DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL 2023

Memorandum from the Department for Business and Trade and the Department for Science, Innovation and Technology to the Delegated Powers and Regulatory Reform Committee

Contents

Additional cases where existing power under section 28(2) EA02 for the Secretary of State to specify the basis on which the United Kingdom turnover of an enterprise should be determined for the purposes of merger control thresholds will apply

Clause 127 (Relevant merger situations and special merger situations) and Schedule 4, Paragraph 6(4): Amendments to existing power in section 59(6A) EA02 to amend conditions for application of the special public interest merger regime – turnover element of the thresholds

Clause 127 (Relevant merger situations and special merger situations) and Schedule 4, Paragraph 6(4): Amendments to existing power in section 59(6A) EA02 to amend conditions for application of the special public interest merger regime – non-turnover elements of the thresholds

Clause 127(Relevant merger situations and special merger situations) and Schedule 4, Paragraph 7(3): Correction to existing power in paragraph 3(c) of Schedule 5A EA02 for the Secretary of State to alter the level of turnover specified in merger control thresholds for mergers of energy network enterprises

Clause 127 (Relevant merger situations and special merger situations) and Schedule 4, Paragraph 9: Amendments to existing power to alter share of supply test in section 123 EA02

MARKETS

Clause 137(2): Power for Secretary of State to amend any sectoral enactment and section 168 Enterprise Act 2002 in connection with the provision made by Schedule 7.

Clause 137(7): Power to amend list of sectoral enactments at clause 133(4) and relevant regulators listed at clause 137(6).

Clause 137 (Final undertakings and orders: power to conduct trials) and Schedule 8, Paragraph 4: Power to specify qualifying remedial matters in relation to which remedies may be the subject of an implementation trial.

MISCELLANEOUS

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 9(10): Power to amend the maximum penalty for persons who are not undertakings, which may be imposed by the CMA under section 40A CA98

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 9(13): A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who are undertakings under section 40A CA98

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 17(10): Power to amend the maximum penalty for persons who do not own or control an enterprise, which may be imposed by the CMA under section 111 EA02

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 17(12): A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 111 EA02

Clause 142(1) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 28(9): Power to amend the maximum penalty for persons who do not own or control an enterprise, which may be imposed by the CMA under section 174D EA02

Clause 142(1) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 28(13): A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 174D EA02

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 6: Power to amend the maximum penalty which may be imposed by the CMA on a person who is not an undertaking under section 35B CA98 (as inserted by Schedule 10 Paragraph 6)

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies)), Paragraph 6: A power to specify the basis on which turnover should be calculated for the

purposes of maximum civil penalties for persons who are undertakings under section 35B CA98 (as inserted by Paragraph 6 of Schedule 10)

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 11: Power to amend the maximum penalty which may be imposed by the CMA on persons who do not own or control an enterprise under section 94AB EA02 (as inserted by Paragraph 11 of Schedule 10)

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 11: A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 94AB EA02 (as inserted by paragraph 11 of Schedule 10)

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 17: Power to amend the maximum penalty which may be imposed by the CMA on persons who do not own or control an enterprise under section 167B EA02 (as inserted by paragraph 17 of Schedule 10)

Clause 142(2) (Civil penalties etc in connection with competition matters) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 17: A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 167B EA02 (as inserted by paragraph 17 of Schedule 10)

PART 3 - ENFORCEMENT OF CONSUMER PROTECTION LAW

ENFORCEMENT

Clause 150(3) (Enforcers): Delegated power for the Secretary of State to amend, by regulations, clause 150 (Enforcers) so as to add or remove a person as a public or private designated enforcer or to vary the entry of a public or private designated enforcer.

Clause 176(3) (Enhanced consumer measures: private designated enforcers): Delegated power for the Secretary of State to, by regulations, specify a private enforcer in relation to enhanced consumer measures.

Clause 203(2) (Determination of turnover): Power for the Secretary of State to specify in secondary legislation the methodology for determining “turnover” for civil monetary penalties imposed under Chapters 3 and 4 of Part 3 to the Bill

Clause 204(1) (Power to amend amounts): Delegated power for Secretary of State to substitute a different maximum amount for fixed or daily penalties

Schedule 16 (investigatory powers), paragraph 2(3) (new paragraph 16H(2) - meaning of turnover for purposes of paragraphs 16A and 16C: Power for the Secretary of State to specify in secondary legislation the methodology for determining “turnover” for civil monetary penalties imposed under Schedule 5 to the Consumer Rights Act 2015, as amended by Chapter 6 - investigatory powers of Part 3 and Schedule 16 to the Bill)

Schedule 16 (Investigatory Powers), paragraph 2(3) (new paragraph 16 I): Delegated power for Secretary of State to substitute a different maximum amount for fixed or daily penalties.

Clause 208(1) (Powers to amend Schedule 14 and Schedule 15): Delegated power for the Secretary of State to, by regulations, amend the tables set out in Schedules 14 and 15 so as to add, remove or vary an entry for (i) an enactment within scope of the court-based or CMA direct enforcement mechanisms or (ii) an entry providing for the enforcers authorised to use the court-based enforcement mechanism in respect of an enactment, obligation or rule of law.

Clause 209(1) (Rules): Delegated power for the CMA to make, subject to approval by the Secretary of State, rules on procedure and other matters in connection with the carrying out of its functions under the direct enforcement regime for consumer protection law

PART 4 - CONSUMER RIGHTS AND DISPUTES

PROTECTION FROM UNFAIR TRADING

Clause 231 (Right to Redress: Further Provision): Power for the Secretary of State to make provision about exercise of rights to redress.

Clause 240 (1)(a) and (1)(c) (Powers to amend this Chapter): Power for the Secretary of State to add to or amend Schedule 18 (commercial practices which are in all circumstances considered unfair)

Clause 240 (1)(b)(Powers to amend this Chapter): Power for the Secretary of State to delete

from Schedule 19 (Commercial practices which are in all circumstances considered unfair)

Clause 240 (2) (Powers to amend this Chapter): Power for the Secretary of State to amend clause 231(8) (excluded description of power)

Clauses 240 (3)(a) and (3)(b) (Right to redress: further provision): Power for Secretary of State to amend Clause 230 (7)

Clause 240(4): Power to amend list of information deemed material in Clause 228 (2)

SUBSCRIPTION CONTRACTS

Clause 253(2) (Excluded contracts): Delegated power for the Secretary of State to amend the list in Schedule 20 of descriptions of contract excluded from the definition of 'subscription contracts' within scope of the new provisions;

Clause 254(8) (Pre-contract information): Delegated power for the Secretary of State to amend Parts 1 and 2 of Schedule 21 which contain respectively the key pre-contract information and full pre-contract information to be provided to consumers;

Clause 256(6) (Reminder Notices): delegated power for the Secretary of State, by regulations, to disapply or modify the requirements to give a reminder notice in relation to traders or contracts of a specified description.

Clause 265 (Cancellation of subscription contract: further provision): Delegated powers for the Secretary of State, by regulations, to make further provision in connection with a consumer's exercise of a right under Part 4 Chapter 2 to cancel a subscription contract, and to extend a cooling-off cancellation period under Part 4 Chapter 2.

Clause 275 (Power to make further provision in connection with this Chapter): delegated power for the Secretary of State, by regulations, to make further detailed provision relating to various Part 4 Chapter 2 requirements on traders, and to specify descriptions of cases for the purposes of clause 271(2) (specified term of a subscription contract to be of no effect).

INSOLVENCY PROTECTION FOR CONSUMER SAVINGS SCHEMES

Clause 282(2) (Excluded arrangements): Power for the Secretary of State to amend the list of excluded arrangements set out in Schedule 22 by adding a description of an excluded arrangement or removing a description of an excluded arrangement or modifying a description of an excluded arrangement.

ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER CONTRACT DISPUTES

Clause 290(8) (Other definitions): Power for the Secretary of State to disapply the requirements of Chapter 4 (including accreditation of ADR providers) in relation to certain consumer contracts

Clause 293(2) (Exempt ADR providers): Power for the Secretary of State to amend Schedule 23

Clause 298 (Fees regulations): Power for the Secretary of State to make provision about fees for accreditation of ADR providers.

Clause 299(2) (Accreditation criteria): Power for the Secretary of State to amend Schedule24

Clause 301(1) (ADR Information regulations): Power for the Secretary of State to require the provision of information

Clause 305(1): Power for the Secretary of State to provide for other persons to have accreditation functions

PART 5 - MISCELLANEOUS

Clause 309(9) Power to require information about competition in the market for motor fuel: A power for the Secretary of State to amend definitions.

Clause 310(6) Penalties for failure to comply with notices under clause 309 (Power to require information about competition in the market for motor fuel): A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for undertakings under clause 310 (Penalties for failure to comply with notices under section 309 (Power to require information about competition in the market for motor fuel))

Clause 316(Expiry of this Chapter): Power for Secretary of State to extend the period for which clauses 309 to 315 have effect

Clause 324(2) (Disclosing information overseas): Re-enactment of existing power under section 243 EA02 for Secretary of State to modify considerations to which a public authority

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Digital Markets, Competition and Consumers Bill (the “Bill”). The Bill was published on 25 April 2023.

2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected. Provisions are described below in the order in which they appear in the Bill.

3. This memorandum refers to other powers in the Bill which do not confer powers to make delegated legislation, but which involve Parliamentary scrutiny or relate to administrative functions that may be of interest to the Committee. These are listed and summarised separately in Annex B.

B. PURPOSE AND EFFECT

4. The purpose of the Bill is:

   a. To ensure effective competition in digital markets through the introduction of an *ex ante* regulatory regime, enforcement of which will be the responsibility of the Competition and Markets Authority ("CMA");

   b. To make amendments to competition law to ensure the CMA's powers and processes are efficient and effective;

   c. To make amendments to consumer law to reform the manner of its enforcement, and ensure effective consumer protection measures are in place; and

   d. To make amendments in relation to the powers and functions of the CMA and other regulators of cross-cutting application, in particular through the introduction of a duty of expedition in relation to competition, consumer and digital markets functions, and new amendments in relation to the sharing of information and ability to provide investigative assistance to international partners.

5. The Bill is structured in 6 Parts and 27 Schedules.

Summary of delegated powers in the Bill

6. The Bill prescribes the new framework for the regulation of digital markets, makes amendments to the existing competition law regimes concerning antitrust, mergers and markets functions, sets out a new model for the enforcement of consumer protection law, enhances information gathering powers and consumer rights and makes amendments of cross-cutting application in relation to the powers and functions of the CMA. However, aspects of each legislative framework will need to be determined under the Bill to set out further detailed and technical aspects of the regimes. The provision for delegated powers, subject to appropriate scrutiny and safeguards, is proposed to enable the government to react effectively to

technological or economic developments, and ensure the continued effective operation of each regime.

7. The delegated powers in the Bill fall into five categories. First, there are provisions which create new delegated powers to ensure that the regimes can respond to developments in markets, particularly in fast moving digital markets, and remain effective. Second are those to give effect to the new or amended regimes and set out technical details to support their operation. Third are powers which modify, or are based upon, existing delegated powers. Fourth are powers related to the new or amended powers for the CMA to issue civil sanctions which arise across its digital markets, competition and consumer regimes. Fifth are general provisions which are required for the Bill to have effect.

8. In the first category there are a number of delegated powers which are intended to ensure the regimes can remain responsive to market changes. Examples of these powers include the following:

   a. The new digital markets regulatory regime will apply to those undertakings designated as having "Strategic Market Status" ("SMS") in respect of a digital activity. Before designating an undertaking, the CMA will be required to undertake an SMS investigation, including consideration of whether the undertaking has, in respect of a digital activity, substantial and entrenched market power and a position of strategic significance (together, "the SMS conditions"). An undertaking will have a position of strategic significance in respect of a digital activity where at least one of four conditions applies. While those four conditions are set out on the face of the Bill, clause 6(2) sets out a power for the Secretary of State to vary the conditions.

   b. Another component of the SMS investigation will be a turnover threshold test ("the turnover condition"). The Bill sets turnover thresholds to provide certainty to undertakings below those thresholds that they will not be in scope of the regime. Clause 7(3) provides the Secretary of State with a power to amend the turnover thresholds.

c. The Bill provides a power for the CMA to impose conduct requirements on undertakings designated with SMS. Such conduct requirements must fall into one of the permitted types of conduct requirement set out in the Bill. Clause 20(4) (permitted types of conduct requirement) provides a power for the Secretary of State, by regulation, to amend or otherwise modify the list of permitted types and so the range of conduct requirements available to the CMA.

d. The Bill provides a power for the CMA to undertake implementation trials of remedies before deciding on a final remedy package at the conclusion of a market investigation where it has concluded that there is a feature of the market which has an adverse effect on competition. Trials will only be permitted in relation to the provision or publication of information to consumers, and, by virtue of clause 137 and paragraph 4 of Schedule 8, such other matters as the Secretary of State may specify in regulations.

e. The Bill makes provision for traders to protect payments made by consumers to qualifying consumer savings scheme contracts. Clause 282 provides for descriptions of arrangements to be excluded from the scope of consumer savings scheme contracts. Excluded arrangements are set out in Schedule 22. Schedule 22 currently contains seven descriptions of arrangements which are excluded from the scope of consumer savings scheme contracts. Clause 282(2) provides the Secretary of State with a power to add to, remove or modify excluded arrangements set out in Schedule 22.

f. The Bill makes provision for, and in connection with, the mandatory accreditation of persons providing alternative dispute resolution in consumer disputes. The Secretary of State is the decision-maker, but clause 305(1) of the Bill provides a regulation-making power to confer the relevant functions on one or more other persons.

9. Provisions falling into the second category are those delegated powers which will allow technical or operational details to be set out in secondary legislation to support the operation of the new regimes in relation to digital

markets, the new CMA direct enforcement regime for consumer protection law and new consumer rights under subscription contracts. Examples of these powers include the following:

a. As referred to above, the new digital markets regulatory regime will apply to those undertakings designated as having SMS and a component of the SMS investigation will be assessing whether the turnover condition is met in relation to the undertaking being investigated. Clause 8(4) sets out a power for the Secretary of State to make provision in regulations about how the total value of UK or global revenue should be estimated for the purposes of the turnover condition.

b. In relation to the new digital markets regulatory regime, the Bill sets out functions which are reserved for the CMA Board, with the most strategically significant decisions within the regime being so reserved. Clause 106(9) provides a power for the Secretary of State to amend those functions should the operation of the regime indicate that this would be appropriate.

c. A power in clause 110(2) for the CMA to make rules on the calculation of the levy to fund its costs of carrying out its digital markets functions.

d. A power for the CMA to make rules providing for the carrying out of its new functions for the direct enforcement of consumer protection law under Chapter 4 of Part 3 of the Bill (Clause 209(1)).

e. Clause 324 provides a power for the Secretary of State, by regulations, to designate international cooperation agreements for the purposes of the new section 243F EA02 where they are satisfied, amongst other things, that the law and practice of the country or territory with whom the agreement or arrangements are with provides appropriate protection against self-incrimination in criminal proceedings, and the law and practice of that country or territory provides appropriate protection in relation to the storage and disclosure of confidential information.

f. Clause 275(1)(a) to (d) empower the Secretary of State to make further detailed provision in relation to the main requirements imposed on traders in Part 4 Chapter 2 on subscription contracts.

10. Provisions falling into the third category modify, build on or clarify existing delegated powers to reflect changes to primary legislation, improve their efficacy, building on lessons learnt from consultation, stakeholder engagement and reviewing policy outcomes over time. Examples of these amendments to existing frameworks include the following:

a. Clause 124 and Schedule 3 (Power of Competition Appeal Tribunal to grant declaratory relief) amends primary legislation to enable the CAT to grant declaratory relief in private damages competition claims (under section 47A or 47B of the CA98), in addition to other existing remedies. To reflect this, paragraph 9 in Schedule 3 amends the power regarding matters which may be specified in CAT Rules, to include rules on declaratory relief. In particular, it amends Schedule 4 to the EA02 and makes provision such that Tribunal rules can also be made in relation to the grant of declarations (or declarators in Scotland).

b. Clause 127 and paragraph 3 of Schedule 4 amend the existing power at section 28(6) EA02 which allows the Secretary of State, by order, to amend the threshold for the turnover in the UK of the enterprise being taken over which is one of the factors determining whether a transaction is in scope of the merger regime. The Bill makes provision for a new threshold which applies where the value of the turnover in the UK of one of the enterprises concerned exceeds £350 million and that enterprise also has a 33% share of the supply of particular goods or services in the UK, and creates a new “safe harbour” under which mergers will no longer be subject to merger control if none of the enterprises has turnover in the UK of over £10 million. The clause amends the existing section 28(6) power to alter the specified turnover figures so that it applies to the new thresholds as it does the existing one.

c. Clause 324 repeals section 243 EA02, which concerns the disclosure of information by public authorities to overseas authorities for the purpose of criminal investigations or proceedings or civil investigations or proceedings that relate to competition or consumer matters. It is replaced with new sections, including new section section 243F which specifies considerations to which the public authority must have regard before making a disclosure. Clause 324 re-enacts the existing power for the Secretary of State, by regulations, to amend the list of considerations to which the public authority must have regard.

11. In the fourth category are a number of new delegated powers which will allow technical details to be set out in secondary legislation to support the operation of new civil sanctions regimes. The CMA will have powers across its digital markets, competition and consumer enforcement functions, to impose civil penalties in relation to non-compliance with: statutory requirements; the CMA's investigative powers; or remedies it has imposed as part of a regulatory process (in the case of digital markets) or investigative process where an infringement is found (in relation to competition and consumer matters). The maxima for some of these penalties is prescribed in statute and for others it is turnover based. The legislative framework sets out the core framework and delegated powers are required to ensure the primary legislation remains responsive over time, to inflation and in relation to how the turnover should be calculated. Examples of new powers include the following:

a. Clause 90(2) (calculation of daily rates and turnover) gives a power to the Secretary of State to set out by way of regulation, how turnover should be calculated for the purposes of determining the maximum penalty which may be imposed on an undertaking under the digital markets regime.

b. Clause 88(6) (amount of penalties under section 87) gives a power to the Secretary of State to amend the maximum penalty which may be imposed on a person who is an individual under the digital markets regime.

c. Clause 142 (Civil Penalties etc in connection with competition matters 142(1)) and Paragraph 9 of Schedule 9 amend section 40A CA98 so that where a civil penalty is imposed on an undertaking under that provision, the maximum penalty is set by reference to the turnover of that undertaking, and where imposed on a person who is not an undertaking, it is a fixed amount of £30,000 in case of a fixed penalty, and £15,000 where calculated by reference to a daily rate. Paragraph 9(10) further amends section 40A so that the Secretary of State has the power, by order, to amend the maximum penalties which may be imposed on persons who are not undertakings.

d. Paragraph 9(13) of Schedule 9 also makes provision for the Secretary of State to set out by way of regulations, the basis on which turnover should be calculated for the purposes of calculating the maximum penalty which may be imposed on an undertaking under section 40A CA98.

e. Similar powers are set out in relation to the mergers (Part 3 EA02) and markets (Part 4 EA02) regimes by way of Paragraph 17(10), (12) and Paragraph 28(9), (13) respectively, of Schedule 9. These powers are also mirrored in context of the new civil sanctions for breach of remedies (Clause 142(2)) across the CA98, mergers and markets regimes, and are set out in Schedule 10, Paragraphs 5, 9 and 14.

f. Clause 203(2)(b) provides a power for the Secretary of State to provide in regulations the methodology for determining turnover for different types of entity, for the purpose of the calculation of civil monetary penalties.

g. Clause 204(1) provides a power for the Secretary of State to amend, by regulations, the maxima for fixed and daily monetary penalties that can be imposed under Chapters 3 and 4 of Part 3 of the Bill.

h. Schedule 16 inserts an amendment to Schedule 5 to the Consumer Rights Act 2015 (paragraph 16I) which provides a power for the Secretary of State to amend by regulations, the maxima for fixed and

daily monetary penalties that can be imposed in connection with failure to comply with an information notice.

12. Provisions falling into the fifth category are powers to make consequential provision; supplementary, incidental, transitional or saving provision; and to bring the Bill into force.

Henry VIII powers

13. The Bill contains 43 powers to amend primary legislation through secondary legislation.

14. These Henry VIII powers are proposed in order to ensure that legislation continues to operate effectively and the statute book is kept up-to-date regularly. Where the powers to amend primary legislation would permit major changes to the legislation concerned, they are subject to the draft affirmative procedure. Where the powers are to amend a minor or technical provision only or involves amendment of an existing power already subject to the negative procedure, they are subject to the negative procedure.

Consultation

15. Two major consultations were undertaken during 2021 to support the development of policy in the Bill. The consultations were as follows:

a. Reforming competition and consumer policy (20 July – 1 October 2021) Government response published: 20 April 2022[1]

b. A new pro-competition regime for digital markets (20 July May – 1 October 2021) Government response published: 6 May 2022[2]

Abbreviations

16. This Memorandum contains the following abbreviations:

[1] Government Consultation on Reforming Competition and Consumer Policy (July 2021)
[2] Government Response to the Consultation on A New Pro-competition Regime for Digital Markets (May 2022)

“AEC”	means an Adverse Effect on Competition
“ADR”	means Alternative Dispute Resolution
“CAT”	means the Competition Appeal Tribunal
“CA98”	means the Competition Act 1998
“CMA”	means the Competition and Markets Authority
“CPRs”	means the Consumer Protections from Unfair Trading Regulations 2008
“CRA15”	means the Consumer Rights Act 2015
“DMU”	means the Digital Markets Unit
“EA02”	means the Enterprise Act 2002
“FOM”	means the Final Offer Mechanism see clauses 38-45
“IEO”	means an Initial Enforcement Order
“MIR”	means Market Investigation Reference
“MoU”	means a Memorandum of Understanding
“PCI”	means a Pro-Competition Intervention
“SMS”	means Strategic Market Status

C. DELEGATED POWERS

17. The Bill confers delegated powers on the Secretary of State. In deciding whether matters should be specified on the face of the Bill or dealt with in delegated legislation, the government has carefully considered the need:

    a. To avoid too much administrative detail on the face of the Bill;

    b. To allow the legislation to respond to changing circumstances, so that requirements can be adjusted without the need for further primary legislation;

c. To allow detailed administrative arrangements to be set up and kept up to date within basic structures and principles that are set out in primary legislation, subject to Parliament's right to challenge inappropriate use of powers; and

d. To allow robust Parliamentary scrutiny and oversight to ensure any delegated power is used appropriately and proportionately.

18. In deciding what procedure is appropriate for the exercise of the powers in the Bill, the government has carefully considered in particular:

a. Whether the provisions amend primary legislation

b. The significance of the amendments

19. The powers outlined in this document will result in regulation that can evolve and adapt to promote competition and innovation across the economy, including in fast-moving digital markets. This is complex legislation which builds on the CMA's extensive experience as an independent regulator. It is crucial that the CMA's status as a trusted, independent economic regulator is upheld. The use of procedural safeguards in relation to certain key delegated powers will ensure that Parliament maintains its vital statutory role in determining the legislative framework governing the CMA's ability to act. The safeguards built into the legislative framework itself include statutory objectives, public consultation, transparency standards and appeals.

PART 1 - DIGITAL MARKETS

20. The measures referred to in Part 1 include delegating powers to the CMA to enable it to operate effectively and independently as the expert regulator.

SMS AND INTERVENTIONS

Clause 6(2) (Position of strategic significance): SMS test - power to vary the position of strategic significance conditions
Exercised by: *Secretary of State*
Means of exercise: *Regulations made by Statutory Instrument*
Parliamentary Procedure: *Draft affirmative*

Context and purpose

21. Designating an undertaking as having SMS in respect of a digital activity is the gateway into the regime. Undertakings designated as having SMS will be in scope and subject to the tools of the regime. In order to designate an undertaking as having SMS, the CMA will be required to undertake a formal assessment called an SMS investigation. As part of that investigation, the CMA must consider whether the undertaking meets the SMS conditions; i.e. whether the undertaking has, in respect of a digital activity, substantial and entrenched market power and a position of strategic significance.

22. This clause relates to the 'position of strategic significance' condition. An undertaking has a position of strategic significance in respect of a digital activity where at least one of four conditions is met. The conditions are set out in clause 6(1) (Position of strategic significance). Only one condition would have to be met in order for the CMA to find that an undertaking has a position of strategic significance, although we expect that most designated undertakings would meet more than one condition. The conditions are:

    a. the undertaking has achieved a position of significant size or scale in respect of the digital activity;

    b. a significant number of other undertakings use the digital activity as carried out by the undertaking in carrying on their business;

c. the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities; and

d. the undertaking's position in respect of the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves, in respect of the digital activity or otherwise.

23. Subsection (2) allows the Secretary of State to make regulations to amend the section so as to vary the conditions in subsection (1).

24. The power in subsection (2) is a Henry VIII power in that it allows other provisions of the Bill to be amended by secondary legislation.

Justification for power

25. For the pro-competition regime to be targeted and responsive, the designation process must provide regulatory certainty but be capable of adapting to changes in the market.

26. Delegating this power is necessary because of the potential for future technologies, patterns or business models to change. This power therefore allows the government to respond to developments by ensuring the factors that give rise to 'a position of strategic significance' are updated over time.

Justification for procedure

27. By virtue of clause 6(3) (Position of strategic significance), regulations made under clause 6(2) (Position of strategic significance) are subject to the draft affirmative procedure.

28. The draft affirmative resolution procedure is the appropriate mechanism for this power, as the parameters of the CMA's power to designate undertakings will define the scope of the regime. It is important that Parliament has the opportunity to debate any changes to this framework.

Clause 7(3) (The turnover condition): SMS Test - power to amend the turnover thresholds

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

29. One component of the designation assessment is the turnover condition, which is intended to provide certainty to undertakings below the relevant thresholds that they will not be in scope of the regime.

30. In order for an undertaking to be in scope of the regime, the turnover condition must be met in relation to an undertaking (clause 7(1)). The turnover condition is met if the CMA estimates that the total value of an undertaking or group's turnover in the relevant period exceeds UK or global thresholds. The Bill sets these turnover thresholds at £1bn for UK turnover, or £25bn for global turnover (clause 7(2) (The turnover condition)). The "relevant period" is defined in clause 7(6)(a).

31. Undertakings with turnover below these thresholds will not be in scope of the SMS regime and cannot be designated. The regime is targeted at only the undertakings that have a position of strategic significance (as set out in clause 6 (Position of strategic significance)), which is assessed against various conditions, including size and scale. The government's view is that undertakings with turnover below the thresholds will not meet the position of strategic significance conditions. Turnover thresholds will provide clarity to undertakings that will be out of scope of the regime.

Justification for power

32. This will make sure that the CMA can update the turnover thresholds to remain relevant as digital markets develop, evolve and grow over time. It is important that the CMA is able to take into account other relevant factors such as inflation and currency fluctuation.

Justification for procedure

33. The affirmative procedure is considered appropriate, as this is a power to amend primary legislation passed by Parliament. The turnover thresholds may have a significant impact on the scope of the regime and the types of undertakings that the CMA may designate as having SMS. It is important that Parliament has the opportunity to debate changes to the legislative framework that may have significant impacts on the operation of the regime.

Clause 8 (Turnover of an undertaking): power to make provision about how the total value of UK and global turnover is to be estimated

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

34. Clause 7 (The turnover condition) sets out the turnover condition. For the turnover condition to be met in relation to an undertaking, the CMA must estimate that the total value of the undertaking or group's turnover exceeds either the UK or the global turnover threshold as set out in clause 7(2).

35. Clause 8 (Turnover of an undertaking) makes provision about the value of an undertaking or group's UK or global turnover for the purposes of the turnover condition. Clause 8(2) provides that global turnover is turnover arising in connection with any of the undertaking or group's activities. Clause 8(3) provides that UK turnover is turnover arising in connection with any of the undertaking or group's activities and relating to UK users or UK customers. Both these provisions are subject to regulations made under subsection (4).

36. Clause 8(4) gives the Secretary of State the power to make provision, by regulations, about how the total value of UK or global turnover is to be estimated. Clause 8(5)(a) provides that regulations made under subsection (4) may (among other things) make provision about amounts that are, or are not, to be regarded as comprising the turnover of an undertaking or group. Clause 8(5)(b) provides that regulations may give the CMA the power to determine matters specified in the regulations (including the matter mentioned in clause 8(5)(a)).

Justification for power

37. The turnover condition allows undertakings to assess whether they are likely to be in scope of the regime and subject to an SMS investigation. Undertakings will therefore need to be able to understand how the CMA will estimate UK and global turnover.

38. This level of detail is not suitable for primary legislation. Similar thresholds in other regimes take a similar approach; for example, section 28 EA02.

Justification for procedure

39. A negative Parliamentary procedure is considered appropriate because these regulations are of a technical and non-controversial nature. This is the same procedure that is used within existing legislation which gives the Secretary of State the power to define turnover. The Communications Act 2003 (section 97), the EA02 (Part 3 (Mergers), and sections 28 and 94A), and the CA98 (section 36), all contain a delegated power for the Secretary of State to define turnover. As an example, the power under section 28(2) of the EA02 was exercised through The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, as amended, which was subject to the negative procedure.

Clause 20(4) (Permitted types of conduct requirement): Power to amend the list of permitted types of conduct requirement

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

40. The legislation will enable the CMA to set out how designated undertakings are required to behave, shaping undertakings' behaviour to prevent bad outcomes before they occur. Conduct requirements set by the CMA must fall within one of the permitted types of conduct requirements set out in clause 20(2) and (3).

41. The list of permitted types of conduct requirements set out in legislation must be clear and exhaustive in order to set an easy-to-interpret regulatory perimeter for CMA intervention and provide legal certainty for undertakings on the types of requirements to which they could be subject. At the same time, it must be wide enough for the CMA to be able to design conduct requirements which will apply to different undertakings in different markets and not require frequent amendment as the markets evolve over time.

42. Clause 20(4) provides the Secretary of State with the power to modify the list of permitted types of conduct requirement. Clause 20(5) clarifies that this is a Henry VIII power.

Justification for power

43. Digital markets are already diverse and comprise numerous different kinds of products and activities. They are furthermore unpredictable and will continue evolving. Future innovations are therefore hard to foresee, and will likely give rise to a wide range of new behaviours and ensuing harms.

44. Preventing harms before they occur is a key objective for the CMA's conduct requirements tool. Delegating this power is justified to allow the Secretary of State to adapt the legislative framework in a timely fashion, under the supervision of Parliament, to ensure that the CMA is able to intervene promptly on the right issues longer-term and adapt to the fast-moving nature of digital markets.

Justification for procedure

45. By virtue of clause 20(5), regulations made under subsection (4) are subject to the draft affirmative procedure.

46. As conduct requirements must be for the purposes of one or more of the objectives in clause 19(5), that is the statutory context for modification of the list of categories, and so the modified list must remain in line with the objectives. There is no power to amend the objectives. This will ensure that the power to impose requirements on undertakings stays within a clearly defined legislative scope and purpose.

47. The draft affirmative resolution procedure is the appropriate mechanism for this power because the requirements imposed on designated undertakings by the CMA can have a significant impact on the way they can conduct their business. It is important that Parliament has the opportunity to debate changes to the legislative framework that control the imposition of conduct requirements by the CMA.

Clause 41(4) (Final offer mechanism): Power to amend the length of the final offer period

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

48. The legislation will enable the CMA to use the Final Offer Mechanism, a tool to help resolve breaches of conduct requirements relating to unfair payment terms.

49. The process for carrying out Final Offer Mechanism must not last longer than 6 months (see clause 41(3), which sets the time limit for the "final offer period"), during which time the CMA will facilitate information sharing between parties, receive final offers from the two parties, and make a determination between the final offers.

50. Clause 41(4) provides the Secretary of State with the power to modify the 6 month time limit for the final offer period. This power is a Henry VIII power.

Justification for power

51. The Final Offer Mechanism is a new tool. While we are of the view that 6 months is an appropriate statutory deadline for the final offer period, this may need to be amended once the tool is used in practice.

52. Delegating this power is justified to allow the Secretary of State to adapt the legislative framework, under Parliamentary scrutiny, to ensure that the time limit is appropriate for ensuring that there is a sufficient but not excessive period of time allowed for the whole final offer process. This power enables adaptation if need be to adjust to the fast-moving nature of digital markets and the practicalities of enforcement.

Justification for procedure

53. By virtue of clause 41(5), regulations made under subsection (4) are subject to the draft affirmative procedure.

54. The draft affirmative resolution procedure is the appropriate mechanism for this power because Parliament should have the opportunity to debate timing changes which could have a material effect on the effectiveness of

enforcement of conduct requirements by way of the new final offer mechanism tool.

MERGERS

Clause 59(3) (Value of Consideration): Power to make further provision about how the value of consideration, capital or assets is to be calculated for the purposes of merger reporting

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

55. Clause 57(1) requires designated undertakings, or, where a designated undertaking is part of a larger corporate group[3], group members, to report certain possible mergers involving them ("reportable events") to the CMA before they take place.

56. Reportable events are defined in clauses 57, 58 and 59. They fall into two categories. The first category consists of events which result in a designated undertaking or larger corporate group collectively[4] reaching certain percentage thresholds of the shares or voting rights held[5] in a UK-connected body corporate[6], where the value of the consideration provided by the undertaking or group for the total holding is at least £25 million. The second category comprises events in which a designated undertaking, or one or more members of a larger corporate group, form a body corporate (a "joint venture vehicle") with at least one other unconnected person, in circumstances where: the undertaking or group collectively[7] acquires at least 15% of the shares or voting rights in the vehicle; the undertaking or group members involved intend or expect the vehicle to become a UK-connected body corporate; and, the total value of all capital and assets contributed to the vehicle by the undertaking or group, and of all other consideration

[3] See subsection (4) and clause 116.
[4] By virtue of clause 61(2).
[5] Where their holding increases from less than 15% to 15% or more, from 25% or less to more than 25%, or from 50% or less to more than 50% of the shares or voting rights.
[6] A body corporate that carries on activities in the UK or supplies goods or services to a person or persons in the UK, or that has one or more subsidiaries that do so.
[7] By virtue of clause 61(2).

provided by the undertaking or group in relation to the formation of the vehicle, is at least £25 million.

57. Clause 59(2) defines "consideration" for these purposes as fees, remuneration, assets of any description, liabilities assumed and any other kind of consideration, however provided, including conditional and deferred consideration.

58. The purpose of the value criteria is to target the "relevant merger situations" within the investigative jurisdiction of the CMA under the merger control regime in Part 3 of the EA02 which are most likely to raise competition concerns, as the consideration provided for a holding or in relation to the formation of a joint venture vehicle (including any capital or assets contributed to the vehicle) is considered to be an indicator of the competitive advantage it may provide to the acquirer or participant.

59. Clause 59(3) gives the Secretary of State a power to make further provision in regulations about how the value of consideration, capital or assets is to be calculated. By virtue of subsection (5) such regulations are subject to the negative procedure. Subsection (4) requires the Secretary of State to consult the CMA before exercising this power.

Justification for power

60. The Government considers the delegation of this power to the Secretary of State to be appropriate because its purpose is to set out detailed provision about how the value of consideration, capital or assets is to be calculated, to assist with determining whether there is a duty to report in particular cases. This sort of supplementary technical detail is more suited to being set out in delegated legislation than in primary legislation. In addition, if amendments to existing provisions are required, due to changes in accounting practice for example, the availability of a delegated power will facilitate these being made in an efficient manner. The requirement to consult the CMA will ensure that its views as the expert competition regulator are taken into account whenever the power is exercised.

Justification for procedure

61. The Government considers that the negative procedure provides the appropriate level of parliamentary oversight because this power is limited to setting out how the value of consideration, capital or assets is to be calculated and cannot be used to alter the reporting criteria or to change the definition of “consideration” set out in the Bill. In addition, the requirement to consult the CMA will ensure that its expert views are taken into account.

Clause 67(1) (Regulations about duty to report): Power to make provision about the duty to report a reportable event

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative for certain purposes, negative for others*

Context and purpose

62. Clause 57(1) requires designated undertakings, or, where a designated undertaking is part of a larger corporate group[8], group members, to report certain possible mergers involving them ("reportable events") to the CMA before they take place.

63. Reportable events are defined in clauses 57, 58 and 59. They fall into two categories. The first category consists of events which result in a designated undertaking or larger corporate group collectively[9] reaching certain percentage thresholds of the shares or voting rights held[10] in a UK-connected body corporate[11], where the value of the consideration provided by the undertaking or group for the total holding is at least £25 million. The second category comprises events in which a designated undertaking, or one or more members of a larger corporate group, form a body corporate (a "joint venture vehicle") with at least one other unconnected person, in circumstances where: the undertaking or group collectively[12] acquires at least 15% of the shares or voting rights in the vehicle; the undertaking or group members involved intend or expect the vehicle to become a UK-connected body corporate; and, the total value of all capital and assets contributed to the vehicle by the undertaking or group, and of all other consideration provided by the undertaking or group in relation to the formation of the vehicle, is at least £25 million.

[8] See subsection (4) and clause 116.
[9] By virtue of clause 61(2).
[10] Where their holding increases from less than 15% to 15% or more, from 25% or less to more than 25%, or from 50% or less to more than 50% of the shares or voting rights.
[11] A body corporate that carries on activities in the UK or supplies goods or services to a person or persons in the UK, or that has one or more subsidiaries that do so.
[12] By virtue of clause 61(2).

64. 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 in Part 3 of the EA02 which are most likely to raise competition concerns.

65. Clause 63(1) provides that a designated undertaking or group member with a duty to report a reportable event must not allow the event to take place until a report has been submitted to the CMA and the waiting period in relation to the event has expired. The “waiting period” is defined in clause 63(2) as the period of five working days beginning with the first working day after the day on which the CMA gives the person that made the report a notice confirming that the CMA accepts the report is sufficient. Clause 62(1) requires the CMA to decide whether to accept a report within five working days beginning with the working day after the day on which it receives the report. “Working day” is defined in clause 328.

66. Clause 65 provides for a designated undertaking or group member with a duty to report a reportable event to authorise another person (such as a legal representative) to report the event on its behalf. Any authorisation must be provided in writing to the CMA and signed by an officer (such as a director, manager or secretary) of the undertaking or group member.

67. Clause 329 regulates how the CMA may serve notices under the Bill. Its provisions apply to notices of acceptance or rejection of reports under clause 62(1).

68. Clause 67(1) provides that the Secretary of State may make provision in regulations about the duty to report. Pursuant to subsection (3), these regulations may (amongst other things) make provision:

a. varying, adding or removing circumstances in which the duty to make a report applies;

b. varying the period the CMA has to decide whether to accept a report;

c. varying the waiting period;

d. about exemptions from the duty to make a report;

e. varying, adding or removing circumstances in which one person may act on behalf of another under clause 65;

f. modifying how clause 329 applies for the purposes of the duty to report.

69. Subsection (3)(g) provides that regulations may make provision conferring functions on the CMA in relation to the duty to report, including power to make provision by notice or general or specific directions about exemptions from the duty. For example, the CMA could be authorised to issue exemptions to designated undertakings relieving them of the obligation to report in specified cases.

70. Subsection (3)(h) provides that regulations may amend Chapter 5 of Part 1, which contains the merger reporting provisions, or Schedule 2, which makes further provision about cases in which a person is to be treated for the purposes of merger reporting as acquiring or holding an interest or right. Paragraph 3 of Schedule 2 for example provides that shares that are held by the nominee of a designated undertaking or group member are to be treated as held by the undertaking or member.

71. Pursuant to clause 67(4) and (5), regulations which modify how clause 329 applies for the purposes of the duty to report, or which do not make provision about exemptions from the duty to report or amend Chapter 5 of Part 1 or Schedule 2, are subject to the negative procedure. All other regulations are subject to the draft affirmative procedure[13].

72. Clause 67(2) requires the Secretary of State to consult the CMA before making any regulations.

Justification for power

73. The Government considers delegation to the Secretary of State of a power that can be used to amend the reporting criteria to be justified as operational experience may reveal that the criteria need to be changed for the reporting

[13] See also clause 332(3).

process to continue to function effectively. For example, it may become apparent that some events which have not been required to be reported raise sufficient competition risks to warrant being reported. Furthermore, given that one of the purposes of the reporting criteria is to target the "relevant merger situations" that are within the investigative jurisdiction of the CMA under the merger control regime, the reporting criteria may also need to be changed if delegated powers in Part 3 of the EA02[14] are used to amend the investigative thresholds. In addition, the availability of a delegated power will facilitate changes being made in an efficient manner. Efficiency is of particular importance given the potential consequences of letting mergers that raise significant competition risks slip through without being reported. A power that can be used to amend relevant Bill provisions is required as the reporting criteria are set out in the Bill.

74. Delegation to the Secretary of State of a power that can be used to vary the period the CMA has to decide whether to accept a report, or to vary the waiting period, is considered justified because operational experience may reveal that these are too long or too short, potentially jeopardising the effective operation of the reporting process. A power that can be used to amend relevant Bill provisions is required because these periods are set out in the Bill.

75. Delegation to the Secretary of State of a power that can be used to provide for exemptions from the duty to report is considered justified as it may become apparent that while a general obligation to report a category of event is still appropriate, some specific cases within this category do not need to be reported. This power will contribute to ensuring that the reporting process operates in a proportionate manner. It is appropriate to allow for the CMA to be given a power to make provision by notice or to issue directions in connection with exemptions as a case-by-case approach to exemptions with the CMA as the decision-maker is likely to be required.

76. Delegation to the Secretary of State of a power that can be used to amend the circumstances in which one person may act on behalf of another in

[14] See sections 28(6) and 123, which are being amended by clause 127 of the Bill.

relation to a report, for example to change the requirements in relation to how this may be authorised, is considered justified as operational experience may reveal that different arrangements are appropriate. The power can also be used to ensure continuing consistency with the arrangements for appointment of representatives that apply to merger notices under the merger control regime[15]. A power that can be used to amend relevant Bill provisions is required as the circumstances in which one person may act for another are set out in the Bill.

77. Delegation to the Secretary of State of a power that can be used to modify how the provisions in clause 329 regulating the service of notices by the CMA apply in relation to the duty to report is considered justified as the power can be used to ensure that there continues to be consistency with the service of document provisions that apply to the merger control regime[16].

78. The requirement to consult the CMA will ensure that the views of the expert competition regulator are taken into account before any regulations are made.

Justification for procedure

79. The draft affirmative procedure is considered appropriate for regulations made under this power which vary, add or remove events which must be reported (and therefore which events are subject to a restriction on completion), vary the length of the reporting process (and therefore the length of the restriction on completion), exempt persons from reporting, or amend Chapter 5 of Part 1 or Schedule 2. These are all significant changes.

80. The negative procedure is considered appropriate for regulations which modify how the provisions in clause 329 regulating the service of notices by the CMA apply in relation to the duty to report, because this is a supplementary procedural power. The negative procedure is also considered appropriate for all other regulations made under this power, i.e. those which

15 See regulation 14 of the Enterprise Act 2002 (Merger Prenotification) Regulations 2003 (S.I. 2003/1369), made under section 101(2)(h) of the EA02.

16 See section 126 of the EA02, which is being amended by paragraph 1 of Schedule 12 to the Bill.

do not make provision about exemptions from the duty to report or amend Bill provisions, because such regulations will be of more limited significance.

REGULATORY FRAMEWORK

Clause 88(6) (Amount of penalties under section 87): Maximum level of civil penalties on individuals

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

81. Clause 87 (*Penalties for failure to comply with investigative requirements*) provides that the CMA will have the power to impose a fixed penalty of up to £30,000 on individuals for failure to comply with an investigatory measure and a daily penalty of up to £15,000 for ongoing non-compliance. This includes penalties for senior managers named as being responsible for an undertaking's compliance with an information notice, and for nominated officers who are responsible for the undertaking complying with a compliance reporting obligation.

82. We consider that the maximum amounts accommodated in the CA98 and EA02 are appropriate precedents for the maximum fines for individuals. We therefore do not consider that there is a requirement to increase the maximum penalty available at this stage, but this may be appropriate in the future. We would like to allow the Secretary of State to substitute different sums in place of the £30,000 or £15,000 specified in legislation through the mechanism of secondary legislation. The desired effect of this power would be to ensure that the fines continue to be an effective enforcement tool in the future. The proposed power will allow the regulatory framework to be updated quickly if required, for example due to inflation over time.

83. As proposed, this power has the effect of secondary legislation being able to amend primary legislation. As a result, the power is likely to be subject to detailed scrutiny, particularly in light of the fact that the power relates to civil penalties that can be imposed on individuals. We suggest that any secondary legislation exercising this power should be subject to the draft affirmative procedure to ensure that there is Parliamentary scrutiny. The power should be limited to amending the statutory cap only. There is further

procedural protection by way of the requirement for the Secretary of State to consult before beginning the draft affirmative procedure.

Justification for power

84. As set out above, the objective of this power is to ensure that the penalties continue to be an effective enforcement tool. We think it is appropriate to include caps on the amount of a penalty in legislation but it is desirable to retain the ability to amend these caps using secondary legislation in case the original capped amounts become an inadequate deterrent in the future. The proposed power will allow the regulatory framework to be updated faster than passing new primary legislation.

Justification for procedure

85. In terms of Parliamentary process, we note that the secondary legislation relating to the corresponding power in the EA02[17] was made under the negative procedure and the CA98 equivalent[18] was made under the draft affirmative procedure. We consider that it would be appropriate for the delegated legislation conferring the power on the Secretary of State to increase the level of possible maximum penalties that may be levied on individuals to have a higher degree of Parliamentary scrutiny. We therefore consider that any secondary legislation allowing the Secretary of State to increase the statutory maxima of penalties that can be imposed on individuals should be subject to the draft affirmative procedure.

[17] S.I. 2014/533. See section 124 EA02, in particular section 124(5) referring to section 94A(3) EA02.
[18] S.I. 2000/309 (as amended by S.I. 2000/2952 and S.I. 2002/765 and S.I. 2004/1259). See section 71(4) referring to section 36(8) CA98.

Clause 90(2) (Calculation of daily rates and turnover): Calculation of turnover

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

86. Clause 86 (Amount of penalties under section 85) gives the CMA the power to impose fixed penalties of up to 10% of worldwide turnover on undertakings for breaches of obligations imposed by the regime and 5% of daily turnover for certain continuing breaches. Clause 88 (Amount of penalties under section 87) separately gives the CMA the power to impose penalties of up to 1% of worldwide turnover on undertakings for failure to comply with investigative requirements, and 5% of daily turnover for continued non-compliance.

87. Clause 90(2) (*Calculation of daily rates and turnover*) includes a power for the Secretary of State to specify in secondary legislation the process for calculating an undertaking's turnover.

Justification for power

88. The inclusion of a power for the Secretary of State to specify the process in secondary legislation ensures the penalties in the regime stay up-to-date and are calculated appropriately. This is of particular importance because the secondary legislation will likely refer to certain accounting principles that may change from time to time.

Justification for procedure

89. This is the same procedure that is used within existing legislation which gives the Secretary of State the power to define turnover. The Communications Act 2003 (section 97), CA98 (section 36) and EA02 (Part 3 (Mergers), sections 28 and 94A) all contain a delegated power for the Secretary of State to define turnover. The latter examples in the EA02 were both subject to the negative procedure. These regulations are of a technical and non-controversial nature, and that is why it is appropriate to use the negative procedure.

ADMINISTRATION

Clause 106(9) (Exercise and delegation of functions): Delegated power to amend list of reserved functions

Exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

90. This clause creates a power that enables the Secretary of State to amend the list of decisions which are reserved for the CMA Board and its committees as part of this Bill. The description below is in line with the current version of the Bill. However, the lists will be revised prior to introduction.

91. The Bill currently reserves the most market-shaping decisions within the new regime for the CMA Board:

    a. launching an initial SMS designation assessment;
    b. launching a further SMS designation assessment; and
    c. whether to open a PCI assessment investigation.

92. This is because these decisions will have the greatest impact on digital markets, and require oversight of the CMA's priorities and resourcing. As such, we believe it appropriate that they sit with the Board, as the decision maker with the greatest accountability to government and Parliament.

93. The following significant decisions that require ongoing and intensive engagement will be reserved to a new sub-committee of the Board:

    a. Whether to make an SMS designation
    b. What provision to make under clause 17 to apply existing obligations to a new designation that is the same, similar or connected to a previous designation, or to make transitional provision in relation to obligations at the end of a designation
    c. Whether to impose or vary conduct requirements
    d. Whether to revoke conduct requirements

e. Whether to make an enforcement order (other than 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 on a person under clauses 85 of 87
m. The amount of any such penalty

Justification for power

94. This power will mean that the governance of the new regime will be able to keep up with the fast-changing digital markets it regulates.

95. We have thoroughly tested this position with the CMA to ensure that reserving these decisions are appropriate for the Board and new committee's level of expertise and capacity as it currently stands.

96. However, when the regime is up and running, it may become apparent that other decisions are of sufficient significance, and have large enough resource implications for the CMA, that it is appropriate for these decisions to also be reserved for the Board or its committees in statute. Conversely, we may also see that decisions currently reserved for the board would more effectively be made by a committee.

97. As such, the government believes it is appropriate that the list of decisions reserved for the Board in primary legislation can be amended via secondary legislation. This means changes can be made more quickly, and with less of an administrative burden on the government.

Justification for procedure

98. Government proposes that the Secretary of State's delegated power should be subject to the draft affirmative procedure to ensure the appropriate level of Parliamentary oversight.

99. Given that this is a change relating to the governance of a regulator accountable to Parliament, the government's view is that requiring draft affirmative procedure is proportionate and appropriate.

Clause 110(Power to charge levy): Levy funding methodology rules

Exercised by: *CMA*

Means of exercise: *Power to set the levy, requirement to consult and lay draft Rules in Parliament during consultation*

Parliamentary Procedure: *None*

Context and purpose

100. This clause creates a power for the CMA to set the levy in accordance with certain principles set out in the Bill and requires it to prepare and publish Rules which sets out the methodology and operational details of the SMS levy. The levy will recover funds from designated undertakings to cover the digital market regime's costs, and the CMA will return these funds to the Exchequer.

101. To ensure that principles of proportionality, accountability and transparency are observed in the development of the levy we propose that the CMA must consult such persons as it considers appropriate on the proposed Rules, including laying a draft of the rules in Parliament, before the CMA publishes the final Rules document. This is also the case for any subsequent amended or replacement rules.

Justification for power

102. A policy aim running throughout the regime is the desire to construct an agile, pro-innovation regime which can respond according to developments in digital markets where innovations can be rapid. Government therefore wants to ensure the functions relating to the setting and collection of the levy are free from unnecessary constraints so that it may be amended relatively quickly. As the regulator delivering the regime, the CMA will be best placed to use its expertise to design a proportionate and deliverable levy methodology. By requiring that the draft rules are laid in Parliament which will draw the attention of Parliamentarians to the public consultation, and through HMT's role as the CMA's financial sponsor, we ensure that the CMA is accountable for the design of the levy and its administration.

Justification for procedure

103. The principles for levy methodology, which are on the face of the Bill, determine the factors and constraints that the CMA must comply with when designing the levy methodology, including requirements to consult and publish a draft of the levy Rules. This approach will ensure that the constraints placed on the CMA when setting the levy, and their interpretation of these constraints, are transparent to industry, parliamentarians and other interested parties.

104. The chosen process of laying the Rules does not preclude parliamentarians from tabling a motion to debate the contents of the Rules. Parliamentarians will be able to engage with a draft of the rules, and will be consulted at a point that will allow for substantive input into their drafting. Government believes it would be disproportionate to provide any further Parliamentary scrutiny than that proposed in relation to the Rules in these proposals.

PART 2 - COMPETITION

105. Part 2 of the Bill makes amendments to various aspects of the competition regime, across the Competition Act 1998 (**"CA98"**) and Enterprise Act 2002 ("**EA02**").

ANTITRUST

Clause 124 and Schedule 3 (Power of Competition Appeal Tribunal to grant declaratory relief), Paragraph 9: Amendment of power regarding matters which may be specified in CAT Rules, to include rules on declaratory relief
Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

106. The CAT is a specialist competition law tribunal which was established under Part 2 of the EA02 (section 12) and came into existence on 1 April 2003. Its functions include the power to hear and decide appeals cases in the UK against decisions taken by the CMA and the economic regulators under the CA98 and certain other legislation, for example decisions made by OFCOM under the Communications Act 2003. It can also hear private damages actions for breaches of competition law, brought by persons (consumers and businesses) under sections 47A and 47B CA98. These private claims can be brought before the CAT or the High Court (or Court of Session in Scotland). Chapter IV in Part 1 of the CA98 (from section 47A onwards) and Schedule 8A to the CA98 set out the framework for enforcement of private law rights created as a result of a finding of an infringement of competition law by a competition authority (a 'follow-on claim', see section 47A(2) and (6)) or an alleged infringement of competition law (a 'stand-alone claim'). In a stand-alone claim the claimant must also prove the breach of the law and the defendant's liability as part of its claim. These can take the form of either individual or collective claims. Section 47B CA98 makes provision for collective claims where proceedings are brought which combine two or more claims which could be brought under section 47A.

107. Under section 47A(3) CA98 the remedies available to claimants currently in private action claims are damages, ‘any other claim for a sum of money’, or an injunction (but not an interdict in Scotland). Clause 124 and Schedule 3 amend the CA98 such that the CAT can also grant declaratory relief in competition proceedings. A declaration as a remedy at court is a legally binding statement of rights; in this context, this may for example be a statement from the court on the application of competition law to a set of facts. At present, the CAT cannot grant declaratory relief in competition proceedings, although the High Court (and Court of Session in Scotland) can. Notably, the CAT can also grant declaratory reliefs under section 72 of the Subsidy Control Act 2022.

108. Section 15 of the EA02 gives the Secretary of State the power to make rules in connection with proceedings before the CAT and Schedule 4 to the EA02 sets out in more detail the matters which may be covered in those rules. Paragraph 9 in Schedule 3 to the Bill amends Schedule 4 to the EA02 and makes provision such that Tribunal rules can also be made in relation to the grant of declarations (or declarators in Scotland) in proceedings under section 47A or 47B of the CA98.

Justification for taking the power

109. The power is intended to ensure that CAT rules can make provision in relation to declaratory relief, a remedy which the CAT will now be able to grant in competition proceedings. Schedule 4 to the EA02 has similar provisions in relation to other remedies the CAT can currently grant, for instance injunctions (paragraph 21A of Schedule 4). The Government considers that setting out further detail regarding the operation of this remedy and how claims before the CAT should proceed in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter. It would not be appropriate to make detailed provisions on this in primary legislation, and this will also not be consistent with the current practice followed in context of other remedies which the CAT can grant.

Justification for the procedure

110. Currently, regulations made using the power under section 15 EA02 and Schedule 4 to the EA02 are subject to the negative procedure. The Government is proposing to add another matter which these regulations may cover to Schedule 4, and considers that this amendment does not impact on the appropriateness of the negative procedure. Schedule 3 paragraphs 1 to 6 will prescribe principal parameters around the declaratory relief remedy in primary legislation. The power relates to the detailed procedural and technical rules which may apply to the grant of this remedy by the CAT. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. The power here is similar to the provision currently set out in paragraph 21A of Schedule 4, which provides that Tribunal rules may make provision in relation to the grant of injunctions (including interim injunctions) in proceedings under section 47A or 47B of the 1998 Act. For these reasons it is considered that this ensures appropriate Parliamentary scrutiny over use of the power.

MERGERS

Clause 127 (Relevant merger situations and special merger situations) and Schedule 4, Paragraph 3(3): Amendment of existing power in section 28(6) EA02 for the Secretary of State to alter the level of turnover specified in merger control thresholds

Exercised by: *Secretary of State*

Means of exercise: *Order made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

111. Part 3 of the EA02 sets out the United Kingdom's merger control regime. Various thresholds set out in section 23 EA02 determine whether a transaction is subject to merger review by the relevant authorities in the United Kingdom. Currently, one of those thresholds relates to the total value of the turnover in the United Kingdom of the enterprise being taken over - see section 23(1)(b). Under section 28(6) EA02 the Secretary of State may by order amend section 23(1)(b) so as to alter the sum for the time being mentioned there. The CMA is under a duty to keep the sum in question under review and advise the Secretary of State as to whether it is still appropriate. An order under section 28(6) altering the turnover figure is subject to the negative resolution procedure.

112. Clause 127 (*Relevant merger situations and special merger situations*) and corresponding Schedule 4 to the Bill make provision creating a new threshold for merger control which applies where the value of the turnover in the United Kingdom of one of enterprises concerned in the merger exceeds £350 million and that enterprise also has a 33% percent of the supply of particular goods or services in United Kingdom. It also creates a new safe harbour under which mergers will no longer be subject to merger control if none of the enterprises concerned has turnover in the United Kingdom of over £10 million.

113. Paragraph 3(3) of Schedule 4 amends section 28(6) so that it also allows the Secretary of State to alter the figures of £350 million and £10 million in the

new thresholds inserted into section 23 and amends the duty of the CMA so that it is required to keep all these sums under review.

Justification for taking the power

114. Without this power, the turnover figures specified in the merger thresholds will be fixed, and, over time, they will no longer be fit for purpose. It is important that all the figures for the value of UK turnover which trigger the application of merger control should be capable of being altered should they prove inadequate or otherwise inappropriate over time. In particular, they may need to be altered to reflect changes in rapidly moving markets and in economic conditions in general, including the effects of inflation. The CMA is tasked to keep the figures under review precisely to ensure that they remain fit for purpose.

Justification for the procedure

115. The existing power at section 28(6) is subject to the negative procedure. The power is limited to substituting one figure for another. 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. The precise levels at which the turnover values are set warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and affirmative approval. In exercising the power the Secretary of State is required to act in accordance with public law principles and, accordingly, any increase or decrease in the figures will need to be reasonable and fair. The Secretary of State would also have the benefit of advice from the CMA as the expert competition regulator. The government's view is that in these circumstances the negative procedure will continue to provide the appropriate level of scrutiny in relation to the exercise of the power.

Clause 127 (Relevant merger situations and special merger situations) and Schedule 4: Additional cases where existing power under section 28(2) EA02 for the Secretary of State to specify the basis on which the United Kingdom turnover of an enterprise should be determined for the purposes of merger control thresholds will apply

Power conferred on: *Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

116. As noted in connection with power to specify turnover values in paragraph 108 above, various thresholds set out in section 23 EA02 determine whether a transaction is subject to merger review by the relevant authorities in the United Kingdom. Currently, one of those thresholds relates to the total value of the turnover in the United Kingdom of the enterprise being taken over - see section 23(1)(b). Under section 28(2) EA02 the Secretary of State may by order specify how the turnover in the United Kingdom of an enterprise is to be determined for the purposes of Part 3. An order under subsection (2) may, in particular, make provision as to (a) the amounts which are, or which are not, to be treated as comprising an enterprise's turnover; (b) the date or dates by reference to which an enterprise's turnover is to be determined; and (c) the connection with the United Kingdom by virtue of which an enterprise's turnover is considered as turnover in the United Kingdom. An order under section 28(2) may also allow the regulator to determine matters specified for these purposes in the order.

117. Schedule 4 to the Bill makes provision creating new turnover based thresholds. One applies where, amongst other things, the value of the turnover in the United Kingdom of one of enterprises concerned in the merger exceeds £350 million and another creates a new safe harbour for transactions where none of the enterprises concerned has turnover in the United Kingdom of over £10 million.

118. The power in section 28(2) will automatically apply in respect of the turnover elements in the two new thresholds.

Justification for taking the power

119. The Government considers that setting out the basis on which turnover should be determined in subordinate legislation remains appropriate and proportionate, because these provisions deal with complex details of a subsidiary and technical matter. The power is intended to enable the government to address any amendments needing to be made in this technical provision more readily, within secondary legislation. The government's view is that the amount of technical detail on the principles to be followed when determining the value of turnover in the United Kingdom is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

120. The existing power at section 28(2) is subject to the negative procedure. 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. The power relates to the detailed technical basis on which turnover should be calculated and considered as United Kingdom turnover. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and affirmative approval. The government's view is that in these circumstances the negative procedure will continue to provide the appropriate level of scrutiny in relation to the exercise of the power.

Clause 127 (Relevant merger situations and special merger situations) and Schedule 4, Paragraph 6(4): Amendments to existing power in section 59(6A) EA02 to amend conditions for application of the special public interest merger regime – turnover element of the thresholds

Power conferred on: *Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

121. Where a merger does not meet the thresholds in section 23 for merger review on competition grounds, Ministers may still be able to intervene in the transaction on public interest grounds if it instead qualifies as a special public interest merger. The thresholds for special public interest mergers are set out in section 59 EA02. Currently, the thresholds are concerned with whether one of the parties to the merger has an existing 25% or more share of the supply of newspapers, or of the provision of broadcasting, of any description in the United Kingdom, or in a substantial part of the United Kingdom. Amendments are being made to the special public interest merger regime to preserve the ability of Ministers to intervene in mergers involving media or newspaper enterprises in the same circumstances as they could if the changes being made to the thresholds for merger review on competition grounds were not being enacted.

122. Paragraph 6(4) of Schedule 4 (*Relevant and special merger situations*) to the Bill, therefore, makes provision creating new conditions for a merger to qualify as a special interest merger if it involves media or newspaper enterprises and would have met the thresholds for merger control had they not been amended, for example, where the turnover of the enterprise being taken over exceeds £70 million (see new subsection (3E) inserted into section 59). Other amendments are intended to ensure that mergers meeting the standard share of supply test in section 23 and involving a media or newspaper enterprise qualify as a special public interest merger even if they would otherwise fall within the new safe harbour for mergers involving enterprises with turnover not exceeding £10 million in the United Kingdom (see new subsection (3F)).

123. There is an existing power in section 59(6A) which allows the Secretary of State by order to amend the conditions mentioned above relating to mergers involving media and newspaper enterprises with an existing share of supply of 25% (those currently in section 59(3C) and (3D)). Paragraph 6(4) of Schedule 4 amends that power so that it allows the Secretary of State to alter the figure of £70 million in the condition created by new section 59(3E)(c). See paragraph 126 below for amendments to section 59(6A) in relation to the other elements of the new conditions for a special public interest merger situation.

Justification for taking the power

124. It is important that the figure for the value of United Kingdom turnover which triggers the application of the special public interest merger regime should be capable of being adjusted should it prove inadequate or otherwise inappropriate over time. It is currently set to reflect the existing £70 million turnover threshold in section 23(1) EA02 for all mergers to ensure that the Secretary of State can intervene on media plurality grounds in transactions where that would be possible under the existing regime. However, the figure may need to be altered to reflect changes in rapidly moving markets and in economic conditions in general, including the effects of inflation.

Justification for the procedure

125. This power is very similar to the existing power at section 28(6) EA02 which is subject to the negative procedure. The overall parameters for the threshold, i.e., that there should be a threshold focused on the target's UK turnover, are set out in the primary legislation. The precise level at which the turnover value is set warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and affirmative approval. The government's view is that in these circumstances the negative procedure will continue to provide the appropriate level of scrutiny in relation to the exercise of the power.

Clause 127 (Relevant merger situations and special merger situations) and Schedule 4, Paragraph 6(4): Amendments to existing power in section 59(6A) EA02 to amend conditions for application of the special public interest merger regime – non-turnover elements of the thresholds

Power conferred on: *Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

126. The context and purpose of this power is the same as is set out for the power referred to in the immediately preceding paragraphs relating to the power in new section 59(6A)(a) EA02.

127. As noted above, there is an existing power in section 59(6A) which allows the Secretary of State by order to amend the conditions mentioned above relating to mergers involving media and newspaper enterprises with an existing share of supply of 25% (those currently in section 59(3C) and (3D) EA02). In particular, as mentioned in the Explanatory Notes for section 378 of the Communications Act 2003 which inserted the power in the EA02, this was intended to ensure that in the event that the Secretary of State exercises his or her powers in section 123 EA02 in order to amend the share of supply test in section 23 EA02, the changes can be carried across to section 59 EA02, such that the share of supply test remains consistent throughout Part 3 EA02.

128. Paragraph 6(4) of Schedule 4 (*Relevant and special merger situations*) amends that power so that it also allows the Secretary of State to amend the conditions in section 59(3E)(b) and (3F) by a draft affirmative procedure order.

Justification for taking the power

129. The amendments to section 59(6A) preserve the ability of the Secretary of State to amend the conditions in section 59(3C) and (3D) and allow the Secretary of State to make amendments beyond simply altering the turnover figure in the new condition in subsection (3E) (e.g. to adjust the categories of media enterprises covered by the provision to reflect any future changes to

the public interest consideration for media plurality in section 58 EA02). Divergence between the public interest considerations in section 58 EA02 and the thresholds for the special public interest intervention regime would be undesirable as it would undermine the purpose of the latter regime which is intended to allow review on public interest grounds where the ordinary merger review thresholds have not been met. If the grounds can be amended but this cannot be carried over effectively into the special public interest intervention regime, the Secretary of State's ability to intervene could be unduly restricted in a subset of cases.

130. The amended power will also allow for changes to the new condition in subsection (3F) which ensures that interventions on public interest grounds are still possible in cases involving a newspaper or media enterprise if the standard share of supply test is met but the merger would otherwise fall within the safe harbour. The power to amend the conditions in subsection (3F) is necessary to ensure that the thresholds for review across the standard merger regime and the special public interest intervention regime can be kept aligned and that the effective disapplication of the safe harbour in media cases continues to work properly.

Justification for the procedure

131. The existing power in section 59(6A) is subject to the draft affirmative resolution procedure and the government's view is that the amended power also warrants close Parliamentary scrutiny and time for debate, and so has proposed that an order under the power is subject to the draft affirmative procedure.

Clause 127(Relevant merger situations and special merger situations) and Schedule 4, Paragraph 7(3): Correction to existing power in paragraph 3(c) of Schedule 5A EA02 for the Secretary of State to alter the level of turnover specified in merger control thresholds for mergers of energy network enterprises

Exercised by: *Secretary of State*

Means of exercise: *Order made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

132. The Energy Act 2023 amends Part 3 of the EA02 to create a special merger regime for mergers involving energy network enterprises. The new regime is intended to enable the CMA to investigate energy network enterprise mergers in Great Britain effectively. The Energy Act 2023 inserted a new Schedule 5A into the EA02 which sets out modifications which should be read into certain provisions in Chapter 1 of Part 3 EA02 insofar as they apply to energy network mergers. Paragraph 2(a) of Schedule 5A modifies the turnover threshold in section 23(1)(b) EA02 so that the test is met if the enterprise being taken over has over £70 million turnover in Great Britain, as opposed to in the United Kingdom. Paragraph 3(c) of Schedule 5A then modifies the power of the Secretary of State in section 28(6) EA02 to alter the figure in section 23(1)(b) so that the power also applies to allow amendments of that provision as modified by paragraph 2(a) of Schedule 5A. In other words, the policy intention was that the Secretary of State should be able to use the power in section 28(6) to adjust the turnover threshold specifically for energy network mergers. However, technically that is not really an amendment of section 23(1)(b) (which is what the current modification in paragraph 3(c) purports to allow), but an amendment of the modification set out in paragraph 2(a) of Schedule 5A. As a result, paragraph 7(3) of Schedule 4 to the Bill, as well as making amendments to paragraph 3(c) which are purely consequential on the Bill) corrects paragraph 3(c) of Schedule 5A EA02 so that it modifies section 28(6) to allow the Secretary of State to amend the figure in the modification made by paragraph 2(a).

Justification for taking the power

133. The correction to paragraph 3(c) is not the taking of a new power nor does it expand on the existing power taken under paragraph 3(c), it is a technical amendment which simply corrects the mechanism by which the policy is achieved. The justification for the existing power in paragraph 3(c) was set out in the Delegated Powers Memorandum[19] for the then Energy Bill at paragraph 431.

Justification for the procedure

134. Again, this is a correction of a power which was considered during the passage of the Energy Bill in the 2022-2023 session. The justification for the procedure for the power was set out in paragraph 432 of the Delegated Powers Memorandum[20] for the Energy Bill.

19 https://bills.parliament.uk/publications/47260/documents/2121

20 https://bills.parliament.uk/publications/47260/documents/2121

Clause 127 (Relevant merger situations and special merger situations) and Schedule 4, Paragraph 9: Amendments to existing power to alter share of supply test in section 123 EA02

Power conferred on: *Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

135. Existing section 123 EA02 provides a power for the Secretary of State to amend or replace some of the conditions in section 23 which determine whether a transaction is subject to merger review by the relevant authorities in the United Kingdom. Currently this effectively applies only to the share of supply test. In exercising this power, the Secretary of State must have regard to the desirability of ensuring that any amended or new condition continues to operate by reference to the degree of commercial strength which may result from the merger. There is an additional safeguard in that the Secretary of State must also consult the CMA before making an order. This reflects the need to ensure that the thresholds are set with appropriate consideration being given to theories of harm related to mergers that are based on the enforcement experience of the independent competition authority.

136. In future, the power in section 123 to amend or replace the conditions for merger review will extend to the share of supply and other elements of the new acquirer focussed threshold and the small merger safe harbour introduced by Schedule 4 (see paragraph 112 above). Clause 127 (*Relevant merger situations and special merger situations*) and Schedule 4, paragraph 9, amend section 123 to clarify that it does extend to these additional conditions and to introduce appropriate safeguards.

Justification for taking the power

137. Under section 123 the Secretary of State has the power to amend or replace the existing share of supply test. Extending this power to the share of supply and other elements of the new acquirer focussed threshold ensures that in the event that the Secretary of State exercises his or her powers in section 123 EA02 in order to amend the standard share of supply test in section

23(2) EA02, changes can be made to the share of supply element in both thresholds, such that the share of supply test remains consistent throughout Part 3 EA02. It would also allow any condition replacing the share of supply test to be replicated in the acquirer focussed threshold, as well as allowing other adjustments to how that test is framed. Adjustments to the new safe harbour for mergers involving enterprises with low turnover in the United Kingdom could also be made using the amended power in section 123. The primary purpose of thresholds for merger review in the UK is to filter out transactions that are unlikely to raise competition concerns. They carefully balance the need for effective enforcement of competition law with the objective of limiting regulatory burden where possible. This necessitates the ability to amend the thresholds from time to time to reflect market developments and the continuously developing understanding of theories of harm. The shift towards digital markets for example has significantly changed the assessment of certain transactions as have developments regarding certain vertical and conglomerate mergers which have led to the introduction of the new acquirer focussed threshold in the first place. Both market conditions and the understanding of the likelihood of certain transactions leading to competitive harms is likely to continue developing over time and therefore requires the ability to adjust thresholds to ensure the regime continues to operate effectively to protect consumers and businesses in the UK.

138. This is particularly pertinent in the context of the CMA taking on responsibility for the review of a significant number of additional, international transactions post EU Exit. While the need for the new threshold has already become clear, the experience of using it and the CMA's increasingly international role requires ongoing review of the specifics of the thresholds to ensure any undesirable gaps in jurisdiction are closed or adjustments made to ensure the CMA is able to review the appropriate set of transactions.

139. The power is carefully circumscribed. It is limited to changing the specifics of the threshold, while not permitting to move away from the general principle of having a threshold that provides a filtering function based on what

transactions are likely to raise competition concerns. The power is therefore not able to change the overarching policy set out by Parliament in primary legislation.

140. In addition, in exercising this power, the Secretary of State will be subject to safeguards in relation to the exercise of the power. The proposed amendments mean that the Secretary of State will need to have regard to the desirability of ensuring that any conditions amending or replacing those in subsections (4E) and (4F) of the acquirer focussed threshold continue to operate by reference to the degree of commercial strength which is held by the acquiring enterprise immediately before the merger. This ensures that the focus of the threshold on the commercial strength of the acquiring enterprise at a specified point in time is appropriately considered when amending the threshold. In all cases, the Secretary of State will have to consult the CMA before making any changes.

Justification for the procedure

141. The existing power in section 123 is subject to the draft affirmative resolution procedure and the government's view is that the power as extended to the share of supply and other elements of the new tests also warrants close Parliamentary scrutiny and time for debate, and so has proposed that an order under the power is subject to the draft affirmative procedure.

MARKETS

Clause 137(2): Power for Secretary of State to amend any sectoral enactment and section 168 Enterprise Act 2002 in connection with the provision made by Schedule 7.

Power conferred on: *Secretary of State*
Power exercised by: *Regulations made by Statutory Instrument*
Parliamentary Procedure: *Draft affirmative*

Context and purpose

142. Where a market is referred for investigation by the CMA, the CMA must decide whether there is an adverse effect on competition within the market; that is whether any feature, or combination of features, of a relevant market, prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a party of the United Kingdom (section 134 EA02). Where such an effect is identified, the CMA is under a duty to take such action in relation to the acceptance of undertakings under section 159 EA02, or making of orders under section 161 EA02, as it considers to be reasonable and practicable to remedy, mitigate or prevent the adverse effect and to remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition (section 138 EA02). The Secretary of State has powers to take remedial action in cases in which a restricted or full public interest reference has been made, and the decision made that there is either an adverse effect on competition to which a public interest consideration is relevant, or an effect adverse to the public interest, as the case may be (sections 147 and 147A EA02).

143. Where a market investigation is undertaken in relation to a regulated sector, or where a relevant authority has regulatory functions, there is the potential for remedies considered necessary and appropriate to improve competition or address the effects adverse to the public interest, to come into conflict with existing regulatory schemes. The legislative framework deals with this by either giving the CMA or Secretary of State, as the case may be, the

power to modify the regulatory conditions directly or empowering them to request the relevant authority amends the conditions in light of the conclusions reached in the market investigation. Section 168 EA02 makes provision so that when the CMA or Secretary of State take such action, they are required to have regard to the statutory functions of the regulator who would ordinarily impose or modify the condition.

144. Clause 137 and Schedule 8 (*Final undertakings and orders: power to conduct trials*) introduce new powers for the CMA, and the Secretary of State in cases in which a market investigation involves a public interest consideration, to allow them to undertake implementation trials in relation to remedies before settling a final remedy package. Paragraph 4 of Schedule 7 inserts new sections 161B to 161E into the EA02 which allow trials of remedies which relate to a "qualifying remedial action". Those implementation trials will be undertaken either via the acceptance of undertakings, or the imposition of orders, for the purpose of a trial. The policy intention is to allow the testing of remedies so that an assessment can be made of their effectiveness (given the unpredictability of consumer response) before a final package of remedies is settled. At the conclusion of a trial, the CMA, or Secretary of State as the case may be, will then decide whether to accept a final undertaking, and/or make a final order, or take no further action.

145. Should implementation trials take place in regulated sectors, without amendment of the sectoral enactments, the CMA or Secretary of State would not be able to make modifications to regulatory conditions directly, nor request that the relevant authority does so, for the purposes of a trial.

146. Implementation trials are initially to be permitted in relation to a narrow subset of remedies only (see further below at paragraphs 157 to 158). The immediate likelihood of conflict between implementation trials and regulatory conditions is therefore considered to be low, and such that immediate amendment of section 168 of the EA02 and the sectoral legislation is not considered necessary.

147. However, if the scope of implementation trials is expanded in future (using the power at paragraph 4 of Schedule 7 set out below), then the potential for conflict will increase and it may be appropriate to amend the sectoral legislation accordingly. Section 168 of the EA02 would also require amendment to ensure that the CMA or Secretary of State, as the case may be, would be required to have regard to the statutory functions of the relevant regulator when taking action for implementation trials, as they would if they were settling a final remedy package.

Justification for taking the power

148. It is considered it would be premature to amend section 168 EA02 and the sectoral enactments while implementation trials are to be permitted in relation to only a narrow subset of remedies and the potential for conflict between remedies subject to trial and regulatory conditions is low. Taking a specific power to amend the enactments, subject to a requirement that the Secretary of State must consult with the relevant regulatory authority before exercising the power in relation to the enactment which relates to its functions, would allow implementation trials to be facilitated effectively in regulatory sectors should it be appropriate to do so, without a risk of undue delay while a Bill with appropriate scope was identified.

Justification for procedure

149. The government's view is that expanding the action which the CMA or Secretary of State may take for the purposes of implementation trials in regulated sectors is likely to be of particular interest to Parliament and therefore has proposed that the regulations are subject to the draft affirmative procedure, and subject to a specific requirement that the Secretary of State must consult with the relevant regulatory authority concerned before exercising the power.

Clause 137(7): Power to amend list of sectoral enactments at clause 133(4) and relevant regulators listed at clause 137(6).

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

150. The legislative context for this power is the same as that set out for the delegated power described above (power for the Secretary of State to amend sectoral enactments in connection with provision made by Schedule 7).

151. The power to amend the sectoral enactments is limited to the list of enactments specified at clause 137(4), and subject to a requirement that the Secretary of State must consult with the relevant regulatory authority before the power is exercised in relation to the relevant enactment. The regulatory authorities are listed in subsection (6).

152. Subsection (7) gives the Secretary of State a power to amend subsection (4) so as to add or remove an enactment and to amend subsection (6) to add, vary or remove an entry.

Justification for taking the power

153. As sectoral enactments are amended over time, it may be necessary to update the lists in subsections (4) and (6) accordingly.

Justification for procedure

154. The government's view is that amending the scope of the power to make amendments to other enactments is likely to be of particular interest to Parliament and therefore has proposed that the regulations are subject to the draft affirmative procedure.

Clause 137 (Final undertakings and orders: power to conduct trials) and Schedule 8, Paragraph 4: Power to specify qualifying remedial matters in relation to which remedies may be the subject of an implementation trial.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

155. The legislative context is the same as that set out for the delegated powers described above (power for the Secretary of State to amend sectoral enactments in connection with provision made by Schedule 7)

156. Clause 137 and Schedule 8 (*Final undertakings and orders: power to conduct trials*) introduce new powers for the CMA, and the Secretary of State in cases in which a market investigation involves a public interest consideration, to allow them to undertake implementation trials in relation to remedies before settling a final remedy package. Paragraph 4 of Schedule 7 inserts new sections 161B to 161E into the EA02 which allow trials of remedies which relate to a "qualifying remedial action". Those implementation trials will be undertaken either via the acceptance of undertakings, or the imposition of orders, for the purpose of a trial. The policy intention is to allow the testing of remedies so that an assessment can be made of their effectiveness (given the unpredictability of consumer response) before a final package of remedies is settled. At the conclusion of a trial, the CMA, or Secretary of State as the case may be, will then decide whether to accept a final undertaking, and/or make a final order, or take no further action.

157. By the new section 161B(3) inserted by paragraph 4 of Schedule 7, a "qualifying remedial action" is one which concerns the provision or publication of information to consumers (whether directly or through an intermediary), or a matter which is specified in regulations made by the Secretary of State, thereby providing a power for the Secretary of State to specify further matters in relation to which remedies may be trialled before a final remedy package is settled.

Justification for taking the power

158. The government's view is that at the present time, the possibility of implementation trials should be limited to a subset of behavioural remedies, being those which relate to the provision of information to consumers. Rather than allowing the CMA a discretion to require an implementation trial of any remedy it may impose, the government would prefer to place statutory limits on the types of remedy which may be subject to trialling. As the use of implementation trials develops, and businesses have the opportunity to participate in, or observe the trial process, they may consider it preferable and in their interests for a broader range of remedies to be tested and refined through a trial process. This could relate to matters such as the terms and conditions to be used, or prevented, in contractual agreements, for instance cancellation fees or penalties, contract length, or different ways of promoting interoperability (e.g. access to different technology). Such an expansion would need to be supported by analysis that it would be proportionate in relation to the costs and benefits. Requiring primary legislation to broaden the scope for the use of implementation trials would risk unduly delaying expanding the use of implementation trials while a Bill with appropriate scope was identified.

Justification for the procedure

159. The government's view is that expanding the scope of matters in relation to which remedies may be trialled is likely to be of particular interest to Parliament and therefore has proposed that the regulations are subject to the draft affirmative procedure.

MISCELLANEOUS

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 9(10): Power to amend the maximum penalty for persons who are not undertakings, which may be imposed by the CMA under section 40A CA98

Power conferred on: *Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

160. The CMA has a number of investigative powers set out in Chapter 1 of Part 1 of CA98, for the purposes of its functions relating to the enforcement of the Chapter I and Chapter II prohibitions. By virtue of section 40A, where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement imposed under sections 26, 26A, 27, 28, 28A or 40ZD, it has a power to impose a civil penalty. Section 40A(3) makes provision which enables the Secretary of State to specify the maximum amounts which may be imposed as penalties, either by reference to a fixed amount, or by an amount calculated by reference to a daily rate. This power is subject to the statutory maxima set out in sections 40A(4) and (5): the amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000.

161. Paragraph 8 of Schedule 9 inserts section 40ZE into the CA98, making provision to expand the powers of the CMA to impose civil penalties, so that they are also available to the CMA where a person obstructs an officer in specified circumstances, provides false or misleading information, and where a person falsifies, conceals, destroys, or otherwise disposes of documents which have been required to be produced to the CMA, or which he has been required to retain as a result of the new section 25B, which creates a duty to preserve documents relevant to investigations (new section 40ZE is applied to this new duty to preserve documents by clause 120(3) of the Bill) . These

powers will be an alternative to taking action under the existing criminal offences set out in sections 42, 43 and 44 CA98.

162. Paragraph 9 of Schedule 9 further amends section 40A so that where a civil penalty is imposed on an undertaking, the maximum penalty is set by reference to the turnover of that undertaking. Where a fixed penalty is set, the maximum penalty will be 1% of the total global turnover of that business. Where a penalty is set by reference to a daily rate, the maximum penalty will be 5% of the daily turnover.

163. Paragraph 9(6) amends section 40A so that where a penalty is imposed on a person who is not an undertaking, the amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000. It further omits the power for the Secretary of State to specify, by order, the maximum penalty which may be imposed by the CMA, so that this is instead specified in the Act. Paragraph 9(10) gives the Secretary of State the power, by way of regulations, to amend the maximum penalties which may be imposed by the CMA specified in amended section 40A(3).

Justification for taking the power

164. The government considers it appropriate to provide the Secretary of State with the power to amend the maximum penalties which may be imposed on persons who are not undertakings to ensure that they do not become an inadequate deterrent in the future. Providing the Secretary of State with a power to amend the maxima will allow the regulatory framework to be updated quickly if required (for example, due to inflation over time). It is not anticipated that this power would be used frequently (the existing maxima has only been raised once in 20 years). However, the need to update the statutory maxima quickly is considered appropriate, given the continuing harm that consumers may be exposed to whilst any anti-competitive behaviour remains unaddressed. The government considers the most proportional approach is to amend the maxima by secondary legislation rather than introducing primary legislation to amend only one aspect of the regime.

Justification for the procedure

165. The regulations would allow the Secretary of State to amend the maximum penalty which a person may be ordered to pay by the CMA. The government's view is that this warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the draft affirmative procedure. There is an additional safeguard in that the Secretary of State must consult the CMA and anyone else the Secretary of State considers appropriate before making regulations under the proposed power.

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 9(13): A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who are undertakings under section 40A CA98

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

166. The context for this power is the same as that set out for the delegated power described above (power for the Secretary of State to specify by order the maximum level of penalty which may be imposed on a person who is not an undertaking under the CA98).

167. Clause 142(1) (*Civil penalties etc in connection with competition matters*) and paragraph 9(7) of Schedule 9 of the Bill make provision so that the maximum civil penalty which may be imposed on a person who is an undertaking is a percentage of that person's turnover, with a maximum fixed penalty of 1% of the turnover, and an amount calculated by reference to a daily rate where the daily rate is 5% of the entity's daily turnover.

168. Paragraph 9(13) makes provision which allows the Secretary of State, by regulations, to set out the basis on which the undertakings' turnover should be calculated for the purposes of determining the maximum level of penalty. In particular, the Secretary of State may make regulations determining the amounts which are or are not to be treated as an undertaking's turnover or daily turnover, and the date or dates by reference to which an undertaking's turnover or daily turnover is to be determined.

Justification for taking the power

169. The power is intended to enable the government to address any amendments needing to be made in this technical provision more readily, within secondary legislation. The government considers that setting out the basis on which the calculation should be made in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary

and technical matter. The government's view is that the amount of technical detail on the accounting principles to be followed when calculating turnover both on an annual and daily basis is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

170. It is proposed that regulations made using this power should be subject to the negative procedure. The primary legislation already sets out the principal parameters of the penalty scheme. The power relates to the detailed technical basis on which turnover should be calculated. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. While it is noted that the similar power under section 36(8) of the CA98 is subject to the draft affirmative procedure, that relates to the basis on which turnover is calculated for the purposes of determining the maximum penalty which may be imposed for a substantive infringement of competition law. The power here is similar to the power to make an order under section 94A of the EA02 which is also subject to the negative resolution procedure and enables the Secretary of State to specify the basis on which turnover of an enterprise is calculated for the purposes of penalties which may be imposed in relation to failure to comply with an initial enforcement order. To date, this power has only been used once to lay the order following amendments to the EA02 under the ERRA 2013. For these reasons it is considered that this ensures appropriate Parliamentary scrutiny over use of the power.

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 17(10): Power to amend the maximum penalty for persons who do not own or control an enterprise, which may be imposed by the CMA under section 111 EA02

Power conferred on: *Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

171. The CMA has a number of information gathering powers set out in section 109 in Part 3 of the EA02, for the purposes of its functions relating to the review of mergers.

172. By virtue of sections 110 (1) and (3) EA02, where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement imposed under section 109 EA02, it has a power to impose a civil penalty in accordance with section 111 EA02. Sections 111(4) and (6) EA02 enable the Secretary of State to specify the maximum amounts which may be imposed as penalties. The amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000 (section 111(7) EA02).

173. Paragraph 15 of Schedule 9 to the Bill makes provision amending section 110 EA02 to expand the powers of the CMA to impose civil penalties, so that they are also available to the CMA where a person provides false or misleading information, and where a person intentionally alters, suppresses or destroys any documents which have been required to be produced to the CMA. These powers will be an alternative to taking action under the existing criminal offences set out in sections 110(5) and 117 EA02.

174. Paragraph 17(7) further amends section 111 so that where a civil penalty is imposed on a person who owns or controls one or more enterprises, the maximum penalty is set by reference to the turnover of that or those enterprises. Where a fixed penalty is set, the maximum penalty will be 1% of

the total global turnover. Where a penalty is set by reference to a daily rate, the maximum penalty will be 5% of the daily turnover. These maximum levels are set out in the Bill.

175. Paragraph 17(6) amends section 111 so that where a penalty is imposed on a person who does not own or control an enterprise, the amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000. The existing power for the Secretary of State to specify the maximum penalty by order is omitted. Paragraph 17(10) gives the Secretary of State the power, by way of regulations, to amend the maximum penalties which may be imposed by the CMA specified in amended section 111(4).

Justification for taking the power

176. The government considers it appropriate to provide the Secretary of State with the power to amend the maximum penalties which may be imposed to ensure that they do not become an inadequate deterrent in the future. Failure to comply with the CMA's information gathering powers can prevent the CMA from gaining access to the timely and accurate information it needs to assess the impact on competition of a merger, ensuring fairness for consumers and a level playing field for businesses. Providing the Secretary of State with a power to amend the maxima will allow the regulatory framework to be updated quickly if required (for example, due to inflation over time). The government considers the most proportional approach is to amend the maxima by secondary legislation rather than introducing primary legislation to amend only one aspect of the regime.

Justification for the procedure

177. Regulations to amend the statutory cap will determine the maximum penalty a person may be required to pay. The government's view is that this warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure. There is an additional safeguard in that the Secretary of State must consult the CMA and

anyone else the Secretary of State considers appropriate before making regulations under the proposed power.

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 17(12): A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 111 EA02

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

178. The legislative context for this power is the same as that set out for the delegated power described above (power for the Secretary of State to specify by order what the maximum level of penalty which may be imposed on a person who does not own or control an enterprise under Part 3 EA02).

179. Paragraph 17 of Schedule 9 to the Bill amends section 111 to make provision so that the maximum civil penalty which may be imposed on a person who owns or control one or more enterprises is, in the case of a fixed amount, 1% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by that person, and in the case of an amount calculated by reference to a daily rate, 5% of the total value of the daily turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person.

180. Paragraph 17(12) makes provision which allows the Secretary of State, by regulations, to make provision for determining:

a. when an enterprise is to be treated as being controlled by a person; and
b. the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise.

181. Such regulations may, in particular, make provision as to the amounts which are or are not to be treated as comprising an enterprise's turnover or daily turnover, and the date or dates by reference to which turnover or daily turnover is to be determined.

Justification for taking the power

182. The power is intended to enable the government to address any amendments needing to be made in this technical provision more readily, within secondary legislation. The government considers that setting out the basis on which the calculation should be made in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter. The government's view is that the amount of technical detail on the accounting principles to be followed when calculating turnover both on an annual and daily basis is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

183. It is proposed that regulations made using this power should be subject to the negative procedure. The primary legislation already sets out the principal parameters of the penalty scheme. The power relates to the detailed technical basis on which turnover should be calculated. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. The power is similar to the power to make an order under section 94A of the EA02 which is also subject to the negative resolution procedure and enables the Secretary of State to specify the basis on which turnover of an enterprise is calculated for the purposes of penalties which may be imposed in relation to failure to comply with an initial enforcement order. For these reasons it is considered that this ensures appropriate Parliamentary scrutiny over use of the power.

Clause 142(1) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 28(9): Power to amend the maximum penalty for persons who do not own or control an enterprise, which may be imposed by the CMA under section 174D EA02

Power conferred on: *Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

184. The CMA has information gathering powers set out in section 174 in Part 4 of the EA02, for the purposes of its functions relating to the investigation of markets.

185. By virtue of sections 174A (1) and (3) EA02, where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement imposed under section 174 EA02, it has a power to impose a civil penalty in accordance with section 174D EA02. Sections 174D (4) and (5) EA02 enable the Secretary of State to specify the maximum amounts which may be imposed as penalties. The amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000 (section 174D(6)).

186. Paragraph 26 of Schedule 9 to the Bill makes provision amending section 174A expanding the powers of the CMA to impose civil penalties, so that they are also available to the CMA where a person provides false or misleading information, and where a person intentionally alters, suppresses or destroys any documents which have been required to be produced to the CMA. These powers will be an alternative to taking action under the existing criminal offence set out in section 174A(4) EA02.

187. Paragraph 28 amends section 174D so that where a civil penalty is imposed on a person who owns or controls one or more enterprises, the maximum penalty is set by reference to the turnover of that or those enterprises. Where a fixed penalty is set, the maximum penalty will be 1% of the total global turnover. Where a penalty is set by reference to a daily rate, the

maximum penalty will be 5% of the daily turnover. The maximum levels are set out in the Bill.

188. It further amends section 174D so that where a penalty is imposed on a person who does not own or control an enterprise, the amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000. The existing power for the Secretary of State to specify the maximum penalty is omitted. Paragraph 28(9) gives the Secretary of State the power, by way of regulations, to amend the maximum penalties which may be imposed by the CMA specified in amended section 174D(4).

Justification for taking the power

189. The government considers it appropriate to provide the Secretary of State with the power to amend the maximum penalties which may be imposed to ensure that they do not become an inadequate deterrent in the future. Failure to comply with the CMA's information gathering powers can prevent the CMA from fulfilling its statutory requirement to consider the extent to which the acquisition or supply of goods or services in the United Kingdom may have an adverse impact on the interests of consumers. Providing the Secretary of State with a power to amend the caps will allow the regulatory framework to be updated quickly if required (for example, due to inflation over time).

Justification for the procedure

190. Regulations to amend the statutory maxima will determine the maximum penalty a person may be required to pay. The government's view is that this warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure. There is an additional safeguard in that the Secretary of State must consult the CMA and anyone else the Secretary of State considers appropriate before making regulations under the proposed power.

Clause 142(1) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 28(13): A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 174D EA02

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

191. The legislative context for this power is the same as that set out for the delegated power described above (power for the Secretary of State to specify by order the maximum level of penalty which may be imposed on a person who does not own or control an enterprise under Part 4 EA02).

192. Paragraph 28(7) of Schedule 9 to the Bill amends section 174D to make provision so that the maximum civil penalty which may be imposed on a person who owns or controls one or more enterprises is, in the case of a fixed amount, 1% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by that person, and in the case of an amount calculated by reference to a daily rate, 5% of the total value of the daily turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person.

193. Paragraph 28(13) makes provision which allows the Secretary of State, by regulations, to make provision for determining:

a. when an enterprise is to be treated as being controlled by a person, and
b. the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise.

194. Such regulations may, in particular, make provision as to the amounts which are or are not to be treated as comprising an enterprise's turnover or daily turnover, and the date or dates by reference to which turnover or daily turnover is to be determined.

Justification for taking the power

195. The power is intended to enable the government to address any amendments needing to be made in this technical provision more readily, within secondary legislation. The government considers that setting out the basis on which the calculation should be made in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter. The government's view is that the amount of technical detail on the accounting principles to be followed when calculating turnover both on an annual and daily basis is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

196. It is proposed that regulations made using this power should be subject to the negative procedure. The primary legislation already sets out the principal parameters of the penalty scheme. The power relates to the detailed technical basis on which turnover should be calculated. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. The power is similar to the power to make an order under section 94A of the EA02 which is also subject to the negative resolution procedure and enables the Secretary of State to specify the basis on which turnover of an enterprise is calculated for the purposes of penalties which may be imposed in relation to failure to comply with an initial enforcement order. For these reasons it is considered that this ensures appropriate Parliamentary scrutiny over use of the power.

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 6: Power to amend the maximum penalty which may be imposed by the CMA on a person who is not an undertaking under section 35B CA98 (as inserted by Schedule 10 Paragraph 6)

Power conferred on: *Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

197. The CMA has powers to accept and impose remedies to conclude investigations of an infringement of the Chapter 1 or Chapter 2 prohibition in the CA98. In particular, where it makes an infringement decision it may issue directions, which are orders as to future conducts, under sections 32 and 33 CA98 requiring that the infringement be brought to an end. If the directions are not adhered to without reasonable excuse the CMA can apply to the court for an order for enforcement (section 34 CA98). In the context of interim measures, directions may be issued by the CMA under section 35 CA98. The parties under investigation may also offer commitments prior to the conclusion of an investigation to bring the case to an end (sections 31A – 31E CA98). Commitments are binding promises given by an undertaking relating to its future conduct and may be accepted by the CMA at its discretion if it is satisfied that the commitments offered address its competition concerns. If the commitments are not adhered to, the CMA can apply to the court for an order for enforcement (section 31E CA98).

198. Therefore, as it currently stands, the only recourse available to the CMA if directions and commitments are not complied with, is to seek a court order for enforcement. Paragraph 6 of Schedule 10 inserts section 35A into the CA98, which makes provision for the CMA to also be able to impose civil penalties in the event remedies imposed or accepted under sections 31A, 32, 33 or 35 are not complied with, without reasonable excuse.

199. Further details regarding the penalty amount are set out in new section 35B, which is inserted by paragraph 6 of Schedule 10. Where a civil penalty is imposed on an undertaking, the maximum penalty is set by reference to the

turnover of that undertaking (subsection (4) of section 35B). In the case of a fixed penalty, the maximum penalty will be 5% of the total global turnover of that business; and where a penalty is set by reference to a daily rate, the maximum penalty will be 5% of the daily turnover.

200. Section 35B also provides that where a penalty is imposed on a person who is not an undertaking, the amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000 (subsection (3) of 35B). Subsection (7) of section 35B gives the Secretary of State the power, by way of regulations, to amend the maximum penalties which may be imposed by the CMA specified in section 35B(3).

Justification for taking the power

201. The government considers it appropriate to provide the Secretary of State with the power to amend the maximum penalties which may be imposed to ensure that they do not become an inadequate deterrent in the future. Providing the Secretary of State with a power to amend the maxima will allow the regulatory framework to be updated quickly if required (for example, due to inflation over time). The need to update the statutory maxima quickly is considered appropriate, given the continuing harm that consumers may be exposed to whilst any anti-competitive behaviour remains unaddressed. Given the changing economic climate and nature of anti-competitive behaviour, it would be unduly onerous for primary legislation to be introduced every time the statutory cap needed to be amended, even slightly, as a Bill with appropriate scope would need to be found each time.

Justification for the procedure

202. The regulations would allow the Secretary of State to amend the maximum penalty which a person may be ordered to pay by the CMA. The government's view is that this warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure. There is an additional safeguard in that the Secretary of State must consult the CMA and anyone else the Secretary of State considers appropriate before making regulations under the proposed power.

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies)), Paragraph 6: A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who are undertakings under section 35B CA98 (as inserted by Paragraph 6 of Schedule 10)

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

203. The context for this power is the same as that set out for the delegated power described above (power for the Secretary of State to specify by order the maximum level of penalty which may be imposed on an individual who is not an undertaking under the CA98).

204. Clause 142(2) and paragraph 6 of Schedule 10 to the Bill make provision, by inserting section 35B(4) so that the maximum civil penalty which may be imposed on a person who is an undertaking is a percentage of that person's turnover, with a maximum fixed penalty of 5% of the turnover, and an amount calculated by reference to a daily rate where the daily rate is 5% of the entity's daily turnover.

205. Paragraph 6 of Schedule 10 to the Bill makes provision by inserting section 35B(9), to allow the Secretary of State, by regulations, to set out the basis on which the undertaking's turnover should be calculated for the purposes of determining the maximum level of penalty. These regulations may, in particular, make provision as to the amounts that may or may not comprise an undertaking's turnover, and dates by reference to which such turnover is to be determined (section 35B(10)).

Justification for taking the power

206. The power is intended to enable the government to address any amendments needing to be made in this technical provision more readily, within secondary legislation. The government considers that setting out the basis on which the calculation should be made in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary

and technical matter. The government's view is that the amount of technical detail on the accounting principles to be followed when calculating turnover both on an annual and daily basis is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

207. It is proposed that regulations made using this power should be subject to the negative procedure. The primary legislation already sets out the principal parameters of the penalty scheme. The power relates to the detailed technical basis on which turnover should be calculated. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. While it is noted that the similar power under section 36(8) of the CA98 is subject to the draft affirmative procedure, that relates to the basis on which turnover is calculated for the purposes of determining the maximum penalty which may be imposed for a substantive infringement of competition law. The power here is similar to the power to make an order under section 94A of the EA02 which is also subject to the negative resolution procedure and enables the Secretary of State to specify the basis on which turnover of an enterprise is calculated for the purposes of penalties which may be imposed in relation to failure to comply with an initial enforcement order. For these reasons it is considered that this ensures appropriate Parliamentary scrutiny over use of the power.

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 11: Power to amend the maximum penalty which may be imposed by the CMA on persons who do not own or control an enterprise under section 94AB EA02 (as inserted by Paragraph 11 of Schedule 10)
Power conferred on: *Secretary of State*
Power exercised by: *Order made by Statutory Instrument*
Parliamentary Procedure: *Draft affirmative*

Context and purpose

208. In the mergers regime, the CMA has powers to accept and impose remedial measures by way of undertakings and orders. Undertakings are voluntary and are submitted by the merging parties; and if accepted by the CMA, these become legally binding. Orders are imposed by the CMA and either prohibit the merging parties from doing something or specify that they must take certain action. Undertakings and orders may be used to prevent pre-emptive action being taken and can also be used to resolve substantive competition concerns with the merger.

209. In summary, the CMA can impose Interim Enforcement Orders during a Phase 1 review (section 72 EA02), and at the end of a Phase 1 review it can accept undertakings in lieu (section 73 EA02) instead of referring to a merger for a Phase 2 review. During a Phase 2 review the CMA may accept interim undertakings from merging parties (section 80 EA02) and can also make an interim order which prevents the merging parties from taking any action that might prejudice the outcome of the merger reference (section 81 EA02). At the end of a Phase 2 review if the CMA has decided that there is an anti-competitive outcome from the merger, the CMA can either accept final undertakings from merging parties in order to remedy the competition problems identified (section 82 EA02) or make final orders (section 84 EA02).

210. Currently, if undertakings accepted or orders imposed under the mergers regime are not fulfilled, the CMA can seek enforcement by way of a court order (section 94 EA02). Paragraph 11 of Schedule 10 inserts section 94AA into the EA02, and makes provision for the CMA to also be able to impose

civil penalties in the event these remedies are not complied with, without reasonable excuse.

211. Further details regarding the penalty amount are set out in section 94AB EA02, which is also inserted by paragraph 11 of Schedule 10. As per this provision (in particular, subsection (4)), where a civil penalty is imposed on a person who owns or controls an enterprise the maximum penalty is set by reference to the turnover of that or those enterprises. Where a fixed penalty is set, the maximum penalty will be 5% of the total global turnover. Where a penalty is set by reference to a daily rate, the maximum penalty will be 5% of the daily turnover. The maximum levels are set out in the Bill.

212. As per section 94AB, where a penalty is imposed on a person who does not own or control an enterprise, the amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000 (subsection (3)). Subsection (7) of draft provision 94AB gives the Secretary of State the power, by way of regulations, to amend the maximum penalties which may be imposed by the CMA specified in amended section 94AB(3).

Justification for taking the power

213. The government considers it appropriate to provide the Secretary of State with the power to amend the maximum penalties which may be imposed to ensure that they do not become an inadequate deterrent in the future. Providing the Secretary of State with a power to amend the maxima will allow the regulatory framework to be updated quickly if required (for example, due to inflation over time). The need to update the statutory maxima quickly is considered appropriate, given the continuing harm that consumers may be exposed to whilst any anti-competitive behaviour remains unaddressed. Given the changing economic climate and nature of anti-competitive behaviour, it would be unduly onerous for primary legislation to be introduced every time the statutory cap needed to be amended, even slightly, as a Bill with appropriate scope would need to be found each time.

Justification for the procedure

214. Regulations to amend the statutory cap will determine the maximum penalty a person may be required to pay. The government's view is that this warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure. There is an additional safeguard in that the Secretary of State must consult the CMA and anyone else the Secretary of State considers appropriate before making regulations under the proposed power.

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 11: A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 94AB EA02 (as inserted by paragraph 11 of Schedule 10)

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

215. The legislative context for this power is the same as that set out above (for the Secretary of State's power to amend the maximum penalty which may be imposed by the CMA on persons who do not own or control an enterprise under section 94AB EA02).

216. Paragraph 11 of Schedule 10 to the Bill inserts section 94AB to make provision so that the maximum civil penalty which may be imposed on a person who has control of one or more enterprises is, in the case of a fixed amount, 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by that person, and in the case of an amount calculated by reference to a daily rate, 5% of the total value of the daily turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person.

217. Subsection (9) of 94AB makes provision which allows the Secretary of State, by regulations, to make provision for determining:

a. When an enterprise is to be treated as being controlled by a person, and
b. The turnover and daily turnover (both in and outside the United Kingdom) of an enterprise.

218. Such regulations may, in particular, make provision as to the amounts which are or are not to be treated as comprising an enterprise's turnover or daily turnover, and the date or dates by reference to which turnover or daily turnover is to be determined.

Justification for taking the power

219. The power is intended to enable the government to address any amendments needing to be made in this technical provision more readily, within secondary legislation. The government considers that setting out the basis on which the calculation should be made in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter. The government's view is that the amount of technical detail on the accounting principles to be followed when calculating turnover both on an annual and daily basis is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

220. It is proposed that regulations made using this power should be subject to the negative procedure. The primary legislation already sets out the principal parameters of the penalty scheme. The power relates to the detailed technical basis on which turnover should be calculated. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. The power is similar to the power to make an order under section 94A of the EA02 which is also subject to the negative resolution procedure and enables the Secretary of State to specify the basis on which turnover of an enterprise is calculated for the purposes of penalties which may be imposed in relation to failure to comply with an initial enforcement order. For these reasons it is considered that this ensures appropriate Parliamentary scrutiny over use of the power.

Clause 142(2) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 17: Power to amend the maximum penalty which may be imposed by the CMA on persons who do not own or control an enterprise under section 167B EA02 (as inserted by paragraph 17 of Schedule 10)
Power conferred on: *Secretary of State*
Power exercised by: *Order made by Statutory Instrument*
Parliamentary Procedure: *Draft affirmative*

Context and purpose

221. Similar to the mergers regime, the CMA has powers to accept and impose remedial measures by way of undertakings and orders in the markets regime. Undertakings are voluntary and if accepted by the CMA, become legally binding. Orders are imposed by the CMA and either prohibit the parties from doing something or specify that they must take certain action.

222. In summary, at the conclusion of a market study where the CMA indicates that it intends to proceed and undertake a market investigation, participants in the market may offer undertakings in lieu of a reference (section 154 EA02). If at the conclusion of the investigation, the CMA finds that there are one or more features of a market which are adversely affecting competition, then the CMA can accept undertakings to address those features (section 159 EA02) or impose final orders (section 161 EA02). The CMA may accept interim undertakings (section 157 EA02) or impose interim orders (section 158 EA02) to prevent pre-emptive action from being undertaken which might prejudice a final remedy. The CMA can also issue directions to an undertaking (section 164 EA02) if it has breached a remedy requiring that undertaking to take specific actions to end the breach and prevent future breaches.

223. Currently, undertakings and orders in the market's context are only enforceable by way of a court order (section 167 EA02). Paragraph 17 of Schedule 10 inserts section 167A into the CA98, which makes provision for the CMA to also be able to impose civil penalties in the event these remedies are not complied with, without reasonable excuse.

224. Further details regarding the penalty amount are set out in section 167B EA02, which is inserted by paragraph 17 of Schedule 10. As is the case in the context of the mergers framework, where a civil penalty is imposed on a person who has control of one or more enterprises, the maximum penalty is set by reference to the turnover of that or those enterprises. Where a fixed penalty is set, the maximum penalty will be 5% of the total global turnover. Where a penalty is set by reference to a daily rate, the maximum penalty will be 5% of the daily turnover. The maximum levels are set out in the Bill.

225. Per section 167B(3), where a penalty is imposed on a person who does not have control of an enterprise, the amount specified in relation to a fixed penalty may not exceed £30,000 and the amount per day specified in relation to a penalty calculated by reference to a daily rate may not exceed £15,000. Section 167B(7) gives the Secretary of State the power, by way of regulations, to amend the maximum penalties which may be imposed by the CMA specified in section 167B(3).

Justification for taking the power

226. The government considers it appropriate to provide the Secretary of State with the power to amend the maximum penalties which may be imposed to ensure that they do not become an inadequate deterrent in the future. Providing the Secretary of State with a power to amend the caps will allow the regulatory framework to be updated quickly if required (for example, due to inflation over time). The need to update the statutory maxima quickly is considered appropriate, given the continuing harm that consumers may be exposed to whilst any anti-competitive behaviour remains unaddressed. Given the changing economic climate and nature of anti-competitive behaviour, it would be unduly onerous for primary legislation to be introduced every time the statutory cap needed to be amended, even slightly, as a Bill with appropriate scope would need to be found each time.

Justification for the procedure

227. Regulations to amend the statutory maxima will determine the maximum penalty a person may be required to pay. The government's view is that this warrants close Parliamentary scrutiny and time for debate, and so has

proposed that the regulations are subject to the affirmative procedure. There is an additional safeguard in that the Secretary of State must consult the CMA and anyone else the Secretary of State considers appropriate before making regulations under the proposed power.

Clause 142(2) (Civil penalties etc in connection with competition matters) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 17: A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 167B EA02 (as inserted by paragraph 17 of Schedule 10)

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

228. The legislative context for this power is the same as that set out for the delegated power described above in relation to amending the maximum penalty which may be imposed by the CMA on persons who do not have control of an enterprise under section 167B EA02.

229. Paragraph 17 of Schedule 10 to the Bill inserts section 167B to make provision so that the maximum civil penalty which may be imposed on a person who controls one or more enterprises is, in the case of a fixed amount, 5% of the total value of the turnover (both in and outside the United Kingdom) or the enterprises owned or controlled by that person, and in the case of an amount calculated by reference to a daily rate, 5% of the total value of the daily turnover (both in and outside the United Kingdom) or the enterprises owned or controlled by the person.

230. Paragraph 17 (through section 167B(9)) makes provision which allows the Secretary of State, by regulations, to make provision for determining:

a. when an enterprise is to be treated as being controlled by a person, and
b. the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise.

231. Such regulations may, in particular, make provision as to the amounts which are or are not to be treated as comprising an enterprise's turnover or daily turnover, and the date or dates by reference to which turnover or daily turnover is to be determined.

Justification for taking the power

232. The power is intended to enable the government to address any amendments needing to be made in this technical provision more readily, within secondary legislation. The government considers that setting out the basis on which the calculation should be made in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter. The government's view is that the amount of technical detail on the accounting principles to be followed when calculating turnover both on an annual and daily basis is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

233. It is proposed that regulations made using this power should be subject to the negative procedure. The primary legislation already sets out the principal parameters of the penalty scheme. The power relates to the detailed technical basis on which turnover should be calculated. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. The power is similar to the power to make an order under section 94A of the EA02 which is also subject to the negative resolution procedure and enables the Secretary of State to specify the basis on which turnover of an enterprise is calculated for the purposes of penalties which may be imposed in relation to failure to comply with an initial enforcement order. For these reasons it is considered that this ensures appropriate Parliamentary scrutiny over use of the power.

PART 3 - ENFORCEMENT OF CONSUMER PROTECTION LAW

234. Part 3 of the Bill reforms the public enforcement of consumer protection law to prevent harm to the collective interests of consumers.

ENFORCEMENT

Clause 150(3) (Enforcers): Delegated power for the Secretary of State to amend, by regulations, clause 150 (Enforcers) so as to add or remove a person as a public or private designated enforcer or to vary the entry of a public or private designated enforcer.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

235. The purpose of this power is to allow the Secretary of State to by order add, amend or vary the United Kingdom public bodies and private organisations specified in clause 150 (*Enforcers*) who can use the court-based civil enforcement mechanism to enforce consumer protection law. This power is based on the Secretary of State's current power to designate enforcers under section 213(2) of Part 8 EA02.

236. By way of background: under Part 8 currently, in relation to conduct from 1 January 2021, there are three categories of enforcer who can use the court-based civil enforcement mechanism:

a. General enforcers;
b. Designated enforcers; and
c. Schedule 13 enforcers (formerly CPC enforcers).

237. The first category – general enforcers - are set out section 213(1) EA02 and may make an application for an enforcement order or interim enforcement order in respect of any infringement (section 215(2), section 218).

238. The second category - "designated" enforcers – includes enforcers who have been designated by the Secretary of State by order under section 213(2) EA02. Three orders have been made under section 213(2), designating

regulators and one private body as enforcers, in each case in respect of all infringements.[21]

239. The third category – "Schedule 13" enforcers – captures public authorities who have specific responsibilities to enforce certain EU derived consumer protection legislation, who are currently able to use the court-based civil enforcement mechanism in Part 8 in this capacity in relation to Schedule 13 infringements only.

240. Through repealing and replacing Part 8, the Bill simplifies this categorisation into two categories: public designated enforcers (which includes that existing category plus any general enforcers who are not already public designated enforcers) and private designated enforcers.

241. The government anticipates that enforcers who can use the court based enforcement regime may need to be altered more frequently than the anticipated frequency of consumer protection primary legislation.

242. The government would like the exercise of the power to add new private and public designated enforcers to be subject to the following limitations:

a. Firstly, the Secretary of State cannot use the power in order to remove the ability of the CMA, local trading standards departments in Great Britain or the Department for the Economy in Northern Ireland to use the court based enforcement mechanism.
b. Secondly, the Secretary of State can only designate persons that have as one of their purposes the protection of the collective interests of consumers. This replicates the current pre-condition, set out in section 213(2)(a), for designating an enforcer under section 213(2)(b) of Part 8 EA02.

243. Moreover, in order to remove the risk of private bodies (especially those with trading arms) using the court based enforcement regime for competitive advantage or commercial gain, the government would like to impose

[21] 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.

additional limitations on use of the power to add a person as a private designated enforcer, so that the power is only exercisable in respect of a private body person who, in addition to having as one of its purposes the collective interests of consumers:

a. is not a public body, and
b. satisfies the designation criteria.

244. The designation criteria are set out in clause 151 (*Designation criteria*) and require that the private body person to be designated:

a. is constituted, managed and controlled in such a way as to be expected to act independently, impartially and with integrity;
b. has established procedures to ensure that any potential conflicts of interest are properly dealt with;
c. has demonstrated experience, competence and expertise in promoting or protecting the collective interests of consumers;
d. has demonstrated the ability to protect the interests of consumers by promoting high standards of integrity and fair dealing in the conduct of business in relation to consumers;
e. has the capability to investigate infringements and to carry out the relevant enforcement procedures under Part 3;
f. is ready and willing to follow best practice in enforcement; and
g. is ready and willing to co-operate with other enforcers and relevant persons.

245. A private body person (P) will not fail to meet the first criterion solely because they have a connection with another person carrying on a business of a kind that could be affected (directly or indirectly) by action taken under Chapter 3 if:

a. the other person does not control P; and
b. the profits of the other person's business are used for the purposes of furthering the objectives of P.

246. Clause 151(3) (*Designation criteria*) defines "relevant persons" and "co-operation" for the purposes of the private body designation criteria.

247. Overall, the designation criteria are drawn from those currently set out in articles 3 and 4 of the Public Enforcers and Private Enforcers' Criteria Order 2003,[22] with minor changes for simplification.

248. The government does not wish to replicate the requirement currently set out in section 213(3) EA02 that a public body must be independent in order to be added as a public designated enforcer. This requirement originated from the Injunctions Directive[23] and the government considers that this particular requirement is no longer appropriate.

Justification for taking the power

249. The government considers that the power to add new enforcers or remove enforcers from either category is necessary in order to respond to future changes in enforcers' responsibilities for consumer protection law enforcement and to enable the addition of private body enforcers with the experience, constitution and desire to enforce consumer protection law on behalf of consumers.

250. The power to vary the entry for an enforcer is necessary to respond (for example) to changes to the name of an enforcer that are not made through primary legislation, such as machinery of government changes.

251. The government considers that any such additions, variations and removals will be simple, binary changes to the availability of the court-based process or the names of enforcers' who can use it and are therefore appropriate to be made through secondary legislation. The government also considers that such changes may need to be made with greater frequency than the anticipated frequency of primary legislation concerning consumer protection.

Justification for the procedure

252. The power is intended to be used to amend the enforcers listed in clause 150 *(Enforcers)* of the Bill as public or private designated enforcers. This may be limited to changing the name of an enforcer following a machinery of government change, however the power is also capable of being used to

[22] S.I. 1399/2003.
[23] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

alter which enforcers, including private bodies, can use the court based process provided by Part 3 of the Bill to enforce consumer protection law in order to protect the collective interests of consumers. With this latter purpose in mind, the government considers that the power is capable of being used to alter the effect of the Bill and amounts to a Henry VIII power. The government considers that the exercise of the power warrants a significant degree of Parliamentary oversight and therefore proposes for the exercise of the power to be subject to the affirmative Parliamentary procedure.

Clause 176(3) (Enhanced consumer measures: private designated enforcers): Delegated power for the Secretary of State to, by regulations, specify a private enforcer in relation to enhanced consumer measures.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

253. Under the current court-based civil enforcement mechanism in Part 8 EA02, the courts and public body enforcers can include enhanced consumer measures ("ECMs") that are just, reasonable and proportionate in enforcement orders and undertakings, in relation to conduct which occurs or is likely to occur after 1 October 2015.

254. The purpose of this power is to allow the Secretary of State to extend the use of ECMs to private bodies who are designated as enforcers for the purposes of the court based enforcement regime, where certain conditions are met. In particular, these conditions will prevent private designated enforcers from obtaining or agreeing ECMs that benefit them or associated persons.

Further background:

255. The policy aim behind the introduction of ECMs was to allow for, or require, redress to be provided to individual consumers or for positive actions to be taken by the enforcement subject. ECMs were introduced into the court based regime in Part 8 EA02 by section 79 of the Consumer Rights Act 2015. Since then, ECMs have been successfully agreed in many enforcement cases – for example, compliance-related enhanced consumer measures included in undertakings from online hotel booking sites,[24] and compensation-related enhanced consumer measures included in undertakings from travel/flight companies.[25]

24 https://www.gov.uk/cma-cases/online-hotel-booking

25 https://www.gov.uk/cma-cases/covid-19-cancellations-package-holidays

256. During pre-legislative scrutiny of the then Consumer Rights Bill 2015 by the BIS Select Committee, the argument was made that even more redress might be paid to consumers if private designated enforcers were also given powers to agree or apply for ECMs.[26] In response, section 219C(3) Part 8 EA02 introduced a power for the Secretary of State to extend the ability to agree or apply for enhanced consumer measures to private designated enforcers, subject to certain conditions.

257. Clause 176(3) *(Enhanced consumer measures: private designated enforcers)* will replace section 219C(3) Part 8 EA02. Then, as now, there is only one private designated enforcer (the Consumers' Association – "Which?").

Justification for taking the power

258. The government intends for the Secretary of State to be able to extend the use of ECMs to private designated enforcers, either individually or collectively, at a later date if considered appropriate.

259. However, the government also wishes to limit the use of this power so that it can only be used where the Secretary of State is satisfied that giving the private designated enforcer in question access to enhanced consumer measures is likely to improve:

a. the availability of redress for consumers,
b. the information being provided to consumers to enable them to make better decisions or
c. compliance with consumer law.

260. These replicate the conditions for use of the current power in section 219C(3) EA02.

261. The private designated enforcer must also be subject to sections 21 and 22 of the Legislative and Regulatory Reform Act 2006.

262. Clause 176(4) and (5) (*Enhanced consumer measures: private designated enforcers*) replicate the current restriction that where enhanced consumer

26 https://publications.parliament.uk/pa/cm201314/cmselect/cmbis/697/697.pdf at 246.

measures have been extended to a particular private enforcer, the enforcer cannot obtain enhanced consumer measures that benefit them nor associated persons.

263. Clause 176(7) and (8) (*Enhanced consumer measures: private designated enforcers*) require any private designated enforcers applying for enhanced consumer measures, or seeking to include them in an undertaking, to have regard to any relevant advice or guidance given by a primary authority under Part 2 of the Regulatory Enforcement and Sanctions Act 2008.

Justification for the procedure

264. Given that the scope of the power will be limited to extending ECMs (already defined and delineated through Part 3 of the Bill) to private designated enforcers, and the exercise of the power is limited as described above, the government considers the exercise of the power warrants a lesser degree of Parliamentary scrutiny and should be subject to the negative Parliamentary procedure. This is the same procedure as applies to the exercise of the current power to extend ECMs to private designated enforcers in section 219C(3) - see section 219C(8)(a) EA02.

Clause 203(2) (Determination of turnover): Power for the Secretary of State to specify in secondary legislation the methodology for determining "turnover" for civil monetary penalties imposed under Chapters 3 and 4 of Part 3 to the Bill

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

265. Chapters 3 and 4 of Part 3 of the Bill provide new powers for the court and CMA to impose fixed monetary penalties, and/or monetary penalties calculated by reference to a daily rate in certain circumstances, on persons for non-compliance with:

    a. undertakings,
    b. consumer protection law,
    c. CMA direct enforcement directions,
    d. or for providing false or misleading information in connection with the carrying out by the CMA of a direct enforcement function.

266. Where the person (P) has a turnover that can be determined, the government intends for the monetary penalty to be the higher of (i) a turnover-based amount of up to the relevant percentage of turnover or (ii) up to the relevant maximum fixed or daily amount. For example, the higher of (i) up to 10% of total turnover or (ii) up to £300,000, where the court has found that P has engaged in, or is engaging in, infringing commercial practices, or was or is an accessory to such practices.

267. The government intends the turnover-based amount to be calculated based on:

    a. the turnover of P (both in and outside the United Kingdom),
    b. plus the turnover of any person controlled by P,
    c. plus the turnover of any person who controls P.

268. Where P does not have any turnover, or one cannot be determined, then the government intends that the courts or the CMA may impose a monetary penalty up to the maximum fixed and/or variable penalty specified in the

relevant civil fining power in Part 3. For example, up to a maximum fixed penalty of £300,000, where the court has found that P has engaged in, or is engaging in, infringing commercial practices, or was or is, an accessory to such practices.

269. The purpose of the power is to enable the government to make technical provision through secondary legislation to enable the determination and calculation of the base turnover to be used for calculating a turnover-based monetary penalty.

270. Therefore clause 203(2)(a) (*Determination of turnover*) will allow the Secretary of State to provide, by regulations, for when a person is to be treated as controlled by another, and hence which entities' turnover is to be taken into account for the purpose of calculating the base turnover for a civil monetary penalty.

271. Clause 203(2)(b) (*Determination of turnover*) will allow the Secretary of State to provide, by regulations, for determining the turnover of different types of entities.

272. By way of precedent, see section 94A EA02 or section 36(8) CA98, section 71(4)(c) CA98 and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000. In particular, Section 94A EA02 enables the Secretary of State to make provision for determining when an enterprise is to be treated as controlled by a person, and the global turnover of an enterprise, for the purposes of penalties which may be imposed in relation to failure to comply with an initial enforcement order. The exercise of the power is subject to the negative Parliamentary procedure.

Justification for taking the power

273. The government's view is that the amount of technical detail either in the accounting principles to be followed when determining turnover, or in defining "control", is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

274. Given that the exercise of the power is limited to defining the detailed, technical methodology by which turnover should be determined, and the rules for determining when one entity controls another, the government considers that the exercise of the power warrants a lesser degree of Parliamentary scrutiny and should be subject to the negative Parliamentary procedure.

Clause 204(1) (Power to amend amounts): Delegated power for Secretary of State to substitute a different maximum amount for fixed or daily penalties

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

275. As explained above:

a. Chapters 3 and 4 of Part 3 of the Bill provide new powers for the court and CMA to impose fixed monetary penalties, and/or monetary penalties calculated by reference to a daily rate in certain circumstances, on relevant persons, and

b. Where the person (P) has a turnover that can be determined, the government intends for the monetary penalty to be the higher of (i) a turnover-based amount of up to the relevant percentage of turnover or (ii) up to the relevant maximum fixed or daily amount. Where P does not have any turnover, or one cannot be determined, then the government intends that the courts or the CMA may impose a monetary penalty up to the maximum fixed and/or variable penalty specified in the relevant civil fining power in Part 3.

276. The fixed or daily amount monetary penalties are limited to the penalties of up to the following amounts:

a. Up to £30,000 for providing false or misleading information in connection with the carrying out by the CMA of a direct enforcement function,

b. Up to £150,000, with an additional daily penalty of up to £15,000 while non-compliance continues, for non-compliance with undertakings and CMA direct enforcement directions,

c. Up to £300,000 for non-compliance with consumer protection law.

277. The purpose of the power is to enable the Secretary of State to amend the maxima above for fixed and daily penalties.

Justification for taking the power

278. The government considers that the delegated power is necessary to enable amendment of the maxima specified in Part 3 to avoid erosion of the real value of these maxima through inflation, so that fixed or daily penalties can continue to serve their purposes of punishment and deterrence.

Justification for the procedure

279. The government intends for the power to be exercisable by statutory instrument and, in anticipation that this will be a Henry VIII power, the government considers that the exercise of the power should be subject to the affirmative Parliamentary procedure.

Schedule 16 (investigatory powers), paragraph 2(3) (new paragraph 16H(2) - meaning of turnover for purposes of paragraphs 16A and 16C: Power for the Secretary of State to specify in secondary legislation the methodology for determining "turnover" for civil monetary penalties imposed under Schedule 5 to the Consumer Rights Act 2015, as amended by Chapter 6 - investigatory powers of Part 3 and Schedule 16 to the Bill)

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

280. Paragraph 2(3) of Schedule 16 (*Investigatory powers*) of the Bill provides new powers for the court and CMA to impose fixed and/or monetary penalties calculated by reference to a daily rate on enforcement subjects and third parties for non-compliance with information notices without a reasonable excuse.

281. Where the person (P) has a turnover that can be determined, the government intends for the monetary penalty to be the higher of (i) a turnover-based amount of up to 1% of total turnover, or 5% of daily turnover for a daily penalty or (ii) up to £30,000 or £15,000 per day for a daily penalty.

282. The government intends the turnover-based amount to be calculated based on:

a. the turnover of P (both in and outside the United Kingdom),
b. plus the turnover of any person controlled by P,
c. plus the turnover of any person who controls P.

283. Where P does not have any turnover, or one cannot be determined, then the courts or the CMA may impose a monetary penalty of up to £30,000, or £15,000 per day for a daily penalty.

284. As above for clause 203(2) (*Determination of turnover*), the purpose of the power is to enable the government to make technical provision through secondary legislation to enable the determination and calculation of the base turnover to be used for calculating a turnover-based monetary penalty.

285. As above for clause 203(2) (*Determination of turnover*), paragraph 16H(2)(a) will allow the Secretary of State to provide, by regulations, for when a person is to be treated as controlled by another, and hence which entities' turnover is to be taken into account for the purpose of calculating the base turnover for a civil monetary penalty.

286. As above, paragraph 16H(2)(b) will allow the Secretary of State to provide, by regulations, for determining the turnover of different types of entities.

287. Please see the entry above for clause 203(2) (*Determination of turnove*r) for details of relevant precedents.

Justification for taking the power

288. The government's view is that the amount of technical detail either in the accounting principles to be followed when determining turnover, or in defining "control", is such that it is appropriate for this to be set out in secondary, not primary, legislation.

Justification for the procedure

289. Given that the exercise of the power is limited to defining the detailed, technical methodology by which turnover should be determined, and the rules for determining when one entity controls another, the government considers that the exercise of the power warrants a lesser degree of Parliamentary scrutiny and should be subject to the negative Parliamentary procedure.

Schedule 16 (Investigatory Powers), paragraph 2(3) (new paragraph 16 I): Delegated power for Secretary of State to substitute a different maximum amount for fixed or daily penalties.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

290. As explained above:

a. Paragraph 2(3) of Schedule 16 (investigatory powers) of the Bill provides new powers for the court and CMA to impose fixed monetary penalties, and/or monetary penalties calculated by reference to a daily rate on enforcement subjects and third parties for non-compliance with information notice without a reasonable excuse, and

b. Where the person (P) has a turnover that can be determined, the government intends for the monetary penalty to be the higher of a turnover-based amount of up to 1% of total turnover, or 5% of daily turnover for a daily penalty. Where P does not have any turnover, or one cannot be determined, then the government intends that the courts or the CMA may impose a monetary penalty of up to £30,000 or £15,000 per day for a daily penalty.

291. As for clause 204 of the Bill, the purpose of the power is to enable the Secretary of State to amend the maxima above for fixed and daily penalties (i.e. the amount of £30,000 or £15,000 per day for a daily penalty).

Justification for taking the power

292. The government considers that the delegated power is necessary to enable amendment of these maxima penalties to avoid erosion of the real value of these maxima through inflation, so that fixed or daily penalties can continue to serve their purposes of punishment and deterrence.

Justification for the procedure

293. The government intends for the power to be exercisable by statutory instrument and, in anticipation that this will be a Henry VIII power, the government considers that the exercise of the power should be subject to the affirmative Parliamentary procedure.

Clause 208(1) (Powers to amend Schedule 14 and Schedule 15): Delegated power for the Secretary of State to, by regulations, amend the tables set out in Schedules 14 and 15 so as to add, remove or vary an entry for (i) an enactment within scope of the court-based or CMA direct enforcement mechanisms or (ii) an entry providing for the enforcers authorised to use the court-based enforcement mechanism in respect of an enactment, obligation or rule of law.
Power conferred on: *Secretary of State*
Power exercised by: *Regulations made by Statutory Instrument*
Parliamentary Procedure: *Draft affirmative*

Context and purpose

294. Currently the consumer protection enactments, obligations and rules of law that the court-based civil enforcement mechanism provided by Part 8 EA02 can be used to enforce are set out in a mix of (i) secondary legislation, such as the EA02 (Part 8 Domestic Infringements) Order 2003, and (ii) primary legislation, such as Schedule 13 to the EA02.

295. As above, Part 3 of the Bill will replace Part 8 EA02 in relation to (in general) conduct which takes place after commencement. Clause 147(1)(c) (*Relevant infringements*) limits the acts or omissions within scope of the court based enforcement regime to those which satisfy, in particular, the specified prohibition condition. Clause 149 (*The specified prohibition condition*) sets out the specified prohibition condition and clause 149(1) (*The specified prohibition condition*) limits the scope of the court based enforcement regime to acts or omissions in breach of an enactment specified, or to the extent specified in, in Part 1 of Schedule 14 or an obligation or rule of law listed in Part 2 of that Schedule.

296. Clause 149(2) (*The specified prohibition condition*) limits the scope of the CMA direct enforcement regime to acts or omissions in breach of an enactment specified, or to the extent specified, in Schedule 15.

297. Clause 208(1)(a) (*Powers to amend Schedule 14 and Schedule 15*) will allow the Secretary of State to by regulations add, remove or vary the enactments listed in the first column of the table in Part 1 of Schedule 14. The purpose is to allow the government to amend the scope of the

court-based civil enforcement regime for consumer protection law in the future, for example, to include new consumer protection laws.

298. Clause 208(1)(a) (*Powers to amend Schedule 14 and Schedule 15*) replaces:

a. Section 211(2) EA02 which provides for the Secretary of State to by order specify acts or omissions contravention of which can amount to a domestic infringement and

b. Section 210(9) EA02 which provides for the Secretary of State to by order subject to the negative procedure modify the enactments and rules of law currently set out in Schedule 13 to the EA02, contravention of which can amount to a Schedule 13 infringement.

299. The government does not consider it necessary to seek a delegated power through the Bill to add, remove or vary the obligations or rules of law that are within scope of the court-based enforcement regime.

300. Clause 208(1)(b) and (d) (*Powers to amend Schedule 14 and Schedule 15*) will allow the Secretary of State to add, remove or vary which enforcers are authorised to use the court based enforcement regime to enforce any particular enactment, obligation or rule of law.

301. Clause 208(1)(e) (*Powers to amend Schedule 14 and Schedule 15*) will allow the Secretary of State to by regulations add, remove or vary the enactments listed in the table in Schedule 15 and hence to amend the scope of the CMA direct enforcement regime in the future.

Justification for taking the power

302. In the past, the regulation necessary to protect the economic interests of consumers has changed in line with changes in market, trader and consumption behaviour and this trend is expected to continue.

303. The government considers that the power in clause 208(1)(a) and (e) (*Powers to amend Schedule 14 and Schedule 15*) is therefore necessary to allow for the scope of the court-based and the CMA direct enforcement regimes to be updated in the future.

304. The government considers that the responsibilities of particular enforcers for enforcing particular consumer protection enactments, obligations and rules of law may alter. Therefore, the government considers that the power in clause 208(1)(b) and (d) (*Powers to amend Schedule 14 and Schedule 15*) is necessary to alter which enactments, obligations or rules of law particular enforcers can enforce.

305. The government considers that these changes are likely to be necessary with greater frequency than the expected frequency of consumer protection primary legislation.

306. The government acknowledges that the delegated power in clause 208(1)(a) and (e) (*Powers to amend Schedule 14 and Schedule 15*) will be able to be used to alter the scope of application of the courts' and CMA's powers under Part 3.

307. However, the exercise of the delegated power in clause 208(1)(a) and (e) (*Powers to amend Schedule 14 and Schedule 15*) will be limited to acts or omissions falling within the categories of enactment described in clause 208(2) - for example, a duty, prohibition or restriction enforceable by criminal proceedings, although as a result of clause 208(3) it is not necessary for the duty, prohibition or restriction to be in relation to a defined category of consumers or to provide a remedy or sanction for the benefit of consumers, whether any proceedings have been brought in relation to the act or omission concerned, or whether or not any person has been convicted of an offence in relation to the act or omission.

308. These limitations on the exercise of the delegated power are heavily based on the limitations to by order specify acts or omissions as domestic infringements, as set out in subsections 211(2)-(4) EA02, save for drafting changes for simplification and the omission of subsection 211(2)(b) EA02 (the category of breach of contract). The latter is because breach of contract is already brought within scope of the court-based civil enforcement regime by the first row of the first column of the table in Part 2 of Schedule 14.

Justification for the procedure

309. The government notes that the delegated power will be capable of being used to amend the scope of the civil enforcement regimes and to alter the legal effect of Part 3 of the Bill. Therefore, the government considers that the exercise of the power will warrant a greater degree of Parliamentary scrutiny and intends for the affirmative procedure to apply to these regulations. This is the same as the procedure which applies to the exercise of the current power to specify acts or omissions as domestic infringements in section 211(7) EA02.

Clause 209(1) (Rules): Delegated power for the CMA to make, subject to approval by the Secretary of State, rules on procedure and other matters in connection with the carrying out of its functions under the direct enforcement regime for consumer protection law

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Rules approved by regulations made by the Secretary of State*

Parliamentary Procedure: *Negative*

Context and purpose

310. The government intends that the administrative details of the new CMA direct enforcement regime for consumer protection law will be set out in new rules made by the CMA.

311. The government intends for the rules to provide in particular for the administrative process to be followed for the following CMA direct enforcement decisions:

a. whether there has been non-compliance with information notices,
b. whether to open an investigation,
c. whether to close an investigation,
d. whether to accept, vary or release undertakings,
e. whether undertakings given to the CMA have been breached, and if so whether to impose a monetary penalty in respect of the breach,
f. whether the CMA is satisfied that infringing commercial practice has, is or (where relevant) is likely to take place, whether to give a final infringement notice and whether to impose a monetary penalty in respect of any past or ongoing infringing practice or for being an accessory to such a practice,
g. whether to give any online interface directions, and
h. whether there has been non-compliance with CMA directions, whether to give a breach of directions enforcement notice and whether to impose a monetary penalty.

312. The government also intends for the power to be used to allow the CMA to make provision on other matters in connection with the carrying into effect of

the new direct enforcement process, such as maintaining a public register of relevant notices and penalties.

313. Without restriction on this broad power:

a. clause 209(2) (*Rules*) specifies that the rules may provide for the delegation of the CMA's functions under Part 3;

b. Clause 209(3) (*Rules*) specifies particular matters which may be provided for in the rules, for example, arrangements to ensure the protection of confidential information.

Justification for the power

314. The government intends that the rules will set out the procedural and administrative details needed to supplement the new direct enforcement powers that will be given to the CMA in Part 3 of the Bill. The government considers that specifying these details in the rules will provide transparency for enforcement subjects and accountability for the CMA.

315. The government anticipates that these procedural and administrative provisions will need amending in future, for example to reflect learning and experience gained through operation of the CMA direct enforcement process.

316. The government considers that it will be appropriate to set out these procedural and administrative details in secondary rather than primary legislation.

317. Moreover, given that the CMA will be responsible for resourcing and carrying out its new direct enforcement powers, the government considers that the CMA should have the opportunity to design and draft the rules, albeit subject to Secretary of State approval.

318. Therefore, the government would like the rules to be subject to the approval of the Secretary of State by regulations.

319. For a close precedent, see section 51 CA98 (rule-making power for the CMA), Schedule 9 to that Act (further provision about rules which may be

included in CMA rules made under section 51) and the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014.

Justification for the procedure

320. Clause 210(1) (*Procedural requirements for making of rules*) requires the CMA to consult with interested parties when first preparing the rules. This is important in particular to allow those who may be future enforcement subjects or their legal representatives to comment on and contribute to the development of the processes and administrative matters under the new CMA direct enforcement regime.

321. Secondly, clause 210(2) (*Procedural requirements for making of rules*) requires a rule, or variation of a rule, to be approved by regulations made by the Secretary of State before it can come into force, save where the variation results from regulations made by the Secretary of State under 210(5). The Secretary of State can make any modifications to the rule or variation that are considered appropriate 210(3). However, where the Secretary of State proposes modifications to a rule or variation, they must first notify the CMA and take into account the CMA's comments (if any) before approving the rule (clause 210(4) (*Procedural requirements for making of rules*)).

322. Clause 210(5) (*Procedural requirements for making of rules*) empowers the Secretary of State to by regulations vary or revoke any rules or to direct the CMA to vary or revoke rules.

323. Given these safeguards, and as the rules themselves will consist of detailed procedural and other matters of an administrative character, the government considers that it is appropriate for the Secretary of State's regulations approving, varying or revoking rules, or directing the CMA to vary or revoke rules, to be subject to the negative Parliamentary procedure.

PART 4 - CONSUMER RIGHTS AND DISPUTES

324. Part 4 of the Bill updates and reforms existing consumer protection law and includes new consumer rights in relation to subscription contracts and consumer savings clubs.

PROTECTION FROM UNFAIR TRADING

Clause 231 (Right to Redress: Further Provision): Power for the Secretary of State to make provision about exercise of rights to redress.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Affirmative for the first set of regulations made under the power. Negative for subsequent regulation.*

Context and purpose

325. At present the provisions in the CPRs concerning right to redress only apply to aggressive practices and misleading actions and not any other unfair commercial practices. They also set out in some detail the conditions in which each right applies and how each right (the right to unwind, discount, right to damages) works e.g. what percentage of discount a customer is entitled to. They also set out categories of goods to which the rights do not apply to.

Justification for Taking the Power

326. This power is considered necessary in order to improve clarity of provisions which set out consumers' right to redress and ensure they are up to date e.g. for appropriate discount percentages to apply. This is particularly important given clause 240 (see below) permits the Secretary of State to apply rights to redress to further categories of unfair practices . The power to specify and amend existing remedies ensures that remedies are appropriate and targeted to the specific unfair practice in question without the need for primary legislation.

327. The existing provisions set out in CPRs will be saved until the first set of regulations are made.

Justification for the Procedure

328. As the first exercise of the power will have the effect of replacing the private redress of the CPRs, the government considers that the affirmative process to be appropriate for the first exercise of the power to make regulations. Subsequent exercises of the power will be amending or limiting the regulations and as such the negative procedure will provide an appropriate level of parliamentary scrutiny.

Clause 240 (1)(a) and (1)(c) (Powers to amend this Chapter): Power for the Secretary of State to add to or amend Schedule 18 (commercial practices which are in all circumstances considered unfair)

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

329. Schedule 19 (*Commercial practices which are in all circumstances considered unfair*) restates Schedule 1 of the CPRs. Schedule 1 currently sets out those commercial practices which are automatically considered unfair and subject to the appropriate civil and criminal liability without the need to establish that the practice would cause the average consumer to take a different transactional decision. Currently, there is no means provided in the CPRs for updating the list in Schedule 1 (Primary legislation would be required).

330. This power will allow the Secretary of State to respond to emerging harms to consumers and ensure appropriate levels of consumer protection are maintained by where appropriate adding to or amending the list of practices which are automatically considered unfair, which for conduct taking place after commencement (subject to transitional provisions) will be listed in Schedule 19 to the Bill.

Justification for the taking the power

331. The government is aware of a number of commercial practices which have become increasingly prevalent in recent years and where there is growing evidence of considerable harm to consumers. It is also the case that in the future, new commercial practices may become more prevalent and evidence may emerge of significant resulting consumer harm. This power will allow ministers to respond to such harms and update the list of practices considered to be automatically unfair accordingly.

Justification for the procedure

332. The affirmative procedure is considered appropriate. The power is to amend primary legislation. Adding to the list of automatically unfair practices may

have a significant impact on traders and consumers. Therefore, it is important Parliament has the opportunity to consider such changes. As an additional safeguard, before making regulations the Secretary of State will be required to consult such persons as considered appropriate.

Clause 240 (1)(b)(Powers to amend this Chapter): Power for the Secretary of State to delete from Schedule 19 (Commercial practices which are in all circumstances considered unfair)

Power conferred on: *Secretary of State*

Power exercised by: *Regulation*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

333. Schedule 19 (*Commercial practices which are in all circumstances considered unfair*) restates Schedule 1 of the CPRs. (Schedule 1 currently sets out those commercial practices which are automatically considered unfair and subject to the appropriate civil and criminal liability without the need to establish that the practice would cause the average consumer to take a different transactional decision. Currently, there is no means provided in the CPRs for updating the list in Schedule 1 (Primary legislation would be required).

334. This power will allow the Secretary of State to remove commercial practices from the list. This power is likely to be used where a commercial practice is appropriately regulated elsewhere (avoiding duplication), or are no longer prevalent.

Justification for taking the power

335. Commercial practices may fall out of use or alternatively sector specific regulation may better address such practices. This power to remove commercial practices will ensure the list remains relevant and up to date.

Justification for the procedure

336. The draft affirmative procedure is considered appropriate. The power is to amend primary legislation and it is considered that this provides the appropriate degree of Parliamentary oversight. Deleting from the list of automatically unfair practices may have a significant impact on consumers. Therefore, it is important Parliament has the opportunity to consider such changes.

337. An additional safeguard is provided in that the Secretary of State will be required to consult such persons as considered appropriate before exercising the power.

Clause 240 (2) (Powers to amend this Chapter): Power for the Secretary of State to amend clause 231(8) (excluded description of power)

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft Affirmative*

Context and purpose

338. Clause 240 (1) (a) gives the Secretary of State power by regulations to amend Schedule 19 to add a description of a commercial practice. If a commercial practice is included within Schedule 19 within the Bill it will be an offence under Clause 235 (7) unless it is an excluded description. If a commercial practice is subsequently added to Schedule 19 under Clause 240(1)(a) by regulations, the regulations must amend Clause 235(8) to make the practice an excluded description. Clause 240(2) is considered appropriate because while a commercial practice may be added by regulations, creation of an offence should not be by regulations.

Justification for taking the power

339. The Secretary of State will have the power by regulations to add to Schedule 19 to add commercial practices that may emerge in the future but not add to clause 235 offences.

Justification for the procedure

340. The affirmative procedure is considered appropriate. The power is to amend primary legislation. Clause 240(2) reflects the position that an offence should not be created by regulations.

341. As an additional safeguard, before making regulations the Secretary of State will be required to consult such persons as considered appropriate.

Clauses 240 (3)(a) and (3)(b) (Right to redress: further provision): Power for Secretary of State to amend Clause 230 (7)

Power conferred on: *Secretary of State*

Power exercised by: *Regulations by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

342. This clause creates a power that enables the Secretary of State to extend the private rights of redress to any of the unfair commercial practices set out in Part 4 Chapter 1, which they do not currently extend to, and to remove unfair commercial practices added by such regulations .

343. As currently drafted, the CPRs provide private rights of redress in respect of misleading actions and aggressive practices only.

344. Where a commercial practice is added by regulations, this power will allow the Secretary of State to remove the practice from the list. This power is likely to be used where provision for a commercial practice is appropriately regulated elsewhere (avoiding duplication) or is no longer prevalent.

Justification for power

345. It is important for the government to have the power to align consumers' private redress rights with the full extent of the harms they are exposed to, for example, to unfair commercial practices by way of misleading omissions.

346. The potential to extend the private right of redress would facilitate greater coherence between the government's policy objective of supporting consumers to enforce their rights independently via Alternative Dispute Mechanism ("ADR"), where this is available, and follow on recourse should it be unavailable.

347. Not only would this make such follow on actions for consumers easier, it would also enable the government to improve the trading environment for businesses because providing appropriate redress to consumers reduces or removes any competitive advantage that a trader has temporarily gained through use of unfair practices.

348. Where commercial practices are added by regulations the practices may fall out of use or alternatively sector specific regulation may better address those practices. This power to remove commercial practices will ensure the list of prohibited practices remains relevant and up to date.

Justification for procedure

349. The affirmative procedure is considered appropriate. The power is to amend primary legislation and it is considered this provides the appropriate degree of Parliamentary oversight. Extending the private rights of redress may have a significant impact on traders and consumers, and it is therefore important that Parliament has the opportunity to consider such changes. Removing commercial practices from the list of prohibited practices added by regulations will restrict private rights of address and may significantly impact consumers, therefore similarly Parliament should have the opportunity to consider changes. However the present list of prohibited practices under clause 230(7) reflects the present private redress rights and it is not considered appropriate to remove those practices by regulations.

350. There is an additional safeguard in that we intend for the Secretary of State to be required, before exercising the power, to consult such persons as considered appropriate. This may include relevant sectoral regulators, business groups and bodies representing the interests of consumers and affected businesses respectively.

Clause 240(4): Power to amend list of information deemed material in Clause 228 (2)

Power conferred On: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

351. Clause 228 (2) sets out information which in the context of an invitation to purchase is considered material and must not be omitted. 240 (4) is intended to let the Secretary of State update this list by adding, modifying or deleting descriptions of such material.

Justification for Power

352. As new commercial practices, products and services emerge, markets will change and the information customers need to make an informed decision about a purchase will also change. This power will allow the Secretary of State to reflect this in the prohibition of material omission in the case of an invitation to purchase.

Justification for Procedure

353. The affirmative procedure is considered appropriate; the power is to amend primary legislation and it is considered this procedure provides the appropriate degree of parliamentary scrutiny. Amending the list of material deemed material has the potential to impact the criminal and civil liability of traders as well as impact on consumers.

354. There is an additional safeguard in that we intend to require the Secretary of State, before exercising the power, to consult those persons they consider appropriate. This may include relevant sectoral regulators, business groups and bodies representing the interests of consumers and affected businesses respectively.

SUBSCRIPTION CONTRACTS

Clause 253(2) (Excluded contracts): Delegated power for the Secretary of State to amend the list in Schedule 20 of descriptions of contract excluded from the definition of 'subscription contracts' within scope of the new provisions;
Power conferred on: *Secretary of State*
Power exercised by: *Regulations made by Statutory Instrument*
Parliamentary Procedure: *Draft affirmative*

Context and purpose

355. Clause 253(2) (*Excluded contracts*) with Schedule 20 excludes from the application of Part 4 Chapter 2 a number of descriptions of contracts, in specified sectors, that would otherwise be in scope.

356. Clause 253 (*Excluded contracts*) reflects a public policy rationale that the requirements and rights in Part 4 Chapter 2 should not apply to the specified kinds of contract/sectors because the protections are not considered necessary in those contexts and/or because such contracts are already covered by sectoral regulation that provides existing detailed legislative or other rules which may have been set by a specialist regulator, and which the new requirements could duplicate or conflict with. The exclusions with the greatest impact therefore apply to large, regulated sectors, many of which involve delivery of essential or very important services. These include the provision of utilities (water, gas, electricity and district heating), financial services (including insurance), communications service providers, education and childcare services, medical and healthcare services and products supplied by professionals within the public health service and in certain private contexts, and contracts for gambling.

357. Clause 253 (*Excluded contracts*) contains a delegated power for the Secretary of State to make defined amendments to the substantive limbs setting out the exclusions. This is accordingly a Henry VIII power.

358. This delegated power allows the Secretary of State to amend the list of excluded descriptions of contract in Schedule 20 by adding or removing a description of contract, or modifying an existing description of contract. The

power also allows the Secretary of State to provide for a contract of a description specified in Schedule 20 to be an excluded contract only for certain purposes under Part 4 Chapter 2.

Justification for the power

359. For the subscriptions framework to function effectively, it must remain responsive to technological and legislative changes, including those enacted by devolved administrations, and must be proportionate in its application. Without a delegated power, there is a reasonable risk of dual-regulation being imposed on business. Regulatory changes in the excluded sectors or within devolved administrations may necessitate rapid changes to the exclusions, without which businesses may face a disproportionate regulatory burden.

360. Most of the proposed exclusions are drafted by reference to the scope of regulated sectors, activities or contracts as set out in other legislation. These are large sectors involving often essential or very important services and the landscape of regulation is subject to regular review and change. Many of these regulated sectors involved heavily prescribed and fast-changing regulatory rules. Therefore we think there is a significant chance that, in the foreseeable future the legislation under which some of these sectors are regulated could be repealed or amended so as to make relevant defined exclusions ineffective, and/or the content of rules applying in a particular regulated area could change so as to negate the continued justification for the exclusion.

361. We consider that the inclusion of this limited delegated power reflects an appropriate balance of legislative authority so as to facilitate any changes that prove to be required in order to maintain delivery of Parliament's core intention regarding the scope of the new provisions as expressed in the Bill.

Justification for the procedure

362. Given that this is a Henry VIII power, and one which allows amendment of the scope of application of the new provisions, the government considers it appropriate for the greater Parliamentary oversight of the affirmative procedure to apply to any regulations made under it.

Clause 254(8) (Pre-contract information): Delegated power for the Secretary of State to amend Parts 1 and 2 of Schedule 21 which contain respectively the key pre-contract information and full pre-contract information to be provided to consumers;

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

363. Clause 254 requires the pre-contract information specified in Parts 1 and 2 of Schedule 21 to be provided to consumers before they enter a subscription contract with a trader. Clause 254(1)(a) requires the key pre-contract information specified in Part 1 of Schedule 21 to be given to consumers and clause 254(1)(b) requires the full pre-contract information to be given or made available to consumers. Where the pre-contract information is not given to a consumer in writing and on a durable medium before they enter a subscription contract, clause 255(9) requires this to be done as soon as reasonably practicable afterwards.

364. Clause 254(8) allows the Secretary of State to amend Parts 1 and 2 of Schedule 20 so as to add, modify or remove descriptions of information.

Justification for the power

365. The list of pre-contract information is intended to be comprehensive but given the wide range of contracts with very different features that all fall within the definition of subscription contract, the government anticipates that experience of the regime operating in practice is likely to demonstrate that the categories of information listed do not work in all cases. Furthermore, new types of subscription contract with new features are constantly emerging in the retail market so the government expects to need to update the list of information in the light of new products. Experience of the operation of the regime may also show that certain items of information are

not found by consumers to be helpful or comprehensible so giving rise to a need to remove some listed items or amend the way they are expressed.

Justification for the procedure

366. As this power allows for the amendment of Schedule 21 it is a Henry VIII power and the government considers it appropriate for the affirmative procedure to apply to any regulations made under it.

Clause 256(6) (Reminder Notices): delegated power for the Secretary of State, by regulations, to disapply or modify the requirements to give a reminder notice in relation to traders or contracts of a specified description.
Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

367. Clause 256(6) (*Reminder Notices)* confers on the Secretary of State a delegated power to disapply or modify the requirements to give a 'reminder notice' in relation to traders or contracts of a specified description. A reminder notice is a notice required to be given by a trader to a consumer under clause 256 of Chapter 2.

368. The power at clause 256(6)(a) enables the Secretary of State, by regulations, to provide for the requirements imposed on traders by clause 256 and 257 not to apply in relation to specified descriptions of traders or contracts. This allows the Secretary of State to effectively disapply some or all of the requirements to give a reminder notice in particular circumstances under clause 256, or to disapply some or all of the requirements to provide a reminder notice in a certain way or within a certain time period under clause 257. Importantly, the power is limited in that it cannot be exercised generally and must be exercised in relation to specified descriptions of traders or contracts.

369. The power at clause 256(6)(b) enables the Secretary of State, by regulations, to provide for the requirements imposed by clause 256 and 257 to apply, subject to modifications in relation to specified descriptions of traders or contracts. This allows the Secretary of State to modify some or all of the requirements to give a reminder notice in particular circumstances under clause 256, or to modify some or all of the requirements to provide a reminder notice in a certain way or within a certain time period under clause 257. Importantly, the power is limited in that it cannot be exercised generally and must be exercised in relation to specified descriptions of traders or

contracts.

370. The purpose of these powers is to improve the flexibility and responsiveness of the legislation by granting the ability for the Secretary of State, by regulations – and subject to the approval of parliament , to amend or update legislation in response to the new sectoral, technological or commercial developments, or as a result of the findings of the monitoring and evaluation phase.

Justification for the power

371. The Bill provides details the requirements on traders in relation to giving reminder notices at specified points in the life of a subscription contract at clause 256, and also details the requirements as to how and when reminder notices must be given by traders.

372. Part 4 Chapter 2 applies to a number of sectors and types of entity, in addition to a wide range of kinds of contract with different payment arrangements, and a wide range of kinds of product. Evidence demonstrates that reminder notices are an effective mechanism for protecting consumers from unclear contracting arrangements, and prompting consumers to action which align with the goals of this Chapter. Hence, requirements are being enacted at whole-of-economy level to ensure a baseline level of protection for all consumers. However, the types of contracts and products regulated will likely continue to evolve, including new business models that may emerge in response to the new regime in Part 4 Chapter 2. In particular, means of communication by which parties conclude contracts and notices may be given are likely to change as technologies develop at pace. As such, the delegated powers in clause 256(6)(a) and (b) are reasonably necessary to enable the government to respond to, and make appropriate provision for, emerging new cases and technologies.

Justification for the procedure

373. The affirmative procedure is considered a necessary level of Parliamentary scrutiny of regulations made pursuant to this power because the provision is

able to disapply or modify requirements relating to reminder notices which are contained on the face of the Bill.

374. The power at clause 256(6)(a) has the effect of disapplying some or all of an existing Chapter 2 provision and accordingly operates as a Henry VIII power. This power is noteworthy in terms of its potential impact on consumers. While the power could only be used so as to reduce regulatory burden for certain classes of trader, or for traders offering certain classes of contract, the use of the power would necessarily diminish consumer protections for consumers contracting with those traders or entering into those types of contract. Importantly, the scope of the power has been limited as it cannot be applied via regulation generally. Instead, the power must be exercised only in relation to specified types of traders, or specified types of contract. While the exercise of the power by the Secretary of State is curtailed by this limitation, it is nonetheless considered necessary and proportionate for any such proposed change to have to be made in regulations subject to the affirmative procedure with the opportunity for Parliamentary debate and scrutiny which that would entail.

375. The power at clause 256(6)(b) has the effect of modifying some or all of an existing Chapter 2 provision and accordingly operates as a Henry VIII power. This power is again noteworthy in terms of its potential impact on traders and consumers alike. Unlike the power at clause 256(6)(a), the power at clause 256(6)(b) can be used to increase the regulatory burden for certain classes of trader, or for traders offering certain classes of contract, and can either enhance or diminish consumer protections for consumers contracting with those traders, or entering into those types of contract. Again, the scope of the power has been limited in legislation, in that it cannot be applied via regulation generally. The power can only be exercised in relation to specified types of traders, or specified types of contract. While this limitation curtails the exercise of the power by the Secretary of State, it is considered necessary and proportionate for any such proposed change to have to be made in regulations subject to the affirmative procedure with the opportunity for Parliamentary debate and scrutiny which that would entail.

Clause 265 (Cancellation of subscription contract: further provision): Delegated powers for the Secretary of State, by regulations, to make further provision in connection with a consumer's exercise of a right under Part 4 Chapter 2 to cancel a subscription contract, and to extend a cooling-off cancellation period under Part 4 Chapter 2.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative for the first exercise of the power; negative for subsequent exercises of the power. (In the case of regulations making provision within clause 265(1)(c) (extension of cooling-off periods), the draft affirmative procedure will apply in all cases.)*

Context and purpose

376. Clause 265 (*Cancellation of subscription contract: further provision*) confers a delegated power on the Secretary of State to make further provision about the exercise of a consumer's right to cancel a subscription contract under Chapter 2, including (clause 265(1)(c)) by extending the period within which a consumer can exercise a cooling-off cancellation right under clauses 262 and 263.

377. Subsections (1)(a) and (b) allow the Secretary of State to make detailed provision about the consequences of a consumer exercising a right to cancel under Part 4 Chapter 2.

378. The cooling-off cancellation periods referred to in clause 265(1)(c) consist of the 'initial cooling-off period' and the 'renewal cooling-off period. The right to cancel a contract during an initial cooling-off period in clauses 262 and 263(2) largely reproduces a similar right that consumers entering subscription contracts currently have under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. The initial cooling-off period which currently applies under the CCRs extends for a period of up to one year on top of the standard 14 day period where a trader failed to give the consumer information on their cooling-off cancellation rights in the required pre-contract information. The delegated power allows the Secretary of State to provide for a similar extension to the

initial cooling-off cancellation right if still deemed appropriate, but with flexibility as to the duration of the extension, and confers power to make similar provision with regard to the renewal cooling-off cancellation period if considered appropriate.

Justification for the power

379. It is necessary to develop rules relating to refunds, the consumer's liability for the benefit of any products they have received and arrangements for the return of goods to traders. Subscription contracts by their nature involve recurrent product supplies and payments over an extended period of time, and the frequency of recurrence may vary significantly. Accordingly, the wide range of variable contracts and circumstances in which the cancellation right will apply means that there is a need to make detailed provision for these aspects which will differ in different scenarios. Such provision is more appropriately prescribed in delegated legislation.

380. Regarding the power to extend the 14 day cooling-off periods under Part 4 Chapter 2, the power allows the Secretary of State to make equivalent provision in the case of subscription contracts to what currently applies under the CCRs in relation to the initial cooling-off period. Enabling this provision to be made in regulations allows the Secretary of State to consider how long a cooling-off period should extend in cases where the trader failed to give the consumer the required information on their initial cooling-off right, and can make different provisions for different kinds of cases so as to secure a proportionate remedy. The power to make similar provision in cases where the trader fails to give the consumer information on their renewal cooling-off cancellation right gives similar power to prescribe a fair balance between the rights of consumers and traders in different categories of cases.

Justification for the procedure

381. The delegated power in clause 265(1)(c) could be considered to be a Henry VIII power on the basis that allowing an extension of the statutory 14 day cancellation period amounts to altering the legal effect of the current provision. An exercise of delegated power of this kind could have a substantial impact on the rights of consumers and liabilities of traders. As

such, it is considered that the draft affirmative Parliamentary procedure is appropriate so as to apply a heightened degree of Parliamentary scrutiny and an opportunity to debate the policy. Clause 265(6)(b) therefore provides that the draft affirmative procedure will apply in the case of all regulations making provision under clause 265(1)(c). Furthermore, clause 265(5) requires the Secretary of State to consult such persons as considered appropriate before making any regulations with provision under clause 265(1)(c).

382. As regards uses of the delegated power to make other provisions, outside the scope of clause 265(1)(c), it is considered that a more balanced approach is justifiable. A primary focus of the clause 265 power is to establish basic rules on traders' liability to pay refunds and their rights to recover goods already supplied under cancelled contracts, and to make detailed provision applying in different kinds of cases. Rules of this kind are considered sufficiently important that, for the first use of the power establishing the regime for refunds and other consequences of cancellation, the regulations should be subject to the draft affirmative procedure. However, for subsequent exercises of the delegated power where it is likely to be used to implement more minor updates to the rules or make new provision for emerging new cases, it is deemed appropriate for the negative procedure to apply. A duty to consult does not apply in either case.

Clause 275 (Power to make further provision in connection with this Chapter): delegated power for the Secretary of State, by regulations, to make further detailed provision relating to various Part 4 Chapter 2 requirements on traders, and to specify descriptions of cases for the purposes of clause 271(2) (specified term of a subscription contract to be of no effect).

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

383. Clause 275 (*Power to make further provision in connection with this Chapter*) confers on the Secretary of State a delegated power to make further detailed, technical provision in connection with the application of a number of Chapter 2 requirements on traders (clause 275(1)(a) to (d)), together with a power to specify descriptions of cases for the purposes of clause 271(2) (specified term of a subscription contract to be of no effect) (clause 275(1)(e)).

384. The powers in clause 275(1)(a) to (d) enable further provision on how and when information and notices required under this Chapter may or must be given and what other information must be contained in such notices. They also allow for further provision on what arrangements a trader must make to enable a consumer easily to exercise a contractual right to end their contract, and about when a consumer may exercise such a right including provision restricting the amount of notice that a trader may require a consumer to give to end their contract. The Secretary of State is also empowered to specify periods of time within which a trader is required to refund any overpayment to a consumer following the cancellation or ending of a subscription contract.

385. Clause 275(1)(e) empowers the Secretary of State to specify descriptions of cases for the purposes of clause 271(2). Clause 271(2) provides that in such prescribed cases, any term of a subscription contract which makes a consumer liable to pay a renewal payment before the day on which their contract renews is, to that extent, of no effect. Clause 275(1)(e) also

empowers the Secretary of State to make provision as to how it is to be determined in such descriptions of cases when the contract renews for those purposes.

Justification for taking the power

386. The Bill provides the outline of the requirements on traders in relation to giving pre-contract information to consumers, and serving different kinds of notices, at specified points in the life of a subscription contract, in each case providing the information that consumers need at that stage to make decisions about the contract. These notices include reminders that a subscription contract is about to automatically renew, notices in certain circumstances that a contract has renewed but the consumer has a cooling-off cancellation right, and notice confirming that a contract has been cancelled or has come to an end.

387. However, Part 4 Chapter 2 applies to a wide range of kinds of contract with different payment arrangements, and a wide range of kinds of product. It is not appropriate to enact on the face of the Bill detailed provision adapting the basic rules to such a potentially wide range of scenarios. Furthermore, the types of contract and product will likely continue to evolve, including new business models that may emerge in response to the new regime in Part 4 Chapter 2. In particular, means of communication by which parties conclude contracts and notices may be given are likely to change as technologies develop at pace. As such, the delegated powers in clause 275(1)(a) and (b) are reasonably necessary to enable the government to respond to, and make appropriate provision for, emerging new cases and technologies.

388. The power in clause 275(1)(c) enables further provision on what arrangements a trader must make to enable a consumer easily to exercise a contractual right to end their contract, and about when a consumer may exercise such a right, including provision restricting the period of notice that a trader may require a consumer to give to end their contract. This power is necessary to enable the government to make more detailed provision, and different provision for different cases, with respect to what arrangements to end a contract would comply with the main requirement set out in clause

258-. As with the powers in clause 275(1)(a) and (b), this power is also necessary to enable the government to respond to, and make appropriate provision for, emerging new technologies and digital means of communication.

389. Clause 275(1)(c) also enables the government to give effect to its policy that traders should not impose unreasonably restrictive time limits on when a consumer can exercise a right to end their contract by giving notice to this effect. Subscription contracts can contain terms which require a consumer to give notice to stop their contract automatically renewing at an unreasonably early point beforehand, and/or which prevent the consumer from giving notice to stop their contract before a prescribed date or time. Terms of this kind can serve as a barrier to consumers being able to bring their contracts to an end and, although they may be unfair under Part 2 of the Consumer Rights Act 2015, the government wants to prescribe clear rules for traders as to what is permissible in this respect. A delegated power is necessary so that the government can make appropriate tailored provision in the many varied kinds of subscription contract falling within Chapter 2.

390. In relation to the power in clause 275(1)(e), this is necessary to give effect to the government's policy that consumers should not be charged renewal payments before a subscription contract automatically renews. The government recognises that there is a wide range of contracts with very different features that all fall within the definition of subscription contract which has intentionally been drawn widely. Many of the contract types currently used in the retail market are structured as a contract with a defined term that automatically renews, however some types are not so structured. Furthermore, new and different kinds of subscription contract are constantly emerging in the retail market. It is therefore necessary to implement the government's policy by making detailed rules about the kinds of contract that can be treated as having a renewal date, and how that date should be determined. Rules of this level of detail are more appropriately made in delegated legislation.

Justification for the procedure

391. The negative procedure is considered a sufficient level of Parliamentary scrutiny of regulations made pursuant to this power because the provision is of a detailed and technical nature, and in relation to the powers in clause 275(1)(a), (b), and (d), can generally only be used to enable provision within the scope of the relevant duties on traders as they are set out in Chapter 2.

392. One of the powers in clause 275(1)(a), (b) and (d) could be exercised so as to alter the effect of an existing Chapter 2 provision and as such, could be deemed to operate as a Henry VIII power in those very limited circumstances. Clause 275(1)(a) allows the Secretary of State to specify when notices required under Chapter 2 may or must be given. This power could be used to specify the period of time within which a reminder notice under clause 256(1) must be given or within which an end of contract notice under clause 259(2) must be given. Clauses 257(3) and (6) prescribe the period within which the trader must give a reminder notice if no different period is specified in regulations made under clause 275(1)(a). Clause 259(5)(b) prescribes the period within which the trader must give an end of contract notice if no different period is specified in regulations made under clause 275(1)(a). Any time period prescribed in regulations made under clause 275(1)(a) will therefore take precedence over the time periods currently specified in clauses 257(3), 257(6) and 259(5)(b).

393. While the foregoing power is technically a Henry VIII power, the scope of the power is practically very limited as it relates to the very narrow issue of the time within which a trader must give an end of contract notice following receipt of a consumer's notification of their intention to end or cancel the contract. Currently clauses 257(3) and 257(6) requires a trader to serve a reminder notice either within the time specified in the key pre-contract information or within a reasonable time for the purpose of providing additional notification to the consumer that they will soon become liable for the renewal payment to which the notice relates. Currently clause 259(5)(b) requires a trader to serve an end of contract notice within 24 hours of a consumer cancelling the contract online, or within 3 working days after a consumer cancellation notification given by any other means. If the

Secretary of State decides to use the delegated power in clause 275(1)(a) to make any different provision as to the time limit for a trader to give a either a reminder or an end of contract notice it is likely to be either a very minor change or the introduction of another specified period of time of similar length to a new specified category of cases. In light of this context for the power, it is not considered necessary or proportionate for a proposed change to have to be made in regulations subject to the affirmative procedure with the opportunity for Parliamentary debate that that would entail.

394. The clause 275(1)(c) power allows the government to elaborate on the general rule reflected in clause 258(3) that a consumer should be able to exercise a right to bring a subscription contract to an end without unreasonable time constraints on when notice can be given. The regulations would allow for the provision of detailed rules on the different amounts of notice that would be permissible for the purposes of different kinds of contract, and as such, the negative procedure is an appropriate level of scrutiny.

395. In relation to the power in clause 275(1)(e), this is also a power to make technical detailed provision determining the kinds of contract to which the provision in clause 271(2) can properly apply, and the way in which a renewal date should be determined in different categories of cases. As these are in the nature of detailed provisions implementing a general rule set out in primary legislation, the negative procedure is an appropriate level of scrutiny.

INSOLVENCY PROTECTION FOR CONSUMER SAVINGS SCHEMES

Clause 282(2) (Excluded arrangements): Power for the Secretary of State to amend the list of excluded arrangements set out in Schedule 22 by adding a description of an excluded arrangement or removing a description of an excluded arrangement or modifying a description of an excluded arrangement.
Power conferred on: *Secretary of State*
Power exercised by: *Regulations made by Statutory Instrument*
Parliamentary Procedure: *Draft affirmative*

Context and purpose

396. Clause 282(1) (*Excluded arrangements*) states that an arrangement is excluded from the provisions on consumer savings scheme contracts if it is of a description specified in Schedule 22. Schedule 22 currently specifies seven descriptions of arrangements which are excluded from the scope of consumer savings scheme contracts. These include, for example, arrangements which fall in scope of regulated financial services activity or arrangements for the supply of utilities.

397. The primary purpose of clause 282 (*Excluded arrangements*) and Schedule 22 is to prevent double regulation by excluding descriptions of arrangements which have a separate regulatory regime. Clause 282 (*Excluded arrangements*) and Schedule 22 also specify exclusions which are intended to be out of scope, for example the exclusion for small business. Clause 282(2) gives a power to the Secretary of State to amend Schedule 22 to add, remove or modify descriptions of excluded arrangements.

398. By clause 282(3) (*Excluded arrangements*) the Secretary of State has a power to add or modify excluded arrangements generally for the purposes of the Chapter or only for such purposes as specified in the Chapter.

Justification for taking the power

399. The Secretary of State requires a power to add, remove or modify descriptions of arrangements excluded from the scope of consumer savings scheme contracts in order to make any necessary changes required for the

smooth running of the scheme once it has been operational for a period of time.

400. The Secretary of State also requires the power in order to accommodate changes in consumer regulatory regimes and/or to accommodate changes as a result of fast moving consumer markets.

Justification for the procedure

401. As the Secretary of State will be taking a power to amend primary legislation via secondary legislation this is considered to be a Henry VIII power.

402. The power will be subject to the affirmative procedure. This is to ensure Parliament has a greater degree of oversight of any additions to, or exclusions from or modifications made to arrangements excluded from the scope of consumer savings scheme contracts.

ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER CONTRACT DISPUTES

Clause 290(8) (Other definitions): Power for the Secretary of State to disapply the requirements of Chapter 4 (including accreditation of ADR providers) in relation to certain consumer contracts

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

403. Chapter 4 of Part 4 (Alternative dispute resolution for consumer contract disputes) requires (inter alia) that, unless exempt, persons providing alternative dispute resolution (ADR) for consumer contract disputes must be accredited by the Secretary of State or providing ADR under arrangements put in place by an accredited or exempt provider.

404. Clause 290(2)-(7) defines a "consumer contract" for the purposes of the Chapter. This is a contract to which Part 1 (consumer contracts for goods, digital content and services) of the Consumer Rights Act 2015 applies and includes 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.

405. Subsection (8) confers a power for 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.

406. The power is modelled on section 48(5) of Chapter 4 (services) of the Consumer Rights Act 2015 under which the Secretary of State may by order provide that a provision of that Chapter does not apply in relation to a service of a description specified in that order.

Justification for power

407. This power is included against the possibility that, in the future, the government may consider that there are consumer contracts for which the provisions of Chapter 4 should not apply. It would allow for a more general exclusion, in relation to disputes relating to contracts of a particular kind, than provided for by the regulation-making power in clause 293(2) which is designed to exempt specific persons and redress schemes from the requirements of the Chapter.

Justification for procedure

408. The government considers this power a Henry VIII power since its use will modify the scope of application of Chapter 4 through the exclusion of the consumer contracts to which it applies. The government considers that the appropriate Parliamentary procedure is the affirmative procedure.

Clause 293(2) (Exempt ADR providers): Power for the Secretary of State to amend Schedule 23

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

409. Schedule 23 exempts persons listed in Part 1 of that Schedule, to which it is not considered appropriate to apply the accreditation requirement, and redress schemes listed in Part 2 of the Schedule, which are regulated under other legislation, from the accreditation requirement.

410. Clause 293(2) empowers the Secretary of State, by regulations, to amend Schedule 23. Clause 293(3) clarifies that the regulations may, in particular, be used to exempt a specified person or redress scheme, or a person or redress scheme of a specified description, and to limit the exemption, for instance to cases or circumstances specified in the regulations which may allow for an exemption to be imposed subject to conditions.

Justification for power

411. The regulation-making power will allow for the exemptions to be kept under review and for possible additional exemptions in the future. The government considers that a power to review the exemptions is necessary to keep pace with changes in the landscape of consumer ADR as it will, for instance, allow new exemptions in cases where ADR may be better regulated, whether or not under statute, under another regulatory regime.

Justification for procedure

412. While the government recognises that this regulation-making power is a Henry VIII power as it amends a Schedule to the Bill, the government considers that, in this specific instance, the negative resolution procedure is appropriate. This is because the power will be exercised to make specific, and limited, exemptions for particular persons or redress schemes. In this case, therefore, and unlike clause 290(8), use of the power does not

otherwise alter the scope of the obligations of the Chapter. The affirmative procedure would be an unnecessary process for what are essentially technical updates, designed to maintain an appropriate and relevant list of exempt ADR providers.

Clause 298 (Fees regulations): Power for the Secretary of State to make provision about fees for accreditation of ADR providers.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and purpose

413. Clause 298(1) allows the Secretary of State, by regulations, to make provisions about fees payable by applicants for accreditation or for variation of an accreditation under clause 294(1) and (5) and for periodic fees payable by accredited ADR providers under clause 297(1).

414. The purpose of the fee provisions is to ensure that the costs incurred by the Secretary of State in processing and determining applications, and in carrying out its accreditation and related functions under Chapter 4, are met by applicants and by accredited ADR providers, as relevant.

415. The regulation-making power is constrained by subsection (3) which requires that, in making regulations, the Secretary of State must have regard to the need to ensure that, over a reasonable course of time, fees are set at a level which reflects the cost of processing and determining applications and of carrying out of the Secretary of State's functions as the case may be.

Justification for power

416. This power was introduced by government amendment at report stage in the House of Commons. On introduction, the Bill provided for fees to be set administratively by the Secretary of State. In the interests of certainty and transparency, the government now considers that fees payable by applicants and accredited ADR providers should be set out in regulations.

Justification for procedure

417. The negative procedure is considered appropriate since setting fees is an operational matter and the regulations do not substantively alter the overall

scope of rights or obligations of the Chapter. Furthermore, the ability to set fees is constrained by subsection (3) which should, overall, limit fees to what is needed to cover costs.

Clause 299(2) (Accreditation criteria): Power for the Secretary of State to amend Schedule24

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

418. Schedule 24 sets out the accreditation criteria with which a person must comply to be, and remain, accredited. These are designed to ensure that (inter alia) the ADR provider has appropriate expertise and follows fair procedures. Clause 299(2) allows the Secretary of State, by regulations, to amend the Schedule.

Justification for power

419. The government considers it prudent to be able to update Schedule 24 in light of experience and evolving best practice in the provision of ADR.

Justification for procedure

420. The government accepts that this clause is a Henry VIII power and considers the draft affirmative procedure the appropriate procedure.

Clause 301(1) (ADR Information regulations): Power for the Secretary of State to require the provision of information

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

421. Clause 301(1) allows the Secretary of State, by regulations, to require the categories of persons specified in subsection (2), including both accredited and exempt ADR providers and relevant regulators, to provide, at specified times or intervals, information to the Secretary of State and/or to consumers.

422. The regulation-making power is constrained by subsection (3) under which requirements to provide information to the Secretary of State may only be imposed for one or more of the purposes in paragraphs (a) to (c) of that subsection being publication of information for the benefit of consumers or monitoring or evaluation of ADR provision. Subsection (5) contains further provision about what the regulations may do.

Justification for power

423. The power to require provision of information to the Secretary of State is sought to enable provision of consistent and comparable information to the Secretary of State to enable the Secretary of State to evaluate the effectiveness of the regime introduced by Chapter 4 and the provision of consumer ADR generally including exempt ADR.

424. The power to require provision of information to consumers is sought to enable the provision of information to consumers that, inter alia, will make consumers aware of their rights and how to exercise them.

425. A regulation-making power is appropriate as the information required to be provided may be detailed and/or may need to be reviewed on a regular basis.

Justification for procedure

426. The negative procedure is considered appropriate since, as noted, the information requirements may be detailed and require regular review. Unlike some of the other regulation-making powers, use of this regulation-making power will not substantially alter the scope of the Chapter.

Clause 305(1): Power for the Secretary of State to provide for other persons to have accreditation functions

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative*

Context and purpose

427. Clause 305(1) empowers the Secretary of State, by regulations, to confer functions on other persons in place of the Secretary of State in such cases or circumstances as the regulations may provide. Subsection (2) specifies what those functions are. Where functions are conferred on one or more other persons, subsections (3) and (4) allow provision to be made for information sharing between the persons exercising the relevant functions. Subsection (5) allows for the amendment of Chapter 4.

428. By way of context, the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (S.I. 2015/542), which the Chapter 4 replaces, confer decision-making on several different competent authorities with these being sectoral regulators as well as the Secretary of State. Given the exemption of several sectoral redress schemes under Schedule 23, and to prevent ADR providers having to seek multiple accreditations from different decision-makers if they provide ADR in different contexts, it has been decided to make the Secretary of State the sole decision-maker for the time being.

429. However, the government considers it prudent to keep under review whether it remains best for the Secretary of State to be the sole decision-maker. It may be that, in the future, there are advantages in conferring decision-making functions on another person to align with the statutory functions of a sectoral regulator or other body, or where such a body has greater expertise in a specific kind of consumer dispute.

Justification for power

430. The government therefore considers that it is prudent to have a regulation-making power to enable the conferral of relevant functions on another person.

431. If so, it may be necessary to make consequential provisions, including any necessary amendments of Chapter 4, to ensure that Chapter 4 can work effectively in a context where there is more than one decision-maker.

Justification for procedure

432. Given the possibility that consequential provisions of the regulations may amend the Chapter, the government considers that this clause is a Henry VIII power. In addition, exercise of the regulation-making power will necessarily alter the decision-making framework established by the Chapter. Accordingly, the government considers that exercise of the regulation-making power should be subject to the affirmative procedure.

PART 5 - MISCELLANEOUS

Clause 309(9) Power to require information about competition in the market for motor fuel: A power for the Secretary of State to amend definitions.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

433. The CMA has an information gathering power under clause 309 - (Power to require information about competition in the market for motor fuel), for the purposes of its ongoing monitoring function in relation to the retail of motor fuel (petrol and diesel).

434. The definition of "motor fuel" has the same meaning as in Motor Fuel (Composition and Content) Regulations 1999 (S.I. 1999/3107), save for omissions to ensure that "motor fuel" is only limited to petrol and diesel. This is important to ensure that the scope of information gathering powers is not disproportionate and focuses on the specific sector relevant for the CMA to fulfil its functions.

435. Clause 309(9) makes provision which allows the Secretary of State, by regulations, to make provision amending the definition of "motor fuel".

Justification for taking the power

436. The current definition is based on definitions contained in other legislation, in particular Motor Fuel (Composition and Content) Regulations 1999 (S.I. 1999/3107). The reason behind taking the power is to protect against any potential future amendments to the definitions made in other legislation, resulting in it becoming unsuitable for the clause's purpose. If they are amended, it could inadvertently broaden the scope of the information gathering powers without the appropriate assessment and analysis. This is important as the definition of "motor fuel" is specifically limited in the amendment to petrol and diesel.

Justification for the procedure

437. It is proposed that regulations made using this power should be 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. Therefore, the definition of “motor fuel” under the 1999 Regulations can already be changed using the negative procedure. Therefore, it seemed appropriate that if the existing definition under the 1999 Regulation could be changed by negative SI, then it was appropriate for the definition under the amendment to be changed subject to the same procedure.

Clause 310(6) Penalties for failure to comply with notices under clause 309 (Power to require information about competition in the market for motor fuel): A power to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for undertakings under clause 310 (Penalties for failure to comply with notices under section 309 (Power to require information about competition in the market for motor fuel))

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and purpose:

438. The CMA has an information gathering power under clause 309 (Power to require information about competition in the market for motor fuel), for the purposes of its ongoing monitoring function in relation to the retail of road fuel (petrol and diesel).

439. Clause 310 (Penalties for failure to comply with notices under section (clause 309 - power to require information about competition in the market for motor fuel)) makes provision that the maximum civil penalty which may be imposed on an undertaking. In the case of a fixed amount, 1% of the total value of the turnover (both in and outside the United Kingdom), and in the case of an amount calculated by reference to a daily rate, 5% of the total value of the daily turnover of the undertaking (both in and outside the United Kingdom).

440. Clause 310(6) makes provision which allows the Secretary of State, by regulations, to make provision for determining the turnover (both in and outside the United Kingdom) of an undertaking.

441. Such regulations may, in particular, make provision as to the amounts which are or are not to be treated as comprising an undertaking's turnover or daily

turnover, and the date or dates by reference to which turnover or daily turnover is to be determined.

Justification for taking the power

442. The power is intended to enable the government to address any amendments needing to be made in this technical provision more readily, within secondary legislation. The government considers that setting out the basis on which the calculation should be made in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter. The government's view is that the amount of technical detail on the accounting principles to be followed when calculating turnover both on an annual and daily basis is such that it is appropriate for this to be set out in secondary, not primary legislation.

Justification for the procedure

443. It is proposed that regulations made using this power should be subject to the negative procedure. The primary legislation already sets out the principal parameters of the penalty scheme. The power relates to the detailed technical basis on which turnover should be calculated. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. The power is similar to the existing power to make an order under section 94A of the EA02 and that inserted by clause 142(1) and paragraph 17(12) of Schedule 9 to this Bill as the new section 111(9) EA02, which are also subject to the negative resolution procedure and enables the Secretary of State to specify the basis on which turnover is calculated for the purposes of penalties which may be imposed in relation to failure to comply with an initial enforcement order. For these reasons it is considered that this ensures appropriate Parliamentary scrutiny over use of the power.

Clause 316(Expiry of this Chapter): Power for Secretary of State to extend the period for which clauses 309 to 315 have effect

Power conferred on: Secretary of State

Power exercised by: Regulations by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and purpose:

444. The CMA has an information gathering power under clause 309 (Power to require information about competition in the market for motor fuel), and an associated civil penalties regime and offences under clauses 310 to 315 for the purposes of its ongoing monitoring function in relation to the retail of road fuel (petrol and diesel).
445. Clause 316(Expiry of this Chapter) provides that this Chapter under Part 5 shall expire at the end of the relevant period, which is defined as five years beginning with the day on which the Act is passed.
446. Clause 316(3) makes provision for the Secretary of State to make regulations to change to definition of the “relevant period”.

Justification for taking the power

447. The power is intended to enable the government to extend the period by which the CMA’s information gathering powers, as part of its monitoring function into the retail of motor fuel, have effect. The government’s view is that this is required to ensure that the powers are proportionate and do not extend into perpetuity. This power will also ensure that the powers can adapt to potential changes in the market as we transition toward net zero and ensure that any persisting or developing competition issues, that may be exacerbated by this transition, that adversely affect consumers in the retail of motor fuel can be appropriately assessed by the CMA and whether further intervention is required.

Justification for the procedure

448. Regulations to amend the expiry date of this Chapter will extend the period for which the CMA can issue information notices to undertakings involved in, or connected with, the distribution, supply or retail of motor fuel. The power will alter the effect of the Bill and amounts to a Henry VIII power. The government's view is that this warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure.

Clause 324(2) (Disclosing information overseas): Re-enactment of existing power under section 243 EA02 for Secretary of State to modify considerations to which a public authority must have regard before making overseas disclosures

Power conferred on: *Secretary of State*

Power exercised by: *Regulations by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

449. Clause 324 (*Disclosing information overseas*) amends Part 9 EA02 to create new gateways for the disclosure of information to overseas authorities. The rationale for the reforms to Part 9 EA02 is essentially to permit a more efficient information exchange to facilitate greater cooperation between the United Kingdom's competition and consumer authorities and their international counterparts. Section 243 in Part 9 EA02 currently provides a gateway under which public authorities may disclose information to overseas authorities for the purpose of any criminal investigations or proceedings, or for civil investigations or proceedings that relate to competition, consumer or related matters. Section 243(6) sets out a series of considerations to which a public authority must have regard before making such a disclosure.

450. Section 243(8) allows the Secretary of State by order to modify, add to, or remove any of the considerations in subsection (6) and section 243(9) specifies that an order to this effect is subject to the negative resolution procedure.

451. Clause 324 inserts new sections in Part 9 EA02 replacing the repealed section 243. These new sections include new section 243F which specifies relevant considerations to which a public authority must have regard before making a disclosure to an overseas authority. These considerations are similar to those in section 243(6) but the new section sets out different considerations which apply depending on whether the disclosure is solely for the purpose of the overseas authority's functions or is for the purpose of both domestic and overseas functions. New section 243F(5) and (6) re-enact the

provisions of section 243(8) and (9) by giving a power to the Secretary of State to modify, add to, or remove any of the considerations in subsections (2) and (3) for each of the respective gateways.

Justification for taking the power

452. The government considers it important that the Secretary of State should continue to be able to modify the list of considerations relating to overseas disclosure to ensure they remain balanced and appropriate. This is the position currently under section 243 and there is nothing in the new proposals which should change this position.

453. The government considers it important that there be safeguards in place to ensure that information is disclosed where it is appropriate and necessary. The power will provide an additional layer of protection as it will enable the Secretary of State to modify the specified conditions, for example, where there needs to be alignment in approach with wider foreign policy or indeed in response to changes in technology and best practice.

454. The government anticipates that the introduction of the new gateways and the increasingly international role of the CMA post EU Exit is likely to lead to an increase in the use of Part 9 for overseas disclosures. We expect this rise to develop the CMA's and the government's experience of these matters and therefore may bring to light amendments to the list that would be beneficial or produce a more efficient information sharing regime. The power is therefore needed to ensure such possible refinements are facilitated.

Justification for the procedure

455. The exercise of this power will be subject to the negative resolution procedure. The government considers that this is appropriate because it is consistent with the existing arrangements under section 243. The Secretary of State would not be able to use the power in ways which reduced the protections provided by, for example, the data protection legislation (see section 237(4) EA02) or Article 8 of the European Convention on Human Rights. Article 8 protects the right to a private life and is relevant to information sharing involving personal data. Compliance with Article 8 requires that any interference with a person's private and family life must be

in accordance with the law, necessary and proportionate in a democratic society in the pursuit of a legitimate aim (or aims), including the economic wellbeing of the country.

456. In addition, section 244 EA02 will continue to apply to all disclosures under Part 9. Section 244 sets out a list of considerations that a United Kingdom public authority must have regard to when disclosing specified information under any of the Part 9 gateways. These are as follows:

a. the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest;
b. the need to exclude from disclosure (so far as practicable);
c. commercial information whose disclosure the United Kingdom public authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or
d. information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests; and
e. the extent to which the disclosure of the information is necessary for the purpose for which the UK public authority is permitted to make the disclosure.

457. In the light of these protections, the government considers that modifying the conditions set out in section 243F(2) and (3) warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. The government's view is that in these circumstances the negative procedure will continue to provide the appropriate level of scrutiny in relation to the exercise of the power.

Clause 324(2) (Disclosing information overseas): power for Secretary of State to designate international cooperation agreements

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative*

Context and purpose

458. Clause 324 (*Disclosing information overseas*) amends Part 9 EA02 to create new gateways for the disclosure of information to overseas authorities. The rationale for the reforms to Part 9 EA02 is essentially to permit a more efficient information exchange to facilitate greater cooperation between the United Kingdom's competition and consumer authorities and their international counterparts. These powers are intended to bring the United Kingdom in line with these key partners. Globalisation means that the ability to cooperate effectively is particularly important given that many United Kingdom businesses operate overseas and vice versa. The United Kingdom's exit from the EU also means that the CMA and other United Kingdom competition and consumer authorities have taken on more functions and cases which previously fell to the European Commission. This framework is also intended to cater for the government's aim of negotiating new, detailed cooperation arrangements with key international partners which should further facilitate closer and more effective cooperation. The new sections replacing section 243 therefore include in new section 243C a power for the Secretary of State to designate an arrangement or agreement entered into between the United Kingdom and another State, or between relevant United Kingdom competition or consumer authorities and their overseas counterparts, relating to reciprocal cooperation for the purposes of consumer or competition functions.

459. The Secretary of State may not designate a cooperation arrangement or agreement (which can be either a fully binding treaty or a memorandum of understanding (MoU)) unless the Secretary of State is satisfied that:

a. the law and practice of the country or territory with whom the agreement or arrangements are with provides appropriate protection against self-incrimination in criminal proceedings;

b. the law and practice of that country or territory provides appropriate protection in relation to the storage and disclosure of any confidential information .

460. The terms of designated cooperation arrangements will require the approval of the Secretary of State via the designation process which will ensure consideration of whether they include appropriate safeguards. Accordingly, if a United Kingdom public authority is making disclosures permitted under a designated cooperation agreement it is not required to have regard to the considerations set out in section 243F (explained above). Additionally, the power of the Secretary of State under section 243(4) and (5) of the EA02 to veto a disclosure does not apply in relation to disclosures made in accordance with a designated cooperation arrangement. Section 244 will, however, apply to disclosures under a designated cooperation agreement.

Justification for taking the power

461. Globalisation means the United Kingdom competition and consumer agencies should be provided with the right tools to cooperate with their overseas counterparts, including facilitating the negotiation of new international co-operation agreements and streamlining the 'information gateways' in domestic legislation, to allow critical information to be shared safely so cases can be decided quickly and well. As new agreements or MoUs are negotiated to allow effective information sharing between authorities who need to cooperate seamlessly, this power will allow the Secretary of State to approve those agreements or arrangements on a case by case basis. The primary legislation limits the discretion of the Secretary of State. It defines the kind of agreements that can be subject to designation, i.e. that they should relate to cooperation in relation to specified functions and that the cooperation should concern reciprocal assistance. The primary legislation also provides for the Secretary of State not to be able to designate an agreement unless it provides adequate protection relating to self-incrimination and the maintenance of the confidentiality of the information disclosed.

462. The government's view is that regulations are an appropriate and straightforward mechanism for making designations.

Justification for the procedure

463. The parameters for the designation of cooperation agreements and arrangements are set out in the primary legislation. The delegated power allows the Secretary of State to approve individual agreements falling within those parameters. This matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. The government's view is that in these circumstances the negative procedure will provide the appropriate level of scrutiny in relation to the exercise of the power.

PART 6 - GENERAL

Clause 331 (Power to make consequential provision): Power to make consequential provision

Power exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative, unless the power is exercised to modify primary legislation etc., then draft affirmative .*

Context and purpose

464. Clause 331 provides the Secretary of State with a power to make consequential provision in connection with this Bill or regulations made under it. Regulations made under this power may modify primary legislation. In consequence, this is a Henry VIII power.

Justification for power

465. This power may only be exercised in connection with a provision of the Bill or regulations made under it. It is not possible to establish in advance all consequential provisions that may be required; a power is needed to avoid any legal uncertainty or legal lacunas after the Act comes into force.

Justification for procedure

466. The government considers that the draft affirmative resolution procedure should apply where the power is exercised to modify an Act of Parliament. The government considers that the negative resolution procedure is appropriate in all other cases.

Clause 334 (Commencement): Commencement

Power exercised by: *Secretary of State*

Means of exercise: *Regulations made by Statutory Instrument*

Parliamentary procedure: *None*

Context and purpose

467. Clause 334 provides the Secretary of State with the power to bring the Bill into force by commencement regulations, and to make transitional or saving provisions in connection with the coming into force of any provision in the Act.

Justification for power

468. This power will allow the Secretary of State to commence those provisions of the Bill in Parts 1 to 5 at an appropriate time.

Justification for procedure

469. Consistent with common practice, commencement regulations under this clause are not subject to any Parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them; commencement by regulation enables the provisions to be brought into force at the appropriate time.

Department for Business and Trade and Department for Science, Innovation and Technology

22 November 2023

Annex A: Summary of Powers

Clause/Schedule	Power	Procedure
Part 1: Digital Markets		
Clause 6(2)	Gives the Secretary of State the power to vary the position of strategic significance conditions via regulations. This is a Henry VIII power.	Draft affirmative
Clause 7(3)	Gives the Secretary of State the power to amend the turnover thresholds in subsection (2) via regulations. This is a Henry VIII power.	Draft affirmative
Clause 8	Gives the Secretary of State the power, by regulations, to make provision about how the total value of UK and global turnover is to be estimated.	Negative
Clause 20(4)	Gives the Secretary of State the power to amend the permitted types of conduct requirement via regulations. This is a Henry VIII power.	Draft affirmative
Clause 41(4)	Gives the Secretary of State the power to amend the Final Offer Mechanism deadline via regulations. This is a Henry VIII power.	Draft affirmative
Clause 59(3)	Gives the Secretary of State the power, by regulations, to make further provision about how the value of consideration, capital or assets is to be calculated for the purposes of merger reporting.	Negative
Clause 67(1)	Gives the Secretary of State the power, by regulations, to make provision about the duty to report a reportable event. This is a Henry VIII power.	Draft affirmative for certain purposes, negative for others
Clause 88(6)	Gives the Secretary of State the power to amend the maximum amount of penalty on individuals by regulations. This is a Henry VIII power.	Draft affirmative
Clause 90(2)	Gives the Secretary of State the power to, by regulations, make provision for determining the turnover (both inside and outside the United Kingdom) of a person for the purposes of penalties.	Negative
Clause 106(9)	Gives the Secretary of State the power, by regulations, to amend the list of decisions which are reserved for the CMA Board and its sub-committees as part of this Bill. This is a Henry VIII power.	Draft affirmative
Clause 110	Creates a power for the CMA to set the levy in accordance with certain principles set out in the Bill and requires it to prepare and publish Rules which sets out the methodology and operational details of the SMS levy.	None

Part 2: Competition		
Clause 124 and Schedule 3, Paragraph 9	Amendment of existing power regarding matters which may be specified in CAT Rules, to include rules on declaratory relief.	Negative
Clause 127 and Schedule 4, Paragraph 3(3)	Amendment of existing power in section 28(6) EA02 for the Secretary of State by order to alter the level of turnover specified in merger control thresholds. This is an order made by Statutory Instrument and is a Henry VIII power.	Negative
Clause 127 and Schedule 4	Additional cases where existing power under section 28(2) EA02 for the Secretary of State by order to specify the basis on which turnover should be calculated for the purposes of merger control thresholds will apply. This is an order made by Statutory Instrument.	Negative
Clause 127 and Schedule 4, Paragraph 6(4)	Amendments to existing power in section 59(6A) EA02 for the Secretary of State by order to amend conditions for application of the special public interest merger regime – turnover element of the thresholds. This is an order made by Statutory Instrument and is a Henry VIII power.	Negative
Clause 127 and Schedule 4, Paragraph 6(4)	Amendments to existing power in section 59(6A) EA02 for the Secretary of State by order to amend conditions for application of the special public interest merger regime – non-turnover elements of the thresholds. This is an order made by Statutory Instrument and is a Henry VIII power.	Draft affirmative
Clause 127 and Schedule 4, Paragraph 7(3)	Amendment to correct an existing power in paragraph 3(c) of Schedule 5A EA02 (recently inserted by the Energy Act 2023) for the Secretary of State by order to alter the figure in the turnover threshold for energy network mergers. The existing power is a Henry VIII power.	Negative
Clause 127 and Schedule 4, Paragraph 9	Amendments to existing power for the Secretary of State by order to alter the share of supply test in section 123 EA02. This is an order made by Statutory Instrument and is a Henry VIII power.	Draft affirmative
Clause 137(2)	Gives the Secretary of State the power, by regulations, to amend section 168 EA02 and specified sectoral enactments, in connection with the provision made by Schedule 7 to the Bill (which amends Part 4 EA02 to allow implementation trials for remedies). This power is subject to a requirement to consult with the relevant sectoral regulators before exercise. This is a Henry VIII power.	Draft affirmative
Clause 137(7)	Gives the Secretary of State the power, by regulations, to amend the list of sectoral enactments in scope of the power at clause 133(2) and the regulatory authorities who must be consulted before that power is exercised. This is a Henry VIII power.	Draft affirmative

Clause 137 and Schedule 8, Paragraph 4	Gives the Secretary of State the power, by regulations, to specify matters which will be “qualifying remedial action” and so in scope for implementation trials.	Draft affirmative
Clause 142(1) and Schedule 9, Paragraph 9(10)	Gives the Secretary of State the power to amend the maximum penalty for persons who are not undertakings, which may be imposed by the CMA under section 40A CA98 via an order. This is a Henry VIII power.	Draft affirmative
Clause 142(1) and Schedule 9, Paragraph 9(13)	Gives the Secretary of State the power, by regulations, to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who are undertakings under section 40A CA98.	Negative
Clause 142(1) and Schedule 9, paragraph 17(10)	Gives the Secretary of State the power to amend the maximum penalty for persons who do not own or control an enterprise, which may be imposed by the CMA under section 111 EA02 via an order. This is a Henry VIII power.	Draft affirmative
Clause 142(1) and Schedule 9, paragraph 17(12)	Gives the Secretary of State the power, by regulations, to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 111 EA02.	Negative
Clause 142(1) and Schedule 9, paragraph 28(9)	Gives the Secretary of State the power to amend the maximum penalty for persons who do not own or control an enterprise, which may be imposed by the CMA under section 174D EA02 via an order. This is a Henry VIII power.	Draft affirmative
Clause 142(1) and Schedule 9, paragraph 28(13)	Gives the Secretary of State the power, by regulations, to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 174D EA02.	Negative
Clause 142(2) and Schedule 10, paragraph 6	Gives the Secretary of State the power to amend the maximum penalty which may be imposed by the CMA on a person who is not an undertaking under section 35B CA98 via an order. This is a Henry VIII power.	Draft affirmative
Clause 142(2) and Schedule 10, paragraph 6	Gives the Secretary of State the power, by regulations, to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who are undertakings under section 35B CA98.	Negative
Clause 142(2) and Schedule 10, paragraph 11	Gives the Secretary of State the power to amend the maximum penalty which may be imposed by the CMA on persons who do not own or control an enterprise under section 94AB EA02 via an order. This is a Henry VIII power.	Draft affirmative
Clause 142(2) and Schedule 10, paragraph 11	Gives the Secretary of State the power, by regulations, to specify the basis on which turnover should be calculated for	Negative

	the purposes of maximum civil penalties for persons who own or control an enterprise under section 94AB EA02.	
Clause 142(2) and Schedule 10, paragraph 17	Gives the Secretary of State the power to amend the maximum penalty which may be imposed by the CMA on persons who do not own or control an enterprise under section 167B EA02 via an order. This is a Henry VIII power.	Draft affirmative
Clause 142(2) and Schedule 10, paragraph 17	Gives the Secretary of State the power, by regulations, to specify the basis on which turnover should be calculated for the purposes of maximum civil penalties for persons who own or control an enterprise under section 167B EA02.	Negative
Part 3: Enforcement of Consumer Protection Law		
Clause 150(3)	Gives the power for the Secretary of State to amend, by regulations, clauses 150 - Enforcers (1) and (2) so as to add or remove a person as a public or private designated enforcer or to vary the entry of a public or private designated enforcer. This is a Henry VIII power.	Draft affirmative
Clause 176(3)	Gives the power for the Secretary of State to, by regulations, specify a private enforcer in relation to enhanced consumer measures.	Negative
Clause 203(2)	Gives the power for the Secretary of State to specify in secondary legislation the methodology for determining “turnover” for civil monetary penalties imposed under Part 3 to the Bill.	Negative
Clause 204(1)	Gives the power for the Secretary of State, by regulations, to substitute a different maximum amount for fixed or daily penalties imposed under Chapters 3 or 4 of Part 3 to the Bill. This is a Henry VIII power.	Draft affirmative
Schedule 16, paragraph 2(3) - new paragraph 16H(2)	Gives the power for the Secretary of State to specify, by regulations in secondary legislation, the methodology for determining “turnover” for civil monetary penalties imposed under Schedule 5 to the Consumer Rights Act 2015, as amended by Chapter 6 - investigatory powers of Part 3 and Schedule 15 to the Bill.	Negative
Schedule 16, Paragraph 2(3) - new paragraph 16 I	Gives the power for the Secretary of State, by regulations, to substitute a different maximum amount for fixed or daily penalties that can be imposed by the court or the CMA for non-compliance with an information notice issued under Schedule 5 to the Consumer Rights Act 2015. This is a Henry VIII power.	Draft affirmative
Clause 208(1)	Gives the power for the Secretary of State to, by regulations, amend the tables set out in Schedules 14 and 15 so as to add, remove or vary an entry for (i) an enactment within scope of the court-based or CMA direct enforcement mechanisms or (ii) an entry providing for the enforcers authorised to use the court based enforcement	Draft affirmative

	mechanism in respect of an enactment, obligation or rule of law. This is a Henry VIII power.	
Clause 209(1)	Gives a power for the CMA to make, subject to approval by the Secretary of State, rules on procedure and other matters in connection with the carrying out of its functions under the direct enforcement regime for consumer protection law.	Negative
Part 4: Consumer Rights and Disputes		
Clause 231	Gives the Secretary of State the power, by regulations, to make provision about the exercise of rights to redress.	Affirmative for the first set of regulations. Negative for subsequent regulations.
Clause 240 (1) (a) and 1 (c)	Gives the Secretary of State the power, by regulations, to add to or amend Schedule 19 (commercial practices which are in all circumstances considered unfair). This is a Henry VIII power.	Draft affirmative
Clause 240(1)(b)	Gives the Secretary of State the power, by regulations, to remove commercial practices from Schedule 19. This is a Henry VIII power.	Draft affirmative
Clause 240(2)	If regulations made under Clause 240 (1)(a) add to Schedule 19, the regulations must amend clause 235(8) to make the practice an excluded description of practice. This is a Henry VIII power.	Draft affirmative
Clause 240(3)	Gives the Secretary of State the power, by regulations, to add or remove from clause 230(7) (right to redress). This is a Henry VIII power.	Draft affirmative
Clause 240(4)0	Gives the Secretary of State the power to amend, by regulations, clause 228(2) (information deemed material for purpose of omission of material information from invitation to purchase). This is a Henry VIII power.	Draft affirmative
Clause 253(2)	Gives the Secretary of State the power, by regulations, to amend Schedule 20 so as to add, remove or modify a description of contract excluded from the clause 252 definition of subscription contracts within scope of the new provisions. This is a Henry VIII power.	Draft affirmative
Clause 254(8)	Gives the Secretary of State the power, by regulations, to amend Parts 1 and 2 of Schedule 21 so as to add, modify or remove descriptions of information specified as key pre-contract information and full pre-contract information to be provided to consumers. This is a Henry VIII power.	Draft affirmative
Clause 256(6)	Gives the Secretary of State the power, by regulations to disapply or modify the requirements to give a reminder	Draft affirmative

	notice in relation to traders or contracts of a specified description. This is a Henry VIII power.	
Clause 265	Gives the Secretary of State power, by regulations, to make further provision in connection with a consumer's exercise of a right under Part 4 Chapter 2 to cancel a subscription contract, and (by sub-paragraph (1)(c)) to extend a cooling-off cancellation period under Part 4 Chapter 2. Clause 265(1)(c) is considered to be a Henry VIII power.	In relation to clause 265(1)(c), draft affirmative in all cases. Otherwise, draft affirmative as to first use of the power and thereafter negative.
Clause 275	Gives the Secretary of State power, by regulations, ● to make further detailed provision in connection with a number of Part 4 Chapter 2 requirements on traders; ● to specify descriptions of cases for the purposes of clause 271(2) (specified term of a subscription contract to be of no effect). Clause 275(1)(a) is considered to be a Henry VIII power insofar as it can be used to specify the period of time within which a reminder notice must be given under clause 256(1) in precedence over the provision currently made in clauses 257(3) and (6), and the period of time within an end of contract notice must be given under clause 259(5)(a) in precedence over the provision currently made in clause 259(5)(b).	Negative
Clause 282(2)	Gives the power for the Secretary of State to, by regulations, amend the list of excluded arrangements set out in Schedule 22 by adding a description of an excluded arrangement or removing a description of an excluded arrangement or modifying a description of an excluded arrangement. This is a Henry VIII power.	Draft affirmative
Cause 290(8)	Gives the power for the Secretary of State to disapply the requirements of Chapter 4 (including accreditation of ADR providers) in relation to certain consumer contracts. This is a Henry VIII power.	Draft affirmative
Clause 293(2)	Gives the power for the Secretary of State to amend the exemptions listed in Schedule 23 (which would allow the Secretary of State to add to, or vary, the persons or redress scheme listed as exempt in Parts 1 or 2 of that Schedule). This is a Henry VIII power.	Negative
Clause 298	Gives power for the Secretary of State, by regulations, to make provisions about fees payable by applicants for accreditation or for variation of their accreditation and for periodic fees payable by accredited ADR providers.	Negative
Clause 299(2)	Gives the power for the Secretary of State, by regulations to amend Schedule 24 to add to or vary the accreditation criteria in that Schedule. This is a Henry VIII power.	Draft affirmative

Clause 301(1)	Gives the Secretary of State the power, by regulations, to require the provision of information	Negative
Clause 305(1)	Gives the power for the Secretary of State, by regulations, to delegate certain functions specified in the Bill to other persons. This is a Henry VIII power.	Draft affirmative
Part 5: Miscellaneous		
Clause 309(9)	Gives the power to the Secretary of State, by regulations, to amend the definition of “motor fuel” relied upon in clause 309, which makes provision for an information gathering power for the CMA for the purposes of its ongoing monitoring function in relation to the retail of road motor fuel. This is a Henry VIII power.	Negative
Clause 310(6)	Gives the power to the Secretary of State, by regulations, to specify the basis on which turnover should be calculated for the purposes of the maximum civil penalty that may be imposed on an undertaking under clause 310 for failure to comply with a requirement imposed under clause 309.	Negative
Clause 316	Gives the power to the Secretary of State, by regulation, to amend the date on which the provisions in Chapter 1 of Part 5 of the Bill will expire. This is a Henry VIII power.	Draft affirmative
Clause 324(2)	Gives the power for the Secretary of State, by regulations, to designate international cooperation agreements.	Negative
Clause 324(2)	Re-enactment of existing power under section 243 EA02 for Secretary of State to, by regulations, modify considerations to which a public authority must have regard before making overseas disclosures. This is a Henry VIII power.	Negative
Part 6: General		
Clause 331	Power to make consequential provision. This is a Henry VIII power.	Draft affirmative or Negative
Clause 334	Commencement Powers	None

D. NON-LEGISLATIVE POWERS

PART 1 - DIGITAL MARKETS

Clause 2: Designation of undertaking

Exercised by: *CMA*

Means of exercise: *Decision*

Parliamentary Procedure: *None*

Context and purpose

470. Clause 2 gives the CMA the power to designate an undertaking as having SMS. The CMA may designate an undertaking as having SMS in respect of a digital activity where the CMA considers that the undertaking meets the SMS conditions; i.e. that it has, in respect of the digital activity, substantial and entrenched market power and a position of strategic significance. The CMA would only be able to designate undertakings that have UK or global turnover above a certain threshold and where the relevant digital activity has a sufficient connection with the UK.

471. SMS designation is the basis of the regime. Following an evidence based assessment by the CMA, undertakings will be designated with SMS and may be subject to regulation in the form of conduct requirements and pro-competition interventions. Designated undertakings will also be subject to additional merger reporting requirements. Therefore there is a need for CMA to have the power to designate.

Justification for power

472. SMS designation ensures that regulation is targeted and proportionate, applying to a small number of undertakings with powerful positions.

473. We consider that this delegation of power is appropriate because it is permitting an act of more regulatory, rather than legislative, nature. The CMA is the expert competition regulator and will be best placed to undertake an evidence based assessment and make decisions on designation.

Justification for procedure

474. The CMA is the expert competition regulator and is best placed to undertake an evidence-based assessment and make designation decisions.

475. The power to designate will be subject to certain limitations and procedural requirements.

Clause 17: Power to apply existing obligations to a new designation and to make transitional provision when designation ends

Exercised by: *CMA*

Means of exercise: *Decision*

Parliamentary Procedure: *None*

Context and purpose

476. The power in clause 17(1) allows the CMA to make transitional, transitory or saving provision in respect of any existing obligations (i.e. conduct requirements, enforcement orders, commitments, final offer orders and pro-competition orders), if a designation is revoked. Subsection (2) however provides that this power may only be used for the purpose of managing the impact of the revocation on a person who was a beneficiary of the existing obligation, and in a way that appears to the CMA to be fair and reasonable.

477. The power in clause 17(5) allows the CMA to continue to apply existing obligations, with or without modification, to a designated undertaking in respect of a new designation, if the digital activity to which the designation relates is the same, or a similar or connected activity.

Justification for power

478. The power in clause 17(1) allows for the CMA to design a smooth transition from the position where the digital activity is regulated to the position where it is unregulated, for the purpose of protecting those who were beneficiaries of the regulation, to allow time for adjustment.

479. The power in clause 17(5) prevents regulatory gaps when the same designation is continued, or a new designation is for a similar or connected digital activity, by allowing the CMA to carry forward existing obligations uninterrupted. The CMA is able to modify any obligations so that they are appropriate in the context of the new designation.

Justification for procedure

480. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can

objectively and consistently intervene in the interest of promoting competition to the benefit of UK businesses and consumers. The CMA will have to consult when deciding whether to revoke or make a new designation, and will have to consult on its intentions to use the powers in clause 17. The CMA is best placed to determine what provision should be made to safeguard competition in the event of a new designation, or what smoothing there should be at the end of a designation as regards the removal of any regulation.

Clause 19(1): Power to impose conduct requirements

Exercised by: *CMA*

Means of exercise: *Decision*

Parliamentary Procedure: *None*

Context and purpose

481. The purpose of conduct requirements is to tackle the effects of market power of undertakings designated with SMS, and to prevent and to tackle exploitative or exclusionary conduct by those undertakings in order to benefit consumers and business customers.

482. Clause 19(1) gives power to the CMA to impose conduct requirements on designated undertakings in relation to the carrying on of the relevant digital activity. The power is to impose requirements, specifically tailored for the designated undertaking concerned, to address the specific problems in or anticipated in that market. The requirements must fall within the permitted categories of conduct requirements set out in clause 20.

483. The legislation therefore governs the activity of the CMA, rather than applying directly to designated undertakings (it is the conduct requirements which apply directly to undertakings and are enforced by the CMA).

484. The CMA will also have the power to revoke and replace conduct requirements in line with its duty to keep them under review.

Justification for power

485. In order for regulation to remain targeted and proportionate, the conduct requirements will be tailored for each designated undertaking. A more rigid set of regulations would risk putting in place rules that are not needed, with potential for unintended consequences and hindering growth and innovation. The undertakings subject to conduct requirements undertake different digital activities and have different business models. Allowing the CMA to set the conduct requirements will also allow them to respond to these individual circumstances, which means they will be clearer for all stakeholders; designated undertakings will know what they need to do and users of their services will know what to expect when dealing with designated undertakings.

486. The CMA will be constrained by categories of conduct requirements set out in legislation and which both Houses will have the opportunity to debate as the Bill passes through Parliament. Any future changes to the list of categories will also be subject to Parliamentary approval.

Justification for procedure

487. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can objectively and consistently intervene in the interest of promoting competition to the benefit of UK businesses and consumers. After undertaking an investigation and consultation on draft conduct requirements, the CMA will be best placed to determine what conduct requirements are appropriate to safeguard competition.

Clause 31(1): Enforcement orders

Exercised by: *CMA*

Means of exercise: *Order*

Scrutiny: *None*

Context and purpose

488. The main remedy for a breach of a conduct requirement is to be a power for the CMA to impose such obligations on a designated undertaking to stop an ongoing breach, prevent a breach from happening again, and/or address any damages as a result of the breach, as the CMA considers appropriate. This is what we are calling an enforcement order.

489. The threshold for use of the power is that where the CMA finds that an undertaking has breached or is continuing to breach a conduct requirement it may give the undertaking an order (an "enforcement order") imposing on it such obligations as the CMA considers appropriate for the purposes of stopping the breach, preventing it from happening again or addressing any damage caused by the breach. The CMA will have power to require a designated undertaking to modify a particular aspect of its conduct, including to reverse a particular course of conduct or action, to cease particular conduct or to require the undertaking to take specific actions to bring its behaviour back in line with its conduct requirements.

490. There is a power for the CMA to consult such persons as it considers appropriate over the enforcement order.

491. There is a need for the CMA to keep under review the possible need to vary or revoke enforcement orders, and also to keep compliance by the designated undertaking with enforcement orders under review.

492. There is a power for the CMA to consult such persons as it considers appropriate over the varied or revoked enforcement order.

Justification for power

493. The CMA needs the ability to make and enforce orders so that it is able to respond quickly and efficiently to any breaches of conduct by a designated

undertaking. This focus on remedying the conduct rather than punishing the undertaking is an important distinction from enforcement under the CA98.

494. Without a means to direct an undertaking back to conduct in line with the conduct requirements, harm will be done. This means consumers and businesses will suffer the negative effects of an undertaking's market power and strategic position that led to certain conduct being proscribed in the first place. This enforcement order utilises detailed empirical investigation and a fair and rigorous process to enforce conduct requirements.

495. Section 33 CA98 provides a precedent for this approach, as does section 161 EA02 read with Schedule 8 to that Act. We prefer the broader drafting approach in section 33 CA98 permitting directions in relation to conduct, and we do not want to use the approach under EA02 where only the remedies available in Schedule 8 can be ordered.

Justification for procedure

496. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can objectively and consistently intervene in the interest of promoting long-term, dynamic competition to the benefit of UK businesses and consumers. This follows the long-standing CMA precedent, which already has the power to order undertakings to implement a similar range of competition remedies when using the CA98 and EA02.

Clause 32(1): Interim enforcement orders

Exercised by: *CMA*

Means of exercise: *Order*

Parliamentary Procedure: *None*

Context and purpose

497. The CMA are empowered to issue Interim Enforcement Orders ("IEOs") to designated undertakings so it can seek to quickly address the immediate harms that may occur from conduct breaches, intervene before irreversible change occurs, and ensure that viable options to restore competitive conditions are maintained.

498. Interim orders can only be issued by the CMA in limited circumstances. These are that the CMA considers that it is appropriate to act on an interim basis:

a. to prevent significant damage to a particular person or category of person,
b. to prevent conduct which might reduce the effectiveness of any other steps the CMA might take in relation to the conduct requirement which it suspects the undertaking has breached or is breaching, or
c. to protect the public interest.

499. Interim enforcement orders can be issued by the CMA with or without notice. The CMA will be able to issue an IEO without notice when the CMA considers that notice would substantially reduce the effectiveness of the order. Although the introduction of interim orders without notice will be rare, the power is needed to make sure that the CMA is able to act upon serious harm quickly.

500. Interim orders can be varied or revoked as required to keep them appropriate. This is to make sure they keep continuing to stop the harm they were introduced to address.

Justification for power

501. The CMA needs the ability to issue interim orders to ensure urgent and harmful breaches of the conduct requirements can be remedied as soon as

possible. The six month statutory deadline for a conduct breach investigation could be too long for some consumers and businesses given the fast-moving nature of digital markets and the speed at which significant harm can materialise. Therefore, the CMA needs to be able to issue interim measures to address immediate harms that arise from breaches of the conduct requirements. Otherwise, some of these harmful behaviours may have irreversible consequences on business, consumers or the market more broadly.

502. Our approach is broadly in line with the approach taken to interim measures under Section 35 CA98 in the context of the CMA's competition regime, but with a few necessary differences. We are not not seeking to mirror the requirements in section 35(2) CA98 for necessity to act as a matter of urgency and we are including the ability for the CMA to issue an IEO without notice. The reason for this is to simplify the legal test and because the need to act urgently will still be a key factor in the CMA's assessment as to whether or not to proceed with an interim order.

Justification for procedure

503. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can objectively and consistently intervene in the interest of promoting long-term, dynamic competition to the benefit of UK businesses and consumers. This follows the long-standing CMA precedent, which already has the power to order undertakings to implement a similar range of competition remedies when using the CA98 and EA02.

Clause 38: A power to adopt the Final Offer Mechanism

Exercised by: CMA

Means of exercise: *Order*

Parliamentary Procedure: *None*

Context and purpose

504. Clause 38 gives the CMA the power to impose use of a Final Offer Mechanism ("FOM") to resolve breaches of conduct requirements relating to complex payment terms. The CMA can use FOM where there has been a breach of a conduct requirement for undertakings to trade on fair and reasonable terms, and a breach of a subsequent enforcement order directing the undertaking to comply with the original conduct requirement. FOM can only be used by the CMA where the exercise of its other functions under the pro-competition regime would not sufficiently address the breach in a reasonable time period.

Justification for power

505. The CMA needs the power to help resolve breaches of conduct requirements relating to complex payment terms. While the CMA will be able to set prices directly, this is likely to be costly, complex, and time-consuming. In these circumstances the CMA will be able to use the party-led Final Offer Mechanism to resolve breaches relating to conduct requirements to deal on fair and reasonable terms without directly setting prices, leading to better outcomes for consumers.

506. This mechanism was first proposed as a sector-neutral tool for the new pro-competition regime in the CMA and Ofcom's advice to the government on platforms and content providers in November 2021.

Justification for procedure

507. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can objectively and consistently intervene in the interest of promoting long-term, dynamic competition to the benefit of UK businesses and consumers.

Clause 46: A power to make a pro-competition intervention

Exercised by: *CMA*

Means of exercise: *Order*

Parliamentary Procedure: *None*

Context and purpose

508. The CMA will have a power to implement Pro-Competition Interventions ("PCIs") where it identifies an adverse effect on competition in a designated digital activity. PCIs will tackle competition concerns related to the entrenched market power of designated undertakings. PCIs can take the form of pro-competition orders, which can include provisions of the kind described in clause 51(1), or recommendations for others to take action using their powers. The Government considers recommendations to be non-legislative as they are not binding on the person the recommendations are addressed to.

509. In order to implement a PCI, the CMA must determine, through a PCI investigation, that there is an adverse effect on competition (AEC) in relation to a designated activity of a designated undertaking. The CMA will then have discretion to design remedies to address that competition harm. Where the CMA implements a PCI to address an AEC, it may also use this power to additionally address any detrimental effects on users or customers that arise from that AEC.

510. The CMA will have a duty to monitor pro-competition orders and to review them periodically to ensure remedies continue to be effective and proportionate. The CMA will also have the power to revoke and replace implemented pro-competition orders in line with its duty to keep pro-competition orders under review .

Justification for power

511. The CMA needs to be able to effectively remedy adverse effects on competition in digital markets upon concluding - through a PCI investigation - that there is an AEC in or relating to a designated activity of a designated undertaking. The PCI tool has been tailored to address the characteristics of digital markets that mean the competition harms that arise are novel,

complex and subject to rapid change. PCIs are based and draw on the CMA's existing regulatory powers to conduct a Market Investigation Reference (MIR) under the markets regime, principally set out in the EA02. The CMA is an expert body with responsibility for using PCIs within the constraints of robust procedural safeguards which will ensure that PCIs are only used when it is appropriate and reasonable.

Justification for procedure

512. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can objectively and consistently intervene in the interest of promoting long-term, dynamic competition to the benefit of UK businesses and consumers. This follows the long-standing CMA precedent, which already has the power to order undertakings to implement a similar range of competition remedies when using the Markets Investigation Reference (MIR) tool. Giving Parliament a role in the administration of the PCI tool would diverge from the UK's internationally-respected approach to competition regulation.

Clause 51(1): PCIs - power to issue directions through pro-competition orders

Exercised by: *CMA*

Means of exercise: *CMA direction power*

Parliamentary Procedure: *None*

Context and purpose

513. In order for the CMA to implement a PCI in a designated undertaking, it must publish an order (a "pro-competition order"), specifying the intervention/s to be implemented by the undertakings. This power is discussed above under clause 46.

514. In addition to the power to make pro-competition orders under clause 46, clause 51 gives the CMA further powers to direct designated undertakings to take or refrain from specified actions in order to ensure compliance with pro-competition orders.

515. This direction power arises from clause 51(1) allowing the CMA to include in an order anything which can be included in an order under section 161 EA02. As a consequence of sections 161 and 164 EA02, the CMA will be able to issue directions as described in section 87 EA02 in respect of compliance with digital markets pro-competition orders.

516. It can be used to ensure that the specific details with which the designated undertaking must comply can be updated more easily following, for example, changes in the market or the adoption of new technology.

517. These subordinate provisions are binding and enforceable in the same manner as an order.

Justification for power

518. In line with the existing markets regime (see above paragraph 427), this power gives the CMA the ability to direct undertakings with SMS to take or refrain from specified actions in order to ensure compliance with pro-competition orders. They are necessary in order to allow the CMA to make directions to the undertaking in order to ensure it complies with an existing pro-competition order in a way that satisfies the CMA's intent, without needing to go through the formal review process.

519. Powers of direction are inherently limited in that they can only set out the actions required in order to comply with an existing pro-competition order - they cannot require anything beyond the scope of the original order. Any changes the CMA wishes to make to the order must be enacted through the pro-competition order review process.

Justification for procedure

520. These powers only enable the CMA to be more specific as to the actions required in order to comply with an existing pro-competition order - they do not enable the CMA to go beyond the order. It would be disproportionate to give Parliament a role in this process.

Clause 60(1): Duty to set out the required form and content of a merger report

Exercised by: *CMA*

Means of exercise: *Notice*

Scrutiny: *None*

Context and purpose

521. Clause 57(1) requires designated undertakings, or, where a designated undertaking is part of a larger corporate group[27], group members, to report certain possible mergers involving them ("reportable events") to the CMA before they take place.

522. Clause 63(1) provides that a designated undertaking or group member with a duty to report a reportable event must not allow the event to take place until a report has been submitted to the CMA and the waiting period in relation to the event has expired. The "waiting period" is defined in clause 63(2) as the period of five working days beginning with the first working day after the day on which the CMA gives the person that made the report a notice confirming that the CMA accepts the report is sufficient. Clause 62(1) requires the CMA to decide whether to accept a report within five working days beginning with the working day after the day on which it receives the report. "Working day" is defined in clause 328.

523. The purpose of the reporting process is to give the CMA sufficient information and time to decide, before a reportable event takes place and harm to competition possibly ensues, whether to investigate and whether to impose interim restrictions on the event under the merger control regime in Part 3 of the EA02.

524. Clause 60(1) and (4) requires the CMA to make and publish online[28] a notice setting out the required form and content of a report. Clause 62(3) prohibits the CMA from rejecting a report if it is in the form and contains the information required by such a notice. Pursuant to clause 60(2), a notice may not require a report to contain information other than information which

[27] See subsection (4) and clause 116.
[28] See clause 113(3).

the CMA considers necessary to allow it to determine whether to investigate a reported event under the merger control regime or whether to make an initial enforcement order ('IEO') under section 72 of the EA02. An IEO may be made by the CMA after it has commenced an initial Phase 1 merger investigation, for the purpose of preventing or reversing pre-emptive action, i.e. action which may prejudice a more in-depth Phase 2 merger investigation or impede the taking of any action which may be justified by such an investigation, or for the purpose of mitigating the effects of pre-emptive action.

525. Clause 60(3) permits the CMA to replace a notice with another notice.

526. Clause 60(5) requires the CMA to consult the Secretary of State and such other persons as it considers appropriate before making or replacing a notice. It may be considered appropriate to consult designated undertakings before making a notice, for example.

527. The exercise of this power is not subject to any parliamentary procedure.

Justification for power

528. The Government considers that delegation of this power to the CMA is justified because the CMA is best placed, as the expert competition regulator, to determine the information it needs, and the form in which it needs that information, to decide whether to investigate a reported event before the expiry of the waiting period. Given the level of detail that would be required, the Government also considers that the required form and content of a report are better suited to being set out in a non-legislative format. In addition, the CMA should have the flexibility to amend the required form and content of a report by notice, if it becomes apparent that more or less information is required in order to make the relevant merger control decisions for example. The requirement for the CMA to consult the Secretary of State and such other persons as it considers appropriate will ensure that relevant views are taken into account.

529. There is a similar power under the merger control regime for the CMA to prescribe the form and content of a merger notice by publishing a notice[29], so the delegation of this power to the CMA also reflects the existing approach under the merger control regime.

Justification for procedure

530. The absence of parliamentary procedure reflects the CMA's status as an independent and expert competition regulator. The Government also considers that there will be adequate safeguards attached to the use of this power, in particular clause 60(2) will not permit the CMA to require information to be included in a report beyond that which it considers necessary for it to decide whether to investigate or to make an IEO, and the CMA will be required to consult before exercising the power.

531. The similar power under the merger control regime for the CMA to prescribe the form and content of a merger notice is also not subject to any parliamentary procedure, so the absence of parliamentary procedure for this power reflects the existing approach under the merger control regime.

[29] See section 96(2) and (5) of the EA02. This power is being amended by clause 132 of the Bill to require a notice to be published online rather than in the Gazettes.

Clause 91: CMA statement of policy: appropriate amount of a penalty

Exercised by: *CMA*

Means of exercise: *Statement of policy*

Scrutiny: *None*

Context and purpose

532. Clause 85 (*Penalties for failure to comply with competition requirements*) gives the CMA the power to impose fixed penalties. Under clause 86 (*Amount of penalties under section 85*) these can be up to 10% of worldwide turnover on designated undertakings for breaches of obligations imposed by the regime and 5% of daily turnover for certain continuing breaches. Clause 87 (*Penalties for failure to comply with investigative requirements*) separately gives the CMA the power to impose penalties on designated undertakings or individuals who do not comply with investigative requirements. Clause 88 (*Amount of penalties under section 86*) sets out that these penalties can be up to 1% of worldwide turnover and 5% of daily turnover for continued non-compliance or, in the case of an individual, a fixed amount of £30,000 in case of a fixed penalty, and £15,000 where calculated by reference to a daily rate.

533. Clause 91 (*Statement of policy on penalties*) places a statutory requirement on the CMA to publish a statement of policy on how penalties will be calculated and that statement is subject to the approval of the Secretary of State. The statement will include more practical details to help undertakings understand under which circumstances penalties will be imposed and how the level of the penalty will be calculated.

Justification for power

534. The statement will set out the basis on which the CMA will calculate penalties for infringements of the SMS regime where it decides to exercise its discretion to impose a penalty under Clauses 85 (*Penalties for failure to comply with competition requirements*) and 87 (*Penalties for failure to comply with investigative requirements*). It is important for undertakings subject to the regime to understand this information and process. This level of detail is not suitable for primary legislation.

535. Delegating this power will ensure undertakings and stakeholders are able to access detailed, up-to-date information on how the penalties will be applied in practice. It also mirrors the statutory obligation on the CMA to publish guidance to the calculation on penalties, contained in section 38 of the CA98, and to publish a statement of policy on penalties, contained in section 174E of the EA02.

Justification for procedure

536. This is consistent with the CA98 and the EA02, which both contain a requirement for the CMA to produce guidance or a statement of policy (respectively) regarding the appropriate amount of a penalty.

537. Guidance under section 38 CA98 is already subject to approval by the Secretary of State, and this Bill is amending section 174E EA02 so that the statement of policy published under that section is subject to approval by the Secretary of State (see clause 142(1) of, and paragraph 29 of Schedule 9 to, this Bill).

Clause 114: Guidance

Exercised by: *CMA*

Means of exercise: *Guidance*

Scrutiny: *None*

Context and purpose

538. The CMA will be under a duty to publish guidance, to set out how it intends to exercise its functions under Part 1, these functions include: designating an undertaking as having SMS; implementing PCIs and conduct requirements; and the use of the Final Offer Mechanism.

539. This clause gives the CMA the power to revise or replace this guidance at any time, and any revised or replacement guidance must then be published. Before publishing guidance (including revised or replacement guidance) the CMA must consult such persons as it considers appropriate and obtain the approval of the Secretary of State.

Justification for power

540. The publication of this guidance will provide clarity for stakeholders regarding how the CMA intends to exercise its functions under Part 1. The regime is new and guidance will be valuable to stakeholders. The power to revise its guidance allows the CMA to modify the guidance as circumstances change. This guidance is explanatory only.

Justification for procedure

541. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can objectively and consistently intervene in the interest of promoting long-term, dynamic competition to the benefit of UK businesses and consumers.

542. The requirement for the CMA to consult appropriate persons when preparing guidance will ensure that the guidance is developed with appropriate external input and properly scrutinised. This approach mirrors existing competition law duties, such as those found in sections 106 and 171 of the EA02.

PART 2 - COMPETITION

Clause 137 and Schedule 8, Paragraph 4: A power to make orders for the purposes of implementation trials

Exercised by: *CMA and Secretary of State*

Means of exercise: *Order*

Parliamentary Procedure: *None*

Context and purpose

543. Where, following an investigation into a market undertaken following a reference made under either section 131 or section 132 EA02, the CMA concludes that there is one or more adverse effects on competition within that market, it has a duty under section 138(2) EA02 to take action by accepting undertakings under section 159 ("enforcement undertakings"), or making orders under section 161 ("enforcement orders") as it considers reasonable and practicable, for the purposes of remedying, mitigating or preventing the adverse effect on competition concerned, and any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition. That action must be taken within 6 months of the publication of the market investigation report (extendable by no more than 4 months where the CMA considers there are special reasons for doing so). The powers to accept undertakings and impose orders are subject to the procedural requirements set out in Schedule 10 to the EA02.

544. Under section 147 EA02, following an investigation into a market undertaken following a restricted public interest reference, the powers to remedy any adverse effects on competition to which an eligible public interest consideration has been decided to be relevant by the Secretary of State, either by accepting undertakings under section 159 or making orders under section 161, rest with the Secretary of State. Similarly, under section 147A EA02, where a full public interest reference has been made and the Secretary of State concludes that there is an effect adverse to the public interest arising, the remedial powers lie with the Secretary of State.

545. The bill inserts new sections 161B to 161E and section 162B which make provision so that where, in any of those cases, the remedial action proposed concerns a "qualifying remedial action" (that is a matter concerning the provision or publication of information to consumers, or another matter specified in regulations made by the Secretary of State) the CMA and Secretary of State will have powers to accept undertakings and make orders under the new section 161C for the purpose of assessing the likely effectiveness of the action, and putting in place provisional remedies to take effect while the trial is ongoing. This will enable the efficacy of remedies to be tested before a decision is made regarding final undertakings to be accepted under section 159 or orders made under section 161 EA02.

546. The bill sets out a procedural framework for the exercise of the new powers, with an obligation for a provisional implementation trial notice to be published and consultation taking place before a final implementation trial notice is published. There is no statutory time limit placed on the duration of an implementation trial. However, the CMA, or Secretary of State (as the case may be) will be required to set out in the notice how long the trial will last for. The CMA will have a duty to monitor the implementation trial measures and review them periodically to ensure that they remain appropriate. The CMA and Secretary of State will also have powers set out in the new section 162B to vary the measures during the trial period.

Justification for power

547. The CMA, and Secretary of State in public interest cases, need to be able to effectively remedy adverse effects on competition. They have existing powers to remedy those adverse effects at the conclusion of a market investigation and the CMA is required to keep the effectiveness of those remedies under review. Some remedies, despite careful planning and consultation in design, do not have the intended and predicted effects on a market. This is particularly the case where consumer response is difficult to predict. In those circumstances, allowing different remedy approaches to be trialled before a remedy package is settled will allow the CMA (and Secretary of State as may be the case) to test remedies where this is appropriate. The CMA is an expert body with responsibility for using orders within the

constraints of robust procedural safeguards, which will ensure that they are only used when it is appropriate and reasonable.

Justification for procedure

548. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can objectively intervene in the interest of promoting long-term, dynamic competition to the benefit of UK businesses and consumers and that the Secretary of State can undertake these functions where necessary in the public interest, in which case there are duties for the CMA to provide advice to support that process appropriately. Giving Parliament a role in the administration of the regime would diverge from the UK's internationally-respected approach to competition regulation.

Clause 138(2): Amendment of existing powers for the Secretary of State to make and vary enforcement orders

Exercised by: *Secretary of State*

Means of exercise: *Order*

Parliamentary Procedure: *None*

Context and purpose

549. Under section 147 EA02, following an investigation into a market undertaken following a restricted public interest reference, the powers to remedy any adverse effects on competition to which an eligible public interest consideration has been decided to be relevant by the Secretary of State, either by accepting undertakings under section 159 or making orders under section 161, rest with the Secretary of State. Similarly, under section 147A EA02, where a full public interest reference has been made and the Secretary of State concludes that there is an effect adverse to the public interest arising, the remedial powers lie with the Secretary of State. There is no statutory time limit on the exercise of the power to accept undertakings or impose orders as there is in relation to the CMA under section 138 EA02. The acceptance of undertakings and making of orders by the Secretary of State is subject to the procedural requirements set out in Schedule 10 to the EA02.

550. The CMA is under a duty to monitor such undertakings and orders and keep under review their carrying out and from time to time consider whether they are being complied with, and whether, by reason of any change in circumstances, they are no longer appropriate and should be varied, or revoked and provide advice to the Secretary of State accordingly. Where such advice is received, under section 161(5) EA02, the Secretary of State may then vary or revoke an enforcement order. However, there is no basis for the Secretary of State to vary an order where the CMA concludes it has been ineffective for the purpose for which it was imposed.

551. Clause 138 makes provision which amends the CMA's powers and duties in relation to undertakings and orders which, following a review of their effectiveness, are found to have been ineffective for the purpose for which

they were accepted or imposed, inserting new section 162A EA02 and make amendments to section 161(5)) concerning the Secretary of State's powers to vary enforcement orders.

552. New section 162A(7) and (8) provides that in a case where the Secretary of State has accepted an undertaking or made an order, and no more than 10 years have elapsed since the report concerning the reference was laid before Parliament, and at least 2 years have elapsed since action was last taken, whether at the end of a the investigation or by exercise of the new power, and the remedies are found to have been ineffective, the CMA will be required to provide advice to the Secretary of State regarding the matter.

553. Clause 138(2) amends section 161(5) EA02 so that the Secretary of State's powers to vary orders are extended to permit variation of enforcement orders following the receipt of such advice. Such variations will be subject to the procedural requirements set out in Schedule 10 to the EA02.

Justification for power

554. In public interest cases, the Secretary of State needs to be able to effectively remedy adverse effects on competition, and effects adverse to the public interest, as the case may be. They have existing powers to remedy those adverse effects at the conclusion of a market investigation and the CMA is required to keep the effectiveness of those remedies under review. Some remedies, despite careful planning and consultation in design, do not have the intended and predicted effects on a market. This is particularly the case where consumer response is difficult to predict. In such circumstances, allowing a limited window in which case the Secretary of State can return to the remedy package, without the need for repeating the entire market investigation with the disruption that causes to a market, is considered a proportionate approach. The Secretary of State will receive advice from the CMA, an expert body, and there are robust procedural safeguards which will ensure that the powers are only used when it is appropriate and reasonable.

Justification for procedure

555. There is no proposed Parliamentary procedure; it is appropriate that the Secretary of State should carry out their functions in public interest cases,

with appropriate advice being received from the independent regulator. Giving Parliament a role in the administration of the regime would diverge from the UK's internationally-respected approach to competition regulation.

Clause 138(4): Amendment of existing powers for the CMA to make and vary enforcement orders following a market investigation reference

Exercised by: *CMA*

Means of exercise: *Order*

Parliamentary Procedure: *None*

Context and purpose

556. Where, following an investigation into a market undertaken following a reference made under either section 131 or section 132 EA02, the CMA concludes that there is one or more adverse effects on competition within that market, it has a duty under section 138(2) EA02 to take action by accepting undertakings under section 159 ("enforcement undertakings"), or making orders under section 161 ("enforcement orders") as it considers reasonable and practicable, for the purposes of remedying, mitigating or preventing the adverse effect on competition concerned, and any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition. That action must be taken within 6 months of the publication of the market investigation report (extendable by no more than 4 months where the CMA considers there are special reasons for doing so). The powers to accept undertakings and impose orders are subject to the procedural requirements set out in Schedule 10 to the EA02.

557. The CMA is under a duty to monitor enforcement undertakings and enforcement orders and keep under review their carrying out and from time to time consider whether they are being complied with, and whether, by reason of any change in circumstances, they are no longer appropriate and should be varied, or revoked. The CMA is also under a duty to keep under review the effectiveness of such enforcement undertakings and enforcement orders and, when requested by the Secretary of State and otherwise from time to time, prepare a report of its findings (section 161(5) and (6) EA02). However, there is no basis on which action may be taken where they are found to be ineffective for the purpose for which they were accepted or imposed.

558. The CMA's powers to vary enforcement undertakings it has accepted and enforcement orders it has made are limited by the provisions in section 162 EA02, to where there has been a change of circumstances.

559. Clause 138(4) inserts new section 162A EA02, which amends the CMA's powers and duties in relation to undertakings and orders which, following a review of their effectiveness, are found to have been ineffective for the purpose for which they were accepted or imposed.

560. New sections 162A(4) and (5) provide that in a case where the CMA has accepted an undertaking or made an order, no more than 10 years have elapsed since the publication of the report at the conclusion of the market investigation, and at least 2 years have elapsed since action was last taken, either at the conclusion of the market investigation or by exercise of the new power, and the remedies are found to have been ineffective, the CMA has a power to take such action as it considers appropriate for the purposes set out in section 138(2), in relation to any possible variation or release of an existing undertaking, any possible new enforcement undertaking to supersede another, any possible variation or revocation of an existing enforcement order, and any possible enforcement undertaking to be accepted instead of an order made by it, or possible enforcement order to be made instead of an enforcement undertaking accepted by it. Such variations will be subject to the procedural requirements for undertakings and orders set out in Schedule 10 to the Enterprise Act 2002.

Justification for power

561. The CMA needs to be able to effectively remedy adverse effects on competition in a manner which is efficient and effective for consumers. Some remedies, despite careful planning and consultation in design, do not have the intended and predicted effects on a market. This is particularly the case where consumer response is difficult to predict.

562. In those circumstances, allowing a limited window in which they can return to the remedy package, without the need for repeating the entire market investigation with the disruption that causes to a market, is considered a proportionate approach. The CMA is an expert body with responsibility for

using orders within the constraints of robust procedural safeguards which will ensure that they are only used when it is appropriate and reasonable.

Justification for procedure

563. There is no proposed Parliamentary procedure; it is appropriate that the CMA should carry out its function as an independent regulator who can objectively intervene in the interest of promoting long-term, dynamic competition to the benefit of UK businesses and consumers. Giving Parliament a role in the administration of the regime would diverge from the UK's internationally-respected approach to competition regulation.

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 10: A delegated power to allow the CMA to issue statutory guidance in relation to the use of its powers under section 40A CA98

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Issuing statutory guidance*

Parliamentary procedure: *None*

Context and purpose

564. Under section 40B CA98, the CMA is required to prepare and publish a statement of policy in relation to the use of its powers to impose administrative penalties under section 40A CA98. The CMA currently has a statement of policy regarding the use of its enforcement powers under the CA98 (section 40A) and the EA02 (sections 94, 94A, 110(1) and (3) and 174) to impose administrative penalties called 'Administrative Penalties: Statement of policy on the CMA's approach' (also known as the CMA4 guidance). In respect of the powers under sections 94 and 94A EA02 concerning the imposition of interim measures in the mergers context, the statement may not be published until the Secretary of State has approved it.

565. In particular, this statement of policy must include a statement about the considerations relevant to the determination of the amount and, in certain circumstances, the nature of any penalty imposed under the above-mentioned sections of the EA02 and CA98.

566. Whilst it is currently the case that it is only in the context of merger interim measures that the statement of policy must be approved by the Secretary of State; Paragraph 10 of Schedule 9 to the Bill amends section 40B to make provision that the CMA must issue guidance in relation to the use of the expanded powers under section 40A and that such guidance be subject to approval by the Secretary of State. The same requirements that currently apply to consult before issuing a statement of policy, and any revised statement, will also apply to the new requirement to issue guidance. It is proposed that the guidance should be required to cover how penalties are set and when such penalties will be applied.

567. New section 40ZE(3) CA98 (inserted by Paragraph 8 of Schedule 9) to the Bill makes provision to ensure that the CMA must have regard to the guidance in force at the time the level of the penalty is set. The CAT must also have regard to this guidance when deciding appeals in relation to penalties imposed by the CMA (by way of new subsection 114(5A) and (12)(b) as inserted by paragraph 20 of Schedule 9, and applied by new section 40ZE(5) of the CA98.

Justification for taking the power

568. The government's view is that it would not be appropriate to have the technical detail necessary to explain how the penalties will be set and the circumstances in which they will apply (including example scenarios of minor breaches whereby the CMA will not ordinarily consider imposing penalties (such as providing information the day after a deadline or missing an inconsequential document when responding to an information notice) in legislation. However, the government considers such information helpful for persons and businesses affected by these penalties and thinks it will assist with the policy implementation of the updated civil sanctions regime. Accordingly, the government thinks it appropriate that this detail is included in statutory guidance.

Justification for the procedure

569. The government's view is that statutory guidance containing technical, practical and operational details does not require parliamentary oversight. There are statutory requirements to consult relevant persons when preparing or revising the guidance (which includes the Secretary of State whose approval must be sought), which will ensure that interested persons are given the chance to provide their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 22: A delegated power to allow the CMA to issue statutory guidance in relation to the use of its powers under section 111 EA02

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Issuing statutory guidance*

Parliamentary procedure: *None*

Context and purpose

570. The legislative context for this power is the same as that set out for the delegated power described above (power for the CMA to issue statutory guidance in relation to the use of its powers under section 40A CA98).

571. Paragraph 22 of Schedule 9 to the Bill amends sections 116 EA02 to make provision such that the CMA is required to get approval from the Secretary of State before publishing the statement of policy under section 116 EA02.

572. Paragraph 15(6) of Schedule 9 to the Bill makes provision to ensure that the CMA must have regard to the guidance in force at the time the level of the penalty is set. The CAT must also have regard to this guidance when deciding appeals in relation to penalties imposed by the CMA or OFCOM (by way of new subsection 114(5A) and (12)(b) as inserted by paragraph 20 of Schedule 9).

Justification for taking the power

573. The government's view is that it would not be appropriate to have the technical detail necessary to explain how the penalties will be set and the circumstances in which they will apply (including examples on scenarios of minor breaches whereby the CMA will not consider ordinarily imposing penalties (such as providing information the day after a deadline or missing an inconsequential document when responding to an information notice) in legislation. However, the government considers such information helpful for persons and businesses affected by these penalties and thinks it will assist with the policy implementation of the updated civil sanctions regime. Accordingly, the government thinks it appropriate that this detail is included in statutory guidance.

Justification for the procedure

574. The government's view is that statutory guidance containing technical, practical and operational details does not require Parliamentary oversight. There are statutory requirements to consult relevant persons when preparing or revising the guidance (which includes the Secretary of State whose approval must be sought), which will ensure that interested persons are given the chance to provide their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

Clause 142(1) (Civil penalties etc in connection with competition matters) and Schedule 9 (Civil penalties etc in connection with competition investigations), Paragraph 29: A delegated power to allow the CMA to issue statutory guidance in relation to the use of its powers under section 174D EA02

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Issuing statutory guidance*

Parliamentary procedure: *None*

Context and purpose

575. The legislative context for this power is the same as that set out for the delegated power described above (power for the CMA to issue statutory guidance in relation to the use of its powers under section 40A CA98 and section111 EA02).

576. Paragraph 29 of Schedule 9 to the Bill amends sections 174E EA02 such that the CMA is required to get approval from the Secretary of State before publishing the statement of policy under section 174E EA02.

577. Section 174A EA02 provides that the CMA must have regard to the guidance in force at the time the level of the penalty is set. The CAT must also have regard to this guidance when deciding appeals in relation to penalties imposed by the CMA (by way of new subsection 114(5A) and (12)(b) as inserted by paragraph 20 of Schedule 9, and applied by new section 174A(10) EA02.

Justification for taking the power

578. The government's view is that it would not be appropriate to have the technical detail necessary to explain how the penalties will be set and the circumstances in which they will apply (including examples on scenarios of minor breaches whereby the CMA will not consider ordinarily imposing penalties (such as providing information the day after a deadline or missing an inconsequential document when responding to an information notice) in legislation. However, the government considers such information helpful for persons and businesses affected by these penalties and thinks it will assist with the policy implementation of the updated civil sanctions regime.

Accordingly, the government thinks it appropriate that this detail is included in statutory guidance.

Justification for the procedure

579. The government's view is that statutory guidance containing technical, practical and operational details does not require Parliamentary oversight. There are statutory requirements to consult relevant persons when preparing or revising the guidance (which includes the Secretary of State whose approval must be sought), which will ensure that interested persons are given the chance to provide their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

Clause 142(2) (Civil penalties etc in connection with competition matters) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 6: A delegated power to allow the CMA to issue statutory guidance in relation to the use of its powers under section 35A CA98 (as inserted by paragraph 6 of Schedule 10)

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Issuing statutory guidance*

Parliamentary procedure: *None*

Context and purpose

580. Paragraph 6 of Schedule 10 inserts provision 35C in the CA98, which requires the CMA to prepare and publish a statement of policy in relation to the exercise of its powers under provision 35A CA98 (as inserted by paragraph 6 of Schedule 10); that is, the imposition of penalties for breach of commitments or directions under the CA98.

581. In particular, this statement of policy must include a statement about the considerations relevant to the determination of the amount and nature of any penalty imposed under provision 35A; and must be approved by the Secretary of State. The CMA must also consult the Secretary of State before issuing a statement of policy, or any revised statement. This is in line with the current approach under section 94A EA02; and the intended approach for administrative penalties in the context of information powers, as detailed above. The CMA is required to have regard to this statement of policy when deciding whether and how to proceed under sections 31E (enforcement of commitments) and section 34 (enforcement of directions) under new subsections 31E(4) and 34(4) (as inserted by Schedule 10 paragraphs 3 and 5); and, when deciding whether and how to proceed under new section 35A (imposition of penalties). The CAT is also required to have regard to this guidance when deciding appeals in relation to penalty decisions made by the CMA (by way of new subsection 114(5A) and (12)(b) EA02 as inserted by paragraph 20 of Schedule 9, and applied by new section 35B(6) of the CA98.

Justification for taking the power

582. The government's view is that it would not be appropriate to have the technical detail necessary to explain how the penalties will be set and the circumstances in which they will apply (including example scenarios of minor breaches whereby the CMA will not ordinarily consider imposing penalties) in legislation. However, the government considers such information helpful for persons and businesses affected by these penalties and thinks it will assist with the policy implementation of the new civil sanctions regime. Accordingly, the government thinks it appropriate that this detail is included in statutory guidance.

Justification for the procedure

583. The government's view is that statutory guidance containing technical, practical and operational details does not require parliamentary oversight. There are statutory requirements to consult relevant persons when preparing or revising the guidance (which includes the Secretary of State whose approval must be sought), which will ensure that interested persons are given the chance to provide their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

Clause 142(2) (Civil penalties etc in connection with competition matters) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 12: A delegated power to allow the CMA to issue statutory guidance in relation to the use of its powers under section 94 AA EA02 (as inserted by paragraph 11 of Schedule 10)

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Issuing statutory guidance*

Parliamentary procedure: *None*

Context and purpose

584. The legislative context for this power is similar to that set out for the delegated power described above (power for the CMA to issue statutory guidance in relation to the use of its powers under section 36A CA98).

585. Paragraph 12 of Schedule 10 amends provision 94B EA02, such that it applies in context of new provision 94AA EA02 (as inserted by paragraph 11 of Schedule 10), i.e., in context of penalties imposed for breaches of enforcement undertakings and orders; instead of just in relation to penalties for breaches of interim measures under section 94A. As before, this statement of policy must include a statement about the considerations relevant to the determination of the amount of any penalty and must be approved by the Secretary of State. The CMA must also consult the Secretary of State before issuing a statement of policy, or any revised statement. The CMA is required to have regard to this statement of policy when deciding whether and how to proceed under new sub-section 94B(10) (right to enforce undertakings and orders) (as inserted by Schedule 10 paragraph 10), and when deciding whether and how to proceed under new section 94 AA (imposition of penalties). The CAT is also required to have regard to this guidance when deciding appeals in relation to penalty decisions made by the CMA (by way of new subsection 114(5A) and (12)(b) as inserted by paragraph 20 of Schedule 9, and applied by new section 94AB(6) EA02.

Justification for taking the power

586. The government's view is that it would not be appropriate to have the technical detail necessary to explain how the penalties will be set and the circumstances in which they will apply (including examples on scenarios of minor breaches whereby the CMA will not consider ordinarily imposing penalties) in legislation. However, the government considers such information helpful for persons and businesses affected by these penalties and thinks it will assist with the policy implementation of the new civil sanctions regime. Accordingly, the government thinks it appropriate that this detail is included in statutory guidance.

Justification for the procedure

587. The government's view is that statutory guidance containing technical, practical and operational details does not require Parliamentary oversight. There are statutory requirements to consult relevant persons when preparing or revising the guidance (which includes the Secretary of State whose approval must be sought), which will ensure that interested persons are given the chance to provide their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

Clause 142(2) (Civil penalties etc in connection with competition matters) and Schedule 10 (Civil penalties etc in connection with breaches of remedies), Paragraph 17: A delegated power to allow the CMA to issue statutory guidance in relation to the use of its powers under section 167A EA02 (as inserted by paragraph 17 of Schedule 10)

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Issuing statutory guidance*

Parliamentary procedure: *None*

Context and purpose

588. The legislative context for this power is the same as that set out for the delegated power described above (power for the CMA to issue statutory guidance in relation to the use of its powers under section 40A CA98 and section 94AA EA02).

589. Paragraph 17 of Schedule 10 inserts provision 167C EA02, such that it applies to the enforcement of the CMA's functions under new provision 167A EA02 (as inserted by paragraph 17 of Schedule 10). As above, this Statement of Policy must include a statement about the considerations relevant to the determination of the amount of any penalty imposed under section 167A, and must be approved by the Secretary of State. The CMA must also consult the Secretary of State before issuing a statement of policy, or any revised statement. The CMA is required to have regard to this statement of policy when deciding whether and how to proceed under new subsection 167(10) (right to enforce undertakings and orders) (as inserted by Schedule 10 paragraph 16); and, when deciding whether and how to proceed under new section 167A (imposition of penalties). The CAT is also required to have regard to this Guidance when deciding appeals in relation to penalty decisions made by the CMA (by way of new subsection 114(5A) and (12)(b) as inserted by paragraph 20 of Schedule 9, and applied by new section 167B(6) .

Justification for taking the power

590. The government's view is that it would not be appropriate to have the technical detail necessary to explain how the penalties will be set and the

circumstances in which they will apply (including examples on scenarios of minor breaches whereby the CMA will not consider ordinarily imposing penalties) in legislation. However, the government considers such information helpful for persons and businesses affected by these penalties and thinks it will assist with the policy implementation of the new civil sanctions regime. Accordingly, the government thinks it appropriate that this detail is included in statutory guidance.

Justification for the procedure

591. The government's view is that statutory guidance containing technical, practical and operational details does not require parliamentary oversight. There are statutory requirements to consult relevant persons when preparing or revising the guidance (which includes the Secretary of State whose approval must be sought), which will ensure that interested persons are given the chance to provide their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

PART 3 - ENFORCEMENT OF CONSUMER PROTECTION LAW

Clause 198(1) (Statement of policy in relation to monetary penalties): Duty on the CMA to prepare and publish a statement of policy in relation to the exercise of its new powers under Chapter 4 of Part 3 to impose civil monetary penalties.

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Competition and Markets Authority*

Parliamentary Procedure: *None*

Context and purpose

592. Chapter 4 of Part 3 of the Bill gives the CMA new powers to impose civil monetary penalties for:

a. breach of undertakings given to the CMA without a reasonable excuse,
b. breach of CMA direct enforcement directions without a reasonable excuse,
c. providing false or misleading information in connection with the carrying out by the CMA of a direct enforcement function without a reasonable excuse, or
d. infringements of certain consumer protection laws.

593. Clause 198(1) (*Statement of policy in relation to monetary penalty*) requires the CMA to prepare and publish a statement of policy in relation to the use of the CMA's new powers to impose civil monetary penalties through the direct enforcement regime provided by Chapter 4 of Part 3 of the Bill.

594. The CMA must have regard to the penalty statement (clause 198(7) (*Statement of policy in relation to monetary penalties*)) that was most recently published at the relevant time when determining whether to impose a penalty and, if so, the nature and amount of the penalty.

595. The purpose of the statement is to provide clarity and transparency for potential enforcement subjects of the factors that the CMA considers are relevant to (i) whether to impose a penalty and the (ii) nature and amount of any penalty.

596. The CMA will be able to decide whether to fulfil this requirement through publication of a new statement or through amending and updating a pre-existing publication.

597. The government intends for the CMA to be able to publish a new or revised statement of policy at any time.

598. However under 198(4) and (5):

a. the CMA must consult the Secretary of State and other appropriate parties when preparing or revising the statement; and
b. the statement, or any revision to it, may not be published without the approval of the Secretary of State.

599. By way of precedent, section 94 and 94A EA02 require the CMA to publish a statement of policy concerning the imposition of penalties. This is subject to approval by the Secretary of State. A statement is also required in relation to the imposition of penalties under section 110 EA02 (required by section 116 EA02) which is not subject to the same requirement of prior approval. In practice both these statements are published in one document.

Justification for the guidance

600. The government considers that the factors relating to whether a penalty will be imposed by the CMA under Chapter 4 of Part 3 and if so, its nature and amount, will be helpful for potential enforcement subjects. The government considers that making these factors public in a statement will also assist with the policy implementation and consistency of the new civil sanctions regime. However, given the nature and likely level of detail of the factors relevant to whether a penalty will be imposed by the CMA under Chapter 4 of Part 3 and if so, its nature and the steps for determining its amount, it is considered more appropriate for such details to be set out in guidance rather than legislation.

601. The government considers that setting out the considerations relevant to whether to impose, and the nature and the amount of, any monetary penalty in a non-statutory statement is appropriate because the factors informing the imposition and amount of penalties are likely to require amendment from

time to time. This will allow the CMA to identify additional factors which in future may be deemed relevant.

Justification for the procedure

602. In line with the position for the equivalent guidance in the context of competition law enforcement (see paras 437, 444, 448, 453, 461, 471 above), the government's view is that the statement does not require Parliamentary oversight. As explained above, the statement will have to be prepared in consultation with appropriate parties and the Secretary of State. This will ensure that interested persons are given the chance to provide their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

Schedule 16 (Investigatory powers), paragraph 2(3) (new paragraph 16F): Duty on the CMA to prepare and publish a statement of policy in relation to the exercise of its new powers under new paragraph 16C of Schedule 5 to the Consumer Rights Act 2015 to impose civil monetary penalties.

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Competition and Markets Authority*

Parliamentary Procedure: *None*

Context and purpose

603. New paragraph 16C inserted into Schedule 5 to the Consumer Rights Act 2015 ("CRA15") gives the CMA new powers to impose civil monetary penalties for non-compliance without reasonable excuse with information requested by notice under paragraph 14 of Schedule 5.

604. New paragraph 16F inserted into Schedule 5 to the CRA15 requires the CMA to prepare and publish a statement of policy in relation to the use of the CMA's new power under paragraph 16C to impose civil monetary penalties.

605. The CMA must have regard to the most recently published penalty statement (new paragraph 16C(9) of Schedule 5 CRA15) when determining whether to impose a penalty and the nature and amount of a penalty for non-compliance with information notices.

606. The purpose of the statement is to provide clarity and transparency for potential enforcement subjects of the factors that the CMA considers are relevant to (i) whether to impose a penalty and the (ii) nature and amount of any penalty.

607. The CMA will be able to decide whether to fulfil this requirement through publication of a new statement or through amending and updating a pre-existing publication.

608. The government intends for the CMA to be able to publish a new or revised statement of policy at any time.

609. However under 16F(4) and (5):

a. the CMA must consult the Secretary of State and other appropriate persons when preparing or revising the statement; and
b. the statement, or any revision to it, may not be published without the approval of the Secretary of State.

610. Please see the entry above for the CMA's duty to publish an equivalent statement under clause 198 for close precedents.

Justification for the guidance

611. The government considers that the factors relating to whether a penalty will be imposed by the CMA under new paragraph 16C and if so, its nature and amount, will be helpful for persons receiving information notices. The government considers that making these factors public in a statement will also assist with the policy implementation and consistency of the new civil sanctions regime. However, given the nature and likely level of detail of the factors relevant to whether a penalty will be imposed by the CMA under paragraph 16C and if so, its nature and the steps for determining its amount, it is considered more appropriate for such details to be set out in guidance rather than legislation.

612. The government considers that setting out the considerations relevant to whether to impose, and the nature and the amount of, any monetary penalty in a non-statutory statement is appropriate because the factors informing the imposition and amount of penalties are likely to require amendment from time to time. This will allow the CMA to identify additional factors which in future may be deemed relevant.

Justification for the procedure

613. In line with the position for the equivalent guidance in the context of competition law enforcements, and the CMA's new powers to impose civil monetary penalties under Chapter 4 of Part 3, the government's view is that the statement does not require Parliamentary oversight. As explained above, the statement will have to be prepared in consultation with appropriate parties and the Secretary of State. This will ensure that interested persons are given the chance to provide their views on the proposed guidance. The

consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

Clause 211 (Guidance): Duty on the CMA to prepare and publish guidance in relation the carrying out of its direct enforcement functions

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Competition and Markets Authority*

Parliamentary Procedure: *None*

Context and purpose

614. Clause 211(1) (*Guidance*) requires the CMA to prepare and publish guidance about its general approach to the carrying out of its new direct enforcement functions.

615. Clause 211(2) (*Guidance*) requires that the guidance must include, in particular, information about the factors that the CMA will take into account when making a decision under Chapter 4 on whether to accept, vary or release undertakings, whether there is a reasonable excuse for a breach in relation to which the CMA is considering the imposition of a civil monetary penalty and in a case where a monetary penalty has not been paid (or paid in full), whether to start proceedings for the recovery of the penalty.

616. Clause 211(3) ensures that the guidance may include other matters in connection with the carrying out by the CMA of its direct enforcement functions.

617. The government intends for the CMA to be able to choose to fulfil this obligation through the publication of the required guidance either as a stand-alone publication or as part of a broader new or revised guidance document.

Justification for the guidance

618. This obligation draws from the existing requirement, under section 31D CA98, on the CMA to prepare and publish guidance as to the circumstances when it may be appropriate to accept "commitments" under section 31A.

619. The government considers that the publication of guidance on the carrying out of the new CMA direct enforcement process will be necessary to provide a greater level of detail and clarity to consumers, traders and third parties

about the operation of that process, and therefore to supplement Chapter 4 of Part 3 of the Bill and the CMA Rules referred to above.

620. The guidance will contain administrative details, factors relevant to the decisions identified above and other matters connected to the carrying out of the CMA's new direct enforcement powers.

621. The government considers that these details and factors are likely to be subject to change. For example, the CMA may wish to in the future update its guidance to specify delay arising from a new global pandemic as a reasonable excuse for non-compliance with a CMA undertaking or direction (HMRC added coronavirus as a reasonable excuse for missing some tax obligations such as payments or filing dates).[30] Secondly, the government anticipates that as a result of the experience gained in the operation of the new CMA direct enforcement process, the CMA may wish to change administrative details, such as precise arrangements to protect confidentiality.

622. The government considers that these changes will be of a detailed, administrative nature, will supplement the Bill and the CMA Rules and are therefore appropriate to be included in guidance rather than secondary or primary legislation.

Justification for the procedure:

623. Clause 211(5) and (6) (*Guidance*) limits the power to issue guidance. Firstly, clause 211(5) (*Guidance*) requires the CMA to consult with the Secretary of State and other appropriate persons before the first issue of the guidance, to ensure that the guidance is subject to the scrutiny of traders, those representing them or other interested parties. This is important in particular to allow those who may be future enforcement subjects or their legal representatives to comment on and contribute to the guidance before first publication.

624. Secondly, clause 211(6) (*Guidance*) requires the CMA to obtain the Secretary of State's approval before publishing the guidance for the first time

[30] Disagree with a tax decision - Reasonable excuses

and to inform the Secretary of State before revising or replacing the guidance.

625. Given these safeguards, the expectation that the guidance will supplement the Bill and the CMA's rules (which are subject to Parliamentary scrutiny) and contain detailed administrative and technical provisions, the government does not consider that the publication of the guidance warrants formal, additional scrutiny by Parliament.

PART 5 - MISCELLANEOUS

Clause 312 (Statement of policy on penalties): A delegated power to allow the CMA to issue statutory guidance in relation to the use of its powers under clause 310 (Penalties for failure to comply with notices under section309 (Power to require information about competition in the market for motor fuel))
Power conferred on: Competition and Markets Authority
Power exercised by: Issuing statutory guidance
Parliamentary procedure: None

Context and purpose

626. Under section 40B CA98, the CMA is required to prepare and publish a statement of policy in relation to the use of its powers to impose administrative penalties under section 40A CA98. The CMA currently has a statement of policy regarding the use of its enforcement powers under the CA98 (section 40A) and the EA02 (sections 94, 94A, 110(1) and (3) and 174) to impose administrative penalties called 'Administrative Penalties: Statement of policy on the CMA's approach' (also known as the CMA4 guidance).

627. Clause 312 (Statement of policy on penalties) includes the same requirement to prepare and publish a statement of policy in relation to the use of its powers to impose administrative penalties under clause 310 (Penalties for failure to comply with notices under section309 (Power to require information about competition in the market for motor fuel)).

628. The clause provides that the CMA must consult with the Secretary of State and such other persons as the CMA considers appropriate when preparing or revising the statement, and that the statement may not be published until the Secretary of State has approved.

629. The CMA must have regard to the guidance in force at the time the level of the penalty is set.

Justification for taking the power

630. The government's view is that it would not be appropriate to have the technical detail necessary to explain how the penalties will be set and the

circumstances in which they will apply (including examples on scenarios of minor breaches whereby the CMA will not consider ordinarily imposing penalties (such as providing information the day after a deadline or missing an inconsequential document when responding to an information notice) in legislation. However, the government considers such information helpful for persons and businesses affected by these penalties and thinks it will assist with the policy implementation of the civil sanctions regime. Accordingly, the government thinks it appropriate that this detail is included in statutory guidance.

Justification for the procedure

631. The government's view is that statutory guidance containing technical, practical and operational details does not require Parliamentary oversight. There are statutory requirements to consult relevant persons when preparing or revising the guidance (which includes the Secretary of State whose approval must be sought), which will ensure that interested persons are given the chance to provide their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of Parliamentary scrutiny.

Clause 320(2) (Authorisation of the provision of investigative assistance): Power of Secretary of State to approve requests for investigative assistance from overseas public authorities

Power conferred on: *Secretary of State*

Power exercised by: *Decision*

Parliamentary Procedure: *None*

Context and purpose

632. Clause 317 (*Provision of investigative assistance to overseas regulators*) creates powers under which specified United Kingdom regulators are able to provide investigative assistance to overseas authorities in connection with the enforcement (whether by civil or criminal investigations or proceedings) of overseas competition law (including digital competition) and consumer law. The assistance which can be provided involves authorities in the United Kingdom using the existing information gathering powers available to them when exercising the corresponding functions in the domestic context.

633. Various safeguards apply to the provision of the assistance by the relevant United Kingdom authorities and the considerations which have to be taken into account in deciding whether to accept a request. In particular, under new clause 320 the approval of the Secretary of State is required before a request for assistance can be accepted unless the assistance is being provided under and in accordance with a "qualifying cooperation arrangement"[31] entered into between the UK and the relevant overseas country. In deciding whether to give approval the Secretary of State is required to have regard to:

a. whether the request is made under an arrangement or agreement to which the UK is a party and, if so, the terms of the relevant arrangement or agreement;
b. whether it would be more appropriate for the investigation or any proceedings which might result from the investigation to be carried out

31 A "qualifying cooperation arrangement" is defined in clause 317 and is in essence an agreement or arrangement relating to cooperation regarding competition and consumer protection enforcement to which the UK is a party and which provides for mutual investigative assistance as between a specified UK regulator and their overseas counterparts.

solely on behalf of a person or body in the United Kingdom or a country or territory other than the country or territory of the requesting authority; and

c. whether providing the assistance would otherwise be contrary to the public interest.

634. As well as having the right to approve individual requests for assistance, the Secretary of State also has the power to make a general decision that requests for specified types of assistance or assistance meeting specified criteria are approved without needing to be individually notified and approved.

635. The Secretary of State is able to make such a decision in respect of categories of requests including, without limitation, those made:

a. under a specified cooperation arrangement;
b. for a specified purpose; or
c. by a specified overseas public authority.

636. The Secretary of State is required to publish any general decision of this kind but not decisions about individual requests.

Justification for taking the power

637. Given the sensitive nature of investigative assistance (i.e., collecting evidence from businesses and individuals in the United Kingdom on behalf of a foreign state), the government considers that provision should be made for appropriate oversight of the use of these powers by public authorities. In addition, therefore, to the considerations which the legislation will require those authorities to take into when deciding whether to accept a request, the government's view is that acceptance should also require approval by the Secretary of State. This approach has parallels in other jurisdictions where authorisation of assistance is required from a Minister or the Attorney General (as, for example, in Australia, Canada and the USA).

638. The requirement for authorisation is dispensed with in cases where the government will be a party to the agreement under which investigative assistance may be requested, as this means that the provision of assistance

and the terms under which it may be provided will have already been approved by government, and as such, this assistance will be subject to the appropriate level of oversight.

Justification for the procedure

639. Parliament will have approved the overall regime for investigative assistance to be provided including the factors which must be taken into account by those making the decisions regarding the acceptance of requests. The government considers that within that context individual and even general approvals being given by decision by the Secretary of State is appropriate. Given the time sensitive nature of requests for assistance and their case specific nature and possibly confidential nature, it would not be appropriate, as well as being a disproportionate use of Parliamentary time, for such approvals to require a statutory instrument.

Clause 322 (Guidance): Duty on the CMA to prepare and publish guidance in connection with investigative assistance

Power conferred on: *Competition and Markets Authority*

Power exercised by: *Issuing statutory guidance*

Parliamentary Procedure: *None*

Context and purpose

640. Clause 322 (*Guidance in connection with investigative assistance*) requires the CMA to prepare and publish guidance about the making and consideration of requests for the provision of investigative assistance under the powers in the Bill and the carrying out of the activities it is authorised to undertake as a result of the approval of such requests.

Justification for the guidance

641. The government considers that the publication of guidance on how requests are to be made and considered and how the CMA expects to use its investigatory powers on behalf of overseas regulators is necessary to provide a greater level of detail and clarity to businesses and overseas regulators themselves about the operation of the process. A parallel can be drawn with the Mutual Legal Assistance guidelines[32] published by the Home Office for obtaining assistance in the investigation of criminal offences.

642. The guidance will also be helpful to other UK regulators given powers to provide investigative assistance under clause 317, such as local trading standards authorities. Under clause 322(6), these bodies are required to have regard to the guidance when exercising their functions under the provisions. This will help to ensure the powers are applied and operated consistently by all the bodies with the new functions.

643. The guidance will contain administrative details, factors relevant to the decisions identified in the clauses, for example, as to what the CMA might consider to be appropriate in different scenarios and other matters connected to the carrying out of the CMA's new powers to provide assistance.

[32] Mutual Legal Assistance Guidelines

644. The government considers that these details and factors are likely to be subject to change. For example, the government anticipates that as a result of the experience gained in the operation of the new powers to assist overseas regulators, the CMA may wish to change administrative details or provide further examples of how they operate in practice.

645. The government considers that these changes will be of a detailed, administrative nature, will supplement the Bill and are therefore appropriate to be included in guidance rather than secondary or primary legislation.

Justification for the procedure

646. Clause 322 (*Guidance in connection with investigative assistance*) limits the power to issue guidance. Firstly, clause 322 provides that the CMA must consult appropriate persons before publishing it to ensure that the guidance is subject to the scrutiny of those who may be affected by it. This is important in particular to allow those who may be future enforcement subjects or their legal representatives to comment on and contribute to the guidance before publication.

647. Secondly, clause 322(3) requires the CMA to obtain the Secretary of State's approval before publishing any guidance. This is particularly important given the Secretary of State's own role in approving requests for assistance.

648. Given these safeguards, the expectation that the guidance will supplement the Bill, which is subject to Parliamentary scrutiny, and contain detailed administrative and technical provisions, the government does not consider that the publication of the guidance warrants formal, additional scrutiny by Parliament.

Clause 324 (Disclosing information overseas): Amendments to existing power under section 243 EA02 for Secretary of State to direct that a disclosure of information overseas must not be made

Power conferred on: *Secretary of State*

Power exercised by: *Directions*

Parliamentary Procedure: *None*

Context and purpose

649. The law on information sharing in relation to competition, consumer and related matters is contained within Part 9 EA02. Section 237(2) EA02 prohibits the disclosure of "specified information" which relates to the affairs of an individual or which relates to any business of an undertaking, during the lifetime of the individual or while the undertaking is in existence, as the case may be, unless one or more of the information sharing gateways contained within Part 9 applies or the information is already lawfully in the public domain. At present under section 243 EA02 public authorities are permitted to disclose specified information to any overseas public authority (as defined in subsection (11)) for the purpose of any criminal investigations or proceedings, or for civil investigations or proceedings that relate to competition, consumer or related matters. Subsection (4) of the section provides that the Secretary of State can prevent disclosure of information overseas if the Secretary of State thinks the proceedings or investigation for which the information has been requested would be more appropriately carried out by authorities in the United Kingdom or in another country. Subsection (5) requires the Secretary of State to take appropriate steps to bring any decision made under subsection (4) to the attention of persons likely to be affected by it.

650. Clause 324 (*Disclosing information overseas*) repeals section 243 and replaces it with a series of new sections which (amongst other things) replace the section 243 gateway with three separate gateways - one (in new section 243A) for international disclosures that facilitate both the functions of the overseas authority in question and the domestic functions of the public authority in the United Kingdom, another (in new section 243B) for international disclosures that facilitate only overseas purposes and a third for

international cooperation agreements or arrangements which have been designated by the Secretary of State by regulations (new section 243C). As part of this amendment the existing provisions in section 243(4) and (5) are re-enacted in new section 243E. Under the new section the power of the Secretary of State to give a direction barring international disclosure applies to overseas disclosure under the gateways in sections 243A and 243B. The direction power does not, however, apply in a case where disclosure is made under an international cooperation agreement or arrangement designated by the Secretary of State (although designated status can be revoked by regulations by the Secretary of State should that be considered necessary and appropriate).

Justification for taking the power

651. The existing provisions of section 243(4) and (5) reserve the right of the Secretary of State to decide that disclosure may not be in the interest of the United Kingdom; for example, in circumstances where an overseas authority requests information that may be more appropriately restricted to an investigation by United Kingdom authorities. The role of the Secretary of State is confined to protecting the legitimate jurisdictional interests of the United Kingdom. It is appropriate that this power should be retained and also extended to cover disclosure of information to an overseas authority under the new gateway in section 243A which allows disclosure for both international and domestic purposes.

652. A very similar power exists under section 18 of the Anti-terrorism, Crime and Security Act 2001.

Justification for the procedure

653. The exercise of this power will not be subject to any Parliamentary procedure. The government considers that this is appropriate given the time sensitive nature of requests for information to be shared and their case specific and possibly confidential nature. It would not be appropriate for directions of this kind to require a statutory instrument. The approach is also consistent with the existing arrangements under section 243 and those under section 18 of the Anti-terrorism, Crime and Security Act 2001. The

Secretary of State is currently able to decide whether it is necessary to protect the legitimate jurisdictional interests of the United Kingdom without recourse to Parliament. Furthermore, the use of this power will be subject to appropriate safeguards in terms of the purposes for which it can be exercised by the Secretary of State as currently set out in section 243(4)(a) and (b).

Annex B: Non-Legislative Powers

The below table lists powers which are considered not to be legislative with an explanation of why this is thought to be the case.

Clause	Power
Part 1: Digital Markets	
Clause 2	A power to designate undertakings with SMS.
Clause 17	Power to apply existing obligations to a new designation and to make transitional provision when designation ends.
Clause 19(1)	A power to impose conduct requirements.
Clause 31(1)	A power to issue an enforcement order for conduct requirements.
Clause 32(1)	A power to issue interim enforcement orders for conduct requirements.
Clause 38	A power to adopt the Final Offer Mechanism.
Clause 46	A power to make a pro-competition intervention.
Clause 51(1)	A power to issue directions through pro-competition orders.
Clause 60(1)	A duty on the CMA to set out the required form and content of a merger report.
Clause 91	A duty on the CMA to prepare and publish a statement of policy in relation to the exercise of its powers to impose a penalty under clauses 76 and 78.
Clause 114	A duty on the CMA to issue guidance relating to the exercise of its functions under Part 1.
Part 2: Competition	
Clause 137 and Schedule 8	A power to make orders for the purposes of implementation trials.
Clause 138(2)	Amendment of existing powers for the Secretary of State to make and vary enforcement orders.
Clause 138(4)	Amendment of existing powers for the CMA to make and vary enforcement orders following a market investigation reference

Clause 142(1) (Civil penalties etc in connection with competition matters), Schedule 9, Paragraph 10.	A duty on the CMA to issue guidance in relation to the use of its powers under section 40A CA98. Note: The CMA is already under a similar duty under existing section 40B CA98. The Bill makes further amendments to this duty.
Clause 142(1), Schedule 9, Paragraph 22.	A duty on the CMA to issue guidance in relation to the use of its powers under section 111 EA02. Note: The CMA is already under a similar duty under existing section 116 EA02. The Bill makes further amendments to this duty.
Clause 142(1), Schedule 9, Paragraph 29.	A duty on the CMA to issue guidance in relation to the use of its powers under section 174D EA02. Note: The CMA is already under a similar duty under existing section 174E EA02. The Bill makes further amendments to this duty.
Clause 142(2), Schedule 10, Paragraph 6	A duty on the CMA to issue guidance in relation to the use of its powers under new section 35A CA98.
Clause 142(2), Schedule 10, Paragraph 12.	A duty on the CMA to issue guidance in relation to the use of its powers under new section 94AA EA02.
Clause 142(2), Schedule 10, Paragraph 17.	A duty on the CMA to issue guidance in relation to the use of its powers under new section 167A EA02.
Part 3: Consumer Enforcement	
Clause 198(1) (statement of policy in relation to monetary penalties)	A duty on the CMA to prepare and publish a statement of policy in relation to the exercise of its new powers under Chapter 4 of Part 3 to impose civil monetary penalties.
Schedule 16 (Investigatory powers), paragraph 2(3)	A duty on the CMA to prepare and publish a statement of policy in relation to the exercise of its new powers under paragraph 16C to impose civil monetary penalties.
Clause 211 (guidance)	A duty on the CMA to prepare and publish guidance in relation to the carrying out of its direct enforcement powers.
Part 4: Consumer Rights	

Clause 294(6)	S of S may determine procedures for application for accreditation as an ADR provider.
Part 5: Miscellaneous	
Clause 312	A duty on the CMA to prepare and publish a statement of policy in relation to the exercise of its new powers under Chapter 1 of Part 5 to impose civil monetary penalties.
Clause 320	A power for the Secretary of State to approve requests for investigative assistance from overseas public authorities.
Clause 322	A duty on the CMA to prepare and publish guidance in connection with investigative assistance.
Clause 324	An amendment to an existing power under section 243 EA02 for the Secretary of State to direct that a disclosure of information overseas must not be made.