 of the Criminal and Justice Police Act 2001 to enable the CMA to seize information and take copies of, or extracts from, information when exercising its power to enter business and domestic premises under a warrant under section 75. Section 123 of this Act makes similar amendments to these sections of the Criminal and Justice Police Act 2001 to enable the CMA to seize documents when entering domestic premises under a warrant under section 28A of the Competition Act 1998. The CMA has existing powers to seize documents from business premises under section 28 of the Competition Act 1998.

Section 78: Application for a warrant

- 414 This section requires the CMA to follow the respective rules of the High Court, the Court of Session or the CAT when making an application to one of those courts for a warrant to exercise its power to enter premises under section 75.
- 415 Subsection (2) amends Schedule 4 of the Enterprise Act 2002 to specify that Competition Appeal Tribunal rules (made under section 15 of the Enterprise Act 2002) may make provision for proceedings when the CMA applies for a warrant under section 75.

Section 79: Reports by skilled persons

- 416 This section gives the CMA the power to require a skilled person, which could be a legal or natural person, to provide a report to it on a matter relevant to the operation of the regime.
- 417 Subsection (1) sets out that the CMA can use this power when exercising, or deciding whether to exercise, any of its digital markets functions. The CMA can only exercise this power in relation to a designated undertaking (and an undertaking subject to existing obligations under section 17(1)) or an undertaking subject to either a breach investigation or an SMS investigation.
- 418 Subsections (2) and (3) set out that the CMA may appoint a skilled person to provide a report. Where it does so, the CMA must give notice of the appointment, and the relevant matters to be included in the report, to the undertaking in question. The CMA may specify the form of the report.
- 419 Subsection (4) specifies that the CMA can make the designated undertaking (and undertaking subject to existing obligations under section 17(1)) or the undertaking subject to either a breach investigation or an SMS investigation liable to pay the skilled person directly for producing the report.
- 420 Subsections (5) and (6) set out that the CMA can also give notice to an undertaking requiring it to appoint a skilled person to produce a report to the CMA. The notice should specify the form of the report, the relevant matters that it must deal with and the date by which it must be provided. The CMA must approve any appointments made by an undertaking, including details of how payment will be made to the skilled person.
- 421 Subsections (7) to (10) state that the payment due to the skilled person from an undertaking under subsection (4) and subsection (6), paragraph (b) can be recovered through the courts.
- 422 Subsection (11) provides that the CMA must be satisfied that the skilled person has the necessary skills to report on the relevant matters. This could include an external third party with relevant expertise, such as an accounting firm, management consultancy or an individual with technical expertise such as a software engineer.

- 423 Subsection (12) imposes a duty on the designated undertaking (and undertaking subject to existing obligations under section 17(1)) or undertaking subject to either a breach investigation or an SMS investigation, and any person connected to those undertakings, to assist the skilled person in any way reasonably required to prepare the report. Section 118(3) defines how a person can be connected to an undertaking. If an undertaking or connected person fails to comply with this duty, the CMA may impose a penalty in accordance with section 87 of the enforcement provisions under this Part of the Act.
- 424 Subsection (13) specifies that the duty to assist a skilled person in subsection (12) does not include giving access to individuals, premises, equipment or individuals outside the United Kingdom. However, subsection (14) clarifies that the skilled person can require access to information and services within and outside the United Kingdom.

Section 80: Duty to preserve information

- 425 This section creates a legal duty to preserve evidence which is relevant to a digital markets investigation, a compliance report by an undertaking or where the CMA is providing investigative assistance to an overseas regulator. Where the CMA has made a request for information, there are penalties for non-compliance, or for falsifying, concealing or destroying information. The purpose of this section is to preserve evidence before and after the CMA has made a formal request. This is consistent with an existing duty to preserve evidence in section 201, subsection (4) of the Enterprise Act 2002 in relation to cartel offence investigations and the creation of a new duty to preserve evidence under section 28B of the Competition Act 1998 made under section 121 of this Act.
- 426 Subsection (1) sets out that in the circumstances described in subsections (2), (3), (4) and (5), a person must not carry out, cause or permit the destruction, disposal, falsification or concealment of relevant information. This duty does not apply where the person has a reasonable excuse to do so.
- 427 Subsections (2), (3), (4) and (5) set out the circumstances in which this duty applies. This includes situations where a person knows or suspects that a breach or PCI investigation is being or is likely to be carried out, but - for example - where the CMA has not yet formally opened an investigation or required information to be produced. The duty also applies where an undertaking, or a person connected to an undertaking, knows that the undertaking is subject to an initial SMS investigation. This also includes where an undertaking, or a person connected to an undertaking, knows that the undertaking is required to produce a compliance report under section 84, or is subject to a further SMS investigation. The duty also applies where an undertaking, or a person connected to an undertaking, knows or suspects that the CMA is, or is likely to, provide investigative assistance to an overseas regulator in relation to that undertaking. Section 118(3) defines how a person can be connected to an undertaking.
- 428 Subsection (6) sets out the circumstances in which information would be considered relevant for the purposes of this section.

Section 81: Privileged communications

- 429 This section specifies that the CMA cannot require any information subject to legal professional privilege or (in Scotland) confidentiality of communications - i.e. the principle that legal advice is confidential to the client to whom it is given - when exercising its investigatory powers under this Part of the Act.
- 430 Subsection (2) specifies that this limitation applies to producing, taking possession of, taking copies of, or extracts from, a privileged communication. Subsection (2) also clarifies that this limitation is subject to Part 2 of the Criminal Justice and Police Act 2001 as that Part is amended by section 77 of the Act. This means that legally privileged information is subject to

the relevant provisions and safeguards in the Criminal Justice and Police Act 2001, when the CMA is exercising its power to seize information when entering premises under a warrant under section 75 of the Act.

Section 82: Power of CMA to publish notice of investigative assistance

- 431 This section gives the CMA the power to publish a notice of any decision to use its investigatory powers under the digital markets regime to assist an investigation by a regulator in another jurisdiction. This notice may include the regulator the CMA is assisting, the undertaking which is the subject of investigation, as well as the matter for which the undertaking is under investigation.

Compliance reports etc

Section 83: Nominated officer

- 432 This section requires an undertaking subject to a digital markets requirement under the regime to assign an appropriate senior manager to the role of “nominated officer”, for the purpose of monitoring the undertaking’s compliance with a digital markets requirement. A penalty may be imposed on a nominated officer of an undertaking that fails to comply with a relevant compliance reporting obligation (see section 87(3)).
- 433 Subsection (2) sets out the tasks of the nominated officer and requires them to carry out those tasks in relation to “digital markets requirements and each related requirement”. For example, if a nominated officer is assigned to a conduct requirement, they are automatically assigned to any subsequent enforcement orders made in connection to it.
- 434 Subsection (5) requires that the individual assigned to the role of nominated officer must be a “senior manager” as defined in section 69 and must be able to carry out the tasks required.

Section 84: Compliance reports

- 435 This section requires undertakings subject to a digital markets requirement under the regime to provide the CMA with reports setting out how they are complying with requirements imposed upon them. The CMA has a duty to notify an undertaking of any compliance reporting requirements and will specify in the notice when reports should be submitted, what information they should contain, and what form they should take. The CMA can alter the reporting requirements on an undertaking by giving the undertaking a further notice.
- 436 Subsection (5) permits the CMA to require an undertaking to publish a compliance report or a summary of a compliance report. This could include publication on the undertaking’s website or in hard copy at a registered office of the undertaking. The version the undertaking is required to publish may be different to the version provided in private to the CMA under subsection (1), for example some information may be redacted for confidentiality purposes.

Chapter 7: Enforcement and Appeals

Civil penalties

Section 85: Penalties for failure to comply with competition requirements

- 437 This section sets out that the CMA can impose monetary penalties on an undertaking where it is satisfied that the undertaking has breached a regulatory requirement, including for merger reporting and commitments, without reasonable excuse.

Section 86: Amount of penalties under section 85

- 438 This section sets the maximum penalties that the CMA can impose under section 84. The CMA is able to impose penalties of up to 10% of worldwide turnover, and in the case of breaches of orders or commitments up to 5% of daily worldwide turnover for each day a breach continues.
- 439 Subsections (2) and (3) state that the CMA will in most situations have the discretion to choose whether to impose a fixed penalty or a daily rate penalty, or both. However, where an undertaking breaches a conduct requirement (as opposed to an enforcement order) or breaches any requirements under Chapter 5 of Part 1 (mergers), the CMA will only be able to impose a fixed penalty.

Section 87: Penalties for failure to comply with investigative requirements

- 440 This section sets out that the CMA can impose penalties on any person (including an undertaking), where it is satisfied that they have failed to comply with an investigative requirement or a compliance reporting obligation without reasonable excuse. This includes supplying the CMA with information which is false or misleading in connection with any function of the CMA under Part 1 of the Act. The section also sets out the circumstances in which the CMA can impose civil sanctions against either a named senior manager assigned to an information request (see section 70) or a nominated officer with relation to a compliance report (see section 83).

Section 88: Amount of penalties under section 87

- 441 This section sets the maximum fixed and daily rate penalties that the CMA can impose under section 87 on persons.
- 442 Subsection (3) sets out that the CMA may impose a fixed penalty on undertakings that are not individuals, of up to 1% of worldwide turnover, or a daily penalty of up to 5% of daily worldwide turnover for each day non-compliance continues, or both. Subsection (5) sets out that the CMA may impose a fixed penalty on a person that is not an undertaking of up to £30,000, or a daily penalty of £15,000, or both. Within those limits, the level of penalty will be an amount that the CMA considers appropriate given the circumstances of the case.
- 443 Subsections (6) to (8) set out that the Secretary of State has the power to amend the maximum amounts of penalty that can be imposed on an individual under section 87.

Section 89: Procedure and appeals etc

- 444 This section sets out which sections of the Enterprise Act 2002 apply to the CMA's decision to impose a penalty under section 85 or section 87, following a finding that a person has breached a requirement imposed under this Part. Section 112 of the 2002 Act covers the main procedural requirements for giving notice of a penalty. Section 113 covers procedural requirements for payment of a penalty and interest. Section 114 covers appeals in relation to penalty decisions (set out below). Section 115 sets out the procedure for recovering a penalty which has not been paid.
- 445 As a result of the provision made by subsection (1), section 114 of the Enterprise Act 2002 applies to appeals which are brought under section 89 against the decision to impose penalties under either sections 85 or 87, the amount of one of those penalties and the date by which the penalty is required to be paid. Appeals against all other decisions taken under Part 1 are to be brought under section 103, with the exception of those decisions taken in connection with the CMA's functions under Chapter 5 which section 66 applies to.

Section 90: Calculation of daily rates and turnover

- 446 This section sets out how the CMA will calculate daily rates and turnover for the purpose of imposing a monetary penalty. Daily penalties are calculated from the date that the relevant party is served notice of the penalty by the CMA. Daily penalties will accumulate until the person complies with the requirement (e.g. the requested information is provided) or, where the penalty is incurred in relation to an overseas investigation, when the overseas regulator no longer requires assistance. The CMA has the discretion to determine an earlier date for the amount payable to cease accumulating.
- 447 Subsections (2) to (4) set out that the Secretary of State has the power to specify how turnover is calculated in secondary legislation.

Section 91: Statement of policy on penalties

- 448 This section sets out that the CMA must publish and have regard to a statement of policy in deciding how to make use of the powers to impose penalties under section 85 and section 87. It requires the CMA to consult the Secretary of State and then publish the statement of policy, which will include the considerations relevant to determining the nature and amount of any monetary penalty.

Section 92: Monetary penalties: criminal proceedings and convictions

- 449 This section provides that where a person has been found guilty of a criminal offence committed under sections 93, 94 or 95, they will not be required to pay a civil penalty for that same offence. Likewise, where a person has paid a civil penalty for an act of the kind referenced under section 87, they cannot be criminally convicted for that same offence. The section does not prevent criminal or civil proceedings from being started where, respectively, a penalty has been imposed but not paid or someone has been charged but not convicted.

Offences

Section 93: Destroying or falsifying information

- 450 This section sets out that it is a criminal offence to intentionally or recklessly destroy, falsify or conceal information that has been requested by the CMA. The section mirrors section 43 of the Competition Act 1998. The offence can only be committed in relation to information that has been requested by the CMA, and can only be committed by the person from whom the information was requested.

Section 94: False or misleading information

- 451 This section sets out that it is a criminal offence to knowingly or recklessly provide information to the CMA which is false or misleading. This section mirrors section 44 of the Competition Act 1998 and section 117 of the Enterprise Act 2002.

Section 95: Obstructing an officer

- 452 This section sets out that obstructing an investigating officer is a criminal offence. The section mirrors section 42 of the Competition Act 1998.

Section 96: Offences by officers of a body corporate etc

- 453 This section provides for the circumstances in which individual officers of a body corporate (for example, companies), members of limited liability partnerships and partners of Scottish partnerships may be held responsible for the conduct of their body corporate where they have committed a criminal offence under sections 93, 94 or 95. Criminal proceedings may be pursued against such an individual where their body corporate has committed an offence, and that offence is proved to have been committed with their consent, connivance, or neglect.

454 This section mirrors section 72 of the Competition Act 1998 and section 125 of the Enterprise Act 2002.

Section 97: Offences: limits on extra-territorial jurisdiction

455 This sets out that an individual cannot commit an offence under sections 93, 94 and 95, if they are outside the UK when they perform the act, unless they meet one or more of the listed conditions.

Section 98: Sentences

456 This section sets out the punishments that can be imposed by the relevant courts on conviction of a criminal offence under sections 93, 94 or 95.

457 In England, Wales and Northern Ireland, a summary offence is triable in the Magistrates' Courts and an indictable offence, in the Crown Courts. In Scotland, a summary offence is triable in the Justice of the Peace Courts or the Sheriff Courts, and an indictable offence in the Sheriff Courts or High Court of Justiciary. In Scotland and Northern Ireland, there are statutory limits on fines that can be imposed by courts on conviction. In England and Wales, there is no such limit.

Further enforcement provisions etc

Section 99: Director disqualification

458 This section inserts new text into the Company Directors Disqualification Act 1986. The Company Directors Disqualification Act 1986 provides that the court must make a disqualification order against a director of a company which has breached competition law if the court considers the person's conduct was such as to make them unfit to be concerned in the management or control of a company. This section will enable disqualification of a person from being a director as a consequence of their involvement in an infringement of a requirement relating to conduct requirements or pro-competition interventions. The disqualification can be for up to 15 years.

Section 100: Enforcement of requirements

459 This section makes provision for the CMA to enforce orders and commitments through the courts if a person (including an undertaking) has failed to comply with the instructions set out by the CMA in those orders or has failed to adhere to commitments accepted by the CMA.

460 Subsection (1) states that the CMA only has the power to apply to court under this section once a person (including an undertaking) has failed to comply with an order or commitment listed in subsection (2). This means, for example, that an initial breach of a conduct requirement, before an enforcement order has been put in place or a commitment has been accepted, cannot be enforced with a court order.

461 Subsection (1) also states that if a requirement listed in subsection (2) relates to the management or administration of the undertaking, then a court order can be addressed to either the undertaking itself or its officers, members or partners.

462 Subsection (3) states that the person who is the subject of the order may be made responsible for the costs incurred by the CMA in applying for it.

Section 101: Rights to enforce requirements of this Part

463 This section sets out the right for any person to bring private action seeking a remedy for losses, resulting from a designated undertaking's breach of its statutory duties.

464 Subsection (1) explains that any duty listed as a relevant requirement in sub-section (4) may be subject to private action if it is breached.

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Act 2024 which received Royal Assent on 24 May 2024 (c. 13)

- 465 Subsection (2) sets out that any person that suffers loss or damage, as a result of a designated undertaking's (or part of a designated undertaking's) breach of a statutory duty, can seek appropriate compensation in the High Court, Court of Session, Sheriff Courts or the CAT. The claimant can seek damages, a court order to restrict the designated undertaking's actions in relation to their legal rights, or any other suitable type of remedy for loss resulting from the undertaking's breach of its statutory duty.
- 466 Subsection (4) sets out that the relevant statutory duties for which redress is available are: conduct requirements, pro-competition intervention orders and commitments.
- 467 Subsection (5) creates a power to permit rules of the relevant court and CAT to make provision for private actions brought under this section to be transferred between the relevant court and the CAT and vice versa.
- 468 Subsection (6) sets out that, outside of the CAT, claimants can choose to bring a private action case in the High Court for England & Wales; the Court of Session and the Sheriffdom courts for Scotland; and the High Court for Northern Ireland.
- 469 Subsection (6) allows for the CAT to refer a designated undertaking's breach of an injunction to the High Court. If the High Court is satisfied that the designated undertaking would have been in contempt of court if the injunction had been granted by the High Court, the High Court may deal with the designated undertaking as if it were in contempt.

Section 102: Treatment of CMA breach decisions etc

- 470 This section sets out that the courts and Tribunal are bound by the CMA's finalised breach decisions. This means that for any private action brought by a person following a finalised CMA breach decision, the court or Tribunal will not consider whether a breach was made, but instead will consider what a suitable remedy would be.
- 471 Subsections (2) and (3) detail the circumstances under which a CMA's breach decision becomes final and therefore binding on the courts for any private actions brought under section 101. This is when the deadline to apply for a review of the decision has passed without any application being made or when an application, including any appeal relating to it, is determined or has ended.
- 472 Subsection (5) defines a "CMA breach decision" as a decision by the CMA that a designated undertaking has breached a statutory duty imposed on it by the regime. These statutory duties are: conduct requirements, pro-competition intervention orders and commitments.
- 473 Subsection (6) sets out that the courts or Tribunal rules can be amended to allow the CMA to assist in private action cases brought in relation to the digital regime. For example, the CMA may assist by providing interpretations of the pro-competition interventions it imposed, or information about enforcement decisions relevant to the case.

Applications for review

Section 103: Applications for review etc

- 474 The section allows decisions taken by the CMA in connection with its digital markets functions to be reviewed by the CAT. It applies to any decision taken by the CMA in connection with its digital markets functions, other than decisions made in connection with the CMA's mergers functions (see section 66) and decisions to impose a penalty under section 85 or section 87 (see section 89). The CAT will decide these challenges on the same basis as the courts decide applications for judicial review. Case law suggests possible grounds of challenge include: (i) that an error of law was made; (ii) that there was a material procedural error; (iii) that a material error as to the facts has been made; and (iv) that there was some other material illegality (such as unreasonableness or lack of proportionality).

- 475 Subsections (1) and (2) set out that, any party with a “sufficient interest” in a decision has the right to make an appeal. “Sufficient interest” is a test for who has standing to bring a challenge, which is already used by the CAT and also the Administrative Court. These provisions mean that undertakings who are subject to the decision as well as third parties, which may include competitors of the undertaking, who have a particular interest in the subject matter of the decision can challenge that decision.
- 476 Subsection (3) provides that a designated undertaking will always be expected to comply with a decision until the outcome of an appeal is known, unless the CAT makes an interim order to the contrary.
- 477 Subsections (6) to (8) provide that decisions of the CAT may be appealed to the appellate court for that jurisdiction. As the CAT is a UK-wide tribunal, at the beginning of a case, the CAT will decide which of the UK’s three legal jurisdictions it is sitting in for the purposes of that case. If the CAT decides it is sitting in Scotland, for example, subsection (6) means that any appeals of CAT decisions in that case should be made to the Court of Session.

Chapter 8: Administration etc

Administration

Section 104: Extension etc of periods

- 478 This section sets out the powers the CMA has to extend the statutory deadlines established in Part 1 of this Act.
- 479 Subsections (1) and (2) establish the CMA’s power to extend the relevant investigation period or a period when the final offer mechanism is being used by up to three months for special reasons. Subsection (8) defines ‘relevant investigation period’ as being the period set by the statutory deadlines for SMS investigations, conduct requirement breach investigations, and pro-competition intervention investigations. The section does not further define ‘special reasons’, but it is anticipated that they would include occasions where there are specific reasons which justify an extension of the normal time limits. These might include matters such as the illness or incapacity of members of an investigation team that has seriously impeded its work, an unexpected event such as a merger of competitors, or new relevant information. These reasons will depend on the relevant circumstances of each case. The CMA must publish a notice to trigger the beginning of any extension. The CMA must also specify in the notice how long the extension will be for (up to a maximum of three months).
- 480 Subsection (3) establishes the CMA’s power to extend a relevant investigation period or period when the final offer mechanism is being used in the case of failure to comply with an information request (see section 69) or an interview request (section 72). The CMA must publish a notice to trigger the extension. The following conditions must be met before a notice can be published:
- a. In the context of a relevant investigation period:
 - i. The CMA has issued an information request under section 69 or an interview request under section 72, as part of an SMS designation investigation, PCI investigation or conduct breach investigation, and the recipient of those requests has failed to comply. For example, a firm may have failed to return requested information or turn up to an interview. And,
 - ii. By virtue of their request not being complied with, the CMA has been unable to properly carry out the function that the request was in relation to. For example, failure to supply information has led to the CMA being unable to properly assess whether a conduct requirement breach has taken place.

b. In the context of a final offer period:

- i. The CMA has issued a notice under section 69 and a person has failed to comply with a requirement in that notice, and
- ii. By virtue of the notice not being complied with, the CMA has been unable to properly carry out any of its functions under sections 38 to 45.

481 Subsection (4) requires the CMA to publish a notice to mark the end of an extension under subsection (3). This process of suspending the statutory time limits is colloquially known as “stopping the clock”. Under subsection (5), the extension lasts until the information requested has been provided or the CMA has decided to end the extension period for some other reason, for example, because it has obtained the information required through another source. Sections 25(2) and 34ZB of the Enterprise Act 2002 set out equivalent powers.

482 Subsection (7) explains the interaction between extensions to SMS investigations and active SMS designations. If the CMA is carrying out a further SMS investigation for a designated undertaking, and they need to extend that investigation, it is possible that the investigation would not conclude until the original designation has expired, meaning that undertaking would fall out of the regime before the need for continued SMS designation is confirmed. This subsection allows an SMS designation to be extended to match the length of the SMS investigation period. If the extension is made under subsection (3), an extension to the SMS designation can only be made if the person not complying is, or is connected to, the designated undertaking in question. Section 118, subsection (3) sets out when a person is “connected to” an undertaking.

483 The power to extend relevant investigation periods under this section does not affect any other powers that the CMA has to address a failure to comply with the provisions noted above, such as the power to impose a fine under section 87.

Section 105: Extensions: supplementary

484 This section provides additional detail on how extensions made under section 104 interact with each other, are brought to a close and are calculated.

485 Subsection (1) clarifies that both types of extension provided for in section 104 can be applied in the course of any given final offer period or ‘relevant investigation period’, defined at section 104, subsection (8), for SMS investigations, conduct requirement breach investigations, pro-competition intervention investigations. For example, the CMA can extend an SMS designation investigation for up to three months, and also make a “stop the clock” extension as part of that period.

486 Subsection (2) clarifies that only one extension of up to three months for special reasons can be made per ‘relevant period’. This restriction does not apply for a “stop the clock” extension which can be applied multiple times.

487 Subsection (3) clarifies how the total length of SMS investigations, conduct requirement breach investigations, pro-competition intervention investigations and final offer periods will be calculated, when they have been subject to an extension made under section 104, subsection (1) or section 104, subsection (3). For example, if a 9-month SMS investigation is subject to a 2-month extension under section 104, subsection (3), the final length of the investigation will be 11 months.

488 Subsection (4) clarifies that for periods where multiple 103 (3) extensions are active at the same time, they are considered to run concurrently rather than cumulatively. For example, if a 9-month SMS investigation had been extended for two months under section 104, subsection (3), and one month into that extension a further two-month extension under section 104,

subsection (3) occurs, then those extensions would run concurrently for one month, and that period of overlap would be ignored when calculating the total length of the extension made. The total length of that investigation would be nine months plus two months for the initial extension, plus one month for the remainder of the second extension, for a total of 12 months.

Section 106: Exercise and delegation of functions

- 489 This section explains how decisions will be made under the digital markets regime.
- 490 Subsections (1) to (5) give the CMA the discretionary power to create groups (under Schedule 4 to the Enterprise and Regulatory Reform Act 2013) to carry out functions of the new regime that have not been reserved for the CMA Board or its committees. The functions that are reserved for the Board and its committees are described at subsections (7) and (8). The CMA must state the function that such a group is being established for and the group will be required to fulfil that function. For example, the CMA could constitute a Group to consider PCI orders, and subsequently all PCI orders would need to be seen by that Group.
- 491 Subsections (6) and (7) add functions to the list of non-delegated functions at paragraph 29(2) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013. As a result, the following decisions will need to be made by the CMA Board:
- a. Whether to launch an initial SMS investigation
 - b. Whether to launch a further SMS investigation (for example if the CMA decides to launch a designation investigation ahead of the requirement to do so before the end of the 5-year designation period)
 - c. Whether to begin a pro-competition intervention investigation.
- 492 Subsection (8) adds a new sub-paragraph (2A) to paragraph 29 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013. This section lists out functions that can only be undertaken by the CMA Board or delegated to a committee of the Board. These functions are:
- a. Whether to make an SMS designation
 - b. Whether to apply existing obligations or make transitional, transitory or saving provisions in relation to them (see section 17)
 - c. Whether to impose or vary conduct requirements
 - d. Whether to revoke conduct requirements
 - e. Whether to make an enforcement order (not including an interim enforcement order)
 - f. Whether to accept a commitment
 - g. Whether to adopt the final offer mechanism
 - h. Whether to make a pro-competition intervention
 - i. Deciding the contents of the notice of decision at the end of a pro-competition investigation
 - j. Whether to replace a pro-competition order
 - k. Whether to revoke a pro-competition order
 - l. Whether to impose a penalty
 - m. Deciding the amount of a penalty

- 493 Sub-paragraph (2B) clarifies that to be eligible to carry out the functions under sub-paragraph (2A), a committee must include at least two CMA Board members, which can include the Chair. At least half of the committee's membership must be non-staff (which may include the Chair) or CMA panel members.
- 494 Subsection (9) creates a delegated power for the Secretary of State to amend the lists of decisions reserved to the Board or a Committee. A draft of this statutory instrument would need to be laid before and approved by each House of Parliament before it can be enacted.

Regulatory coordination and information sharing

Section 107: Consultation with relevant regulators

- 495 This section sets out requirements for the CMA to consult specific named regulators when proposing to exercise certain significant digital markets functions (a "regulatory digital markets function", as defined in section 118(1)), where certain specified conditions are met. These functions include the discretionary opening of an SMS investigation, SMS designation, the imposition of a conduct requirement and the making of a PCI. The five regulators that these requirements apply to are the Bank of England, the Financial Conduct Authority, the Information Commissioner, the Prudential Regulation Authority and the Office of Communications.
- 496 Subsections (1) and (2) require the CMA to consult the Financial Conduct Authority and the Office of Communications respectively on proposals which the CMA considers fall within the sectoral remit of the relevant regulator. In relation to the Financial Conduct Authority, this is the provision of financial services and the provision of claims management services in Great Britain, and in relation to the Office of Communications, commercial activities connected with communications matters. This could involve the CMA seeking the view of the relevant regulator on the impacts that the proposal may have on the sector the regulator is responsible for as well as any other relevant expertise the regulator might have.
- 497 Subsection (3) requires the CMA to consult the Information Commissioner on proposals which the CMA considers are likely to have a non-negligible adverse impact on the Commissioner's ability to exercise their functions under data protection and related legislation (see subsection (7)). This requirement does not affect any duty the CMA may have to consult the Information Commissioner under Article 36(4) of the UK General Data Protection Regulation.
- 498 Subsection (4) requires the CMA to consult the Bank of England on proposals which the CMA considers are likely to have a non-negligible adverse impact on the Bank's ability to advance its Financial Stability Objective (as defined in section 2A of the Bank of England Act 1998).
- 499 Subsection (5) requires the CMA to consult the Prudential Regulation Authority on proposals which the CMA considers are likely to have a non-negligible adverse impact on the Authority's ability to advance its general objective under section 2B of the Financial Services and Markets Act 2000, or its insurance objective under section 2C of that Act.
- 500 Subsection (6) provides that the CMA is only required to consult a regulator to the extent that the CMA considers the burden on it of conducting the consultation not to outweigh the benefits that it would bring.

Section 108: Recommendations to the CMA

- 501 This section sets out a formal mechanism for the Financial Conduct Authority or the Office of Communications to make a recommendation to the CMA for it to exercise a regulatory digital markets function. This term is defined in section 118(1) and encompasses certain significant functions under the digital markets regime, including the discretionary opening of an SMS

investigation, the imposition of a conduct requirement and the making of a PCI. This mechanism could for example be used in cases where the Financial Conduct Authority or the Office of Communications identify a potential competition concern specifically in digital markets, for which the CMA is considered to have the most suitable powers to take action. The CMA must respond to the relevant regulator within 90 days setting out what action, if any, it has taken or will take and the reasons for its decision. A summary of the CMA's response must also be published online (see section 113(3)).

Section 109: Information sharing

- 502 This section extends the information provisions of Part 9 of the Enterprise Act 2002 to cover the new functions of the CMA introduced in Part 1 of this Act. It will also extend the provisions to enable sharing of information between the CMA and the Information Commissioner's Office (ICO) where it facilitates the exercise of one of their respective statutory functions.
- 503 Subsection (1) adds Part 1 of the Act to the list of Specified Functions set out in Schedule 14 of the Enterprise Act 2002. This places any information obtained by the CMA through the exercise of any statutory function under the digital markets regime in scope of the general restriction on disclosure set out at section 237 of the Enterprise Act 2002. It is a criminal offence under section 245 of the Enterprise Act 2002 to disclose or use information to which section 237 applies unless that disclosure or use is permitted by Part 9 of the Enterprise Act 2002.
- 504 Subsection (2) adds several pieces of legislation to Schedule 15 of the Enterprise Act 2002. This would allow - under section 241(3) of the Enterprise Act 2002 - any public authority, such as the CMA, to share information which it holds that is subject to the restriction on disclosure in section 237 with a different party. This would only be possible for the purpose of assisting that party exercise a statutory function under any of the pieces of legislation added to this Schedule. For example, by adding legislation which contains functions of the ICO, the CMA will be able to share information obtained through its functions under this Act to facilitate the ICO carrying out its functions under that legislation.

Miscellaneous

Section 110: Power to charge levy

- 505 This section will give the CMA a delegated power to collect a levy from designated undertakings to recoup costs associated with delivering the digital markets regime.
- 506 Subsection (1) sets out that the CMA can require undertakings which have been designated with SMS to pay a levy, and that the requirement to pay the levy will relate to a given 'chargeable year', which is defined in subsection (10) as the period of 12 months ending with 31 March. It establishes that designated undertakings will be required to pay the levy in any such year where they have an active SMS designation, whether that designation is in place for the full year or only part of it.
- 507 Subsection (2) sets out that the CMA will make rules to establish the methodology they will use for calculating the levy, and that the CMA must comply with these rules once created. Subsection (3) sets out that the CMA will be able to update or change these rules.
- 508 Subsection (4) sets out a number of obligations that the levy rules must comply with. These are that:
- a. Paragraph (a) - the CMA cannot collect more money through the levy than it spends delivering the regime in any given chargeable year. Subsection (10), paragraph (b) establishes that the cost of delivering the regime should not include costs associated with litigation.

- b. Paragraph (b) - the rules must set out how the cost of the levy is split between designated undertakings. For example, split evenly between undertakings which have been designated, or proportionately based on the number of designated activities each undertaking has.
 - c. Paragraph (c) - if an undertaking only has SMS designation for part of a year, the amount of levy it pays should be proportionate to the amount of time it has a designation. For example, if it had been designated for six months of the year, it would pay 50% of the amount that it might have to pay if it had been designated for the full year.
 - d. Paragraph (d) - the rules must set out how the CMA calculates its anticipated costs in a year. This will be the amount that it bases its initial levy charges on at the start of the year.
 - e. Paragraph (e) - As the amount identified when complying with (4)(d) might change if the CMA ultimately carries out more or less work than expected, the rules must also set out how the CMA will calculate its actual costs, so that it can increase or reduce the amount of levy charged to designated undertakings at the end of the year. This will support the CMA's compliance with (4)(a), ensuring that the CMA does not collect more than it actually spends on the regime.
 - f. Paragraph (f) - the CMA will need to set out how repayment or crediting of overpayment would be carried out if the CMA's estimates for its spending end up being greater than its actual costs.
 - g. Paragraph (g) - the CMA should make sure that repayment or crediting of designated undertakings is proportionate to the amount that was paid by a designated undertaking in that year.
 - h. Paragraph (h) - the CMA will need to set out how additional charges would be made to designated undertakings if the CMA's estimates for its spending end up being less than its actual costs.
 - i. Paragraph (i) - additional charges should be in proportion to the amount already paid by a designated undertaking in that year.
 - j. Paragraph (j) - the rules will need to set out how the CMA will administer the levy, for example the processes that will be used to design, calculate and charge for it, and how the levy is to be paid, for example setting out when levy payments are due.
- 509 Subsection (5) establishes that the CMA is able to charge interest on the late payment of levy fees, and sets the rate of interest as that in section 17 of the Judgments Act 1838, which is currently 8%. Subsection (6) clarifies that stipulations made for the administration of the levy in subsection (5), specifically references to amounts payable, do not include any interest that may be charged. Subsection (7) specifies that any interest collected must be returned to the Consolidated fund.
- 510 Subsections (8) to (11) set out how the levy rules will be created and published. Before the levy rules can be implemented, the CMA will need to consult such persons as it considers appropriate (for example, undertakings which have or who may be designated) on the draft rules and arrange for the draft rules to be laid before Parliament. The same conditions apply should the CMA seek to amend or replace the levy rules. The final rules, including where they are amended or replaced, must be published.
- 511 If a designated undertaking fails to pay the levy, subsection (12) allows the CMA to recover the amount due through the courts as a debt owed to it by the designated undertaking.

Section 111: Extra-territorial application

- 512 This section specifies that, unless stated otherwise, the digital markets regime applies extraterritorially in relation to persons outside the UK. For example, the CMA's powers to interview (section 72), enter premises without a warrant (section 74) and enter premises under a warrant (section 75) all expressly state that they are not exercisable outside the UK. However, powers conferred by section 74 and section 75 are exercisable in relation to information whether it is stored within or outside the United Kingdom.
- 513 Subsection (2) sets out that the CMA can only give a notice (such as a penalty notice) under this Part to a person outside the United Kingdom if that person meets at least one of the descriptions set out in subsections (3), (4) and (5).
- 514 Subsection (3) sets out that a person is within this subsection if that person is or is part of an undertaking (for example a subsidiary firm) that has been designated with SMS, or that is subject to existing obligations (see section 17), or that is the subject of a digital markets investigation.
- 515 Subsection (4) describes senior managers (see section 70) and nominated officers (see section 83) on whom the CMA has imposed or is considering imposing a penalty under section 87(2) or 87(3).
- 516 Subsection (5) describes four types of link to the United Kingdom. A person with at least one of the four links to the United Kingdom will fall within this subsection.
- 517 Subsection (6) makes provision so that to the extent that the CMA has broader powers, absent this section, to issue notices extra-territorially under Part 1 of the Digital Markets, Competition and Consumers Act, section 111 does not limit such powers.

Section 112: Defamation

- 518 This section protects the CMA against legal action for defamation as a result of their exercise of functions under the digital markets provisions in this Part.

Section 113: Consultation and publication of statements

- 519 This section outlines how the CMA must undertake its duties to consult and publish statements online under Part 1 of the Act.
- 520 Subsection (1) provides that the CMA, when consulting and publishing statements under this Part, must take into account matters of confidentiality and the timetable for making a decision or taking action following the consultation. Subsection (2) provides that the CMA must include reasons and sufficient information for consultees to understand those reasons.

Section 114: Guidance

- 521 This section sets out the CMA's obligation to publish guidance on how it will exercise its powers under the digital markets regime in Part 1 of the Act. It will be able to revise or replace any guidance it publishes, but must then publish the revised or replacement guidance.
- 522 Subsection (3) permits the CMA to update the guidance over time.
- 523 Subsection (4) places requirements on the CMA in relation to the publication of guidance. It provides that the CMA must consult such persons as it considers appropriate before publishing guidance. For example, this could include industry associations with a particular interest in the specific guidance in question. The CMA must also obtain the approval of the Secretary of State before publishing any guidance under this section.

- 524 Subsections (5) and (6) require the Secretary of State to respond to the CMA’s request for approval for guidance documents within 30 working days. By that time the Secretary of State must either approve the guidance or give reasons to the CMA for not doing so.

Section 115: Protected Disclosures

- 525 This section ensures that any whistleblower making a disclosure regarding compliance with the digital regime will be afforded protections which prevent retaliation from their employer, such as dismissal or demotion. The Employment Rights Act 1996 provides protection for workers who suffer a detriment as a result of whistleblowing by making a qualifying disclosure.

Section 116: Restriction on disclosure orders

- 526 This section places restrictions on the use of disclosure orders to access certain information in the possession of the CMA or information which relates to a CMA investigation.
- 527 Subsections (1) and (4) define the context of the restriction as private actions relating to competition claims or those brought under section 101 of this Act.
- 528 Subsection (2) prevents the CMA from being required to disclose information in its possession by a court or the CAT where another person would reasonably be able to provide that information.
- 529 Subsection (3) prevents any party from being required to disclose information where it relates to an ongoing CMA investigation by a court or the CAT.
- 530 Subsection (6) amends Schedule 8A of CA98 to prevent any information which cannot be required through a disclosure order through a competition claim being required through a disclosure order in a private action brought under section 101 of this Act.

Interpretation

Section 117: Groups

- 531 Subsection (2) provides that an undertaking will be part of a group for the purposes of Part 1 of the Act if it is part of a larger corporate group. That is, when one or more bodies corporate that make up the undertaking belong to the same corporate group (as explained in subsection (3)) as one or more bodies corporate that do not form part of the undertaking.
- 532 Subsection (3) sets out that two bodies corporate are members of the same group if one is the subsidiary of the other or if both are subsidiaries of another body corporate. For example, where A is a subsidiary of B, both will be members of the same group. This would also be the case if neither A nor B was a subsidiary of the other but both were subsidiaries of C.

Section 118: General interpretation

- 533 This section defines certain terms for the purposes of Part 1. All terms that are not listed below are self-explanatory (or, where the definition of the term is found in another section, have been explained elsewhere in these explanatory notes).
- a. “Customer” includes customers that are not consumers, for example, business customers.
 - b. A “digital markets function” is any function of the CMA in Part 1 of the Act, and the CMA’s power to do anything that is calculated to facilitate or is conducive or incidental to, the performance of those functions (this power is bestowed on the CMA in relation to any of its functions by paragraph 20 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013).

- c. “Information” is to be understood in the widest possible sense, including estimates and forecasts as well as information that can be generated or brought into being by a party. Where the CMA requires a party to produce information in a visible and legible form, this might include producing estimates based on knowledge or experience in written form, or providing datasets or code in a usable format.
- d. “Person” is broader than the definition in the Interpretation Act 1978 and includes any undertaking, as well as legal persons and human individuals.
- e. “Undertaking” has the same meaning as it has in Part 1 of the Competition Act 1998. Simply put, an undertaking is an economic entity engaged in an economic activity e.g., placing goods or services on a market. A single undertaking may be comprised of one or more legal entities, where those entities constitute a single economic entity. This will be the case where one company can and does exercise decisive influence over another; for example, a parent company which decides the commercial policy of its subsidiaries.
- f. “User” is to be understood in very broad terms to include a person or a business that interacts in any way with the relevant digital activity. This term applies to all parts of the supply chain and regardless of whether or not the person or business provides any form of compensation/payment to interact with the relevant digital activity. Where the Act refers to “potential users”, it applies to people and businesses that are not interacting with the relevant digital activity but may be seeking to do so, or who may seek to do so in the future. For example, a user may include a business whose product depends on interoperating with the relevant digital activity. It may also include a person or business whose content is hosted on or accessible through the relevant digital activity, such as is the case with the platform-press publisher relationship. A potential user may include a person or business that accesses a different undertaking’s similar or competing product to the relevant digital activity provided by the designated undertaking.
- g. “Using” is similarly to be understood in very broad terms to include any activity carried out by a person or a business that makes use of the relevant digital activity. It also applies to those conducting activities that interact with the relevant digital activity. This term applies to all parts of the supply chain and applies regardless of whether or not the person or business provides any form of compensation/payment to use the relevant digital activity. For example, if a person is using an undertaking’s video streaming service which is not the activity in relation to which it has been designated, but which prompts or otherwise redirects users to use the undertaking’s search service for which it has been designated, then the person may be considered to be using or potentially using the search service.

Part 2: Competition

Chapter 1: Anti-trust

The Chapter 1 and 2 prohibitions

Section 119: Removal of requirement for agreements etc to be implemented in the UK

- 534 This section expands the territorial reach of the Chapter 1 prohibition of the Competition Act 1998.
- 535 The Chapter 1 prohibition makes illegal agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition. Prior to this Act, such agreements, decisions and practices were only prohibited where they are, or are intended to be, implemented in the United Kingdom.
- 536 Subsections (2) and (3) expand the territorial reach of the Chapter 1 prohibition. Subsection (2) replaces the previous section 2(1) to provide that agreements, decisions and practices which are, or are intended to be, implemented in the United Kingdom continue to fall in scope of the Chapter 1 prohibition insofar as they may affect trade within the United Kingdom, and further that agreements etc. which are likely to have an immediate, substantial and foreseeable effect on trade within the United Kingdom are also within the scope of the Chapter 1 prohibition, even when these are not implemented in the United Kingdom. The expansion of the territorial reach of the prohibition is therefore qualified by the degree to which it has an effect on trade in the United Kingdom. Agreements etc. implemented outside of the United Kingdom which are likely to have a more limited effect in the United Kingdom than those which are immediate, substantial and foreseeable are not captured by the Chapter 1 prohibition. Subsection (3) repeals the previous section 2(3) of the Competition Act 1998 which sets out that only agreements etc. implemented or intended to be implemented in the United Kingdom are caught by the prohibition.
- 537 The qualified effects test ensures that UK trade and businesses and consumers based in the United Kingdom are protected from the detrimental effects of anticompetitive conduct, regardless of where that conduct takes place, even when an agreement is implemented in another jurisdiction.
- 538 Subsection (4) provides that the expanded scope of the prohibition only applies to agreements etc. which are made after the coming into force of the section.
- 539 Subsection (5) applies the interpretative provision made at section 2(5) of the Competition Act 1998 so that the reference to "agreements" in subsection (4) is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

Section 120: Repeal of exclusions relating to the European Coal and Steel Community

- 540 This section repeals paragraph 8 in Schedule 3 to the Competition Act 1998 in order to remove a provision which has been redundant since the expiry of the Treaty establishing the European Coal and Steel Community and make other consequential provision. Schedule 3 sets out general exclusions to the Chapter I and II prohibitions in the Competition Act 1998. Paragraph 8 provided an exclusion for agreements and conduct relating to coal or steel products to the extent to which the European Coal and Steel Community gave the European Community exclusive jurisdiction in the matter. The provision has had no effect since the Treaty expired in 2002.

Investigations

Section 121: Duty to preserve documents relevant to investigations

- 541 This section makes provision amending Part 1 of the Competition Act 1998 to impose a duty to preserve documents where a person knows or suspects that an investigation is, or is likely to be, carried out by the CMA.
- 542 Subsections (1) and (2) make provision for the insertion of section 25B into the Competition Act 1998. Section 25B(1) sets out that the duty applies where a person knows or suspects that an investigation is, or is likely to be, carried out by the CMA. Subsection (2) of section 25B sets out the actions which are prohibited where the duty arises. As defined in section 59 of the Competition Act 1998, documents for this purpose include information recorded in any form.
- 543 The duty to preserve evidence arises from the point that a person has knowledge of, or suspects, that an investigation under section 25 of the Competition Act 1998 either is being carried out, or is likely to be carried out. In practice, the duty would arise where a business receives a case initiation letter from the CMA and so is aware that its conduct is under investigation. It may further arise where, for example, an individual working for a business is aware that a customer has reported their suspicions of price fixing and that the customer has been interviewed by the CMA, or members of an anti-competitive agreement are “tipped off” that a member of the agreement has blown the whistle to the CMA. The duty would apply in this case to the individual and their employer.
- 544 Subsection (3) amends section 40ZE of the Competition Act 1998 (inserted by paragraph 8 of Schedule 8 to this Act), which sets out the powers of the CMA (and sector regulators) to impose a financial penalty on a person if, without reasonable excuse, they fail to comply with a requirement specified in that section which has been imposed for the purposes of an investigation under section 25. Subsection (3) amends section 40ZE so that failure to comply with the new duty, without a reasonable excuse, gives rise to liability for a financial penalty.

Section 122: Production of information authorised by warrant

- 545 This section amends sections 28 and 28A of the Competition Act 1998 which make provision regarding the grant of warrants, and the powers of the CMA when executing such warrants, to enter business premises (section 28) and domestic premises (section 28A) for the purposes of an investigation concerning an infringement of either the Chapter I or Chapter II prohibitions. When executing such warrants, a named CMA officer (who may be accompanied by other CMA officers authorised by the CMA) has the power, among other things, to require the production of information which is held electronically and accessible from the premises.
- 546 Subsection (2) amends section 28(1) of the Competition Act 1998 to expand the powers of the court or CAT to grant a warrant to the CMA on the basis that there are reasonable grounds for suspecting that there are documents relevant to an investigation which are accessible from the premises, where the other criteria set out in that section are met.
- 547 Subsection (3) amends the powers set out in section 28(2) of the Competition Act 1998 which a warrant authorises the CMA officers to exercise. Section 28(2)(f) is amended to broaden the power to require the production of information which is stored in electronic form, and which is accessible from the premises. This power now applies to any information stored electronically and accessible from the premises, not only that which the named officer considers relates to a matter relevant to the investigation.

- 548 Subsection (3) further inserts paragraphs (g), (h) and (i) into section 28(2). Paragraph (g) enables CMA officers to operate equipment on the premises for the purpose of producing information stored in electronic form and accessible from the premises which is visible and legible or in a form from which it can readily be produced in a visible and legible form. For example, this power could be used to operate equipment so that electronic information can be transferred securely to CMA devices or where an undertaking or its employees cannot or will not produce the required information in such a form. Paragraph (h) enables the named officer to require assistance from any person on the premises to access information held electronically and accessible from the premises (such as the provision of passwords or encryption keys). Paragraph (i) empowers the CMA to take copies of or seize anything produced which the named officer considers relates to any matter relevant to the investigation.
- 549 Subsections (4), (5) and (6) make amendments which have identical effect in relation to the power at section 28A of the Competition Act 1998 concerning the grant of a warrant, and powers available under that warrant, to enter and inspect domestic premises.
- 550 Subsection (7) makes a consequential amendment to section 30 of the Competition Act 1998 which deals with privileged communications, that is a communication between a professional legal adviser and a client, or one made in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings. Section 30(1) of the Competition Act 1998 provides that a person shall not be required under Part 1 of that Act, to produce or disclose a privileged communication. Section 122(7) inserts a new section 30(1A) which sets out that nothing in section 28 or section 28A of the Competition Act 1998 authorises an officer to produce, seize, make copies of or take extracts from any communication which a person could not be required to produce or disclose, as a result of the protection given by section 30(1).

Section 123: Additional powers of seizure from domestic premises

- 551 This section amends Part 2 of the Criminal Justice and Police Act 2001, to specify the powers of seizure conferred by section 28A(2) of the Competition Act 1998 for the purposes of section 50 of the Criminal Justice and Police Act 2001 and make clarificatory amendments regarding the existing specification of the power at section 28 of the Competition Act 1998 in light of its amendment by section 122 of this Act. Section 28 of the Competition Act 1998 provides the CMA with a power to enter business premises when authorised by warrant, and section 28A of the Competition Act 1998 provides equivalent powers in relation to domestic premises. The powers of seizure conferred by section 28(2) of Competition Act 1998 are already specified for the purposes of section 50 of the Criminal Justice and Police Act 2001, so the amendment aligns the powers available to the CMA whether they are inspecting business or domestic premises under a warrant and makes consequential amendments in light of those made by section 122.
- 552 Specification of the powers for the purposes of section 50 of the Criminal Justice and Police Act 2001 provides for a power of seizure, where a named officer of the CMA (or a sector regulator where relevant) is on any premises as a result of a warrant issued under section 28 or 28A, and finds anything which they have reasonable grounds to consider they are authorised to seize, but it is not reasonably practicable on the particular premises either to determine whether the material or information is indeed within the scope of the warrant, or for something they consider to be within scope to be separated from something else located on the premises.

- 553 Subsection (2) amends section 50(6) of the Criminal Justice and Police Act 2001 to make clear that, as in relation to section 28(2)(b) of the Competition Act 1998, whilst section 50 applies to the section 28A(2)(b) Competition Act 1998 power, it only enables those exercising it to copy material in order to examine it elsewhere to determine or separate out what in fact they would be entitled to copy under section 28A itself. It does not give them the power to seize original documents.
- 554 Subsection (3) amends section 57(1) of the Criminal Justice and Police Act 2001 to add section 28A(8) of the Competition Act 1998 to the list of provisions. Section 28A(8) of the Competition Act 1998 applies in relation to documents which have been seized under section 28A(2)(c), because they appear to be of the relevant kind and there is a need to take possession of them (rather than copies) because such action appears necessary to preserve the documents or prevent interference with them, or it is not reasonably practicable to take copies of the documents on the premises. Where the power is exercised, section 28A(8) provides that the documents may be retained for no longer than 3 months. The amendment to section 57(1) of the Criminal Justice and Police Act 2001 clarifies that the three month maximum limit continues to apply where the section 50 power has been relied upon and extends the protections set out in that section regarding the relationship between the Criminal Justice and Police Act 2001 regime and the Competition Act 1998 powers.
- 555 Subsection (4) amends section 63(2) of the Criminal Justice and Police Act 2001 to provide that the CMA's powers under section 28(2)(f) of the Competition Act 1998, and those under section 28A(2)(f) and (g), to take copies of information stored in electronic form which has been produced are to be treated as a power of seizure for the purposes of the Criminal Justice and Police Act 2001 and so subject to the safeguards set out in that regime.
- 556 Subsection (5) amends section 64(3) of the Criminal Justice and Police Act 2001 to specify that the appropriate judicial authority for an application under section 59 of that Act in relation to material seized in reliance on the section 28A Competition Act 1998 power is, in relation to England and Wales and Northern Ireland, the High Court and, in relation to Scotland, the Court of Session. Section 59 Criminal Justice and Police Act 2001 allows any person with a relevant interest in the seized property to apply to the appropriate judicial authority on certain grounds for the return of the whole or part of the seized property.
- 557 Subsection (6) amends section 65(2) of the Criminal Justice and Police Act 2001. It ensures that references to items which are subject to legal privilege in the Criminal Justice and Police Act 2001 will be read consistently with the definition of "privileged communications" in section 30 of the Competition Act 1998, when the relevant property which has been seized is in exercise, or purported exercise, of section 28A of the Competition Act 1998 or section 50 of the Criminal Justice and Police Act 2001 as exercisable by reference to section 28A of the Competition Act 1998.
- 558 Subsection (7) amends section 66(5) of the Criminal Justice and Police Act 2001 to ensure any references to seizure under the Criminal Justice and Police Act 2001 will be read as including the CMA's powers to take possession of items under section 28A(2)(c) of the Competition Act 1998.
- 559 Subsection (8) amends paragraph 67 in Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001 so that section 50 of that Act applies to the CMA's powers under section 28A(2) of the Competition Act 1998, as it already applies to the powers under section 28(2) of the Competition Act 1998.

Proceedings before the Competition Appeal Tribunal

Section 124: Standard of review on appeals against interim measures directions

- 560 This section changes the standard of review to be applied by the CAT on appeals against interim measures directions under section 35 of the Competition Act 1998 from a determination on the merits by reference to the grounds set out in the notice of appeal to a review which applies the same principles as would be applied by a court on an application for judicial review.
- 561 Under section 35 of the Competition Act 1998, when an investigation has been commenced but not completed, the CMA has the power to issue directions known as “interim measures” for the purpose of preventing significant damage to a particular person or category of person or protecting the public interest.
- 562 Subsection (1) amends section 46 of the Competition Act 1998 to make clear that a decision to either make or not make interim measures directions under section 35 can be appealed to the CAT by any party to an agreement in respect of which the CMA has made such a decision or any person in respect of whose conduct the CMA has made such a decision. It is already clear that third parties have such a right of appeal to the Tribunal under section 47(1)(d)-(e).
- 563 Subsections (2), (3) and (4) amend Schedule 8 to the Competition Act 1998 so that appeals in respect of CMA decisions to make or not make interim measures directions will be determined by the CAT by applying the same principles as would be applied by a court on an application for judicial review.

Section 125: Power of Competition Appeal Tribunal to grant declaratory relief

- 564 This section introduces Schedule 3 which amends the Competition Act 1998 in order to give the CAT the power to grant declaratory relief in individual or collective claims made with regards to actual or alleged infringements of the Chapter I or II prohibitions in the Competition Act 1998. Schedule 3 further amends Schedule 4 to the Enterprise Act 2002 to make express provision regarding the making of Tribunal rules in relation to the grant of declaratory relief.
- 565 Declaratory relief takes the form of a declaration (or declarator in relation to Scotland), which is a remedy whereby the CAT makes a legally binding statement on the application of the law to a particular set of facts. It may be granted independently of any other claims or awards such as payment of compensation. A declaration could, for example, be about the interpretation of a clause in a contract, the interpretation of a term or provision in a statute or a statutory instrument or whether a patent is still valid.

Schedule 3: Power of Competition Appeal Tribunal to grant declaratory relief

- 566 Paragraphs (2) and (3) amend section 47A of the Competition Act 1998 to insert subsection (3A) which expands the types of claims which may be made in proceedings before the CAT to include a claim for the making of a declaration (or declarator in relation to Scotland).
- 567 Paragraph (4) inserts section 47DA into the Competition Act 1998. This section provides that declarations or, in Scotland, declarators, granted by the Tribunal have the same effect as those granted by the High Court or the Court of Session respectively and that the Tribunal must apply the same principles as the High Court and Court of Session when deciding whether to grant a declaration or declarator. Further, the Tribunal may grant a declaration or declarator whether or not any other remedy is claimed.
- 568 Paragraphs (5) and (6) make a consequential amendment to section 47F of the Competition Act 1998 to reflect that Schedule 8A to that Act now makes provision in respect of declaratory relief as well as other kinds of claims.

- 569 Paragraph (7) amends section 49 of the Competition Act 1998 to make provision for appeals to be made against a decision by the Tribunal to grant declaratory relief.
- 570 Paragraph (8) makes consequential amendments to Schedule 8A to the Competition Act 1998 regarding the conduct of claims before a court or the CAT to ensure that claims for declaratory relief may be sought in addition to, or instead of, claims in respect of loss or damages.
- 571 Paragraph (9) inserts an additional paragraph 21B into Schedule 4 to the Enterprise Act 2002 so as to include declaratory relief to the list of areas which the rules, made by the Secretary of State regarding proceedings before the Tribunal, may cover.

Section 126: Exemplary damages

- 572 This section amends the Competition Act 1998 to enable the CAT, High Court of England and Wales, the Court of Session and Sheriff Court in Scotland, or the High Court in Northern Ireland to award exemplary damages in competition cases (except in collective proceedings before the CAT).
- 573 Parties who have suffered harm due to a breach of competition law can initiate private damages claims, on a stand-alone or follow-on basis, against individuals or businesses which committed the infringement or alleged infringement.
- 574 Exemplary damages, in common law, are awarded beyond what is compensatory for the loss or harm which occurred to punish particularly egregious conduct. In cases where compensatory redress is considered insufficient in light of the defendant's conduct, additional and proportionate exemplary damages can be sought. Courts have developed well-established principles regarding the award of exemplary damages, including when such an award may be made and the quantum thereof.
- 575 Subsection (1) amends section 47C of the Competition Act 1998 so that exemplary damages cannot be sought or granted in collective proceedings before the CAT, that is cases where multiple claimants are seeking remedies against the same defendant(s) as part of one case.
- 576 Subsection (2) makes amendments to Schedule 8A to the Competition Act 1998. Paragraph 15 of Schedule 8A is amended to provide that an immunity recipient can be liable to pay exemplary damages to its direct or indirect customers or suppliers (as defined in subparagraphs (a) to (d) of paragraph 15(1)). However, an immunity recipient cannot be held liable for exemplary damages that the claimant is unable to obtain from other undertakings involved in the cartel infringement. Part 8 of Schedule 8A, which previously prevented the award of exemplary damages, is repealed, and a consequential amendment is made to Part 10.

Chapter 2: Mergers

Section 127: Relevant merger situations and special merger situations

- 577 This section introduces Schedule 4 which makes several changes to the thresholds which determine what transactions are within jurisdiction of UK merger control. Transactions within jurisdiction can be reviewed by the CMA although no obligations or requirements are imposed on businesses by being in scope. Jurisdiction does not trigger automatic CMA review or intervention.
- 578 Schedule 4 introduces a new acquirer-focused threshold which provides a more comprehensive and effective jurisdictional basis for certain vertical and conglomerate mergers, in particular acquisitions that may reduce dynamic competition and risk the development of new products or services. It also introduces a small merger safe harbour which is primarily targeted at reducing the regulatory burden faced by small and micro businesses.

Schedule 4: Relevant and special merger situations

- 579 Schedule 4 makes several changes to the thresholds which determine what transactions are within jurisdiction of UK merger control.
- 580 Section 23 of the Enterprise Act 2002 sets out the criteria for a merger to qualify as a “relevant merger situation” and therefore be subject to potential investigation by the CMA. This is the case where the transaction meets at least one of two “tests” detailed below:
- a. the “turnover test”: the value of the turnover in the UK of the target exceeds £70 million; or
 - b. the “share of supply test”: the merger would result in the creation or enhancement of at least a 25% share of supply of goods or services in the UK, or in a substantial part of the UK. This test is met, for example, for a merger between two enterprises each having a 15% share of supply, as well as for a merger between two enterprises where one which already has a 25% share of supply merges with another having a 5% share.
- 581 Schedule 4 amends the thresholds in three ways:
- a. it increases the level of the turnover test,
 - b. it introduces a safe harbour for mergers involving parties with low levels of UK turnover, and
 - c. it introduces a new acquirer-focused threshold for merger review.
- 582 Paragraph 2 of Schedule 4 implements these three amendments:
- a. Subparagraph 2 increases the level of the turnover test from £70m UK turnover to £100 million UK turnover.
 - b. Subparagraph 3 introduces a safe harbour by adding a condition into the existing share of supply test in section 23(2) that requires at least one of the merging enterprises to have UK turnover of more than £10 million. This has the effect that any merger involving only enterprises with a respective UK turnover of £10 million or less is exempt from UK merger review on competition grounds.
 - c. Subparagraph 4 prevents turnover of the enterprise being taken over from being double counted in certain merger situations, such as a joint venture.
 - d. Subparagraph 5 introduces a new acquirer-focused threshold by inserting new subsections (4C) - (4G) into section 23. These specify the conditions which must be met in respect of one of the merging enterprises regarding share of supply (subsection (4D)) and turnover (subsection (4E)) and set out an additional condition intended to ensure the transaction has a sufficient connection with the UK (subsections (4F) and (4G)). The persons carrying on the enterprise concerned need to have at least a 33% share of supply of goods or services in the UK, or in a substantial part of the UK, and the enterprise must have a UK turnover of over £350 million. The UK nexus criterion is met where an enterprise other than the one that meets the share of supply and turnover conditions is carried on by a UK business or body, at least part of its activities are carried on in the UK, or it supplies goods or services in the UK. The conditions are to be assessed without taking the merger into account, i.e. on the assumption that it has not taken place or will not do so.
- 583 Paragraph 3 makes consequential amendments to sections 28(5) and (6) of the Enterprise Act 2002 which includes a delegated power for the Secretary of State to amend section 23 by order so as to alter the turnover figures specified in that section. The changes ensure that the provisions of these subsections are applied not just to the existing turnover test but also the

turnover elements of the new acquirer-focused threshold and the safe harbour. The exercise of this power is subject to the negative resolution procedure. The power is limited to substituting one figure for another and the Secretary of State is required to act in accordance with public law principles when doing so. The overall parameters for the thresholds, e.g. that there should be a safe harbour for mergers involving parties with a specified level of turnover or that there should be a threshold focussed on mergers involving larger, established market players, are set out in the primary legislation.

- 584 Paragraph 6 amends the provisions in section 59 of the Enterprise Act 2002 on special public interest cases to ensure that public interest interventions in media mergers are not affected by the increase in the turnover test and the small merger safe harbour. The special public interest regime enables the Secretary of State to refer certain mergers for investigation on public interest grounds, even though they do not meet the jurisdictional thresholds outlined above. They are scrutinised against public interest considerations only, with no review on competition grounds. The Secretary of State will retain their ability to intervene in mergers where at least one of the enterprises concerned is a media enterprise or a newspaper enterprise and where the target turnover is over £70 million as well as where at least one of the enterprises concerned is a media enterprise or a newspaper enterprise and the share of supply test has been met, even if none of the enterprises has UK turnover of over £10 million.
- 585 Paragraph 6 also amends section 59(6A) of the Enterprise Act 2002 to amend the conditions for application of the special public interest merger regime. Section 59(6A) previously allowed the Secretary of State by order to amend the conditions relating to mergers involving media and newspaper enterprises with an existing share of supply of 25%. Paragraph 6 amends that power so that it allows the Secretary of State to alter the turnover threshold figure of £70 million. The exercise of this power is subject to the negative resolution procedure. The power is limited to substituting one figure for another and the Secretary of state is required to act in accordance with public law principles when doing so. The overall parameters for the thresholds, i.e., that there should be a threshold focused on the target's UK turnover, are set out in the primary legislation. Separately, the non-turnover elements of the thresholds are subject to amendment by a delegated power which is, however, subject to the draft affirmative procedure as it permits a wider range of amendments to the threshold tests than altering a turnover figure.
- 586 Paragraph 7 amends Schedule 5A to the Enterprise Act 2002 which was recently inserted by Schedule 16 to the Energy Act 2023 as part of the amendments made by that Act to enable the CMA to investigate energy network mergers in Great Britain effectively. Paragraph 7 amends the modifications made by Schedule 5A to Chapter 1 of the Enterprise Act 2002 for the energy network merger regime, to reflect the changes made to the ordinary merger regime by the Act. Firstly, paragraph 7, subparagraph 2 amends the level of the turnover test for the energy network merger regime from £70 million GB turnover to £100 million GB turnover, in line with the amendment raising the threshold in the ordinary turnover test from £70 million UK turnover to £100 million UK turnover in paragraph 2, subparagraph 2 of Schedule 4. Secondly, paragraph 7, subparagraph 3 amends Schedule 5A to take account of the amendments made to section 28 of the Enterprise Act 2002 by Schedule 4 to the Act and corrects the modification made by paragraph 3(c) of Schedule 5A to section 28(6) of the Enterprise Act 2002.
- 587 Paragraph 9 amends the existing delegated power to alter the share of supply test in section 123 of the Enterprise Act 2002. This power will extend to altering the new thresholds introduced by Schedule 4. The amendments introduce restrictions or safeguards in relation to these new uses of the power which are similar to those currently applying in relation to amendments of the share of supply test.
- 588 Paragraphs 4 and 10 make minor consequential amendments.

Section 128: Fast-track references under sections 22 and 33 of EA 2002

- 589 This section introduces Schedule 5 which amends Part 3 of the Enterprise Act 2002 to enable the CMA to fast-track a merger to an in-depth Phase 2 investigation if it receives a request from the parties involved in a merger to do so. It streamlines merger review procedures and timelines by removing certain statutory duties on the CMA that previously limited use of the existing, non-statutory fast-track procedure.
- 590 While the legislation does not specify for which reasons the parties involved in a merger can request a fast-track, this is most likely to be helpful where the facts of the case are such that the parties involved in a merger and the CMA both consider at an early stage of the investigation that it is highly likely that the merger will be referred to an in-depth Phase 2 investigation. Under such circumstances, it may be beneficial for all parties to streamline the review process and move straight to Phase 2.

Schedule 5: Mergers: Fast-track references under sections 22 and 33 of EA 2002

- 591 Schedule 5 amends Part 3 of the Enterprise Act 2002 to enable the CMA to fast track a merger to an in-depth Phase 2 investigation if it receives a request from the parties involved in a merger to do so (paragraph 1).
- 592 The CMA may only launch a Phase 2 investigation if it believes that it is or may be the case that a completed or anticipated merger has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom. If parties are aware that their merger is likely to fall into this category, moving straight into Phase 2 should speed up the overall process by significantly reducing the timelines to get to the in-depth investigation.
- 593 Paragraph 2 introduces a new duty in section 22(1A) on the CMA to make a reference for a Phase 2 merger investigation regarding a completed merger if it has accepted a fast-track request from the parties involved in a merger. In a fast-track merger investigation, this duty replaces the ordinary duty in section 22(1) to make a reference for a Phase 2 merger investigation where the CMA believes that it is or may be the case that the completed merger has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom. Paragraph 3 introduces an equivalent duty in section 33(1A) for anticipated mergers.
- 594 Paragraph 4 amends section 34ZA which sets out the time-limits for decisions about Phase 2 references to include a time limit for fast-track references. It requires the CMA to notify the parties involved in a merger of the making of a fast-track reference within the “initial period” which is the statutory period of 40 working days within which the CMA must complete the initial stage of its merger review process (Phase 1).
- 595 Paragraph 7 inserts new sections 34ZD, 34ZE and 34ZF setting out the conditions and procedure for fast-track reference requests. Section 34ZD enables the parties involved in a merger to make such a request either before or after the start of Phase 1. The CMA may publish further guidance on the appropriate timings for such a request. When it receives such a request, the CMA must decide whether to accept it and has to notify the parties involved in a merger of its decision (see new section 34ZE). Where the request is made before the start of the Phase 1 investigation, the CMA can either reject it before or after it launches Phase 1, or accept it after launching Phase 1 and before the end of the initial period. Where the request is made after the start of the Phase 1 investigation, the CMA has to either accept or reject it before the end of the initial period. New section 34ZF sets out the conditions for acceptance of a request. The CMA has broad discretion on whether to accept a fast-track request but can only do so if it is satisfied to the usual standard that a relevant merger situation has been or

may be created (i.e. that the merger meets the jurisdictional tests set out in section 23 of the Enterprise Act 2002 – see the note on Schedule 4 for further details). Unlike a standard Phase 1 investigation, however, the CMA does not have to determine whether the merger has resulted, or may be expected to result, in a substantial lessening of competition and therefore does not have to undertake the investigation necessary to come to this decision. Instead, it will investigate the substantive issues at the in-depth Phase 2 investigation. When deciding whether to accept a fast-track reference request, the CMA must have regard to whether the merger could raise public interest issues (see section 58 of the Enterprise Act 2002) or whether a special public interest intervention has been launched under section 59 of that Act, to ensure no such case is unduly fast tracked.

- 596 Paragraph 8 amends section 39 which sets out the time limits for Phase 2 investigations and reports. It enables the CMA to extend a Phase 2 investigation following a fast-track reference by up to 11 weeks for ‘special reasons’ (instead of the normal 8 weeks allowed in a non-fast tracked Phase 2 investigation). This slightly longer permitted extension period reflects the fact that a fast-track decision in the early stages of a Phase 1 investigation means the CMA may be unable to rely on information gathered and findings made at Phase 1 to the same extent as it would ordinarily. In some cases, the CMA may therefore need to be able to extend the Phase 2 investigation for slightly longer to ensure it can conduct a full and proper investigation.
- 597 Paragraph 10 amends Schedule 5A to the Enterprise Act 2002 which was recently inserted by Schedule 16 to the Energy Act 2023. It amends the modifications made by Schedule 5A to Chapter 1 of the Enterprise Act 2002 for the energy network merger regime to ensure that a review of a merger between energy network enterprises under that regime cannot be fast tracked.
- 598 Paragraphs 5-6, 9 and 11-15 make consequential amendments to provisions in the Enterprise Act 2002, including by introducing a duty on the CMA to publish a fast-track reference decision under section 107.

Section 129: Mergers of energy network enterprises

- 599 This section introduces Schedule 6 which amends Part 3 of the Enterprise Act 2002 to facilitate the investigation of mergers involving energy networks enterprises under sections 68B or 68C of that Act and under section 22 or 33 of that Act by the same CMA Group.

Schedule 6: Mergers of energy network enterprises

- 600 Schedule 6 amends Part 3 of the Enterprise Act 2002 to facilitate the investigation of mergers involving energy networks enterprises under sections 68B or 68C of that Act and under section 22 or 33 of that Act by the same CMA Group. In particular, it ensures that a merger can still be referred for review on competition grounds if it has already been referred under the energy network merger regime. It also makes other minor amendments and corrections to provisions relating to mergers involving energy network enterprises.

Section 130: Mergers involving newspaper enterprises and foreign powers

- 601 Section 130 introduces Schedule 7 to the Act. Section 130 confirms that the provisions in Schedule 7 relating to foreign powers gaining control or influence over newspaper enterprises do not apply in relation to foreign state merger situations created before 13 March 2024.

Schedule 7: Mergers involving newspaper enterprises and foreign powers

- 602 Schedule 7 inserts a new Chapter (Chapter 3A: “Mergers involving newspaper enterprises and foreign powers”) and Schedules (Schedule 6A: “Determination of when a foreign state newspaper merger situation has been created” and Schedule 6B: “Control or influence of a person by a foreign power”) into the Enterprise Act 2002, relating to mergers involving

newspaper enterprises and foreign powers. The new Chapter 3A includes the new sections 70A to 70G referred to below, and new Schedule 6B includes new Parts 1, 2 and 3.

New section 70A

- 603 Subsection (1) of this new section requires the Secretary of State to give the CMA a notice (a “foreign state intervention notice”) if the Secretary of State has reasonable grounds to suspect that a foreign state newspaper merger situation (as defined in subsection (3)) has been created or its creation is in progress or under contemplation. Subsection (2) confirms that the situation in question must be specified in the notice, while subsection (6) confirms that the notice comes into force when it is given, and ceases to be in force when the matter to which it relates is finally determined.
- 604 Subsection (3) sets out the circumstances in which a foreign state newspaper merger situation is considered to have been created. Subsection (3) applies existing provisions in the Enterprise Act relating to merger situations, with modifications as set out in new Schedule 6A, to circumstances where one of the enterprises which is being merged is a newspaper enterprise, and as a result of the merger, a foreign power is able to control or influence, or increase its level of control or influence over, the policy of the person carrying on the newspaper enterprise.
- 605 Subsection (4) introduces new Schedule 6B which makes provision about the circumstances in which a foreign power is able to control or influence the policy of a person for the purposes of this Chapter.

New section 70B

- 606 Subsection (1) obliges the CMA to provide a report to the Secretary of State, within a time period specified by the Secretary of State, in relation to the foreign state intervention notice which has been given to them.
- 607 Subsection (2) sets out the necessary content of such a report, namely the decision which the CMA has reached as to whether a foreign state newspaper merger situation has been created (or is in progress or under contemplation), and a summary of the relevant representations which it has received. The CMA must carry out the investigations it considers appropriate to inform its report (subsection (3)) and, as part of its investigations, the CMA must invite representations from the enterprises concerned (subsection (4)).

New section 70C

- 608 New section 70C sets out the action which the Secretary of State must take on receipt of a report from the CMA setting out the CMA’s belief that a foreign state newspaper merger situation has been created, is in progress or is under contemplation.
- 609 Subsection (2) confirms that, in such circumstances, the Secretary of State must make an order containing such provision which they consider reasonable and practicable, which may include anything permitted by Schedule 8 to the Enterprise Act (provision that can be included in enforcement orders), as well as such supplementary, consequential or incidental provision as they consider appropriate (subsection (3)), to prevent or reverse the merger. Subsection (4) confirms that such an order can be varied or revoked.
- 610 Subsection (5) enables the provisions in paragraph 2 of Schedule 7 to the Enterprise Act 2002 relating to enforcement and the prevention of pre-emptive action to be applied to this new Chapter. This gives the Secretary of State the power to make an order which prevents action which might prejudice a foreign state intervention notice which is in force, or the CMA’s report on the case, or the ability for either the Secretary of State, or the CMA, to take any action relating to a notice or a report.

New section 70D

- 611 New section 70D confirms that other powers in Part 3 of the Enterprise Act 2002 (for example, the public interest merger regime in Chapter 3) can also be exercised in relation to a foreign state newspaper merger situation (subsection (1)), and that the use of those other powers does not prevent the exercise of the powers in new Chapter 3A (subsection (2)).
- 612 Subsection (3) requires the CMA to bring to the attention of the Secretary of State any case which it has identified through the exercise of its duties under section 22 (“Duty to make references in relation to completed mergers”) or 33 (“Duty to make references in relation to anticipated mergers”), and which it believes may involve a foreign state newspaper merger situation. This reflects a similar requirement in section 57 of the Enterprise Act 2002 for the CMA (and Ofcom) to bring to the attention of the Secretary of State any case which it believes raises any public interest consideration, as specified in section 58 of the Enterprise Act 2002.

New section 70E

- 613 New section 70E sets out a definition of “foreign power” for the purposes of this Chapter. The definition is modelled on section 32 of the National Security Act 2023 but also includes senior members of a foreign government, state, agency or authority in their private capacity as well as their public one. Subsection (3) clarifies that the Channel Islands, the Isle of Man and the British Overseas Territories are not to be considered as foreign countries or territories for the purpose of this Chapter.
- 614 This provision should be read with section 127 of the Enterprise Act (associated persons). Section 127 provides that associated persons, and any bodies corporate they control, are to be treated as one person for the purposes of establishing whether there is a foreign state newspaper merger situation under new section 70A(3) – see paragraph 4(10) of Schedule 6A to the Act. For example, an individual who is a foreign power, and any spouse, partner or relative of that individual are associated persons.

New section 70F

- 615 Subsection (1) of this section clarifies that the term “newspaper” is to be read, for the purpose of this Chapter, as including periodicals (such as news magazines).
- 616 Subsection (2) confirms that a matter is considered to be “finally determined” when the Secretary of State has either made an order to prevent or reverse a merger under new section 70C(2) or has published a report provided by the CMA under new section 70B stating that the CMA does not believe that such a merger has been created, is in progress or is under contemplation.

New section 70G

- 617 New section 70G enables the Secretary of State to amend the definition of “foreign power” or “newspaper” (subsection (1)) by making regulations subject to the affirmative resolution procedure. Such regulations may provide for a description of person to be treated as if they were not a foreign power (subsection (2)), for the purpose of this Chapter.
- 618 Subsection (1) of this section enables the Secretary of State to change the meaning of ‘foreign power’.
- 619 Subsection (2) of this section sets out that regulations may, in particular, make provision to exclude categories of persons from being treated as a foreign power and to base this on the level of independence that person has from a foreign power or the level of interest they have in a newspaper or news magazine.

- 620 Subsection (1)(b) gives the Secretary of State the ability to change the definition of ‘newspaper’, where reference is made to it throughout this Chapter either to widen or to narrow the scope of the types of news publication covered by the foreign state newspaper merger regime.
- 621 Subsection (3) gives the Secretary of State the power to apply provisions in Chapter 1 of Part 3 of the Enterprise Act 2002 to the new regime in Chapter 3A. In particular, a modification to a provision in Part 3, Chapter 1 by Schedule 6A sets the turnover threshold for the creation of a foreign state newspaper merger situation at £2 million. The power in section 70G(3) enables this threshold to be varied.

New Schedule 6A

- 622 New Schedule 6A applies a number of provisions, with modifications, from Chapter 1 of Part 3 of the Enterprise Act 2002 (sections 23 to 29) for the purposes of new Chapter 3A.
- 623 Paragraph 1(2) of Schedule 6A amends section 23 to reduce the turnover threshold for the creation of a relevant merger situation to £2 million.
- 624 Paragraph 1(3) amends section 24 to provide that the deadline for the Secretary of State to issue a foreign state intervention notice and for the CMA to give its report (see new section 70B above) is, in relation to a completed merger, four months from the date of completion or notice of the material facts of the merger are given to the CMA or Secretary of State, or are made public. The material facts include facts about whether or the extent to which a foreign power is able to control or influence a newspaper enterprise.
- 625 Paragraph 1(5) modifies section 26 to provide that where a foreign power which is already able to control or influence a newspaper enterprise increases their level of control or influence (e.g. by acquiring more shares or voting rights), this is to be treated as the foreign power bringing the newspaper under its control thus allowing the Secretary of State to give a foreign state intervention notice.

New Schedule 6B, Part 1 - Conditions for control or influence

- 626 Part 1 of new Schedule 6B sets out a list of conditions which define when control or influence from a foreign power arises in the case of a merger involving newspaper enterprise and a foreign power. If one or more of these conditions is met, a foreign power is to be able to control or influence the policy of a person defined in new section 70F as a newspaper or periodic news publication. The specific conditions in subparagraphs (2) to (6) of paragraph 1 are subject to a power to amend the requirements set out in Part 3 of this schedule.
- 627 Subparagraph (2) sets conditions related to the holding of shares by a foreign power, directly or indirectly, in a UK newspaper or periodic news publication.
- 628 Subparagraph (3) sets conditions related to voting rights that a foreign power holds either directly or indirectly in a UK newspaper or periodic news publication.
- 629 Subparagraph (4) sets conditions related to any right, directly or indirectly, to appoint or remove any officer (for example a director or chief executive) of a UK newspaper or periodic news publication.
- 630 Subparagraph (5) sets conditions related to any right or ability to direct, control or influence (whether directly or indirectly) the policies or activities of a UK newspaper or a periodic news publication; this would include a UK newspaper or a periodic news publication’s editorial policies.
- 631 Subparagraph (6) applies the requirements on control and influence where the foreign power exercises that through a trust or partnership.

New Schedule 6B, Part 2 - Interpretation

- 632 Part 2 of new Schedule 6B sets out how various terms should be interpreted for the purpose of new Schedule 6A. It includes paragraph 7 which defines voting rights in relation to shares that have such a right, paragraph 9, which sets out how the provisions should be interpreted where a foreign power holds a share or right indirectly, for example, in paragraph 9(1)(b) as part of a chain, while paragraph 11 confirms that where a foreign power controls a right, the right is to be treated as held by that foreign power.

New Schedule 6B, Part 3 - Power to amend circumstances in which there is control or influence

- 633 Part 3 of new Schedule 6B provides the Secretary of State with a power to make regulations to amend the requirements which must be satisfied in order for a foreign power to be considered to have control or influence. This includes the capacity to change specified proportions of shares or rights (paragraph 15(1)(a) and (b)), the assumptions to be made regarding control or influence including with reference to ownership of those shares or rights (paragraph 15(1)(c)), and the point at which 'control' or 'influence' will be considered to come within new section 70A (paragraph 15(1)(d)); as well as to change or supplement new Schedule 6B, Part 1 such as to include other circumstances which would come to a similar effect as the conditions set out in that Part. The power can be used to apply such changes from 13 March 2024.
- 634 Paragraph 15(3) confirms that such regulations may confer a discretion on the CMA.

Further amendments

- 635 Schedule 7 also makes various consequential amendments to the Enterprise Act 2002 (paragraph 4 (further amendments)). These include provisions which require the Secretary of State to publish details of any foreign state intervention notice (subparagraph 4(a)) and any report received by the Secretary of State from the CMA under section 70B within 7 days of its receipt (subparagraph 4(b)). Subparagraph (9) amends section 124 of the Enterprise Act 2002 (orders and regulations under Part 3) to provide that a statutory instrument under section 70G or paragraph 15 of Schedule 6B must be made using the affirmative resolution procedure.

Section 131: Mutual agreements to extend time-limits: duty to make reference cases

- 636 This section enables the CMA and parties involved in a merger to mutually agree to extend the statutory timetable for Phase 2 investigations (known as stopping the clock) where this is likely to support timely resolution of merger investigations and to create added flexibility to the process.
- 637 Section 39 of the Enterprise Act 2002 (time limits for investigations and reports) requires the CMA to prepare and publish its report on a merger reference within 24 weeks from the date of the reference.
- 638 Subsection (2) amends section 39 to give the CMA the power to extend the Phase 2 timetable where it and the parties involved in a merger agree to do so. The length of an extension period has to be agreed between the CMA and parties involved in a merger. The extension comes into force when published under section 107 and continues until the end of the agreed extension period, unless the CMA and the parties involved in a merger agree to an earlier cancellation.
- 639 Subsection (3) amends section 40 of the Enterprise Act 2002 to make clear that a mutually agreed extension does not prevent the CMA from using its existing powers to extend the Phase 2 timetable for other reasons, e.g. for special reasons (section 39, subsection (3)) or if it considers that a relevant person has failed to comply with any requirement of a formal notice under section 109 to provide information or documents (section 39, subsection (4)). The

amendment to section 40(5) ensures that mutually agreed extensions are included when calculating the total length of the Phase 2 timetable in a case where there are multiple extensions.

- 640 Subsection (4) makes amendments to section 107(2) to ensure that the CMA is required to publish any decision, agreed to by it and the parties involved in a merger, to cancel a previously agreed extension.
- 641 While the legislation does not specify in which circumstances the CMA and the parties involved in a merger can agree an extension, this is most likely to be helpful in support of early consideration of remedies or in multi-jurisdictional mergers that are being reviewed in other countries in parallel to the UK.

Section 132: Mutual agreements to extend time-limits: public interest cases

- 642 This section enables the CMA and the parties involved in a merger to mutually agree to extend the statutory timetable for Phase 2 investigations where there has been a public interest intervention, replicating the provision in section 130 for standard merger reviews.
- 643 Subsection (1) explains that this section amends Chapter 2 of Part 3 of the Enterprise Act 2002. This Chapter sets out that the Secretary of State may intervene in the consideration of a merger where the Secretary of State believes it raises a public interest consideration that needs to be taken into account (relevant considerations are specified in section 58 of the Enterprise Act 2002).
- 644 Subsections (2) and (3) make amendments to sections 51 and 52 of the Enterprise Act 2002 which are equivalent to those made by section 130. The only notable difference is that subsection (2) ensures that the CMA can only make an extension or cancel it in a public interest case, if the Secretary of State consents. This ensures the Secretary of State is appropriately involved in the decision-making, reflecting their role as decision maker in public interest interventions. This will apply to special public interest cases too as section 65(3) of the Enterprise Act 2002 applies sections 51 and 52 automatically to such cases.
- 645 Subsection (4) makes amendments to section 107 which are equivalent to those made by section 130.

Section 133: Publication of merger notices online

- 646 This section replaces an obligation on the CMA in section 96(5) of the Enterprise Act 2002 to publish the latest form of the merger notice in the London, Edinburgh and Belfast Gazettes with an obligation to instead publish it online (for example on the CMA website). The merger notice is used by undertakings to notify the CMA of potentially relevant merger situations.

Chapter 3: Markets

Section 134: Market studies: removal of time-limit on pre-reference consultation

- 647 Section 134, subsections (1) and (2) amend section 131B of the Enterprise Act 2002 to remove the restriction on the time period during which the CMA, after the commencement of a market study, is required to either begin a consultation regarding a proposal to make a reference or must publish notice of its decision not to make a reference. The requirement to undertake a consultation in a case where the CMA proposes to make a reference, or where it does not propose to make a reference but has received representations in response to the market study notice indicating that it should make a reference, are set out in section 131A of the Enterprise Act 2002 and continue to apply. The removal of the time restriction gives the CMA flexibility and more time to gather evidence to determine when the consultation process should commence, provided that it can complete the process and reach a decision on a reference within 12 months of the publication of the market study notice.

- 648 Subsection (3) removes provisions which enable the Secretary of State, by order, to reduce the 6-month time limit period, since these become redundant as a consequence of the removal of the restriction mentioned above.

Section 135: Power to make a reference after previously deciding not to do so

- 649 This section amends Section 131B of the Enterprise Act 2002 to specify the circumstances when a market investigation reference may be made, following an earlier decision by the CMA or a concurrent sector regulator during a market study not to make a market investigation reference in relation to the same matter.
- 650 Subsection (4) inserts new subsections (8) and (9) in section 131B of the Enterprise Act 2002. These make provision so that a reference for a market investigation may not be made within 2 years of the publication of a market study report in relation to the same matter, unless there has been a material change in circumstances since the report was prepared. This could include where it is subsequently discovered there has been a mistake of fact or misrepresentation made during the course of the market study, or evidence was provided late in the course of the study which indicates that the market has changed since the report was prepared.

Section 136: Scope of market investigations

- 651 This section makes provision regarding the ability of the CMA (or the appropriate Minister, as the case may be) to specify the feature or features of a market it considers require further investigation when making a reference under section 131 or section 132 of the Enterprise Act 2002 and amending the questions which the CMA group constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to undertake the investigation must consider accordingly.
- 652 Subsection (2) inserts new subsections (1A) and (1B) in section 133 of the Enterprise Act 2002 which make provision so that a reference may require the CMA Group to limit its investigation to the effects of features of the market or markets concerned which are set out in the reference itself ("particular features"). It further amends section 133(2) of the Enterprise Act 2002 so that the provision sets out examples of the types of feature which the reference may specify.
- 653 Subsection (3) amends section 134 of the Enterprise Act 2002 so that the CMA group will only be required to investigate "relevant features", defined in new section 134, subsection (2B) of the Enterprise Act 2002 as being any features of a relevant market other than features that are excluded by virtue of the above amendments to section 133 of the Enterprise Act 2002. This ensures that the questions which the CMA Group must consider reflect only the matter or matters it is required to investigate as specified in the reference and prevents unnecessary duplication of work.
- 654 It is therefore possible for a reference to be made which refers a whole market for investigation, or specific features of a market, where the person making the reference has identified particular features of concern. This means the question to be considered by the CMA reflects that it is possible for the CMA to refer the whole market for investigation, or a specific feature of the market where they have identified that specific features require further investigation, rather than the market as a whole.
- 655 Should it subsequently be identified that it would be appropriate for the terms of a reference to be varied, there are powers for the CMA (or the appropriate Minister, as the case may be), to vary a market investigation reference under section 135 of the Enterprise Act 2002.

Section 137: Acceptance of undertakings at any stage of a market study or investigation

- 656 This section gives effect to Schedule 8 which expands the temporal scope of acceptance of undertakings, allowing voluntary commitments to be accepted by the CMA during all stages of a market study and a market investigation. It also allows the CMA to accept undertakings partially to narrow the issues which require further investigation.

Schedule 8: Acceptance of undertakings at any stage of a market study or investigation

- 657 Paragraph 1 is self-explanatory.
- 658 Paragraph 2 of Schedule 8 makes amendments to section 131B of the Enterprise Act 2002 so that in a case where a market study has been undertaken, and the CMA has accepted an undertaking under the new section 154A, either instead of, or in addition to, making an investigation for a market reference under section 131, the market study report must contain that decision.
- 659 Paragraph 3 of Schedule 8 makes amendments to section 133A of the Enterprise Act 2002 which deals with which functions of the CMA must be carried out on its behalf by the group constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 following the making of a reference under any of sections 131, 132 or 140A of the Enterprise Act 2002 (“the CMA Group”) and which may be carried out by the CMA Board. Section 133A(1) lists the decisions which must be made by the CMA Group. That subsection is amended to include a decision to accept an undertaking in lieu of a report under section 154A. Subsection (2) lists the decisions which may be made by the CMA Board where the CMA Group has ceased to exist. It is amended to include a decision to accept an undertaking in lieu of a report.
- 660 Paragraph 4 of Schedule 8 amends section 136 to make provision so that a report on a market investigation reference must include any decision made by the CMA during the course of the investigation to accept an undertaking partially in lieu of a report.
- 661 Paragraph 5 of Schedule 8 makes amendments to section 139 Enterprise Act 2002 as a consequence of the introduction of the new section 154A of the Enterprise Act 2002. Section 139 concerns the circumstances in which the Secretary of State may give a notice to the CMA (“a public interest intervention notice”) that they believe it is or may be the case that one or more public interest considerations is relevant to a matter in relation to which a market study notice has been published, or a consultation regarding a possible reference under section 131 has commenced in accordance with section 169 of the Enterprise Act.
- 662 Subparagraphs (2) and (3) of Paragraph 5 amend sections 139(1A)(a) and 139(1B)(a) so that the permitted period within which the Secretary of State may give a public interest intervention notice ends where the CMA accepts an undertaking fully in lieu of a reference under the new section 154A (whether in a case in which a market study notice has been published by the CMA, or a consultation regarding a possible reference commenced under section 169 of the Enterprise Act 2002). Should the CMA accept undertakings partially in lieu and then plan to make a reference in relation to other features of a market, the Secretary of State retains the power to issue a public interest intervention notice. Subsections (4) and (5) make consequential amendments to reflect the replacement of section 154 with the new section 154A of the Enterprise Act 2002.
- 663 Paragraph 6 of Schedule 8 makes amendments to section 140 of the Enterprise Act 2002. Section 140 makes provision regarding public interest intervention notices which may be given under section 139. By section 140(4) a public interest intervention notice comes into

force when it is given and remains in force until the matter to which it relates is “finally determined” under the Chapter. Section 140(5) sets out when a matter is finally determined for the purposes of subsection (4). Paragraph 6 amends the list of circumstances in section 140(5) so that it includes the acceptance by the CMA of an undertaking fully in lieu of a reference. Should the CMA accept undertakings partially in lieu, any public interest intervention notice would remain in force.

- 664 Subparagraph (3) of Paragraph 6 makes a consequential amendment to section 140(6A) to replace the reference to former section 154 with the new section 154A of the Enterprise Act 2002.
- 665 Paragraph 7 of Schedule 8 amends section 150 of the Enterprise Act 2002 so that the Secretary of State’s power of veto over the acceptance of undertakings applies to the new section 154A power to accept undertakings in lieu of a reference as it previously applied to undertakings in lieu under the old section 154.
- 666 Paragraph 8 of Schedule 8 inserts new section 154A in the Enterprise Act 2002 in substitution for section 154 of the Enterprise Act 2002, replacing the CMA’s power to accept undertakings in lieu with a power to accept two types of undertakings: undertakings in lieu of a reference and undertakings in lieu of a report. Both types of undertaking can be accepted either partially or in full of the reference or report, allowing the CMA to use them to narrow the issues which require further investigation either before, or during the course of, a market investigation.
- 667 New section 154A(1) of the Enterprise Act 2002 expands the temporal scope of acceptance of undertakings by the CMA. It provides that the power to accept an undertaking applies where no market study notice has been published under section 130A but the CMA considers it has the power to make a market investigation reference under section 131, and otherwise intends to make a reference, where a market study notice has been published under section 130A but no market investigation reference has been made under section 131, or where a market investigation reference has been made under section 131, but no report published under section 136. Acceptance of undertakings after a market investigation reference has been made will allow the CMA to use them to narrow issues during the course of a market investigation.
- 668 New section 154A(2) of the Enterprise Act 2002 mirrors former section 154(3) of the Enterprise Act 2002, and provides that the new power is to accept, from such persons as it considers appropriate, and to take such actions as it considers appropriate, for the purpose of remedying, mitigating or preventing an adverse effect on competition or any detrimental effect on customers so far as it has resulted from the adverse effect on competition, or may be expected to result from it.
- 669 New section 154A(3) of the Enterprise Act 2002 provides that undertakings accepted in circumstances where the CMA considers it has power to make a reference and otherwise intends to make a reference, or where a market study notice has been published up to the making of a market investigation reference are known as “undertakings in lieu of a reference”. Undertakings accepted after the making of a reference under section 131 or 132, but before the publication of a report under section 136 are known as “undertakings in lieu of a report”.
- 670 New section 154A(4) of the Enterprise Act 2002 provides that undertakings in lieu of a reference may be accepted instead of making a reference, in which case they are “undertakings fully in lieu of a reference”, or in addition to making a reference under section 131 in which case they are “undertakings partially in lieu of a reference”. Any reference made would have to relate to features other than those to which the undertakings relate, as a result of the restrictions in section 156 of the Enterprise Act 2002 (see further below). Undertakings in lieu of a report may be accepted either instead of publishing a report under section 136

(“undertakings fully in lieu of a report”), or in addition to publishing such a report (“undertakings partially in lieu of a report”). Where undertakings are accepted partially in lieu of a report, the questions which must be addressed in the report are amended by section 156 of the Enterprise Act 2002.

- 671 New section 154A(5) of the Enterprise Act 2002 mirrors former section 154(3) of the Enterprise Act 2002, but is applied only in relation to undertakings accepted fully in lieu of either a reference or a report. The CMA is required to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable as regards the adverse effect they are targeted at. That the duty is not applied to undertakings accepted partially in lieu of a reference or report recognises that the CMA may continue its inquiry in relation to other features which give rise to competition concerns.
- 672 New section 154A(6) of the Enterprise Act 2002 provides that when accepting undertakings under the section, the CMA may in particular have regard to the effect on any action on any relevant customer benefits or the feature or features concerned, mirroring former section 154(4).
- 673 New section 154A(7) of the Enterprise Act 2002 follows the approach in former section 154(5) and the restriction in section 138(6) of the Enterprise Act 2002. This provision prevents the CMA taking action in relation to a potential detrimental effect on customers unless they are also taking action in relation to the underlying adverse effect on competition. Where a detrimental effect on customers has already materialised, the CMA is able to address the adverse effect or the customer detriment, in the alternative.
- 674 Subsections (8), (9) and (10) of the new section 154A Enterprise Act 2002 mirror the previous section 154(6), (7) and (8) Enterprise Act 2002 respectively. Undertakings accepted under the new section 154A come into force when accepted, and may be varied, or superseded by other undertakings and may be released by the CMA. The CMA is required, as soon as reasonably practicable, to consider any representations received by it in relation to the variation or release of any undertaking accepted under the section. The powers to accept undertakings are subject to the Secretary of State’s power of veto at section 150 of the Enterprise Act 2002, and the procedural requirements set out in section 155 of the Enterprise Act 2002.
- 675 Paragraph 9 of Schedule 8 amends section 155 of the Enterprise Act 2002 (undertakings in lieu: procedural requirements).
- 676 Sub-paragraph (2) of Paragraph 9 amends subsection 155(1) so that the procedural requirements and restrictions set out in the section apply to the new undertakings to be accepted under section 154A as they applied to undertakings in lieu under section 154. These include specific consultation and publication requirements.
- 677 Sub-paragraph (3) of Paragraph 9 repeals subsection 155(3), replacing it with a new subsection (3A). This requires the CMA to set out, in a notice detailing an undertaking which it proposes to accept, the adverse effect on competition and any detrimental effect on customers resulting from the adverse effect on competition, which the CMA has identified. The obligation to include the terms of the reference which the CMA considers it has the power to make, and would otherwise intend to make, is omitted. This reflects that in the early stages of a market study, the CMA may not be in a position to set out the terms of the market investigation reference in full, even in circumstances where it is satisfied that there is an adverse effect on competition in the market which the undertaking would remedy, mitigate or prevent.
- 678 Sub-paragraph (4) of Paragraph 9 makes consequential changes to amend references to former section 154 to refer to new section 154A of the Enterprise Act 2002.

- 679 Paragraph 10 of Schedule 8 amends section 156 Enterprise Act 2002 which deals with the effects of undertakings and the bar on making future references, to reflect the new types of undertaking created by the new section 154A.
- 680 Sub-paragraphs (1) and (2) of paragraph 10 of the Schedule are self-explanatory.
- 681 Sub-paragraphs (3) and (4) of paragraph 10 of the Schedule amend section 156(A1) and (1) so that the restrictions set out in those sub-section applies to undertakings accepted under the new section 154A as they applied to undertakings in lieu accepted under section 154. The references to “any feature” in the amended section 156(A1)(b) and new section 156(1)(ab) reflects that undertakings may be accepted partially in lieu. Where undertakings have been accepted in relation to particular features, or combinations of features, a reference may not be made in relation to the same feature or combination of features within the following 12 months, however this does not prevent the making of a reference in relation to another feature in the same market.
- 682 This also means that where undertakings in lieu have been accepted in relation to a specific feature in a market, that will have the effect of preventing the making of an ordinary reference which relates to the market as a whole (i.e. any feature of the market which may be present) within 12 months following the acceptance of those undertakings. In contrast, where the CMA Board narrows the scope of a reference under section 133 of the Enterprise Act 2002, this would not prevent the reference of the entire market where this is considered appropriate.
- 683 For example, where an undertaking in lieu has been accepted in relation to feature A in market Z, it would not be possible for an ordinary reference to be made in the following 12 months relating to feature A in market Z, nor a cross-market reference which includes feature A in relation to market Z. The CMA would be able to make an ordinary reference in relation to any other feature in market Z, and a cross-market reference which includes feature A in relation to any other market except Z.
- 684 Sub-paragraph (5) of paragraph 10 of the Schedule is self-explanatory.
- 685 Sub-paragraph (6) of paragraph 10 of the Schedule inserts new subsections (4), (5), (6) and (7) into section 156 of the Enterprise Act 2002 to address the effects of undertakings in lieu of a report under new section 154A.
- 686 New subsections 156(4) and (5) of the Enterprise Act 2002 provide that where the CMA has accepted an undertaking in lieu of a report, the CMA’s obligation to consider the questions set out in section 134 of the Enterprise Act 2002 does not apply in relation to the feature, or features, to which the undertakings relate. Where an undertaking is accepted partially in lieu of a report, the report will therefore only be required to address the features which are not resolved by the acceptance of the undertaking or group of undertakings. Where an undertaking is accepted fully in lieu of a report, there is therefore no obligation to publish a report under section 136 and the duty under section 138 does not arise.
- 687 The new subsection 156(6) provides that where the CMA accepts an undertaking fully in lieu of a report, the CMA must, instead of the section 136 report, prepare and publish a report setting out its decision to accept the undertaking, reasons for the decision and such information as it considers appropriate for facilitating a proper understanding of the decision and reasons.
- 688 The new subsection 156(7) is self-explanatory.
- 689 Paragraph 13 of Schedule 8 amends section 162 of the Enterprise Act 2002 which sets out the duty on the CMA to keep the carrying out of undertakings under review, and from time to time consider whether they have been or are being complied with, and or need to be varied or

superseded by another undertaking. Paragraph 13 amends sections 162(4) and (8) of the Enterprise Act 2002 so that this duty will apply to undertakings accepted under section 154A as it applied to undertakings accepted under section 154 and includes the new types of undertaking in the definition of “enforcement undertaking”. This has the effect of making undertakings under new section 154A Enterprise Act 2002 enforceable by virtue of existing section 167 of the Enterprise Act 2002 which applies to any enforcement undertaking.

- 690 Paragraph 14 of Schedule 8 makes amendment to section 169 of the Enterprise Act 2002. Section 169 requires a relevant authority (that is the CMA, or the Secretary of State in cases involving a full or restricted reference) so far as practicable, to consult where it proposes to make a relevant decision if it considers such decisions are likely to have a substantial impact on the interests of any person. Section 169(6) Enterprise Act 2002 sets out a list of “relevant decisions”. Paragraph 14 of Schedule 8 amends this list so it includes decisions to accept an undertaking in lieu of a reference under section 154A as it previously applied to decisions to accept undertakings in lieu under section 154.
- 691 Paragraph 15 of Schedule 8 makes consequential changes to section 174C of the Enterprise Act 2002 to amend references to former section 154 to refer to new section 154A of the Enterprise Act 2002. Section 174C supplements section 174B which sets out a restriction on the exercise of powers to impose penalties under section 174A for non-compliance with an information notice issued under section 174. There is a limitation period imposed on the issue of a civil penalty for non-compliance with an information notice, which, as amended by Schedule 9, is 10 weeks from the “relevant day”. By section 176B(6), where the information gathering power is exercised for the purpose of the CMA’s enforcement functions in relation to a matter that is the subject of a possible reference under section 131, the relevant day is the day when the CMA finally decides whether to make the reference.
- 692 Section 174C(3) makes provision regarding when the relevant day is for the purposes of section 176B(6). Paragraph 15 amends section 174C(3) so that the decision to accept an undertaking fully in lieu of a reference under section 154A will be taken as the day the CMA finally decides whether to make a reference under section 131 for this purpose, and so the limitation period will run from that date.
- 693 Paragraph 16 of Schedule 8 amends the list of circumstances where a market investigation reference is deemed to be finally determined set out in section 183(3)(a) of the Enterprise Act 2002 to include the acceptance of an undertaking fully in lieu of a report under new section 154A Enterprise Act 2002.
- 694 Paragraph 17 of Schedule 8 makes consequential changes to amend references to former section 154 in paragraph 29 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to refer to new section 154A of the Enterprise Act 2002.

Section 138: Final undertakings and orders: power to conduct trials

- 695 Subsection (1) gives effect to Schedule 9 which makes provision to enable the CMA, and as the case may be, the Secretary of State, to conduct trials of remedies before settling a final remedy package.

Schedule 9: Final undertakings and orders: power to conduct trials

- 696 Paragraph 2 of Schedule 9 makes amendment to section 133A of the Enterprise Act 2002, which deals with which functions of the CMA must be carried out on its behalf by the group constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 following the making of a reference under any of sections 131, 132 or 140A of the Enterprise Act (“the CMA Group”) and which may be carried out by the CMA Board. Section 133A(1) sets out the decisions which must be carried out by the CMA Group. Section 133A(2) sets out the decisions which may be carried out by the CMA Board where the CMA Group has ceased to exist.

- 697 Paragraph 2(2) amends subsection 133A(1) so that the decisions under sections 138 to 138B which must be made by the Group are limited to those which relate to an adverse effect on competition in respect of which the CMA is required to take action in accordance with section 138(2) within the period permitted by section 138A(1). It further inserts decisions made under the new section 161C into subsection 133A(1). The CMA Group is thereby required to make decisions regarding any remedies which are to be settled within the period required by section 138A(1) immediately following the conclusion of a market investigation reference, and the design and commencement of any implementation trial to be undertaken under new section 161C, however decisions to be taken at the conclusion of an implementation trial may be taken by the CMA Board, as may decisions to revise remedies in accordance with section 138(2) following a decision made under the new section 162A(5).
- 698 Paragraph 2(3) amends subsection 133A(2) to include decisions made under the new section 162B concerning the variation of any undertakings accepted or orders made for the purpose of a trial undertaken under the new section 161C. This allows the CMA Board to vary remedies during the implementation trial period once the CMA Group has ceased to exist.
- 699 Paragraph 3 of Schedule 9 amends section 138A of the Enterprise Act 2002 which deals with the time limits within which the CMA is required to take action by either accepting undertakings or imposing orders, following a finding of an adverse effect on competition in a market investigation report published under section 136. By section 138A(1) the CMA is required to discharge its duty under section 138(2) within 6 months from the date of the publication of its report. That time period may be extended by no more than 4 months where the CMA considers there are special reasons for doing so.
- 700 Paragraph 3(2) inserts new subsections 138A(A1) to (A3). New subsections (A1) and (A3) have the effect of disapplying the time limit in relation to any adverse effect on competition in relation to which an implementation trial takes place, or where, as a result of an implementation trial, it is not reasonably practicable for the CMA to discharge its duty in relation to another adverse effect on competition identified in the report. Instead, the time in which the section 138(2) duty must be discharged is the date specified under the new section 161D(5)(b)(ii); that is the date specified in the final implementation trial notice as the last date on which any implementation trial measure (undertaking or order) is to have effect. The new subsection (A2) confirms that the existing time limits apply to any other adverse effects on competition. This means that where, in a report published under section 136, the CMA identifies multiple adverse effects on competition, and considers that an implementation trial should be undertaken in relation to one or more of those adverse effects, the existing 6+4 month window will apply to remedies which relate to any adverse effect on competition which are not the subject of a trial, and which it is reasonably practicable for the CMA to settle before the trial is concluded. The extended period will apply to the remedies which are the subject of the trial, and those which it is not reasonably practicable for the CMA to make a final decision about before the trial concludes.
- 701 Paragraphs 3(3) and 3(4) make consequential amendments to section 138A of the Enterprise Act 2002 to reflect that the existing window for action to be taken under section 138(2) Enterprise Act 2002 continues to apply in all other cases except those indicated at section 138A(A1).
- 702 Paragraph 4 of the Schedule inserts new sections 161B, 161C, 161D and 161E which provide powers for the CMA (and Secretary of State, in public interest cases) to undertake trials of different packages of qualifying remedies before reaching a decision as to the final measures to be accepted or imposed under section 159 or section 161 Enterprise Act 2002.

New section 161B – Implementation trials: purpose and interpretation

- 703 New section 161B Enterprise Act 2002 introduces new sections 161C to 161E and makes interpretative provision for the purpose of those sections.
- 704 New section 161B(2) defines “relevant authority” as the CMA or the Secretary of State. The CMA has responsibility for making decisions regarding remedies in relation to cases which have not involved a full or restricted reference. In the case of the latter, decision making powers regarding remedies lie with the Secretary of State.
- 705 New section 161B(3) makes interpretative provision which applies in relation to Part 4. It further includes a power for the Secretary of State to specify in regulations matters in relation to which remedial action will be “qualifying remedial action” and so in scope of the power to conduct an implementation trial. This power is subject to the draft affirmative procedure, see section 145 and paragraph 3(8) in Schedule 14 to the Act.
- 706 New section 161B(4) provides that the last day on which an implementation trial measure may have effect is the earlier of either the day specified in the final implementation trial notice as the last day on which any undertaking or order made under the new powers is to have effect, or the day on which a decision is made regarding the final remedy package under the relevant power concerned. There is no limit on how long an implementation trial may last, as each trial will need to be designed according to the needs of the particular market. However, the CMA (or Secretary of State, as the case may be) will be required to set out in the final implementation trial notice how long the specific trial measures are to last for, and will be required to make a decision regarding the final remedy package within that period.
- 707 New section 161B(5) provides that where the CMA makes a decision under section 138A(3) to extend the period within which it must make a decision regarding the final remedy package, as a result of a person failing to comply with a requirement of an information notice under section 174, where such failure prevents the CMA properly discharging its duty under section 138(2), then the last day on which an implementation trial measure is to have effect is the last day of that period as so extended. This ensures that in the event the CMA has not been provided with information it needs to evaluate the effectiveness of remedies to enable it to make a decision regarding the final remedy package, it will not be forced to make a decision without this as a result of the time restriction that would otherwise apply.
- 708 New section 161C – Power to conduct implementation trials.
- 709 New section 161C(1) gives the CMA the power to begin an implementation trial where it is under a duty to take remedial action in accordance with section 138(2), (which may be either because it has identified an adverse effect on competition in a report prepared and published under section 136 within the required time period following the making of a market investigation reference, or because it is required to take action under the new section 162A(5)), and it has not taken, but is minded to take qualifying remedial action, that is action which relates to the provision of information to consumers, whether directly or through an intermediary, or any other matter which may be specified in regulations made by the Secretary of State. Consumer is defined in section 183 Enterprise Act 2002 for the purposes of Part 4.
- 710 New section 161C(2) gives the Secretary of State the power to begin an implementation trial where (i) the Secretary of State has the power to take action under section 159 or section 161 by virtue of section 147(2) or section 147A(2), (ii) and they have not taken, but are minded to take qualifying remedial action.
- 711 New section 161C(3) provides that the powers of both the CMA and Secretary of State to undertake implementation trials are subject to the requirements in new section 161D Enterprise Act 2002 concerning the publication of notices.

- 712 New section 161C(4) provides that an implementation trial is begun by the CMA, or the Secretary of State, as the case may be, by the acceptance of an undertaking or making of an order under section 161C for the purposes of assessing, during the implementation trial period, the likely effectiveness of the qualifying remedial action.
- 713 New sections 161C(5) and (6) make provision so that where the CMA or Secretary of State begin an implementation trial, they also have a power to accept undertakings or make orders which they consider would be likely to contribute to, or otherwise be of use for remedying, mitigating or preventing an adverse effect on competition, or detrimental effect on customers resulting from it, or which may be expected to result from it, identified in the report concerned, during the implementation trial period. This allows the relevant authority flexibility to design implementation trials according to the needs of the market and to impose a provisional remedy in relation to one section of the market, while other remedies are trialled with other cohorts. It further means that where adverse effects are linked such that it is not reasonably practicable to determine a final remedy package while the implementation trial is ongoing, a provisional remedy may be put in place in relation to a related adverse effect on competition pending the outcome of the trial.

New section 161D – Implementation trials: notices

- 714 New section 161D of the Enterprise Act 2002 makes provision regarding the procedural steps which the relevant authority is required to follow before it may begin an implementation trial.
- 715 New section 161D(1) requires that the relevant authority must publish both a provisional implementation trial notice, and a final implementation trial notice.
- 716 New section 161D(2) specifies the matters that must be included in the provisional implementation trial notice. The relevant authority must set out details of each implementation measure, that is undertaking and order, it is minded to accept or impose, and the relevant adverse effect each is intended to address must be specified. The relevant authority must state any other facts that they consider justify the imposition of the measure, and set out how it intends to assess the effects of the measure, and the last day on which it intends for the measure to have effect. It must further invite the making of representations by the persons on which it is minded to impose measures, and specify how, and by when, such representations must be made. New subsection (3) specifies that at least 15 days after the date on which the provisional implementation trial notice is published must be allowed for the making of representations.
- 717 New subsection 161D(4) makes provision requiring the relevant authority to take into account any representations received in response to the provisional implementation trial notice, and where they consider it appropriate to begin an implementation trial, to publish a final implementation trial notice.
- 718 New section 161D(5) specifies the matters which must be set out in the final implementation trial notice. This must include the implementation trial measures the relevant authority intends to impose, and in relation to each such measure, how they intend to assess the effect of the measure, and the last day on which the measure is to have effect. Since trials are to be undertaken in circumstances where it is not clear what the most effective approach to the remedy is, there is no statutory time limit set in relation to the trial period itself. To ensure that a trial cannot continue indefinitely, the final implementation trial notice must specify the last day on which each implementation trial measure is to have effect. This specified day acts as a long stop on the implementation trial, and is the date by which the final action under section 138(2) by the CMA must be taken. The period specified will therefore take account of both the time needed to allow the remedy to take effect, its effectiveness to be assessed, and to allow any consultation to take place about the final measure to be imposed taking into account the conclusions of the trial.

New section 161E – Implementation trials: supplementary

- 719 New section 161E of the Enterprise Act 2002 makes provision regarding the applicability of other provisions in Part 4 to the new powers to undertake implementation trials, and other procedural provisions.
- 720 New section 161E(1) requires the CMA, before accepting an undertaking for a purpose permitted by new subsection 161C, to provide the person with information about the possible consequences of failing to comply with it. Any person to whom an undertaking accepted under section 161B relates has a duty to comply with it, which is owed to any person who may be affected by a contravention of it and which is actionable under section 167(4) of the Enterprise Act 2002. Further, the new subsection 167A inserted by Schedule 10 makes provision for a relevant authority to impose a civil penalty for failure to comply with undertakings accepted under Part 4 of the Enterprise Act 2002.
- 721 New section 161E(2) requires the CMA to begin an implementation trial either within the 6 month window (extendable by 4 months) under section 138A of the Enterprise Act 2002, where the trial immediately follows a market investigation, or within 6 months of the decision to vary a remedy following a decision that action should be taken under section 162A(5) as a remedy has been ineffective.
- 722 New section 161E(3) applies the provisions at section 138(3), (5), and (6) to decisions regarding remedies for implementation trials as they apply to decisions concerning action to be taken under section 138(2). That is, decisions concerning implementation trial measures must be consistent with the decisions included in the relevant report published under section 136, unless there has been a material change in circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently. The CMA may have regard to the effect of any action on any relevant customer benefits of the feature or features of the market or markets concerned. The CMA may not take action to remedy, mitigate or prevent any detrimental effect on customers which is anticipated to arise from the adverse effect on competition if that detrimental effect has yet to arise, unless the adverse effect on competition is being remedied, mitigated or prevented. There is no requirement for the CMA to have regard to the need to ensure that remedies are as comprehensive as is reasonably practicable, given the nature of an implementation trial.
- 723 New section 161E(4) applies the provisions in section 147(3)(b), (4), (5) and (6) of the Enterprise Act 2002 to decisions made regarding implementation trials by the Secretary of State in a restricted public interest case as they would apply to final remedies imposed in those cases. These are the requirement for the Secretary of State to have regard to the CMA's report, the bar on the Secretary of State challenging the CMA's decision as to whether there is an adverse effect on competition, the power to have regard to the effect of any action on any relevant customer benefits of the feature/s concerned and the restriction on the Secretary of State taking action in relation to potential detrimental effect on customers unless the underlying adverse effect on competition is being remedied.
- 724 New section 161E(5) applies the provisions in section 147A(3) and (4)(b) of the Enterprise Act 2002 to decisions made regarding implementation trials by the Secretary of State in a full public interest reference case as they would apply to a final remedy in those cases. These are the requirement for the Secretary of State to have regard to the CMA's report and the power to have regard, in particular, to any detrimental effect on customers so far as resulting from effects adverse to the public interest concerned.
- 725 New sections 161E(6) and (7) apply the procedural obligations to undertakings accepted and orders made under section 161C for the purposes of an implementation trial as they apply to the making of any final order under section 161 of the Enterprise Act 2002 or acceptance of an undertaking under section 159 of the Enterprise Act 2002.

- 726 Paragraph 5 of Schedule 9 inserts new Section 162B of the Enterprise Act 2002, which provides a power for the CMA or the Secretary of State to vary implementation trial remedies. By new subsection (1), the section applies where the CMA or Secretary of State has imposed implementation trial measures in accordance with section 161C.
- 727 New section 162B(2) requires the CMA to keep under review the effectiveness of any measure which has been imposed.
- 728 New section 162B(3) requires the CMA, from time to time, to consider whether a measure has been, or is being, complied with, and whether any undertaking accepted or order imposed, is no longer appropriate and needs to be varied or revoked, or in the case of undertakings, one or more parties could be released from it, or it should be superseded by a new undertaking.
- 729 New section 162B(4) requires the CMA, within the implementation trial period, to provide the Secretary of State with such advice as it considers appropriate in relation to the variation of any measure accepted or imposed by the Secretary of State under section 161C.
- 730 New section 162B(5) makes provision for the CMA and Secretary of State to take such action as they consider appropriate in relation to the variation or release of undertakings or orders, or replacement by new undertakings or orders during the implementation trial period.
- 731 New section 162B(6) prevents the CMA or Secretary of State from varying an implementation trial measure in such a manner that it would extend the implementation trial period and requires any varied measure to remain in compliance with section 161C.
- 732 New sections 162B(8), (9) and (10) apply the provisions at sections 138(3), (5) and (6) to variations of implementation trial measures by the CMA, and the provisions at sections 147(3)(b), (5) and (6) and sections 147A(3) to variations of implementation trials measures by the Secretary of State, as they apply to measures imposed at the outset of an implementation trial.
- 733 Paragraph 6 of Schedule 9 makes amendments to section 165 of the Enterprise Act 2002 to apply the procedural requirements set out in Schedule 10 (other than the provision in paragraph 9 of that Schedule, which allow the relevant authority to dispense with the requirements where there are special reasons for doing so) to any decision to accept an undertaking or make an order for the purpose of an implementation trial under section 161C, as they apply in relation to undertakings accepted under section 159 and orders made under sections 160 and 161 of the Enterprise Act 2002. Schedule 10 sets out specific consultation and publication requirements.
- 734 Paragraph 7 of Schedule 9 makes amendments to section 167 of the Enterprise Act 2002 so that enforcement action can be taken in relation to undertakings accepted and orders imposed for the purpose of an implementation trial, as can be taken in relation to other types of order and undertaking under Part 4 Enterprise Act 2002.
- 735 Paragraph 8 of Schedule 9 makes amendments to new section 167A of the Enterprise Act 2002 (inserted by paragraph 16 of Schedule 11 to this Act - Civil penalties in connection with breaches of remedies), so that penalties can be imposed in relation to undertakings accepted and orders imposed for the purpose of an implementation trial, as will be the case in relation to other types of order and undertaking under Part 4.
- 736 Paragraph 9 of Schedule 9 makes amendments to new section 167B of the Enterprise Act 2002 (inserted by paragraph 16 of Schedule 11 of this Act - Civil penalties in connection with breaches of remedies), so that the penalty amount payable by reference to a daily rate ceases to accumulate at the beginning of the day on which the undertakings accepted and orders imposed for the purpose of an implementation trial are complied with, as will be the case in relation to other types of order and undertaking under Part 4.

- 737 Paragraph 10 of Schedule 9 makes amendment to section 169 of the Enterprise Act 2002 so that it requires a relevant authority so far as practicable, to consult where it proposes to make a relevant decision, if it considers such decisions are likely to have a substantial impact on the interests of any person. Section 169(6) sets out a list of “relevant decisions”. Paragraph 10 amends the list so this includes decisions to impose implementation trial measures, and decisions to vary or replace existing remedies.
- 738 Paragraph 11 of Schedule 9 amends section 172 of the Enterprise Act 2002 which sets out specific decisions which the CMA is required to publish. Subsection 172(2) is amended to include a decision under section 138A(A1)(b) that the CMA considers it is not reasonably practicable to separate the element of the remedy package undergoing an implementation trial from an element of the remedy package that is not undergoing an implementation trial, but might be influenced by the results of that implementation trial and so the time for complying with the section 138(2) duty is extended to the end of the implementation trial.
- 739 Subsection (2) of section 138 gives the Secretary of State a delegated power, by regulations, to amend (a) specified sectoral legislation, and (b) section 168 of the Enterprise Act 2002 in connection with the provision made by Schedule 8 to this Act, that is the ability to undertake trials of different packages of market investigation remedies.
- 740 Where a market investigation takes place in a regulated sector, to ensure there is no conflict between the regime in Part 4 of the Enterprise Act 2002 and for instance, regulatory licensing schemes, the existing legislative framework makes provision so that the CMA, or Secretary of State (as the case may be), are given powers to modify regulatory conditions directly, or to request that relevant regulatory authority does so. These powers sit within the sectoral enactments.
- 741 Where the CMA and Secretary of State have powers to take action directly, section 168 Enterprise Act 2002 makes provision so that, when taking such action, they are required to have regard to the functions of the regulatory authority which would ordinarily be responsible for such actions.
- 742 Without amendment of the sectoral enactments, the CMA or Secretary of State may be unable to take action to trial different regulatory conditions when undertaking implementation trials. Should the sectoral enactments be amended to give this power to the CMA and Secretary of State, section 168 Enterprise Act 2002 would also require amendment to ensure that they were required to take relevant regulatory functions into account appropriately. Subsection (2) provides the power for the Secretary of State, by regulation, to make these amendments.
- 743 Subsection (3) provides examples of the types of provision which the power may be used to make in the specified sectoral enactments.
- 744 Subsection (4) limits the power in subsection (2) so that where it is used to amend a sectoral enactment listed in section 168 of the Enterprise Act 2002, it may only make provision in connection with a relevant action mentioned in section 168(3) Enterprise Act 2002. This means that, in relation to those enactments, the power can only be exercised to allow the CMA or Secretary of State to take the same types of action during an implementation trial as they can already take when settling a final remedy package following a market investigation.
- 745 Subsection (5) lists the relevant sector legislation that may be amended using the power at subsection (2).
- 746 Subsection (6) imposes a requirement that the relevant regulators must be consulted before the Secretary of State makes regulations to amend the sectoral legislation. If section 168 Enterprise Act 2002 is amended, such sectoral authorities as the Secretary of State considers are likely to have an interest in the amendment must be consulted.

- 747 Subsection (7) lists the relevant sectoral authorities for the purposes of the consultation requirements.
- 748 Subsection (8) provides a power for the Secretary of State, by regulations, to add or remove an enactment in scope of the power at subsection (2) and to amend subsection (7) so as to add, amend or vary an entry.
- 749 Subsection (9) is self-explanatory.

Section 139: Duty of CMA to monitor undertakings and orders

- 750 This section makes provision regarding the review of remedies by the CMA and for new powers for the CMA or the Secretary of State (as the case may be) to vary remedies accepted or imposed following a market investigation which are subsequently found to have been ineffective.
- 751 Subsection (2) amends section 161(5) of the Enterprise Act 2002 to broaden the Secretary of State's power to vary or revoke an order. Previously the Secretary of State had the power to vary or revoke an order only where the CMA advised that such variation or revocation was appropriate by reason of a change of circumstances. Section 161(5) is amended so that the Secretary of State has the power to vary or revoke an order following the receipt of advice from the CMA under either 162(3) (in relation to a change in circumstances) or section 162A(8).
- 752 Subsection (3) amends section 162 of the Enterprise Act 2002 to repeal subsections (5) to (7). The heading before the section is also amended to reflect that the duty under the section is thereby limited to require the CMA to monitor the carrying out of remedies accepted or imposed at the end of a market investigation, as opposed to the effectiveness of those remedies.
- 753 Subsection (4) inserts new section 162A of the Enterprise Act 2002 which imposes a separate duty on the CMA to monitor the effectiveness of undertakings and orders accepted or imposed under Part 4 of the Enterprise Act 2002 and makes provision for powers to amend remedies which are found to have been ineffective.
- 754 New sections 162A(1) to (3) re-enact previous section 162, subsections (5) to (7) and require the CMA to keep the effectiveness of remedies under review and report its findings to the Secretary of State when requested to do so, and otherwise from time to time. A copy of that report must be given to the Secretary of State and published.
- 755 The new sections 162A(4) to (6) provide a power for the CMA to vary undertakings accepted or orders imposed by it which are subsequently identified to be ineffective for the purpose of remedying, mitigating or preventing the adverse effect on competition, or any actual or potential detrimental effect on customers resulting from it which was identified in a market investigation.
- 756 New section 162A(4) provides that the new power arises in relation to action taken by the CMA under section 138(2) Enterprise Act 2002, (that is undertakings accepted under section 159 or orders imposed under section 161), in relation to an adverse effect on competition identified in a report published by the CMA under section 136, subsection (1) within the preceding 10 years, where the CMA's review under subsection 162A, paragraph (1) has concluded that the undertaking or order has been ineffective for the purpose of remedying, mitigating or preventing the adverse effect on competition, or detrimental effect on customers resulting from it. The power is not available where the CMA took action under section 138, subsection (2) less than 2 years ago, or took action under section 162A(5), less than 2 years ago. This provides a "cooling-off" period after undertakings are accepted or orders imposed

(whether immediately following a market investigation reference, or after action taken under the new section 162A(5)), and a “long stop” of 10 years on the exercise of the power.

- 757 New section 162A(5) provides that where the power arises, the CMA must take such action as it considers appropriate in relation to the variation or release of undertakings or orders, or replacement by new undertakings or orders.
- 758 New section 162A(6) provides that where the CMA decides to take action under subsection (5), it must do so within 6 months of the date of publishing its decision to do so.
- 759 New sections 162A(7) and (8) set out an obligation for the CMA to provide advice to the Secretary of State in relation to remedies accepted or imposed by the Secretary of State under either section 147 in relation to a restricted public interest reference, or section 147A in relation to a full public interest reference which it concludes have been ineffective for the purposes of remedying, mitigating or preventing the adverse effects they were intended to address.
- 760 New section 162A(7) provides that the new obligation arises in relation to action taken by the Secretary of State under section 147(2) or section 147A(2) of the Enterprise Act 2002, (that is undertakings accepted under section 159 or orders imposed under section 161), in relation to an adverse effect on competition, or effect adverse to the public interest identified in a report prepared and published by the CMA and laid before each House of Parliament by the Secretary of State within the preceding 10 years, where the CMA’s review under subsection 162A(1) has concluded that the undertaking or order has been ineffective for the purpose of remedying, mitigating or preventing the adverse effect it was intended to address. The obligation does not arise where the Secretary of State took action under section 147(2) or section 147A(2) no less than 2 years prior. As under subsections (4) and (5), this provides a “cooling-off” period of 2 years after undertakings are accepted or orders imposed (whether immediately following a reference, or after action taken after advice provided under section 162A(8)), and a “long stop” of 10 years on the obligation to provide advice, and therefore the exercise of the expanded power of the Secretary of State to make variations following the receipt of such advice.
- 761 Subsection (6) of section 138 amends section 169 (certain duties of relevant authorities to consult: Part 4) of the Enterprise Act 2002. Section 169 requires a relevant authority so far as practicable, to consult where it proposes to make a relevant decision if it considers such decisions are likely to have a substantial impact on the interests of any person. Section 169(6) sets out a list of “relevant decisions”. Subsection (6) amends the list so this includes decisions by the CMA to take action under section 162A(5).
- 762 Subsection (7) amends section 172 (further publicity requirements) of the Enterprise Act 2002 to include a decision made to take action under the new section 162A(5) power in the list of decisions which the CMA is required to publish. It further inserts a new section 172(11) into the Enterprise Act 2002 which requires the Secretary of State, where they have decided to take action to vary or revoke an order or undertaking following the receipt of advice from the CMA under either section 162(3) or section 162A(8), to lay details of the decision and reasons for it, and the CMA’s advice, before each House of Parliament, after the relevant variation action has been taken.
- 763 Subsection (8) amends section 177 (excisions from reports: Part 4) of the Enterprise Act 2002 to make provision so that the Secretary of State may exclude a matter from the CMA’s advice before laying it before Parliament in accordance with the new section 172(11) obligation, where they consider that inclusion would be inappropriate. Depending on the nature of the public interest consideration, it may be that there is information within the advice that it would not be appropriate for this to be disclosed in a document which will be made public.

Section 140: Taking action in relation to regulated markets

- 764 Section 140 makes amendments to section 168 of the Enterprise Act 2002, to tidy up the section and correct references to enactments which have become out of date.

Chapter 4: Cartels

Section 141: Production of information authorised by warrant

- 765 Section 141 amends section 194 of the Enterprise Act 2002 which makes provision regarding the grant of warrants, and the powers of the CMA when executing such warrants, to enter premises for the purposes of an investigation concerning the cartel offence. That offence is set out at section 188 of the Enterprise Act 2002. In England and Wales, and Northern Ireland, proceedings for the offence may only be brought by the Director of the Serious Fraud Office, or by, or with the consent of, the CMA.
- 766 Section 194 of the Enterprise Act 2002 enables a named officer of the CMA (who may be accompanied by other CMA officers authorised by the CMA) to require the production of information held electronically and accessible from a premises during an inspection under a warrant. These investigative powers apply to the CMA only; where the Serious Fraud Office is investigating a suspected commission of the cartel offence it uses its powers under the Criminal Justice Act 1987.
- 767 Subsection (2) amends section 194(1) of the Enterprise Act 2002 to expand the powers of, in England and Wales or Northern Ireland, the High Court or the CAT, and in Scotland, the sheriff, to grant a warrant to the CMA on the basis that there are reasonable grounds for suspecting that there are relevant documents accessible from any premises, where the other criteria set out in that section are met.
- 768 Subsection (3) amends the powers set out at section 194(2) of the Enterprise Act 2002 which a warrant authorises the CMA officers to exercise. Section 194(2)(d) is amended to broaden the power to require the production of information stored electronically and accessible from the premises. This power will now apply to any information stored electronically and accessible from the premises, not only that which the named officer considers relates to a matter relevant to the investigation.
- 769 Subsection (3) further inserts new paragraphs (e), (f) and (g) into section 194(2) of the Enterprise Act 2002. Paragraph (e) enables the CMA officers to operate equipment on the premises for the purpose of producing information stored in electronic form and accessible from the premises in a form in which it is visible and legible or in a form from which it can readily be produced in a visible and legible form. For example, this power could be used to operate equipment so that electronic information can be transferred securely to CMA devices or where an undertaking or its employees cannot or will not produce the required information in such a form. Paragraph (f) enables the CMA officers to require assistance from any person on the premises to access information held electronically and accessible from the premises (such as the provision of passwords or encryption keys). Paragraph (g) empowers the CMA to take copies of or seize anything produced which the named CMA officer considers relates to any matter relevant to the investigation.
- 770 Subsection (4) makes a consequential amendment to section 196 of the Enterprise Act 2002 which deals with privileged information etc. Section 196(1) of the Enterprise Act 2002 provides that a person may not, under the powers at section 193 or 194, be required under the powers to produce or disclose a privileged communication, except that a lawyer may be required to provide the name and address of his client. Section 196(2) provides that a person may not be required under sections 193 or 194 to disclose any information or produce any

document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business, unless certain exceptions apply. Subsection (4) inserts a new section 196(2A) which sets out that nothing in section 194 authorises an officer to produce, seize, makes copies of or take extracts from any communication which a person could not be required to produce or disclose, as a result of the protection given by section 196(1) or (2).

Chapter 5: Miscellaneous

Section 142: Attendance of witnesses etc.

- 771 Section 142 amends section 26A of the Competition Act 1998, and sections 109 and 174 of the Enterprise Act 2002. Section 26A of the Competition Act 1998 sets out the power of the CMA (and so where relevant the sector regulators exercising functions on a concurrent basis) to require persons to answer questions with respect to any matter relevant to an investigation under section 25 of that Act into a suspected infringement of either the Chapter I or Chapter II prohibitions. Section 109 of the Enterprise Act 2002 makes provision regarding the CMA's powers to require the attendance of witnesses and production of documents etc. for the purposes of its functions under Part 3 of that Act (mergers). Section 174 of the Enterprise Act 2002 makes provision regarding the powers of the CMA (and so the sector regulators exercising functions on a concurrent basis) to require the attendance of witnesses and production of documents etc. for the purposes of its functions under Part 4 of that Act (market studies and market investigations).
- 772 Subsection (2) amends section 26A(1) of the Competition Act 1998 to broaden the power to require persons to attend and answer questions, by enabling the CMA, by notice, to require any individual to attend an interview at a time and place specified, and answer questions for the purpose of an investigation, rather than only those who have a connection to a relevant undertaking. A person has a connection with an undertaking if they are, or have been, concerned with the management or control of the undertaking, employed by or otherwise working for the undertaking. A relevant undertaking means an undertaking whose activities are being investigated under section 25 of the Competition Act 1998. Subsection (2) further amends section 26(1)(a) to specify that a person may be required to answer questions remotely.
- 773 Subsection (3) amends section 26A(2) of the Competition Act 1998 so that a copy of the notice which must be given to an individual who is required to attend and answer questions must also be given to any relevant undertaking that the individual in question has a current connection with.
- 774 Subsection (5) amends section 109(1) of the Enterprise Act 2002 to specify that a person may be required to answer questions remotely.
- 775 Subsection (6) amends section 174(3) of the Enterprise Act 2002 to specify that a person may be required to answer questions remotely.

Section 143: Civil penalties etc in connection with competition matters

- 776 This section introduces Schedule 10, 11 and 12.
- 777 Subsection (1) introduces Schedule 10 which amends the powers of the CMA to issue civil penalties and introduces new powers for the CMA to issue civil penalties where previously only criminal offences existed, for failure to comply with investigative measures and information requirements under Part 1 of the Competition Act 1998 (competition) and Parts 3 (mergers) and 4 (market studies and market investigations) of the Enterprise Act 2002.

- 778 Subsection (2) introduces Schedule 11 which provides for new powers for the CMA to issue civil penalties for breaches of interim measures, commitments and directions under Part 1 of the Competition Act 1998 (competition) and interim measures, undertakings in lieu, final undertakings and orders under Parts 3 (mergers) and 4 (market studies and market investigations) of the Enterprise Act 2002. Collectively, these measures are known as “remedies”.
- 779 Subsection (3) introduces Schedule 12 which provides for consequential amendments related to the legislative framework which provides for the exercise of some functions of the CMA concurrently by sector regulators. The amendments provide that some of the new functions, in particular those which relate to the publication of statements of policy, are not to be exercisable by the sector regulators.

Schedule 10: Civil Penalties etc in connection with competition investigations

- 780 Schedule 10 amends the powers of the CMA to issue civil penalties and introduces new powers for the CMA to issue civil penalties where previously only criminal offences existed, for failure to comply with investigative measures and information requirements under Part 1 of the Competition Act 1998 (competition) and Parts 3 (mergers) and 4 (market studies and market investigations) of the Enterprise Act 2002.
- 781 These powers also apply to concurrent regulators (under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002), and functions of the Secretary of State and Ofcom relating to public interest cases under the Enterprise Act 2002. In the following paragraphs references to the CMA should be read to include “and others where relevant” unless indicated otherwise.
- 782 Part 1 of Schedule 10 makes amendments to Part 1 of the Competition Act 1998.
- 783 Paragraphs 2, 3, 4, 5 and 6 of Schedule 10 amend sections 26, 26A, 27, 29 and 40ZD of the Competition Act 1998 respectively to insert provision which requires that notices issued under those sections (or a warrant, in the case of section 29) must include the possible consequence of failing to comply with the relevant information gathering power, rather than only information regarding the offences at sections 42 to 44 of the Competition Act 1998. This will ensure that those who are required to produce or provide information are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse at the time the obligation is imposed or arises.
- 784 Paragraph 8 of Schedule 10 inserts a new section 40ZE into the Competition Act 1998.
- 785 New section 40ZE, subsection (1), makes provision to empower the CMA to impose a penalty on a person in accordance with section 40A where the CMA considers that they have, without reasonable excuse:
- 786 failed to comply with a requirement imposed on them under any of sections 26 (power to require documents and information), 26A (power to ask questions), 27 (power to enter business premises without a warrant), 28 (power to enter business premises under a warrant), 28A (power to enter domestic premises under a warrant) or 40ZD (information relating to transferred EU anti-trust commitments and transferred EU anti-trust directions);
- a. obstructed an officer acting in the course of their powers under section 27, or under a warrant issued under sections 28 or 28A;
 - b. destroyed or otherwise disposed of, falsified or concealed, or caused or permitted such action, a document which had been required to be produced under any of sections 26, 27, 28 or 28A;

- c. provided information that was false or misleading in a material particular to the CMA in connection with any function of the CMA under Part 1 (whether or not the information had been required to be provided by the CMA);
 - d. provided information that was false or misleading in a material respect to another person, knowing that it was to be used for the purpose of providing information to the CMA in connection with any of its functions under Part 1.
- 787 This introduces civil penalties where only criminal offences existed previously (in relation to the destruction etc. of documents which had been required to be produced, and the provision of false or misleading information to the CMA), and in relation to the new duty to preserve documents (as provided by section 121 of the Act). The “without reasonable excuse” threshold is consistent with the threshold for existing civil penalties (under section 40A of the Competition Act 1998, and sections 110 and 174A of the Enterprise Act 2002).
- 788 New section 40ZE, subsection (2) makes provision which prevents a civil penalty being issued in relation to an act or omission which constitutes an offence under any of sections 42 ((obstruction(the heading for section 42 is substituted by paragraph 11 in Schedule 10, see further below)), 43 (destroying or falsifying documents) or 44 (false or misleading information), if the person has by reason of the act or omission, been found guilty of the offence. Similar provision is inserted in relation to the offences, in order to prevent a person being penalised under both the civil and criminal enforcement regimes.
- 789 New section 40ZE, subsection (3) requires the CMA to have regard to the statement of policy most recently published under section 40B when deciding whether, and if so how, to proceed in relation to the issue of a civil penalty.
- 790 New section 40ZE(5) applies sections 112 to 115 of the Enterprise Act 2002 in relation to penalties imposed under section 40ZE(1) as they apply to penalties issued under section 110(1) or (1A) of that Act, with relevant modifications. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties.
- 791 Paragraph 9 of Schedule 10 amends section 40A of the Competition Act 1998 so that it deals with the amount of a penalty imposed under the new section 40ZE. New section 40A(1A) is inserted so that a penalty imposed is to be of such amount as the CMA considers appropriate. Section 40A(2) is amended so that penalties issued in relation to failures to comply with an information requirement which are continuing may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. New section 40A(2A) makes provision so that a penalty imposed in relation to the obstruction of an officer in the exercise of his powers under section 27, or a warrant issued under sections 28 or 28A, or the destruction etc. of documents which have been required to be produced, or the provision of false or misleading information, must be a fixed amount. This reflects that these breaches are not capable of remedy. Section 40A(3) is amended to set out the maximum penalty on a person who is not an undertaking. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. Section 40A(3A) is inserted to set out the maximum penalties which may be imposed on a person who is an undertaking. In the case of a fixed amount, the penalty must not exceed 1% of the turnover of the undertaking. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily turnover of the undertaking. Section 40A(6) is amended to reflect the amendments to the procedural requirements in section 112 of the Enterprise Act 2002 made by paragraph 18 of Schedule 10, and the provision made by the new section 40ZE. New section 40A(7A) makes provision for

- the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who is not an undertaking. This power is subject to the draft affirmative procedure, see section 145 and paragraph 1(3) of Schedule 14. New sections 40A(10) to (12) enable the Secretary of State to make provision by way of regulations for determining the turnover and daily turnover of an undertaking for the purposes of the section. This power is subject to the negative procedure.
- 792 Paragraph 10 of Schedule 10 amends section 40B of the Competition Act 1998 which requires the CMA to prepare and publish a statement of policy in relation to the use of its powers to impose civil penalties. New section 40B(5A) introduces a requirement for the statement of policy to be approved by the Secretary of State before it can be published.
- 793 Paragraphs 11,12 and 13 of Schedule 10 make amendments to sections 42, 43 and 44 of the Competition Act 1998 respectively. Section 42 sets out the offence in relation to obstructing officers acting under sections 27, 28 or 28A of the Act. Section 43 sets out the offence relating to the destruction etc. of documents which have been required to be produced by the CMA, and section 44 the offence relating to the provision of false or misleading information to the CMA. New subsections are inserted into each of those sections to provide that a person does not commit an offence by reason of any act or omission in relation to which the CMA has proceeded by issuing a civil penalty under the new section 40ZE(1). Paragraph 11 also amends the heading for section 42 to clarify the offence to which the provision relates.
- 794 Part 2 of Schedule 10 makes amendments to Part 3 (mergers) of the Enterprise Act 2002.
- 795 Paragraph 15 amends section 110 of the Enterprise Act 2002 which makes provision regarding the issue of penalties for non-compliance with any requirement of a notice issued under the information gathering power at section 109. Section 110(1) is substituted to empower the CMA to impose a penalty on a person in accordance with section 111 where it considers that the person has, without reasonable excuse:
- a. failed to comply with any requirement of a notice issued under section 109;
 - b. obstructed or delayed a person in the exercise of that person's powers under section 109(6) (which permits the copying of any document produced);
 - c. altered, suppressed or destroyed any document which the person had been required to produce by notice under section 109.
- 796 Section 110(1A) is inserted to allow the appropriate authority (being the CMA, OFCOM, or the Secretary of State, who all have functions under Part 3 in relation to mergers which raise public interest considerations as a result of which they may be provided with information even though they do not have compulsory information gathering powers), to impose a penalty on a person where it considers that they have, without reasonable excuse:
- a. supplied information that was false or misleading in a material respect to the authority in connection with any of its function under Part 3;
 - b. supplied information that was false or misleading in a material respect to another person, knowing that it was to be used for the purpose of providing information to the appropriate authority in connection with any of its functions under Part 3.
- 797 New section 110(1C) is inserted to make provision which prevents a civil penalty being issued in relation to an act or omission which constitutes an offence under section 116A (Intentional destruction etc. of documents, inserted by this Schedule) or section 117 (False or misleading information) if the person has by reason of the act or omission, been found guilty of the offence. Similar provision is inserted in relation to the offences, in order to prevent a person being penalised under both the civil and criminal enforcement regimes.

- 798 Section 110(9) is amended to require the CMA to have regard to the statement of policy most recently published under section 116 when deciding whether, and if so how, to proceed in relation to the issue of a civil penalty either under section 110(1) or (1A), or under section 39(4) or 51(4) (which concern the CMA's powers to extend the time within which a reports under sections 38 and 50, respectively) are to be prepared and published where a relevant person has failed to comply with a requirement in a section 109 notice). Where OFCOM is the appropriate authority, it must have regard to the statement of policy most recently published under section 392 of the Communications Act 2003.
- 799 Paragraph 16 of Schedule 10 amends section 110A of the Enterprise Act 2002. It makes amendments which are consequential to the amendments to section 110(1) and further extends the limitation period which applies to the issue of a penalty in relation to non-compliance with a requirement imposed by a notice issued under section 109, or the obstruction or delay of another person in the exercise of their powers under section 109(6), from 4 weeks to 10 weeks from the relevant day, as determined in accordance with that section.
- 800 Paragraph 17 of Schedule 10 amends section 111 of the Enterprise Act 2002 so that it deals with the amount of a penalty imposed under section 110(1) or (1A). Section 111(1) is amended so that a penalty imposed is to be of such amount as the appropriate authority considers appropriate. Section 111(2) is amended so that penalties issued by the CMA in relation to failures to comply with an information requirement which are continuing may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. Section 111(3) is amended so that a penalty imposed by the CMA in relation to the obstruction of an officer in the exercise of his powers under section 109(6), or the destruction etc. of documents which have been required to be produced, and penalties imposed by an appropriate authority in relation to the provision of false or misleading information, must be a fixed amount. This reflects that these breaches are not capable of remedy. Section 111(4) is amended to set out the maximum penalty on a person who does not own or control an enterprise. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. Section 111(4A) is inserted to set out the maximum penalties which may be imposed on any other person. In the case of a fixed amount, the penalty must not exceed 1% of the global turnover of the enterprises owned or controlled by the person. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily global turnover of the enterprises owned or controlled by the person. Section 111(5) is amended to reflect the amendments to the procedural requirements in section 112 of the Enterprise Act 2002 made by paragraph 18 of this Schedule. New section 111(7A) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who does not own or control an enterprise. This power is subject to the draft affirmative procedure, see section 145 and paragraph 2(6) of Schedule 14. New sections 111(9) to (11) enable the Secretary of State to make provision by way of regulations for determining when an enterprise is to be treated as being controlled by a person, and the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise for the purposes of the section. This power is subject to the negative procedure.
- 801 Paragraph 18 of Schedule 10 makes amendments to section 112 of the Enterprise Act 2002. Section 112 sets out the main procedural requirements which apply in relation to the imposition of penalties. New subsection (A1) is inserted to require the appropriate authority to issue a provisional penalty notice before it may impose a penalty. New subsection (A2) requires that the provisional penalty notice must contain a draft of the final penalty notice the

- appropriate authority is minded to give, invite the making of representations from the recipient and set out how and by when, such representations must be made. New subsection (A3) requires the appropriate authority to have regard to any representations received and prevents the issue of a penalty before the time specified in the provisional notice for the making of representations has expired. Section 112(2) and (3) are amended to reflect that it may be the case that a penalty is issued by the Secretary of State or Ofcom, and not the CMA.
- 802 Paragraph 19 of Schedule 10 makes amendments to section 113 of the Enterprise Act 2002 to reflect that it may be the case that a penalty is issued by the Secretary of State or Ofcom, and not the CMA.
- 803 Paragraph 20 of Schedule 10 amends section 114 (appeals in relation to penalties) of the Enterprise Act 2002. The amendments to section 114(4) and (5) reflect that it may be the case that a penalty is issued by the Secretary of State or Ofcom, and not the CMA. New subsection (5A) requires the CAT, in cases of penalties imposed by the CMA or OFCOM, to have regard to relevant guidance when considering what is appropriate for the purposes of section 114(5). Section 114(5) allows the CAT, on an application under the section, to quash the penalty, substitute a penalty of a different nature or of such lesser amount or amounts as it considers appropriate, or substituting the date or dates by which the penalty must be paid, where this has been the subject of the appeal. The relevant guidance, in relation to a penalty imposed by the CMA, is the statement of policy published under section 116 of the Enterprise Act 2002 at the time the act or omission occurred. The relevant guidance, in relation to a penalty imposed by OFCOM, is the statement of policy published under section 392 of the Communications Act 2003 at the time the act or omission occurred.
- 804 Paragraph 21 of Schedule 10 amends section 115 (Recovery of penalties) of the Enterprise Act 2002 to reflect the insertion of section 110(1A) and that it may be the case that a penalty is issued by the Secretary of State or Ofcom, and not the CMA.
- 805 Paragraph 22 of Schedule 10 amends section 116 (Statement of policy) of the Enterprise Act 2002 to reflect the broadening of the power to issue penalties in section 110. It further amends section 116(4) and inserts new section 116(5) which require the CMA to consult the Secretary of State specifically, in addition to such other persons it considers appropriate, when preparing or revising its statement of policy, and requires that the statement be approved by the Secretary of State prior to publication.
- 806 Paragraph 23 of Schedule 10 inserts new section 116A (Intentional destruction etc. of documents) into the Enterprise Act 2002. This repositions the provisions regarding the offence previously found at section 110(5) to (7) of the Enterprise Act 2002, omitted by paragraph 15. It also applies in relation to the offence previously found at section 174A(3) to (7), omitted by paragraph 27 of Schedule 10. The new section 116A is applied for the purposes of Part 4 of the Enterprise Act 2002 by section 180.
- 807 Paragraph 24 of Schedule 10 amends section 117 (false or misleading information) to reflect the insertion of the definition of “appropriate authority” in section 110(1B) by paragraph 15. It further inserts section 117(2A) which provides that no offence is committed in relation to any act or omission in relation to which a penalty has been issued under section 110(1) or (1A).
- 808 Part 3 of Schedule 10 makes amendments to Part 4 (market studies and market investigations) of the Enterprise Act 2002.
- 809 Paragraph 27 amends section 174A of the Enterprise Act 2002 which makes provision regarding the issue of penalties for non-compliance with any requirement of a notice issued under the information gathering power at section 174. Section 174A(1) is substituted to

empower the CMA to impose a penalty on a person in accordance with section 174D where it considers that the person has, without reasonable excuse:

- a. failed to comply with any requirement of a notice issued under section 174;
- b. obstructed or delayed a person in the exercise of that person's powers under section 174(7) (which permits the copying of any document produced);
- c. intentionally altered, suppressed or destroyed any document which the person had been required to produce by notice under section 174.

810 Section 174A(1A) is inserted to allow the relevant authority (being the CMA, or the Secretary of State, or the appropriate Minister (so far as the Minister is not the Secretary of State acting alone) who all have functions under Part 4 as a result of which they may be provided with information even though they do not have compulsory information gathering powers), to impose a penalty on a person where it considers that they have, without reasonable excuse:

- a. supplied information that was false or misleading in a material respect to the relevant authority in connection with any of its function under Part 4;
- b. supplied information that was false or misleading in a material respect to another person, knowing that it was to be used for the purpose of providing information to the relevant authority in connection with any of its functions under Part 4.

811 New section 174A(1C) is inserted to make provision which prevents a civil penalty being issued in relation to an act or omission which constitutes an offence under section 116A (Intentional destruction etc. of documents, inserted by this Schedule) or section 117 (False or misleading information) if the person has by reason of the act or omission, been found guilty of the offence. Sections 116A and section 117 are applied for the purposes of Part 4 of the Enterprise Act 2002 as they apply for the purposes of Part 3, by section 180 Enterprise Act 2002. Similar provision is inserted in relation to the offences, in order to prevent a person being penalised under both the civil and criminal enforcement regimes.

812 Section 174A(8) is amended to require the CMA to have regard to the statement of policy most recently published under section 174E when deciding whether, and if so how, to proceed in relation to the issue of a civil penalty. New section 174A(10) applies sections 112 to 115 of the Enterprise Act 2002 in relation to penalties imposed under section 174A(1) and (1A) as they apply to penalties issued under section 110(1) or (1A), with relevant modifications. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties.

813 Paragraph 28 of Schedule 10 amends section 174B (restrictions on powers to impose penalties under section 174A) of the Enterprise Act 2002. It makes amendments which are consequential to the amendments to section 174A(1) and further extends the limitation period which applies to the issue of a penalty in relation to non-compliance with a requirement imposed by a notice issued under section 174, or the obstruction or delay of another person in the exercise of their powers under section 174(7), from 4 weeks to 10 weeks from the relevant day, as determined in accordance with that section.

814 Paragraph 29 of Schedule 10 amends section 174D (penalties) of the Enterprise Act 2002 so that it deals with the amount of a penalty imposed under section 174A(1) or (1A). Section 174D(1) is amended so that a penalty imposed is to be of such amount as the relevant authority considers appropriate. Section 174D(2) is amended so that penalties issued by the CMA in relation to failures to comply with an information requirement which are continuing may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of

the two. Section 174D(3) is amended so that a penalty imposed by the CMA in relation to the obstruction of an officer in the exercise of his powers under section 174(7), or the destruction etc. of documents which have been required to be produced, and penalties imposed by an relevant authority in relation to the provision of false or misleading information, must be a fixed amount. This reflects that these breaches are not capable of remedy. Section 174D(4) is amended to set out the maximum penalty on a person who does not own or control an enterprise. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. Section 174D(4A) is inserted to set out the maximum penalties which may be imposed on any other person. In the case of a fixed amount, the penalty must not exceed 1% of the global turnover of the enterprises owned or controlled by the person. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily global turnover of the enterprises owned or controlled by the person. New section 174D(6A) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who does not own or control an enterprise. This power is subject to the draft affirmative procedure, see section 145 and paragraph 3(8) of Schedule 14. Section 174D(8) is amended to reflect the amendments to the procedural requirements in section 112 of the Enterprise Act 2002 made by paragraph 18. New sections 174D(11) to (13) enable the Secretary of State to make provision by way of regulations for determining when an enterprise is to be treated as being controlled by a person, and the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise for the purposes of the section. This power is subject to the negative procedure.

- 815 Paragraph 30 of Schedule 10 amends section 174E (Statement of policy on penalties) of the Enterprise Act 2002 to reflect the broadening of the power to issue penalties in section 174A. It further amends section 174E(4) and inserts new section 174E(5) which require the CMA to consult the Secretary of State specifically, in addition to such other persons it considers appropriate, when preparing or revising its statement of policy, and requires that the statement be approved by the Secretary of State prior to publication.
- 816 Paragraph 31 of Schedule 10 amends section 179 (review of decisions under Part 4) of the Enterprise Act 2002 to reflect the amendments made to section 174A.
- 817 Paragraph 32 of Schedule 10 amends section 180 (offences) of the Enterprise Act 2002 to apply the offence at section 116A Enterprise Act 2002, which is a repositioning of the offence at section 110(5) to (7), for the purposes of Part 4, with relevant modifications.

Schedule 11: Civil penalties etc in connection with breaches of remedies

- 818 Schedule 11 introduces new powers for the CMA to issue civil penalties for breaches of interim measures, commitments and directions under Part 1 of the Competition Act 1998 (competition) and interim measures, undertakings in lieu, final undertakings and orders under Parts 3 (mergers) and 4 (market studies and market investigations) of the Enterprise Act 2002. Collectively, these measures are known as “remedies”.
- 819 The new powers to issue civil penalties also apply to concurrent regulators (under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002) and the Secretary of State insofar as remedies may be accepted or imposed in relation to public interest cases under the Enterprise Act 2002. In the following paragraphs references to the CMA should be read to include “and others where relevant” unless indicated otherwise.
- 820 Part 1 of Schedule 11 amends Part 1 of the Competition Act 1998.

- 821 Paragraph 2 of Schedule 11 amends sections 31A (commitments) of the Competition Act 1998, to insert provision which requires that, before accepting commitments from a person, the CMA must have provided them with information about the possible consequence of non-compliance. This ensures that those who offer commitments are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse before the commitment is accepted and the obligation crystallises.
- 822 Paragraphs 3 and 5 of Schedule 11 amend sections 31E and 34 of the Competition Act 1998 respectively. Sections 31E and 34 deal with the enforcement of commitments and directions, and allow the CMA to make an application to the court for an order to secure compliance. New sections 31E(4) and 34(4) are inserted to require the CMA, before taking such action, to have regard to the statement of policy most recently published by it under the new section 35C at the time of the non-compliance.
- 823 Paragraph 6 of Schedule 11 inserts new sections 35A, 35B and 35C into the Competition Act 1998.
- 824 New section 35A makes provision to empower the CMA to impose a penalty on a person in accordance with section 35B where the CMA considers that, without reasonable excuse:
- a. a person from whom the CMA has accepted commitments under section 31A has failed to adhere to them (and not been released from them);
 - b. a person to whom the CMA has given a direction under section 32 (Directions in relation to agreements), section 33 (Directions in relation to conduct) or section 35 (Interim measures) has failed to comply with the direction.
- 825 New section 35A(2) requires the CMA to have regard to the statement of policy most recently published under section 35C at the time of failure to adhere or comply.
- 826 New section 35B makes provision regarding the amount of the penalty which may be imposed. New section 35B(1) makes provision so that a penalty imposed is to be of such amount as the CMA considers appropriate. New section 35B(2) sets out that a penalty may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. New sections 35B(3) makes provision regarding the maximum amounts of penalties in relation to a person who is not an undertaking. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. New section 35B(4) makes provision regarding the maximum amounts of penalties in relation to a person who is an undertaking. In the case of a fixed amount, the penalty must not exceed 5% of the turnover of the undertaking. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily turnover of the undertaking. Section 35B(5) provides that where a penalty is to be calculated by reference to a daily rate, no account is to be taken of days before a person is served with a provisional penalty notice, or after the day on which the person complies with the remedy. New section 35B(6) applies sections 112 to 115 of the Enterprise Act 2002 with modifications in relation to penalties issued under section 35A(1) as they apply to penalties under section 110(1) or (1A) of the Enterprise Act 2002. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties. New section 35B(7) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who is not an undertaking. This power is subject to the draft affirmative procedure, see section 145 and paragraph 1(3) of Schedule 14. New sections 35B(9) to (11) enable the Secretary of State to make provision by way of regulations for determining the turnover and daily turnover of an undertaking for the purposes of the section. This power is subject to the negative procedure.

- 827 New section 35C of the Competition Act 1998 requires the CMA to prepare and publish a statement of policy in relation to the use of its functions under sections 31E, 34 and 35A. By new section 35C(2) the statement must deal with the considerations relevant to the determination of the nature and amount of any penalty imposed under section 35A. New subsection (4) and (5) require the CMA to consult the Secretary of State and such other persons as it considers appropriate when preparing or revising the statement, and where the statement or revision relates to a matter in which a regulator exercises concurrent jurisdiction, they must also be consulted. New subsection (6) requires that the Secretary of State must approve the statement and any revisions before it is published.
- 828 Part 2 of Schedule 11 makes amendments to Part 3 (mergers) of the Enterprise Act 2002.
- 829 Paragraph 8 of Schedule 11 amends section 34C (functions to be exercised by CMA Groups) of the Enterprise Act 2002 to reflect the omission of section 94A of the Enterprise Act 2002 and insertion of the new section 94AA. This will ensure that where a CMA Group has been constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013, it will have the function of determining whether, and if so how, the new functions under section 94AA should be exercised while it is in existence.
- 830 Paragraph 9 of Schedule 11 amends section 89 (subject matter of undertakings) of the Enterprise Act 2002 to insert provision so that before accepting undertakings from a person, the CMA (or the Secretary of State, as the case may be) must have provided them with information about the possible consequence of non-compliance. This ensures that those who offer undertakings are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse before the undertaking is accepted and the obligation crystallises.
- 831 Paragraph 10 amends section 94 (rights to enforce undertakings and orders) of the Enterprise Act 2002. Section 94(6) enables the CMA to enforce compliance with enforcement orders and enforcement undertakings by way of application to the court for an injunction, or interdict or any other appropriate relief or remedy. Paragraph 10 inserts new section 94(10) which requires the CMA to have regard to the statement of policy most recently published by it under section 94B at the time of the failure to comply with the undertaking or order.
- 832 Paragraph 11 of Schedule 11 replaces existing section 94A of the Enterprise Act 2002 with new sections 94AA and 94AB.
- 833 New section 94AA empowers the appropriate authority (that is the Secretary of State in relation to an enforcement undertaking or enforcement order made by the Secretary of State in a case which has involved a public interest consideration, and in relation to any other enforcement undertaking or enforcement order, the CMA) to impose a penalty on a person in accordance with section 94AB where they consider that the person has, without reasonable excuse, failed to comply with an enforcement undertaking or enforcement order. The CMA must, in deciding whether and if so how to proceed under section 94AA(1), have regard to the most recent statement of policy published by it under section 94B at the time of the failure to comply.
- 834 New section 94AB makes provision regarding the amount of the penalty which may be imposed. New section 94AB(1) makes provision so that a penalty imposed is to be of such amount as the appropriate authority considers appropriate. New section 94AB(2) sets out that a penalty may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. New sections 94AB(3) makes provision regarding the maximum amounts of penalties in relation to a person who does not own or control an enterprise. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. New

section 94AB(4) makes provision regarding the maximum amounts of penalties in relation to any other person. In the case of a fixed amount, the penalty must not exceed 5% of the global turnover of the enterprises owned or controlled by the person on whom it is imposed. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily global turnover of the enterprises owned or controlled by the person. Section 94AB(5) provides that where a penalty is to be calculated by reference to a daily rate, no account is to be taken of days before a person is served with a provisional penalty notice, or after the day on which the person complies with the remedy. New section 94AB(6) applies sections 112 to 115 of the Enterprise Act 2002 with modifications in relation to penalties issued under section 94AA(1) as they apply to penalties under section 110(1) or (1A) of the Enterprise Act 2002. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties. New section 94AB(7) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who does not own or control an enterprise. This power is subject to the draft affirmative procedure, see section 145 and paragraph 2(6) of Schedule 14. New sections 94AB(9) to (11) enable the Secretary of State to make provision by way of regulations for determining when an enterprise is to be treated as being controlled by a person, and the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise for the purposes of the section. This power is subject to the negative procedure.

- 835 Paragraph 12 of Schedule 11 amends section 94B (statement of policy in relation to powers under sections 94 and 94A) of the Enterprise Act 2002 to reflect the removal of section 94A and insertion of section 94AA.
- 836 Part 3 of Schedule 11 makes amendments to Part 4 (market studies and market investigations) of the Enterprise Act 2002.
- 837 Paragraph 15 of Schedule 11 amends section 133A (functions to be exercised by CMA Groups) of the Enterprise Act 2002 to reflect the insertion of the new section 167A. This will ensure that where a CMA Group has been constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013, it will have the function of determining whether, and if so how, the new functions regarding the imposition of penalties under section 167A should be exercised while it is in existence.
- 838 Paragraph 16 of Schedule 11 inserts new section 161A (Acceptance of enforcement undertakings: Part 4) into the Enterprise Act 2002. This makes provision so that before accepting undertakings, the CMA or the Secretary of State, as the case may be, referred to as “the relevant authority”, must have provided the person offering the undertaking with information about the possible consequence of non-compliance. This ensures that those who offer undertakings are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse before the undertaking is accepted and the obligation crystallises.
- 839 Paragraph 17 amends section 167 (rights to enforce undertakings and orders) of the Enterprise Act 2002. Section 167(6) enables the CMA to enforce compliance with enforcement orders and enforcement undertakings to which the section applies by way of application to the court for an injunction, or interdict or any other appropriate relief or remedy. Paragraph 17 inserts new sub-section 167(10) which requires the CMA to have regard to the statement of policy most recently published by it under section 167C at the time of the failure to comply with the undertaking or order.
- 840 Paragraph 18 of Schedule 11 inserts new sections 167A, 167B and 167C into the Enterprise Act 2002.

- 841 New section 167A empowers the relevant authority (that is the Secretary of State in relation to an enforcement undertaking or enforcement order made by the Secretary of State in a case which has involved a public interest consideration, and in relation to any other enforcement undertaking or enforcement order, the CMA) to impose a penalty on a person in accordance with section 167B where they consider that the person has, without reasonable excuse, failed to comply with an enforcement undertaking or enforcement order. The CMA must, in deciding whether and if so how to proceed under section 167A(1), have regard to the most recent statement of policy published by it under section 167C at the time of the failure to comply.
- 842 New section 167B makes provision regarding the amount of the penalty which may be imposed. New section 167B(1) makes provision so that a penalty imposed is to be of such amount as the relevant authority considers appropriate. New section 167B(2) sets out that a penalty may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. New section 167B(3) makes provision regarding the maximum amounts of penalties in relation to a person who does not own or control an enterprise. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. New section 167B(4) makes provision regarding the maximum amounts of penalties in relation to any other person. In the case of a fixed amount, the penalty must not exceed 5% of the global turnover of the enterprises owned or controlled by the person on whom it is imposed. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily global turnover of the enterprises owned or controlled by the person. Section 167B(5) provides that where a penalty is to be calculated by reference to a daily rate, no account is to be taken of days before a person is served with a provisional penalty notice, or after the day on which the person complies with the remedy. New section 167B(6) applies sections 112 to 115 of the Enterprise Act 2002 with modifications in relation to penalties issued under section 167A(1) as they apply to penalties under section 110(1) or (1A) of the Enterprise Act 2002. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties. New section 167B(7) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who does not own or control an enterprise. This power is subject to the draft affirmative procedure, see section 145 and paragraph 3(8) of Schedule 14. New sections 167B(9) to (11) enable the Secretary of State to make provision by way of regulations for determining when an enterprise is to be treated as being controlled by a person, and the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise for the purposes of the section. This power is subject to the negative procedure.
- 843 New section 167C makes provision which requires the CMA to prepare and publish a statement of policy in relation to the exercise of the new functions under sections 167 and 167A. New subsection (2) requires that the statement must include the considerations relevant to the determination of the amount of any penalty imposed under section 167A. New subsection (4) requires the CMA to consult the Secretary of State and such other persons as it considers appropriate when preparing the statement and any revisions, and new subsection (5) provides that the statement and any revision may not be published without the approval of the Secretary of State.

Schedule 12: Civil penalties: amendments relating to sectoral regulators

- 844 Schedule 12 makes amendments to the legislation by virtue of which sector regulators are able to exercise some functions under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002 on a concurrent basis with the CMA.

845 Schedules 10 and 11 to the Act make amendments which introduce new functions which, without provision otherwise, would fall to be exercised by the concurrent regulators. The new functions under section 35C in Part 1 of the Competition Act 1998 and section 167C in Part 4 of the Enterprise Act 2002 which relate to the preparation and publication of statements of policy concerning the exercise of the new powers to impose financial penalties are not to be exercised by the concurrent regulators. The function at existing section 174E in Part 4 of the Enterprise Act 2002 is also not to be exercised by concurrent regulators. The statements of policy to be prepared by the CMA will apply to the exercise of the functions by the concurrent regulators, and the CMA will be required to consult with the concurrent regulators in the preparation of the statements. Schedule 12 makes provision which amends the sector specific legislation so that the functions at section 35C of the Competition Act 1998 and section 167C and 174E of the Enterprise Act 2002 are not exercisable concurrently by the sector regulators.

Section 144: Service and extra-territoriality of notices under CA 1998 and EA 2002

846 This section gives effect to Schedule 13 which makes provision regarding the service and extra-territorial application of notices under Part 1 of the Competition Act 1998 and Parts 3 and 4 of the Enterprise Act 2002.

Schedule 13: Service and extra-territoriality of notices under CA98 and EA 2002

- 847 Schedule 13 makes provision regarding the service of documents and the extraterritorial application of notices under Part 1 of the Competition Act 1998 and Parts 3 and 4 the Enterprise Act 2002.
- 848 Paragraph 1 of Schedule 13 replaces the existing section 126 of the Enterprise Act 2002 with comprehensive provisions on the service of documents which reflect modern business practices. For example, comprehensive provisions on service of documents by email reflect its everyday use as a method of communication by businesses and individuals.
- 849 New section 126(1) provides that the section applies in respect of documents required or authorised to be served under Part 3 on a person by the CMA, OFCOM, or the Secretary of State, each of whom exercise functions under that Part.
- 850 New section 126(2) sets out the methods of service which may be used: either delivering it to the person, leaving at their proper address, sending it by post to that address, or sending by e-mail to the person's email address.
- 851 New sections 126 (3), (4) and (5) make specific provision in relation to the service of documents on a body corporate, a partnership or an unincorporated body or association. In particular, these subsections set out specific classes of person (legal or natural) to whom a notice may be given to so as to effect service on the body corporate, a partnership or an unincorporated body or association.
- 852 New sections 126 (6) and (7) make provision to determine what is to be considered as a person's "proper address" for the purpose of subsection (2).
- 853 New section 126(8) makes provision regarding the email address which may be used for the purposes of subsection (2).
- 854 New section 126 (9) makes provision regarding service which is to be effected outside the United Kingdom.
- 855 New section 126(11) provides that section 126 does not limit any other lawful means of serving a document on a person.

- 856 Paragraph 2 of Schedule 13 inserts a new section 44A into the Competition Act 1998 which applies the new section 126 of the Enterprise Act 2002 to the giving of notices under Chapter 3 of Part 1 of the Competition Act 1998. Chapter 3 of Part 1 sets out the powers of the CMA (and sector regulators where relevant) to investigate and enforce the prohibitions in Part 1 of the Competition Act 1998.
- 857 Paragraphs 3 to 14 make amendments to the legislation by virtue of which sector regulators are able to exercise the specified functions in Part 1 of the Competition Act 1998 on a concurrent basis with the CMA. That legislation each contains a provision which glosses references to the CMA in Part 1 of the Competition Act 1998 so that they are read appropriately as a reference to the sector regulator concerned. Paragraphs 3 to 14 amend the legislation to ensure that the gloss applies to provisions of the Enterprise Act 2002 applied by Part 1 of the Competition Act 1998, as it applies to provisions in the Competition Act 1998 itself. This ensures that references to the CMA in section 126 of the Enterprise Act 2002, as applied by the new section 44A of the Competition Act 1998, are read as a reference to the sector regulator concerned.
- 858 Paragraph 15 of Schedule 13 inserts a new section 44B into the Competition Act 1998.
- 859 New section 44B(1) provides that the new section applies to the exercise of the CMA's power to give a person a notice under section 26 (Investigations: power to require documents and information) and section 40ZD (Information relating to transferred EU anti-trust commitments and transferred EU anti-trust direction).
- 860 New section 44B(2) sets out that the powers may be used, to give the notice to a person outside the United Kingdom (subject to the conditions in new subsections (3) and (4), and to require the production of a specified document or the provision of specified information held outside the United Kingdom.
- 861 New section 44B(3) provides that the power to give a section 26 notice to a person outside the United Kingdom may only be exercised if the person's activities are being investigated as part of an investigation under section 25, or they have a "UK connection". Persons whose activities are being investigated as part of an investigation under section 25 includes parties to an anti-competitive agreement etc. whose activities are being investigated in relation to the Chapter I prohibition, and those whose conduct is being investigated in relation to the Chapter II prohibition. In effect, this allows information to be required to be produced from those persons who are the subject of an enforcement investigation and, also, third parties where there is a sufficient UK connection.
- 862 New section 44B(4) makes provision regarding the CMA's power under section 40ZD of the Competition Act 1998. Section 40ZD enables the CMA to issue a notice under section 40ZD to a person outside of the United Kingdom if that person is bound by transferred EU anti-trust commitments (within the meaning of section 40ZA of the Competition Act 1998) or is subject to a transferred EU anti-trust direction (within the meaning of that same section).
- 863 New section 44B(5) sets out the circumstances in which a person has a UK connection for the purposes of the new section 44B(2)(b). A third party, that is a person other than an enforcement subject, may only be given a section 26 notice outside the United Kingdom if they are a United Kingdom national, an individual habitually resident in the United Kingdom, a body incorporated under the law of the United Kingdom or any part of the United Kingdom, or they carry on business in the United Kingdom.
- 864 New section 44B(6) defines a United Kingdom national for the purposes of sub-section (5)(a).

- 865 New section 44B(7) provides that nothing in the new section 44B of the Competition Act 1998 is to be taken to limit any other power of the CMA to give a notice under section 26 or 40ZD to a person outside the United Kingdom. Section 44B(7) makes provision so that to the extent that the CMA has a broader power, absent this section, to gather information extra-territorially under section 26 of the Competition Act 1998, section 44B does not limit such power.
- 866 Paragraph 16 of Schedule 13 inserts a new section 109B into Part 3 of the Enterprise Act 2002 to make provision for the extra-territorial reach of information notices under section 109.
- 867 New section 109B(1) provides that the section applies to the exercise of the CMA's power to give a person a notice under section 109(2) or (3), that is for the production of specified documents, or the supply of such estimates, forecasts, returns or other information as may be specified or described in the notice.
- 868 New section 109B(2) sets out that the powers may be used to give the notice to a person outside the United Kingdom (subject to the conditions in new subsection (3)), and to require the production of a specified document or the provision of specified information held outside the United Kingdom.
- 869 New section 109(3)(a) provides that a notice may be issued to a person outside of the United Kingdom where that person is or was, part of, or involved with or carrying on an enterprise which is, or has been involved in a transaction in circumstances which have been or may be, the subject of a reference under sections 22, 33, 45 62, 62B or 62C of the Enterprise Act 2002 or the subject of a foreign state intervention notice given to the CMA under section 70A of the Enterprise Act 2002. This allows the CMA to exercise the section 109 information gathering powers extraterritorially in relation to any person involved in a merger which either has been, or may be, the subject of a reference, so allowing it to use the power for the purposes of both reviewing merger transactions, and for the purpose of any subsequent enforcement action following a review. This includes mergers where there has been a public interest intervention or special intervention notice as well as mergers reviewed under the energy network merger regime.
- 870 New section 109B(3)(b) allows the CMA to send notices extraterritorially to third parties to merger investigations if that third party is a person that has a UK connection as defined in the new section 109B (which is in identical terms to the definition of UK connection under the new section 44B of the Competition Act 1998).
- 871 New section 109B(5) provides that nothing in the new section 109B is to be taken to limit any other power of the CMA to give a notice under section 109(2) or (3) to a person outside the United Kingdom. Section 109B(5) makes provision so that to the extent that the CMA has a broader power, absent this section, to gather information extra-territorially under section 109 of the Enterprise Act 2002, section 109B does not limit such power.
- 872 Paragraph 17 of Schedule 13 inserts a new section 174ZA into Part 4 of the Enterprise Act 2002 to make provision for the extra-territorial reach of information notices under section 174.
- 873 New section 174ZA(1) provides that the section applies to the exercise of the CMA's power to issue notices under section 174(4) or (5) of the Enterprise Act 2002, that is for the production of specified documents, or the supply of such estimates, forecasts, returns or other information as may be specified or described in the notice. Subsection (1) is self-explanatory.
- 874 New section 174ZA(2) sets out that the powers may be used to give the notice to a person outside the United Kingdom where they have a UK connection, and to require the production of a specified document or the provision of specified information held outside the United

Kingdom. The requirement for a UK connection when serving a notice outside the United Kingdom is in line with the amendments set out above in the new section 44B of the Competition Act 1998 and section 109B of the Enterprise Act 2002 but reflects the fact that in the context Part 4 of the Enterprise Act 2002, there are no specific enforcement subjects who are suspected of infringing the law or specific enterprises ceasing to be distinct pursuant to a merger.

875 Subsection (3) sets out the circumstances in which a person has a UK connection for the purposes of the new section 174ZA of the Enterprise Act 2002.

876 New section 174ZA(5) provides that nothing in the new section 174ZA is to be taken to limit any other power of the CMA to give a notice under section 174(4) or (5) to a person outside the United Kingdom. Section 174ZA makes provision so that to the extent that the CMA has a broader power, absent this section, to gather information extra-territorially under section 174 EA02, section 174ZA does not limit such power.

Section 145: Orders and regulations under CA 1998 and EA 2002

877 This section introduces Schedule 14 which makes provision about the making of orders and regulations under the Competition Act 1998 and Parts 3 and 4 of the Enterprise 2002.

Schedule 14 Orders and regulations under CA 1998 and EA 2002

878 Schedule 14 amends the Competition Act 1998 and Parts 3 and 4 of the Enterprise Act 2002 to make provision regarding the Parliamentary procedures to apply to the new order and regulation making powers created by the Act and remove references to powers which are repealed as a result of other provision made by the Act.

879 Schedule 14 also amends the Competition Act 1998 and Parts 3 and 4 of the Enterprise Act 2002 to refer expressly to whether an order or regulations are subject to the affirmative or negative procedure in Parliament and to define those procedures. The Schedule does not change the substance of which procedure any order or regulations are subject to but rather inserts clearer and more modern language.

880 Where orders or regulations are subject to “the affirmative procedure”, the orders or regulations may not be made unless a draft of the statutory instrument containing them has been laid before, and approved by a resolution of, each House of Parliament.

881 Where orders or regulations are subject to “the negative procedure”, they are subject to annulment in pursuance of a resolution of either House of Parliament.

882 Paragraph 1 of this Schedule makes the required amendments to the Competition Act 1998.

883 Paragraph 2 of this Schedule makes the required amendments to Part 3 of the Enterprise Act 2002.

884 Paragraph 3 of this Schedule makes the required amendments to Part 4 of the Enterprise Act 2002.

Section 146: Meaning of “working day” in Parts 3 and 4 of EA 2002

885 This section amends Parts 3 and 4 of the Enterprise Act 2002, and the Enterprise Act 2002 (Merger Prenotification) Regulations 2003, so that they are consistent in providing that a bank holiday in any part of the United Kingdom is not a working day. This aligns with the definition of “working day” in section 330 of this Act.

Part 3: Enforcement of consumer protection law

Chapter 1: Overview

886 Part 3 provides for two regimes for the civil enforcement of consumer protection law to protect the collective interests of consumers: a court-based regime (which simplifies and enhances the regime provided by Part 8 of the Enterprise Act 2002) and a direct enforcement regime which is administered by the CMA (the “Part 3 enforcement regimes”). In particular, Part 3 provides for a single category of infringement to which the Part 3 enforcement regimes apply (instead of the two categories of infringements which feature in Part 8 of the Enterprise Act 2002, domestic infringements and Schedule 13 infringements). Subject to the transitional provisions set out in section 215 and Schedule 19, the Part 3 enforcement regimes replaces the regime provided by Part 8 of the Enterprise Act 2002 for conduct which takes place after commencement.

Section 147: Overview

887 This section provides an overview of the structure of this Part.

888 Chapter 2 defines the scope of the Part 3 enforcement regimes (subsection (2)).

889 Chapter 3 sets out the court-based regime and which enforcers can use it (subsection (3)). It provides for enforcers to apply for, and the courts to make, the following types of orders:

- a. Enforcement orders,
- b. Interim enforcement orders,
- c. Online interface orders (only public designated enforcers may apply), or
- d. Interim online interface orders (only public designated enforcers may apply).

890 An enforcer or the court can accept an undertaking from the enforcement subject instead of making an application for, or making, an enforcement order or interim enforcement order.

891 Chapter 3 provides for certain enforcers and the court to attach remedies - enhanced consumer measures - to enforcement orders and undertakings. The enhanced consumer measures need to fall into at least one of three specified categories (referred to as the “redress”, “compliance” and “choice” categories). Measures in the redress category offer compensation or other redress to affected consumers. Compliance measures are intended to increase business compliance with the law and to reduce the likelihood of further breaches. Measures in the choice category help consumers obtain relevant market information to enable them to make better purchasing decisions.

892 It also provides new powers for the courts to impose civil monetary penalties on enforcement subjects who have infringed the consumer protection laws within scope of Part 3.

893 Finally, it provides new powers for the courts to impose civil monetary penalties for non-compliance with an undertaking.

894 Chapter 4 provides a new direct enforcement regime for the CMA in respect of the consumer protection laws listed in Schedule 16 (subsection 4). Chapter 4 provides a new express power for the CMA to investigate suspected infringements. It provides new powers for the CMA to give provisional and final infringement, breach of undertakings and breach of directions enforcement notices. These notices may include compliance directions, impose monetary penalties and, for infringement notices, attach enhanced consumer measures.

- 895 Chapter 4 provides new powers for the CMA to give online interface notices. The CMA may accept an undertaking instead of giving a final infringement notice and where it has not given an online interface notice.
- 896 Chapter 4 provides for the CMA to make an application to the court where a direction included in a final notice has not been complied with.
- 897 Finally, it provides a new power for the CMA to give provisional and final false information notices to any person who provides the CMA with materially false or misleading information in connection with the exercise of the CMA's functions under Chapter 4 or the direct enforcement of non-compliance with CMA information notices (see explanatory note for section 208 and Schedule 17 below in relation to direct enforcement of non-compliance with CMA information notices).

Chapter 2: Relevant infringements

Section 148: Relevant infringements

- 898 The main underlying policy purpose is to define the scope of the Part 3 enforcement regimes. The act or omission must harm the collective interests of consumers (subsection (1), paragraph (a)). There must be harm or a risk of harm to a section of the public who are consumers, and this harm can be inferred from the accumulation of individual instances of harm.
- 899 Subsection (5), paragraph (a) makes it clear that continuation or repetition of an act or omission could harm the collective interests of consumers, since the interests of future customers of the trader can be affected. For example, if a trader has not complied with the requirement to give information relating to the right to cancel an off-premises or distance contract under regulations 10(1) and 13(1) of, and paragraph (l) of Schedule 2 to, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, the court or the CMA could consider that this omission harms the collective interests of consumers, on the basis that repetition of this omission would harm the interests of potential future customers of the trader.
- 900 Subsection (5), paragraph (b) makes it clear that a single act or omission is also capable of harming the collective interests of consumers. For example, a supplier who puts on to the market a single, large consignment of a beverage stated to be a healthy drink for a baby that is wholly unsuitable for this purpose.
- 901 Subsection (2) sets out key definitions of "commercial practice", "trader" and "consumer". The main policy purpose for the use of the concept of "commercial practice" here is to limit the scope of the Part 3 regimes to those acts or omissions which amount to commercial practices, i.e. interactions between traders and consumers. This is because several of the enactments, obligations and rules of law within scope of Part 3 (see note for section 150 below) apply also to solely trader to trader interactions.
- 902 The definition of commercial practice is broad and far reaching. A commercial practice can be derived from a single act or omission, depending on the relevant circumstances, as well as from repeated behaviour and a course of conduct (*R v X Ltd [2013] EWCA Crim 818, at paragraph 22, Warwickshire County Council v Halfords Autocentres Ltd [2018] EWHC 3007 (admin), at paragraph 28*).
- 903 Subsection (2), paragraph (b) makes it clear that the definition includes an act or omission by a trader relating to a third party trader's goods, services or digital content. Subsection (2), paragraph (c) establishes that an act or omission by a trader that enables private individuals (i.e. consumers) to sell products to that trader or to each other are also included in the definition of commercial practice. For example, this would bring the acts or omissions of an

online marketplace that designs their website in such a way that the consumer goods advertised are misleadingly described into scope of the Part 3 enforcement regimes.

- 904 Subsection (3) makes it clear that the definition includes acts or omissions which take place before, during or after promotion or supply (if any). For example, the acts or omissions of a debt collection agency that acquires claims derived from consumer credit agreements with consumers and seeks to recover these debts some considerable time after the original consumer credit agreements were concluded can amount to a commercial practice. An act or omission need not relate to a promotion or supply to or from consumers which actually occurs, in order to amount to a commercial practice. The concept is concerned with systems rather than individual transactions between a consumer and a business (*Warwickshire County Council v Halfords Autocentres Ltd* [2018] EWHC 3007 (admin), at paragraph 29).
- 905 The definition of “consumer” makes it clear that a consumer is an individual, i.e. a natural person. Body corporates, including small and micro companies, are excluded from the definition of consumer. However, businesses may be protected under other legislation governing trader-to-trader transactions, e.g. the Business Protection from Misleading Marketing Regulations 2008 which prohibit advertising that is misleading to traders.
- 906 The court or the CMA, as relevant, must consider whether the individual is acting for purposes wholly or mainly outside of their business to determine if they fit the definition of consumer. It is irrelevant whether the individual is supplying, or receiving, a good, service or digital content. The words “wholly or mainly” make it clear that: the individual is still a consumer when acting for dual purposes (a consumer purpose and a business purpose) as long as the consumer purpose is the main purpose. This means, for example, that a person who buys a kettle for their home, works from home one day a week and uses it on the days when working from home would still be a consumer. An individual who occasionally sells their unwanted and used clothes on eBay is also likely to be a consumer. Conversely, a sole trader who operates from a private dwelling and buys a printer of which 95% of the intended use is for the purposes of their business, is unlikely to be a consumer.
- 907 An individual who supplies goods or services for mainly non-business purposes to a person who receives them for business purposes will still be a consumer. For example, an individual who sells their personal vinyl record collection to a second-hand record shop is likely to be a consumer.
- 908 Further, an individual who acts for the purpose of a future business, which is not yet up and running, is likely to be a consumer. For example, an individual who participates in training to gain skills or a qualification with a view to supply goods or services for business purposes in the future is likely to be a consumer.
- 909 Limb (a) of the definition of “trader” extends to any person who is acting for purposes relating to his business. Subsection (4), paragraph (a) makes it clear that acts or omissions “by” such a person may include acts or omissions done or made by a person acting in their name or on their behalf (for example, their agent, subcontractor or representative), where this liability is imposed by the enactment, obligation or rule of law in question or other rules of law of general application. For example, where a building company subcontracts part of a building contract, the court or the CMA could consider the actions or omissions of the subcontractor carried out on behalf of the building company to be acts done or omissions made by the building company itself.
- 910 Limb (b) of the definition of trader makes it clear that a person (for example, an agent, subcontractor or representative) acting in the name of, or on behalf of, another for purposes relating to the other’s business, may also be held personally liable, where this liability is imposed by the enactment, obligation or rule of law in question or other rules of law of

general application. It is irrelevant whether a person acting in the name of, or on behalf of, another is also acting for their own business or private purposes in relation to the same act or omission (subsection (4), paragraph (b)).

Section 149: The UK connection condition

- 911 This section sets out the jurisdictional test which must be met for a commercial practice to fall within scope of the Part 3 enforcement regimes. It limits the extraterritorial reach of the regimes to acts or omissions done or made by a trader who satisfies at least one of conditions set out in subsection (1). These are not mutually exclusive.
- 912 Subsection (1), paragraph (a) applies where the trader has a place of business in the United Kingdom. This means that traders with a place of business in the United Kingdom are in scope of the Part 3 enforcement regimes regardless of whether they have been incorporated in the United Kingdom or overseas.
- 913 Subsection (1), paragraph (b) applies where the trader carries on business in the United Kingdom. This does not require the trader to have a place of business in the United Kingdom and this condition can be satisfied by management activity taking place abroad (*Akzo Nobel N.V. v Competition Commission & Ors*, [2014] EWCA Civ 482, at paragraphs 30 - 38).
- 914 Subsection (1), paragraph (c) brings in scope commercial practices occurring as part of activities directed to consumers in the United Kingdom by any means.
- 915 To satisfy this condition, the trader's relevant activities must demonstrate an intention of being directed to consumers in the United Kingdom. This is an objective test: while evidence of "actual intention" may assist in resolving the question it is not a necessary ingredient (*see Merck KGaA v Merck Sharp & Dohme Corp & Or's* [2017] EWCA Civ 1834 at paragraph 165, *Argos Limited v Argos Systems Inc.* [2018] EWCA Civ 2211 at paragraph 51 and *Bitar v Banque Libano-Francaise* [2021] EWHC 2787 (QB) at paragraph 26). The question is whether average consumers in the United Kingdom would consider that the activities are directed at them.
- 916 It follows that the fact that the trader's goods, services or digital content are accessible by consumers in the United Kingdom (for example, through a website) is insufficient to establish that the trader's relevant activities are directed to consumers in the United Kingdom (*see Merck KGaA v Merck Sharp & Dohme Corp & Or's* [2017] EWCA Civ 1834 at para 168, *Nifty v Soleymani* [2022] EWHC 773 at para 69).
- 917 Whether the trader's activities are directed to consumers in the United Kingdom by any means is a question of fact requiring evaluation of all the relevant circumstances. These may include (alone or in combination) (*see Merck KGaA v Merck Sharp & Dohme Corp & Or's* [2017] EWCA Civ 1834 at para 170, *Bitar v Banque Libano-Francaise* [2021] EWHC 2787 (QB) at para 28):
- a. The nature of the activity,
 - b. The nature of the goods, services or digital content,
 - c. The relevant contact details – for example, use of a telephone number with an international dialling code,
 - d. The relevant domain name (for a website),
 - e. The language used,
 - f. The currency indicated,
 - g. List or map of areas for delivery or provision of the goods, services or digital content, or
 - h. Any past transactions with consumers in the United Kingdom.

- 918 The UK connection condition may be met, for example:
- a. by an overseas trader who promotes and sells, via its website, services to consumers in the United Kingdom;
 - b. by an overseas platform which promotes, via its website, a third party's services to UK consumers. For example, an overseas platform whose website promotes holiday clubs and add-on trips to consumers in the United Kingdom, whilst a third party resort operator is responsible for the actual sale and provision of these goods and services to the consumer;
 - c. where the consumer is the supplier.
- 919 This section does not require the supply in question to be made by the trader, only that the trader has a place of business in or carries on business in the United Kingdom or that its commercial practice occurs in the carrying on of activities directed to consumers in the United Kingdom. The effect of this section is to enable enforcement using the Part 3 regimes to protect consumers within the United Kingdom no matter where the trader is based, as long as the UK connection condition is met.

Section 150: The specified prohibition condition

- 920 This section limits the application of the Part 3 enforcement regimes to the commercial practices which breach an enactment, obligation or rule of law listed, or to the extent listed, in Schedules 15 or 16 - in these notes, "infringing practices" (subsections (1) and (2)).

Schedule 15: Consumer protection enactment

- 921 The table in Schedule 15 lists the enactments, obligations and rules of law to which the court-based enforcement regime in Chapter 3 of this Part applies. The corresponding entry in the second column of the table sets out which enforcers can use the court-based enforcement regime to enforce that enactment, obligation or rule of law (subsections (3) and (4)).

Schedule 16: Direct enforcement enactments

- 922 The table in Schedule 16 lists the enactments to which the CMA direct enforcement regime in Chapter 4 of this Part applies (subsection (2)).

Chapter 3: Consumer protection orders and undertakings

Enforcers for purposes of Chapter

Section 151: Enforcer

- 923 This section restates and updates section 213 of Part 8 of the Enterprise Act 2002 and sets out which persons can use the court-based enforcement regime set out in this Chapter. The category of "Schedule 13 enforcer" under Part 8 of the Enterprise Act 2002 (section 213, subsection (5A)) is not re-stated as the Government considers it is no longer necessary to maintain a separate category of enforcers whose powers are limited to enforcing consumer protection laws of EU origin. Relevant enforcers are re-categorised by this section as public designated enforcers.
- 924 Two categories of enforcer are defined: public designated enforcers (subsection (1)) and private designated enforcers (subsection (2)).
- 925 The category of public designated enforcers consolidates the two previous categories of public enforcers in Part 8 of the Enterprise Act 2002 – general enforcers (i.e. the CMA, local weights and measures authorities in Great Britain - i.e. Trading Standards departments - or the Department for the Economy in Northern Ireland) and public bodies designated by order of the Secretary of State under section 213, subsection (2) of the Enterprise Act 2002.

- 926 Subsection (3) sets out a delegated power for the Secretary of State to add or remove an enforcer or to amend their entry. Regulations made by the Secretary of State under this section are subject to the draft affirmative procedure (subsection (7)), see section 337, subsection (3)). As per subsection (4) and subsection (5), paragraph (c), the power to add a new enforcer is subject to the limitation that the enforcer has, as one of its purposes, the protection of the collective interests of consumers. This power cannot be used to remove or vary the enforcement powers of the CMA, local weights and measures authorities in Great Britain and the Department for the Economy in Northern Ireland under this Chapter. Any changes to the powers of these enforcers could fundamentally reshape the consumer protection regime in the UK, given their cross-economy remit. Therefore, the Government considers their powers should not be capable of alteration through secondary legislation (subsection (6)).
- 927 Subsection (5) further limits the Secretary of State's power to add a person as a private designated enforcer to where the Secretary of State considers that the person is not a public body and also satisfies the designation criteria in section 152.

Section 152: Designation criteria

- 928 This section sets out the criteria a person must satisfy for the Secretary of State to designate it as a private designated enforcer. Applicant organisations must provide evidence to the Secretary of State that they meet the designation criteria listed in subsection (1). This is likely to include, for example, their legal status and constitution, a list of directors, examples of situations in which the organisation has protected the collective interests of consumers, etc.
- 929 The Government intends that any subsequent failure to meet the criteria will form the basis for the Secretary of State to change or withdraw the designation of a person as a private designated enforcer.
- 930 The criteria listed in this section replicate the criteria listed in Articles 3 and 4 of the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, with some minor amendments for simplification.
- 931 The designation criteria establish certain minimum standards of governance, transparency and competence that a person must meet in order for it to carry out enforcement action under this Chapter (subsections (1) to (3)). The underlying policy intent is to mitigate the risk of private organisations (especially those with trading arms) using the enforcement process for competitive advantage or commercial gain.

Applications for enforcement orders and interim enforcement orders

Section 153: Applications

- 932 This section identifies which categories of person an application for an enforcement order or an interim enforcement order may be made against, and the types of infringements in relation to which an application may be made. This section restates most of section 215 of the Enterprise Act 2002 and updates it as needed.
- 933 An enforcer may apply for an order against the infringer (the person considered to have engaged in, be engaging in or be likely to engage in the infringing practice) or an accessory (subsections (1) and (3)). Where the infringer is a body corporate, an accessory is any person who has a special relationship with the infringing body corporate and who consented or connived in the infringing practice – this and the meaning of “special relationship” is defined in sections 219 and 220. An enforcer may apply for an order against an accessory even if no application is made in respect of the infringer. These notes use the term “enforcement subject” to mean both the infringer and any accessories to the infringing commercial practice.

- 934 Subsection (2) sets out that enforcers may make applications under this section only for breaches of those enactments, obligations or rules of law which they have been authorised to enforce as per Schedule 15.
- 935 Subsection (4) limits the power to apply for the imposition of a monetary penalty for past or ongoing infringing practices to public designated enforcers only (i.e. private designated enforcers may not apply to court for the imposition of penalties). This application can be made as part of the application for an enforcement order.
- 936 Subsection (5) precludes the application for a penalty where the infringer is likely to engage in an infringing practice. A similar qualification is not needed for accessories as section 219(2)(c) has the effect that an accessory cannot be an accessory to future infringing practices.

Section 154: CMA directions to other enforcers

- 937 This section provides a direction-making power for the CMA. This section restates and updates section 216 of the Enterprise Act 2002.
- 938 If it appears to the CMA that an enforcer other than itself intends to apply for an enforcement order or an interim enforcement order in respect of a particular infringement, it may direct which enforcer may make the application, that only the CMA may do so or that an application should not be made at all (subsections (1) and (2)). The underlying policy intent is for the CMA to be able to prevent businesses being faced with multiple applications for interim enforcement or enforcement orders in respect of the same potentially infringing practice. The Government considers that the CMA is able to decide which enforcer is best placed to proceed with the application.
- 939 Subsection (4) limits the CMA's power to direct that an application should not be made to where the particular infringement is being investigated by the CMA under the direct enforcement regime in Chapter 4 or the CMA proposes to conduct such an investigation.
- 940 Where the CMA makes a direction under subsection (2), this does not prevent the CMA or another enforcer from agreeing an undertaking with the enforcement subject or the CMA from taking other steps to prevent the infringing practice or bring the infringing practice to an end (subsection (3)).
- 941 Subsection (5) provides a power for the CMA to vary or withdraw a direction under this section.

Section 155: Consultation

- 942 This section provides that where an enforcer thinks that a relevant infringement has occurred, is occurring or is likely to occur, they must consult the enforcement subject before making an application for an enforcement order or interim enforcement order (subsection (1)). This section restates, consolidates and updates the duty to consult set out in section 214 of the Enterprise Act 2002 and the underlying secondary legislation on making and receipt of an initial consultation request.
- 943 The requirement to consult is suspended if the CMA thinks that an application for an enforcement order or an interim enforcement order should be made without delay (subsection (5)). The enforcer is required to notify the CMA of its intention to apply for an enforcement order or an interim enforcement order under section 169 which enables the CMA to assess whether a prospective application is urgent and should be made without consultation with the enforcement subject.
- 944 Subsection (2) defines the purposes of consultation under this section. In particular, the consultation should alert the enforcement subject to the possibility of a monetary penalty being sought alongside an enforcement order.

- 945 The underlying policy intent is that in most cases prior consultation will provide an opportunity to stop or prevent the relevant infringement without the need for court action. It may be, for example, that the enforcement subject was not aware that their practice constituted a relevant infringement. Following consultation, the enforcer may then decide it is not necessary to make an application. The enforcement subject may decide to offer an undertaking to the enforcer (see section 163).
- 946 Subsections (3) and (4) require the enforcer to give a written consultation request - by notice - to the enforcement subject. Section 332 sets out the process for giving notices under this Part to persons within and outside of the UK.
- 947 Subsections (6) to (9) set out the minimum periods for consultation for enforcement orders and interim enforcement orders and related definitions.

Powers of court on application under section 153

Section 156: Enforcement orders and undertakings

- 948 This section sets out that where the court considers that the respondent to an application for an enforcement order has engaged, is engaging in or is likely to engage in an infringing practice, or is an accessory to an infringing practice, it may either make an enforcement order against, or accept an undertaking from, the infringer or an accessory (for the purpose of these notes, the “enforcement subject”) (subsections (1) and (2)). This section restates, simplifies and updates section 217 of the Enterprise Act 2002.
- 949 In considering whether to exercise its discretion to make an enforcement order, the court must have regard to whether the enforcement subject has failed to comply with any undertaking given under section 163 or section 185 in respect of the infringing practice (subsection (3)). Failure to comply with an undertaking may be relevant to the question of whether an enforcement order should be made (rather than another undertaking accepted). However, there is no requirement for an undertaking to have been breached before an order can be granted.
- 950 An enforcement order must set out the nature of the infringing practice (e.g. past, ongoing or likely) and give directions to the enforcement subject in order to achieve compliance. The order must direct the infringer to not continue or repeat the infringing practice. The order must direct any accessory to not consent or connive in the infringing practice. The order must direct the enforcement subject (infringer and accessory) to not engage in the infringing practice in the course of their business or another business, and to not consent or connive in the carrying out of the infringing practice by a body corporate with which they have a special relationship (subsections (4) and (6)). The underlying policy intent is to prevent, for example, a sole trader from evading the scope of an enforcement order by setting up a company to operate the same business and continue the infringing practices.
- 951 In addition, the court may order the enforcement subject to publish at their expense its order (in full or in part) and/or a corrective statement in such form and manner as deemed adequate to publicly correct any information provided to consumers and the general public (subsections (8) and (10)). This discretionary power may be used, for example, in respect of an advert that has been found to be misleading, to prevent further distorting consumers’ purchasing decisions based on the misleading contents of the advert. Whether or not the court exercises this power, enforcers are able to publish the terms of court orders and undertakings given to the court (see below).

- 952 As an alternative to making an enforcement order, the court may accept an undertaking from the enforcement subject (subsection (2), paragraph (b)). The undertaking may cover the same compliance requirements as in an order or may be to take such steps as the court believes will achieve compliance (subsection (5)). The court may also accept a further undertaking from the enforcement subject to publish at their expense the terms of the undertaking (in full or in part) or a corrective statement (subsection (9)).
- 953 Where the court accepts an undertaking under this section, it may vary the undertaking if it considers that would achieve compliance or release the undertaking if it is no longer needed (for example, if the original compliance concerns no longer apply or the enforcement subject's business model has changed such that the undertakings are no longer needed) (subsection 11)). It is open to enforcement subjects who have given the undertakings to seek their release, but this could be done at the court's own initiative too.

Section 157: Enforcement orders and undertakings: enhanced consumer measures

- 954 This section empowers the court to include enhanced consumer measures that it considers to be just reasonable and proportionate in an enforcement order or undertaking. This section partially restates and updates section 219B of the Enterprise Act 2002. Enhanced consumer measures are defined by section 221.
- 955 Subsections (2) and (3) require the court to consider the likely benefits and costs of the measures, as part of its assessment of the proportionality of the measures. In particular, the court must take into account for this assessment the costs of the measures themselves to the enforcement subject, as well as administrative costs.
- 956 Subsection (4) stipulates that the enforcement subject may also be required to provide information or documents to the court to enable it to determine if they are carrying out the enhanced consumer measures as stipulated.
- 957 Subsections (5) and (6) set out that where a settlement agreement is entered into in connection with the payment of compensation required as an enhanced consumer measure, any waiver of consumers' rights to bring civil proceedings is not valid to the extent that it purports to extend beyond the conduct covered by the order or undertaking.

Section 158: Enforcement orders: requirement to pay monetary penalty

- 958 This section gives a new, discretionary power to the court to require payment of a monetary penalty through an enforcement order (subsection (2)). This power is limited to where the application for the order was made by a public designated enforcer (subsection (1)).
- 959 Only infringing practices that have taken place (or are currently happening) can be penalised with a monetary sanction (subsection (3)).
- 960 Section 203 makes further provisions for what information must be included in an enforcement order, or in a separate notice accompanying an order, which includes a requirement to pay a monetary penalty (subsection (4)).
- 961 The court has discretion to impose a monetary penalty as it considers appropriate, subject to the statutory maxima set out in subsection (5).
- 962 The underlying policy intent is to provide for a penalty of up to the higher of a fixed amount or a percentage of turnover because:
- a. a penalty of up to only a fixed amount might not act as a meaningful deterrent for large companies with substantial turnover,

- b. conversely, there may be smaller companies (such as a new start up) which have a low or negligible turnover, so a penalty of up to only the relevant percentage of turnover might not act as a meaningful deterrent, and
- c. some individuals in scope of the penalty powers, such as a company director who consents or connives in the infringing practice (as an accessory) will not have a turnover and therefore the higher penalty will necessarily be a penalty of up to the fixed amount.

- 963 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £300,000 or, if higher, 10% of the total value of the enforcement subject's turnover. Section 204 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £300,000.
- 964 Subsections (6) and (7) make provision to prevent a person from being subjected to both civil and criminal sanctions in respect of the same conduct.
- 965 Subsection (6) prevents an enforcement subject who has been found guilty of an offence from being required to pay a monetary penalty in respect of the same conduct.
- 966 Subsection (7) clarifies that an enforcement subject does not commit an offence by conduct in respect of which a monetary penalty under this section has been imposed.
- 967 Subsection (8) provides an enforcement subject who is required to pay a monetary penalty with a right to appeal the decision to impose a penalty, its nature or amount "on the merits", in addition to their existing appeal rights.
- 968 Subsection (9) provides that in Scotland 'service of the order' includes service of an extract order in execution of or diligence on the order. This ensures that Part 3 of the Act accounts for the different mechanisms and terminology in Scotland for the service and enforcement of orders.

Section 159: Interim enforcement orders and undertakings

- 969 This section gives a discretionary power to the court, where the conditions in subsection (1) are satisfied, to make an interim enforcement order or accept an undertaking as an alternative. An undertaking accepted as an alternative may cover the same compliance requirements as in an interim enforcement order or may be to take such steps as the court considers will secure compliance (subsection (2), paragraph (b)). This section restates and updates section 218 of the Enterprise Act 2002.
- 970 An interim enforcement order may be made without notice to the enforcement subject if the court considers that appropriate (subsection (3)). However, an enforcer other than the CMA must not make an application for an interim enforcement order without complying with the prior notification requirements in section 169. A notice period of up to 7 days, or (if sooner) the CMA consent to the making of the application, is required under that section.
- 971 Secondly, subsection (7) requires that where an application for an interim enforcement order is made without notice, the application must explain why no notice has been given and, in any event, all relevant information supporting the application must be included, to enable the court to decide if the conditions for making an interim order have been met.
- 972 An application for an interim enforcement order without notice may be considered to be necessary, for example, if an enforcer becomes aware that a misleading advertisement is about to be published in a national publication or if a trader sets up in temporary premises to sell goods of unsatisfactory quality or to mislead consumers as to the goods they are purchasing (so-called "one day sales").

- 973 An interim enforcement order must stipulate the nature of the infringing practice and how compliance is to be achieved (subsections (4) and (5)).
- 974 An application for an interim enforcement order may be made at any point in time, subject to the exception that the application cannot be made after an application for an enforcement order, or a final infringement notice, against the same enforcement subject in respect of the same conduct, has been determined or given (subsection (6)).
- 975 Subsections (8) and (9) provide for the variation or discharge of an interim enforcement order. Subsection 9(b) provides that an interim enforcement order made in respect of certain conduct is discharged upon the giving of a final infringement notice to the respondent in respect of that conduct. It is the Government's intention that the CMA (which is not granted interim enforcement powers in Chapter 4) will be able to obtain an interim enforcement order from the court but then pursue final enforcement through its direct enforcement powers (i.e. through the imposition of a final enforcement notice), rather than seeking an enforcement order from the court.

Online interface orders and interim online interface orders

Section 160: Applications

- 976 This section and sections 161 to 162 replace and update sections 218ZA – 218ZD of Part 8 of the Enterprise Act 2002. Those sections limited the CMA's, and the court's, online interface powers to infringements of EU-derived consumer protection laws. With the consolidation of infringements of domestic and EU-derived laws into a single category of infringement, this limitation is removed. Therefore, this section extends the courts' online interface powers to the enactments, obligations and rules of law previously categorised as domestic infringements under Part 8. This section also extends the power to apply for an online interface order to all public designated enforcers, rather than just the CMA as was the case under the Enterprise Act 2002.
- 977 The following examples illustrate where online interface orders and interim online interface orders could potentially be useful in relation to consumer protection law within the former category of domestic infringements in Part 8:
- 978 Underage sales products: Several consumer protection enactments of domestic origin restrict the display or supply of certain products until the consumer is at an age to make informed decisions as to the risks (fireworks and tobacco for example). An online platform based overseas could be promoting the supply of such third-party products to consumers in the UK.
- 979 Hallmarking: There is a strict legal requirement for domestic suppliers of precious metals to consumers (such as gold, silver and palladium) to have their articles appropriately assessed as to their authenticity and quality - and stamped (or hallmarked) by an assay office. A trader based overseas may decide to direct its sales to consumers in the UK, supplying falsely described - or highly substandard - "precious" metals directly to UK consumers in breach of UK hallmarking requirements. Where the trader cannot be identified or is not responsive to enforcement measures against them, the public designated enforcer might wish to apply for an online interface order against a third party UK-based website through which the trader's sales are directed at consumers in the UK.
- 980 Weights and measures: Under the UK's weights and measures regime, there are systems of control for the sale of packaged or short-weight goods as well as the prescribed measurements and descriptions as to their mass, volume or number. It is possible that there may be online supply of goods to UK consumers which have the aim of overcoming legal restrictions or avoiding inspection. Where the trader cannot be identified or is not responsive to enforcement measures against them, the public designated enforcer might wish to apply for an online

interface order against the third-party overseas website through which the trader's goods are sold to UK consumers.

- 981 Subsection (1) sets out the circumstances when a public designated enforcer (as listed in section 151(1)) may apply to court for an online interface order or an interim online interface order.
- 982 Subsection (2) sets out the categories of person in respect of whom the application may be made: the infringer or a third party. However, subsection (3) sets out a jurisdictional test which limits the power of public designated enforcers to apply for an order to a third party overseas who satisfies at least one of the conditions listed in that subsection. See the explanatory note for section 149 regarding the "carries on business in the United Kingdom" and the "directs activities ... to consumers in the United Kingdom" limbs of this jurisdictional test.
- 983 Subsection (5) extends the CMA's enforcement coordination power set out in section 154 so it can make directions to other enforcers when it appears that another public designated enforcer intends to apply for an online interface order or interim online interface order.
- 984 Subsection (6) clarifies that the power to apply for an online interface order or interim online interface order does not preclude the use of the other powers provided by this Chapter. It is possible that a public designated enforcer might wish to apply for an enforcement order against the infringer and, simultaneously, for an online interface order against a third party (where, for example, the enforcer does not consider that an enforcement order against the infringer would, by itself, be wholly effective and considers that the online interface order is therefore necessary to avoid the risk of serious harm to the collective interests of consumers).

Section 161: Online interface orders

- 985 This section gives the court a discretionary power to make an online interface order, in response to an application from a public designated enforcer under section 160, where the conditions set out in subsection (1) are met. The court must have found that there is, has been or is likely to be a relevant infringement, that there are no other available means under Chapter 3 of Part 3 of the Act which would be wholly effective by themselves to stop or prohibit the infringement and it is necessary to make an order to avoid the risk of serious harm to the collective interests of consumers.
- 986 Subsection (2) lists what a person can be required to do through an online interface order, including displaying warnings to consumers or removing infringing content from an online interface. The meaning of an "online interface" is given by subsection (5) and includes websites and apps.
- 987 Subsections (3) and (4) enable the public designated enforcer (that applied for the order) to publicise any online interface orders made by the court under this section and to identify the infringer, where known, in order to raise awareness of that enforcement intervention and stop any continuing effects of the infringing practice.

Section 162: Interim online interface orders

- 988 This section gives the court a discretionary power to make an interim online interface order, in response to an application from a public designated enforcer under section 160, where the conditions set out in subsection (1) are met. The court can make an interim online interface order only if the court considers that the strict criteria for making a final online interface order under section 161 would be likely to be met (if the application had been for a final online interface order). This enables the court to take urgent action in respect of infringing online content while ensuring the imposition of potentially intrusive requirements is commensurate with the alleged harm they address.

- 989 The court may make an interim online interface order without a public designated enforcer having given notice of the applications to the respondent if the court considers that appropriate (subsection (2), paragraph (b)). Subsection (2), paragraph (a) and subsection (5) require that where an application for an interim online interface order is made without notice, it must explain why no notice has been given, and in any event, all relevant information supporting the application must be included, to enable the court to decide if the conditions for making an interim online interface order have been met.
- 990 Subsection (3) lists what a person can be required to do through an interim online interface order. The requirements are the same as those that can be imposed under a final online interface order under section 161 (for example, removal of content from an online interface). The meaning of an “online interface” is given by section 161, subsection (5).
- 991 An application for an interim online interface order may be made at any point in time, subject to the exception that the application cannot be made after an application for an online interface order, or an online interface notice, against the same respondent in respect of the same relevant infringement, has been determined or given (subsection (4)).
- 992 Subsections (6) and (7) provide for the variation or discharge of an interim online interface order.

Undertakings and further proceedings

Section 163: Acceptance of undertakings by enforcers

- 993 This section provides that where an enforcer could make an application to the court for an enforcement order or interim enforcement order against a person whom it believes is an infringer or an accessory (“an enforcement subject”), it may accept an undertaking from the enforcement subject (subsection (1)). This section restates and updates section 219 of the Enterprise Act 2002.
- 994 The enforcer is not required to have notified the CMA before accepting an undertaking under this section (subsection (8)). An enforcer may decide that such an undertaking will avoid the need for it to apply for an order.
- 995 Subsection (2) sets out the scope of an undertaking under this section:
- a. for the infringer, not to continue or repeat the infringing practice,
 - b. for the accessory, not to consent or connive in the infringing practice,
 - c. for both the infringer and accessory, not to engage in the infringing practice in the course of their business or another business, and to not consent or connive in the carrying out of the infringing practice by a body corporate with which they have a special relationship.
- 996 Subsections (4) and (5) enable enforcers to exercise discretion as to publishing undertakings agreed under this section to, for example, raise consumer awareness, maintain market confidence and deter future infringing practices or conduct. Such publicity is not an enhanced consumer measure. The party giving an undertaking may publish the undertaking instead of the enforcer.
- 997 Under section 156, if an enforcement subject gives an undertaking to an enforcer under this section, the court must take into account any failure to comply with the undertaking when exercising its discretion to make an enforcement order on any subsequent application in relation to the same conduct.

- 998 Under section 170, an enforcer must notify the CMA of the terms of any undertaking given to it under this section and the identity of the person giving it. This is to enable the CMA to fulfil its coordination role.
- 999 Where an enforcer accepts an undertaking under this section, it may accept from the enforcement subject any variation of the undertaking if it considers that would achieve compliance. An enforcer may also release the undertaking if it is no longer needed (for example, if the original compliance concerns no longer apply or the enforcement subject's business model has changed such that the undertaking is no longer needed) (subsection 6)). It is open to enforcement subjects who have given undertakings to seek their release, but this could be done at the enforcer's own initiative too (subject to the procedural requirements set out in section 165).
- 1000 Subsection (7) imposes record-keeping requirements on enforcers in relation to undertakings they accept and reviews of their effectiveness they carry out.

Section 164: Undertakings under section 163: enhanced consumer measures

- 1001 This section empowers an enforcer to include enhanced consumer measures that it considers to be just, reasonable and proportionate in an undertaking. It partially restates and updates section 219B of the Enterprise Act 2002.
- 1002 Subsections (2) and (3) require the enforcer to consider the likely benefits and costs of the measures, as part of its assessment of the proportionality of the measures. In particular, the enforcer must take into account for this assessment the costs of the measures themselves to the enforcement subject, as well as administrative costs. Private designated enforcers are subject to further provisions in section 177 (subsection (7)).
- 1003 Subsection (4) stipulates that the enforcement subject may also be required to provide information or documents to the enforcer to enable it to determine if they are taking any enhanced consumer measures required.
- 1004 Subsections (5) and (6) set out that where a settlement agreement is entered into in connection with the payment of compensation as a result of an enhanced consumer measure, any waiver of consumers' rights to bring civil proceedings is not valid to the extent that it purports to extend beyond the conduct covered by the undertaking.

Section 165: Undertakings under section 163: procedural requirements

- 1005 This section sets out the process to be followed where an enforcer, upon its own initiative, proposes to materially vary, or release, an undertaking it has previously accepted (subsections (1) to (4)). Subsection (5) provides discretion to the enforcer to consider whether a variation is material.

Section 166: Consumer protection orders or undertakings to court: further proceedings

- 1006 This section, which restates and updates section 220 of the Enterprise Act 2002, applies where the court has made a consumer protection order against an enforcement subject or member of the same interconnected corporate group (see section 176), or the court has accepted an undertaking from an enforcement subject. Where there is a failure to comply with the order or undertaking, the enforcer who made the original application or any public designated enforcer is able to make a further application to the same court that made the order or accepted the undertaking (subsections (1), (2) and (3)).

- 1007 An application cannot be made for a failure to comply with an undertaking or order which consists solely of a failure to provide information or documents required by the undertaking or order to determine whether the enforcement subject is taking any enhanced consumer measures required (subsection (7)).
- 1008 In an application relating to a failure to comply with an undertaking given to the court, where the enforcer has the power under Chapter 3 of Part 3 to make the application, an enforcer can include an application for an enforcement order, an interim enforcement order, an online interface order or an interim online interface order (subsection (4)). An application for a consumer protection order can only be made in respect of a commercial practice that has occurred or is occurring (subsection (6), paragraph (b)).
- 1009 Breach of a consumer protection order will be a contempt of court (breach by disobedience). The enforcer must establish liability to the criminal standard of proof.
- 1010 Where the court finds that undertakings given to it have been breached, it may also treat the breach as a contempt of court. Alternatively, as indicated above, this section provides that the court may make an enforcement order, an interim enforcement order, an online interface order or an interim online interface order (as applicable) and/or require the enforcement subject to pay a monetary penalty (subsection (5)).
- 1011 However, the court is not able to accept another undertaking in response to an application for a consumer protection order under this section (subsection (6), paragraph (c)) and is able to impose a monetary penalty (under subsection (5), paragraph (b)) regardless of whether the enforcement subject has a reasonable excuse (also see section 167 in relation to monetary penalties for non-compliance with undertakings given to enforcers), reflecting the serious nature of breaching an undertaking given to the court.
- 1012 Subsection (6), paragraph (a) removes the power for the CMA to give directions (under section 154 and section 160, subsection (5)) and removes the requirement for the enforcer to consult with the enforcement subject (under section 155) before making an application for a consumer protection order following on from non-compliance with an undertaking. The consultation requirements aim to resolve infringing practices without the need for court action. Where an enforcer believes a person has breached an undertaking given to the court, which is itself an alternative to a court order, the Government considers that another round of out-of-court consultation would fail to resolve the underlying infringing practice.
- 1013 Subsection (8) provides an enforcement subject who is required to pay a monetary penalty with a right to appeal the decision to impose a penalty, its nature or amount “on the merits”, in addition to their existing appeal rights.
- 1014 Section 168 sets out the maximum monetary penalties that the court may impose under this section and section 203 makes further provisions for information to be included in an order, or in a notice to accompany an order, that includes a requirement to pay a monetary penalty (subsection (9)).

Section 167: Undertakings to public designated enforcers: further proceedings

- 1015 This section sets out that where a public designated enforcer has accepted an undertaking and there has been a failure to comply with it, the enforcer is empowered to make an application to the court (subsections (1) and (2)).
- 1016 However, an application cannot be made for a failure to comply with an undertaking which consists solely of a failure to provide information or documents required by the undertaking to determine whether the enforcement subject is taking any enhanced consumer measures attached to the undertaking (subsection (7)).

- 1017 In its application, a public designated enforcer can request the imposition of a monetary penalty for the alleged failure to comply with the undertaking. If the court finds that the undertaking is not being complied with and is satisfied that this failure is without a reasonable excuse, the court may make an order requiring the payment of a monetary penalty (subsection (4), paragraph (b) and subsection (5)).
- 1018 In its application under this section, an enforcer can also include an application for a consumer protection order (subsection (3)). This means that where the enforcer has the power under Chapter 3 of Part 3 to make the application, they may apply for an enforcement order, an interim enforcement order, an online interface order or an interim online interface order (as applicable). By making such an order, the court is able to address the infringing practice and any related consent or connivance to it by an accessory. A consumer protection order can be made by the court instead of or in addition to making an order to pay a monetary penalty for failure to comply with an undertaking, without reasonable excuse.
- 1019 Subsection (4), paragraph (a) provides that the court may make a consumer protection order instead of any other order within its power to make (e.g. a finding of contempt). An enforcement order made by the court may include the imposition of a monetary penalty (see section 158). Therefore, the court has discretion to impose monetary penalties following an application made by a public designated enforcer under this section in respect of failure to comply with the undertaking and/or in respect of the relevant infringement.
- 1020 The court is not able to accept another undertaking in response to an application for a consumer protection order under this section (subsection (6), paragraph (c)). This is because there would already have been one failure to comply with an undertaking and it would be appropriate to escalate the means by which compliance is sought.
- 1021 Subsection (6), paragraph (a) removes the power for the CMA to give directions (under section 154) and the requirement for the enforcer to consult with the enforcement subject (under section 155). The consultation requirements aim to resolve infringing practices without the need for court action or to facilitate enforcement action by the most appropriate enforcer in the circumstances of the case. Where an enforcer believes an enforcement subject has breached an undertaking, which is itself an alternative to a court order, this may strongly suggest that another round of out-of-court consultation would fail to resolve the underlying infringing practice.
- 1022 An application under this section can only be made in respect of a commercial practice that has occurred or is occurring (subsection (6), paragraph (b)).
- 1023 Subsection (8) provides an enforcement subject who is required to pay a monetary penalty with a right to appeal the decision to impose a penalty, its nature or amount “on the merits”, in addition to their existing appeal rights.
- 1024 Section 168 sets out the maximum monetary penalties that the court may impose under this section and section 203 makes further provisions for information to be included in an order, or in a notice to accompany an order, that includes a requirement to pay a monetary penalty (subsection (9)).

Section 168: Monetary penalties under sections 166 and 167: amount

- 1025 This section sets out the maximum monetary penalties that the court may impose for failure to comply with undertakings given to public designated enforcers or to the court. It specifies the maximum fixed penalty and the maximum daily rate penalty.
- 1026 The court has discretion to impose a penalty of a fixed amount and/or a penalty based on a daily rate as it considers appropriate, subject to the statutory maxima set out in subsection (3).

- 1027 See explanatory note to section 158 for the policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.
- 1028 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £150,000 or, if higher, 5% of the total value of the enforcement subject's turnover. Section 204 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £150,000 (subsection 3, paragraph (a)).
- 1029 Where the enforcement subject has a turnover that can be determined, a daily penalty must not exceed £15,000 or, if higher, 5% of the total value of the enforcement subject's daily turnover. Where the enforcement subject does not have a turnover, the daily penalty must not exceed £15,000 per day (subsection 3, paragraph (b)).
- 1030 Subsection (4), paragraph (a) has the effect that a daily penalty imposed by the court on the enforcement subject can only begin to accrue after the respondent has received notice of the application served to the court by the enforcer to determine whether the undertaking has been breached on the enforcement subject. A daily penalty stops accruing when the enforcement subject fulfils the relevant requirements unless the court determines an earlier date (subsection (4), paragraph (b)).

Notification of CMA

Section 169: Notification requirements: applications

- 1031 This section restates and updates the effect of sections 214 and 215 of the Enterprise Act 2002 to the extent they include obligations on enforcers who are not the CMA. This section requires these other enforcers to notify the CMA of their intention to apply for a consumer protection order. The enforcer can only make an application for an enforcement order or an online interface order at least 14 days after the notice was given (beginning with the day the notice was given). There is a corresponding requirement – subject to a minimum 7-day period from the day the notice was given – when an enforcer intends to apply for an interim enforcement order or an interim online interface order (subsections (1) to (3)). These waiting periods can be shortened if the CMA consents by notice to the enforcer making the application sooner (subsection (2), paragraph (b)). Subsection (4) requires the enforcer to inform the CMA of the outcome of any application it makes.
- 1032 The policy intent underlying the notification requirement in this section is for the CMA to be able to perform a coordinating role in relation to enforcement under this Part. The notification requirement enables the CMA to facilitate the sharing of information between enforcers and to make directions under section 154. The Government considers that this mitigates the risk of traders facing multiple actions in relation to the same infringing practice.
- 1033 Subsections (5) and (6) require an enforcer to inform the CMA of the making, and outcome, of applications to the court under section 166 in respect of a failure to comply with a consumer protection order or undertakings to the court.

Section 170: Notification requirements: undertakings

- 1034 This section requires enforcers to notify the CMA of the terms of any undertaking given to them under section 163 and of the identity of the person(s) giving it (subsections (1) and (2)).
- 1035 The underlying policy intent is to enable the CMA to fulfil its coordination role. This section restates equivalent provisions in section 219 of the Enterprise Act 2002.

Section 171: Notification requirements: proceedings

- 1036 This section, which restates section 230 of the Enterprise Act 2002, applies if a local weights and measures authority (i.e. Trading Standards department) in England and Wales intends to start proceedings for an offence under an enactment listed in Part 1 of Schedule 15 (subsection (1)).
- 1037 The authority must give the CMA notice of its intention to start proceedings (subsection (2)). Subsection (3) sets out the notice period. The authority must also notify the CMA of the outcome of the proceedings (subsection (4)).
- 1038 The underlying policy intent is to enable the CMA to fulfil its coordination role. For example, the CMA could inform one authority that another is prosecuting, or that an enforcement order has been granted, in respect of the same infringing practice.
- 1039 Any criminal proceedings will not however be invalid simply because the prosecuting authority has not given the CMA notice (subsection (5)).
- 1040 This section is not relevant to Scotland, where all criminal prosecutions are brought by the Procurator Fiscal, nor to Northern Ireland where public law enforcement of consumer protection legislation rests with the Department for the Economy.

Section 172: Notification requirements: convictions and judgments

- 1041 This section restates section 231 of the Enterprise Act 2002. It gives the courts in the UK the power to notify the CMA of convictions and judgments that might not otherwise be brought to its attention, for the purpose of the CMA considering whether to exercise its functions under this Chapter or Chapter 4 (subsections (1) to (4)).

Jurisdiction etc

Section 173: Appropriate court

- 1042 This section sets out the criteria to determine which courts within the UK have jurisdiction to hear and determine applications for consumer protection orders. This section restates and updates relevant provisions in section 215 of the Enterprise Act 2002.
- 1043 The starting point is subsection (2), which provides for the appropriate courts where the respondent has a place of business in, or carries on business in England and Wales, Scotland or Northern Ireland.
- 1044 Subsection (3) provides for the appropriate court where the respondent does not have a place of business in, nor carries on business in England and Wales, Scotland or Northern Ireland. In such cases, the relevant consumer's domicile determines which court or courts have jurisdiction.
- 1045 Subsections (4) and (5) define who is a relevant consumer for this purpose.

Section 174: Effect of orders in other parts of the United Kingdom

- 1046 This section provides for consumer protection orders made by a court in one part of the UK to have effect in another part of the UK, as if they were made by the court that could make an order in that other part of the UK. This provision eliminates any jurisdictional gap within the UK, ensuring consumer protection orders made within one part of the UK will apply across its nations.
- 1047 This section restates and consolidates the corresponding provisions in sections 217, 218, 218ZB, and 218ZC of the Enterprise Act 2002.

Section 175: Evidence

- 1048 This section, which restates and updates section 228 of the Enterprise Act 2002, allows convictions in the criminal courts and findings in the civil courts to be admitted in evidence for the purpose of proving that an infringing conduct has occurred. It is still necessary to prove, for example, that the conduct harms the collective interests of consumers.
- 1049 Subsection (1) provides that convictions in any related criminal proceedings in the UK may be used as evidence in proceedings under this Part.
- 1050 Subsection (2) enables findings in civil proceedings to be admitted in evidence under this Part, except where the findings have been overturned on appeal (subsection (3)). Subsection (4) defines in respect of whose conduct findings may be made and evidence may be admitted under this section.

Miscellaneous

Section 176: Interconnected bodies corporate

- 1051 This section restates and updates section 223 of the Enterprise Act 2002. It sets out that where the court makes a consumer protection order against a body corporate that is, or becomes, a member of a group of interconnected bodies corporate, the court has a discretionary power to direct that the order is binding upon one or more other members of the same corporate group (subsections (1) and (3)). The court has discretion to make some or all of the requirements of the order, i.e. compliance directions, enhanced consumer measures and monetary penalties, binding on other members of the same corporate group but only if the court considers it just, reasonable and proportionate to do so (subsection (4)).
- 1052 In considering whether it is just, reasonable and proportionate to exercise this power, the court may take into account, for example:
- a. to what extent any other group members have been the “brains” behind the infringement or have benefitted from it,
 - b. whether the infringing body corporate has sufficient funds to pay the penalty, and whether to ensure the penalty is paid it is necessary to make the requirement to do so binding on one or more members of the same corporate group. The underlying policy intent is to help prevent the infringing body corporate from engaging in corporate restructuring to minimise or avoid liabilities.
- 1053 Subsection (2) sets out the circumstances in which a body corporate is considered to be or becomes a member of a group of interconnected bodies corporate (when the interconnection condition applies). These include where the infringing body corporate becomes a member of a group of interconnected bodies corporate after the order is made, or an existing group of which it is a member is enlarged.
- 1054 Subsection (5) defines what a group of interconnected bodies corporate is and subsection (6) defines when any two bodies corporate are interconnected with each other.
- 1055 Subsection (7) requires a copy of an order to be given to any group member on whom it is made binding. Where new members are added to the corporate group, an enforcer may apply to the court for an order to bind those new members to the requirements of the order.

Section 177: Enhanced consumer measures: private designated enforcers

- 1056 This section restates section 219C of the Enterprise Act 2002. It sets out two conditions that must be met before enhanced consumer measures can be included in an undertaking given to a private designated enforcer or in an undertaking given to the court, or an order made by the court, following an application made by a private designated enforcer.

- 1057 Subsection (3) sets out the first condition, which is that the enforcer must have been specified by the Secretary of State in regulations for this purpose (i.e. regarding securing enhanced consumer measures) and subsection (6) provides the conditions which must be satisfied before an enforcer may be specified in the regulations. This section gives the Secretary of State a delegated power to make regulations subject to the negative parliamentary procedure (subsection (9)).
- 1058 Subsection (4) sets out the second condition, which is that the enhanced consumer measures must not directly benefit the enforcer or an associated undertaking. Subsection (5) sets out, non-exhaustively, particular types of measures that would be considered to directly benefit the enforcer or an associated undertaking. Subsection (10) defines associated undertaking.
- 1059 Subsections (7) and (8) require private designated enforcers, where including enhanced consumer measures in an undertaking, to have regard to any relevant advice or guidance given by a Primary Authority. The policy objective is to support consistency in achieving business compliance, given that a Primary Authority enables businesses to form a legal partnership with one local authority, which then provides assured and tailored advice on complying with, inter alia, trading standards regulations, that other local regulators must respect.

Section 178: Substantiation of claims

- 1060 This section enables the court to require evidence from traders substantiating the factual claims used in their commercial practices with consumers, which are at issue in an application for a consumer protection order involving alleged contravention of Chapter 1 of Part 4 (protection from unfair trading) to this Act (subsections (1) and (2)). This section restates and updates section 218A of the Enterprise Act 2002.
- 1061 The effect of this provision is that the burden of proof regarding the accuracy of the claim rests on the trader and any claim (such as claims about products having various positive effects on health) should be based on evidence which can be verified by the court.
- 1062 The content and scope of the evidence to be supplied will depend on the specific content of the factual claim and it is for the court to decide if any evidence provided is adequate. If the court considers that it is not, or if no evidence is produced, the court can decide the claim is inaccurate (subsection (3)).

Section 179: Crown application

- 1063 This section confirms that this Chapter binds the Crown if it engages in an infringing practice (see section 148) or consents or connives in such a practice (subsection (1)).
- 1064 Subsection (2) makes an exception for monetary penalties.
- 1065 This section restates and updates section 236 of the Enterprise Act 2002. It ensures that if an emanation of the Crown is acting as a trader, for example a government agency providing services to members of the public for a fee, it can be enforced against if proven to have engaged in infringing practices.

Chapter 4: Direct Enforcement Powers of CMA Investigations

Section 180: Power of CMA to investigate suspected infringements

- 1066 This section gives a power to the CMA to investigate suspected infringements. This power acts as a trigger for the use of the CMA's direct enforcement powers under this Chapter.

- 1067 The CMA can conduct investigations under Chapter 4 of Part 3 if it reasonably suspects that an infringing practice has occurred, is occurring or is likely to occur. The CMA can investigate the person committing the actual or likely infringing practice (the “infringer”), an accessory to such a practice, or both (together the “enforcement subject”) (subsection (1)).
- 1068 The CMA may publish a notice of investigation under this section, setting out what and, so far as possible, whom, it is investigating and indicating the investigation timetable (subsection (3)). This will signal to other market participants that the CMA has reasonable grounds for suspecting either that the practice constitutes a relevant infringement or that there has been or is consent or connivance in the practice by another relevant person. This may encourage consumers, other traders or other entities to come forward with relevant information or evidence. Publication of a notice is not mandatory in all cases (e.g. it may not be appropriate if potential prejudice may be caused to the investigation).
- 1069 If the CMA has published an investigation notice then, if it decides to close the investigation, it must publish a notice of termination of the investigation (subsection (4)).

Infringement notices and penalties

Section 181: Provisional infringement notice

- 1070 This section allows the CMA, once it has started an investigation under section 180, to give a provisional infringement notice to the enforcement subject (subsections (1) to (3)). This power is discretionary. The CMA may choose not to exercise it where, for example, it considers that the infringing practice of concern can be resolved by means of accepting undertakings under section 185.
- 1071 As it represents the CMA’s provisional view, the provisional infringement notice does not mean that the CMA has made a finding that the enforcement subject has engaged in or is likely to engage in the infringing practice or has consented or connived to it. The provisional infringement notice gives the enforcement subject an opportunity to know the case against them, and if they choose to do so, to respond in writing and orally.
- 1072 The provisional infringement notice must specify certain details (subsection (4)), including:
- a. the grounds for the CMA’s belief that there has been or is likely to be an infringing practice or consent or connivance to such a practice (as relevant),
 - b. proposed directions, which specify any conduct required to ensure compliance as defined in subsection (5). If the proposed directions include enhanced consumer measures (as the CMA considers to be just, reasonable and proportionate), the notice must state that and the details of those measures (subsection (6)),
 - c. the representations process that applies. If the enforcement subject wishes to make oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional infringement notice (subsection (7)).
- 1073 If the CMA is considering the imposition of a monetary penalty, further information must be included in the provisional infringement notice regarding the penalty, including its proposed amount and factors justifying both its imposition and amount (subsection (8)).

Section 182: Final infringement notice

- 1074 This section gives a discretionary power to the CMA to issue a final infringement notice where it is satisfied that the enforcement subject has engaged, is engaging or is likely to engage in the infringing practice or is an accessory to such a practice. The CMA may exercise this power following the issue of a provisional infringement notice under section 181, the expiry of the time for the enforcement subject to make representations on it, and after considering any representations received (subsections (1) and (2)).
- 1075 In deciding whether to give a final infringement notice, the CMA must have regard to whether the enforcement subject has already given an undertaking (covering the infringing practice or an accessory's conduct currently under investigation) under Chapters 3 or 4 of Part 3 (subsection (3)). Failure to comply with an undertaking would be relevant to the question of whether it is proportionate to issue a final infringement notice (as opposed, for example, to accepting a further undertaking).
- 1076 The final infringement notice may include directions to achieve compliance (for the latter, see meaning at section 181, subsection (5)), including such enhanced consumer measures as the CMA considers to be just, reasonable and proportionate and may require payment of a monetary penalty (subsection (4)). The CMA may wish to give directions (including enhanced consumer measures) to rectify an infringement without imposing a penalty and vice versa.
- 1077 A monetary penalty cannot be imposed where the CMA is satisfied that an infringing practice is likely to occur only and therefore has not actually occurred or is not currently occurring (subsection (5)). The effect is that only actual infringing practices that have taken place (or are currently happening) can be penalised with a monetary sanction on the infringer. A similar qualification is not needed for accessories as section 219(2)(c) achieves the effect that an accessory cannot be an accessory to future conduct.
- 1078 The CMA has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in subsection (6).
- 1079 See explanatory note to section 158 for the policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.
- 1080 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £300,000 or, if higher, 10% of the total value of the enforcement subject's turnover. Section 204 concerns the calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £300,000.
- 1081 The final infringement notice must specify certain details (subsection (7)), including:
- a. the CMA's findings of facts relating to the infringing practice or conduct,
 - b. other factors which justify the issuing of the notice,
 - c. where a penalty is imposed, the information specified in section 203,
 - d. the enforcement subject's appeal rights.
- 1082 In addition, the CMA may require the enforcement subject to publish at their expense the final infringement notice (in full or in part) and/or a corrective statement (subsections (8) and (9)). For example, a corrective statement may be required in respect of an advertisement that has been found by the CMA to be misleading, to prevent further distorting consumers' purchasing decisions based on the misleading contents of the advert.

Section 183: Final infringement notice: directions to take enhanced consumer measures

- 1083 This section empowers the CMA to include enhanced consumer measures that it considers to be just, reasonable and proportionate in a final infringement notice.
- 1084 Subsections (2) and (3) require the CMA to consider the likely benefits and costs of the measures, as part of its assessment of the proportionality of the measures. In particular, the CMA must take into account for this assessment the costs of the measures themselves to the enforcement subject, as well as administrative costs.
- 1085 Subsection (4) provides that the enforcement subject may also be required to provide information or documents to the CMA to enable it to determine if the enforcement subject is carrying out the enhanced consumer measures as stipulated.
- 1086 Where a settlement agreement is entered into in connection with the payment of compensation required as an enhanced consumer measure, any waiver of consumers' rights to bring civil proceedings is not valid to the extent that it purports to extend beyond the conduct covered by the final infringement notice (subsections (5) and (6)).

Online interface notices

Section 184: Online interface notices

- 1087 This section empowers the CMA to give an online interface notice as a last resort to prevent serious harm to the collective interests of consumers where the CMA is satisfied that a person has engaged in, is engaging in, or is likely engage in, an infringing practice (subsections (1) and (5)).
- 1088 The notice can be given to the infringer or any third party (subsection (2)). However, subsection (3) sets out a jurisdictional test which limits the CMA's power to give a notice to a third party overseas who satisfies at least one of the conditions listed in that subsection. See the explanatory note for section 149 regarding the "directs activities ... to consumers in the United Kingdom" limb of this jurisdictional test.
- 1089 It is possible that the CMA might give a final infringement notice under section 182 to the infringer and, simultaneously, an online interface notice to a third party (where, for example, the CMA is not satisfied that the giving of the final infringement notice to the infringer would, by itself, be wholly effective and is satisfied that the directions in the online interface notice are therefore necessary to avoid the risk of serious harm to the collective interests of consumers).
- 1090 Subsection (4) lists what a person can be required to do through an online interface notice, including displaying warnings to consumers or removing infringing content from an online interface. The meaning of "online interface" is given by subsection (10) and includes websites and apps.
- 1091 Subsection (6) sets out certain details which the online interface notice must specify, including:
- a. the CMA's findings in relation to the circumstances justifying the notice,
 - b. the appeal rights of those who have received the notice.
- 1092 Subsections (7) and (8) enable the CMA to publicise any online interface notices given under this section and to identify the infringer to raise awareness of that enforcement intervention and stop any continuing effects of the infringement.

Undertakings

Section 185: Undertakings

- 1093 This section applies where the CMA has started an investigation under section 180 which has not yet resulted in the CMA giving a final infringement notice under section 182 or an online interface notice under section 184, in relation to the matter under investigation.
- 1094 In that case, the CMA may accept an undertaking from a person who it believes has engaged in, is engaging in or is likely to engage in an infringing practice or is an accessory to such a practice (subsections (1) and (2)). The CMA may decide that such an undertaking will avoid the need for it to give a final infringement notice as the acceptance of an undertaking can lead to faster resolution of consumer protection concerns and shorten the enforcement process. This is underlined by the fact that when giving an undertaking to the CMA, the enforcement subject does not need to admit that it has engaged in the alleged infringing practice and the CMA, upon accepting the undertaking, will make no finding to that effect.
- 1095 The undertaking must include provisions which effectively stop the alleged infringing practice and hence ensure compliance with consumer protection law (subsection (4)). It may also include such enhanced consumer measures as the CMA considers just, reasonable and proportionate (subsection (3)). The CMA cannot impose any monetary penalties in an undertaking (though it may subsequently impose monetary penalties for any breaches without reasonable excuse of the terms of the undertaking - see section 189).
- 1096 Under section 182, if an enforcement subject gives an undertaking to it pursuant to this section, the CMA must take this, as well as failure to comply with it, into account in considering whether to give a final infringement notice.
- 1097 Subsection (5) makes provision, in certain circumstances, for the CMA to vary the terms of the undertaking at the enforcement subject's initiative. It is also open to the CMA to release them from the undertaking, whether on its own initiative (subject to the procedural requirements set out in section 187) or at the enforcement subject's request. This may be appropriate, for example, if the original compliance concerns no longer apply.
- 1098 The CMA's power to accept an undertaking under this section does not limit, or take away from, the CMA's enforcement powers (as a public designated enforcer) under Chapter 3 of this Part (subsection (6)). Such Chapter 3 powers include the acceptance of an undertaking during an investigation under the court-based enforcement regime (see section 163).

Section 186: Effect of undertakings under section 185

- 1099 This section prevents the CMA, once it accepts an undertaking under section 185, from giving a final infringement notice (under section 182) or an online interface notice (under section 184) to the same enforcement subject in relation to the same matter (subsections (1) and (2)). The underlying policy intent is that undertakings are an alternative to final infringement or online interface notices and therefore the effect is that a person cannot be subjected to multiple enforcement resolutions of the same matter.
- 1100 Nevertheless, subsection (3) provides that, where the CMA accepts an undertaking from a person, it is not prevented from giving a final infringement notice or online interface notice to that person) in circumstances which:
- a. either are not covered by the undertaking, or
 - b. cast doubt on the effectiveness of the undertaking to stop or prevent the consumer detriment because of reasonable grounds for suspecting non-compliance with the undertaking (subsection (3), paragraph (c)), or a change to, or revelation regarding, the basis on which the undertaking was accepted (subsection (3), paragraphs (b) and (d)).

- 1101 However, subsection (3) does not remove the need to meet the threshold requirements in sections 182 and 184 before a final infringement notice or an online interface notice is given, i.e. subsection (3) does not permit the CMA to automatically issue a final infringement notice or online interface notice.
- 1102 Subsection (4) has the effect that undertakings are to be treated as released from the date the CMA gives a final infringement notice or an online interface notice in the circumstances set out in subsection (3) paragraphs (b), (c) or (d).

Section 187: Undertakings under section 185: procedural requirements

- 1103 This section sets out the process to be followed where the CMA, upon its own initiative, proposes to materially vary, or release, an undertaking it has previously accepted (subsections (1) and (5)).
- 1104 The CMA must first give notice of its intention and rationale to the person who is party to the undertakings (subsections (2) and (3)). The CMA must consider any representations by that person and confirm its decision to that person (subsection (4)).

Section 188: Provisional breach of undertakings enforcement notice

- 1105 This section, in conjunction with section 189, sets out the CMA's powers to enforce compliance with undertakings accepted under section 185.
- 1106 The CMA may give a provisional breach of undertakings enforcement notice to a person, if it has reasonable grounds to believe that they have failed to comply with one or more of the terms of the undertaking (subsections (1) and (2)).
- 1107 The provisional breach of undertakings enforcement notice does not constitute a finding that a person has failed to comply with the terms of the undertaking and, where the notice provides that the CMA is considering imposing a monetary penalty, does not constitute a finding by the CMA that there is no reasonable excuse for the alleged breach.
- 1108 The provisional breach of undertakings enforcement notice represents the CMA's provisional view and proposed next steps. It allows the enforcement subject to know the case against them and, if they choose to do so, to respond in writing and orally.
- 1109 The provisional breach of undertakings enforcement notice must specify certain details (subsection (3)), including:
- a. the terms of the undertaking which are alleged to be breached and the acts or omissions which constitute the breach,
 - b. proposed directions to achieve compliance as defined in subsection (5):
 - i. for the infringer, not to continue or repeat the infringing practice,
 - ii. for the accessory, not to consent or connive in the infringing practice.
 - iii. for the enforcement subject(s) (infringer and accessory), not to engage in the infringing practice in the course of their business or another business, and not to consent or connive in the carrying out of the infringing practice by a body corporate with which they have a special relationship.
 - c. the representation process that applies. If the enforcement subject wishes to make oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional breach of undertakings enforcement notice (subsection (4)).

- 1110 Further information must be included in the provisional breach of undertakings enforcement notice if the CMA is considering imposing a monetary penalty on the enforcement subject, including factors which justify the imposition of a penalty and its proposed amount (subsection (6)).

Section 189: Final breach of undertakings enforcement notice

- 1111 This section allows the CMA to issue a final breach of undertakings enforcement notice where it is satisfied that the enforcement subject has failed to comply with one or more terms of the undertaking. The CMA may issue a final breach of undertakings enforcement notice following the issue of a provisional breach of undertakings enforcement notice under section 188, the expiry of the deadline to make representations to the CMA and after considering any representations received (subsections (1) and (2)).
- 1112 The notice may specify directions to achieve compliance (see explanatory note for subsection (5) of section 188), a monetary penalty or both (subsection (3)). The CMA may give directions without imposing a penalty and vice versa.
- 1113 A monetary penalty can only be imposed if the CMA is satisfied that there is no reasonable excuse for the breach of the undertakings (subsection (4)). This means, for example, an enforcement subject may be able to avoid a requirement to pay a monetary penalty if they can provide evidence of an externally verifiable and unforeseen factor(s) outside of their control, which resulted in the breach of the term or terms of the undertaking.
- 1114 The final breach of undertakings enforcement notice must specify certain details (subsection (5)), including:
- a. the acts or omissions which constitute the breach,
 - b. further factors, which justify the giving of the notice,
 - c. if directions are imposed, specify any action to be taken (or stopped) to ensure the infringing practice ceases, will not be repeated or to prevent it from arising (as applicable),
 - d. if a penalty is imposed, the penalty notice information specified in section 203,
 - e. the applicable rights and procedures to appeal the notice.
- 1115 The CMA has discretion to publish a final breach of undertakings enforcement notice, as the CMA considers appropriate (subsection (6)).

Section 190: Monetary penalties under section 189: amount

- 1116 This section sets out the maximum monetary penalties (a fixed amount or an amount based on a daily amount or both) that the CMA may impose in a final breach of undertakings enforcement notice under section 189.
- 1117 The CMA has a discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in subsection (3).
- 1118 See the explanatory note for section 158 for the policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.
- 1119 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £150,000 or, if higher, 5% of the total value of the enforcement subject's turnover. Section 204 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £150,000 (subsection (3), paragraph (a)).

- 1120 Where the enforcement subject has a turnover that can be determined, a daily penalty must not exceed £15,000 or, if higher, 5% of the total value of the enforcement subject's daily turnover. Where the enforcement subject does not have a turnover, the daily penalty must not exceed £15,000 per day (subsection 3, paragraph (b)).
- 1121 Subsection (4), paragraph (a) means that a daily penalty imposed by the CMA can only begin to accrue after the CMA has given a provisional breach of undertakings enforcement notice to the enforcement subject, i.e. the point when the enforcement subject is clearly made aware of their failure to comply with the terms of the undertaking. A daily penalty stops accruing when the enforcement subject fulfils the requirements of the final breach of undertakings enforcement notice, unless the CMA determines an earlier date (subsection (4), paragraph (b)).

Directions

Section 191: Provisional breach of directions enforcement notice

- 1122 This section, in conjunction with section 192, sets out the CMA's powers to enforce compliance with enforcement directions given in its final infringement notices under section 182, online interface notices under section 184 and final breach of undertakings enforcement notices under section 189. This is the final step in the CMA's own control under the direct enforcement regime.
- 1123 The CMA may give a provisional breach of directions enforcement notice to an enforcement subject, if it has reasonable grounds to believe that they have failed to comply, without a reasonable excuse, with an enforcement direction given to the enforcement subject (subsections (1) and (2)).
- 1124 As it represents the CMA's provisional view, the provisional breach of directions enforcement notice does not mean that the CMA has made a finding that the enforcement subject has failed to comply with an enforcement direction or that it considers that they do not have a reasonable excuse for failing to do so. The provisional breach of directions enforcement notice allows the enforcement subject an opportunity to know the case against them, and if they choose to do so, to respond in writing and orally.
- 1125 The provisional breach of directions enforcement notice must specify certain details (subsections (3) to (5)), including:
- a. the grounds of the alleged failure to comply with an enforcement direction(s), without reasonable excuse,
 - b. proposed directions to achieve compliance with the enforcement direction(s),
 - c. the intent and rationale to impose a penalty and its proposed amount,
 - d. the representation process that applies and a deadline for the enforcement subject to respond. If the enforcement subject wishes to make oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional breach of directions enforcement notice (subsection (4)).

Section 192: Final breach of directions enforcement notice

- 1126 This section allows the CMA to issue a final breach of directions enforcement notice requiring the payment of a monetary penalty where the CMA is satisfied that the enforcement subject has without reasonable excuse failed to comply with an enforcement direction. The CMA may issue a final breach of directions enforcement notice following the issue of a provisional breach of directions enforcement notice under section 191, the expiry of the time to make representations and after considering any representations received (subsections (1) and (2)).

- 1127 Subsection (3) reflects that at this late stage of giving a final breach of directions enforcement notice and given the seriousness of failing to comply with its previous directions without a reasonable excuse, the CMA will wish in every case to impose a penalty. Subsection (5) provides that the CMA has a discretion to vary or revoke its original directions and to specify new directions to achieve compliance.
- 1128 The final breach of directions enforcement notice must specify certain details (subsections (4) and (6)), including:
- a. the CMA's findings in relation to the circumstances of the breach,
 - b. the monetary penalty information specified in section 203, which includes information on appeal rights in respect of the imposition of the penalty;
 - c. where the notice varies an enforcement direction or specifies other directions, applicable rights and details to appeal the notice.
- 1129 The CMA has discretion to publish a final breach of directions enforcement notice (subsection (7)).

Section 193: Monetary penalties under section 192: amount

- 1130 This section stipulates the maximum monetary penalties that the CMA may impose in a final breach of directions enforcement notice under section 192. It specifies the maximum fixed penalty and the maximum daily rate penalty.
- 1131 The CMA has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in subsection (3).
- 1132 See the explanatory note to section 158 for the policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.
- 1133 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £150,000 or, if higher, 5% of the total value of the enforcement subject's turnover. Section 204 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £150,000 (subsection (3), paragraph (a)).
- 1134 Where the enforcement subject has a turnover that can be determined, a daily penalty must not exceed £15,000 or, if higher, 5% of the total value of the enforcement subject's daily turnover. Where the enforcement subject does not have a turnover, the daily penalty must not exceed £15,000 per day (subsection (3), paragraph (b)).
- 1135 Subsection (4), paragraph (a) means that a daily penalty imposed by the CMA can only begin to accrue after the CMA has given a provisional breach of directions enforcement notice to the enforcement subject, i.e. the point when enforcement subject is clearly made aware of their failure to comply with an enforcement direction. A daily penalty stops accruing when the enforcement subject complies fully with the relevant directions, unless the CMA determines an earlier date (subsection (4), paragraph (b)).

Section 194: Powers of court to enforce directions

- 1136 This section provides a backstop power for the CMA to apply to an appropriate court where it considers that a person has failed to comply with a direction given in a final breach of directions enforcement notice under section 192.
- 1137 This section also sets out an alternative means for the CMA to enforce compliance with enforcement directions, i.e. those given in its final infringement notices under section 182, online interface notices under section 184 and final breach of undertakings enforcement notices under section 189 – by means of applying to court for an order.

- 1138 It is for the CMA to decide whether to enforce directions itself (using powers under sections 191 and 192) or by making an application to the court under this section. The underlying policy intent is that the direct enforcement route may be appropriate where the prospect of a CMA-imposed monetary penalty would incentivise compliance. However, there may be cases where this prospect is potentially ineffective or insufficient and the prospect of a court order (which would result in contempt proceedings if breached) would act as an appropriately stringent sanction.
- 1139 An order made by the court under this section may require the enforcement subject to take such steps as the court considers appropriate to achieve compliance with the enforcement direction in issue (subsection (3)). The court may also order that the enforcement subject(s) pay all the costs or expenses of the application (subsection (4)).
- 1140 The CMA may also apply for an enforcement order, an interim enforcement order, an online interface order or an interim online interface order under Chapter 3 (subsection (5)). This will enable the court to take action in respect of any practice or conduct which amounts to a relevant infringement (by making a consumer protection order) in addition to, or instead of, making an order in respect of the breach of directions.
- 1141 Subsection (6) applies provisions in Chapter 3 concerning which court has jurisdiction to hear and decide applications, and relevant court powers to a court order under this section.

Section 195: Substantiation of claims

- 1142 This section enables the CMA, where it gives a provisional notice (defined in subsection (4)) to an enforcement subject and the respondent makes representations in respect of that notice, to require evidence from the enforcement subject substantiating the factual claims used in their commercial practices with consumers, which are at issue in CMA direct enforcement proceedings involving alleged contravention of Chapter 1 of Part 4 (protection from unfair trading) to this Act (subsections (1) and (2)).
- 1143 The effect of this provision is that the burden of proof regarding the accuracy of the claim rests on the trader and any claim (such as claims about products having various positive effects on health) should be based on evidence which can be verified by the CMA.
- 1144 The content and scope of the documentation to be supplied will depend on the specific content of the factual claim and it would be up to the CMA to decide if the evidence provided is adequate. If the CMA considers that it is not, or if no evidence is produced in the first place, the CMA can decide the claim is inaccurate (subsection (3)).

Section 196: Variation or revocation of directions

- 1145 This section sets out the process to be followed where the CMA proposes to make a material variation of, or to revoke, an enforcement direction it has given through a final infringement notice under section 182, an online interface notice under section 184, a final breach of undertakings enforcement notice under section 189 or a final breach of directions enforcement notice under section 192 (subsection (1) and (5)).
- 1146 The CMA must first give notice of its intention and rationale to the person subject to those directions and provide details regarding how and when representations can be made (subsections (2) and (3)). The CMA must consider any representations by that person and give notice of its decision to that person (subsection (4)).

False or misleading information

Section 197: Provisional false information enforcement notice

- 1147 This section, in conjunction with section 198, gives discretionary power to the CMA to enforce against the provision of materially false or misleading information provided to it in connection with the exercise of its direct enforcement functions under Chapter 4 of Part 3 of this Act or under paragraph 16B or 16C of Schedule 5 to the Consumer Rights Act 2015 (as inserted by paragraph 2 of Schedule 17 to this Act).
- 1148 The CMA's power under this section may be used where, for example, the CMA has reasonable grounds to believe that it has been given, without reasonable excuse, materially false or misleading information in written representations on a provisional infringement notice, during an oral hearing, or in response to proposed undertakings or proposed material variations of undertakings.
- 1149 Subsection (1) sets out the circumstances in which the CMA may give a provisional false information enforcement notice under subsection (2).
- 1150 The provisional false information enforcement notice must specify certain details (subsection (3)), including:
- a. the information in question and why the CMA believes that it is materially false or misleading,
 - b. the CMA's reasons for proposing a monetary penalty and its proposed amount,
 - c. the representation process that applies. If the respondent thinks that their circumstances warrant oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional false information enforcement notice (subsection (4)).

Section 198: Final false information enforcement notice

- 1151 This section allows the CMA to issue a final false information enforcement notice following the issue of a provisional false information enforcement notice under section 197 and after considering any representations received. The notice is to require payment of a monetary penalty where the CMA is satisfied that the relevant information provided to it is materially false or misleading and was provided without reasonable excuse.
- 1152 The CMA may impose a monetary penalty of the amount that it considers to be appropriate, subject to the statutory maxima set out in subsection (4).
- 1153 See the explanatory note to section 158 for background on providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.
- 1154 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £30,000 or, if higher, 1% of the total value of the enforcement subject's turnover. Section 204 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £30,000.
- 1155 Subsection (5) sets out the information that must be contained in the final false information enforcement notice.

Miscellaneous and appeals

Section 199: Statement of policy in relation to monetary penalties

- 1156 This section requires the CMA to produce and publish a statement about the considerations relevant to the exercise of its powers to propose and to impose monetary penalties in respect of:
- a. relevant infringements (sections 181 and 182),
 - b. breaches of undertakings (sections 188 and 189),
 - c. breaches of directions (sections 191 and 192),
 - d. provision of materially false or misleading information in connection with the exercise of the CMA's direct enforcement functions (sections 197 and 198).
- 1157 Subsection (2) specifies particular considerations which the statement must include.
- 1158 Subsection (3) provides for the CMA to revise its statement from time to time.
- 1159 Subsections (4) and (5) set out the process to be followed before the CMA first publishes or subsequently revises the statement. In particular, the Secretary of State must approve the final statement before first publication, and any subsequent revisions to it.
- 1160 Subsections (6) and (7) require the CMA to have regard to the most recent, Secretary of State-approved statement, at the time of the act or omission giving rise to the penalty, in deciding whether to impose a penalty under this Chapter and if so, the nature and the amount of the penalty.

Section 200: Interconnected bodies corporate

- 1161 Where the CMA gives a body corporate a final infringement notice, an online interface notice or a final breach of directions enforcement notice, this section gives the CMA a discretionary power to make the requirements of the notice binding upon one or more members of the same interconnected corporate group (subsections (1), (3) and (8)). The CMA has discretion to make some or all of the requirements of the notice, i.e. directions, enhanced consumer measures and monetary penalties, binding on other members of the same corporate group but only if the CMA considers it just, reasonable and proportionate to do so (subsection (4)).
- 1162 In considering whether it is just, reasonable and proportionate to exercise this power, the CMA may take into account, for example:
- a. to what extent any other group members have been the "brains" behind the infringement or have benefitted from it,
 - b. whether the infringing body corporate has sufficient funds to pay the penalty, and
 - c. whether to ensure the penalty is paid, it is necessary to make the requirement to do so binding on one or more members of the same corporate group.
- 1163 The underlying policy intent is to prevent the infringing body corporate from engaging in corporate restructuring to minimise or avoid liabilities.
- 1164 Subsection (2) sets out the circumstances in which a body corporate is considered to be or becomes a member of an interconnected corporate group for the purposes of this section. These include where the body corporate that is subject to the notice becomes a member of a group of interconnected bodies corporate after the notice is given, or an existing group of which it is a member is enlarged.

- 1165 Subsection (5) defines what an interconnected corporate group means for the purposes of this section.
- 1166 Any two bodies corporate are interconnected if one of them is a subsidiary of the other, or if both are subsidiaries of the same company (subsection (6)).
- 1167 Where the CMA imposes requirements on other members of the interconnected corporate group, it must give the final notice to them in addition to giving it to the enforcement subject (subsection (7)).

Section 201: Record-keeping and reporting requirements

- 1168 This section requires the CMA to keep a record of undertakings it has accepted and enforcement directions it has given under the direct enforcement regime provided through this Chapter, and any reviews it carries out of their effectiveness (subsection (1)).
- 1169 In addition, the CMA must prepare and publish a report on the effectiveness of its undertakings and enforcement directions, and the number and outcome of appeals brought under this Chapter, if requested to do so by the Secretary of State (subsections (2) and (3)). These reports will assist the Secretary of State in monitoring and evaluating the operation of the direct enforcement regime.

Section 202: Appeals

- 1170 This section provides for appeals from certain direct enforcement decisions taken by the CMA under this Chapter.
- 1171 Appealable decisions: Subsection (1) sets out the CMA decisions and directions against which an appeal under this section can be brought, when given by a relevant notice or imposed by virtue of a relevant notice. Subsection (8) defines “relevant notice” for the purpose of this section. These are any final direct enforcement notices under this Chapter through which a penalty may be imposed on the respondent.
- 1172 Persons able to bring appeals: Subsection (1) also sets out that any person to whom a relevant notice is given may bring an appeal. This includes a member of the same interconnected corporate group, to whom a relevant notice has been given under section 200.
- 1173 Grounds for appeal are set out in relation to a monetary penalty and directions in subsections (2) and (3) respectively. These provide for a right of appeal “on the merits”. The appeal court is able to:
- a. inquire into the correctness of the CMA’s findings of fact and into the correctness of the CMA’s analysis of, and conclusions drawn from, those facts,
 - b. inquire into the correctness of the CMA’s interpretation of the law,
 - c. inquire into the correctness of the discretion exercised by the CMA.
- 1174 The final ground of appeal, in subsection (2), paragraph (d) and subsection (3), paragraph (d), reflects in particular the Government’s intention that the appeal court will have discretion to hear fresh evidence on appeal. There could therefore arise circumstances where the appeal court finds that on the evidence before it, the CMA arrived at a reasonable conclusion, but on the basis of the new evidence before the court, the CMA’s conclusions were nonetheless wrong. This reflects the observation of the Court of Appeal in *CMA v Flynn Pharma*, [2020] EWCA Civ 339, at paragraph 146.
- 1175 Appropriate appeal courts (subsection (9)), these are:
- a. The High Court in England and Wales or Northern Ireland, or
 - b. The Outer House of the Court of Session in Scotland.

- 1176 Powers of appeal court (subsection (4)). The appeal court will be able to confirm, vary or set aside the CMA's notice, or any part of it. In addition, it may also remit the matter under appeal back to the CMA, save where the appeal relates to a final false information notice. For example, the appeal court may:
- a. Impose, revoke or vary the amount of any penalty imposed by virtue of a notice,
 - b. Give such directions, or take such other steps, as the CMA could have given or taken,
 - c. Make any other decision which the CMA could itself have made,
 - d. Confirm the CMA's decision and dismiss the appeal, including if the court concludes that the decision was the right one but for different reasons than those given by the CMA.
- 1177 The policy intent is that a court conducting an appeal on the merits under this section should interfere only if it concludes that the decision is wrong in a material respect (reflecting the observation of the Court of Appeal in *T-Mobile v Ofcom* [2008] EWCA Civ 1373, as approved by the Court of Appeal in *CMA v Flynn Pharma*, [2020] EWCA Civ 339, at paragraphs 143 to 147).
- 1178 The time limits within which an appeal must be brought are (see subsections (6), (7) and (9)):
- a. Within 60 days of the CMA giving a final notice to a person,
 - b. Except for appeals of final false information enforcement notices which must be brought within 28 days of the CMA giving that notice to a person,
 - c. The appeal court may extend the period for bringing an appeal, for example, to further the overriding objective set out in rule 1.1 of the Civil Procedure Rules (England and Wales).
- 1179 Effect of appeals (subsection (8)): The requirement to pay a penalty, and the requirement to pay compensation (under an enhanced consumer measure direction) will be suspended until an appeal of these decisions is determined. Otherwise, the making of an appeal will not automatically suspend the effect of any directions to which the appeal relates.

Chapter 5: Monetary penalties: general provision

Section 203: Information to accompany orders or notices imposing monetary penalties

- 1180 This section prescribes the information that must be stated in an order made by the court, or a final notice given by the CMA, that includes a requirement to pay a monetary penalty (subsections (1) and (2)). Subsection (6) clarifies the interpretation of 'service of order' as it relates to proceedings in Scotland.
- 1181 Subsections (3) and (4) provide for a person who receives an order or notice imposing a monetary penalty to apply to the court or the CMA, respectively, to vary the date or dates by which the penalty or portions of it are required to be paid.

Section 204: Determination of turnover

- 1182 Chapters 3 and 4 give discretionary powers to the courts and the CMA to impose monetary penalties of up to the higher of two caps – a specified amount or a percentage of a person's turnover.
- 1183 Subsection (1) of this section defines "turnover", for the purposes of calculating a penalty based on the recipient's turnover, as the recipient's global turnover (i.e. both in and outside the UK) as well as the turnover of any person who controls the recipient and the turnover of any person whom the recipient controls.

- 1184 Subsections (2) to (4) give a delegated power to the Secretary of State to make relevant provisions by regulations, including:
- a. for when a person is to be treated as controlled by another, and
 - b. methodologies for determining turnover for different types of entity.
- 1185 Regulations under this section are subject to the negative parliamentary procedure (subsection (5)).

Section 205: Power to amend amounts

- 1186 This section gives a delegated power to the Secretary of State to make regulations to amend the stated maximum monetary amount for the non-turnover based penalties for both the fixed penalties and daily penalties imposed under this Part. This power may be used to update maximum monetary amounts in order to offset the erosion of the real value of the fixed maxima through inflation, or to amend the maximum fixed or daily penalty amounts (both upwards and downwards) to achieve the intended policy outcome of effective deterrence of non-compliance in a proportionate manner. This power does not allow for amendment to the percentage amount, which is stated for the purpose of determining a maximum penalty by reference to the enforcement subject's turnover.
- 1187 The Secretary of State must consult with relevant parties before making these regulations (subsection (2)).
- 1188 Regulations under this section are subject to the draft affirmative procedure (see section 337, subsection (3)).

Section 206: Recovery of monetary penalties

- 1189 This section provides that if the period during which an appeal against a penalty may be made has expired without an appeal having been made, or where an appeal has been determined, withdrawn or disposed of the CMA may commence proceedings to recover the penalty and any unpaid interest as a civil debt (subsections (1) to (3)).
- 1190 Subsections (4) and (5) provide that where the CMA has given a final infringement notice requiring the payment of both a penalty and consumer compensation as an enhanced consumer measure, it must first consider whether any of the compensation it has ordered is due to consumers and it may choose to delay commencing penalty recovery proceedings until affected consumers get their money back. This means the CMA can be flexible in weighing up the direct benefit to affected consumers from receiving compensation against the need to enforce a penalty as soon as feasible. Such flexibility is desirable where an enforcement subject may lack sufficient financial resources to pay both compensation and the monetary penalty.

Section 207: Monetary penalties: further provision

- 1191 Subsection (1) provides for interest at the statutory rate (as specified in section 17 of the Judgments Act 1838) to be incurred on the unpaid balance if a penalty imposed by the court or the CMA is not paid by its deadline.
- 1192 Where a person applies to change the date or dates by which the penalty, or different portions of it, are to be paid, the payment(s) cannot be required from the person before the application is dealt with (subsection (2)).
- 1193 Where a person applies to appeal the penalty, its payment cannot be required from the person before the application is dealt with (subsection (3)).
- 1194 Subsection (4) enables the court to require immediate payment of outstanding penalties. Subsection (5) enables the CMA to do the same.

- 1195 If a penalty is varied by the court on appeal from a CMA final notice, the appeal court can decide when interest on the substituted penalty can be charged from (subsection (6)).
- 1196 Subsection (7) deals with the payment of monetary penalties by entities that are not a body corporate, for example partnerships or unincorporated associations. Such penalties are to be paid out of the assets or funds of the entity.
- 1197 Receipts from the courts' or the CMA's exercise of the power to impose monetary penalties will be paid into the relevant Consolidated Fund (subsection (8)).

Chapter 6: Investigatory Powers

Section 208: Investigatory powers of enforcers

- 1198 Schedule 5 of the Consumer Rights Act 2015 details the investigatory powers available to consumer enforcers for the purposes of civil enforcement of consumer protection law. This section introduces Schedule 17 to this Act, which amends Schedule 5 of the Consumer Rights Act 2015 to enhance the enforceability of statutory information notices given to a person under paragraph 14 of Schedule 5 and to clarify enforcers' ability, during onsite inspections, to access material which is held remotely. The key amendments in this Chapter and its corresponding Schedule are to:
- a. provide the courts with a power to impose a civil monetary penalty (subject to maximum amounts) where the court finds there has been non-compliance with an information notice without reasonable excuse,
 - b. provide a direct enforcement power for the CMA to decide whether an information notice that it has issued has been complied with and if not, to impose a civil monetary penalty (subject to the same maximum amounts referred to above in the context of the court's equivalent fining power) for any non-compliance without reasonable excuse,
 - c. set out the extra-territorial reach of enforcers' powers to request information by notice, to which the above sanctions apply, for purposes including the Part 3 enforcement regimes,
 - d. provide rules for service of notices, and
 - e. amend the prescribed conditions for seeking a premises entry warrant to make clear that they cover documents accessible from the premises as well as documents located on the premises.

Schedule 17: Investigatory powers

Paragraph 2: Penalties for non-compliance with information notices

- 1199 Paragraph 15 of Schedule 5 to the Consumer Rights Act 2015 sets out the procedure and required content of an information notice issued under paragraph 14 of Schedule 5 to the Consumer Rights Act. Paragraph 2 makes limited amendments to Schedule 5 of the Consumer Rights Act so that an information notice has to specify the circumstances in which non-compliance with the information notice could result in the imposition of a monetary penalty (subparagraph (2)).
- 1200 Subparagraph (3) inserts a new paragraph 16A into Schedule 5 to the Consumer Rights Act, which will give the court the power to impose a civil monetary penalty where the court finds that there has been a failure to comply with an information notice without reasonable excuse (paragraph 16A, subparagraph (3)). "Without reasonable excuse" means, for example, that the recipient of an information notice may not be subject to a penalty if they can provide evidence

- of an externally verifiable and unforeseen factor, outside of their reasonable control, that resulted in non-compliance with the information notice.
- 1201 The new paragraph 16A is in addition to the existing power of the court under paragraph 16 of Schedule 5 to the Consumer Rights Act to make an order requiring the recipient of the information notice to do anything that the court thinks is reasonable for them to do to ensure compliance with the information notice as well as ordering the recipient of the notice to pay the costs or expenses of the enforcer's application. Paragraph 16A, subparagraph (9) enables enforcers to combine an application for an order under paragraph 16 and an application for the imposition of a monetary penalty under paragraph 16A of Schedule 5 to the Consumer Rights Act, or to apply for one instead of the other.
- 1202 The Government considers that the provision of false or misleading information in response to an information notice constitutes a failure to comply with the information notice. Similarly, the destruction, disposal, concealment or falsification of requested information (e.g. destruction of a document or part of a document which contains the required information) also constitutes a failure to comply with the information notice.
- 1203 Paragraph 16A, subparagraph (4) covers the nature of the penalty that a court may impose where it finds that there has been a failure to comply with an information notice, without reasonable excuse. It specifies that the court may impose a fixed amount penalty or a penalty calculated by reference to a daily rate, or a combination of both. The court has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in paragraph 16A, subparagraph (5).
- 1204 The policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover is because:
- a. a penalty of up to only a fixed amount might not act as a meaningful deterrent for large companies with substantial turnover,
 - b. conversely, there may be smaller companies (such as a new start up) which have a low or negligible turnover, so a penalty of up to only the relevant percentage of turnover might not act as a meaningful deterrent, and
 - c. some individuals in scope of the penalty powers, such as a company director who consents or connives in the infringing practice (as an accessory) will not have a turnover and therefore the higher penalty will necessarily be a penalty of up to the fixed amount.
- 1205 Where the recipient of the information notice has a turnover that can be determined, a fixed amount penalty must not exceed £30,000 or, if higher, 1% of the total value of their turnover. Paragraph 16H concerns calculation of turnover for these purposes. Where the recipient of the notice does not have a turnover, the fixed penalty must not exceed £30,000 (paragraph 16A, subparagraph (5) (a)).
- 1206 Where the recipient of the information notice has a turnover that can be determined, a daily penalty must not exceed £15,000 per day or, if higher, 5% of the total value of their daily turnover. Where the recipient of the information notice does not have a turnover, the daily penalty must not exceed £15,000 (paragraph 16A, subparagraph (5) (b)).
- 1207 Paragraph 16A, subparagraph (6),(a) means that a daily penalty imposed by the court can only begin to accrue after the enforcer has served the court application on the recipient of the information notice, i.e. the point when they are clearly made aware of their failure to comply with the requirements of the information notice. A daily penalty stops accruing when the requirements of the information notice are met unless the court determines an earlier date (paragraph 16A, subparagraph (6) (b)).

- 1208 Paragraph 16A, subparagraph (7) sets out the information that must be included in a court order, or a notice accompanying service of the court order, that requires payment of a monetary penalty, including the type, amount and grounds for imposition of the penalty, the process and timing for its payment, and relevant rights to apply to change a payment date or to appeal against the penalty in the relevant jurisdiction.
- 1209 Paragraph 16A, subparagraphs (8) and (10) set out applicable rights for the recipient of the penalty to seek an amended payment schedule for, or to bring an appeal against, a penalty. A person who is required to pay a monetary penalty has a right to appeal the decision to impose a penalty, its nature or amount “on the merits”, in addition to their existing appeal rights.
- 1210 Where the recipient of the information notice applies to appeal the penalty, its payment cannot be required before this application is decided (paragraph 16A, subparagraph (11)).
- 1211 Paragraph 16A, subparagraph (12) extends the court’s powers under paragraph 16(4) and (5) to require payment of costs to its order-making powers under paragraph 16A.
- 1212 Paragraph 16A, subparagraph (13) clarifies that, in Scotland, the references to an order being served (in subparagraphs (7) and (8) of Paragraph 16A) includes service of an extract order in execution of or diligence on the order.

Non-compliance with notice under paragraph 14: powers of CMA to give provisional enforcement notice

- 1213 Paragraph 16B empowers the CMA to give a provisional enforcement notice if it reasonably believes that a recipient of an information notice it has given under paragraph 14 of Schedule 5 to the Consumer Rights Act has failed to comply with it (paragraph 16B, subparagraphs (1) and (2)).
- 1214 The provisional enforcement notice does not mean that the CMA has made a finding that the recipient of the information notice has failed to comply with its requirements and, where the provisional notice provides that the CMA is considering to impose a monetary penalty for the alleged failure, does not constitute a finding by the CMA that there is no reasonable excuse for such a failure. Rather, the provisional enforcement notice represents the CMA’s provisional view and proposed next steps. It allows the recipient of the information notice to know the case against them and, if they choose to do so, to respond in writing or orally to the provisional enforcement notice.
- 1215 This provisional enforcement notice must specify the CMA’s grounds for giving it including the alleged compliance failure(s) and any actions which the CMA considers should be taken to secure compliance with the information notice (paragraph 16B, subparagraph (3)(a) and (b)). It must also invite the recipient of the provisional enforcement notice to make representations and set out the process for doing so (paragraph 16B, subparagraph (3)(c) and (d)). If the respondent wishes to make oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional enforcement notice (paragraph 16B, subparagraph (4)).
- 1216 Where the CMA considers the alleged compliance failure with the information notice warrants imposing a monetary penalty, the provisional enforcement notice must also state that and give details about the type, amount and grounds for the proposed penalty (paragraph 16B, subparagraph (5)).
- 1217 The Government considers that the provision of false or misleading information in response to an information notice constitutes a failure to comply with the information notice. Similarly, the destruction, disposal, concealment or falsification of requested information (e.g. destruction of a document or part of a document which contains the required information) also constitutes a failure to comply with the information notice.

Non-compliance with notice under paragraph 14: power of CMA to give final enforcement notice

- 1218 Paragraph 16C sets out when and how the CMA may issue a final enforcement notice for non-compliance with an information notice it has given under paragraph 14 of Schedule 5 to the Consumer Rights Act. It can do so only after the end of the period for representations by the recipient on the provisional enforcement notice and after considering such representations (if any) (paragraph 16C, subparagraph (1)).
- 1219 The final enforcement notice can impose a requirement to pay a monetary penalty or a requirement to comply with directions that the CMA considers appropriate to secure compliance with the information notice or both (paragraph 16C, subparagraph (2)).
- 1220 The CMA can impose a monetary penalty only if the CMA is satisfied that the person lacks a reasonable excuse for the compliance failure (paragraph 16C, subparagraph (3)). This means, for example, that a person will be able to avoid a penalty if they can provide evidence of externally verifiable and unforeseen factors outside the person's control that resulted in the non-compliance.
- 1221 Paragraph 16C, subparagraph (4) covers the nature of the penalty that the CMA may impose. It specifies that the CMA may impose a fixed amount penalty or a penalty calculated by reference to a daily rate, or a combination of both. The CMA has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in paragraph 16C, subparagraph (5).
- 1222 See the explanatory note to paragraph 16A for the policy rationale for providing a penalty of up to the higher of a fixed amount or a percentage of turnover.
- 1223 Where the recipient of the information notice has a turnover that can be determined, a fixed amount penalty must not exceed £30,000 or, if higher, 1% of the total value of their turnover. Paragraph 16H concerns calculation of turnover for these purposes. Where the recipient of the notice does not have a turnover, the fixed penalty must not exceed £30,000 (paragraph 16C, subparagraph (5) (a)).
- 1224 Where the recipient of the information notice has a turnover that can be determined, a daily penalty must not exceed £15,000 per day or, if higher, 5% of the total value of their daily turnover. Where the recipient of the information notice does not have a turnover, the daily penalty must not exceed £15,000 (paragraph 16C, subparagraph (5)(b)).
- 1225 Paragraph 16C, subparagraph (6)(a) means that a daily penalty imposed by the CMA can only begin to accrue after the CMA has given a provisional enforcement notice, i.e. the point when the person is clearly made aware of their failure to comply with the requirements of the notice. A daily penalty stops accruing when the person fulfils the requirements of the notice unless the CMA determines an earlier date (paragraph 16C, subparagraph (6) (b)).
- 1226 Paragraph 16C, subparagraph (7) sets out what information must be included in a final enforcement notice that includes a requirement to pay a monetary penalty, including the type, amount and grounds for imposition of the penalty, the process and timing for its payment, and relevant rights to apply to change a payment date or to appeal against the final enforcement notice.
- 1227 Paragraph 16C, subparagraph (8) sets out applicable rights for a person to seek an amended payment schedule for a penalty.
- 1228 The CMA must have regard to the most recent published statement of policy (at the time of the acts or omissions giving rise to the penalty) detailing the considerations relevant to

whether to impose a penalty under this paragraph, and the nature and amount of any such penalty (paragraph 16C, subparagraph (9)).

1229 The CMA may publish a final enforcement notice it has given under this paragraph in a manner it thinks appropriate, e.g. on its website (paragraph 16C, subparagraph (10)).

1230 Paragraph 16C, subparagraph (11) applies sections 190 to 195 of the Act to directions given by the CMA in a final enforcement notice under this paragraph.

Appeals against final enforcement notice

1231 Paragraph 16D provides for appeals from final enforcement notices given by the CMA under paragraph 16C.

1232 Appealable decisions: an appeal under this paragraph can be brought against the requirement to pay a monetary penalty for failure to comply with an information notice, or directions aimed at achieving compliance with an information notice, or both (paragraph 16D, subparagraph (1)).

1233 Persons able to bring appeals (paragraph 16D, subparagraph (1)): Any recipient of the final enforcement notice has the right to bring an appeal against the notice.

1234 Grounds for appeal are set out in paragraph 16D, subparagraph (2) in relation to appeals against the imposition of a monetary penalty and paragraph 16D, subparagraph (3) in relation to appeals against CMA directions given through a final enforcement notice. These provide for a right of appeal on the merits. The appeal court will be able to:

- a. inquire into the correctness of the CMA's findings of fact and into the correctness of the CMA's analysis of, and conclusions drawn from, those facts,
- b. inquire into the correctness of the CMA's interpretation of the law,
- c. inquire into the correctness of the discretion exercised by the CMA.

1235 The final ground of appeal, in paragraph 16D, subparagraph (2)(d) and subparagraph (3) (d) reflects in particular the Government's intention that the appeal court will have discretion to hear fresh evidence on appeal. There could therefore arise circumstances where the appeal court finds that on the evidence before it, the CMA arrived at a reasonable conclusion but on the basis of the new evidence before the court, the CMA's conclusions were nonetheless wrong. See also the explanatory note for section 202.

1236 Appropriate appeal courts (paragraph 16D, subparagraph (8))

- a. The High Court in England and Wales or Northern Ireland, or
- b. The Outer House of the Court of Session in Scotland.

1237 Powers of appeal court (paragraph 16D, subparagraph (4)). The appeal court will be able to confirm, vary or set aside the CMA's notice, or any part of it, as well as

- a. Impose, revoke or vary the amount of any penalty,
- b. Give such directions, or take such other steps, as the CMA could have given or taken,
- c. Make any other decision which the CMA could itself have made,
- d. Confirm the CMA's decision and dismiss the appeal, including if the court concludes that the decision was the right one but for different reasons than those given by the CMA.

- 1238 The Government's policy intent is that a court conducting an appeal on the merits under this section should interfere only if it concludes that the decision is wrong in a material respect (reflecting the observation of the Court of Appeal in *T-Mobile v Ofcom* [2008] EWCA Civ 1373, as approved by the Court of Appeal in *CMA v Flynn Pharma*, [2020] EWCA Civ 339, at paragraphs 143 to 147).
- 1239 Timing to bring an appeal: (paragraph 16D, subparagraphs (5) and (6)):
- a. Within 28 days of the CMA giving a final enforcement notice to a person
 - b. The appeal court may extend the period for bringing an appeal, for example, to further the overriding objective set out in rule 1.1 of the Civil Procedure Rules for England and Wales.
- 1240 Effect of appeals (paragraph 16D, subparagraph (7)): The requirement to pay a civil monetary penalty will be suspended until the appeal is determined. Otherwise, the making of an appeal will not automatically suspend the effect of any directions to which the appeal relates.

Recovery of penalties imposed under paragraph 16C

- 1241 Paragraph 16E provides that if the period during which an appeal against a penalty for non-compliance with an information notice may be made has expired without an appeal having been made, or such an appeal has been made and determined, the CMA may commence proceedings to recover the penalty and any unpaid interest as a civil debt due to the CMA (paragraph 16E, subparagraphs (1) to (3)).

Statement of policy in relation to penalties under paragraph 16C

- 1242 Paragraph 16F requires the CMA to produce and publish a statement about the considerations relevant to the exercise of its powers to propose and to impose monetary penalties for non-compliance with information notices given by the CMA.
- 1243 Paragraph 16F, subparagraph (2) specifies particular considerations which the statement must include.
- 1244 Paragraph 16F, subparagraph (3) provides for the CMA to revise its statement from time to time, and to publish the revised statement.
- 1245 Paragraph 16F, subparagraph (4) sets out the process to be followed before the CMA first publishes or subsequently revises the statement. In particular, the Secretary of State must approve the final statement before first publication, and any subsequent revisions to it.
- 1246 See the explanatory note for paragraph 16C, subparagraph (9), which requires the CMA to have regard to the relevant version of the statement of policy in deciding whether, and if so how, to impose a civil monetary penalty for non-compliance with information notices given by the CMA.

Penalties imposed under paragraphs 16A and 16C: further provision

- 1247 Paragraph 16G makes further provisions for penalties imposed by the court under paragraph 16A and those imposed by the CMA under paragraph 16C. It provides for interest at the statutory rate (as specified in section 17 of the Judgments Act 1838) to be incurred on the unpaid balance of a penalty if a penalty imposed by the court or the CMA is not paid by its deadline (paragraph 16G, subparagraph (1)).
- 1248 Where a person applies to change the date or dates by which the penalty, or different portions of it, are to be paid, the payment(s) cannot be required from the person before the application is dealt with (paragraph 16G, subparagraph (2)).

- 1249 Paragraph 16G, subparagraph (3) enables enforcers to require immediate payment of outstanding penalties.
- 1250 If upon the appeal of the final enforcement notice, the penalty imposed by the CMA is varied by the court, then the court can decide the date from when interest on the substituted penalty can begin to be charged (paragraph 16G, subparagraph (4)).
- 1251 Paragraph 16G, subparagraph (5) deals with the payment of monetary penalties by entities that are not a body corporate, for example partnerships or unincorporated associations. Such penalties are to be paid out of the assets or funds of the entity.
- 1252 Money received from the courts' or the CMA's exercise of the power to impose monetary penalties will be paid into the relevant Consolidated Fund (paragraph 16G, subparagraph (6)).

Meaning of "turnover" for purposes of paragraphs 16A and 16C

- 1253 Paragraph 16H, subparagraph (1) defines "turnover", for the purposes of calculating a penalty based on the recipient's turnover, as including the recipient's global turnover (i.e. both in and outside the UK) as well as the turnover of any person who controls the recipient and the turnover of any person whom the recipient controls.
- 1254 Paragraph 16H, subparagraphs (2) to (4) give a delegated power to the Secretary of State to provide, by regulations:
- a. for when one person is to be treated as controlled by another, and
 - b. methodologies for determining turnover including for different types of entity.
- 1255 Regulations under paragraph 16H are subject to the negative parliamentary procedure (paragraph 16H, subparagraph (6)).

Power to amend amounts

- 1256 Paragraph 16I(1) gives a delegated power to the Secretary of State to make regulations to amend the stated maximum monetary amount of the non-turnover based penalties for both the fixed penalties and daily penalties imposable under paragraphs 16A(5) and 16C(5). This power may be used to update maximum monetary amounts in order to offset the erosion of the real value of the fixed maxima through inflation, or to amend the maximum fixed or daily penalty amounts (both upwards and downwards) to achieve the intended policy outcome of effective deterrence of non-compliance in a proportionate manner. This power does not allow for amendment to the percentage amount, which is stated for the purpose of determining a maximum penalty by reference to the enforcement subject's turnover.
- 1257 The Secretary of State must consult with relevant parties before making these regulations (subparagraph (2)).
- 1258 Regulations under this paragraph are subject to the draft affirmative procedure (subparagraph (4)), see section 337, subsection (3)).

Miscellaneous

- 1259 Paragraph 16J, subparagraph (1) prevents the CMA from using the court-based enforcement regime (under paragraph 16A) to enforce against failure to comply with an information notice where it has used the direct enforcement regime in respect of the same failure, i.e. given the information notice recipient a final enforcement notice in respect of the same failure.
- 1260 Paragraph 16J, subparagraph (2) prevents the CMA from using the direct enforcement regime in respect of a failure to comply with an information notice where the CMA has already used the court-based regime in respect of the same failure. As a result, the CMA will only be able

to use either the court-based enforcement regime (under paragraphs 16 and 16A) or its own direct enforcement regime (under paragraphs 16B and 16C) in relation to a failure to comply with a CMA information notice.

Paragraph 3: extra-territorial application in relation to notices

- 1261 Paragraph 3 inserts new paragraph 17A in Schedule 5 to the Consumer Rights Act which sets out the express extra-territorial reach of enforcers' powers to request information by notice under paragraph 14 of Schedule 5, to which the new monetary penalty powers described above will apply.
- 1262 An information notice may be given to a person who is outside the UK (paragraph 17A, subparagraph (2), sub-point (a)). (This paragraph does not affect the enforcers' ability to give information notices to persons in the UK).
- 1263 Paragraph 17A, subparagraph (2), sub-point (b) provides that the information notice may require the provision of information, which includes documents, held outside the UK. For instance, if the person to whom the information notice is addressed is inside the UK and can access required information held outside of the UK (e.g. in offshore cloud storage), they will be obliged to bring this information into the jurisdiction and produce it.
- 1264 The power to give a person a notice under paragraph 14 may be exercised in respect of two categories of recipients – potential enforcement subjects (defined in paragraph 17A, subparagraph (6)) and third parties. The latter category includes, for example, banks, payment systems service providers, domain name registrars, operators of servers or internet platforms or other intermediaries.
- 1265 An additional test needs to be met for an information notice to be given to a third party overseas, namely they must have a UK connection (paragraph 17A, subparagraphs (3) to (5)). Persons who are incorporated, serviced and operated outside the UK can meet the UK connection test if they direct their business activities to UK consumers (paragraph 17A, subparagraph (5), sub-point (d)). See the explanatory note for section 149 in relation to the "directing activities" test.
- 1266 For example, if the enforcer considered that details from a trader's bank account were relevant to determining whether the trader had engaged in a relevant infringement, the enforcer could give an information notice to the trader's bank seeking the relevant information as long as the bank directed its business activities to consumers in the UK.

Paragraph 4: Means of giving notices

- 1267 Paragraph 4 inserts new paragraph 17B in Schedule 5 to the Consumer Rights Act which sets out the process by which enforcers may give notices to persons under Part 3 of Schedule 5, including to business entities registered or operating outside the UK.
- 1268 Paragraph 17B, subparagraph (2) sets out four main means of service applicable to notices to be given to any person whether an individual or an artificial entity (referred to here, in either case, as the 'recipient').
- 1269 Paragraph 17B, subparagraphs (6) and (7) expand on the meaning of a recipient's proper address for the purposes of subparagraph (2)(b) and (c), including, in relation to partnerships and any other type of firm, provision for service to the recipient's principal office.

- 1270 Paragraph 17B, subparagraph (8) expands on the meaning of a recipient's email address for the purposes of subparagraph (2)(d).
- 1271 Paragraph 17B, subparagraphs (7) and (8) respectively provide, where no other definition of the recipient's proper address or (as the case may be) the recipient's email address applies, for service to an address, or email address, by means of which the enforcer reasonably believes that the notice will come to the attention of the recipient.
- 1272 Paragraph 17B, subparagraphs (3) to (5) provide that service on each of the listed kinds of business entity can be effected by serving on an individual with the specified office or role in relation to the entity. The means of service provided for service on recipients in subparagraph (2) and related subparagraphs equally apply for the purposes of service on the specified individual.

Paragraph 5: Access to documents

- 1273 This paragraph makes clarificatory amendments to Part 4 of Schedule 5 to the Consumer Rights Act concerning enforcers' ability, during onsite inspections, to access material which is held remotely, off-site – in particular where it is stored electronically. These amendments cover paragraph 32 of Part 4 of Schedule 5 only, which provides the conditions for a warrant in the context of an enforcer exercising its onsite investigatory powers. Save for this provision, the Government considers that Part 4 of Schedule 5 is clear that enforcers have the appropriate powers to require the production of information held remotely, when exercising their relevant onsite investigatory powers without a warrant.
- 1274 Subparagraphs (a) and (b) to this paragraph amend paragraph 32 of Schedule 5 to make clear that the conditions for a warrant to enter premises apply where (i) documents are accessible from the premises (even if the documents are not located on the premises), and (ii) it is likely that documents accessible from the premises would be concealed or interfered with, or access to them would otherwise be restricted, if notice of entry on the premises were given to the occupier.
- 1275 The effect of these amendments is that enforcers can obtain a warrant in relation to premises on the basis that it would give them access to information which may be remotely stored in electronic form but still be accessible from the premises – for example information held in a “cloud” platform rather than saved on a physical device on the business premises. Before the rise of cloud computing, that information might previously have been held in physical files on the premises or saved on a computer hard drive on the premises.

Paragraph 6: Meaning of firm

- 1276 This paragraph makes an amendment to paragraph 8 of Schedule 5 to the Consumer Rights Act to define “firm” for the purposes of that Schedule.

Chapter 7: Miscellaneous

Section 209: Powers to amend Schedule 15 and Schedule 16

- 1277 The court-based regime provided by Chapter 3 of this Part is limited in scope to commercial practices which contravene the enactments, obligations and rules of law listed, or to the extent listed, in Schedule 15. Among other matters, this section gives a delegated power to the Secretary of State to make regulations that add, remove or vary the enactments listed in Schedule 15 and hence to amend or update the scope of the court-based enforcement regime going forward (subsection (1), paragraph (a)).

- 1278 The effect of subsection (1), paragraphs (b) and (d) is that responsibilities of enforcers for enforcing different consumer protection enactments, obligations and rules of law may be updated if and when they evolve over time – for example, if it is no longer appropriate for a particular enforcer to be able to enforce particular consumer protection enactments because of a change in enforcement and/or regulatory remits.
- 1279 The CMA direct enforcement process provided by Chapter 4 of this Part is limited in scope to commercial practices which contravene the enactments specified, or to the extent specified in Schedule 16. This section also allows the Secretary of State to add, remove or vary the enactments listed in Schedule 16 and hence to amend the scope of the CMA direct enforcement regime going forward (subsection (1), paragraph (e)).
- 1280 The effect is that the scope of the CMA direct enforcement regime can be updated if regulation necessary to protect the economic interests of consumers changes in line with changes in market, trader and consumption behaviour.
- 1281 Subsections (2) and (3) limit the types of enactments that can be added to, or varied in, Schedules 15 and 16.
- 1282 Regulations made under this section are subject to the draft affirmative procedure (subsection (4)), see section 337, subsection (3)).

Section 210: Rules

- 1283 This section allows the CMA to make rules, subject to approval by the Secretary of State through secondary legislation, to set out procedural administrative details of the CMA direct enforcement regime. These rules will supplement the framework provided in Chapter 4 of this Part.
- 1284 The rules made under this section may provide for the exercise of CMA direct enforcement functions by the CMA's Board, Panel and personnel (subsection (2)) and may cover a range of procedures including arrangements for ensuring confidential information is appropriately protected, arrangements for enforcement subjects to make representations to the CMA and arrangements for complaints' handling (subsection (3)).

Section 211: Procedural requirements for making of rules

- 1285 This section sets down the process for rule-making under section 210. Firstly, subsection (1) requires the CMA to consult with stakeholders during its preparation of the rules. The effect is that the rules (or variations to them) will be subject to the scrutiny of traders, their representatives and other interested parties.
- 1286 Secondly, subsection (2) requires the CMA to obtain the Secretary of State's approval (by regulations) before bringing any rule into operation or varying any rule. Subsection (3) empowers the Secretary of State to approve a rule in the form that it is submitted by the CMA or to approve a rule after modification. Where the Secretary of State proposes modifications to a rule or variation of it, subsection (4) requires the Secretary of State to first notify the CMA and take into account the CMA's comments on the proposed modifications before approving the rule.
- 1287 Subsection (5) empowers the Secretary of State (by regulations) to vary or revoke rules or to direct the CMA to vary or revoke rules. The process described in the paragraph above does not apply where the Secretary of State directs the CMA to vary or revoke rules in accordance with the direction (subsection (6)).
- 1288 Regulations containing the rules are subject to the negative parliamentary procedure (subsection (7)).

Section 212: Guidance

- 1289 This section requires the CMA to prepare and publish guidance about its general approach to carrying out its direct enforcement functions. The guidance will provide a greater level of detail and clarity to traders and other stakeholders about how this direct enforcement regime will operate in practice.
- 1290 Subsection (2) sets out the information that the guidance must include. Subsection (3) enables the CMA to prepare and publish guidance on further matters at its discretion. Subsection (4) sets out that the CMA must keep the guidance under review and may update this guidance.
- 1291 Subsections (5) and (6) place requirements on the CMA in relation to consultation and approval preceding any publication or revision of this guidance.

Section 213: Defamation

- 1292 This section protects the CMA against actions for defamation as a result of the exercise of functions under this Part.

Section 214: Minor and consequential amendments

- 1293 This section introduces Schedule 18 which contains minor and consequential amendments in relation to this Part.

Schedule 18: Part 3: Minor and consequential amendments

- 1294 Schedule 18 contains minor and consequential amendments in relation to this Part.

Section 215: Transitional and saving provision

- 1295 This section introduces Schedule 19 which provides transitional and saving provision in connection with this Part.

Schedule 19: Part 3: Transitional and saving provisions in relation to Part 3

- 1296 Schedule 19 contains transitional and saving provisions regarding:
- a. the operation of “the new law”, i.e. Chapters 3 and 4 of Part 3 to the Act (and any legal provisions relating to those Chapters, including Schedule 5 to the Consumer Rights Act 2015 as amended by this Act), and
 - b. the operation of “the old law”, i.e. Part 8 of the Enterprise Act 2002 as it had effect immediately before the commencement of this Act (and any provisions of law relating to that Part, including Schedule 5 to the Consumer Rights Act 2015, as they had effect immediately before the commencement of this Act).
- 1297 General rules: The starting position is that the new law applies to conduct that takes place on or after the commencement date of Chapters 3 and 4 of Part 3 to the Act including where conduct of concern is likely to take place on or after the commencement date.
- 1298 Accordingly, the old law continues to apply (paragraph 2, subparagraphs (1)-(3)):
- a. to conduct which takes place before the commencement date of Chapters 3 and 4;
 - b. to enforcement action regarding breach of a court order made under Part 8 of the Enterprise Act 2002 or an undertaking given to the court under that Part; and
 - c. where proceedings have been started under Part 8 of the Enterprise Act 2002 against a person before the commencement of the new law for the purposes of the continuation and completion of those proceedings.

- 1299 Paragraph 3 makes provision for how the new law applies to continuing conduct and paragraph 4 makes provision for its application to undertakings given to an enforcer under Part 8 of the Enterprise Act 2002.
- 1300 Continuing conduct is an act or omission which starts before the new law has commenced (i.e. pre-commencement) but is repeated or continues on or after the new law's commencement (i.e. post-commencement). Paragraph 3, subparagraph (2) provides that the new law applies in full to the continuing conduct to the extent that it takes place post-commencement. In these circumstances, paragraph 3, subparagraph (3) provides that the new law also applies in respect of the person's pre-commencement conduct for the purposes of enabling the taking of enforcement action in relation to that conduct. However, paragraph 3, subparagraph (4) provides that in relation to the pre-commencement relevant infringement, a requirement under Chapter 3 or 4 of Part 3 can be imposed only if a requirement of a corresponding kind could have been imposed under the old law. This means that new enforcement powers, such as monetary penalties, cannot be applied retrospectively.
- 1301 Paragraph 3, subparagraph (5)) provides, regard may be had to the part of the continuing conduct which takes place pre-commencement for the purpose of enabling enforcement action in respect of the post-commencement conduct under the new law (paragraph 3, subparagraphs (5)). This ensures, for example, that the CMA can use its new direct enforcement powers (under Chapter 4 of Part 3) against a trader who is misleading a consumer by continuing to rely upon unfair contract terms post-commencement of the CMA's new powers, albeit the relevant contract (containing the unfair terms) was agreed between the trader and the consumer pre-commencement of Chapter 4.
- 1302 Paragraph 4, subparagraphs (1) and (2) provide that where a breach of an undertaking given to an enforcer under Part 8 Enterprise Act 2002 takes place on or after the date of commencement of the new law, then the enforcer may only enforce this undertaking under the old law.
- 1303 However, if the enforcer considers that this act or omission constituting the breach of the undertaking may also be a relevant infringement under the new law (or a person is an accessory to the infringing practice), the enforcer has a choice whether to enforce that breach under the new law, or the old law (if the act or omission would have amounted to a domestic or Schedule 13 infringement under Part 8 of the Enterprise Act 2002) (paragraph 4, subparagraphs (3) to (5)). If the enforcer decides to pursue the breach under the new law (i.e. under Chapter 3 or, in the case of the CMA, under Chapter 4 of Part 3), then the matter must be treated as a "new" case. For example, in relation to beginning Chapter 3 enforcement, it may be appropriate to commence consultation under section 155. This approach ensures that a breach of an undertaking given to an enforcer under Part 8 Enterprise Act 2002 cannot result in a penalty being imposed retrospectively under the Part 3 enforcement regimes.
- 1304 Paragraph 4, subparagraph (6) makes provision for the treatment of a breach of undertaking where the relevant act or omission is continuing.
- 1305 Paragraph 5 sets out the transitional provisions that apply to information notices under paragraph 14 of Schedule 5 to the Consumer Rights Act 2015. The new powers and related provisions in Schedule 17 to the Act for the court and the CMA to enforce compliance with these information notices may only be exercised in relation to information notices given on or after the relevant commencement date of the Act. This means that monetary penalties for non-compliance with information notices cannot be imposed retrospectively.

Section 216: Enforcement of requirements relating to secondary ticketing

- 1306 This section amends consumer protection legislation to confer additional enforcement powers on the CMA in relation to secondary ticketing.
- 1307 Subsections (2) and (4) amend section 93 of, and Schedule 10 to, the Consumer Rights Act 2015 to make the CMA an enforcement authority for the purposes of Chapter 5 of Part 3 of that Act. Chapter 5 (inter alia) requires, in relation to the re-sale of tickets for recreational, sporting or cultural events in the United Kingdom, operators of secondary ticketing facilities and persons re-selling those tickets on those facilities to provide specified information about those tickets. The enforcement provisions will allow the CMA to impose a financial penalty on a person for breach of the requirements of Chapter 5.
- 1308 Subsection (5) amends the Breaching of Limits on Ticket Sales Regulations 2018 (S.I. 2018/735) to give the CMA enforcement functions under those regulations. Those regulations make it an offence to use software to purchase tickets for those events in excess of any sales limit on the purchase of those tickets with a view to financial gain. Subsection (3) enables the CMA to use the investigatory powers in Schedule 5 to the Consumer Rights Act 2015 for the purpose of investigating offences under those regulations.
- 1309 The enforcement powers conferred by this section are available in addition to (and do not in any way limit) the other powers that the CMA has under Part 3 of this Act in relation to infringements of Chapter 5 of Part 3 of the 2015 Act and of the regulations.

Chapter 8: Interpretation of Part

Section 217: Supply of goods or digital content

- 1310 This section provides for how references to the supply of goods or digital content should be construed across Part 3. It restates, simplifies and updates relevant provisions in section 232 and section 233 of the Enterprise Act 2002.
- 1311 Subsection (2) provides that references to a person making the (actual) supply of goods and digital content is to be read as including references to a person seeking to make such supply.
- 1312 Subsection (3) clarifies that the supply of goods includes the construction of buildings and other structures by one person for another.
- 1313 The effect of subsections (4) and (5) is that in these types of agreements the dealer is treated as the supplier alongside the finance company which is technically the supplier under the contract with the consumer.

Section 218: Supply of services

- 1314 This section provides how references to the supply of services should be construed across Part 3. It restates and updates section 234 of the Enterprise Act 2002.
- 1315 Subsection (2) provides that references to a person making the (actual) supply of services is to be read as including references to a person seeking to make such supply and subsection (5) provides a non-exhaustive definition for what constitutes supplying services.
- 1316 Subsections (3) and (4) excludes a contract of employment between an employer and employee from the definition of supply of services as well as a contract of apprenticeship.

Section 219: Accessories

- 1317 This section sets out who is an accessory to the commercial practice of a body corporate. This section and section 220 replace section 222 of the Enterprise Act 2002.

1318 Where a body corporate has committed or is committing a relevant infringement, an accessory to such practice is a person who has a special relationship with the infringing body corporate and has consented or connived in the practice (subsection (2)). Subsection (2), paragraph (c) has the effect that an accessory cannot be an accessory to future infringing practices. An accessory could be subject to enforcement action under this Part in addition to or instead of the infringing body corporate.

Section 220: Special relationships

1319 This section defines what constitutes having a special relationship with a body corporate. It covers two scenarios – where a person is a controller of the body corporate (subsections (2), paragraph (a) and subsections (3) - (7)) or where a person is an officer of a body corporate or purporting to act in such capacity (subsection (2), paragraph (b)).

Section 221: Enhanced consumer measures

1320 This section defines three types of enhanced consumer measures, referred to as “redress”, “compliance” and “choice” measures. It substantively replicates the definitions in section 219A of the Enterprise Act 2002. Enhanced consumer measures may be required under:

- a. (Court- based regime (Chapter 3))
 - i. an enforcement order made by the court (see section 157(1));
 - ii. an undertaking accepted by the court (see section 157(1));
 - iii. undertakings accepted by enforcers (see section 164(1) but note section 177 relating to private designated enforcers and enhanced consumer measures);
- b. (CMA direct enforcement regime (Chapter 4))
 - i. as a direction in a final infringement notice (see section 183(1));
 - ii. an undertaking accepted by the CMA (see section 185(3))

1321 Subsection (2) describes redress measures, which include offering compensation or other redress to affected consumers. Subsection (5) explains that affected consumers are not limited to those consumers who have suffered loss as a result of the infringing practice (that is conduct that has given rise to the undertaking, notice or court order in question) but also covers consumers who have been otherwise affected. This may include non-financial losses or instances of distress or inconvenience.

1322 Where the infringing practice relates to a contract, subsection (2), paragraph (b) states that measures in the redress category can include giving consumers the option to terminate that contract. Subsection (2), paragraph (c) allows for measures intended to be in the collective interests of consumers in cases where affected consumers cannot be identified or doing so would require a disproportionate cost to those giving the undertaking or to those against whom an order or notice is made. Measures in these circumstances could include, for example, the business making an appropriate charitable donation (where that charity acts in the interests of consumers). Subsection (2), paragraph (c) only applies in the circumstances outlined above. It does not apply in circumstances where affected consumers have been identified and choose to decline the redress offered. Consumers retain the right to refuse offers of redress, whether in an order, notice or undertaking, and instead take their own civil action against the person that has caused them detriment.

1323 Subsections (3) and (4) describe compliance and choice measures. Compliance measures are intended to increase business compliance with the law and to reduce the likelihood of further breaches.

- 1324 Compliance measures might include the person subject to the order, undertaking or notice:
- a. appointing a compliance officer;
 - b. introducing a complaints handling process;
 - c. improving their record keeping; or
 - d. signing up to an established customer review / feedback site.
- 1325 Choice measures help consumers obtain relevant information to enable them to make better purchasing decisions.

Section 222: Other interpretative provisions

- 1326 This section defines certain terms for the purposes of this Part. All terms that are not listed below are self-explanatory (or, where the definition of the term is found in another section, have been explained elsewhere in these explanatory notes).
- 1327 The definition of business is non-exhaustive and widely drawn. It includes a trade, craft or profession (whether or not they are carried on for gain and reward), the activities of public bodies and the activities of others carried on for gain or reward (monetary or otherwise). For example, a trader may offer free repairs forever to obtain goodwill or reputational advantage. The underlying policy intent is for any commercial practices where non-monetary gain is made by a trader, such as the act(s) of providing free repairs, to be within scope of the enforcement regimes.
- 1328 The definition of goods is non-exhaustive and includes buildings and other structures (as a subcategory of immovable property).

Section 223: Index of defined expressions

- 1329 This section is self-explanatory.

Part 4: Consumer rights and disputes

Chapter 1: Protection from unfair trading

Introduction

Section 224: Overview

- 1330 This Chapter largely recreates the legal effect (with minor amendments) of the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277) and has the same core objective of protecting consumers from unfair commercial practices. The regulations were made to implement in the UK the Unfair Commercial Practices Directive 2005/29/EC (UCPD).
- 1331 This section provides an overview of the sections in this Chapter on unfair business to consumer commercial practices.
- 1332 Section 225 sets out the unfair commercial practices that are prohibited.
- 1333 Sections 226 to 230 set out details of commercial practices that are misleading, aggressive, omit material information, or contravene the requirements of professional diligence.
- 1334 Section 231 sets out how the unfair commercial practices are enforced by public bodies.
- 1335 Sections 232 to 235 confer the consumer rights of private redress in relation to certain unfair commercial practices and provide for related matters.
- 1336 Section 236 sets out what the consumer may do when they are supplied with a product from a trader that they did not request.
- 1337 Sections 237 to 241 set out the criminal offences in relation to unfair commercial practices and provide for related matters.
- 1338 Sections 242 to 252 set out miscellaneous and interpretative provisions as well as consequential and transitional provisions.

Prohibition of unfair commercial practices

Section 225: Prohibition of unfair commercial practices

- 1339 This section sets a general prohibition on unfair commercial practices.
- 1340 Subsection (2) prohibits any person who is responsible for the content of a code of conduct or for monitoring compliance with a code of conduct from promoting unfair commercial practices through the content of that code or in connection with that code. A code of conduct under Section 249 means an agreement or set of rules that define the behaviour of traders who agree to be bound by it. This includes codes of conduct relating to specific trades or industries.
- 1341 Subsection (3) defines “commercial practice”, “consumer” and “trader” for the purposes of this Chapter.
- 1342 The definition of a commercial practice is broad and far reaching. A commercial practice can be derived from a single act or omission, depending on the relevant circumstances, as well as from repeated behaviour and a course of conduct (*R v X Ltd* [2013] EWCA Crim 818, at paragraph 22, *Warwickshire County Council v Halfords Autocentres Ltd* [2018] EWHC 3007 (admin), at paragraph 28). Subsection (3), paragraph (b) of the definition of commercial practice makes it clear that a commercial practice includes acts or omissions by a trader relating to a third party trader’s goods, services or digital content. Subsection (3), paragraph (c) of the definition of commercial practice establishes that an act or omission by a trader that

enables private individuals (i.e. consumers) to sell products to that trader or another person are included in the definition of commercial practice. Subsection (5) makes it clear that a commercial practice includes acts or omissions which take place before, during or after promotion or supply. For example, the acts or omissions of a debt collection agency who acquires claims derived from consumer credit agreements with consumers and seeks to recover these debts some considerable time after the original consumer credit agreements were concluded can amount to a commercial practice. An act or omission need not relate to a promotion or supply to or from consumers which actually occurs, in order to amount to a commercial practice. This concept is concerned with systems rather than individual transactions between a consumer and a business. (*Warwickshire County Council v Halfords Autocentres Ltd* [2018] EWHC 3007 (admin), at paragraph 29).

- 1343 The definition of “consumer” makes it clear that a consumer must be an individual (i.e. a natural person) and so excludes body corporates. The individual must be acting for purposes wholly or mainly outside of their business. It is irrelevant whether the individual is supplying, or receiving, a good, service, or digital content. The words “wholly or mainly” make it clear that:
- a. The individual is still a consumer when acting for dual purposes (a consumer purpose and a business purpose) as long as the consumer purpose is the main purpose. This means, for example, that a person who buys a kettle for their home, works from home one day a week and uses it on the days when working from home would still be a consumer. An individual who occasionally sells their unwanted and used clothes on eBay is also likely to be a consumer. Conversely, a sole trader who operates from a private dwelling and buys a printer of which 95% of the intended use is for the purposes of their business, is unlikely to be a consumer.
 - b. An individual who supplies goods or services for mainly non-business purposes to a person who receives them for business purposes will still be a consumer. For example, an individual who sells their personal vinyl record collection to a second-hand record shop is likely to be a consumer.
 - c. Further, an individual who acts for the purpose of a future business, which is not yet up and running, is likely to be a consumer. For example, an individual who participates in training to gain skills or a qualification with a view to supply products for business purposes in the future is likely a consumer.
- 1344 Subsection 3, paragraph (a) of the definition of trader states that any person who is acting for purposes relating to their business is a trader.
- 1345 Subsection 3, paragraph (b) of the definition of trader says that a person (for example, an agent, subcontractor or representative) acting in the name of, or on behalf of, another person, for purposes relating to that other person’s business, is also considered a trader for the purposes of this chapter. It is irrelevant whether a person acting in the name of, or on behalf of, another is also acting for their own business in relation to the same act or omission.
- 1346 Subsection (4) provides that for the purposes of the prohibition in subsection (1), unfair practices are commercial practices that are likely to cause the average consumer to take a transactional decision they would not have taken otherwise as a result of misleading actions, misleading omissions, aggressive practices, or a contravention of the requirements of professional diligence; that omit material information from an invitation to purchase; and commercial practices specified in Schedule 20. Commercial practices specified in Schedule 20 are considered unfair practices in all circumstances.

Schedule 20: Commercial practices which are in all circumstances considered unfair

- 1347 This Schedule lists the commercial practices which are automatically considered unfair in all circumstances, and which are prohibited. The transactional decision test does not apply to these practices, meaning that a trader that carries out any of these commercial practices can be sanctioned by enforcers without assessing whether it is likely to cause the average consumer to take a different transactional decision in relation to a product.
- 1348 Subsection 13(1) prohibits the submitting or commissioning of fake consumer reviews or consumer reviews that conceal the fact that they have been incentivised. A description of what a consumer review that conceals the fact that it has been incentivised means is provided by subsection 13(5)(c).
- 1349 Subsection 13(2) prohibits publishing consumer reviews, or consumer review information, in a misleading way, for example platforms (or third-party traders operating on platforms) publishing consumer reviews in a misleading way by swapping a review of one product to another product ('catalogue abuse'). A non-exhaustive list of what publishing in a misleading way includes is also provided by subsection 13(5)(i). Definitions of 'consumer review information' and 'publishing' are provided by subsections 13(5)(d) and 13(5)(h) respectively.
- 1350 Subsection 13(3) requires traders that publish consumer reviews or consumer review information, from third parties to take reasonable and proportionate steps to prevent inadvertent publication of fake consumer reviews, consumer reviews that conceal the fact they have been incentivised, or consumer review information that is false or misleading and remove such reviews or information. What are reasonable and proportionate steps will depend on the circumstances of the case and what is necessary to prevent the publication of this information, and include assessment of the risk of publication of false or misleading information. The Competition and Markets Authority will publish guidance to assist traders in understanding their obligations.
- 1351 Subsection 13(4) prohibits offering services to traders to (a) submit or commission fake consumer reviews, or consumer reviews that conceal the fact they have been incentivised or (b) publish consumer reviews or consumer review information in misleading ways. It would also prohibit offering services to facilitate these commercial practices. For example, by offering services that increase the chance of a fake consumer review being successfully posted on a platform or website by virtue of their expertise in bypassing the platform or website's fake review detection measures. Facilitation may also extend to intermediary platforms that are aware of and allow fake consumer review services to be sold by traders on the platform.
- 1352 Subsection 13(5) sets out definitional information for this section.

Section 226: Misleading actions

- 1353 This section defines commercial practices that are misleading actions. The section prohibits traders from using misleading actions in a wide range of circumstances, including the use of misleading information relating to a product, a trader, or any other matter relevant to a transactional decision. A commercial practice can also be a misleading action if its overall presentation is likely to deceive the average consumer. Transactional decision is a broad concept covering both pre-purchase and post-purchasing decisions and includes decisions on whether to do something, or not to do something, there does not need to be an actual transaction between the consumer and trader. For example, it includes decisions on whether to visit a shop, to click through a website, to exercise a cancellation right or to pay a debt as well as a decision to purchase a product or to enter a contract.

- 1354 For a commercial practice to be a misleading action, it must meet two conditions: first, the practice matches at least one of the descriptions outlined within subsection (1), and second, it is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.
- 1355 Subsection (2) and (3) clarify that even if information provided to consumers is factually correct, it can still be misleading as a result of the way it has been presented. For example, if a product has more than one charge, and a trader highlights just one of those charges on their website and provides less conspicuous information about the other charge(s), the information provided may be misleading by creating the impression that the product is cheaper than it really is (see for example C-611/14, *Canal Digital Danmark A/S* at paragraph 49). A practice like this could also amount to a misleading omission.
- 1356 Subsection (4) clarifies that ‘another trader’ refers to a different trader to the trader supplying the marketed product for subsection 1, paragraph (c).
- 1357 Subsection (5) clarifies a requirement in a code of conduct relevant for subsection 1, paragraph (d) is a requirement imposed on a trader where compliance can be verified and in relation to which the trader does not have discretion.

Section 227: Misleading omissions

- 1358 This section defines commercial practices that are misleading omissions. The section prohibits traders from omitting or hiding information, or providing it in an unclear (which includes, unintelligible and ambiguous) or untimely manner. The section ensures that consumers get from traders all the information they need to make informed decisions in an upfront, clear, and timely manner.
- 1359 For a commercial practice to be a misleading omission, it must meet two conditions: first, the practice must fall into subsection (1) by a) omitting material information, b) omitting information which the trader is required to give to the consumer under another enactment or c) failing to identify its commercial intent, and second the practice, is likely to cause the average consumer to take a transactional decision they would not otherwise have taken. Transactional decision is a broad concept covering both pre-purchase and post-purchasing decisions such as a decision about whether, how or on what terms to purchase, retain or dispose of a product. It includes decisions whether to do something, or not to do something. For example, it includes decisions whether to visit a shop, to click through a website, to exercise a cancellation right or to pay a debt as well as a decision to purchase a product or to enter a contract. It does not have to lead to a purchase. There does not need to be an actual transaction between the consumer and trader.
- 1360 Material information is the full information that the average consumer needs to have, given the context, to make an informed transactional decision.
- 1361 As indicated, a commercial practice also falls within this section if it omits information which the trader is required under any other enactment to give to the consumer as part of the practice or where a commercial practice does not identify its commercial intent. Examples of how commercial intent may be made clear include the presence of price, or a statement making it obvious that the practice is commercial. The context may also make clear that the intent is commercial - for example, information on a billboard that is obviously intended to market or advertise a product.
- 1362 Subsection (3) provides that when considering whether material information has been omitted, account must be taken of the means of communication and what that allows for, including any limitations that are the result of space or time constraints, as well as the steps taken by the trader to overcome those limitations. For example, a trader selling cereal bars

advertises a 't-shirt for £1' offer on the wrappers. The wrapper is too small to include all of the information on the various conditions that apply (such as restrictions on the availability of the t-shirts). The trader is less likely to commit a misleading omission if they include important information on the wrapper, and make clear on the wrapper that terms and conditions apply and provide details of where they can be found.

- 1363 Subsection (4) elaborates on the meaning of omitting information and clarifies that it applies when a trader provides material information in an unclear or untimely manner, or in a way that the consumer is unlikely to see, as well as when a trader fails to provide material information at all. The effect is that as well as considering how the words used in the commercial practice may be interpreted by the consumer, consideration also needs to be given to how the information is displayed, such as the font size used, the positioning and colour of text, and whether material information is sufficiently prominent. Examples of material information that a consumer is unlikely to see could include information provided only in the 'small print' terms and conditions, or which is only accessible by the consumer if they click on a hyperlink that could be missed or not opened.

Section 228: Aggressive practices

- 1364 This section defines commercial practices that are aggressive practices, which can involve behaviour before a contract or purchase is made (if any) but can also occur after a transaction has taken place.
- 1365 For a commercial practice to be an aggressive practice, it must meet two conditions: first, the practice uses harassment, coercion or undue influence (as defined), and second, it is likely to cause the average consumer to take a transactional decision they would not otherwise have taken. Transactional decision is a broad concept covering both pre-purchase and post-purchasing decisions and includes decisions whether to do something, or not to do something. For example, it includes decisions whether to visit a shop, to click through a website, to exercise a cancellation right or to pay a debt as well as a decision to purchase a product or to enter a contract.
- 1366 Subsection (2) lists the factors that must be considered in determining whether a commercial practice uses harassment, coercion or undue influence.
- 1367 Subsection (3), paragraph (a) also clarifies that coercion includes physical force.
- 1368 Subsection (3) provides more detail on the use of coercion and defines the meaning of "undue influence." In relation to undue influence, there are numerous circumstances where a trader may be in a position of power, for example this may arise because of the trader's expertise regarding a product or as a result of the particular circumstances of the consumer, for example if the consumer is indebted to the trader or otherwise is in a vulnerable position. The application of pressure in a way which significantly limits the consumer's ability to make an informed decision can also arise in numerous circumstances. For example, where a consumer is informed that if they do not sign a contract immediately any subsequent contract entered into with the trader would be on less favourable terms.

Section 229: Contravention of the requirements of professional diligence

- 1369 This section defines commercial practices that contravene the requirements of professional diligence. It sets an objective standard, determined in light of what is reasonable reflecting what traders ought to do, measured by reference to honest market practice or the principle of good faith in the trader's field of practice.

- 1370 For a commercial practice to contravene the requirements of professional diligence, it must meet two conditions: first, the practice falls below the standard of skill and care which a trader may reasonably be expected to exercise towards consumers, and second, it is likely to cause the average consumer to take a transactional decision they would not otherwise have taken.
- 1371 “Honest market practice” means no more than the market practices of reasonable and honest traders in the field of activity. However, poor practice that may be widespread in a particular industry or sector does not equate to an acceptable objective standard. Considerations of honest market practices and good faith also involve looking at whether the legitimate interests or expectations of the average consumer in the particular sector have been taken into account by a trader (see for example C-310/15 *Vincent Deroo-Blanquart v Sony Europe Limited* at paragraph 34).
- 1372 “Good faith” means one of fair and open dealing. For example, a trader should not take advantage of the consumer’s lack of experience or unfamiliarity with a product. “Standard of skill and care” is not intended to convey or require more than would be reasonably expected of a trader in their field of activity.

Section 230: Omission of material information from invitation to purchase

- 1373 This section sets out the conditions under which a commercial practice that is an invitation to purchase omits material information. However, if context makes information apparent, it does not need to be provided by the trader to the consumer as part of the invitation to purchase.
- 1374 “Invitation to purchase” is defined in subsection (10). An invitation to purchase can exist in the entire phase before it is possible to make a purchase, not just immediately before entering the contract. The effect of the definition is that a commercial practice can constitute an invitation to purchase even where the information indicating the price and product’s characteristics is minimal. For example, in the case of C-122/10 *Konsumentombudsmannen v Ving Sverige AB*, an entry level price was held to be sufficient and only a visual or verbal reference was held to be necessary to describe a product that was available in many versions.
- 1375 Following an invitation to purchase, the next step or likely transactional decision taken by the consumer does not necessarily have to be to purchase, and an invitation to purchase does not need to include an actual opportunity or mechanism to enable the consumer to purchase the product (nor does such an opportunity need to appear in close proximity to the communication).
- 1376 Subsection (2) lists the categories of information considered to be material when a commercial practice is an invitation to purchase. It specifies that the total price of the product must be presented to consumers when there is an invitation to purchase and requires that where there are mandatory fees associated with a product that are not fixed and therefore cannot be pre-calculated, for example delivery fees, information about how these variable fees will be calculated must be provided to consumers.
- 1377 Subsection (4) specifies that the total price of the product includes any fees, taxes, charges, or other payments that a consumer must pay to purchase the product.
- 1378 Subsection (5) requires that where there are mandatory fees associated with a product that are not fixed and therefore cannot be pre-calculated, the information provided about how these variable fees are to be calculated must enable the consumer to calculate the total price of the product. This information must be set out with as much prominence as the headline price of the product, for example where a headline price is displayed on the webpage, information about the variable fees should not be presented in smaller text at the bottom of the page.
- 1379 Subsection (6) outlines what “identity” in relation to a trader means and subsection (7) outlines what the trader’s “business address” means.

- 1380 Subsection (8) provides that when considering whether material information has been omitted, account must be taken of any limitation resulting from the means of communication used and steps taken by the trader to overcome those limitations. The means of communication may include for example, apps, webpages, and in-store banners.
- 1381 Subsection (9) elaborates on the meaning of omitting information. It clarifies that omitting information includes the provision of material information in an unclear or untimely manner, or in a way that the consumer is unlikely to see, as well as a failure to provide material information at all. The effect is that consideration is required of not only how the words used in the commercial practice may be interpreted by the consumer but also how the information is displayed, for example the font size used, the positioning and colour of text, and whether material information is sufficiently prominent. Examples of material information that a consumer is unlikely to see could include information provided only in the 'small print' terms and conditions, or which is only accessible by the consumer if they click on a hyperlink that could be missed or not opened.

Public Enforcement

Section 231: Public enforcement

- 1382 This section provides for the enforcement of the prohibition of unfair commercial practices set out in section 225. Local weights and measures authorities in Great Britain (known as Trading Standards) have a duty to enforce the prohibition of unfair commercial practices in their areas. Similarly, the Department for the Economy in Northern Ireland has a duty to enforce the prohibition of unfair commercial practices in Northern Ireland.
- 1383 The CMA has the power to enforce the prohibitions of unfair commercial practices in section 225.

Consumers' right to redress relating to unfair commercial practices

Section 232: Right to redress

- 1384 This section sets out the conditions under which a consumer has a right to redress. Consumers can make a claim in the civil courts against traders who commit misleading actions or aggressive practices. The conditions are outlined through subsections (2) to (5).
- 1385 Subsection (1) provides that a consumer has a right to redress if the four conditions set out in subsections (2) to (5) are met.
- 1386 Subsection (2) provides that the first condition can be satisfied where: a) the consumer enters into a contract with a trader for the supply of a product from the trader to the consumer ("business to consumer contract"), b) the consumer enters into a contract with a trader for the supply of a product from the consumer to the trader ("consumer to business contract" or c) the consumer makes a payment to the trader for the supply of a product (see section 248, subsection (1)).
- 1387 Subsection (3) sets down the second condition namely that the trader engages in a misleading action or aggressive practice in relation to the product or, where a business to consumer contract for goods or digital content is entered into by the consumer, a producer (as defined in subsection (6)) engages in a misleading action or an aggressive practice and the trader is aware of the prohibited practice or could reasonably be expected to be aware of it.
- 1388 Subsection (4) sets down the third condition, which is that the misleading action or aggressive practice is a significant factor in the consumer's decision to enter the contract or to make payment for the product.

- 1389 Subsection (5) sets down the fourth condition, which specifies that the goods are not excluded products by regulations under section 233.
- 1390 Subsection (6) defines “producer” and subsection (7) defines “prohibited practice” (i.e. a misleading action or an aggressive practice) for the purpose of this chapter.
- 1391 Subsection (8) sets out how the reference to transactional decision in section 225 for an aggressive practice and misleading action is to be applied for the purpose of this section.

Section 233: Rights to redress: further provision

- 1392 This section sets out a delegated power for the Secretary of State to provide for the exercise of rights of redress for a consumer under this Chapter in relation to a right to unwind in respect of a contract; a right to a discount in respect of a supply of a product under a contract; and a right to damages. For rights to redress until regulations are made under section 233, see section 252.
- 1393 Subsection (2) sets out examples of what the regulations under this section may include for the purposes of this delegated power, and subsection (3) provides examples of what the consequences of the exercise of a right specified in subsection (2), paragraph (e) may be.

Section 234: Enforcement of rights of redress

- 1394 This section sets out how a consumer can enforce a right to redress.
- 1395 Subsection (1) provides that a consumer with the right to unwind, the right to a discount or the right to damages under regulations made under section 233 may take civil action in court to enforce that right and seek redress. If the legal action succeeds, the court must make an order that gives effect to the consumer’s right and any associated consumer obligations under regulations under section 233 (see subsection (3)).
- 1396 Subsections (4) and (5) explain that in relation to a claim (under this section) in England, Wales and Northern Ireland, the usual contractual limitation period of six years applies.

Section 235: Relationship between rights of redress and other claims relating to prohibited practices

- 1397 This section outlines the relationship between the right to redress and other claims that are related to prohibited practices (i.e. misleading actions and aggressive practices).
- 1398 Subsection (1) ensures that nothing in Chapter 4, Part 1, prevents a consumer pursuing a claim under a rule of law, equity, or other legislation.
- 1399 Subsection (2) has the effect that the consumer cannot recover compensation twice for the same conduct.

Inertia Selling

Section 236: Inertia selling

- 1400 This section sets out the circumstances whereby a trader demands immediate or deferred payment or the return or safekeeping of products supplied by the trader but not solicited by the consumer. The consumer is not required to pay for the products supplied by the trader.
- 1401 Subsection (3) explains that when a consumer is provided with goods that they did not request, the consumer may treat them as though they were an unconditional gift.
- 1402 Subsection (4) explains that the absence of a response from a consumer following the supply of the product they did not request does not mean the consumer consents to any demands by the trader for the consumer to pay, return, or safely store the product.

Offences relating to unfair commercial practices

Section 237: Offences

- 1403 This section sets out the conditions under which unfair commercial practices amount to criminal offences.
- 1404 Subsection (1) sets out that it is a criminal offence for a trader to engage in a commercial practice that involves a misleading action.
- 1405 Subsections (2) and (3) set out that it is also a criminal offence for a trader to engage in a commercial practice that is a misleading omission or an aggressive practice.
- 1406 Subsection (4) provides that it is a criminal offence for a trader to knowingly or recklessly engage in a commercial practice that contravenes the requirements of professional diligence (see section 229).
- 1407 Subsection (5) explains that a trader who fails to regard whether a commercial practice contravenes the requirements of professional diligence is to be considered as being reckless regardless of whether the trader has reason to believe that it might.
- 1408 Subsection (6) sets out that it is a criminal offence for a trader to engage in a commercial practice that omits material information from an invitation to purchase.
- 1409 Subsection (7) sets out that it is a criminal offence for a trader to engage in any of the practices outlined in the schedule of commercial practices which are in all circumstances considered unfair (Schedule 20), other than an excluded description.
- 1410 Subsection (8) outlines that the practices mentioned at paragraphs 12, 13 and 30 of Schedule 20 are excluded descriptions for the purposes of this section namely criminal liability does not attach to them.

Section 238: Defence of due diligence and innocent publication

- 1411 This section sets out the circumstances in which the person accused (defendant) may rely on the due diligence and innocent publication defences for offences under section 237 that are misleading actions, misleading omissions, aggressive practices, omitting material information from an invitation to purchase, and the specific practices outlined in the schedule of commercial practices in Schedule 20. The defences do not apply in relation to an offence involving the contravention of the requirements of professional diligence.
- 1412 Subsection (1) covers the defence of due diligence and sets down what the defendant charged with a relevant offence (see above) must prove to rely on this defence. Subsection (4) requires the defendant to obtain the court's permission before relying on a third- party defence (i.e. the offence was due to the act or omission of a person other than the defendant) unless written notice of such a defence has been given to the prosecuting enforcer at least 7 days before the hearing and containing the information set out in subsection (4), paragraph (a).
- 1413 Subsections (2) and (3) cover the defence of innocent publication, which is available when the defendant is charged with a relevant offence (see above) that is alleged to have been committed by the publication of an advertisement. Subsection (3) sets down what the defendant must prove to rely on a defence of innocent publication.

Section 239: Offences: Criminal liability of others

- 1414 Subsections (1) to (3) have the effect that if a trader commits a relevant offence under section 237 (see section 237), or would have done so but for a defence under section 238, and this is due to the act or omission of another person, that person commits the offence and can also be charged with an offence, regardless of whether action is taken against the trader.

- 1415 Subsection (4) specifies that references to a relevant offence under section 237 in other parts of the Chapter include references to an offence under that section by virtue of subsection (2) (where the commission of the offence, or of what would have been the offence, is due to the act or omission of another person, 'P', and 'P' commits the offence whether or not 'P' is a trader and whether or not P's act or omission is a commercial practice).
- 1416 Subsection (5) sets out that where a body corporate commits an offence with the consent or connivance of an officer of that body, both the officer and the body corporate is guilty of the offence and liable to be prosecuted and punished. This also applies if the offence is attributable to neglect on the part of the officer. Where the offence is committed by a limited liability partnership (LLP), subsection (6) sets out that members who hold a management function in that LLP may be guilty of an offence should the LLP engage in an offence by virtue of subsection 5. Subsection 7 sets out where a Scottish partnership commits an offence with the consent or connivance of a partner or due to neglect on the part of the partner, the partner as well as the partnership is guilty of the offence and liable to be prosecuted and punished.
- 1417 Subsection (8) specifies that references to offences under section 237 in other parts of the Chapter include reference to offences by virtue of subsection (5) or (7).

Section 240: Penalty for offences

- 1418 This section sets out the penalty for offences and is self-explanatory.

Section 241: Time limit for prosecution

- 1419 This section outlines the time limits for prosecution.
- 1420 Subsection (1) states that time limits for prosecution apply either within 3 years of the offence taking place, or within 1 year of the discovery of the offence by the prosecutor, whichever is earlier.
- 1421 Subsection (2) explains how the period of 1 year beginning with the date of discovery of the offence by the prosecutor may be evidenced.

Miscellaneous

Section 242: Powers to amend this chapter

- 1422 This section sets out delegated powers for the Secretary of State to amend this Chapter.
- 1423 Under subsection (1), the Secretary of State may add practices, delete practices, or modify existing practices in Schedule 20 (commercial practices which are in all circumstances considered unfair).
- 1424 Under subsection (3), the Secretary of State may extend the private rights of redress to unfair commercial practices to which redress rights currently do not apply. The Secretary of State may remove the rights of redress from unfair commercial practices so added.
- 1425 Under subsection (4), the Secretary of State may add descriptions, delete descriptions added under subsection (4), or modify existing descriptions in the list of categories deemed to be 'material information' in the context of an invitation to purchase, for the purpose of omission of material information in relation to an invitation to purchase.
- 1426 Before making regulations under this section, the Secretary of State must consult as required by subsection (5).

Section 243: Crown Application

- 1427 This section establishes that the Crown is not criminally liable for any infringement of this Chapter but that does not affect the application of any provision of this Chapter applying in relation to a person in public service of the Crown.

Section 244: Validity of agreements

- 1428 This section establishes that except as resulting from a consumer's right to redress, an agreement shall not be void or unenforceable by reason only of a breach of the prohibition of unfair commercial practices or of the promotion of unfair commercial practices in section 225(1) and (2).

Interpretation

Section 245: Meaning of "transactional decision"

- 1429 This section defines "transactional decision" for the purposes of this Chapter. The definition is broad in scope. It includes decisions taken by a consumer to both do something and not do something as well as a decision about whether, how or on what terms to retain or dispose of a product. In assessing whether a commercial practice is likely to cause the average consumer to take a different transactional decision, it is relevant to take into account the combined effect of any or all of the misleading acts and omissions that the trader may have engaged in (see for example *Office of Fair Trading v Purely Creative Ltd & Ors* 2011 EWHC 106 (Ch) (02 February 2011) at paragraph 72). There may be multiple transactional decisions as part of a single engagement with a trader. Complex transactions may therefore require the provision of information to a consumer at several points.
- 1430 The definition has the effect that a transactional decision covers a wide range of decisions, including decisions pre-contract (regardless of whether a contract is made or not), at the time of contract, and post-contract.
- 1431 For example, pre-contract decisions may include a decision to travel to a shop as a result of a commercial offer (see for example C-281/12, *Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl*); a decision to agree to a sales presentation by a trader; and a decision to click through a website as a result of information relating to the product. A transactional decision also includes decisions regarding payment such as whether to pay a deposit, whether to pay in full, or to make a payment, and how payment should be made.
- 1432 Post-contract decisions may include a decision to withdraw from or terminate a service contract and a decision to switch to another service provider.

Section 246: Meaning of "average consumer": general

- 1433 This section defines "average consumer" for the purposes of this Chapter.
- 1434 Subsection (2) outlines the characteristics of the average consumer. While the standard is objective in character, it recognises that the average consumer's level of attention is likely to vary according to the category of goods or services in question. Also, for example, it recognises that an average consumer is likely to not be a technical expert. The average consumer definition is not a statistical test or statistical average.
- 1435 Subsection (3) specifies that the average consumer cannot be expected to know anything that a trader hides from the consumer.
- 1436 Subsection (4) sets out that where a commercial practice is directed at a particular group, the average consumer is to be understood as the average member of that targeted group.

Section 247: Meaning of “average consumer”: Vulnerable persons

- 1437 This section defines “vulnerable persons” as a particular group for the purposes of this Chapter.
- 1438 This section is applied in two parts. First, when a person is vulnerable to a commercial practice, or vulnerable to the product related to a commercial practice, in a way that the trader can reasonably be expected to foresee. Second, as a result of the vulnerability, the practice is likely to impact the vulnerable person’s ability to make an informed decision, and therefore they are likely to take a transactional decision that they otherwise would not have taken.
- 1439 Subsection (2) states that references to the average consumer in this Chapter in cases involving vulnerable persons, are to be read as references to an average member of a group of consumers who are vulnerable.
- 1440 Subsection (4) outlines some of the ways by which a group of consumers may be vulnerable to commercial practices, or products relating to commercial practices. For example, elderly consumers may be more vulnerable to certain practices like pressure selling because of their age, and consumers affected by a serious illness or physical injury may be more vulnerable to misleading advertising that presents products able to cure them. Vulnerability can also be context dependent, so a group of consumers may become vulnerable due to the ‘circumstances they are in.’ This may include, among other things, being in mourning, going through a divorce, or losing a job.
- Section 248: Meaning of “product”
- 1441 This section defines “product” for the purposes of this Chapter.
- 1442 Subsection (2) specifies that a trader who demands payments from a consumer in settlement of liabilities or purported liabilities is to be treated in this Chapter as offering to supply a product to the consumer. In this case, the product that the trader offers to supply is the full or partial settlement of the liabilities owed.

Section 249: General interpretation

- 1443 This section summarises how various terms are to be read for the purposes of this Chapter.

Section 250: Index of defined terms

- 1444 This section is self-explanatory.

Consequential amendments and transitional provision

Section 251: Consequential amendments etc relating to this Chapter

- 1445 This section outlines the consequential amendments to legislation relating to this Chapter.
- 1446 Schedule 21 contains citations and references made to the Consumer Protection from Unfair Trading Regulations in other pieces of legislation have been amended to reflect that those regulations have been restated and are now contained in this Act.

Section 252: Transitional and saving provisions relating to this Chapter

- 1447 This section sets out how this Chapter is to apply in relation to an act or omission which takes place on or after the commencement date of this Chapter. This Chapter applies to an act or omission which takes place on or after the commencement date. The Consumer Protection from Unfair Trading Regulations (S.I.2008/1277) will apply to any act or omission which takes place before the commencement date.
- 1448 In the case of an act or omission that takes place before the commencement date, and is repeated or continues to take place on or after that date (continuing conduct), “the commencement date” is to be understood as the date on which section 225 (prohibition of

unfair commercial practices) comes into force. The Consumer Protection from Unfair Trading Regulations (S.I.2008/1277) will apply in respect of the private rights to redress until regulations for this Chapter made under section 233 come into force.

Chapter 2: Subscription contracts

Introduction

Section 253: Overview

- 1449 This section provides an overview of the chapter, which provides for duties on traders in relation to subscription contracts, the rights of consumers if those duties are breached, rights for consumers to cancel subscription contracts during cooling-off periods, powers to make further provision in relation to cancellation, offences for failing to provide information about cooling-off rights, and miscellaneous provisions.

Section 254: Meaning of “subscription contract”

- 1450 This section defines the scope of a “subscription contract”. Subsection (1) provides that a subscription contract is a contract between a trader and a consumer for the supply of goods, services or digital content by the trader to the consumer in exchange for payment by the consumer, which contains terms that have the effect set down (in either or both) subsections (2) and (3), and is not an excluded contract, as defined in section 255.
- 1451 Subsection (2) provides that a relevant fixed term contract or a contract for an indefinite period will be considered a subscription contract if it has auto-renewing features as well as a right to bring the contract to an end, which mean a consumer must take action to stop the continuation of the contract beyond a mandatory period, or stop the renewal or extension of the existing contract period, rather than it terminating by default.
- 1452 Subsection (3) provides that a relevant contract which involves the supply of goods, services or digital content as a free-trial or at reduced cost for a specified period of time, after which the contract continues at full cost (or the trader has an option to impose a charge or an increase to the original rate), will be considered a subscription contract if the consumer must take action to avoid defaulting to contract terms which involve paying the full or a higher price.
- 1453 Subsection (4) clarifies that references to a consumer’s right to bring a contract to an end only extend to contractual rights to end the contract which can be exercised by the consumer without incurring a penalty which is more than nominal. In relation to a fixed term contract, this could include an early cancellation right which allows a consumer to exit the contract before the end of the fixed term period.
- 1454 Where a contract does not meet the definition of ‘subscription contract’ set out in this Chapter, the Consumer Contract Regulations (Information, Cancellation and Additional Charges) Regulations 2013 will continue to apply unless otherwise excluded by those regulations.

Section 255: Excluded contracts

- 1455 This section and Schedule 22 define “excluded contracts” which could otherwise meet the definition of subscription contract in section 254. Certain contracts that would otherwise be within the scope of this Chapter have been excluded either because there are already regulations that apply to these contracts which provide equivalent or higher consumer protection or where there is another relevant public policy reason. Definitions and descriptions of excluded contracts are provided in Schedule 22.
- 1456 The Secretary of State has power, by regulations, to amend Schedule 22 to add, modify or remove a description of contract which is excluded. Regulations made under subsection (2) are subject to the draft affirmative procedure.

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Act 2024 which received Royal Assent on 24 May 2024 (c. 13)

- 1457 Subsection (5) refers to section 275 which sets out how the chapter applies to a contract that was an excluded contract at the time it was entered into, but subsequently ceases to be.

Schedule 22: Excluded contracts

- 1458 Schedule 22 sets out the types of contracts which are wholly excluded from the regulatory duties and consumer rights under Part 4 Chapter 2.
- 1459 Paragraph 1 specifies that contracts for the supply of regulated utilities, consisting of electricity, gas, supplies of heating, cooling or hot water made by a relevant heat network, the supply of water or sewerage services are all excluded from rules under Part 4 Chapter 2.
- 1460 Paragraph 2 specifies that contracts for the supply of services of a banking, credit, insurance, personal pension, investment or payment nature are excluded.
- 1461 Paragraphs 3 and 4 outline the kind of healthcare and medical contract that are excluded from the regulatory requirements under Part 4 Chapter 2. The scope of paragraph (2) is intended to closely follow the scope of the exclusion from the cancellation provisions outlined in regulation 27, paragraph (2), sub-paragraphs (a) and (b) under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. There are two related categories of excluded contract; first, contracts for the supply of a healthcare product under prescription, and second, contracts for the supply of a healthcare product by a healthcare professional under arrangements in the health service and where such products are, in some circumstances, provided free or on prescription. Generally, the specified contracts cover two elements, the purpose of the supply of the product and who is providing it. If the product is related to achieving a health outcome and is given by a relevant healthcare professional for that purpose, or is supplied following a prescription or directions from a prescriber, the contract will be excluded.
- 1462 Paragraphs 5 to 7 outline legislation which sets the regulatory scope of OFCOM and the Phone-paid Services Authority (PSA) by extension. Contracts which are regulated by either organisation are excluded from Part 4 Chapter 2.
- 1463 Paragraph 8 specifies that any contract to rent a home is excluded from regulatory duties under Part 4 Chapter 2.
- 1464 Paragraph 9 is an exclusion intended for micro businesses conducting small scale operations to deliver everyday consumables akin to the exclusion effected by regulation 6 paragraph (1) sub-paragraph (f) of The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ('CCRs'). In order to fall in scope of this exclusion, a trader must meet the definition of 'micro-entity' as per the definition set out in section 384A of the Companies Act 2006. This would apply whether a trader was incorporated or not. The trader would be considered in scope of the exclusion if, in their first financial year, they had reasonable grounds to believe they would satisfy the qualifying conditions. If a trader were to be in a year other than their first financial year, a business would have to look to the preceding financial year to determine if they were in scope of the exclusion. Where a trader delivers everyday consumables to consumers, such products should be delivered by the trader; to fall within the exclusion there should be minimal reliance upon using third party businesses to make delivery.
- 1465 Paragraph 10 excludes regulated package holidays and other package travel contracts from Part 4 Chapter 2.
- 1466 Paragraph 11 excludes regulated timeshares and other holiday products from Part 4 Chapter 2.

- 1467 Paragraph 12 excludes contracts for the supply of childcare and provision of school age education, as well as ancillary products, such as food and drink, supplied in the course of providing childcare, and similar items intended for pupils in connection with childcare activity that may be provided by a separate party to the childcare provider. Childcare includes childcare regulated by Ofsted, childminders, providers on domestic and non-domestic premises and nannies.
- 1468 Paragraph 13 excludes contracts for forms of gambling which are covered by certain prescribed legislation from the requirements of Part 4 Chapter 2.

Duties of traders

Section 256: Pre-contract information

- 1469 This section sets out the requirements of traders in relation to information that must be provided prior to the consumer entering into the contract. The pre-contract information consists of 11 items of “key pre-contract information” (in Schedule 23, Part 1) and the “full pre-contract information” (in Schedule 23, Part 2). The key information must be given to consumers for all subscription contracts, regardless of whether this information is apparent from the context. The “full pre-contract information” includes again the “key information” (paragraph 13 of Schedule 23) and additional information set out at paragraphs 14 to 28 of Schedule 23. This additional information only needs to be provided to the extent that it is applicable to the contract and not already apparent from the context. Pre-contract information must be provided in clear and plain language, in a legible form (if in writing) or in a way that is audible and comprehensible (if given orally) (section 272, subsection (8)). If the full pre-contract information is not provided in a “durable medium” before the contract is concluded, it must be provided in this format as soon as reasonably practicable afterwards (section 257, subsection (9)). (Note that where a contract is entered into “in person,” both the key and full pre-contract information must be given in writing and on a durable medium before the contract is entered (section 256, subsection (3), paragraph (c) and section 256, subsection (4)).
- 1470 Subsection (1), paragraph (a) requires that before a trader enters a subscription contract the trader to give the key pre-contract information to the consumer, and paragraph (b) specifies that the full pre-contract information (set out in Part 2 of Schedule 23) must be given or made available to the consumer. There are no specific requirements as to how information is made available, as it will depend on the context and the individual product, however subsection (6) indicates that the test will be satisfied only if the consumer can reasonably be expected to know how to access the information and be able to access it. Information is unlikely to be “made available” if it is not clearly and prominently signposted or if it is obscured in some way either physically, or by being buried within lengthy documents. This may also constitute a misleading action or omission pursuant to Chapter 1 of this Part.
- 1471 Subsection 2, paragraph (a) specifies that the pre-contract information (set out in parts 1 and 2 of Schedule 23) must be provided by the trader to the consumer as close in time to the consumer entering the contract as is practicable. This means immediately before the consumer places their order and/or enters into the contract (whichever is the earlier) where possible. This applies no matter where the subscription contract is entered into (i.e. it applies to contracts concluded online, over the telephone, face-to-face or any other way). How this might look in practice might vary depending on the type of contract and the consumer journey. The key difference is whether a consumer can see and read the pre-contract information because it is presented on a durable medium or otherwise in writing (i.e. online on the trader’s website, paper) or not (i.e. telephone).

- 1472 Paragraphs (b) and (c) of subsection (2) also require that the requirements on providing pre-contract information must be carried out in accordance with subsections (3) and (4) of section 256 and any other requirements set out in regulations under section 277 subsection (1) paragraph (a).
- 1473 For a subscription contract entered into face-to-face at a business premises, the consumer's home or elsewhere, the pre-contract information must be given to the consumer in writing (and on a durable medium), so they have an opportunity to review it prior to entering into the contract. Similarly, for an online contract, the key pre-contract information must be given to a consumer in writing before the contract is entered and the full pre-contract information must also be accessible. Where a subscription contract is to be entered into in the course of a phone call, the consumer will be relying on the verbal information communicated by the trader or his agent. In those circumstances, the key pre-contract information must be relayed orally to the consumer, and the trader must still make available the full pre-contract information before the contract is made, so that the consumer is able to consider it before going ahead with the contract.
- 1474 Subsection 3, paragraph (a) requires the key pre-contract information to be given together, as one whole set of information.
- 1475 Subsection 3, paragraph (b) requires the key pre-contract information to be given separately and distinctly from the full pre-contract information and from any other information that might relate to the product. The purpose of this requirement is to prevent the key pre-contract information being obscured or reducing its prominence.
- 1476 Generally, how traders comply with the various requirements in this section will depend on the product and the medium used to conclude contracts with consumers and communicate the prescribed information, but it should mean:
- a. in the case of online contracts, key pre-contract information is clearly and prominently visible in the location where the consumer will enter into the contract and is directly accessible without a need for the consumer to take any further steps to access and read it;
 - b. the key pre-contract information is provided first, prominently and separate from the full pre-contract information;
 - c. the pre-contract information should not be obscured by the addition of other information which may compete for the consumer's attention;
 - d. all the pre-contract information should be easily understood by the average consumer; and
 - e. all the pre-contract information should be presented in such a way as to come to the consumer's attention so as to enable the consumer to easily identify and read the information; in an appropriate font, size, colour and position.
- 1477 Subsection (3), paragraph (c) requires that where the contract is entered into in the simultaneous presence of the trader and the consumer, the key pre-contract information must be provided in writing and on a durable medium. In respect of durable medium that means a format (such as paper or email) which allows information to be addressed personally to the consumer and allows a consumer to easily store under their control and refer to if needed (see section 280 for the definition of durable medium). However, that does not mean the onus should be on a consumer to save a web page or print off a copy for their records. A mere provision of information on a website does not constitute durable medium.

- 1478 Specific conditions relating to whether information provided via a website will qualify as durable medium include:
- a. whether the website allows the consumer to store information addressed to her/him personally in such a way that s/he may access it and reproduce it unchanged for an adequate period, without any unilateral modification of its content by the service provider or by another trader being possible; and
 - b. if the consumer is obliged to consult that website in order to become aware of the information, the transmission of that information must be accompanied by behaviour on the part of the provider aimed at drawing the consumer's attention to the existence and availability of that information on that website.
- 1479 Subsection (3), paragraph (d) means that during the process towards completing the online purchase the consumer should see the written key pre-contract information at least once and is not required to take any further action, such as click on links or download separate documents, to access the information. To comply with the requirements, it should not be possible for the consumer to navigate e.g. a website ordering process, without seeing all of the key pre-contract information prior to being able to complete a purchase.
- 1480 In the situation covered by subsection (3) paragraph (e) where it is not possible to provide the key pre-contract information in writing prior to the point of purchase, it must be relayed orally to the consumer. Where the information provided is spoken rather than written, it must be audible, clear and spoken at a pace that enables the consumer to fully understand all the information provided. The trader must still make available the full pre-contract information before the contract is made. One way the trader could do this is to refer the consumer to a webpage, or written document previously sent to the consumer, where the full pre-contract information is set out.
- 1481 Subsection (4) provides that the full pre-contract information must be made available or given together; the consumer should be able to view that information in one place. However, this duty only applies to the additional information set out in paragraphs 14 to 28 of Schedule 23 when this information is applicable to contract and not already apparent from the context (subsection (5)). The requirements for the information to be given in writing and on a durable medium for contracts entered into in person under subsection (4), paragraph (b) are the same as those under subsection (3), paragraph (c).
- 1482 The Secretary of State may by regulations amend Parts 1 and 2 of Schedule 23 so as to add, modify or remove descriptions of information. Subsection (9) provides that regulations made under this subsection (8) are subject to the draft affirmative procedure.

Schedule 23: Pre-contract information and reminder notices

- 1483 Part 1 of the Schedule sets out the key pre-contract information which is required to be given to consumers under section 256, subsection (1), paragraph (a).
- 1484 Paragraph 2 applies where the proposed contract falls within section 254, subsection (2) of the definition of subscription contract, and specifies that the consumer must be notified of the on-going obligation to pay unless steps are taken to end the contract and the minimum commitment period e.g. "you have subscribed for a minimum of 6 months, you may end your contract any time after [insert /day/month/year]"
- 1485 Paragraph 3 applies where the proposed contract falls within section 254, subsection (3) of the definition of subscription contract, and specifies that the consumer must be notified that they will be charged, or charged a higher rate than the initial one, and the date on which the consumer will become liable for the first charge, or first higher charge.

- 1486 Paragraph 4 refers to how often payments will be taken, e.g. monthly, weekly annually etc. as well as the amount that will be taken, or the minimum amount if the payment is variable. For certain contracts it may not be possible to specify the amount of the payments, for example, where the consumer is liable for a minimum payment under the contract but the actual amount payable each payment period will be calculated according to the consumer's usage or choice of product for that period. In such cases it will be necessary to provide the consumer with information on how the price will be calculated. Any term of a consumer contract that allows for a price to be varied during the course of the contract must comply with the requirement of fairness in Part 2 of the Consumer Rights Act 2015.
- 1487 Paragraph 5 is intended as a clarifying measure to enable consumers to compare prices. If contracts are not paid for monthly, consumers should be provided with a "pro-rata" cost per month. This requirement does not apply to contracts which are paid for monthly.
- 1488 Paragraph 6 requires the trader to state the minimum total amount for which a consumer will be liable under the contract.
- 1489 Paragraph 7 requires the trader to outline particulars of any terms within the contract that allow the trader to vary the frequency or amount of payments under the contract.
- 1490 Paragraph 8 requires the trader to outline how the consumer can exit the contract and signpost to the location online or provide the necessary contact details to enable the consumer to do so.
- 1491 Paragraph 9 requires the trader to state the amount of notice that the consumer must give to bring the contract to an end.
- 1492 Paragraph 10 requires the trader to specify when a reminder notice will be sent to consumers in accordance with section 259 subsection (3).
- 1493 Paragraph 11 requires traders to provide a summary of the consumer's right to cancel the contract within the initial cooling-off period, and a summary of any right the consumer might have to cancel the contract within a renewal cooling-off period. The trader must also state that further details about the rights are set out in the full pre-contract information.
- 1494 Part 2 of the Schedule sets out the full pre-contract information which a trader is required to give consumers under section 256, subsection (1), paragraph (b). Paragraph 13 of Schedule 23 provides that that this includes the key pre-contract information that was already required to be provided under Part 1 of Schedule 23. The requirements in addition to this are broadly the same as those requirements under schedule 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 that are not already reflected in the key pre-contract information specified in Part 1 of the Schedule.
- 1495 Paragraph 14 requires the trader to describe what the product is and to give as much information as is appropriate to the means of communication.
- 1496 Paragraph 15 requires the trader to set out their identity and the identity of any other person the trader is acting on behalf of. In this context, 'identity' means the name of the trader, and if different, the name under which the trader trades.
- 1497 Paragraph 16 requires the trader to provide their business address and any email address and telephone number. If the service address of the trader (the address at which the person will accept service of documents) is different to the business address, the trader must additionally provide this address.
- 1498 Paragraph 17 requires the trader to provide the business address, email address and telephone number of persons on whose behalf the trader is acting (if that person has such addresses or phone number.) If the service address of that person is different to the business address, the trader must additionally provide this address.

- 1499 Paragraph 18 requires the trader to specify all additional delivery charges and any other costs (if those charges cannot reasonably be calculated in advance, the trader is required to specify that such additional charges may be payable) which is inclusive of tax.
- 1500 Paragraph 19 requires the trader to provide information regarding the payment, delivery and performance of the good, service or digital content, including the time which the trader undertakes delivery of these products.
- 1501 Paragraph 20 requires the trader to provide details of their complaint handling policy.
- 1502 Paragraphs 21 and 22 require the trader to provide information about the consumer's right to cancel during the initial and renewal cooling off period. This includes information such as when these periods begin and end, how a consumer may exercise their right to cancel during these periods, the circumstances under which the consumer may lose their right to cancel and any consequences that arise as a result of the consumer exercising their right, such as refund entitlements.
- 1503 Paragraph 23 requires the trader to provide the consumer with a reminder of the statutory rights of the consumer under Part 1 of the Consumer Rights Act 2015.
- 1504 Paragraph 24 requires the trader to provide information about the existence and conditions of after-sale customer assistance, after-sales and commercial guarantees.
- 1505 Paragraph 25 requires the trader to provide information on the existence of relevant code of conduct and how to obtain a copy.
- 1506 Paragraph 26 require the trader to provide information on the existence and conditions of deposits or other financial guarantees that may be requested by the trader and paid or provided by the consumer.
- 1507 Paragraph 27 requires the trader to provide information on digital content functionality and compatibility. This might cover information such as information about its computer language, file type, access requirements, updates, tracking, internet connection, geographical restrictions, any additional purchases required and information regarding compatibility of the product with both hardware and other software.
- 1508 Paragraph 28 refers to the existence of any 'alternative dispute resolution' schemes that the trader is subject to and how the consumer may access them.
- 1509 Part 3 of the Schedule sets out the reminder notice information which a trader is required to give consumers under section 259, subsection (1), paragraph (a).
- 1510 Paragraph 30 requires the trader to highlight that the consumer will become liable for the renewal payment.
- 1511 Paragraph 31 requires the trader to provide the date the renewal payment is due and the amount the consumer is liable to pay, in the reminder notice. Paragraph 32 requires the trader to specify the amount of the previous renewal payment (if any) for comparison (see also paragraph 33 if the previous renewal payment is lower than the renewal payment to which the notice relates).
- 1512 If the consumer will be liable to pay further payments in addition to the renewal payment, if the contract renews, paragraph 34 requires the trader to disclose the amount and the frequency of those additional payments. Paragraph 35 requires the trader to specify the amount of any previous payments equivalent to those mentioned in paragraph 34 (i.e. recurring payments) for which the consumer was liable (i.e. during the current contract period which is due to expire), for comparison.

- 1513 Paragraphs 33 and 36 require the trader to highlight any differences in the amounts of the renewal payment or the further recurring payments, as between the current contract period which is due to expire, and the renewed contract period in the event the contract were to renew.
- 1514 Paragraph 37 requires the trader to specify the total minimum amount to which the consumer will become liable under the contract if it renews to a further term.
- 1515 Paragraph 38 requires the trader to specify the date on which the consumer will become liable for the next following renewal payment (after the forthcoming renewal payment) or, if no further renewal payments will arise under the contract, the date on which the contract will come to an end.
- 1516 Paragraph 39 requires the trader to specify means by which the consumer can bring the contract to an end to avoid further liability.

Section 257: Pre-contract information: additional requirements

- 1517 This section outlines requirements in addition to section 256 around pre-contractual information.
- 1518 Subsection (2) requires that the last step a consumer takes when entering an online contract is one where they expressly acknowledge that by entering into the contract, they will be obligated to make payments to the trader.
- 1519 Subsection (4) requires traders to provide certain further information when consumers are invited to enter contracts online, namely whether there are any restrictions on the delivery of any goods to be supplied under the contract, and which means of payment can be used by the consumer. Subsection (3) requires that information to be presented in such a way that a consumer should not be required to take any other steps to view it other than going through the contracting process, and in accordance with any other requirements specified in regulations under section 277, subsection (1), paragraph (a).
- 1520 Subsection (5) specifies that where the trader has not complied with subsection (2), the consumer is not bound by the contract.
- 1521 Subsection (7) applies to contracts entered into orally and remotely, such as those concluded via a video or phone call. In such cases where the trader contacts the consumer, the trader is required to inform the consumer at the outset of the trader's identity, the identity of any person on whose behalf the trader is acting, and the commercial purpose of the call.
- 1522 Where the consumer has signed a contract in the course of entering into it face-to-face with the trader, the trader must give the consumer a copy of the signed contract immediately afterwards (subsection (8)).
- 1523 If the trader has not given the full pre-contract information to the consumer in writing and on a durable medium before a contract was entered into, subsection (9) requires the trader to provide the information in this format as soon as reasonably practicable after the contract has been entered into. This must always be before any goods or services are supplied under the contract.

Section 258: Reminder notices

- 1524 This section along with section 259 details requirements for "reminder notices". Reminder notices are written notifications to consumers that a subscription contract is continuing and a renewal payment will fall due unless they act to end the contract. These notifications must contain the information prescribed in Schedule 22, Part 3. The notice is designed to inform the consumer in simple terms of certain important information including the cost and features of

the contract that is about to renew and the actions the consumer should take should s/he wish to avoid renewal. The notice can be given alongside other information e.g. marketing material, but the prescribed information set out in section 259 subsection (1) must be more prominent than any other information given to the consumer at the same time.

- 1525 Subsection (1) provides that, where a trader enters into a subscription contract with a consumer without a concessionary period, the trader must give the consumer a reminder notice before each renewal payment that relates to the end of a relevant six-month period, as set out in subsection (2). “Renewal payments” are payments which can be avoided by a consumer where they exercise their existing rights under the contract to end the contract (subsection (7)). A payment cannot be “avoided” for the purposes of this section by the use of any early termination clause of the contract that involves the consumer paying a fee, or which involves the consumer breaching the contract.
- 1526 Subsection (2) sets out what is considered a relevant six-month period for the purposes of subsection (1). It sets out that the relevant six-month period is considered to be 6 months, which begins on the day after the contract was entered into. Each subsequent six-month period is determined by each six-month period after the day the consumer became liable for a renewal payment in which a reminder notice was required to be sent under subsection (1).
- 1527 Subsection (3) provides that, where a trader enters into a subscription with a consumer with a concessionary period, the trader must send the consumer a reminder notice before the first renewal payment the consumer is liable for under the contract, and each subsequent payment that related to the end of a relevant six- month period. A contract is considered to include a concessionary period if it meets the requirements set out in section 254, subsection (3).
- 1528 A renewal payment will fall within subsection (5) and therefore trigger a reminder notice where it is the last (or only) renewal payment falling due within a relevant six-month period, or (where the consumer does not become liable for any renewal period during that period) the very first renewal payment after that relevant six-month period. The purpose of this provision is that a reminder notice is not required to be given more frequently than once every six months even if renewal payments fall due more frequently than this.
- 1529 Subsection (7) defines a renewal payment as a payment which a consumer could avoid liability for, by exercising their right to bring the contract to an end.
- 1530 Subsection (8) provides that the reminder notices requirements are subject to requirements on content, timing and how notices must be given under section 259.
- 1531 Subsection (9) provides the Secretary of State with the power to disapply or modify the application reminder notice requirements in sections 258 and 259 in respect of certain traders or contracts types.
- 1532 Subsection (10) provides that any regulations made under subsection (9) are subject to the affirmative procedure.

Section 259: Content and timing etc. of reminder notices

- 1533 This section defines the requirements a trader must follow as to timing and content of a reminder notice and how the notice must be given.
- 1534 Subsection (1) requires that the information prescribed in Part 3 of Schedule 23 must be included in a reminder notice together with any other information required by regulations under section 277, subsection (1), paragraph (b). The information must be given all together.

- 1535 Subsection (2) provides that a reminder notice must be given in such a way that the prescribed information (as set out in section 259, subsection (1)) is more prominent than any other information given to the consumer at the same time. It also provides that reminder notices must be given in accordance with any other requirements prescribed in regulations under section 277, subsection (1), paragraph (a) additional to those requirements set out in subsections (3) to (7).
- 1536 The purpose of the reminder notice is to give the consumer sufficient notice to decide if they still want the contract to continue, and if necessary, cancel their contract before the renewal payment is incurred. Subsection (3) sets out that a trader must specify the period in which consumers will receive a reminder notice in the pre-contract information they provide to the consumer.
- 1537 Subsection (4) specifies that the reminder notice period set out in the pre-contract information must be reasonably in advance of “the last cancellation date”. This period must be reasonable for the purposes of informing the consumer that they will soon be liable for a renewal payment. This period must also be reasonable for the purposes of enabling the consumer to take the necessary steps before incurring liability for the next renewal payment.
- 1538 Subsection (5) defines the last cancellation date. This is the last day on which the consumer can exercise a right to bring the contract to an end and thereby avoid liability for the renewal payment.
- 1539 Subsection (7) specifies where the trader is required to serve an additional reminder under subsection (6). Subsection (6) applies where the next following renewal payment that the consumer could avoid by ending the contract would be a year or more after the forthcoming renewal payment. (Or if no further renewal payments would arise under the contract, the contract would continue for at least a year after the forthcoming renewal payment.) The effect of these provisions is that for subscription contracts that will renew to a period of 12 months or more, a trader must give an additional reminder notice prior to the notice set out in subsection (3). This additional reminder notice must be sent prior to the notice set out in subsection (3) and at a time which is reasonable for the purposes of providing additional notification to the consumer that they will soon become liable for a renewal payment.
- 1540 Subsection (8) defines a “12-month period” for the purposes of the provision in subsection (7) triggering a trader’s duty to serve an additional reminder.

Section 260: Arrangements for consumers to exercise rights to end contract

- 1541 This section imposes requirements on traders that are designed to ensure they provide an easy and accessible means for consumers to end the contract. It makes it clear that consumers should not be hindered when trying to leave a subscription contract or stop it renewing.
- 1542 Subsection (1), paragraph (a) requires that traders enable consumers to end the contract in a way which is straightforward.
- 1543 Subsection (1), paragraph (b) provides that the process for consumers to end the contract must not require them to take any steps other than those which are reasonably necessary to end the contract. This requirement precludes traders adopting practices which unreasonably hinder a consumer exercising their contractual right to exit the contract.
- 1544 Examples of practices that are likely to breach subsection (1), paragraphs (a) and/or (b) could include:
- a. For online contracts (where consumers have been able to sign up at the click of a button online), making the process to exit the contract more onerous e.g. requiring customers to phone a call centre.

- b. When a consumer contacts the trader by phone to end the contract, they are required to answer questions about the quality of the product, or why they're leaving.
 - c. Requiring customers to go through an excessive number of steps, or unnecessary steps, to turn off auto-renewal online e.g. requiring them to complete a mandatory free text box or by not giving them the clear and prominent option to turn off auto-renewal or press a cancel button.
- 1545 Subsection (2) and subsection (6) specify that the consumer may choose to notify a trader that they wish to exercise their contractual right to bring their subscription contract to an end by making a clear statement setting out their decision.
- 1546 Subsection (3) provides that a consumer may exercise a right to bring a subscription contract to an end at any time permitted by regulations under section 277 subsection (1) paragraph (c), and subsection (5) provides that arrangements under section 260 must comply with any other requirements specified in such regulations.
- 1547 Subsection (4), paragraph (a) provides that where a contract is entered into online, there must be a way for the consumer to exercise their right to cancel online. It does not prevent other means of doing so also being made available.
- 1548 Subsection (4) paragraph (b) provides that traders must ensure that consumers do not find it hard to locate and access the mechanism for turning off auto-renewal or ending the contract online. An online mechanism offered by traders for consumers to end a subscription contract may breach this requirement if e.g. it is not clearly and prominently labelled, or it is only accessible by the consumer activating hover text or a drop-down menu.

Section 261: Duties of traders on cancellation or end of subscription contract

- 1549 This section sets out requirements on the trader where the consumer has exercised a right to cancel under Chapter 2 or taken the necessary steps to end the contract under its contractual terms.
- 1550 The trader must give the consumer an "end of contract notice". Regardless of the medium used by the consumer to end or cancel the contract, there is a requirement on the trader to acknowledge the cancellation request (once received) in writing on a durable medium and in accordance with any other requirements specified in regulations under section 277 subsection (1) paragraph (a). This must be within the period specified in regulations under section 277, subsection (1), paragraph (a). If no such period is specified in regulations, the notice must be given within three working days after the consumer giving notice of termination, or, where the consumer notifies cancellation online, the trader must give the end of contract notice within 24 hours of cancellation.
- 1551 The end of contract notice must contain clear information that the contract has been or will be cancelled or ended, together with the date on which this occurred or will occur, together with any other information required by regulations made under section 277 subsection (1) paragraph (b).
- 1552 Additionally, any overpayment received must be refunded. An overpayment is defined in subsection (6) as being any payment already made by the consumer for which they are no longer liable as a result of the contract termination.

Rights of consumers to cancel contract for breach

Section 262: Terms implied into contracts

- 1553 This section provides that every subscription contract is deemed to contain terms to the effect that the trader has complied with the statutory obligations imposed by Chapter 2. These are:
- a. The requirement to give key pre-contract information (section 256, subsection (1), paragraph (a))
 - b. The requirement to give full pre-contract information (section 256, subsection (1), paragraph (b))
 - c. The requirement to give a reminder notice (section 258)
 - d. The requirement to specify a reasonable period for giving reminder notices in the key pre-contract information (section 259, subsection (4))
 - e. The requirement to enable a consumer to easily bring a subscription to an end (section 260, subsection (1))
 - f. The requirement to acknowledge a consumer having brought the subscription contract to an end, or cancelled it under this Chapter, and the requirement to refund any overpayments (section 261, subsection (2)).

Section 263: Right to cancel for breach of implied term

- 1554 This section provides a cancellation right for consumers for breaches of certain terms in relation to subscription contracts.
- 1555 Subsection (1) confers the right for a consumer to cancel a contract for a breach of an implied or statutory requirement as set out in section 262, paragraphs (a), (c), (d) and (e).
- 1556 Subsection (2) provides that, in the event of a breach by the trader, the consumer has cancellation rights.
- 1557 The breach could be a failure to comply with any part of the requirements outlined in section 262, paragraphs (a), (c), (d) or (e). For example:
- a. failure by a trader to give the consumer notice reminding them before the end of a commitment period that the contract will automatically continue, and they will be charged payment unless they take action to end the contract;
 - b. failure to provide all of the prescribed information in the reminder notice (i.e. non-compliant reminder providing partial information);
 - c. obscuring the prescribed pre-contract information by including additional information with it which is not prescribed; or
 - d. failure to comply with the rules relating to timings for reminders.
- 1558 Subsection (3) provides that all a consumer must do to exercise this right is communicate their decision to cancel to the trader in accordance with subsection (4).
- 1559 Subsection (4) provides that the consumer may notify a trader that they wish to exercise their right to cancel under subsection (2) by making a clear statement setting out their decision. Even if the trader mandates a specific process for ending the contract in accordance with its terms e.g. that cancellation must be communicated through the trader's website, cancellation following a breach of terms will be effective if the consumer makes a clear statement to that effect.

- 1560 Subsection (5) clarifies that the cancellation will take effect from the time the notification is given.
- 1561 Subsection (6), paragraph (a) provides that any rights and obligations under the contract that would have arisen no longer apply after it is cancelled.
- 1562 Subsection (6), paragraph (b) provides that following such cancellation, the consumer's liability for previous payments will be extinguished, and the resulting rights to a refund will apply, to the extent provided for in regulations made under section 267 subsection (1) paragraph (b). Paragraph (c) provides that any other provision made under those regulations about the treatment of any products supplied under a cancelled subscription contract applies.
- 1563 Subsection (7) means that the trader cannot apply any penalties, or charges on the consumer for cancelling the contract under subsection (2).
- 1564 Subsection (8) refers to section 267, which gives the Secretary of State the power to make regulations about, inter alia, the exercise of the consumer's right to cancel a contract including, for example, provisions requiring a cancellation right under this Chapter to be exercised before the end of a specified period (see the explanatory note relating to section 267).

Cooling-off rights

Section 264: Right to cancel during cooling-off periods

- 1565 Subsection (1) sets out that a consumer has the right to cancel a subscription contract during the initial cooling-off period and any renewal cooling-off period that applies.
- 1566 Subsection (2) specifies that no restrictions or conditions may be placed on this right, except those specified within the Chapter or regulations made under it.
- 1567 Subsection (4) has the same meaning as section 260, subsection (6) and section 263, subsection (4).
- 1568 If the consumer sent the notice of cancellation within the cooling-off period, then they are deemed to have cancelled it within the cooling-off period even if it is not received by the trader until after that period has expired (see section 272, subsections (4) and (5)). However, subsection (5) means that a contract is cancelled with effect from when the notification is given. This might be deemed to be the date when the notification would be normally received according to the means used to send it. For example, where a notification is given by post, it will be deemed to be received as specified under section 7 of the Interpretation Act 1978, specifically, effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved.
- 1569 Under subsection (6), cancellation under section 264 will end parties' obligations under the contract and the consumer will be entitled to any extinguishment of liability or resulting refund to such extent as is prescribed in regulations under section 267 subsection (1) paragraph (b), and the treatment of any goods or other products supplied under the contract will be determined in accordance with provisions in such regulations.

Section 265: Meaning of "initial cooling-off period" and "renewal cooling-off period"

- 1570 This section outlines the two kinds of "cooling-off period" during which a consumer may exercise a right to cancel under section 264. A "cooling-off period" is a 14-day period where a consumer may cancel their contract for any reason and receive such refund as is prescribed under regulations made under section 267, subject to any deductions that may apply under those regulations.
- 1571 This section defines what a "cooling-off period" is and explains the distinction between an "initial" cooling-off period and a "renewal" cooling off period.

- 1572 Subsection (1) describes the initial cooling-off period, which is similar to the cancellation period in The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. It starts from the day the contract is entered into and ends 14 days after the date of the contract, or, in the case of contracts for the supply of goods, the period ends 14 days after the date when the first goods are received.
- 1573 Subsection (2) describes the renewal cooling-off period, which only applies in the case of a ‘relevant renewal’ of a subscription contract. It provides that the renewal cooling-off period starts on the day of the relevant renewal and ends 14 days beginning with the day after that date.
- 1574 Subsection (3) indicates that relevant renewals are:
- a. The first renewal payment to which a consumer becomes liable following the end of an initial free or discounted period; and
 - b. Any other renewal payment where:
 - i. the next following renewal payment will not be due for 12 months or more, or
 - ii. no further renewal payments will be payable, but the contract will continue for a period of 12 months or more.
- 1575 Subsection (4), paragraph (b) defines how the “12-month period” is to be assessed for the purposes of determining whether a renewal is a ‘relevant renewal’.
- 1576 Subsection (5) clarifies that, to identify when the first supply of goods has taken place for the purposes of determining the commencement of the initial cooling-off period under subsection (1), paragraph (b), subparagraph (i), when that supply consists of multiple goods, the 14-day period would only start to run once all of the goods, which form part of the first supply, are received.
- 1577 Subsection (6) provides that this section is subject to any extensions of a cooling-off period that may be provided for by regulations under section 267 subsection (1) paragraph (c).

Section 266: Cooling-off notice

- 1578 This section details the requirement for a trader to give a consumer a “cooling-off notice” in relation to each renewal cooling-off period. “Cooling-off notices” are notifications to consumers that their contract is continuing, and they have a renewal cooling-off cancellation right. These notifications must contain the other information prescribed in subsection (2) and any other information prescribed in regulations under section 277, subsection (1), paragraph (b). The notice is designed to inform the consumer in simple terms of their cooling-off cancellation right.
- 1579 Subsection (3) specifies that the notice must be given on the first day of the renewal cooling-off period or as soon as reasonably practicable afterwards, separately from the giving of any other information, and in accordance with any requirements in regulations made under section 277, subsection (1), paragraph (a).

Cancellation of contracts under this Chapter: further provisions

Section 267: Cancellation of subscription contract: further provisions

- 1580 This section provides a delegated power for the Secretary of State to make provision, by regulations, about the exercise of a consumer’s rights to cancel a subscription contract under Part 4 Chapter 2.

- 1581 Subsection (1) details the scope of the delegated power, specifically empowering the Secretary of State to make provision about the exercise of the rights by the consumer and the consequences which may follow the cancellation. Subsection (1) also empowers the Secretary of State to make regulations extending a cooling-off cancellation period to any extent.
- 1582 Subsection (2) includes detail that the regulations may require the right to cancel to be exercised before the end of a specified period, and may impose any other conditions or restrictions on the exercise of that right. Subsection (2) also clarifies that the power set out in subsection (1), paragraph (a) can be used to make regulation to provide that a consumer may lose the right to cancel their subscription contract during a cooling off period, particularly if they choose to receive digital content or services under the contract during the cooling-off period.
- 1583 Subsection (3) includes further details on what regulations may be made by the Secretary of State. This covers matters such as the extinguishment of the consumer's liability for previous payments required under the contract, and the resulting right to a refund where such payments have already been made as well as the trader's right to recover products that have already been supplied under the contract. Subsection (4) provides that regulations made under subsection (1), paragraph (b) can be used to remove or reduce the refund that a consumer is entitled to if they cancel their subscription contract during a cooling period, for example if they have received digital content or services under the contract.
- 1584 Subsection (3) also allows for provision to be made setting out the consequences, firstly, where a consumer ends a contract under its terms in circumstances where s/he has one or more rights to cancel the contract under this Chapter, and secondly, where a consumer cancels a contract in circumstances where s/he has more than one cancellation right under this Chapter.
- 1585 Subsection (5) requires that the Secretary of State's power to make regulations setting out consequences of a consumer cancelling a contract when they have more than one cancellation right under Part 4 Chapter 2 (subsection (3), paragraph (e), subparagraph (ii)) must be exercised such that the consumer should be deemed to be exercising the most advantageous right available to them under Chapter 2. This means that the regulations must have the effect that where there is any overlap in such rights, the most advantageous rights must prevail. Specifics on what that could mean may be included in the regulations.
- 1586 Subsection (6) imposes a duty on the Secretary of State to consult relevant persons prior to making any regulations under subsection (1), paragraph (c) (provision extending a cooling-off period).
- 1587 Subsection (7) specifies that the first regulations made under this section, or any regulations made that include provision within subsection (1), paragraph (c) are subject to the draft affirmative procedure.
- 1588 Subsection (8) specifies that regulations which are made under this section but where subsection (7) does not apply are subject to the negative procedure.

Offence of failing to provide information about cooling-off rights

Section 268: Offence of failing to provide information about initial cooling-off rights

- 1589 This section creates an offence where a trader fails to provide the relevant information listed in paragraph 11, subparagraph (a) or paragraph 21 of Schedule 23 (information on a consumer's initial cooling-off cancellation rights) in a manner compliant with section 256, subsection (1), paragraph (a) or (b) (as the case may be), before entering into an off-premises subscription contract. These paragraphs of Schedule 23 include information on when the consumer's initial cooling off right will begin and end, how it can be exercised and the

consequences of exercising the right. The offences reproduce offences that currently apply under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

1590 Subsection (5) defines what an “off-premises subscription contract” is. Examples would include contracts concluded by door-to-door sellers and by traders using temporary high-street stands.

1591 Subsection (6) defines “business premises”.

Section 269: Defence of due diligence

1592 This section provides traders with a defence of due diligence to the offence specified in section 268 where the trader can prove that another person was responsible for the offence and the trader took all reasonable precautions and exercised all due diligence to avoid committing the offence.

Section 270: Offences by officers of a body corporate etc

1593 This section establishes direct liability for company officers for offences committed by the body corporate.

1594 Subsection (1) specifies that the officer is liable if the offence was committed with their consent, connivance or due to their neglect.

1595 Subsection (2) defines what an officer of the body corporate includes. This is not an exhaustive list.

1596 Subsection (3) establishes that subsection (1) applies to body corporates which are managed by its members. Members of these body corporates with functions of management may therefore be found liable for an offence under this Chapter.

1597 Subsection (4) establishes the same principles as subsection (1), but for Scottish Partnerships in relation to individual partners.

1598 Subsection (5) specifies that a partner includes those which may not be legally partners of the organisation but purporting to act as one.

Section 271: Penalty for offence and enforcement

1599 Subsection (1) specifies that a person convicted of a section 268 offence is liable on summary conviction to a fine. Subsections (2) to (6) provide for enforcement by local weights and measures authorities in Great Britain, and the Department for the Economy in Northern Ireland.

General and miscellaneous provisions

Section 272: Information and notices: timing and burden of proof

1600 This section specifies the timing and burden of proof for information and notices that are given (or required to be given) under Part 4 Chapter 2.

1601 Subsection (1) specifies that this section applies in relation to the entire chapter relating to subscription contracts.

1602 Subsection (2) specifies that for electronic communication of notices or information sent by a trader to a consumer, delivery timing is deemed as instantaneous.

1603 Subsection (3) clarifies that subsection (2) applies even if the consumer does not receive the notice if that was due to a reason beyond the trader’s control.

- 1604 Subsection (4) provides that subsection (5) applies to determine whether the consumer has effectively exercised their statutory cancellation rights conferred by this Chapter, or their contractual rights to end the contract, by having given notice within the specified period or by the relevant date.
- 1605 Subsection (5) provides that the consumer is to be treated as having given notice within the required period, or before the specified date, if the communication by which the notice is given is sent before the end of that period.
- 1606 Subsection (6) specifies that the burden of proof is on the trader in any dispute between the trader and a consumer as to whether any information or notice has been given to the consumer by the trader in accordance with this Chapter.
- 1607 Subsection (7) specifies that the burden of proof is on the consumer in any dispute between the consumer and a trader regarding whether a notice to end a contract or cancel it under this Chapter was notified by the consumer to the trader in accordance with the requirements of this Chapter.
- 1608 Subsection (8) requires that any information that a trader gives to a consumer under this Chapter must be given in clear and plain language and must be legible if in writing, and audible and comprehensible, if given orally.

Section 273: Terms of a subscription contract which are of no effect

- 1609 Subsection (1) means that any term in a contract which contravenes this Chapter has no legal effect to that extent, including any term that seeks to exclude or restrict a trader's liability arising from the terms implied into the contract by section 262.
- 1610 Subsection (2) provides that in cases to which this subsection applies, any term of a subscription contract has no effect to the extent that it makes consumers liable for a renewal payment prior to the day the contract renews.
- 1611 Subsection (3) provides that subsection (2) applies in such cases as are specified in regulations made under section 277, subsection (1), paragraph (e) and that the regulations may include provision for determining when a contract renews in each category of case.

Section 274: Other remedies for breach by trader

- 1612 This section clarifies that any rights the consumer may have under common law or statute for breach of any term of a subscription contract are not limited by any rights specified in this Chapter and the consumer may exercise both kinds of right in combination, as long as the consumer does not recover twice for the same loss.
- 1613 Subsection (3) provides examples of what other such remedies may be available to the consumer.

Section 275: Application of this Chapter

- 1614 This section specifies that if a consumer and trader choose the law of any other country to govern their contract, but the contract has a close connection to the UK, this chapter will apply.
- 1615 Subsection (3) provides that Chapter 2 does not apply to contracts entered into before section 254 comes into force.

- 1616 Subsection (4) sets out that subsection (5) and (6) provide how the Chapter applies to a contract that was once an excluded contract to the Chapter but subsequently ceases to be.
- 1617 Subsection (5) to (8) modify the application of the Chapter to these contracts and modify duties on traders that have entered into a contract that was once an excluded contract but subsequently ceases to be.
- 1618 Subsection (5), paragraph (a) disapplies the requirement for traders to have to send 'key' and 'full' pre-contract information to consumers in line with sections 256 and 257. Instead, traders must send this information in line with subsections (6), (7) and (8). Failure to provide this information in line with subsections (6) to (8) would be considered a breach of an implied term (see subsection (5), paragraph (d) for the modifications to the implied terms provisions at section 262).
- 1619 Subsection (5), paragraph (b) disapplies the requirement for a trader to send a reminder notice during a concessionary period. Instead, a trader must follow all other reminder notice obligations beginning with the 'relevant day'. The 'relevant day' would be the day the contract ceases to be an excluded contract.
- 1620 Subsection (5), paragraph (e) disapplies the consumer's right to cancel a subscription during the initial cooling -off period.
- 1621 Subsection (6) requires a trader to give 'key' and 'full' pre-contract information, in line with Schedule 23, and subject to the modifications in subsection (7), within a reasonable period of the 'relevant day' (when the contract ceases to be an excluded contract), and in any case within 12 months from that day.
- 1622 Subsection (7) removes the requirement for traders to give information related to the initial cooling off period or information relating to a concessionary period if the concessionary period has ended before the contract ceased to be an excluded contract.
- 1623 Subsection (8) clarifies that the information requirements set out in subsection (6) apply regardless of whether any of this information has been given to a consumer before the contract ceased to be excluded.

Section 276: Crown Application

- 1624 This section specifies that the Crown is bound by the provisions in this chapter, however, may not be criminally liable as a result.

Section 277: Power to make further provision in connection with this Chapter

- 1625 This section gives a delegated power to the Secretary of State to make regulations, which are subject to the negative procedure, in relation to:
- a. how and when information or a notice required to be given by traders to consumers under Chapter 2 may or must be given,
 - b. what information notices given under Chapter 2 must contain,
 - c. what arrangements a trader must make under section 260 to enable consumers to end contracts, and about when a consumer may exercise such a right. This may include provision restricting the period of notice that a trader may require a consumer to give to bring a subscription contract to an end;
 - d. specifying the period within which a trader must refund an overpayment under section 261, subsection (2), paragraph (b),
 - e. specifying cases to which section 273, subsection (2) will apply and making provision about the date when a contract renews for that purpose.

Consequential amendments

Section 278: Consequential amendments to the Consumer Rights Act 2015

- 1626 This section makes consequential amendments to sections 11, 12, 36, 37 and 50 of the Consumer Rights Act 2015 and to paragraph 10 of Schedule 5 to that Act.
- 1627 The amendments ensure that information that is given to consumers as part of the pre-contract information required under Part 4 Chapter 2 is treated as a term of the contract. This has the effect that traders cannot make changes to the matters covered by this pre-contract information without the agreement of the consumer, and if the trader breaches any such term, the consumer remedies provided for in Part 1 of the Consumer Rights Act will apply.
- 1628 The amendment to paragraph 10 of Schedule 5 to the 2015 Act secures that the investigatory powers set out in that Schedule are available to domestic enforcers for the purposes of enforcing the offences in subsection (1) of section 268.

Section 279: Other consequential amendments

- 1629 This section makes further consequential amendments to other legislation including amending the Enterprise Act 2002. This will ensure that information which comes to a public authority in connection with the exercise of any function it has under, or by virtue of, Chapter 2 Part 4 of the Act. It also permits disclosure of that information to any other person for the purpose of facilitating the exercise by that person, of any function they have under or by virtue of Chapter 2 Part 4.
- 1630 In addition, this section amends the Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013 to remove subscription contracts as defined by section 254 from the scope of Part 2 of those Regulations on information requirements, and Part 3 of those Regulations on rights to cancel.

General interpretation

Section 280: Interpretation

- 1631 This section defines certain terms and phrases in the subscription contracts chapter and explains how certain references should be interpreted.

Section 281: Index of defined expressions

- 1632 This section is self-explanatory.

Chapter 3: Consumer Savings Schemes

Section 282: Meaning of “consumer savings scheme contract”

- 1633 This section provides the definition of a “consumer savings scheme contract” which is in scope of the Act. They are contracts in which consumers make payments as a form of saving for goods, services or digital content to be supplied by the trader usually at a later date. They should meet at least one additional criterion outlined in subsections (2) to (4) and they should not be explicitly excluded by virtue of section 284, subsection (1) and Schedule 24.
- 1634 The policy is to regulate such contracts, in particular to protect consumer payment(s) made to a trader who becomes insolvent before a consumer has been able to redeem their payment(s) for goods, services or digital content.
- 1635 In subsection (1), paragraph (a), sub-paragraph (ii) the words “to an account that is held by the trader for the consumer” (“the consumer’s account”) simply means the trader holds money on the consumer’s behalf.

Section 283: Other defined terms

- 1636 This section defines terms used in Chapter 3. Subsection (2) provides further clarification of the words “consumer account” in section 282, subsection (1), paragraph (a), sub-paragraph (ii).
- 1637 Subsection (3) defines the term “protected payment” used in section 285, subsection (1) and section 286, subsection (2), paragraph (d).

Section 284: Excluded arrangements

- 1638 This section introduces Schedule 24 which sets out arrangements excluded from the scope of a consumer savings scheme contract.
- 1639 Subsection (2) provides a delegated power for the Secretary of State to add, remove or modify arrangements excluded by Schedule 24, which is subject to the affirmative procedure, see subsection (4).

Schedule 24: Excluded Arrangements

- 1640 Schedule 24 lists seven arrangements which are excluded from the scope of a consumer savings scheme contract. Excluded arrangements include those in sectors which have their own regulatory regimes e.g. consumer contracts whose subject matter is regulated financial services activity (paragraph (1)), or where the trader is a small business (paragraph (5)).

Section 285: Insolvency protection requirement

- 1641 The primary purpose of this section is to mitigate the risk of loss to consumers upon the insolvency of a trader offering consumer savings scheme contracts. The section provides that consumer savings schemes must be underpinned by arrangements that will cover, in the event of the trader’s insolvency, the cost of refunding payments made by a consumer which have not been redeemed at the time of insolvency. A trader can choose whether to protect payments by way of a trust arrangement or through insurance cover but cannot choose a mix of both options.
- 1642 The requirement to protect payments made by consumers to consumer savings scheme contracts is intended to extend to traders who are established outside the United Kingdom and offer such schemes to consumers located in the United Kingdom.
- 1643 A trader’s insolvency is defined by reference to the trader being subject to insolvency the meaning of which is defined in section 285 subsection (4), paragraphs (a) to (f). This defines insolvency to include a broad range of personal and corporate insolvency events. This approach should provide more certainty for business and consumers alike.

Section 286: Insurance arrangements

- 1644 This section requires that a trader who intends to comply with the insolvency protection requirement in section 285 by way of an insurance policy (or policies) must ensure that the said policy (or policies) is an “appropriate policy”.
- 1645 Subsection (2) sets out the meaning of an “appropriate policy” and requires a trader to ensure that consumers are insured persons under the policy required under subsection (1), in respect of the costs of refunding payments in the consumer’s account which have not been redeemed at the time of the insolvency.
- 1646 The meaning of funds which have not been redeemed shall be interpreted such that “redeemed” has the same meaning as in section 283, subsections (4) and (5). The purpose of section 286, subsection (2) is to ensure protected payments are returned directly to the consumer, in the event of the trader’s insolvency.

- 1647 Subsection (3) requires a trader to pay the costs of arranging and paying for an appropriate policy and any related charges or taxes without recourse to the consumer payments which are to be protected under that policy.

Section 287: Trust arrangements

- 1648 This section requires a trader who intends to comply with the insolvency protection requirement in section 285 by using a trust arrangement to ensure consumer payments are held in a trust located in the United Kingdom.
- 1649 Subsection (2) requires the consumer's payments to be held in the trust until either the funds have been redeemed by the consumer, or the payments have been returned to the consumer, unless payments can be released for one of the authorised purposes set out in subsection (3) and once the declaration in subsection (4) has been received in respect of a payment under 287, subsection (3), paragraph (a).
- 1650 Subsection (5) is intended to ensure a level of independent scrutiny of the use of funds held in Trust.
- 1651 Subsection (6) provides clarification of the meaning of "independent of the trader" specified in subsection (5).
- 1652 Subsection (7) requires the trader to meet any costs associated with setting up and managing the trust arrangement; consumer payments to the trust cannot be used to pay such costs.
- 1653 Subsection (8) requires the trader operating a consumer savings scheme to arrange for the trust's accounts to be audited by an independent auditor every three years.
- 1654 Subsection (9) requires trustee(s) of a trust set up to receive consumer payments under a consumer savings scheme contract to ensure funds which have not been redeemed at the date of the trader's insolvency are returned to those consumers. This subsection ensures monies held in trust are returned to consumers in the event of an insolvency, i.e. treated separately from other assets of the business.

Section 288: Information requirements

- 1655 This section sets out information to be provided to the consumer by the trader once the consumer has joined a consumer savings scheme, the time for providing that information and the manner of its provision.
- 1656 Subsection (1) sets out the information a trader must provide to a consumer when using an insurance or trust arrangement to protect consumer funds. The trader is required to provide the information to the consumer within 30 working days of the consumer's first payment into the consumer savings scheme.
- 1657 Subsection (2) sets out the information a trader must provide where there is a change to the information in subsection (1) and the time within which the consumer should be notified.
- 1658 Subsection (3) makes provision for a consumer to request the information in subsection (1) and for the trader to provide the information for free within 30 working days of receiving the request.
- 1659 Subsections (4) to (6) set out how the information should be provided to the consumer; it takes into account the way the consumer savings scheme contract was entered into.
- 1660 Subsection (7) mirrors section 285, subsection (3) - in other words, the information requirements apply to traders established outside the UK who operate consumer savings schemes in the UK.
- 1661 Subsection (8) makes it an implied term of contract that the trader operating a consumer savings scheme comply with the information requirements set out in this section.

- 1662 Subsection (9) sets out that, in addition, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 will apply to consumer savings schemes insofar as obligations under those regulations are not met by the trader complying with the information requirements in this section.

Section 289: Consequential amendments

- 1663 This section adds Chapter 3 of Part 4 to the list of enactments listed in Schedule 3 of the Regulatory Enforcement and Sanctions Act 2008 and listed in Schedules 14 and 15 of the Enterprise Act 2002.

Section 290: Interpretation

- 1664 This section defines key terms for the purposes of Chapter 3 of Part 4. There are terms which are given a narrower meaning for the purposes of Chapter 3 of Part 4 as compared to their corresponding meaning in Part 3. For example, the definition of a trader in Chapter 3 of Part 4 does not include the activities of any Government department or local or public authority.

Chapter 4: Alternative dispute resolution for consumer contract disputes

Interpretation of Chapter 4

Section 291: Meaning of “ADR” and related terms

- 1665 This section defines ADR and related terms.
- 1666 Subsections (2) to (5) define “ADR”. This includes, but is not limited to, mediation, arbitration, early neutral evaluation and action under an ombudsman scheme. These examples are taken from the Practice Direction on pre-action conduct and protocols of the Civil Procedure Rules. In relation to the reference to arbitration in subsection (4)(b) and to resolutions which are binding on the consumer in subsection (5)(a), nothing in this Chapter is intended to qualify sections 89-91 of the Arbitration Act 1996 and the unfair terms provisions of Part 2 of the Consumer Rights Act 2015 in relation to the use of such forms of ADR in a consumer context.
- 1667 Subsection (6) defines an “ADR provider” as a person who carries out ADR in relation to a consumer contract dispute (see section 292) or who makes special ADR arrangements for doing so.
- 1668 Subsections (7) and (8) define “special ADR arrangements” as arrangements made by an ADR provider for ADR to be carried out by another person. Special ADR arrangements are explained in more detail in the context of section 293.
- 1669 Subsection (9) provides a signpost to section 295 which sets out the definitions of “exempt ADR provider” and “exempt redress scheme” and identifies who are exempt ADR providers for the purposes of Chapter 4. Subsection (10) defines “accredited ADR provider”, and subsection (11) defines “judge” for the purpose of the section.

Section 292: Other definitions

- 1670 This section lists additional definitions in relation to consumer contract disputes.
- 1671 Subsection (2) to (7) defines a “consumer contract”. Subsection (2) provides that a consumer contract is a contract to which Part 1 (consumer contracts for goods, digital content and services) of the Consumer Rights Act 2015 applies (with the modifications in subsection (7)). Under subsections (3) to (6), those contracts are taken to include arrangements for the supply to consumers of electricity, gas and water, whatever their volume or quantity, and the provision of heating, cooling or hot water from a heat network.

- 1672 Subsections (8) to (10) allow the Secretary of State, by regulations, to provide that contracts of a description specified in those regulations are not consumer contracts for the purposes of Chapter 4. Regulations made under these subsections will be subject to the affirmative parliamentary procedure.
- 1673 Subsections (11) to (13) define a “consumer contract dispute”. Consumer contract disputes relate not only to the contract but also to its making and the performance of obligations under the contract. Accordingly, the subject matter of the dispute may extend beyond the matters dealt with in Part 1 of the Consumer Rights Act 2015: for instance, the dispute might relate to a misleading action which the consumer contends was a significant factor in their decision to enter the consumer contract in question. The dispute must be one that may be determined by a court or tribunal: the requirements of Chapter 4 do not apply to more general complaints made by a consumer in so far as they relate to non-justiciable subject matter.
- 1674 Subsection (14) provides that some other terms are to be interpreted in accordance with the Consumer Rights Act 2015 but with modification in relation to the term “consumer”.

Prohibition on acting as ADR provider without accreditation etc

Section 293: Prohibitions relating to acting as ADR provider

- 1675 Subsection (1) prohibits a person from carrying out ADR in relation to a consumer contract dispute unless (and to the extent that) that person is accredited, exempt (see section 295) or is acting in pursuance of special ADR arrangements made by an accredited or exempt ADR provider.
- 1676 Subsection (2) prohibits a person from making special ADR arrangements unless that person’s accreditation or exemption allows them to make special ADR arrangements.
- 1677 Special ADR arrangements are arrangements made by an ADR provider with another person to carry out ADR on that ADR provider’s behalf. They are designed to cover ADR schemes under which the ADR is provided through persons who might, for instance, be styled as “case handlers”, “adjudicators” or “ombudsmen” who are employed, or engaged by, or on behalf of, an ADR provider running the scheme. In that case, the person carrying out the ADR would not need accreditation, so long as the ADR provider running the scheme is accredited or exempt and is permitted to make those arrangements.

Section 294: Prohibitions relating to charging fees to consumers

- 1678 This section restricts the fees that ADR providers may charge consumers.
- 1679 Subsections (1) and (2) prohibit accredited ADR providers, whether they provide the ADR themselves or through another person under special ADR arrangements, from charging the consumer fees for the ADR, unless those fees are charged in accordance with provisions approved by the Secretary of State. Any fees charged must be clearly published in a way that will come to the attention of consumers.
- 1680 The objective of subsections (1) and (2) is to ensure that accredited ADR providers do not charge consumers excessive fees for their ADR services, and for there to be consistency and transparency about those fees.
- 1681 Subsection (3) prevents a person who is carrying out ADR under a special ADR arrangement made by another ADR provider – whether the ADR provider making the arrangement is an accredited or exempt ADR provider – from charging the consumer any fee. This is to prevent a situation in which a consumer is charged twice, by the ADR provider making the special ADR arrangement and then by the person carrying out the ADR under it.

- 1682 In this section, the “consumer” is meant as the person who is the consumer in the consumer contract dispute in question. There is no restriction on the fees that an accredited ADR provider, or person acting under special ADR arrangements, may charge the person who is the trader in that dispute.

Exempt ADR providers

Section 295: Exempt ADR providers

- 1683 This section provides for exempt ADR providers for the purposes of section 293.
- 1684 Under subsection (1), a person is an “exempt ADR provider” if they are listed, or of a description listed, in Part 1 of Schedule 25 or are acting under, or for the purposes of, one of the “exempt redress schemes” listed or described in Part 2 of that Schedule.
- 1685 Subsections (2) to (7) allow the Secretary of State, by regulations, to amend Schedule 25 to add new exemptions, or to vary or remove existing ones. This will allow the exemptions to be kept under review and for possible additional exemptions in the future. Regulations made under these subsections will be subject to the negative parliamentary procedure.
- 1686 Under subsection (3), the regulations may limit the scope of an exemption, for example by reference to the purposes for which an otherwise prohibited activity is carried out.
- 1687 In accordance with subsection (5), the exemptions in Schedule 25 are of general application unless the Schedule provides for an exemption to be more limited.

Schedule 25: Exempt ADR providers

- 1688 Part 1 of Schedule 25 lists persons, or descriptions of persons, which (so far as those persons provide ADR for consumer contract disputes) are exempt ADR providers for the purposes of Chapter 4. These are statutory bodies, or persons performing statutory functions, which it is not considered appropriate to regulate.
- 1689 Part 2 of the Schedule lists redress schemes or similar arrangements that are to be “exempt redress schemes” for the purposes of Chapter 4. These redress schemes are regulated under other legislation and the exemption avoids duplication or conflict between the relevant statutory regimes.
- 1690 Part 3 specifies in further detail the redress scheme to which Part 2 of the Schedule applies.

Accreditation: procedure etc

Section 296: Applications for accreditation or variation of accreditation

- 1691 This section sets out requirements for applicants seeking accreditation or to vary their accreditation.
- 1692 Subsection (1) requires applications for accreditation to be made to the Secretary of State and applicants to pay any applicable application fee as set out by ADR fees regulations (see section 300).
- 1693 Subsections (2) and (3) are self-explanatory.
- 1694 Subsection (4) allows an accredited ADR provider to apply to the Secretary of State to vary its accreditation. This might involve changes to the ADR that the ADR provider can provide or the special ADR arrangements it can make and changes to any conditions attached to its accreditation. In accordance with subsection (5), the application must be accompanied by any applicable fee set out by ADR fees regulations. An accredited ADR provider may also apply for revocation of their accreditation under section 298(2).

- 1695 Subsection (6) enables the Secretary of State to determine the application procedures.
- 1696 By virtue of subsections (7) and (8), this includes: the descriptions of ADR and special ADR arrangements for which limited accreditation may be applied for, which may be framed by reference to kinds of ADR and/or types of dispute; the form in which applications are made; and information applicants must provide.
- 1697 Subsection (9) requires the Secretary of State to publish any application procedures determined under subsection (6).
- 1698 Subsection (10) is self-explanatory.

Section 297: Determination of applications for accreditation or variation of accreditation

- 1699 This section sets out requirements applying to the Secretary of State on receipt of applications for accreditation or for variations of accreditation.
- 1700 Subsection (1) is self-explanatory.
- 1701 Subsections (2) to (7) and (13) deal with the determination of applications for accreditation and subsections (8) to (12) deal with the determination of applications for variations.
- 1702 Subsection (2), paragraphs (a) and (b), requires that the Secretary of State must, as soon as reasonably practicable, consider an application for accreditation and make a decision.
- 1703 Subsection (2), paragraph (b), and subsection (3) allow the Secretary of State to: grant the accreditation applied for; grant an accreditation which is more limited in terms of the ADR that the ADR provider is permitted to carry out or the special ADR arrangement the ADR provider is permitted to make; or reject the application.
- 1704 Subsection (2), paragraph (c), requires the Secretary of State to notify applicants of the decision in writing and to provide reasons for any decision to grant a limited accreditation or reject the application.
- 1705 Subsection (4) provides that the Secretary of State may impose conditions on an accreditation.
- 1706 Subsection (5) provides that the Secretary of State can only approve an application for accreditation if the Secretary of State is satisfied that the applicant will meet the accreditation criteria set out in Schedule 25 after the accreditation is granted.
- 1707 Subsection (6) provides that, as a default, an accreditation is not time limited, but the Secretary of State may grant accreditation on a time limited basis. If the accreditation is time limited, the notice of decision must say so and specify the period of the accreditation.
- 1708 Subsection (7) is self-explanatory.
- 1709 Subsections (8) to (12), relating to the determination of applications for variations of accreditation, largely reflect subsections (2) to (7) with appropriate modification.
- 1710 Subsection (13) requires that the notice of the decision to accredit or vary the accreditation of an ADR provider must set out any conditions applicable to the accreditation or its variation and provide reasons for them.
- 1711 Subsection (14) enables an accreditation to be subject to conditions which make the ADR provider responsible for the acts or omissions of persons carrying out ADR under special ADR arrangements made by that ADR provider. This is to ensure that enforcement action under section 298 or 302 can be taken against the accredited ADR provider in relation to acts or omissions of that person.

Section 298: Revocation or suspension of accreditations etc

- 1712 This section enables the Secretary of State to revoke or suspend accreditation, limit the accreditation or impose further accreditation conditions. These powers are exercisable by notice.
- 1713 Subsection (1) is self-explanatory.
- 1714 Subsection (2) enables ADR providers to apply to have their accreditation revoked.
- 1715 Subsections (3) and (4) deal with circumstances in which the Secretary of State may exercise the powers in this section as a sanction.
- 1716 Subsection (3) sets out the grounds on which those sanctions may be applied. Those grounds are: contravention of the prohibitions in sections 293 (carrying out ADR, or making special ADR arrangements, where the ADR provider is not permitted to do so) or 294 (charging fees where the ADR provider is not permitted to do so); failure to comply with the accreditation criteria (see section 301); failure to comply with any conditions imposed on the ADR provider's accreditation; and failure to comply with an enforcement notice (see section 302).
- 1717 Subsection (4) sets out the sanctions. The Secretary of State can vary an ADR provider's accreditation by either limiting it to certain types of ADR or special ADR arrangements, imposing new conditions (or varying or removing existing conditions), or both. The Secretary of State may suspend or revoke the accreditation. Subsection (5) clarifies that the limiting of accreditation in subsection (4)(a)(i) includes limiting accreditation to consumer contract disputes already in ADR or existing special arrangements.
- 1718 Subsection (6) requires that, before imposing the relevant sanction, the Secretary of State must give the ADR provider an opportunity to make representations about its conduct and the action the ADR provider considers appropriate for the Secretary of State to take.
- 1719 Subsection (7) limits the variations that can be imposed under subsection (4)(a) to those variations that the Secretary of State considers necessary to ensure compliance with the accreditation criteria or existing conditions. Subsection (8) clarifies that existing conditions means the conditions as they stood before any variations made under subsection (4)(a) or (9)(b).
- 1720 Subsection (9)(a) requires the Secretary of State to keep any variations made under subsection (4)(a) under review and under subsection (9)(b) revoke or reverse those that the Secretary of State no longer considers necessary.
- 1721 Subsections (10) to (13) set out requirements to ensure certainty as to when any variation, revocation or suspension has effect and when any suspension ceases.
- 1722 By virtue of section 305(1)(b) and (2), the Secretary of State may publish information about sanctions imposed under this section to bring these to the attention of consumers.

Section 299: Fees payable by accredited ADR providers

- 1723 This section requires accredited ADR providers to pay any fees required by ADR fees regulations. It is intended that, in addition to any fees for applications for accreditation or variation of accreditation under section 296, once accredited ADR providers will be required to pay periodic fees for their continuing accreditation.

Section 300: ADR fees regulations

- 1724 Subsection (1) allows the Secretary of State, by regulations, to set fees for applications for accreditation and for variation of accreditation and periodic fees for maintaining accreditation.

- 1725 The power to make regulations will allow fees charged to be kept under review in the future. Regulations made will be subject to the negative parliamentary procedure.
- 1726 Subsection (2) clarifies that the regulations may set different fees for different cases or circumstances and may provide for cases or circumstances where no fees may be required. The regulations may set payment schedules for periodic fees.
- 1727 Subsection (3) ensures that, in setting fees, the Secretary of State has regard to the need to ensure that the fees are set at levels commensurate, over a reasonable course of time, with the costs of the Secretary of State in performing the related administrative functions.

Section 301: Accreditation criteria

- 1728 Subsection (1) introduces Schedule 26 which lists the accreditation criteria, with which an ADR provider must comply to be, and remain, accredited.
- 1729 Subsections (2) and (3) allow the Secretary of State, by regulations, to amend Schedule 26, either by adding a new criterion, or by varying or removing any existing criteria. Regulations made under these subsections will be subject to the affirmative parliamentary procedure.

Schedule 26: Accreditation criteria

- 1730 Schedule 26 sets out the accreditation criteria with which an ADR provider must comply to become, and remain, accredited under Chapter 4.
- 1731 Part 1 sets out the criteria. These are designed to ensure that ADR providers meet standards of accessibility, expertise, fairness, independence, impartiality, and transparency so that consumers receive better outcomes in resolving disputes with traders.
- 1732 Part 2 contains supplementary provisions on the interpretation and application of the criteria in Part 1. In particular, paragraph 9 clarifies that the accreditation criteria only apply to ADR providers so far as it is reasonable to regard them as applicable in relation to the ADR and activities of the ADR provider and any special ADR arrangements that it makes. This recognises that the criteria in Part 1 are criteria in the nature of general principles, not all of which will be relevant in the same way to all forms or contexts of consumer ADR.

Enforcement of prohibitions etc

Section 302: Enforcement notices

- 1733 This section allows the Secretary of State to issue enforcement notices to an ADR provider for contraventions of Chapter 4.
- 1734 Subsection (1) specifies the contraventions for which the Secretary of State may give an enforcement notice. These consist of carrying out ADR or making special ADR arrangements without being accredited to do so; charging consumers unauthorised fees for that ADR; breaching accreditation conditions; failing to pay periodic accreditation fees; failing to provide information required by the Secretary of State.
- 1735 Subsection (2) requires that, before deciding to issue an enforcement notice, the Secretary of State must give the provider a chance to make representations about its conduct and whether an enforcement notice should be given.
- 1736 Subsection (3) specifies that an enforcement notice may require the ADR provider to do, or not do, such things as are specified in the notice in order to ensure compliance with a requirement that has been breached.
- 1737 Subsection (4) and (5) deal with the contents of enforcement notices and are self-explanatory.

- 1738 Subsections (6) and (7) enable the Secretary of State to revoke enforcement notices or any requirements they contain and, in the latter case, make consequential changes to any remaining requirements which are not revoked.
- 1739 Subsection (8) provides that, with permission of the relevant court, the enforcement notice may be enforced as if it is a court order.
- 1740 Subsection (9) provides authority for the Secretary of State to publish information about enforcement notices. The objective is to enable the Secretary of State to publicise enforcement notices, to bring them to the attention of consumers.
- 1741 Breach of the requirements of this Chapter may also constitute a relevant infringement to which the civil enforcement regime provided by Chapter 3 of Part 3 of this Act (enforcement of consumer protection law) applies.

Provision of Information etc

Section 303: ADR information regulations

- 1742 This section, pursuant to subsection (1), allows the Secretary of State, by regulations, which are subject to the negative parliamentary procedure, to require ADR providers and other persons to provide ADR information (see section 306(1)) to the Secretary of State (or to other persons to which functions are conferred under section 307), and/or to publish ADR information for the benefit of consumers.
- 1743 Subsection (2) specifies the persons on whom those requirements may be imposed. These are persons who are or have been: accredited ADR providers; exempt ADR providers; and persons carrying out ADR under special ADR arrangements. Furthermore, those requirements may, in relation to relevant ADR information (see section 306(2)), be imposed on regulators. The purpose of including regulators is to elicit information about ADR provision in regulated sectors which may, in particular, be useful for ascertaining the appropriateness of exempting, or continuing to exempt, relevant ADR providers such as under sectoral redress schemes.
- 1744 Subsection (3) limits the purposes for which information may be required, these being publication of information for the benefit of customers and monitoring or evaluating the accreditation regime and the provision and quality of ADR in the United Kingdom.
- 1745 Subsection (4) to (6) are self-explanatory.

Section 304: ADR information directions

- 1746 This section, pursuant to subsection (1), allows the Secretary of State to give a direction requiring a person to provide the Secretary of State with ADR information.
- 1747 The purpose of this section is to allow the Secretary of State to require information of a specific kind from a particular person, as and when it is needed, in contrast with the requirements imposed by regulations under section 303 which are more general in their application and envisage provision of information at regular intervals.
- 1748 Subsection (2) specifies the persons to whom directions may be given and mirrors section 303(2).
- 1749 Subsection (3) specifies the purposes for which a direction may be given. The purposes mirror those in section 303(3) but, in addition, include any other purposes connected with the exercise of the Secretary of State's functions under Chapter 4.
- 1750 Subsections (4) to (7) are self-explanatory.

Section 305: Disclosure of ADR information by the Secretary of State

- 1751 This section provides for publication or disclosure of ADR information by the Secretary of State.
- 1752 Subsection (1) specifies the ADR information to which the section applies, this is both information provided to the Secretary of State under sections 303 and 304 as well as information held by the Secretary of State for the purposes of any function of the Secretary of State under Chapter 4. The latter category of information would, for instance, include information relating to any sanctions imposed under section 298 such as a revocation or suspension of accreditation.
- 1753 Subsection (2) allows the Secretary of State to publish that information for the purpose of providing information to consumers.
- 1754 Subsection (3) lists persons to which the information may be disclosed.
- 1755 Subsections (4) and (5) are self-explanatory.
- 1756 In relation to disclosure of information, see also Schedule 27 which brings Chapter 4 within scope of Part 9 of the Enterprise Act 2002.

Section 306: Meaning of “ADR information” and other terms in sections 303 to 305

- 1757 This section defines terms used in sections 303-305.
- 1758 Subsection (1) defines “ADR information”.
- 1759 Subsection (2) defines “relevant ADR information” and this includes information relating to: ADR carried out by a relevant ADR provider; special ADR arrangements made by a relevant ADR provider; ADR carried out in pursuance of those arrangements; and anything done by a regulator which affects the relevant ADR provider in those activities.
- 1760 Subsection (3) clarifies that, in relation to a regulator, a “relevant ADR provider” is an ADR provider regulated by that regulator whether that ADR provider is accredited or exempt.
- 1761 Subsection (4) clarifies that references to information about ADR carried out by ADR providers or special ADR arrangements includes information about fees charged to consumers or traders.
- 1762 Subsections (5) and (6) are self-explanatory.

Involvement of other bodies in the regulation of ADR providers

Section 307: Power to provide for other persons to have accreditation functions etc

- 1763 This section, pursuant to subsection (1), allows the Secretary of State, by regulations, which are subject to the affirmative parliamentary procedure, to confer certain functions on another person. This might, for instance, allow for some decision-making by a regulator or other person who has expertise in disputes of a particular kind.
- 1764 Subsection (2) lists the functions that can be conferred.
- 1765 Subsections (3) and (4) ensure that, when functions are conferred under this section, the persons on whom those functions are conferred can exchange information with each other and with the Secretary of State (who can similarly disclose information to them). Subsection (3) also enables the regulations to abolish functions conferred by regulations under this section.

1766 Subsection (5) enables the regulations to amend Chapter 4. This may be necessary to allow relevant requirements of the Chapter to function effectively where functions are conferred on another person, such as for provisions of the kind in subsection (3). This power does not displace or limit the powers to make consequential provisions in section 336 and consequential, supplementary, incidental, transitional or saving provisions under section 337.

1767 Subsection (6) is self-explanatory.

Complaints by consumers to traders

Section 308: Duty of trader to notify consumer of ADR arrangements etc

1768 This section requires traders to provide consumers with information about ADR or other complaint resolution arrangements in which the trader is required to participate.

1769 Subsection (1) provides that the section applies where a trader responds (see further subsection (3)) to a complaint from a consumer in relation to a consumer contract.

1770 Subsection (2) illustrates the subject matter of complaints relating to a consumer contract to which the section applies.

1771 Subsection (3) imposes the substantive requirement and is to be read with subsection (4). The requirement arises when the trader communicates the outcome of the complaint. At that point, the trader must inform the consumer about any ADR or other arrangements for securing or facilitating resolution which are available to the consumer and in which the trader is required to participate by legislation or contract. The requirement ensures that the consumer, if dissatisfied with the outcome of the complaint, is made aware of those arrangements. The arrangements in relation to which the requirement applies are not limited to accredited ADR and are wider than the definition of ADR in section 291.

1772 Subsection (5) provides that, where a trader does not comply with this section, the Secretary of State may give that trader an enforcement notice in accordance with section 302(1).

1773 Subsection (6) clarifies that the trader notification obligation does not qualify any other obligation a trader may be under to provide information.

Consequential amendments etc and transitional provision

Section 309: Consequential amendments etc relating to this Chapter

1774 This section gives effect to Schedule 27 which makes consequential changes to other legislation.

Schedule 27: Chapter 4 of Part 4: consequential amendments etc.

1775 This Schedule modifies other legislation for the purpose of Chapter 4. In particular, this Schedule:

- a. Amends section 14 of the Prescription and Limitation (Scotland) Act 1973, section 33B of the Limitation Act 1980, section 1B of the Foreign Limitation Periods Act 1984, article 51B of the Limitation (Northern Ireland) Order 1989 (S.I. 1989/1339 (N.I. 11)) and section 140AA of the Equality Act 2010. These provisions extend limitation periods to facilitate consumer ADR if the deadline for commencing proceedings would otherwise expire during or immediately following the ADR process and the amendments update these provisions to reflect the enactment of Chapter 4.
- b. Adds Chapter 4 to Schedule 3 of the Regulatory Enforcement and Sanctions Act 2008 (RESA) in line with the inclusion of Chapters 1-3 of Part 4 in that Schedule.

- c. Amends Schedule 5 to the Consumer Rights Act 2015 (investigatory powers etc.) so that the Secretary of State can use the investigatory powers in that Schedule for investigating actual or suspected breaches of Chapter 4.
- d. Adds a reference to Chapter 4 in Schedules 14 and 15 of the Enterprise Act 2002. The amendment of Schedule 14 ensures that information relating to individuals and businesses which comes to the Secretary of State in the exercise of the Secretary of State's functions under Chapter 4 is "specified information" to which the restrictions on disclosure under Part 9 of the Enterprise Act 2002 apply. The amendment to Schedule 15 ensures that the Secretary of State may, under section 241(3) of that Act, disclose that information to any other person for the purposes of Chapter 4. This ensures consistency with other consumer protection legislation to which Part 9 of the Enterprise Act 2002 applies.
- e. Revokes the EU-derived Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (S.I. 2015/542), which Chapter 4 of Part 4 replaces.

Section 310: Transitional provisions relating to this Chapter

- 1776 This section makes transitional provisions.
- 1777 Subsections (1) and (2) provide that the prohibitions on carrying out ADR under section 293(1) and on charging fees to consumers under section 294(1) do not apply in relation to ADR started before these prohibitions come into force. Subsection (3) defines when ADR is started for these purposes, which is when the dispute was first sent to or otherwise communicated to the ADR provider.
- 1778 Subsection (4) provides that the prohibition in section 294(3) on the charging of fees by a person carrying out ADR under special ADR arrangements does not apply to ADR started before that prohibition comes into force.
- 1779 Subsection (5) provides that the prohibition in section 293(2) on a person making special ADR arrangements does not apply in relation to special ADR arrangements made by that person before that prohibition comes into force where that person is an exempt or accredited ADR provider whose exemption or accreditation would cover the making of those special ADR arrangements.
- 1780 However, subsection (6) provides that, where that prohibition does apply, subsection (5) does not prevent the continuation of special ADR arrangements relating to ADR started before that prohibition comes into force.
- 1781 Subsection (7) provides that, for the purposes of the transitional provisions in subsections (4) and (6), ADR is taken as starting when the dispute is first referred to the ADR provider making the special ADR arrangements or the person carrying out the ADR under those arrangements, whoever receives it first.
- 1782 Subsection (8) provides that the requirement under section 308(3) to inform consumers about ADR or other arrangements available to them does not apply where the consumer's complaint was received by the trader before the coming into force of that requirement.

Part 5: Miscellaneous

- 1783 Section 311 to Section 318 set out provisions that provide the CMA with information gathering powers enabling it to obtain specified information relevant to the retail of motor fuel. The provisions give the CMA power to request undertakings involved in the distribution, supply or retail of petrol and diesel for information to assess competition in the retail of motor fuel retail and impact on consumers.
- 1784 Sections 319 to 325 set out new provisions to facilitate the provision by relevant UK regulators of investigative assistance to overseas regulators who have functions corresponding to those of the UK regulators in relation to competition, consumer protection and digital markets.
- 1785 Section 326 amends Part 9 of the Enterprise Act 2002 (information) insofar as it relates to international information sharing. Section 326 repeals the existing overseas disclosure ‘gateway’ in section 243 of that Act and replaces it with new provisions governing the ability of the CMA and other UK public authorities to exchange information with overseas public authorities.
- 1786 Section 327 introduces a statutory duty of expedition in relation to the CMA’s competition and consumer law functions, as well as the CMA’s functions relating to the new digital market’s regime. Section 327 makes provisions regarding the application and extent of the duty of expedition.
- 1787 Section 328 amends section 71 of the Serious Organised Crime and Police Act 2005 to add the CMA to the list of prosecutors specified in that section. The amendments do not allow the CMA to give a notice providing immunity from prosecution under that section, but allow it to exercise the other powers available to specified prosecutors.
- 1788 Section 329 removes the prohibition on a person being a chair of the Competition Appeal Tribunal for more than 8 years.

Chapter 1: Competition in connection with motor fuel

Section 311: Provision of information about competition in connection with motor fuel

- 1789 This section gives the Competition and Markets Authority (CMA) power to request information from undertakings in, or connected with, the distribution, supply or retail of petrol and diesel. Such information should assist the CMA in assessing competition in the retail market for petrol and diesel and to provide updates and advice on proposals to increase competition and benefit consumers. This includes any information, such as estimates, forecasts, and returns. The use of “undertaking” means the CMA will not have the power to issue information notices to individuals, unless that individual is engaged in economic activity in relation to distribution, supply or retail of petrol and diesel, for example a sole trader that operates a filling station.
- 1790 Subsection (1) sets out that the CMA can request information from undertakings operating in the road fuel supply chain to support the operation of the function. This includes assessing competition in the retail of motor fuel and providing updates, recommendations, and advice on the state of competition in the sector to increase competition or benefit consumers.
- 1791 Subsection (3) sets out the content requirements for an information notice. The notice must set out the time and the frequency with which the information must be given to the CMA, as well as the form the information must take. For example, a notice might specify how the information should be transferred. The notice must also set out the consequences of not complying with the information request.

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Act 2024 which received Royal Assent on 24 May 2024 (c. 13)

- 1792 Subsection (4) sets out the non-exhaustive requirements that the CMA can place upon businesses in an information request, including the provision of copies of or extracts from information, to obtain or generate information, collect, or retain information and to justify why information has not been given to the CMA.
- 1793 Subsection (8) outlines definitions and source of definitions for certain words used in this section. “Motor fuel” means petrol or diesel. These definitions set the parameters for the purposes of the function as outlined in subsection (1).
- 1794 Subsection (9) allows for the Secretary of State to amend the definition outlined in subsection (8) and is subject to the negative procedure. As the power relates to the detailed technical definitions, it was considered that the matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. In addition, the definition used in the amendment comes from the Motor Fuel (Composition and Content) Regulations 1999, which uses powers under section 30 of the Clean Air Act 1993. Regulations made under that section are subject to the negative procedure and therefore to ensure consistency with that the negative procedure is appropriate.

Section 312: Penalties for failure to comply with notices under section 311

- 1795 This section sets out that the CMA can impose financial penalties on undertakings that fail to comply with an information notice issued under section 311 of this Act without reasonable excuse. This includes:
- a. failing to comply with an information notice under section 311;
 - b. destroying, falsifying or concealing any document that is required as part of an information notice under section 311;
 - c. providing information which is false or misleading;
 - d. providing information which is false or misleading to another undertaking knowing that the information was for the purpose of responding to an information notice under section 311 (subsection 1).
- 1796 Subsection (2) sets out a penalty imposed is to be of such amount as the CMA considers appropriate.
- 1797 Subsection (4) defines the maximum amounts of fixed and daily rate penalties that the CMA can impose under subsection (1). It sets out that the maximum fixed amount is an amount equal to 1% of the total value of the undertaking’s turnover (both inside and outside the UK) or a daily rate up to 5% of the total value of the undertaking’s daily turnover (both inside and outside the UK).
- 1798 Subsection (5) sets out how the CMA will calculate daily rates for the purpose of imposing a monetary penalty. Daily penalties are calculated from the date that the undertaking is served notice of the penalty by the CMA. Daily penalties will accumulate until the person complies with the requirement (e.g. the requested information is provided). The CMA has the discretion to determine an earlier date for the amount payable to cease accumulating.
- 1799 Subsection (6) to (8) allows for the Secretary of State, by way of regulations, to determine the turnover of an undertaking. The power is subject to the negative procedure.

Section 313: Procedures and appeals

- 1800 This section sets out which sections of the Enterprise Act 2002 apply for penalties imposed under section 311. Section 112 covers the main procedural requirements for giving notice of a penalty. Section 113 covers the procedural requirements for payment of a penalty and interest. Section 115 sets out the procedure for recovering a penalty which has not been paid.

Section 314: Statement of policy on penalties

- 1801 This section sets out that the CMA must publish and have regard to a statement of policy in deciding how to make use of the powers to impose penalties under section 311. It requires the CMA to consult the Secretary of State and then publish the statement of policy, which will include the considerations relevant to determining the nature and amount of any monetary penalty.

Section 315: Offences etc.

Destroying or falsifying information

- 1802 Subsection (1) sets out that it is a criminal offence to destroy, falsify or conceal information that has been requested by the CMA. The section mirrors section 43 of the Competition Act 1998. The offence can only be committed in relation to information that has been requested by the CMA.

False or misleading information

- 1803 Subsection (2) and (3) sets out that it is a criminal offence to provide information to the CMA which is false or misleading. It also sets out that a person commits an offence if a person knowingly, recklessly, or intentionally gives information to another person that is false or misleading. This section mirrors section 44 of the Competition Act 1998 and section 117 of the Enterprise Act 2002.

Sentences

- 1804 Subsection (4) sets out the punishments that can be imposed by the relevant courts on conviction of a criminal offence under subsections (1), (2) and (3).
- 1805 In England, Wales and Northern Ireland, a summary offence is triable in the Magistrates' Courts and an indictable offence, in the Crown Courts. In Scotland, a summary offence is triable in the Justice of the Peace Courts or the Sheriff Courts, and an indictable offence in the Sheriff Courts or High Court of Justiciary. In Scotland and Northern Ireland, there are statutory limits on fines that can be imposed by courts on conviction. In England and Wales, there is no such limit.

Offences by officers of a body corporate

- 1806 Subsections (5) to (8) provides for the circumstances in which individual officers of companies, partners of Scottish partnerships and members of limited liability partnerships may be held responsible for the conduct of their companies or partnerships in committing offences. Offences may be attributable to consent and connivance, or to neglect.

Section 316: Penalties under section 312 and offences under section 315

- 1807 This section provides that where a person has been found guilty of a criminal offence committed under section 315, they will not be required to pay a civil penalty for that same offence. Likewise, where a person has paid a civil penalty for an act of the kind referenced under section 311, they cannot be criminally convicted for that same offence. The section does

not prevent criminal or civil proceedings from being started where, respectively, a penalty has been imposed but not paid or someone has been charged but not convicted.

Section 317: Information sharing

- 1808 This section provides that the restrictions on the disclosure of information contained in Part 9 of the Enterprise Act 2002 apply to the information that comes to the CMA in connection with the exercise of its functions under the Chapter of Part 5 of this Act to be formed by sections 311 to 318. This Chapter 1 of Part 5 of the Act is added to the list of Specified Functions set out in Schedule 14 to the Enterprise Act 2002. This places any information obtained by the CMA through the exercise of any statutory function under this Chapter in scope of the general restriction on disclosure set out at section 237 of the Enterprise Act 2002. It is a criminal offence under section 245 of the Enterprise Act 2002 to disclose or use information to which section 237 applies unless that disclosure or use is permitted by Part 9 of the Enterprise Act 2002.

Section 318: Expiry of this chapter

- 1809 This section provides that the Chapter in Part 5 formed by section 311 to section 318, expires five years after it comes into force, unless the Secretary of State makes regulations extending the period for which the Chapter has effect. This power to extend the period is subject to the affirmative procedure.

Chapter 2: Provision of investigative assistance to overseas regulators

Section 319: Provision of investigative assistance to overseas regulators

- 1810 This section acts as the gateway into the provisions allowing relevant UK regulators to provide investigative assistance to overseas regulators who have functions corresponding to those of the UK regulators in relation to competition, consumer protection and digital markets. Subsection (1) sets out the three core requirements for a relevant regulator in the United Kingdom (“R”) to assist an overseas regulator (“O”) and introduces a table in subsection (2) which provides more detail regarding the scope of the assistance and the manner in which it may be provided. A “relevant regulator” is one listed in the second column of the table (see definitions in subsection (5) which also defines “overseas regulator”).
- 1811 Subsection (1), paragraph (a) provides that, at O’s request, R may assist O in carrying out functions which correspond or are similar to functions of R under a relevant enactment listed in the first column of the table in subsection (2). For example, with regards to competition law, the CMA may use its investigative powers in Part 1 of the Competition Act 1998 (competition) and Part 3 of the Enterprise Act 2002 (mergers) to assist O with equivalent functions overseas. The ability to assist with functions which “correspond” or “are similar” to R’s functions is intended to provide some flexibility in assessing the degree to which O and R’s functions are comparable. This is in recognition of the fact that while the precise legal nature of statutory provisions may vary between the UK and other jurisdictions, the intended purpose of the provisions and the conduct at which they are directed may be similar. Investigative assistance should be possible where this is the case.
- 1812 Subsection (1), paragraphs (b) and (c) specify two further conditions for the provision of assistance: that R must consider that it would be appropriate to assist O (further details in relation to this requirement are set out in section 321) and that except where the request for assistance is made in accordance with a qualifying cooperation arrangement, assistance must be authorised by the Secretary of State (see section 322). “Qualifying cooperation arrangement” is defined in subsection (5) and, for the purposes of this chapter, refers to any

government-to-government arrangement or agreement which provides for mutual assistance between the UK and the country or territory of the overseas regulator, in relation to competition or consumer protection matters (including matters relating to digital markets).

- 1813 The table in subsection (2) specifies which regulators may provide assistance and identifies the statutory powers which may be exercised and how they can be used. The CMA is the regulator who may provide assistance where O's functions correspond or are similar to the CMA's functions under specified domestic competition and digital markets legislation. Those enforcers who have investigatory powers for consumer protection purposes under Schedule 5 to the Consumer Rights Act 2015 may use those powers in connection with infringements of overseas laws or other requirements which correspond or are similar to domestic consumer protection laws or requirements (as listed in Schedule 15 to the Act).
- 1814 Column 3 in the table in subsection (2) specifies how assistance may be provided. For example, the CMA may exercise its powers under the Competition Act 1998 as if it were carrying out an investigation under section 25 of that Act, and its powers under section 109 of the Enterprise Act 2002 as if providing investigative assistance were a "permitted purpose" for the purposes of that section. This helps ensure that other relevant provisions and safeguards under those Acts which apply where the CMA is using its powers for a domestic competition or merger investigation will apply where those powers are exercised to assist an overseas regulator. This would include, for example, section 30A of Competition Act 1998 (use of statements in prosecutions) which provides protection against self-incrimination in criminal proceedings. In addition, civil sanctions (including those being amended and added through this Act) and offences for non-compliance with investigatory measures available to R via these enactments in domestic investigations will also be available when investigative assistance is provided (see also the note on subsection (4) below).
- 1815 Subsection (3) modifies the application of Parts 3 and 4 of Schedule 5 to the Consumer Rights Act 2015 to allow those Parts to operate effectively in the context of the provision of investigative assistance under this section. Under paragraph (a), paragraphs 13, 19 and 20 of that Schedule, which set out which categories of enforcer may exercise various powers in Parts 3 and 4, are to be disregarded in the context of overseas assistance. Under paragraph (b), a power which is described elsewhere in Parts 3 and 4 as being exercisable by an enforcer of a particular category can only be exercised by R for the purposes of providing assistance if R is an enforcer of that category. Paragraph (c) concerns Part 4 of Schedule 5 to the Consumer Rights Act 2015. In Part 4 of that Schedule, references to the "enforcer's legislation" with regards to an enforcer of the "domestic enforcer" category of enforcer under that Schedule should be interpreted as references to the laws or other requirements in the country or territory of O.
- 1816 Subsection (4) ensures that where there are references in enactments other than Chapter 2 of Part 5 of the Act to the functions of a relevant regulator under an enactment specified in the table in subsection (2), the references include those functions when they are exercised to assist an overseas regulator. This means, for example, that section 117 in Part 3 of the Enterprise Act 2002, which makes it an offence to supply false or misleading information to the CMA in connection with its "functions under this Part", will apply to information supplied to the CMA in connection with its functions in gathering information for an overseas regulator.

Section 320: Requests for investigative assistance.

- 1817 This section prescribes how O should make a request for assistance.
- 1818 Subsection (2) explains that a request must be made by O in writing, should describe the matter in respect of which assistance is being requested, and should include details of any penalty or sanction that could be imposed as a result of O exercising the functions in respect of which R's assistance is being requested.

Section 321: The appropriateness of providing investigative assistance

- 1819 This section makes provision about how R is to consider whether it would be appropriate to assist O for the purposes of section 319, subsection (1), paragraph (b).
- 1820 Subsection (2) outlines three factors which R must have regard to in considering whether it would be appropriate to provide investigative assistance. Specifically:
- a. whether R would be able to exercise its powers under the relevant enactment concerned in a corresponding or similar domestic case,
 - b. the existence of a regulator-to-regulator or government-to-government cooperation agreement covering competition or consumer protection matters, and
 - c. whether the matter in respect of which the request was made is considered to be sufficiently serious to warrant R providing investigative assistance.
- 1821 For example, subsection (2), paragraph (a) should mean that while O will be able to seek assistance from R to gather missing information for the purpose of an investigation being carried out by O, it will not generally be appropriate for R to provide assistance in relation to, for example, a procedural case where O is taking action or imposing sanctions for non-compliance with its investigation if R's powers are not available for such purpose domestically.
- 1822 Subsection (3) provides that R may consider that it should not provide investigative assistance if O was unable or unwilling to contribute towards the financial cost of providing that assistance.
- 1823 Subsection (4) provides that where any of subsections (5), (6), (7) or (8) apply, R must consider that it would not be appropriate to assist O (and should therefore reject an incoming request for investigative assistance).
- 1824 Subsection (5) applies where:
- a. R considers that O would not provide corresponding or substantially similar assistance in return. Reciprocity is an important factor in the provision of investigative assistance. However, even if R considers that reciprocal support would not be forthcoming, it may still consider providing assistance to O would be appropriate should there be an overriding UK public benefit in doing so.
 - b. Providing assistance would be contrary to the UK public interest.
- 1825 Subsection (6) applies where assistance is requested concerning a criminal investigation or criminal proceedings and the request is not made under or in accordance with a qualifying cooperation arrangement.
- 1826 Subsection (7) applies where R would be unable to share the information gathered with O through any of the disclosure gateways in Part 9 of the Enterprise Act 2002 (including as amended under Chapter 2 of Part 5 of this Act). This is to ensure that early consideration is given to whether information gathered could be disclosed to O taking into account the safeguards under the disclosure gateways in Part 9 of the Enterprise Act 2002.
- 1827 Subsection (8) applies where a request relates to a matter where R would not, should the case arise domestically, have the power to use its investigatory powers unless there were reasonable grounds for suspecting a breach of the law; and R does not have reasonable grounds to suspect a breach of the law of the country of O which corresponds or is similar to the equivalent UK law. Subsection (9) provides that a certificate from O stating there has, or may have been, a breach of the overseas law is to be regarded as conclusive.

Section 322: Authorisation of the provision of investigative assistance

- 1828 The provision of investigative assistance by R is subject to authorisation by the Secretary of State unless it is provided under or in accordance with a qualifying cooperation arrangement - see section 319, subsection (1), paragraph (c). This section sets out how the Secretary of State authorises R to provide assistance to O.
- 1829 Subsection (2) provides that the Secretary of State can authorise individual requests or give a general authorisation for requests of a particular description by, for example, granting a general authorisation for a UK authority to carry out any request received from a specific overseas regulator in respect of a particular activity (such as gathering information relevant to a merger review) under the terms of a specific regulator-to-regulator international cooperation agreement. A general authorisation can be withdrawn at any time (subsection (3)). The Secretary of State must publish the giving and the withdrawal of any general authorisation (subsection (4)).
- 1830 Subsection (5) outlines the factors to which the Secretary of State must have regard when considering whether to approve the provision of investigative assistance. The Secretary of State must have regard to whether the request is made in accordance with any arrangements or agreements to which the UK is a party (whether legally binding or non-legally binding), whether it would be more appropriate for R to carry out an investigation (under one of the enactments listed in the table in section 319, subsection (2)) solely for its own purposes or that action should be taken in relation to the subject matter of the request by another UK body or by a body in a country or territory other than the requesting regulator's country or territory; or whether any assistance which R provides would be contrary to the public interest.
- 1831 Subsection (6) details that the Secretary of State may approve R's provision of assistance to O but impose conditions on the assistance which R provides. Examples of possible conditions are set out in subsection (7) and enable the Secretary of State to ensure that any assistance provided is appropriate.

Section 323: Notifications in respect of requests for investigative assistance

- 1832 This section states that R must notify the Secretary of State where it has received a request for assistance from O and is inclined to provide the requested assistance, and where the Secretary of State has not previously approved the assistance requested as part of a general authorisation (subsection (1), paragraph (b)). This requirement does not apply where the overseas regulator is making a request in accordance with a qualifying cooperation agreement (subsection 2). Subsection (3) requires R to notify O as to whether R will be providing the assistance requested and, whether there are any conditions imposed on that assistance by the Secretary of State.

Section 324: Guidance in connection with investigative assistance

- 1833 This section places a duty on the CMA to prepare and publish guidance in connection with the making and considering of requests for investigative assistance and the provision of such assistance. Guidance must be approved by the Secretary of State (subsection (3)) and consulted on (subsection (4)).
- 1834 Subsection (5) stipulates that regulators with powers to provide investigative assistance under this Chapter of Part 5 of the Act (i.e. consumer protection enforcers as well as the CMA) must have regard to the guidance published by the CMA under this section.

Section 325: Amendments to other legislation

- 1835 This section details that Schedule 28 makes a series of consequential amendments to other pieces of legislation to accommodate the provision of investigative assistance brought forward by this Act.

Schedule 28: Provision of investigative assistance to overseas regulators

1836 This Schedule makes a number of amendments to other legislation as follows:

Amendments to Part 3 of the Enterprise Act 2002	There are time limits which apply for the CMA to impose civil penalties for failures to comply with or obstruction in connection with merger information notices issued by the CMA under section 109 of the Enterprise Act 2002. Section 110A of that Act is amended to include a provision to specify the time limit in a case where the section 109 power is being used for purposes of providing investigative assistance. Section 111 is also amended to provide that where the CMA has imposed a daily default penalty in connection with an information notice which it has issued to assist O, such penalty will cease to accumulate on the day on which O no longer requires assistance. Section 120 of the Enterprise Act 2002 concerns the right for a person aggrieved by a decision to appeal to the Competition Appeal Tribunal. An amendment is made to extend this right to decisions of the CMA or the Secretary of State in connection with the CMA's provision of investigative assistance to an overseas regulator.
Amendments to Part 9 of the Enterprise Act 2002	Chapter 2 of Part 5 of this Act replaces section 243 in Part 9 of the Enterprise Act 2002 with new sections 243A to 243F. New section 243E relates to the directions which the Secretary of State can make preventing disclosures to an overseas authority. An amendment is made to clarify that the Secretary of State may not make a direction as set out in section 243E where the disclosure relates to investigative assistance provided by virtue of Chapter 2 of Part 5 of the Act (i.e. assistance which has been authorised by the Secretary of State or is provided under a qualifying cooperation arrangement). To ensure that information which comes to a public authority in connection with the exercise of its functions under Chapter 2 of Part 5 of the Act (investigative assistance) is categorised as "specified information" to which section 237 in Part 9 of the Enterprise Act 2002 applies, an amendment is made to add a reference to Chapter 2 of Part 5 of this Act into Schedule 14 to the Enterprise Act 2002. An amendment is also made to add a reference to Chapter 2 of Part 5 of this Act to Schedule 15 to the Enterprise Act 2002 to ensure that information which comes to a public authority in connection with the exercise of competition and consumer enforcement functions can be disclosed (under the gateway in section 241 of the Enterprise Act 2002) to another public authority for the purposes of enabling that authority to carry out its functions under Chapter 2 of Part 5 of the Act.

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Act 2024 which received Royal Assent on 24 May 2024 (c. 13)

Amendments to the Competition Act 1998	Section 25A of the Competition Act 1998 deals with the CMA’s power to publish notice of investigation. This section is amended to permit the CMA to publish a Section 25A notice in connection with the use of its investigatory powers under Part 1 of the Competition Act 1998 to assist O. Section 25B (duty to preserve documents relevant to investigations) is also amended to ensure that the duty to preserve should apply to investigative assistance being carried out by the CMA. Section 40A is amended to provide that the daily penalty for failure to comply with a requirement imposed by the CMA in connection with the provision of investigative assistance to O will cease to run where O no longer requires assistance.
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Chapter 3: Miscellaneous

Section 326: Disclosing information overseas

- 1837 This section relates to the ability of the CMA and other UK public authorities to exchange specified information with overseas public authorities. It replaces the existing overseas disclosures gateway under section 243 in Part 9 of the Enterprise Act 2002 (which sets out the circumstances under which public authorities may share specified information with overseas public authorities) with three new gateways. These gateways allow for overseas disclosures in defined circumstances and are subject to safeguards necessary to protect specified information.
- 1838 Part 9 of the Enterprise Act 2002 sets out general restrictions and conditions for the disclosure of specified information held by public authorities. “Specified information” (as defined in section 238 of the Enterprise Act 2002) is information which comes to a public authority in connection with the exercise of any of the functions that it has under competition and consumer enforcement related Parts of the Enterprise Act 2002, under legislation listed in Schedule 14 of the Enterprise Act 2002 or under any secondary legislation specified by the Secretary of State in an order.
- 1839 Subsection (2) replaces the existing gateway in section 243 of the Enterprise Act 2002 with new sections 243A-243F.

243A - Overseas disclosures for both overseas and domestic purposes

- 1840 New section 243A provides a gateway for a UK public authority to disclose specified information to an overseas public authority for the purposes of facilitating both its own functions and those of the overseas public authority.
- 1841 Subsection (1) provides that a UK public authority may make an overseas disclosure where this is intended to support both:
- a. the delivery of any of its own statutory functions (subsection (1), paragraph (a)), including functions under any enactment in an Act of the Scottish Parliament, Northern Ireland legislation or any subordinate legislation (as specified in subsection (3)), and

- b. the delivery by the overseas public authority of any of its functions in connection with any criminal investigations or proceedings, or civil investigations or proceedings that relate to the enforcement of “relevant law” (subsection (1), paragraph (b)).
- 1842 Subsection (4) defines “any relevant law” to encompass a range of competition, consumer protection and other related matters. It includes disclosure for the purposes of overseas civil proceedings in connection with breaches of legislation, obligations or rules of law that are equivalent to those listed in Schedule 14 of the Act.
- 1843 Together subsection (1), paragraph (b) and subsection (4) are designed to ensure that specified information can be disclosed through this gateway where an overseas authority has criminal enforcement functions of any kind or civil enforcement functions aligned with those of UK authorities who enforce competition, digital competition or consumer law.
- 1844 Similar to the corresponding provision in the existing gateway under section 243 of Part 9 of the Enterprise Act 2002, subsection (2) of section 243A sets limits on disclosures. It prevents a UK public authority from disclosing to an overseas public authority:
- a. information which is held by a person who is a private designated enforcer for the purposes of Chapter 3 of Part 3 of the Act,
 - b. certain commercially sensitive information including, for example, information in connection with market investigations under Part 4 of the Enterprise Act 2002,
 - c. information which comes to the public authority in connection with an investigation under section 11 of the Competition Act 1980, and
 - d. legacy information which is defined in subsection (5) and includes information in connection with undertakings and orders arising out of past monopoly and merger investigations under the Fair Trading Act 1973 and information held before 21st July 2021 in connection with merger investigations under Part 3 of the Enterprise Act 2002.

243B – Overseas disclosures for overseas purposes only

- 1845 Section 243B provides a gateway for a UK public authority to make a disclosure to an overseas public authority solely for the purpose of facilitating the enforcement functions of the overseas public authority (as those functions are defined in section 243A, subsection (1), paragraph (b)). The exceptions to disclosure set out in subsection (2) of section 243A apply in the same way to the section 243B gateway.

243C – Overseas disclosures for designated cooperation arrangement purposes

- 1846 Section 243C provides a gateway for overseas disclosures by a UK public authority for the purposes of facilitating the terms of a “designated cooperation arrangement”. A UK authority may enter into an agreement or non-legally binding arrangements with an overseas counterpart setting out how they intend to cooperate in relation to, for example, information sharing or coordinating their activities in connection with investigations. Section 243C confers a power on the Secretary of State to designate such arrangements and sets out the factors that they must have regard to or must satisfy themselves of before doing so.
- 1847 Subsection (1) allows specified information to be shared with an overseas public authority for a purpose permitted by a designated cooperation arrangement. This information sharing gateway does not specify, for example, the precise purposes for which specified information may or may not be shared or dictate appropriate safeguards. This is because this detail will be provided for in individual cooperation agreements or arrangements with the process of designation by the Secretary of State providing assurance that information will only be shared where appropriate and subject to relevant safeguards.

- 1848 A designated cooperation arrangement is defined in subsection (2) as an arrangement or agreement, which meets all of Conditions A to D that are set out in subsections (3) to (6):
- a. Condition A is that the arrangement is between either the UK and another country or territory, or directly between the UK and the overseas authority,
 - b. Condition B is that the arrangement relates to cooperation between either the UK and the overseas country or territory; or between the UK and the overseas authority in connection with the enforcement functions mentioned in section 243A(1)(b),
 - c. Condition C is that the arrangement provides for reciprocal assistance to be given for those purposes, and
 - d. Condition D is that the arrangement is designated by the Secretary of State by regulations (subject to the negative resolution procedure as set out in subsection (10)).
- 1849 Subsection (7) provides that before designating a cooperation arrangement, the Secretary of State must have regard to whether it contains provision restricting or preventing (a) the use of information disclosed under the arrangement for a purpose other than the one for which it was disclosed and (b) its further disclosure to another person for any reason.
- 1850 In addition, under subsection (8), the Secretary of State cannot designate an agreement or arrangement unless they are satisfied that there will be appropriate protection against self-incrimination in criminal proceedings and in relation to the storage and disclosure of confidential information (as defined in new section 246A of the Enterprise Act 2002 inserted by section 326, subsection (5)). Subsection (9) states that protection in relation to self-incrimination and the storage and disclosure of information will be adequate if it corresponds, or is substantially similar, to that provided for in any part of the United Kingdom.

243D - Use and further disclosure of information disclosed under sections 243A and 243B

- 1851 Section 243D sets out additional restrictions on the use and further disclosure by overseas public authorities of information disclosed through the gateways in sections 243A (disclosure of information for facilitating both overseas and domestic purposes) and section 243B (disclosure of information for overseas purposes only).
- 1852 Subsections (2) and (3) concern restrictions on the use and further disclosure of information disclosed under the section 243A gateway to facilitate the exercise by the disclosing UK authority of any of its statutory functions. Subsection (2) sets out that information disclosed for these purposes cannot be used by the overseas authority for any purpose other than the one for which it was originally disclosed unless the disclosing UK authority consents to use for another purpose and that purpose is also to facilitate its own functions. Subsection (3) provides similarly that information disclosed to facilitate the functions of a UK authority must not be further disclosed by the overseas authority unless the UK authority gives its consent, and the further disclosure also facilitates a function of the UK authority. Consent may be given either subsequently or at the point the information is originally disclosed.
- 1853 Subsections (5) and (6) of section 243D apply to information disclosed under either the section 243A or the section 243B gateway to facilitate the exercise of any of the overseas authority's enforcement functions as set out in section 243A, subsection (1), paragraph (b). Subsection (5) prevents information disclosed for these purposes from being used by the overseas public authority for any purpose other than the one for which it was originally disclosed unless the disclosing UK authority consents to its use for another purpose and that other purpose is also to facilitate one of the overseas authority's enforcement functions.

- 1854 Similarly, subsection (6) provides that information disclosed to facilitate an overseas authority's enforcement functions must not be further disclosed by the overseas authority unless the UK authority gives its consent, and the further disclosure also facilitates an overseas enforcement function. Again, consent may be given either subsequently or at the point the information is originally disclosed.
- 1855 Subsection (7) specifies that where a UK authority is deciding whether to give consent under any of the relevant provisions of section 243D for an overseas authority to use or further disclose information, it must have regard to the considerations set out in section 243F in the same way that it would have to when making an initial disclosure under the relevant gateway.
- 1856 Subsection (8) makes it clear that the restrictions in section 243D do not prevent any use and further disclosure of information by an overseas public authority that is required under the law of the country or territory of the authority.

243E - Directions by the Secretary of State relating to overseas disclosures under sections 243A and 243B

- 1857 Section 243E provides the Secretary of State with a power to prevent disclosure of information to overseas public authorities via the new gateways in sections 243A and 243B. This replaces the existing power to make such a direction in section 243, subsection (4) of the Enterprise Act 2002.
- 1858 Subsection (1) provides that the Secretary of State may direct that information should not be disclosed overseas under section 243A or 243B if they think the proceedings or investigation for which the information has been requested would be more appropriately carried out by authorities in the UK or in another country. Subsection (3) requires the Secretary of State to take appropriate steps to bring any direction made under subsection (1) to the attention of persons likely to be affected by it.

243F - Relevant considerations relating to overseas disclosures under sections 243A and 243B

- 1859 To ensure that information shared via the new gateways in sections 243A and 243B is appropriately protected, section 243F sets out the factors to which a UK public authority must have regard before making a disclosure.
- 1860 Under subsection (2), when deciding whether to make a disclosure to an overseas public authority under section 243A for the purpose of facilitating both its functions and the functions of the overseas public authority, a UK public authority must have regard to the existence of appropriate protections against self-incrimination in criminal cases and in relation to the storage and disclosure of confidential information (as defined in new section 246A of the Enterprise Act 2002 inserted by section 326, subsection (5)).
- 1861 Under subsection (3), when a UK public authority is deciding whether to make a disclosure to an overseas authority under section 243B for the purpose of facilitating the functions of the overseas authority only, the UK public authority must have regard both to the considerations in subsection (2) and to the following additional considerations:
- a. whether the reason for the request is sufficiently serious to justify disclosure,
 - b. whether the disclosure would further the aims or purposes of any convention or treaty between the United Kingdom and the overseas country relating to cooperation in connection with competition (including matters relating to digital markets (Part 1 of this Act)) or consumer protection,

- c. the existence of any mutual assistance arrangements with the requesting country covering the kind of information protected under Part 9, and
 - d. whether a body or person in the overseas country would provide corresponding or substantially similar assistance to the UK public authority.
- 1862 Subsection (4) states that protection will be appropriate if it corresponds or is substantially similar to that provided in any part of the United Kingdom.
- 1863 Subsections (5) and (6) give the Secretary of State a delegated power to alter, add to or remove any of the considerations set out in subsections (2) and (3) by regulations made by statutory instrument. The exercise of this power is subject to the negative resolution procedure which is consistent with the existing arrangements under section 243 of the Enterprise Act 2002. This procedure is appropriate because the power is limited as the Secretary of State would not be able to use it in ways which reduced the protections provided by, for example, the data protection legislation or Article 8 of the European Convention on Human Rights, and the safeguards provided for in section 244 of the Enterprise Act 2002.
- 1864 Subsection (3) of section 326 makes consequential amendments to section 244 of the Enterprise Act 2002 to update subsection (2) and (3) in the light of the new definitions of “commercial information”, “private information” and “sensitive information” included in new section 246A of the Enterprise Act 2002.
- 1865 Subsection (4) of section 326 makes a consequential amendment to section 245 of the Enterprise Act 2002 which deals with offences related to information sharing. The effect of this amendment (which replicates the existing position under section 243) is that a person will have committed an offence if they disclose information in contravention of a direction given by the Secretary of State under section 243E preventing overseas disclosure.
- 1866 Subsection (5) of section 326 replaces section 246 of Enterprise Act 2002 with new section 246A (interpretation) which includes a new definition of “overseas public authority” and definitions of “confidential information”, “commercial information”, “private information” and “sensitive information”.
- 1867 Subsection (6) of section 326 makes a consequential amendment to section 59, subsection (6) of the Companies (Audit, Investigations and Community Enterprises) Act 2004.

Section 327: Duty of expedition on the CMA and sectoral regulators

- 1868 This section makes provision for a duty of expedition on the CMA (and the sector regulators where relevant (see Schedule 29)) in relation to specified competition, consumer and digital markets functions, expanding and replacing the duty which previously applied in relation to its functions in relation to mergers under Part 3 of the Enterprise Act 2002. It further makes amendments to sector specific legislation to impose an equivalent duty when sector regulators exercise competition functions.
- 1869 Subsection (1) inserts a new subsection (4) into section 25 of the Enterprise and Regulatory Reform Act 2013 so that, when making any decision, or otherwise taking action, for the purposes of any of its functions listed in Schedule 4A the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable. The obligation applies to all steps of any relevant investigatory, regulatory or enforcement process.
- 1870 Subsection (2) inserts Schedule 4A into the Enterprise and Regulatory Reform Act 2013 and sets out the competition, consumer and digital markets functions to which the duty of expedition applies. The functions listed are those where the CMA has casework functions.

- 1871 Subsection (3) repeals the former duty of expedition which applied in relation to the CMA's merger functions under Part 3 of the Enterprise Act 2002, and the modifications made to the application of duty by the Water Mergers (Modification of Enactments) Regulations 2004 (S.I. 2004/3202) for the purposes of the water merger regime set out in the Water Industry Act 1991.
- 1872 Subsection (4) gives effect to Schedule 29 which amends the relevant sectoral legislation to apply an equivalent duty of expedition to sector regulators when exercising competition functions.

Schedule 29: Duty of expedition on sectoral regulators in respect of their competition functions

- 1873 This Schedule amends the relevant sectoral legislation to apply a duty of expedition to regulators when they exercise competition functions under Part 1 of the Competition Act 1998 or Part 4 of the Enterprise Act 2002. In relation to concurrent functions under Part 1 of the Competition Act 1998, the concurrent regulators exercise some functions which are not listed in Schedule 4A to the Enterprise and Regulatory Reform Act 2013. To ensure the regulators are in a consistent position with the CMA, the amendments made to the sectoral legislation ensure that the duty applies only to the extent that a function under Part 1 of the Competition Act 1998 is both exercisable concurrently by the sector regulator, and specified in the new Schedule 4A.
- 1874 Paragraphs (1) and (2) insert a duty of expedition into sections 61 and 63 of the Civil Aviation Act 2012 and section 86 of the Transport Act 2000, which applies when the Civil Aviation Authority exercises its concurrent competition functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.
- 1875 Paragraph (3) inserts a duty of expedition into sections 234I and 234J of the Financial Services and Markets Act 2000 which apply when the Financial Conduct Authority (FCA) exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.
- 1876 Paragraphs (4), (5) and (6) insert a duty of expedition into Article 29 of the Water and Sewerage Services (Northern Ireland) Order 2006 and Article 23 of the Gas (Northern Ireland) Order 1996, and Article 46 of the Electricity (Northern Ireland) Order 1992 respectively. These apply when the Northern Ireland Authority for Utility Regulation exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.
- 1877 Paragraph (7) inserts a duty of expedition into sections 370 and 371 of the Communications Act 2003 which apply when the Office of Communications (Ofcom) exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.
- 1878 Paragraphs (8) and (9) insert a duty of expedition into section 36A of the Gas Act 1986 and section 43 of the Electricity Act 1989 which apply when the Office of Gas and Electricity Markets (Ofgem) exercise concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.
- 1879 Paragraph (10) inserts a duty of expedition into section 67 of the Railways Act 1993 which applies when the Office of Rail and Road (ORR) exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.
- 1880 Paragraph (11) inserts a duty of expedition into sections 59 and 61 of the Financial Services (Banking Reform) Act 2013 which applies when the Payment Systems Regulator exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.

- 1881 Paragraph (12) inserts a duty of expedition into section 31 of the Water Industry Act 1991 which applies when the Water Services Regulation Authority (Ofwat) exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998 that are concurrent with the CMA.

Section 328: Offenders assisting investigations and prosecutions: powers of the CMA

- 1882 This section amends section 71 of the Serious Organised Crime and Police Act 2005 to add the CMA to the list of prosecutors specified in that section.
- 1883 Subsection (2) amends section 71, subsection (4) to add the CMA to the list of specified prosecutors.
- 1884 Subsection (3) amends section 71, subsection (6A) so that the CMA is included in the list of prosecutors who are permitted to designate only one chief prosecutor at a time and one alternative prosecutor for when they are unavailable.
- 1885 Subsection (4) inserts a new section 71, subsection (8) which prohibits the CMA from giving a notice providing immunity from prosecution under section 71, but allows it to exercise the other powers available to specified prosecutors. This has the effect of allowing the CMA to make a formal agreement regarding the use of evidence against an assisting offender, in accordance with section 72 Serious Organised Crime and Police Act 2005. It further means that the provisions at sections 74 and sections 387 and 388 of the Sentencing Act 2020 (in respect of England and Wales) and sections 73 to 74 of the Serious Organised Crime and Police Act 2005 (in respect of Northern Ireland) in relation to reduction in sentence for assistance to prosecution, and review by the courts of sentence, will apply to any written agreements made between an assisting offender and the CMA.

Section 329: Removal of limits on the tenure of a chair of the Competition Appeal Tribunal

- 1886 This section amends paragraph 2 of Schedule 2 to of the Enterprise Act 2002 to remove the prohibition on a person being a chair of the Competition Appeal Tribunal for more than eight years.

Part 6: General

Section 330: Interpretation

1887 This section abbreviations and terms that are used throughout the Act.

1888 In relation to the definition of “digital content”, “data” would include software.

Section 331: Data protection

1889 This section makes provision to clarify the relationship between the duties and powers to process information set out in the Act, and the data protection legislation (as defined in section 330).

Section 332: Notices

1890 This section sets out the process for giving notices under Part 1 and 3 of the Act, and Chapter 1 of Part 5 of the Act to persons within and outside of the UK, including to business entities registered or operating outside the UK.

1891 Subsection (2) sets out four means of service applicable to notices to be given to any person whether an individual or a legal entity (referred to here, in either case, as the “recipient”).

1892 Subsections (6) and (7) expand on the meaning of a recipient’s proper address for the purposes of subsection (2), paragraphs (b) and (c), including, in relation to partnerships and any other type of firm, provision for service to the recipient’s principal office.

1893 Subsection (8) expands on the meaning of a recipient’s email address for the purposes of subsection (2), paragraph (d).

1894 Subsection (7), paragraph (d) and subsection (8), paragraph (b) respectively provide for when no other definition of the recipient’s proper address, or (as the case may be) the recipient’s email address, applies.

1895 Subsections (3) to (5) provide that service on each of the listed kinds of business entity can be effected by serving on an individual with the specified office or role in relation to the entity. The means of service provided for service on recipients in subsection (2) and related subsections equally apply for the purposes of service on the specified individual.

1896 Subsection (9) provides an non-exhaustive meaning of ‘principal office’ for the purpose of subsection (7), paragraphs (a), (b) and (c) where the entity listed is outside of the United Kingdom.

1897 Subsections (10) and (11) are self-explanatory.

Section 333: Consultation

1898 Section 333 clarifies that any requirement under the Act to consult may be satisfied by a consultation which takes place before the Act was passed.

Section 334: Financial provision

1899 Section 334 recognises that as a matter of House of Commons procedure, a financial resolution needed to be agreed for the Bill from which the Act resulted.

Section 335: Minor and consequential amendments

1900 This section introduces Schedule 30 which makes minor and consequential amendments to other legislation as a consequence of provisions made in Part 2, Part 3, Chapter 1 of Part 4 and Chapter 2 of Part 5, of the Act.

Schedule 30: Minor and consequential amendments

- 1901 Schedule 30 makes amendments to other-legislation required as a result of provision made by the Act regarding competition, consumer enforcement, unfair trading and the provision of investigative assistance to overseas regulators.
- 1902 Those amendments include:
- a. amendments to disapply the provisions regarding the extra territorial reach of the information gathering power at section 109 of the Enterprise Act 2002, and the reforms to the civil sanctions regime which enforces it, where that power is applied for non-merger control purposes by other enactments; and
 - b. amendment of information sharing gateways in legislation which otherwise restricts disclosure of information relating to individuals and businesses, to enable disclosure for the purposes of Part 3, Chapter 1 of Part 4 and Chapter 2 of Part 5 of the Act.

Section 336: Power to make further consequential provision

- 1903 This section confers a power on the appropriate authority to make provision that is consequential on this Act, or any provision made under it. The appropriate authority means the Secretary of State unless the regulations made contain amendments only in relation to tax, in which case it means the Treasury. The power conferred under this section includes the ability to amend, repeal or revoke provisions made by enactments (as defined in section 330 but only in relation to any enactment passed or made before the end of the Parliamentary Session in which this Act is passed. An enactment in this context includes an Act of the UK Parliament, primary legislation made by the devolved administrations and assimilated direct legislation.
- 1904 This power is exercised by way of regulations. The use of this power to amend, repeal or revoke provisions made in primary legislation is subject to the affirmative Parliamentary procedure (subsection (3)), otherwise the negative procedure applies (subsection (4)).

Section 337: Regulations

- 1905 This section sets out various procedural aspects relevant to the making of regulations under the Act by statutory instrument (except for commencement regulations made under section 339).
- 1906 Subsections (3) and (4) explain what is meant by references in the Act to the affirmative procedure and the negative procedure. References to “the affirmative procedure” are to the draft affirmative procedure, whereby regulations must be debated and affirmed by both Houses of Parliament before they can be made. Under the negative procedure, regulations must be laid after making, and can be annulled by resolution in either House.
- 1907 Subsection (5) ensures that where the Treasury makes regulations using the power in section 336 to make amendments to tax legislation only, the regulations would be subject only to procedure in the House of Commons. This is in recognition of the financial privilege of the Commons.

Section 338: Extent

- 1908 This section sets out the territorial extent of the Act. The Act extends to the whole of the UK.

Section 339: Commencement

- 1909 This section outlines the details of the commencement of the Act. Generally, commencement will be by way of regulations made by the Secretary of State.

- 1910 The exceptions to this are section 130 and Schedule 7 (mergers involving newspaper enterprises and foreign powers), Part 6 of the Act (except section 335 and Schedule 30 (minor and consequential amendments)) and any powers to make regulations (and any provisions necessary to enable the making of regulations); these commenced on Royal Assent. In addition, the amendments to Part 3 of the Enterprise Act 2002 made by section 129 and Schedule 6 in connection with the investigation of mergers involving energy network enterprises commence two months after Royal Assent.
- 1911 There is power for the Secretary of State to commence different provision on different days, and to make transitional or saving provision in relation to commencement.

Section 340: Short title

- 1912 This section as the Digital Markets, Competition and Consumers Act 2024.

Commencement

- 1913 Section 339 provides for the commencement of the provisions in this Act.
- 1914 Part 6 of this Act (except section 335 and Schedule 30 (minor and consequential amendments)), section 130 and Schedule 7 (mergers involving newspaper enterprises and foreign powers) came into force on the day of Royal Assent. For the most part these are powers to make consequential and financial provision. Provisions which confer powers to make regulations, and provisions which are necessary for enabling the exercise of such powers on or after the day on which Royal Assent is given, also came into force on Royal Assent. Section 129 (and Schedule 6) come into force two months after Royal Assent.
- 1915 The remaining provisions of this Act will come into force on such day as the Secretary of State may appoint by regulations. Different days may be appointed for different purposes.

Related documents

1916 The following documents are relevant to the Act and can be read at the stated locations:

Digital Markets

- [Consultation: ‘A new pro-competition regime for digital markets’](#)
- [Consultation outcome: Government response to the consultation on ‘A new pro-competition regime for digital markets’](#)
- [Unlocking Digital Competition: Report of the Digital Competition Expert Panel](#)
- [CMA market study final report: Online platforms and digital advertising](#)
- [CMA market study final report: Mobile ecosystems](#)
- [Impact Assessment: A new pro-competition regime for digital markets](#)
- [House of Lords Communications and Digital Committee Report: *Free for all? Freedom of expression in the digital age*](#)
- [Relevant overseas legislation: EU Digital Markets Act](#)

Competition and Consumer Protection Law

- [Consumer Green Paper: Modernising Consumer Markets](#)
- [Consultation: Reforming Competition and Consumer Policy](#)
- [Consultation outcome: Government response to consultation on ‘Reforming Competition and Consumer Policy’](#)
- [Letter from Lord Tyrie as Chair of the CMA to the Secretary of State at the Department for Business, Energy and Industrial Strategy](#)
- [CMA’s response to Citizens Advice Super-complaint on the Loyalty Penalty](#)
- [Relevant documents from the BEIS Select Committee inquiry on ‘Post-pandemic economic growth: State Aid and Post-Brexit Competition Policy’](#)
- [Consumer Protection Survey](#)
- [John Penrose MP’s independent report to HM Government \(‘Power to the People’\)](#)
- [CMA State of Competition Report 2020](#)
- [CMA State of Competition Report 2022](#)
- [Consultation: ‘Smarter Regulation: Consultation on Improving price transparency and product information for consumers’](#)

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- [Consultation outcome: Government response to consultation on ‘Smarter Regulation: Improving consumer price transparency and product information for consumers’](#)
- [Call for evidence: ‘Package travel legislation: updating the framework’](#)

Annex A - Hansard References

1917 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
<i>House of Commons – Session 2022-23</i>		
Introduction	25 April 2023	
Second Reading	02 May 2023	Vol 732 Col 879
Public Bill Committee	13 June 2023	1st Sitting
	13 June 2023	2nd Sitting
	15 June 2023	3rd Sitting
	15 June 2023	4th Sitting
	20 June 2023	5th Sitting
	20 June 2023	6th Sitting
	22 June 2023	7th Sitting
	22 June 2023	8th Sitting
	27 June 2023	9th Sitting
	27 June 2023	10th Sitting
	29 June 2023	11th Sitting
	04 July 2023	12th Sitting
	04 July 2023	13th Sitting
	11 July 2023	14th Sitting
Session 23-24		
1 st and 2 nd Reading	08 November 2023	
Report and Third Reading	20 November 2023	Vol 741 Col 45
	21 November 2023	
<i>House of Lords</i>		
Introduction	22 November 2023	Vol 834
Second Reading	05 December 2023	Vol 834 Col 1388
Grand Committee	22 January 2024	Vol 835 Col 114GC
	24 January 2024	Vol 835 Col 198GC
	29 January 2024	Vol 835 Col 258GC
	31 January 2024	Vol 835 Col 352GC
	05 February 2024	Vol 835 Col 410GC
	07 February 2024	Vol 835 Col 496GC
Report	11 March 2024	Vol 836 Col 1813
	13 March 2024	Vol 836 Col 2027
Third Reading	26 March 2024	Vol 837 Col 583

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<i>House of Commons</i>		
Consideration of Lords amendments	30 April 2024	Vol 749 Col 175
<i>House of Lords</i>		
Consideration of Commons amendments	14 May 2024	Vol 838 Col 488
<i>House of Commons</i>		
Consideration of Lords Message	21 May 2024	Vol 750 Col 785
<i>House of Lords</i>		
Consideration of Commons amendments	23 May 2024	Vol 838 Col 1191
Royal Assent	24 May 2024	HoC Vol 750 Col 1274
		HoL Vol 838

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Annex B - Progress of Bill Table

1918 This Annex shows how each section and Schedule of the Act was numbered during the passage of the Bill through Parliament.

Section of the Act	Bill as Introduced in the Commons	Bill as amended in Committee in the Commons	Bill as introduced in the Lords	Bill as amended in Committee in the Lords	Bill as amended on Report in the Lords
1					1
2					2
3					3
4					4
5					5
6					6
7					7
8					8
9					9
10					10
11					11
12					12
13					13
14					14
15					15
16					16
17					17
18					18
19					19
20					20
21					21
22					22
23					23
24					24
25					25
26					26
27					27
28					28
29					29
30					30
31					31
32					32
33					33
34					34
35					35
36					36
37					37
38					38

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39	n/a (added in Section 39: Collective Submissions)		39		39
40	39	39	40		40
41	40	40	41		41
42	41	41	42		42
43	n/a (added Section 43: Decision not to make final offer order)	42	43		43
44	42	43	44		44
45	43	44	45		45
46	44	45	46		46
47	45	46	47		47
48	46	47	48		48
49	47	48	49		49
50	48	49	50		50
51	49	50	51		51
52	50	51	52		52
53	51	52	53		53
54	52	53	54		54
55	53	54	55		55
56	54	55	56		56
57	55	56	57		57
58	56	57	58		58
59	57	58	59		59
60	58	59	60		60
61	59	60	61		61
62	60	61	62		62
63	61	62	63		63
64	62	63	64		64
65	63	64	65		65
66	64	65	66		66
67	65	66	67		67
68	66	67	68		68
69	67	68	69		69
70	68	69	70		70
71	69	70	71		71
72	70	71	72		72
73	71	72	73		73
74	72	73	74		74
75	73	74	75		75
76	74	75	76		76
77	75	76	77		77
78	76	77	78		78
79	77	78	79		79
80	78	79	80		80
81	79	80	81		81

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82	80	81	82		82
83	81	82	83		83
84	82	83	84		84
85	83	84	85		85
86	84	85	86		86
87	85	86	87		87
88	86	87	88		88
89	87	88	89		89
90	88	89	90		90
91	89	90	91		91
92	90	91	92		92
93	91	92	93		93
94	92	93	94		94
95	93	94	95		95
96	94	95	96		96
97	95	96	97		97
98	96	97	98		98
99	97	98	99		99
100	98	99	100		100
101	99	100	101		101
102	100	101	102		102
103	101	102	103		103
104	102	103	104		104
105	103	104	105		105
106	104 (The following section was removed – Section 105: Notices under this Part)	105	106		106
107	106	107	107	107	107
108	107	108	108	108	108
109	108	109	109	109	109
110	109	110	110	110	110
111	110	111	111	111	111
112	111	112	112	112	112
113	112	113	113	113	113
114	113	114	114	114	114
115	n/a (added Section 115: Protected disclosures)		115		115
116	n/a (added Section 116: Restriction on disclosure orders)			116	116
117	114	115	116	117	117
118	115	116	117	118	118
119	116	117	118	119	119
120	n/a (added Section 120: Repeal of exclusions relating to the European and Steel Community)		119	120	120
121	117	118	120	121	121

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122	118	119	121	122	122
123	119	120	122	123	123
124	120	121	123	124	124
125	121	122	124	125	125
126	122	123 (removed Section 124: Offenders assisting investigations and prosecutions: powers of the CMA)	125 (removed Section 126: Use of damages-based agreements in opt- out collective proceedings)	126 (removed Section 127: Use of damages-based agreements in opt- out collective proceedings)	126
127	124	125	127	128	127
128	125	126	128	129	128
129	n/a (added Section 129: Mergers of energy network enterprises)		129	130	129
130	n/a (added Section 130: Mergers involving newspaper enterprises and foreign powers)				
131	126	127	130	131	130
132	127	128	131	132	131
133	128	129	132	133	132
134	129	130	133	134	133
135	n/a (added Section 135: Power to make a reference after previously deciding not to do so)		134	135	134
136	130	131	135	136	135
137	131	132	136	137	136
138	132	133	137	138	137
139	133	134	138	139	138
140	n/a (added Section 140: Taking action in relation to regulated markets)		139	140	139
141	134	135	140	141	140
142	135	136	141	142	141
143	136	137	142	143	142
144	137	138	143	144	143
145	138	139	144	145	144
146	n/a (added Section 146: Meaning of “working day” in Parts 3 and 4 of EA 2002)		145	146	145
147	139	140	146	147	146
148	140	141	147	148	147
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These Explanatory Notes relate to the Digital Markets, Competition and Consumers Act 2024 which received Royal Assent on 24 May 2024 (c. 13)

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209	201 (removed Section 202: Notices under)	202 (removed Section 203: Notices under)	208	209	208
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216	n/a (added Section 216: Enforcement of requirements relating to secondary ticketing)				
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288	280	281	286	287	286
289	n/a (added in Section 289: Consequential amendments and		287	288	287

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Act 2024 which received Royal Assent on 24 May 2024 (c. 13)

	removed Section 281: Exercise of functions relating to this Chapter)				
290	282	283	288	289	288
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300	n/a (added Section 300: ADR fees regulations)		298	299	298
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310	301	302	308	309	308 (removed Section 309: Requirements on secondary ticketing facilities)
311	n/a (added Section 311: Provision of information about competition in connection with motor fuel)		309	310	310
312	n/a (added Section 312: Penalties for failure to comply with notices under section 311)		310	311	311
313	n/a (added Section 313: Procedure and appeals)		311	312	312
314	n/a (added Section 314: Statement of policy on penalties)		312	313	313
315	n/a (added Section 315: Offences etc)		313	314	314
316	n/a (added Section 316: Penalties under section 312 and offences under section 315)		314	315	315
317	n/a (added Section 317: Information sharing)		315	316	316
318	n/a (added Section 318: Expiry of this Chapter)		316	317	317
319	302	303	317	318	318

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328	n/a (added Section 328: Offenders assisting investigations and prosecutions: powers of the CMA)		326	327	327
329	n/a (added Section 329: Removal of limit on the tenure of a chair of the Competition Appeal Tribunal)		327	328	328
330	311	312	328	329	329
331	n/a (added Section 331: Data protection)			330	330
332	n/a (added Section 332: Notices)		329	331	331
333	n/a (added Section 333: Consultation)			332	332
334	n/a (added Section 334: Financial provision)	313	330	333	333
335	n/a (added Section 335: Minor and consequential amendments)			334	334
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Schedule 1	Schedule 1	Schedule 1	Schedule 1		Schedule 1
Schedule 2	Schedule 2	Schedule 2	Schedule 2		Schedule 2
Schedule 3	Schedule 3	Schedule 3	Schedule 3		Schedule 3
Schedule 4	Schedule 4	Schedule 4	Schedule 4		Schedule 4
Schedule 5	Schedule 5	Schedule 5	Schedule 5		Schedule 5
Schedule 6	n/a (added Schedule 6: Mergers of energy network supplies)		Schedule 6		Schedule 6
Schedule 7	n/a (added Schedule 7: Mergers involving newspaper enterprises and foreign powers)				

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Schedule 8	Schedule 6	Schedule 6	Schedule 7	Schedule 7	Schedule 7
Schedule 9	Schedule 7	Schedule 7	Schedule 8	Schedule 8	Schedule 8
Schedule 10	Schedule 8	Schedule 8	Schedule 9	Schedule 9	Schedule 9
Schedule 11	Schedule 9	Schedule 9	Schedule 10	Schedule 10	Schedule 10
Schedule 12	Schedule 10	Schedule 10	Schedule 11	Schedule 11	Schedule 11
Schedule 13	Schedule 11	Schedule 11	Schedule 12	Schedule 12	Schedule 12
Schedule 14	Schedule 12	Schedule 12	Schedule 13	Schedule 13	Schedule 13
Schedule 15	Schedule 13	Schedule 13	Schedule 14	Schedule 14	Schedule 14
Schedule 16	Schedule 14	Schedule 14	Schedule 15	Schedule 15	Schedule 15
Schedule 17	Schedule 15	Schedule 15	Schedule 16	Schedule 16	Schedule 16
Schedule 18	Schedule 16	Schedule 16	Schedule 17	Schedule 17	Schedule 17
Schedule 19	Schedule 17	Schedule 17	Schedule 18	Schedule 18	Schedule 18
Schedule 20	Schedule 18	Schedule 18	Schedule 19	Schedule 19	Schedule 19
Schedule 21	n/a (added Schedule 21: Chapter 1 of Part 4: consequential amendments)			Schedule 20	Schedule 20
Schedule 22	Schedule 19	Schedule 19	Schedule 20	Schedule 21	Schedule 21
Schedule 23	Schedule 20	Schedule 20	Schedule 21	Schedule 22	Schedule 22
Schedule 24	Schedule 21	Schedule 21	Schedule 22	Schedule 23	Schedule 23
Schedule 25	Schedule 22	Schedule 22	Schedule 23	Schedule 24	Schedule 24
Schedule 26	Schedule 23	Schedule 23	Schedule 24	Schedule 25	Schedule 25
Schedule 27	Schedule 24	Schedule 24	Schedule 25	Schedule 26	Schedule 26
Schedule 28	Schedule 25	Schedule 25	Schedule 26	Schedule 27	Schedule 27
Schedule 29	Schedule 26	Schedule 26	Schedule 27	Schedule 28	Schedule 28
Schedule 30	n/a (added Schedule 30: Minor and consequential amendments)			Schedule 29	Schedule 29

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