DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Bill as brought from the House of Commons on 22 November 2023 (HL Bill 12).

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

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Overview of the Bill

1 The Digital Markets, Competition and Consumers Bill (the "Bill") creates a new regime to increase competition in digital markets by conferring powers and duties on the Competition and Markets Authority ("CMA") to regulate competition in these markets; updates powers to investigate and enforce competition law; updates and enhances powers to investigate and enforce consumer protection law and resolve consumer disputes; and gives consumers protections in respect of unfair commercial practices, subscription traps and prepayments to savings schemes.

2 The Bill is in six Parts and has 27 Schedules. The general arrangement of the Bill is as follows:

Part	**Summary**
Part 1 - Digital Markets, including Schedules 1-2.	• Provides for the designation of undertakings as having strategic market status in respect of a digital activity. • Gives the CMA powers to impose conduct requirements on a designated undertaking and to take steps to promote competition through pro-competition interventions where it finds an adverse effect on competition in respect of a designated activity. • Introduces a duty to report certain possible mergers involving a designated undertaking or larger corporate group. • Introduces a series of investigatory powers and requirements to produce compliance reports in respect of a designated activity. • Provides for enforcement, appeals and administrative matters relating to the CMA's powers and duties under the digital markets regime.
Part 2 - Competition, including Schedules 3-13.	• Amends powers to investigate and enforce against (suspected) infringements of the Competition Act 1998 Chapter I and II prohibitions. • Makes changes to the Enterprise Act 2002 merger jurisdictional thresholds, as well as providing for some procedural changes to merger reviews. • Makes changes to the procedures for market studies and investigations under the Enterprise Act 2002, including provision for a new power to conduct trials of certain remedies to determine their final format. • Amends the CMA's power to require the production of information held electronically and accessible from a premises when acting under a warrant during an investigation under section 192 of the Enterprise Act 2002.

	• Sets out miscellaneous provisions, including with regards to civil penalties and the extra-territorial reach of information notices in connection with competition matters.
Part 3 - Enforcement of Consumer Protection Law, including Schedules 14-18.	• Sets out the infringements that are in scope of the enforcement regimes provided by Part 3. • Replaces, simplifies and enhances the civil, court-based enforcement regime for consumer protection law currently set out in Part 8 of the Enterprise Act 2002. This Part gives the courts powers to make consumer protection orders or for undertakings to be accepted as an alternative to these orders. It also gives the courts new powers to impose monetary penalties. • Gives the CMA new powers in respect of infringements of certain consumer protection laws, breach of undertakings and non-compliance with CMA directions, including powers to impose monetary penalties. • Amends Schedule 5 of the Consumer Rights Act 2015 to enhance the enforceability of statutory information notices given to a person under paragraph 14 of Schedule 5 and to clarify enforcers' ability, during onsite inspections, to access material which is held remotely.
Part 4 - Consumer Rights and Disputes, including Schedules 19-25	• Prohibits unfair commercial practices, replacing the Consumer Protection from Unfair Trading Regulations 2008, subject to transitional provisions. • Imposes duties on traders in relation to subscription contracts, provides rights for consumers if those duties are breached and provides rights for consumers to cancel subscription contracts during cooling-off periods. • Gives protections to consumers in respect of payments to consumer saving scheme contracts. • Prohibits alternative dispute resolution procedures for consumer contracts where the provider is not accredited nor exempt and makes provision for accreditation and exemption, related requirements and enforcement.
Part 5 - Miscellaneous, including Schedules 26-27	• Provide the CMA with new information gathering powers for it to obtain specified information from undertakings involved in or connected with the distribution, supply or retail of motor fuel. • Sets out miscellaneous provisions, including in respect of the provision of investigative assistance to overseas regulators;

	disclosing information overseas; and a duty of expedition on the CMA and sectoral regulators.
Part 6 - General	• Sets out general provisions, including interpretation; financial provision; power to make consequential provision; regulations; extent; commencement; and short title.

3 The Bill was introduced in the House of Commons on 25 April 2023 and had its second reading on 17 May 2023. It was considered by a Public Bill Committee over fourteen sittings between 13 June and 11 July 2023. The Bill was carried over into the fourth parliamentary session on 8 November 2023 and completed Report Stage and Third Reading on 20 November 2023. The Bill was introduced to the House of Lords on 22 November 2023.

Policy background

Digital Markets

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

Expert advice and Market Studies

5 In 2018, the Government established a Digital Competition Expert Panel (the "Panel") to examine competition in digital markets. The Panel issued its final report in March 2019, which recommended the establishment of a digital markets unit equipped with tools and frameworks to support greater competition in digital markets. In March 2020, the Government announced it would accept all six of the report's strategic recommendations and committed to establishing a cross-regulator Digital Markets Taskforce to provide advice on the design and implementation of a competition regime for digital markets. In December 2020, the Digital Markets Taskforce recommended that the Government set up a digital markets unit with powers to designate an undertaking with Strategic Market Status, and that designated undertakings be subject to additional merger control requirements.

6 The CMA agreed with the Panel's recommendation to launch a market study into online platforms and digital advertising. This Market Study was launched in July 2019 and the final report was published in July 2020. The report identified several characteristics of digital markets which can cause them to tip in favour of a small number of firms, including network effects and economies of scale which can act as a barrier to market entry, unequal access to user data, platforms' control over default settings and a lack of transparency around complex decision-making algorithms. In November 2020, the Government responded to the Market Study and committed to establishing and resourcing a new Digital Markets Unit within the CMA from April 2021 to oversee a regime designed to increase competition in digital markets.

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

Digital Markets - public consultation

8 The Government set out its plans for the regime in detail in its public consultation which ran from July to October 2021. The consultation received 105 written submissions, with the majority of respondents signalling strong support for the proposals and a desire for them to be delivered quickly. In May 2022, the Government published its response to the consultation.

The consultation response detailed the final policy positions for the new regime and how they had been developed in line with evidence received during consultation. It confirmed the Government's intention to enshrine the policies in law. The Government's policy is to:

- Empower the CMA to designate undertakings which are very powerful in particular digital activities with Strategic Market Status in relation to those digital activities.
- Ensure that designated undertakings comply with rules (called conduct requirements) on how they treat consumers and other businesses in relation to the activities in which they have been designated. These conduct requirements could prevent a firm ranking its own products more highly in a search result where that harms consumers, for example.
- Give the CMA powers to address proactively the root causes of competition issues in digital markets. It could intervene to impose interoperability obligations on designated undertakings to help new competitors enter the market, for example.
- Require designated undertakings to be more transparent about mergers which pose risks to competition.
- Allow the CMA to enforce obligations on designated undertakings and impose penalties including fines of up to 10 per cent of a firm's global turnover for breaches.
- Empower the CMA to resolve payment-related breaches of conduct requirements to deal on fair and reasonable terms through a backstop enforcement tool called the 'Final Offer Mechanism'.

Competition and Consumer Protection Law

9 Effective cross-economy competition and strong consumer protection are critical features of well-functioning markets. Competition stimulates innovation across the economy and helps to drive productivity growth, ultimately raising living standards. Strong consumer rights play an essential part in fair, free and competitive markets by providing consumers with the information and confidence to choose how and where to spend their money.[1]

10 However, recent evidence suggests that UK competition and consumer law is failing to keep pace with market developments. Overall levels of competition may have declined since the legislative framework was last overhauled in 1998, and further since the 2008 financial crisis.

Establishing priorities for reform

11 In April 2018, the Government published the "Modernising Consumer Markets" Green Paper, which set out its ambition to ensure that modern consumer markets work for all, and included a number of proposals aimed at safeguarding consumer rights, particularly in view of new technology and new business models, whilst strengthening competition.

12 In August 2018, the Secretary of State for Business, Energy and Industrial Strategy asked Lord Tyrie, then Chairman of the CMA, to make proposals on legislative and institutional reforms to safeguard the interests of consumers and to maintain and improve public confidence in markets. Lord Tyrie's response, published in February 2019, indicated that there was scope for

[1] Competition and Markets Authority (2022), State of UK Competition Report 2022

strengthening and updating the UK's competition and consumer law framework, particularly in light of the economic and technological developments of recent years. Lord Tyrie presented a series of proposals intended to focus the work of the CMA more directly on protecting the interests of the consumer, enabling the CMA to intervene earlier and more robustly to tackle consumer detriment and to penalise and deter wrongdoing when it occurs. Lord Tyrie also recommended a suite of measures to make the CMA's work generally more agile and efficient, including a reconsideration of all aspects of the competition regime, complemented by a statutory duty of expedition.

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

Reforming Competition and Consumer policy - public consultation

14 The Government set out its plans for reforming competition and consumer policy in detail in its public consultation which ran from July to October 2021. The consultation covered proposals relating to promoting competition, updating consumer rights and strengthening the enforcement of consumer law.

15 In April 2022, the Government published its response to the consultation. The key policy positions established were to:

- Introduce a rebalanced merger control system, stronger enforcement against anti-competitive conduct and a series of enhancements to the CMA's investigative and enforcement powers.
- Introduce new penalty powers for the civil courts for consumer law breaches and out-of-court (administrative) powers for the CMA to determine and sanction breaches of certain consumer laws.
- Prevent the restriction of consumer choice in relation to subscription contracts.
- Strengthen the quality of alternative dispute resolution arrangements.
- Protect consumer payments to Christmas saving clubs and other similar saving schemes.

16 The Government set out plans for further consumer reforms on price transparency and consumer information in a public consultation which ran from September to October 2023. The consultation included proposals relating to a series of consumer practices, including drip pricing and fake reviews. Additionally, the Government set out options for reforms to package travel in a call for evidence which is running from September to December 2023.

Background to road fuel market study

17 In 2021 to 2022 the price of both petrol and diesel went up by 60 pence per litre, following the Russian invasion of Ukraine. Against this backdrop the then Secretary of State for the Department for Business, Energy and Industrial Strategy requested the Competition and Markets Authority (CMA) carry out an urgent review to consider the health and competition in the road fuel market, geographical factors, and further steps government could take to strengthen competition or increase price transparency for consumers.

18 The CMA reported their urgent review in July 2022 and found that while the retail road fuel market appeared relatively competitive, there were local variations in the price of road fuel, including pricing disparities between urban and rural areas.[2] Following the urgent review, the CMA undertook a 12 month market study to explore whether the retail market has adversely affected consumer interests, and to assess how far weakness in competition might be driving higher retail prices in certain parts of the UK.

19 The CMA published its final report of its market study on 3 July 2023 and found three areas of concern.[3]

- At a national level: competition between fuel retailers has weakened since 2019, due to a decision by the historic price-leaders to take a less aggressive approach to pricing by significantly increasing their internal margins for fuel. This coupled with other retailers maintaining largely passive pricing policies, pricing by reference to local competitors rather than responding promptly to cost movement and/or trying to win market share. As a result, consumers are paying generally higher prices than would otherwise have been the case, with estimated financial impact of an increased average supermarket fuel margin resulting in a combined additional cost of £900 million for consumers of the four supermarket retailers in 2022 alone. In addition, during 2023, competition has been significantly weaker for diesel than petrol.

- At a local level: the national level weakening of competition appears to have affected pricing in different parts of the UK in a similar way. However, longstanding patterns of variable pricing between different local areas remain, meaning that consumers in some areas can pay significantly more for fuel than in others.

- At motorway service areas (MSAs): Competition remains weak between MSA petrol filling stations (PFSs), meaning that consumers without access to fuel cards pay significantly more to buy fuel on the motorway than off it.

20 Given the findings in the CMA market study on the health of competition the CMA recommended that the government introduce a statutory open data scheme for prices in the retail road fuel section. The CMA also recommended that government introduce an ongoing road fuels monitoring function to be housed within an appropriate public body and provide it with information gathering powers. The purpose of this monitoring function will be to provide ongoing scrutiny of prices, consider whether further action may be needed by the

[2] Gov.UK (2022), UK fuel retail market review

[3] Competition and Markets Authority (2023), Supply of Road Fuel in the United Kingdom Market Study: Final Report

Government to protect consumers and to monitor developments in the market, both nationally and locally, as the United Kingdom moves through the net zero transition.

21 The government accepted these recommendations to introduce both a statutory open data scheme for road fuels and an ongoing road fuels monitoring function. Both measures will work in a mutually reinforcing way to increase transparency, empower consumers to find the best prices possible for their road fuel and increase pressure on PFSs to price more competitively.

22 Chapter 1 of Part 5 provides the CMA with information gathering powers to establish a road fuels monitoring function. This will enable the CMA to request specified information from undertakings involved in the distribution, supply or retail of petrol and diesel. The CMA will use the information obtained to provide an ongoing assessment of competition in the retail road fuel market to government and provide advice on the need for further intervention to facilitate competition.

Legal background

Digital Markets

23 The new digital markets regime is a legal framework containing new functions for the CMA to impose ex ante regulation for digital markets. The exercise of these functions in practice will be overseen by the Digital Markets Unit, an administrative unit of the CMA. The regime builds on the UK's existing competition legislative framework, of which key sources of law include the Competition Act 1998, the Enterprise Act 2002 and the Enterprise and Regulatory Reform Act 2013. A fuller legislative history of the existing competition legislative framework appears below in the section about the competition provisions in Part 2 of the Bill.

24 The design of the digital markets regime takes account of the interaction between the new CMA regime and existing functions of other regulators active in digital markets by requiring the CMA to consult those other regulators in certain circumstances where there may be an effect on or in relation to their relevant functions. The relevant functions of other regulators arise under other legislative regimes: the competition functions of the Financial Conduct Authority (in the Financial Services and Markets Act 2000) and the Office of Communications (in the Communications Act 2003); the functions of the Information Commissioner relating to the protection of personal data (under the Data Protection Act 2018 and other enactments); and the functions of the Bank of England relating to its financial stability objective as set out in section 2A of the Bank of England Act 1998.

Competition

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

Regulatory Reform Act 2013, to replace the Office of Fair Trading and the Competition Commission.

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

26 The Competition Act 1998 replaced the Restrictive Practices Court Act 1976, the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the restrictive Trade Practices Act 1977. Part 1 of the Act established two central prohibitions: the Chapter I prohibition against anti-competitive agreements and the Chapter II prohibition against the abuse of a dominant position in a market which came into force on 1 March 2000.

27 Chapter 3 of Part 1 of the Competition Act 1998 makes provision regarding the investigation and enforcement of the prohibitions by the CMA. Amendments to provisions in Chapter 3 were made by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (S.I. 2004/1261) in order to implement EU obligations set out in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and for the alignment of the domestic competition regime with the new European regime. The majority of those amendments came into force on 1 May 2004.

28 Chapter 4 of Part 1 of the Competition Act 1998 deals with both appeals against CMA decisions, which are made to the Competition Appeal Tribunal ("the CAT") and proceedings and settlements in relation to competition law. Private law claims may be pursued for breaches of the infringements and such claims may be made before the courts or the CAT. Amendments to provisions in Chapter 4 were made by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments)(Amendment) Regulations 2017 (S.I. 2017.385) in order to implement in part Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("the Damages Directive") and for the alignment of the domestic competition regime with the provisions in the Damages Directive.

29 Further amendments were made to both Chapters 3 and 4 of Part 1 of the Competition Act 1998 by the Competition (Amendment etc.)(EU Exit) Regulations 2019 (S.I. 2019/93) to correct deficiencies arising as a result of the UK's withdrawal from the European Union and ensure the domestic regime operates on a freestanding basis. These amendments took effect on Implementation Period Completion Day.

30 Part 6 of the Enterprise Act 2002 which came into force on 20 June 2003 makes provision for an offence relating to hard-core cartels. The offence may be committed by individuals who enter into serious cartel arrangements, that is if they agree with one or more other persons to make or implement certain prohibited cartel arrangements in relation to two or more undertakings, namely price fixing, market sharing, bid rigging and limiting output. Part 6 of the Enterprise Act 2002 contains specific provisions regarding investigation of the offence by the CMA and the powers available to it for that purpose. The offence was modified by the Enterprise and Regulatory Reform Act 2013 to remove a requirement that a person must act dishonestly in order to commit the offence, set out particular circumstances in which the offence is not committed and provide defences to the commission of the offence. The amendments further required the CMA to prepare and publish guidance on the principles to

be applied to determine, in any case, whether proceedings for the offence should be instituted. Those amendments came into force on 1 April 2014.

Merger control

31 The UK's merger control regime is set out in Part 3 of the Enterprise Act 2002. This replaced the previous public interest test which applied under the Fair Trading Act 1973, and made provision for decisions to be taken in most cases by an independent competition authority against a competition-based test, with a framework for intervention to be made and decision making to rest with the Secretary of State in cases involving a public interest consideration. As originally enacted, functions of the regulator were divided between the Office of Fair Trading and the Competition Commission; those functions now lie with the CMA.

32 Amendments to Part 3 of the Enterprise Act 2002 were made by the Enterprise and Regulatory Reform Act 2013 in order to introduce statutory time limits and information gathering powers for all parts of the merger review process, introduce a time limited period after a Phase 1 decision where merging parties can offer and negotiate undertakings in lieu of a referral for a more in depth investigation, strengthen the voluntary notification regime by giving the CMA the ability to suspend all integration steps in completed and anticipated mergers, clarify the type and range of measures which the CMA may take to prevent pre-emptive action and introduce financial penalties for breach of CMA interim measures. Those amendments came into force on 1 April 2014.

33 The turnover and share of supply tests set out in Part 3 were amended by the Enterprise Act 2002 (Turnover Test)(Amendment) Order 2018 (S.I. 2018/593) and the Enterprise Act 2002 (Share of Supply Test)(Amendment) Order 2020 (S.I. 2020/763), the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (S.I. 2018/578) and the Enterprise Act 2002 (Share of Supply) (Amendment) Order 2020 (S.I. 2020/748) to create reduced or revised thresholds for businesses active in certain sectors relevant to national security. These amendments were subsequently repealed by the National Security and Investments Act 2021.

34 Further amendments were made to Part 3 of the Enterprise Act 2002 by the Competition (Amendment etc.)(EU Exit) Regulations 2019 (S.I. 2019/93) to correct deficiencies arising as a result of the UK's withdrawal from the European Union and ensure the domestic regime operates on a freestanding basis. These amendments took effect on Implementation Period Completion Day.

Market studies and market investigations

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

36 Amendments to Part 4 made by the Enterprise and Regulatory Reform Act 2013 made provision for the introduction of cross market references, to give the Secretary of State power

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

The concurrency regime

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

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

Information

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

persons, and for the purposes of any criminal investigations or proceedings. It also provided for more limited disclosure to overseas authorities for the purpose of any criminal investigations or proceedings. However, in relation to disclosure overseas for the purpose of civil proceedings, it provided for information to be disclosed only to those public bodies involved in the enforcement of consumer or competition legislation. In addition, competition information obtained under the Financial Services and Markets Act 2000 and certain sensitive commercial information (for example, information connected to market and merger investigations) was expressly excluded from the overseas gateway. Amendments made since Part 9 was enacted include the addition of a gateway for disclosure for the purposes of prescribed civil proceedings by the Companies Act 2006, the removal of the gateway in relation to EU obligations by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/93), and the removal of the restriction on sending overseas information connected to a merger investigation by the National Security and Investment Act 2021. In addition, in particular through the subsequent addition of more enactments, such as legislation relating to the Pubs Code in England and Wales, to Schedule 14 of the Enterprise Act 2002, the range of information covered by the Part 9 gateways has been expanded beyond that obtained in connection with purely competition and consumer protection related functions.

Competition in the retail market for motor fuel

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

Use of damages-based agreements in opt-out collective proceedings

40 This clause responds to the Supreme Court judgment in R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28.[4] It provides that a damages-based agreement is only unenforceable in opt-out collective proceedings before the Competition Appeal Tribunal if the agreement is with a provider of advocacy or litigation services.

Enforcement of Consumer Protection Law

41 Part 3 of the Fair Trading Act 1973 gave the Director General of Fair Trading the power to take action against traders who breached their legal obligations to the detriment of consumers.

42 The Stop Now Orders (E.C. Directive) Regulations 2001, which came into force on 1 June 2001, implemented Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests. The Regulations empowered certain public bodies (including the Director General of Fair Trading) to stop traders infringing listed UK legislation, which implemented specific EU consumer protection laws, where the breach harms the collective interest of consumers ('Community Infringements').

43 Thus this resulted in two similar, but separate, regimes for the public enforcement of consumer protection law: a regime for breach of consumer protection laws of UK origin under Part 3 of the Fair Trading Act 1973 and a regime for Community Infringements under the Stop Now Orders (E.C. Directive) Regulations 2001.

[4] https://www.supremecourt.uk/cases/docs/uksc-2021-0078-judgment.pdf

44 Part 8 of the Enterprise Act 2002 was enacted to provide for a court-based unified enforcement regime for the two categories of Community Infringements and infringements of consumer protection laws of UK origin, where there was harm to the collective interests of consumers (the "enforcement regime"). It replaced Part 3 of FTA 1973 and the Stop Now Orders (EC Directive) Regulations 2001, subject to transitional provisions.

45 Since its coming into force, Part 8 of the Enterprise Act 2002 has been amended many times. In particular:

a) Section 79 and Schedule 7 of the Consumer Rights Act 2015 amended Part 8 to give the civil courts and public enforcers flexibility and powers to provide redress for consumers, to require positive, corrective action by traders and to broaden the extra-territorial extent of Part 8.

b) The Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020/484 implemented certain provisions of Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on co-operation between national authorities responsible for the enforcement of consumer protection laws. In particular, the Regulations added additional EU Directives and Regulations into the scope of the enforcement regime and introduced new concepts of interim and final online interface orders into the enforcement regime.

c) The Consumer Protection (Enforcement) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/203) and the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2020. These gave effect to the implications for the enforcement regime resulting from the decision of the UK to leave the EU. As a result, with effect from 1 January 2021, the category of "Community Infringements" was replaced with "Schedule 13 infringements". The category of "Community Infringements" continues to apply in relation to conduct to the extent that it occurred before 11pm on 31 December 2020.

46 As a result of these changes, there are two categories of infringement to which the enforcement regime set out in Part 8 of the Enterprise Act 2002 applies:

a) domestic infringements (consumer protection laws of UK origin) (section 211 of the Enterprise Act 2002), and

b) Schedule 13 Infringements (formerly Community infringements) (section 212 of the Enterprise Act 2002).

47 There are three categories of enforcer who can use the enforcement regime, although many enforcers feature in more than one category:

a) General enforcers (section 213 (1) of the Enterprise Act 2002). General enforcers can use the enforcement mechanism in respect of any infringement, i.e. both kinds of infringement (domestic and Community infringements);

b) Designated enforcers (enforcers designated by order made under s.213(2) of the Enterprise Act 2002). A number of orders have been made under section 213: the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions)

Order S.I. 2003/1399, the Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order S.I. 2005/917 and the Enterprise Act 2002 (Part 8) (Designation of the Financial Conduct Authority as a Designated Enforcer) Order S.I. 2013/478). These enforcers have all been designated as able to use the enforcement mechanism in relation to any infringement; and

c) Schedule 13 enforcers (section 213 (5A) of the Enterprise Act 2002). These are the enforcers designated under Regulation (EU) 2017/2394 or its predecessor and are able to use the enforcement mechanism in relation to Schedule 13 infringements only.

48 Part 3 of the Bill will replace Part 8 of the Enterprise Act 2002 for conduct which takes place after commencement (subject to the additional transitional provisions made by Schedule 18 and through secondary legislation). It will provide for a single category of infringement instead of the two categories of infringements, described above, which feature in Part 8 of the Enterprise Act 2002. Part 3 also makes additional incidental changes, as well as changes to simplify and consolidate Part 8 of the Enterprise Act 2002 and legislation made under it.

Investigatory powers for consumer protection law enforcement

49 Section 77 and Schedule 5 to the Consumer Rights Act 2015 make provision for the information gathering and investigatory powers of consumer law enforcers. They provide a generic set of powers, which were based on the powers previously set out in Part 4 of the Consumer Protection from Unfair Trading Regulations 2008.

50 There are three main types of investigatory powers:

- the power to send statutory notices to request information;
- the power to purchase products and observe business; and
- the power to gather evidence on premises.

51 Paragraphs 13 to 17 of Part 3 of Schedule 5 to the Consumer Rights Act 2015 provide consumer law enforcers with a power to request information by notice. These paragraphs set out the purposes for which the power can be used, the procedure to be followed when using it and how the power can currently be enforced, as well as limitations on the use of the information obtained.

52 Part 4 of Schedule 5 to the Consumer Rights Act 2015 contains further powers permitting entry to premises, under warrant and without a warrant, and the exercise of a range of powers while on the premises. The powers are only available to domestic enforcers and Schedule 13 enforcers, for specified purposes and on the conditions prescribed. The conditions on which a justice of the peace may issue a warrant include being satisfied of reasonable grounds for believing that on the premises are documents which an enforcement officer could require a person to produce.

53 The powers available to enforcement officers while onsite include power to require the production of, and take copies of, documents, including electronically recorded information. Documents can be seized where required as evidence in proceedings. The production and seizure powers may not be exercised in relation to material protected by legal professional privilege or confidentiality of communications. Furthermore, an enforcement officer may require a person on the premises to access any electronic device in which information may be

stored or from which it may be accessed and (if the person fails to comply) to access such electronic device himself.

54 Currently, the four categories of enforcers with access to the investigatory powers are:

a) domestic enforcers (paragraph 3 of Schedule 5);

b) Schedule 13 enforcers (paragraph 4 of Schedule 5);

c) public designated enforcers (paragraph 5 of Schedule 5); and

d) unfair contract terms enforcers (paragraph 6 of Schedule 5).

55 Many enforcers feature in more than one category, for example, the CMA is a domestic enforcer, Schedule 13 enforcer and unfair contract terms enforcer.

56 Clause 207 and Schedule 16 will amend Schedule 5 to the Consumer Rights Act 2015 to, amongst other changes, enhance the enforceability of statutory information notices given to a person under paragraph 14 of Schedule 5 and to set out the extra-territorial reach of enforcers' powers to request information by notice. The amendments will abolish the legacy categories of Schedule 13 infringements and Schedule 13 enforcers throughout Schedule 5 to the Consumer Rights Act 2015.

Consumer Rights and Disputes

Protection from Unfair Trading

57 Chapter 1 of Part 4 will replace the Consumer Protection from Unfair Trading Regulations 2008 (with some amendments). Part 3 provides for the civil enforcement of Chapter 1 of Part 4 by authorised enforcers in order to prevent harm to the collective interests of consumers.

58 The Consumer Protection from Unfair Trading Regulations 2008 prohibits unfair commercial practices. A commercial practice is unfair if it contravenes the requirements of professional diligence so as to materially distort the behaviour of the average consumer, is a misleading action, misleading omission, aggressive commercial practice or is listed in Schedule 1 to the Regulations. The Consumer Protection from Unfair Trading Regulations 2008 implemented Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. Notwithstanding the repeal of the European Communities Act 1972, the Consumer Protection from Unfair Trading Regulations 2008 continue in force, as a result of section 2 of the European Union (Withdrawal) Act 2018.

59 The Consumer Protection from Unfair Trading Regulations 2008 extend to England and Wales, Scotland and Northern Ireland.

60 The Consumer Protection from Unfair Trading Regulations 2008 can currently be enforced by authorised enforcers through the enforcement mechanism provided by Part 8 of the Enterprise Act 2002 in order to prevent harm to the collective interests of consumers.

Subscription Contracts

61 Chapter 2 of Part 4 provides consumers with significant new rights in relation to subscription contracts and replaces the two main parts of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 on pre-contract information and

cooling-off cancellation rights with tailored provisions applicable to subscription contracts. Chapter 2 aims to create a new regime integrating consumers' key rights under the CCRs with a set of new statutory rights so as to create a consolidated regime for the regulation of subscription contracts in one enactment. These private law rights are directly enforceable by consumers. In addition, Part 3 provides for the public civil enforcement of Chapter 2 of Part 4 by authorised enforcers in order to protect the collective interests of consumers.

62 In these Notes, the term "subscription contract" is used with the meaning given by clause 252. There are several consumer protection enactments and rules of law which are relevant to subscription contracts as a category of consumer contracts, detailed below.

63 Firstly, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("CCRs"). These regulations apply to contracts between traders and consumers (apart from certain excluded contracts) and, in particular:

a) require traders to provide certain pre-contract information to consumers, and do so 'in a clear and comprehensible manner' before the consumer is bound by the contract. By virtue of provisions in Part 1 of the Consumer Rights Act 2015, this statutory pre-contractual information is to be treated as amounting to implied terms of the contract and is therefore legally binding on the trader in the same way as what is said in the contract itself, and

b) provide consumers with cancellation rights to cancel so-called distance or off-premises contracts shortly after entering the contract (sometimes known as cooling-off cancellation rights) without giving any reason or incurring any costs other than those specified.

64 The CCRs implemented most of the provisions of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. Notwithstanding the repeal of the European Communities Act 1972, the CCRs continue in force, as a result of section 2 of the European Union (Withdrawal) Act 2018.

65 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 extend to England and Wales, Scotland and Northern Ireland.

66 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 contain provisions for civil enforcement by the specified enforcement authorities, as well as provision for criminal enforcement of specific requirements relating to the provision to consumers of pre-contract information on cooling-off cancellation rights in the case of off-premises contracts. In addition to these enforcement provisions, the requirements of the CCRs as a whole can currently be enforced by authorised enforcers through the enforcement mechanism provided by Part 8 of the Enterprise Act 2002 in order to prevent harm to the collective interests of consumers.

67 Secondly, the Consumer Protection from Unfair Trading Regulations 2008. These regulations prohibit traders from engaging in unfair business-to-consumer commercial practices which, in particular, include practices which are likely to mislead consumers either by action or omission so as to cause the average consumer to take a different transactional decision. Further background in relation to the Consumer Protection from Unfair Trading Regulations 2008 is set out above.

68 Thirdly, the Consumer Rights Act 2015. Part 1 of the Consumer Rights Act 2015 implies terms into consumer contracts for the supply by traders to consumers of goods, digital content and services, which provide for a range of essential rights under such contracts including rights that the products supplied are of the agreed quality and description. Part 1 further confers on consumers a range of remedies where these rights are breached. Part 1 restricts traders from contracting out of these statutory rights or remedies. Part 2 of the Consumer Rights Act 2015 clarified and consolidated existing consumer legislation on unfair contract terms and notices and provides that terms in consumer contracts which are unfair according to the statutory test are not binding on consumers.

69 Apart from one section, Parts 1 and 2 of the Consumer Rights Act 2015 extend to the whole of the UK.

70 Parts 1 and 2 of the Consumer Rights Act 2015 can currently be enforced by authorised enforcers through the enforcement mechanism provided by Part 8 of the Enterprise Act 2002 in order to prevent harm to the collective interests of consumers. Part 2 and Schedule 3 to the Consumer Rights Act 2015 contain provisions for civil enforcement of Part 2 by the Competition and Markets Authority and other specified regulators.

Insolvency protection for consumer savings schemes

71 In the Government's view, consumer savings schemes are not regulated as deposit-takers and many are not subject to any other direct regulation. There is in general currently no legal obligation on these businesses to take steps to protect consumer payments.

72 Under insolvency law, when such a business becomes insolvent, its remaining assets must be distributed to creditors according to a strict statutory hierarchy. Most of the money will go to those towards the top of the list, such as employees and secured lenders, leaving very little for unsecured creditors such as consumers. Law Commission analysis, produced for the Government in 2016, which reviewed insolvent retailers found that distributions to unsecured creditors were extremely low. If consumers have to rely on receiving a dividend as an unsecured creditor, the return may barely cover the cost of applying for it.

73 Chapter 3 of Part 4 will place a legal obligation on traders who enter into a consumer savings scheme contract to protect payments received from consumers under the contract by way of a trust or insurance, so that the consumer may receive the money back in full, in the event of the trader's insolvency.

74 In addition, Part 3 provides for the civil enforcement of the relevant provisions of Chapter 3 of Part 4 by authorised enforcers in order to protect the collective interests of consumers.

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

75 Chapter 4 of Part 4 will replace the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. In addition, Part 3 provides for the civil enforcement of the relevant provisions of Chapter 4 of Part 4 by authorised enforcers in order to protect the collective interests of consumers.

76 The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (S.I. 2015/542) apply to disputes related to contracts entered into on, or after, 9 July 2015.

77 The Regulations provide for the approval by competent authorities against the criteria in Schedule 3, of persons or bodies who seek to become accredited ADR entities, and ongoing reporting and monitoring of the ADR entities against the criteria. A key aspect of the Regulations is that they establish a largely voluntary system. An ADR provider does not have to be approved under the Regulations to offer ADR services. The key change brought about by Chapter 4 of Part 4 is (subject to exceptions) to make accreditation compulsory.

78 The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 implemented the Alternative Dispute Resolution Directive (2013/11/EU). The Regulations continue in force, as a result of section 2 of the European Union (Withdrawal) Act 2018, subject to amendment by regulation 9 of the Consumer Protection (Amendment etc) (EU Exit) Regulations 2018 (S.I. 2018/1326).

79 The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 extend to England and Wales, Scotland and Northern Ireland.

80 Breaches of the information requirements (under which traders are required to notify consumers about available ADR) are currently enforceable as Schedule 13 infringements under Part 8 of the Enterprise Act 2002.

Territorial extent and application

81 Clause 333 sets out the territorial extent of the Bill, that is the jurisdictions which the Bill forms part of the law of. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect rather than where it forms part of the law. The Digital Markets, Competition and Consumers Bill extends and applies to the whole of the United Kingdom. Repeals and amendments made by the Bill have the same territorial extent as the legislation that they are repealing or amending.

82 The Bill provides for varying degrees of extraterritorial application in different areas and in relation to the different powers and sanctions it contains. Extra territorial application is necessary in order to fulfil the Bill's aim of protecting competition in markets within the UK, and UK consumers, and ensuring the regulators responsible for the enforcement of the relevant regimes have the powers they need to fulfil their functions. Details for particular parts of the Bill are set out below.

- In relation to Part 1 of the Bill, clause 2 gives the CMA the power to designate an undertaking as having Strategic Market Status in respect of a digital activity carried out by that undertaking. An undertaking will only be able to be so designated where the CMA considers that the digital activity is linked to the UK. Clause 4 sets the criteria for assessing whether a digital activity is so linked to the UK.

- Clause 111(1) makes provision so that unless stated otherwise, Part 1 of the Bill applies in relation to persons outside the United Kingdom. Clause 111(2) to (6) make provision regarding the ability to give notices (which include notices requiring the provision of information to the CMA for the purposes of Part 1) under Part 1 to a person outside the UK. Clause 97 sets out limits to the extra-territorial jurisdiction applied in Clause 111.

- In relation to Part 2 of the Bill, clause 118 makes provision which extends the extra-territorial reach of the prohibition against anti-competitive agreements etc., set out at section 2 of the Competition Act 1998 so that it applies to agreements etc. which are likely to have a substantial, immediate and foreseeable effect on trade within the UK, even if such agreements were implemented outside the UK.

- Clause 143 and Schedule 12 make provision which amends the Competition Act 1998 and Enterprise Act 2002 to set out the circumstances in which information notices may be given to persons outside the United Kingdom.

- In relation to Part 3 of the Bill, clause 147 makes provision in relation to relevant infringements, that is infringements which harm the collective interests of consumers, meets the UK connection test, and meets the specified prohibition condition, and which are then in scope for the court-based enforcement regime and new CMA direct enforcement regime set out in Part 3.

- Clause 159 makes provision regarding the persons outside the UK in relation to whom an online interface order may be sought and clause 183 makes provision regarding the powers of the CMA to make an online interface notice in relation to persons outside the UK.

- In relation to Part 4 of the Bill, Clauses 147 to 149 (in Part 3) make provision so that the prohibitions on unfair commercial practices set out in Chapter 1 of Part 4, and the consumer savings protections in Chapter 3 of Part 4, apply to traders outside the UK who target consumers in the UK where the conditions of those provisions are met.
- Clause 273 makes provision so that the new duties on traders and consumer rights in relation to subscription contracts set out in Chapter 2 of Part 4 applies to contracts that apply another law but which have a close connection with the UK.
- Clause 207 and Schedule 16 make provision which amends Schedule 5 to the Consumer Rights Act 2015, including to set out the circumstances in which information notices may be given to persons outside the United Kingdom.

83 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly without the consent of the legislature concerned.

84 The regulation of anti-competitive practices and agreements, abuse of dominant position, monopolies and mergers, and internet services, are reserved across the United Kingdom, and as such the government assesses that Parts 1 and 2 of the Bill are reserved. Elements of the legislation in Part 2 of the Bill interact with devolved competencies, however these do not give rise to the need to seek legislative consent motions from the Devolved Administrations.

85 Parts 3 and 4 of the Bill concern consumer protection and its enforcement. Part 5 contains cross-cutting provisions, elements of which relate to the enforcement of consumer protection. The Government considers that these are not within the legislative competence of the Scottish Parliament or Senedd Cymru.

86 Consumer protection and its enforcement is a transferred matter in Northern Ireland and provisions in Parts 3, 4 and 5 are within the legislative competence of the Northern Ireland Assembly. At present it is not possible for a legislative consent motion to be sought from the Northern Ireland Assembly.

87 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Part 1: Digital Markets

Chapter 1: Overview

Clause 1: Overview

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

Chapter 2: Strategic Market Status

Power to designate undertaking as having SMS

Clause 2: Designation of undertaking

89 This clause gives the CMA the power to designate undertakings (as defined in clause 117) as having strategic market status ("SMS") in respect of a digital activity. Only those undertakings designated with SMS will be subject to the digital markets regime.

90 Subsection (1) provides that the CMA may designate an undertaking as having SMS in respect of a digital activity carried out by the undertaking, where the CMA considers that the criteria listed in paragraphs (a) and (b) are met. These criteria are that the digital activity is linked to the UK (as set out in clause 4) and that the undertaking meets the SMS conditions in respect of the digital activity.

91 Subsection (2) sets out the SMS conditions. The conditions are that the undertaking has, in respect of the digital activity, both substantial and entrenched market power (see clause 5) and a position of strategic significance (see clause 6).

92 Subsection (3) provides that the CMA's power to designate is subject to the turnover condition (in clause 7).

93 Under subsection (4), the CMA may only make a designation after carrying out an SMS investigation in accordance with Chapter 2.

Clause 3: Digital activities

94 This clause sets out what constitutes a digital activity for the purposes of Part 1 of the Bill.

95 Under subsection (1), a digital activity is the provision of a service by means of the internet, the provision of digital content, or any activity which is being carried out for the purposes of providing an internet service or digital content. Digital content is defined in clause 328.

96 Under subsection (1), the provision of a service by means of the internet and the provision of digital content include services and digital content that are purchased and those that are delivered free of charge to users. Examples are social media platforms and e-commerce platforms. Paragraph (b) of subsection (1) does not restrict how digital content should be provided, meaning that the provision of digital content would include digital content, such as software, which is pre-installed on a device.

97 Subsection (2) sets out what "by means of the internet" includes for the purposes of clause 3. It includes services provided by the internet as commonly understood, as well as services provided by a combination of the internet and electronic communication services as defined in section 32(2) of the Communications Act 2003. For example, a service which is partly made available over the internet and partly by routing through the public switched telephone network would count as an internet service. This includes services accessed by a mobile phone application as well as those accessed via an internet web browser.

98 Subsection (3) gives the CMA the power to treat multiple digital activities carried out by a single undertaking as a single digital activity. For different activities to be grouped together, they must either:

a) Have substantially the same or similar purposes; for example, a social media provider offering a number of internet services under different brands with a common function, allowing users, such as advertisers and publishers, to interact and communicate with each other, or

b) Be able to be carried out together to fulfil a specific purpose; for example, services and products that are part of the same supply chain, such as services selling advertisements and the provision of an advertising platform.

99 Subsection (4) sets out that where the CMA is required to give or publish a notice or other document under Part 1 of the Bill, it may describe the digital activity by reference to the nature of that activity, brand names, or a combination of these.

Clause 4: Link to the United Kingdom

100 This clause sets out the ways in which a digital activity could be linked to the UK for the purposes of designation under clause 2(1). At least one of the three criteria set out in paragraphs (a), (b) and (c) must be met.

101 Paragraph (a) refers to the activity having a significant number of UK users ("UK user" being defined in clause 117). For example, provision of a search engine service, with some operations physically located elsewhere, could be linked to the UK if the activity had a significant number of UK users.

102 Paragraph (b) refers to where the undertaking that carries out the digital activity carries on business in the UK in relation to the digital activity.

103 Paragraph (c) refers to circumstances in which the digital activity, or the way in which the undertaking carries on the digital activity, is likely to have an immediate, substantial and foreseeable effect on trade in the UK.

Clause 5: Substantial and entrenched market power

104 This clause requires the CMA to look at a period of at least the next five years when assessing whether an undertaking has substantial and entrenched market power in respect of a digital activity. The underlying policy intent is that the CMA should be satisfied that the undertaking's power and influence in the digital activity is neither small nor transient, based on their consideration of competitive conditions. The intent is also that the CMA should not be prevented from considering past and present market conditions as part of this forward-looking assessment.

105 When carrying out the forward-looking assessment, the CMA must take into account expected or foreseeable developments if the CMA did not designate the undertaking as having SMS in respect of the digital activity to which the investigation relates. For instance, where an undertaking is already designated in respect of a digital activity, the CMA must consider what might happen if that designation and existing regulation relating to that designation (such as conduct requirements, described in Chapter 3 of this Part, or pro-competition interventions, described in Chapter 4 of this Part) were to be revoked; for example, a persistence in the undertaking's power in respect of the digital activity following revocation. Where relevant, this would include consideration of expected or foreseeable future developments from other types of regulation that were not dependent on the designation; for example, conduct requirements relating to a different digital activity, or regulation under a different regime.

106 The CMA must consider whether the expected or foreseeable developments it has identified are capable of affecting the undertaking's conduct in carrying on the digital activity. For example, this could include predicted changes in the wider regulatory landscape, such as intervention by another regulator or the introduction of other legislation.

Clause 6: Position of strategic significance

107 This clause sets out when an undertaking has a position of strategic significance.

108 Subsection (1) sets out four conditions, at least one of which must be met in order for an undertaking to have a position of strategic significance.

109 In paragraph (a), having a position of significant size could refer to the number of users in relation to the relevant digital activity. A position of significant size or scale may also depend on the undertaking's size relative to the digital activity. For example, if the total number of potential users of a digital activity is small (because the activity is relevant to businesses in a particular sector only) but the undertaking captures a large proportion of those users, it could be considered that the undertaking has achieved a position of significant scale in respect of the activity.

110 Paragraph (b) is intended to cover scenarios where the digital activity as carried out by the undertaking plays an important role in the day-to-day business or critical operations of a significant number of other undertakings which would be impacted by the undertaking's conduct of the digital activity. For example, this condition could capture a situation where large numbers of businesses advertise on a search engine to reach their customers or use particular software to carry on their activity.

111 Paragraph (c) is intended to cover circumstances in which the undertaking can use its position in the digital activity to leverage or expand into a range of other activities. For example, an undertaking with substantial and entrenched market power in the sale of operating systems may be able to use this power to bundle other services, such as its own online communication service, with its operating system, making it harder for users to switch.

112 Paragraph (d) is intended to cover scenarios where an undertaking's position enables it to determine or substantially influence how other undertakings operate (that is to say, to set the rules of the game). For example, if a search engine requires its customers to use certain mobile friendly formats to benefit from advantageous distribution, that may have important effects on how mobile webpages are designed across the internet.

113 Subsection (2) gives the Secretary of State the power to vary the conditions set out in subsection (1). Subsection (3) provides that regulations made under subsection (2) are subject to the draft affirmative procedure, see clause 332, subsection (3).

Clause 7: The turnover condition

114 This clause is about the turnover condition.

115 Subsection (1) sets out that the turnover condition must be met for the CMA to be able to designate an undertaking as having SMS in respect of a digital activity.

116 Subsection (2) sets out that the turnover condition is met in relation to an undertaking if the CMA estimates that the undertaking's UK turnover in the relevant period exceeds £1 billion or that its global turnover in the relevant period exceeds £25 billion. Only one of these thresholds needs to be met for the turnover condition to be met. If the undertaking is part of a group (see clause 116), then the turnover of the whole group should be considered. For example, if the undertaking is part of a larger conglomerate, the CMA must estimate the turnover of the larger conglomerate. Where the undertaking or group engages in non-digital activities, the CMA will have to take the turnover from those activities into account (see paragraphs 121 and 122 below).

117 Subsection (3) gives the Secretary of State the power to amend the turnover thresholds in subsection (2). Subsection (4) provides that regulations made under subsection (3) are subject to the draft affirmative procedure, see clause 332, subsection (3).

118 Subsection (5) requires the CMA to keep the thresholds under review and, from time to time, advise the Secretary of State as to whether they are still appropriate.

119 Subsection (6) makes provision about the meaning of the "relevant period" and "relevant turnover". Paragraph (a) sets out that the "relevant period" is either the most recent period of 12 months in respect of which the CMA considers it can estimate the undertaking or group's relevant turnover, or the period of 12 months immediately before that if the CMA estimates that the undertaking's or group's relevant turnover was higher in that earlier period. Paragraph (b) sets out that the "relevant turnover" of the undertaking or group is either the UK turnover or the global turnover of the undertaking or group.

Clause 8: Turnover of an undertaking

120 This clause makes provision about the value of an undertaking's or a group's UK or global turnover in the relevant period for the purposes of the turnover condition.

121 Subsection (2) sets out that the total value of the undertaking's or the group's global turnover in the relevant period is the total value of turnover arising in connection with any of its activities.

122 Subsection (3) sets out that the total value of the undertaking's or the group's UK turnover in the relevant period is the total value of turnover arising in connection with any of its activities and relating to UK customers or UK users.

123 Subsection (4) gives the Secretary of State the power to make regulations providing further detail about how the total value of an undertaking's or a group's UK turnover or global turnover is to be estimated for the purposes of the turnover condition. Under subsection (5(b)), such regulations may confer on the CMA the power to determine certain matters,

including which amounts are to be regarded as comprising the turnover of an undertaking or a group. Subsection (6) provides that regulations made under subsection (4) are subject to the negative procedure.

Procedure

Clause 9: Initial SMS investigations

124 This clause concerns initial SMS investigations.

125 Subsection (1) sets out that the CMA may begin an initial SMS investigation where it has reasonable grounds to consider that it may be able to designate an undertaking in accordance with clause 2.

126 Subsection (2) sets out that an initial SMS investigation is an investigation into whether or not to designate an undertaking in respect of a digital activity in respect of which it is not already designated. This is subject to clause 10(4) in relation to further SMS investigations. Where the CMA considers that the digital activity is similar or connected to a digital activity in respect of which the undertaking is already designated, it may instead begin a further SMS investigation.

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

Clause 10: Further SMS investigations

128 This clause concerns further SMS investigations. Further SMS investigations relate to existing SMS designations in respect of a digital activity.

129 Subsection (1) sets out that the CMA may begin a further SMS investigation in relation to a designation at any time during the designation period.

130 Subsection (2) sets out that the CMA must begin a further SMS investigation no later than nine months before the end of the 5-year designation period if it is not already carrying out a further investigation under subsection (1). This clause will ensure that the CMA reviews all designations before the end of the 5-year designation period; the CMA may also exercise its discretion to begin a further SMS investigation at an earlier stage (see subsection (1)).

131 Subsection (3) sets out the various matters with which further investigations are concerned. A further SMS investigation is an investigation into whether to revoke a designation or to designate an undertaking again in respect of the same digital activity. It is also concerned with whether to make provision under clause 17 in relation to existing obligations.

132 Subsection (4) sets out that a further investigation may also concern whether or not to designate an undertaking in respect of a digital activity that the CMA considers to be similar or connected to the relevant digital activity (as defined in clause 117). This aspect of the investigation would be in addition to the matters listed in subsection (3). Designation in respect of a similar or connected digital activity could be instead of or in addition to the relevant digital activity.

Clause 11: Procedure relating to SMS investigations

133 This clause sets out how the CMA should carry out an SMS investigation. Under clause 117, an SMS investigation means an initial SMS investigation and a further SMS investigation. This clause therefore applies to both types of SMS investigation.

134 Subsection (1) requires the CMA, when beginning an investigation, to give an SMS investigation notice to the undertaking subject to the investigation.

135 Subsection (2) sets out what the SMS investigation notice must cover.

136 Subsection (3) sets out what the statement of the purpose and scope of the investigation must include. The investigation may relate to more than one digital activity.

137 Subsection (4) requires the CMA to give the undertaking a revised version of the SMS investigation notice if it changes its view of the purpose and scope of the investigation.

138 Subsection (5) sets out that as soon as it is able to do so after giving an SMS investigation notice, or a revised version of the notice, the CMA must publish a statement summarising the contents of the notice, and give a copy of the statement to the Financial Conduct Authority, the Office of Communications (Ofcom), the Information Commissioner, the Bank of England and the Prudential Regulation Authority.

Clause 12: Closing an initial SMS investigation without a decision

139 This clause is about the closure of an initial SMS investigation without a decision.

140 Subsection (1) sets out that the CMA may close an initial SMS investigation before and without reaching a final view on whether the undertaking should be designated in respect of a digital activity. This could, for example, cover a situation where the CMA has to prioritise other matters.

141 Subsections (2) to (4) set out that if the CMA decides to close an initial SMS investigation, it must give the undertaking under investigation notice of the closure (including reasons) and also, as soon as it is able to do so, publish a statement summarising the contents of the notice.

Clause 13: Consultation on proposed decision

142 This clause requires the CMA to consult on any decision that it is considering making as a result of an SMS investigation.

143 Subsection (1) requires the CMA to carry out a public consultation and bring it to the attention of such persons as it considers appropriate.

144 Subsection (2) sets out that consultation under subsection (1) may be carried out at the same time as consultation under section 24 on proposed conduct requirements.

145 Clause 113 sets out further procedural requirements relating to consultation under Part 1.

Clause 14: Outcome of SMS investigations

146 This clause sets out what the CMA must do at the end of an SMS investigation.

147 Subsection (1) sets out the decisions that the CMA must make. In the case of an initial investigation (save where it has been closed under clause 12), the CMA must decide whether to designate the undertaking with SMS in respect of a digital activity to which the

investigation relates. In the case of a further SMS investigation, the CMA must make a decision on the matters set out in clause 10(3) and, where relevant, clause 10(4).

148 Subsection (2) requires the CMA to give the undertaking a notice of its decisions on or before the last day of the SMS investigation period, and sets out that the period for the SMS investigation is nine months, beginning with the day on which the SMS investigation notice is given. Subsection (3) provides that if the SMS investigation notice is revised under clause 11, the giving of a revised notice does not change the day on which the SMS investigation period begins. Details of what the notice should contain are set out in clauses 15 and 16 (subsection (3)).

149 Subsection (5) sets out that, as soon as it is able to do so after giving an SMS decision notice, the CMA must publish a statement summarising its contents.

150 Subsection (6) sets out what happens if the CMA does not give an SMS decision notice on or before the last day of the SMS investigation period. In the case of an initial investigation, it is as if the CMA had decided not to designate the undertaking in respect of any digital activity to which the investigation related. In the case of a further investigation, it is as if the CMA had decided to revoke the existing designation with effect from the end of the SMS investigation period.

Clause 15: Notice requirements: decisions to designate

151 This clause sets out requirements for SMS decision notices where the CMA decides to designate an undertaking as having SMS in respect of a digital activity.

152 Subsection (2) sets out what the notice must include. The policy intent is that descriptions do not need to be exhaustive.

153 Subsection (3) gives the CMA the power to update its decision notice if it changes its view of the undertaking or of the digital activity, provided that the undertaking or digital activity remains substantially the same. For example, if a firm changes the brand name of a product in scope of the digital activity, without changing the substance of the underlying activity.

154 Under subsection (4), a revised notice does not affect either the day on which the SMS designation begins, nor anything done by the CMA under its powers under Part 1 in relation to the designated undertaking.

155 Subsection (5) sets out that the CMA must publish a statement summarising the contents of the revised notice. This must be done as soon as it is able to do so after giving the revised notice to the undertaking.

Clause 16: Notice requirements: decisions to revoke a designation

156 This clause sets out requirements for SMS decision notices where the CMA decides to revoke an existing designation as a result of a further SMS investigation.

157 Subsection (2) requires the notice to provide for the revocation to have effect. Revocation may have effect at the end of the day on which the notice is given (under clause 16(2)(a)) or from an earlier date (under clause 16(2)(b)); for example, where the undertaking has already ceased to engage in the relevant digital activity.

158 Subsection (3) sets out what the SMS decision notice must include.

Clause 17: Existing obligations

159 An 'existing obligation' for the purposes of this section is defined in subsection (5), and it is any conduct requirement, enforcement order, final offer order, pro-competition order or commitment, applying at the time when a designation is revoked, or another designation is made, after a further SMS investigation.

160 Subsections (1) and (2) grant the CMA a power to make transitional, transitory or saving provisions when revoking a designation, in respect of an existing obligation to manage the impact of revocation on the obligation's beneficiaries, and in a way that appears fair and reasonable to the CMA. Subsection (3) provides that the CMA's information gathering and enforcement powers in Chapters 6 and 7 in respect of designated undertakings also apply to undertakings still subject to obligations applied under clause 17(1).

161 Subsections (4) and (5) set out that the CMA may continue any existing obligation in respect of a new designation, may modify that obligation in respect of the new designated activity, and may make transitional, transitory or saving provision in respect of that obligation. The digital activity may be the same activity as under the previous designation, or a digital activity that the CMA considers to be similar or connected to the previously designated activity (see clause 10(4)).

162 Subsection (7) sets out that decisions related to existing obligations must be included in the SMS decision notice.

Clause 18: Designation period

163 This clause sets out the length of the SMS designation period.

164 Subsection (2) refers to the circumstances in which the designation period may be extended and in which a designation may be revoked before the end of the designation period.

Chapter 3: Conduct Requirements

Imposition of conduct requirements

Clause 19: Power to impose conduct requirements

165 Subsections (1) and (2) give the CMA power to impose conduct requirements on a designated undertaking and vary existing conduct requirements, by giving a notice to the undertaking. Subsection (4) requires that the notice then be published as soon as reasonably practicable.

166 Subsection (3) explains that conduct requirements are requirements as to how a designated undertaking must behave in relation to the digital activity for which it has been designated.

167 Subsection (5) provides that the CMA may only impose conduct requirements if it considers it proportionate to do so for the purposes of one or more of the following objectives: fair dealing; open choices; and trust and transparency, having regard to what those conduct requirements are intended to achieve.

168 Subsections (6) to (8) set out what the objectives mean. The objectives are for the benefit of users and potential users of the relevant digital activity, meaning they will benefit both those who are interacting, and those who may interact in the future, with the relevant digital activity.

169 The fair dealing objective is about fair treatment of users and potential users, including the ability to interact with the designated undertaking on reasonable terms. Reasonable terms that could be required by a conduct requirement for the purposes of this objective may include, for example, providing a clear appeals process for when a designated undertaking terminates a user's marketplace access.

170 The open choices objective is about enabling free and easy choices for users and potential users between the services and digital content offered by the designated undertaking and those offered by other businesses. An example of conduct that a requirement under this objective could prohibit is a designated undertaking restricting the functionalities of web browsers that compete with its own.

171 The trust and transparency objective is about ensuring that those using or seeking to use the relevant digital activity have the information they need to understand how the activity is provided and that they are able to make informed decisions about their interactions with the designated undertaking.

172 Subsection (9) provides that a conduct requirement must be of a type permitted by clause 20.

173 Subsection (10) provides that the CMA must consider the likely benefits for consumers when imposing conduct requirements. These consumer benefits could arise directly, as a result of the requirement itself, or they may arise indirectly (for example, by creating benefits for a business user of a designated activity, which it may pass on to consumers). Consumer benefits could also arise in the short term and/or longer term (for example, as a result of improved competition).

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

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

Clause 20: Permitted types of conduct requirement

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

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

178 Subsection (2), paragraph (a) refers to requirements to oblige the designated undertaking to trade on fair and reasonable terms. Unfair or unreasonable terms may include requiring users to sign up to terms that would unreasonably limit their legal or proprietary rights or imposing

a price on users that is unfairly high or low. Trade is undefined, and in this context has a broad meaning that includes how the designated undertaking provides the relevant digital activity or otherwise interacts with users and potential users. This type of conduct requirement is relevant even if the designated undertaking is providing a service to users for free, if that is part of the undertaking's trade (for example the service may be monetised so that the undertaking gets the benefit of advertising revenue).

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

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

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

182 Subsection (2), paragraph (e) refers to requirements to oblige the designated undertaking to present to users engaging with the relevant digital activity any options or default settings. This should be done in a way that allows those users to make informed and effective decisions about those options or settings in their own best interests. For example, where the relevant digital activity is a search engine, a designated undertaking could be required to make clear to users that this search engine is the default setting on a particular device and that there are other search engines available, and to ensure that information provided to users on how to switch search engines is clear and understandable.

183 Subsection (3), paragraph (a) refers to requirements to prevent the designated undertaking from applying terms, conditions or policies differently to different users or types of users. Discriminatory policies may include treating users more favourably if they purchase other products from the designated undertaking.

184 Subsection (3), paragraph (b) refers to requirements to prevent the designated undertaking from self-preferencing, i.e. treating its own products or services more favourably than those offered by other businesses.

185 Subsection (3), paragraph (c) refers to requirements to prevent the designated undertaking from carrying out activities in non-designated areas of its business in a way that is likely to materially enhance the undertaking's market power or position of strategic significance in relation to the relevant digital activity. This may include, for example, preventing an undertaking with strategic market status in video streaming from including a default setting

in its search engine which automatically redirects users to the designated undertaking's video streaming service.

186 Subsection (3), paragraph (d) refers to requirements to prevent the designated undertaking from incentivising or requiring the use of its broader services or products alongside the use of the relevant service or digital content in the designated digital activity. This is sometimes referred to as 'typing and bundling', and may include, for example, preventing the designated undertaking from refusing to extend warranty or after-sales services where bundled products are not purchased together.

187 Subsection (3), paragraph (e) refers to requirements to prevent the designated undertaking from restricting the ability of the relevant digital activity offered by the designated undertaking to interact with and communicate with products offered by other undertakings. A designated undertaking could be prevented from, for example, restricting the functionality of certain applications on the designated undertaking's operating system for third party developers.

188 Subsection (3), paragraph (f) refers to requirements to prevent the designated undertaking from restricting whether or how users can access and use the designated digital activity. These restrictions could range from a blanket refusal to grant access to a particular platform to more implicit restrictions such as making access to a platform conditional on unfair terms.

189 Subsection (3), paragraph (g) refers to requirements to prevent the designated undertaking from using data unfairly. This may include, for example, prohibiting the provider of a designated digital marketplace from preventing a third party seller using that marketplace from accessing any data about how users engage with the third party's services or products, or prohibiting the designated digital marketplace provider from using third party sellers' data to develop competing products.

190 Subsection (3), paragraph (h) refers to requirements to prevent the designated undertaking from restricting the ability of their users to use services or digital content provided by other undertakings. This may include, for example, a designated undertaking restricting the functionalities of web browsers that compete with its own when using the designated undertaking's operating system.

191 Subsection (4) contains a delegated power for the Secretary of State to amend by regulation the list of types of permitted conduct requirement and subsection (5) clarifies that amending the list would be subject to the draft affirmative procedure, see clause 332, subsection (3).

Clause 21: Content of notice imposing a conduct requirement

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

Clause 22: Revocation of conduct requirements

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

Clause 23: Transitional provision relating to conduct requirements etc

194 Subsection (1) establishes that the CMA may impose transitional, transitory or saving provisions in relation to imposing, varying or revoking conduct requirements. An example would be if a conduct requirement was imposed as from a particular date, but some allowances were made in relation to certain aspects of that conduct requirement so that they had effect from a later date, to smooth the transition for the benefit of the designated undertaking. The CMA could undertake similar smoothing in relation to the ceasing of a conduct requirement, helping to ensure a smooth market transition for the undertaking and other market participants.

195 Subsection (2) allows the CMA to exercise its digital markets functions in relation to potential and actual breaches of conduct requirements where the conduct requirements are no longer in place. This enables the CMA to investigate and enforce against historic breaches.

Clause 24: Consultation in relation to a conduct requirement

196 This clause imposes a duty on the CMA to consult publicly before imposing, varying or revoking a conduct requirement. The consultation must be brought to the attention of such persons as the CMA considers appropriate.

197 The CMA is only able to impose conduct requirements on a designated undertaking, i.e. after designation of that undertaking with SMS, but subsection (3) provides that the CMA will be allowed to carry out a consultation on proposed conduct requirements before it has made a decision on designation. This makes it possible for the CMA to impose conduct requirements at the same time as issuing a decision on designation or very shortly afterwards.

Clause 25: Duty to keep conduct requirements under review etc

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

Enforcement of conduct requirements

Clause 26: Power to begin a conduct investigation

199 This clause provides when and how the CMA can begin an investigation into a suspected breach of a conduct requirement (a conduct investigation). The CMA can use its investigatory and enforcement powers where a suspected breach has taken place during a period of designation or while transitional provisions under clause 17 are or have been in place.

200 Subsection (1) outlines the threshold that the CMA must meet to open a conduct investigation. The CMA will decide on the basis of available evidence, such as that arising from complaints submitted by third parties or from the CMA's market monitoring, whether it has reasonable grounds to suspect that an undertaking has breached a conduct requirement.

201 Subsection (2) explains that a conduct investigation concerns both whether a breach of the conduct requirements has occurred and, if it has, what action the CMA should take in relation to the breach - for example, the imposition of penalties and/or enforcement orders.

202 Subsections (3) and (4) outline the requirement for the CMA to give a notice to the undertaking about the investigation (a conduct investigation notice) and set out the content required for that notice. A conduct investigation notice marks the start of the investigation and of the statutory conduct investigation period, which is a period of six months (see clause 30(2)), although it can be extended in certain circumstances (see clause 104).

203 Subsection (6) requires that the CMA must, as soon as reasonably practicable after giving a conduct investigation notice, publish a summary of the notice. This is to make those who may be interested aware of the ongoing investigation and could summarise the contents of the notice provided to the relevant designated undertaking, while allowing the CMA to redact some information for confidentiality purposes.

Clause 27: Consideration of representations

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

Clause 28: Closing a conduct investigation without making a finding

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

Clause 29: Countervailing benefits exemption

206 Subsection (1) of this clause provides that the CMA must close a conduct investigation where representations made by the designated undertaking under investigation lead the CMA to consider that overall the conduct results in benefits for users that outweigh the negative consequences for competition. There are similarities with the approach of section 9 of the Competition Act 1998 (agreements exempt from the Chapter 1 prohibition on anti-competitive agreements) and the relevant customer benefit test under section 134(7) of the Enterprise Act 2002.

207 Subsection (2) sets out the criteria for the exemption. The benefits need to be for the users or potential users of the digital activity to which the conduct investigation relates, and must outweigh any actual or potential harm to competition. Some examples of benefits may include protecting user security or privacy, lower prices, higher quality goods or services, or greater innovation in relation to goods or services. It must not be possible to realise the benefits without the conduct. This means the CMA must be satisfied that there is no other reasonable or practical way for the designated undertaking to achieve the same benefits with less anti-competitive effect. The conduct must be proportionate to the benefits, and must not eliminate or prevent effective competition, which means that the outcome must be that which is the least disruptive to competition.

208 Subsection (3) explains that where the exemption applies, the designated undertaking is to be treated as if the CMA had found that it had not breached the relevant conduct requirement.

209 In deciding whether the exemption applies, the CMA can consider evidence submitted by the undertaking under investigation, evidence submitted by third parties and evidence it has gathered itself. However it is incumbent on the designated undertaking to make representations to the CMA to establish that the exemption applies.

Example of a designated undertaking's claim of countervailing benefits

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

Clause 30: Notice of findings

210 This clause outlines that the CMA must give a notice setting out its findings to the undertaking under investigation on or before the last day of the six-month investigation period, and publish a summary of the notice as soon as reasonably practicable after that point. This could summarise the contents of the notice provided to the relevant designated undertaking, while allowing the CMA to redact some information for confidentiality purposes. The CMA is not required to give a notice of findings if it has closed the investigation without making a finding under clause 28, or it has accepted under clause 36 a commitment from the designated undertaking in relation to the behaviour under investigation.

Clause 31: Enforcement orders

211 This clause gives power to the CMA to impose obligations on an undertaking for the purpose of remedying a breach of the conduct requirements, by way of enforcement order. Enforcement orders are a key enforcement tool and sit alongside other means of enforcement set out in Chapter 7. Where a provision refers to an "enforcement order" it is referring to both standard enforcement orders and enforcement orders made on an interim basis ("interim enforcement orders") unless otherwise specified.

212 Subsections (2) and (3) provide that enforcement orders may be varied, and may include transitional, transitory and saving provision.

213 Subsection (4) specifies information that the enforcement order must contain. The enforcement order must specify the breach (or in the case of an interim enforcement order, suspected

breach, see clause 32(2)) to which it relates. Subsection (5) requires that the CMA may consult such persons as it considers appropriate before making or varying an order.

214 Subsection (6) provides that where the CMA wishes to make an enforcement order (other than an interim enforcement order under clause 32) it must do so as soon as is reasonably practicable after giving a notice of the conduct investigation findings under clause 30. This is to make sure that the CMA acts swiftly where it wants to make an enforcement order after finding a breach of conduct requirements has occurred, while also providing it with flexibility to consult on a proposed order under subsection (5) where it considers that is appropriate.

215 Subsection (7) requires that, for reasons of public transparency, as soon as reasonably practicable after giving an undertaking an enforcement order the CMA must publish a statement summarising the order.

216 Subsection (8) enables the CMA to consent to an undertaking doing something that would otherwise constitute a breach of an enforcement order. This is to allow for flexibility in relation to particular circumstances. For example, an interim enforcement order may need to be introduced urgently to prevent immediate harm. The designated undertaking may be able to show that it should be able to continue particular aspects of its conduct which could breach the interim enforcement order, but which will not result in any harm.

Clause 32: Interim enforcement orders

217 This clause gives power to the CMA to make enforcement orders on an interim basis, i.e. interim enforcement orders. Interim enforcement orders can only be made during the breach investigation and in the limited circumstances set out in subsection (1)(b).

218 Subsections (2) to (8) explain the procedural requirements in relation to interim enforcement orders, including that the CMA must give an opportunity for the designated undertaking to make representations before introducing an interim enforcement order unless doing so would substantially reduce the effectiveness of the order.

Clause 33: Duration of enforcement orders

219 This clause makes provision for the coming into force of enforcement orders and interim enforcement orders and the circumstances in which they cease to have effect.

220 Subsection (4) allows the CMA to exercise its functions in relation to potential and actual breaches of enforcement orders where the enforcement orders are no longer in place. This enables the CMA to take action against historic breaches.

Clause 34: Revocation of enforcement orders

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

Clause 35: Duty to keep enforcement orders under review

222 This clause provides that the CMA must keep the enforcement orders and interim enforcement orders it has made under review, including whether to vary or revoke them, and

also the extent to which undertakings are complying with them and whether further enforcement action needs to be taken.

Example of an enforcement order

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

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

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

Example of an enforcement order being varied

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

Commitments relating to conduct requirements

Clause 36: Commitments

223 This clause provides that the CMA can accept binding voluntary commitments from an undertaking during a conduct investigation to bring the investigation to an end. Commitments are a common approach to solving competition issues, with similar provisions in the Competition Act 1998 for suspected breaches of the Chapter 1 and Chapter 2 prohibitions against anti-competitive agreements and abuse of dominant positions (see sections 31A to 31E and Schedule 6A).

224 Subsection (3) provides that when a commitment is accepted by the CMA the undertaking must comply with it and that the CMA may not issue a notice of findings under clause 30 or make an enforcement order. The commitments in effect bring an end to the conduct investigation. Subsection (4) sets out that the CMA can accept a commitment that addresses part of the conduct under investigation while continuing the investigation into other conduct. It also sets out when the CMA can investigate the same behaviour again.

225 Subsections (5) and (6) make provision for the coming into force of commitments and the circumstances in which they cease to have effect. A commitment ceases to have effect when

the first of the following occurs: its terms say it ends, the conduct requirement to which the commitment relates ceases to have effect or the CMA releases the undertaking from the requirement. Using the power contained in clause 17, the CMA may make transitional provision in relation to a commitment when it revokes the relevant designation, or it may continue the commitment where it decides to designate the same, similar or connected activity.

226 Subsection (7) provides that the CMA may accept a variation to a commitment from time to time, provided that the commitment as varied remains appropriate, and subsection (8) enables the CMA to release an undertaking from a commitment.

227 Subsection (9) allows the CMA to exercise its functions in relation to potential and actual breaches of commitments where the commitments are no longer in place. This enables the CMA to take action against historic breaches.

Example of a commitment accepted by the CMA

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

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

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

Clause 37: Duty to keep commitments under review etc

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

Schedule 1: Procedure relating to commitments

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

Final offer mechanism

Clause 38: Power to adopt final offer mechanism

230 This clause provides the CMA with the power to use what is called the "final offer mechanism" (FOM) as a backstop tool to enforce conduct requirements to offer fair and reasonable payment terms.

231 Subsection (1) provides that the CMA can require the designated undertaking and invite a third party to submit what they consider to be fair payment terms for a transaction (their "final offer payment terms"), provided the CMA considers that three conditions are met.

232 The first condition, set out in Subsection (2) requires the transaction to be a transaction in which the designated undertaking would either provide goods or services to the third party, acquire goods or services from the third party or use goods or services belonging to the third party. This includes situations where the parties are re-negotiating terms, or agreeing on new terms where there is an obligation to pay.

233 Subsection (3) sets out the second condition, which is that the designated undertaking has failed to agree fair and reasonable payment terms, and in doing so has breached an enforcement order relating to the breach of a conduct requirement to trade on fair and reasonable terms.

234 Subsection (4) sets out the third condition, which is that the CMA considers that it could not resolve the relevant breach satisfactorily and within a reasonable time period by exercising any of its other functions under the digital markets regime. These other functions could include further conduct requirements or PCIs, or other enforcement action by way of financial penalties, enforcement orders and court orders. The decision to adopt FOM does not preclude the CMA from concurrently exercising any of its other functions.

235 Subsection (5) provides that in subsection (1), "transaction" means not only a potential future transaction, but also the future performance of an ongoing transaction. This specifies that FOM is forward-looking, in the sense that it can apply either in relation to the renegotiation of an existing arrangement, or in relation to a newly established obligation to pay.

236 Subsection (6) provides that the CMA can use its investigatory and enforcement powers where a suspected breach of a Final Offer Order occurred during a period of designation or while transitional provisions under clause 17 are or have been in place.

Clause 39: Collective submissions

237 This clause sets out the situations in which two or more third parties may make a single submission of payment terms that they collectively regard as fair and reasonable during the Final Offer Mechanism (FOM) process. This is known as a collective submission. The provisions set out in this clause do not preclude parties from engaging in collective bargaining at other stages in the enforcement process, within the confines of existing competition law.

238 Subsection (1) clarifies that, where a designated undertaking is involved in a single transaction involving two or more third parties, the CMA will have discretion to invite – but not compel – the third parties in question to submit a single final offer of payment terms as a collective.

a) For multiple parties to be able to submit a single bid, the usual conditions required for FOM (see clause 38) apply, and the CMA must consider that the third parties are able to act jointly when submitting a final offer of payment terms. The CMA is not required to share the reasons behind their decision to allow a collective submission in the final offer initiation notice, but may choose to do so.

239 Subsection (3) allows the CMA to invite two or more third parties to make collective submissions in situations where there are multiple transactions. The third parties can be invited to make a collective submission in relation to the transactions provided that the CMA considers the parties can act jointly and that the same terms as to payment could be applied to all the transactions in question. The 'same terms as to payment' does not necessarily mean the same price applies for all the transactions; it also encompasses scenarios where, for example, a common formula for determining a price could apply to all the transactions.

240 Subsection (4) clarifies the situations in which the provisions in clauses 40-44 apply to all the third parties/transactions subject to FOM, and when they could also apply to a smaller subset of them. This provides in particular for the possibility that some decisions taken by the CMA during the FOM process may not affect all members of a grouped third party.

a) For example, the effect of subsection (4) is that clause 43(3) requires the CMA to give notice to all the grouped third parties if it decides not to issue a final offer order, while clause 40(8) provides that, for the purposes of information gathering, the CMA has discretion to require any one or more of the grouped third parties to provide information.

Clause 40: Final offer mechanism

241 This clause sets out the process the CMA must follow if it decides to use FOM.

242 Subsection (1) requires the CMA to give a notice (the "final offer initiation notice") to the two parties of its decision to use FOM

243 Subsection (2) sets out the information that must be contained in the notice, which includes a description of the enforcement order breach that has triggered FOM.

a) Where multiple breaches of enforcement orders are found, either as a result of one investigation or several separate investigations, the CMA can choose to combine the breaches for the purposes of FOM, where appropriate. The notice must also specify the submission date on or before which final offer payment terms are to be submitted to the CMA.

244 Subsection (3) requires the CMA to publish a statement about the use of FOM in each particular case, and sets out the contents for the statement. The statement must be published as soon as reasonably practicable after the final offer initiation notice is issued. It must specify if the CMA is considering taking any other action to address the underlying cause of the breach which led to the use of FOM. For example, a pro-competition order, instructing a

designated undertaking to provide access for third parties to consumer data held by the undertaking, could also be used to rebalance bargaining power within that digital activity.

245 Subsection (4) provides that, after giving a final offer initiation notice, the CMA can subsequently revise certain details.

a) It can change its view of the transaction or the third party, provided they remain substantially the same; it can update the list of joined or grouped third parties, if those parties are making a collective submission of payment terms; and it can change the date on or before which final offer payment terms need to be submitted to the CMA.

246 Subsection (5) requires the CMA to issue a revised version of the final offer initiation notice to the designated undertaking and the third party. Subsection (6) clarifies that "the third party" refers to the persons who were the joined or grouped third parties before the list was updated and any persons who are being added to the joined or grouped third parties.

247 Subsection (8) sets out the powers that the CMA has for the gathering and sharing of information between the designated undertaking and the third party to ensure that they can each submit well-informed final offer payment terms. Powers include requiring parties to provide information to the CMA, which may in turn be shared with the other party.

Clause 41: Final offers: outcome

248 This clause establishes the processes the CMA must follow with regards to the outcome of FOM. The CMA decides which final offer payment terms are to be given effect for the purposes of the transaction (or any other transaction that is substantially the same). The CMA cannot change the final offer payment terms put forward.

249 Subsection (1) provides that this clause applies if the CMA has decided to use FOM, and at least the designated undertaking or the third party has submitted final offer payment terms to the CMA before the submission date. Here, 'the third party' refers to all the grouped/joined third parties in a scenario where a collective submission was to be made.

250 Subsection (2) requires the CMA to make a final offer order directing which final offer payment terms are to be given effect for the purposes of the transaction (or any other transaction that is substantially the same). This requirement is subject to clause 43(1), which provides that the CMA can decide not to make a final offer order where it has reason to believe there has been a material change in circumstances. If the CMA does make a final offer order, the selected payment terms must be "given effect", or implemented fully for the intended purpose. This means that the CMA will not require certain terms to be included verbatim in the transaction, but rather it will set out the outcome the designated undertaking must achieve in the transaction.

251 The final offer payment terms must also be given effect for the purposes of any other transaction that is "substantially the same" as the initial transaction, in order to prevent parties seeking to avoid the effects of the order for transactions that are, in essence, the same, by changing other terms. In the event that only one party submitted final offer payment terms, the CMA will have to choose those terms.

252 Subsection (3) establishes that the period within which the CMA must make its decision, the "final offer period", is subject to a six-month statutory deadline, beginning with the day on which the final offer initiation notice is given to the parties.

253 Subsection (4) creates a power for the Secretary of State to amend the length of the final offer period. Under subsection (5), this power is subject to the draft affirmative procedure, see clause 332, subsection (3).

Clause 42: Final offer orders: supplementary

254 Subsection (1) provides that a final offer order must impose obligations on the designated undertaking that the CMA considers appropriate to ensure the final offer payment terms it has decided upon are given effect. Subsection (2) sets out the information that the CMA must give to the parties, by notice.

255 Subsection (3) requires the CMA to publish a statement summarising the contents of the final offer order and accompanying notice as soon as is reasonably practicable after the notice is given to the parties. The statement could summarise the contents of the order provided to the relevant designated undertaking, for example by redacting some information for confidentiality purposes.

Clause 43: Decision not to make final offer order

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

257 Subsection (2) provides that, for the purposes of this clause and clause 44(3), a material change of circumstances includes the parties coming to a mutual agreement in relation to payment terms.

258 Subsections (3) to (5) provide that, where the CMA decides not to make a final offer order, it must give a notice to the parties including the reasonable grounds for the belief of the change in circumstances, and must publish a statement summarising the contents of the notice as soon as reasonably practicable after giving the notice.

Clause 44: Duration and revocation of final offer orders

259 This clause sets out when a final offer order comes into effect (subsection (1)) and the circumstances in which it ceases to have effect (subsection (2)). Subsection (3) also gives power to the CMA to revoke a final offer order when the CMA has reasonable grounds to believe there has been a material change in circumstances. Where collective submissions have been made, the CMA can also partially revoke a final offer order, e.g. revoke it in respect of some of the grouped third parties, but not others. A material change in circumstances includes, but is not limited to, the third party (or some of the grouped or joined third parties) coming to their own agreement with the designated undertaking in relation to payment terms (see clause 43(2)). The CMA has power to make transitional, transitory or saving provisions in relation to revocation (or partial revocation) of a final offer order (subsection (6)).

260 The CMA must give a notice to the parties of the decision (including reasons) and publish a summary statement (subsections (4), (5) and (7)).

261 Subsection (8) allows the CMA to exercise its functions in relation to potential and actual breaches of a final offer order where the order is no longer in place. This enables the CMA to take action against historic breaches.

Clause 45: Duty to keep final offer orders under review

262 This clause requires that the CMA keep final offer orders, and compliance with them, under review.

Flowchart of the FOM process

1. A designated undertaking is instructed, as part of its conduct requirements, to offer fair and reasonable payment terms to a third party. (Clauses 19 and 20)
2. The CMA has reason to believe the conduct requirement has been breached, and carries out an investigation, lasting a maximum of six months. (Clause 26)
3. The CMA finds a breach. It makes an enforcement order to bring the undertaking's conduct in line with the requirement. (Clause 31)
4. The CMA finds that the undertaking has breached the enforcement order, and is still not complying with the original conduct requirement. (Clause 38(1))
5. The CMA considers whether using FOM is required in order to address breach in a reasonable timeframe (and the other criteria for its use are met). (Clause 38(2)-(4))
6. Where appropriate, the CMA will also consider whether multiple third parties could be invited to make a collective submission of payment terms. (Clause 39)
7. The CMA refers parties to the mechanism through a notice (a FOM initiation notice). (Clause 40(1))
8. The CMA must state what other actions, if any, it is considering taking to address any underlying factor or combination of factors which contributed to the breach. (Clause 40(3)(b))
9. The CMA facilitates evidence gathering and sharing between the two parties. (Clause 40(8))
10. Both parties then prepare their 'final offer payment terms'. The exact amount of time parties will have to prepare their offers will be set by the CMA. (Clause 40). The CMA must make an order on or before the last day of the "final offer period" of six months. (Clause 41(3)).
11. The CMA must state which party's final offer payment terms are to be included in the transaction, unless there has been a material change in circumstances. (Clause 41)
12. The CMA issues a final offer order to give effect to its decision. (Clause 42(1))
13. The CMA publishes a statement explaining, amongst other details, why the winning bid was successful. (Clause 42(3))
14. Parties will be able to appeal the outcome under judicial review principles, with the Competition Appeal Tribunal (CAT) reviewing the decision to adopt one of the offers. (Clause 103)

263 The various timelines set out in this flowchart are subject to the CMA's power to extend deadlines under the circumstances in clause 104.

Chapter 4: Pro-Competition Interventions

Clause 46: Power to make pro-competition interventions

264 This clause sets out the CMA's power to remedy competition problems it finds in relation to relevant digital activities undertaken by designated undertakings by making "pro-competition interventions" (PCIs), and its power when doing so to address any associated consumer detriment.

265 Subsection (1) empowers the CMA to implement a PCI where it considers doing so would be proportionate to remedy or help remedy an adverse effect on competition.

266 Subsection (2) provides that when deciding what, if any, action to take to address the factor or combination of factors having an adverse effect on competition, the CMA may consider any benefits to UK users and UK customers arising from those factors. The PCI provisions adopt the terms UK users and UK customer, the former term being defined in this Bill and the latter using the customer definition set out in the Enterprise Act 2002.

> Example (1) A consumer benefit in a PCI investigation
>
> The CMA may conduct a PCI investigation into a suspected competition concern in a designated undertaking's designated operating system (OS) for mobile devices. The OS pre-installs and makes the designated undertaking's own web browser the default on mobile devices that are powered by the OS. Users of mobile phones that use this OS rarely take the time to download alternative web browsers, or to set alternatives as the default. This makes it significantly harder for other web browsers to build market share and compete.
>
> To remedy this, during the course of the investigation the CMA may propose a pro-competition order that prohibits the designated undertaking's OS from pre-installing a web browser on mobile phone devices. The designated undertaking, however, may provide evidence that the pre-installed web browser on the device improves the quality of the product for consumers, as it makes setting up the new phone easier and quicker.
>
> If the CMA accepted the evidence and took the view that it was appropriate to preserve the benefit, it could instead propose to introduce a different pro-competition order to preserve this benefit. It may instead propose to require the designated undertaking's OS to present users with a choice screen when setting up a device, with different options for setting the default web browser. This could remedy the competition concern by giving users an active choice in their preferred web browser, whilst preserving the consumer benefits of pre-installed web browsers.

267 Subsection (3) sets out how the CMA can implement a PCI. It can take the form of either - or both - an order imposing requirements on the designated undertaking, and non-binding recommendations to other persons exercising functions of a public nature on steps they should take. Other parties may include the Government or another independent regulator

better placed to act (e.g. by way of statutory powers and expertise). The CMA can also implement a PCI in relation to any part of the designated undertaking's business, where the CMA decides that such requirements or non-binding recommendations would address the competition problem.

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

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

Example (3) A recommendation to another party

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

268 Subsection (4) provides that, while the PCI power primarily empowers the CMA to address an adverse effect on competition, a PCI may additionally make provision to remedy or minimise any related detrimental effects on UK users and UK customers. The CMA may take this detriment into account when deciding which PCI remedy to implement.

269 Subsection (5) defines an adverse effect on competition in the United Kingdom and provides that a factor or combination of factors associated with a designated digital activity causes adverse effects on competition where it prevents, restricts or distorts competition in connection with the relevant digital activity in the United Kingdom. These factors can be related to a designated undertaking's conduct (e.g. self-preferencing behaviour) or factors not caused by the designated undertaking's conduct (e.g. the designated undertaking benefits from network effects resulting from large numbers of users).

Clause 47: Power to begin a PCI investigation etc

270 This clause gives the CMA the power to launch a formal evidence gathering process - a PCI investigation - where it suspects there is a competition problem related to an undertaking's relevant digital activity, and sets out its duties during the investigation. A PCI investigation may relate to one or more designated undertakings and multiple designated digital activities. The CMA will decide whether to open a PCI investigation on the basis of available evidence: this may include that arising from complaints submitted by third parties; evidence, where appropriate, from the CMA's other tools; or from referrals of information from other regulators.

271 Subsection (3) states that the CMA may launch a fresh PCI investigation in respect of a designated undertaking in cases where it had previously made a decision to not implement a PCI in relation to the undertaking for either the same digital activity or the same AEC. This will allow the CMA to take due consideration of any change in circumstances.

Clause 48: Procedure relating to PCI investigations

272 This clause describes how and when the CMA should give notice to the relevant designated undertaking of the initiation of a PCI investigation. The CMA will be under a duty to publish a summary of the PCI notice as soon as it is able to do so.

273 Subsection (2) sets out the information that the PCI investigation notice must include. This includes a description of the CMA's grounds for suspecting that there is an adverse effect on competition and the purpose and scope of the investigation in relation to the designated undertaking and the digital activity.

274 Subsection (3) allows the CMA to update the PCI investigation notice if it has refined its view of the purpose and scope of the investigation, or the activity has changed since the earlier notice was given to the designated undertaking. For example, the CMA could give notice that it is narrowing or extending in a limited way an investigation in relation to the digital activity as a result of its assessment of evidence gathered during the investigation. This may not change the general nature of the scope and purpose of the investigation as a whole and does not change the date on which the investigation begins (see clause 50(3)).

275 Subsection (4) places a duty on the CMA to publish a statement summarising the contents of the investigation notice as soon as practicable following the initiation of the investigation. This notice could summarise the contents of the notice provided to the relevant designated undertaking, for example by redacting some information for confidentiality purposes.

Clause 49: Consultation on proposed PCI decision

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

Clause 50: PCI decision

277 This clause describes the procedure for concluding a PCI investigation. The CMA must notify the designated undertaking of its decision before the end of the PCI investigation period (which is a period of nine months beginning with the day on which the PCI investigation notice is given to the undertaking under clause 48), must publish that decision as soon as possible afterwards, and then has a period of four months in which to consult and issue a pro-competition order(s) if it so chooses. Any recommendations being made in addition or in the alternative to pro-competition orders should also be made within the four-month period.

278 Subsections (6) and (7) set out that the CMA may subsequently decide not to make a pro-competition order after providing notice that it would. The CMA must inform the designated undertaking of this change and publish that notice.

Clause 51: Pro-competition orders

279 This clause provides for the remedies possible as part of a pro-competition order, including an order implemented on a trial basis. The CMA must state in the pro-competition order the date by which it must be reviewed and publish a summary of the order for transparency.

280 Subsection (1) provides that a pro-competition order following a PCI investigation, may implement the same remedies, including directions, that are provided for in Section 161 and Schedule 8 of the Enterprise Act 2002 following a market investigation reference. Schedule 8 of the Enterprise Act 2002 sets out a non-exhaustive list of structural and behavioural remedies that the CMA may implement as an order. These include:

a) General restrictions on conduct e.g. a prohibition on combining user data collected from different activities that the undertaking carries out;

b) General obligations to be performed e.g. a requirement to make a service interoperable with a competitor's;

c) Acquisitions and divisions e.g. a requirement to divest an aspect of the business;

d) Supply and publication of information e.g. a requirement to supply a competitor with user data.

281 Subsection (1), as a consequence of Sections 161 and 164 of the Enterprise Act 2002, allows the CMA to also be able to issue directions of the kind described in Section 87 of the Enterprise Act 2002 in respect to compliance with pro-competition orders.

282 Subsection (2) makes necessary modifications to the wording of Schedule 8 to the Enterprise Act 2002 to achieve this.

283 Subsection (3) and (4) outline that the pro-competition order may require a designated undertaking to trial a remedy or remedies with subsets of, or all of, the designated undertaking's users following a PCI investigation, if it would help the CMA build evidence on an effective PCI remedy made on a non-trial basis. The CMA can choose to trial different remedies at the same time, or trial different versions of the same remedy in order to determine the effective remedy design. By their nature trials will be time-limited.

A trial pro-competition order

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

would therefore vary the PCI trial order to become a long-term pro-competition order, requiring the SMS undertaking to show all UK users that particular choice screen layout.

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

Clause 52: Replacement of pro-competition orders

285 This clause gives the CMA the power to replace a pro-competition order. This allows the CMA to effectively address competition problems identified during a PCI investigation, implementing targeted remedies through the iteration of pro-competition orders. The CMA may trial an intervention, or initially adopt lighter-touch pro-competition orders designed to address the competition problem, before imposing more invasive pro-competition orders where the CMA assesses it is necessary and proportionate to do so.

286 Subsection (1) gives the CMA the power to replace a pro-competition order if it determines that it is appropriate to do so. The CMA will particularly have regard to the impact of the existing pro-competition order on the competition problem (and where relevant the related detriment to UK users or customers), and whether circumstances have changed since the existing order was made in a way which means alternative provision is now appropriate.

287 Subsection (2) makes express provision that pro-competition orders which made provision on a trial basis may be replaced to update the terms and parameters of the trial (e.g. the design of a trial, the length of the trial period), or to convert the trial into a pro-competition order that will address the competition problem on a non-trial basis. In doing so the CMA may have regard to that trial as well as other trials the CMA has conducted, including if that trial was done with a different designated undertaking.

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

288 This clause sets out the provisions for a pro-competition order ceasing to have effect, either by the CMA revoking the order, or by the designated undertaking's relevant digital activity ceasing to be designated with SMS.

289 Subsection (3) sets out that the CMA may revoke a pro-competition order where it considers it appropriate to do so. The CMA must in particular have regard to where there have been changes in circumstances. For example, this could occur if new legislation which affects the carrying out of the pro-competition order were implemented. Clause 54(3) requires the CMA to consult before revoking an order under this subsection.

290 Subsections (4), (5) and (6) set out that the CMA must give notice to the designated undertaking of its decision to revoke a pro-competition order. This includes details of any transitional, transitory or saving provision being made in relation to the revocation. The CMA must publish the notice as soon as possible.

291 Subsection (7) provides that where a pro-competition order is revoked without being replaced, the CMA is not able to subsequently introduce another pro-competition order based on the initial PCI investigation. The CMA would need to carry out a new PCI investigation.

292 Subsection (8) allows the CMA to exercise its digital markets functions in relation to potential and actual breaches of a pro-competition order where the order is no longer in place. This enables the CMA to investigate and enforce against historic breaches.

Clause 54: Consultation

293 This clause requires the CMA to consult publicly on a pro-competition order before imposing it, replacing it, or revoking it (subsections (1) and (3)).

294 Subsection (2) provides an exception to the CMA's duty to consult on a pro-competition order if it consulted on a draft order which is substantially the same as the final order.

295 To facilitate minor amendments from time to time, subsection (4) exempts the CMA of its duty to consult on a pro-competition order where the CMA judges that the replacement order is not materially different to the order it replaces.

Clause 55: Duty to review pro-competition orders etc

296 This clause requires the CMA to monitor the effectiveness of any pro-competition order it makes, whether it is being complied with, and if not whether to take enforcement action.

297 Subsections (1) to (3) set out the CMA's specific duty to include in each pro-competition order a date by which the CMA will conduct a formal review on whether to retain, replace or revoke it. This includes replacement pro-competition orders.

298 Subsection (4) provides that the CMA will additionally be under a general duty to keep pro-competition orders under review. Ongoing monitoring may inform the CMA's decision to conduct a formal review earlier than the date stipulated in the most recent order relating to the PCI.

Clause 56: Commitments

299 This clause gives the CMA the power to accept legally binding proposals ("commitments"), from a designated undertaking to address a possible competition problem that relates to a designated activity of that undertaking.

300 Subsections (2) and (3) outline that the CMA may accept a commitment if it considers that it would usefully address a competition problem; it does not necessarily need to comprehensively address the competition problem in order for the CMA to be able to accept it. Where an investigation has begun and commitments have been accepted, the CMA may choose to reduce the scope of the PCI investigation set out in the opening notice, or to close the investigation without making a PCI decision.

301 Subsection (5) provides that where the CMA accepts a commitment then this does not prevent the CMA continuing a PCI investigation in relation to other conduct from the designated undertaking. In addition, the CMA is able to start a new PCI investigation into the conduct related to the commitment if the CMA judges that there has been a change of circumstances following acceptance of the commitment, where the CMA has reasons to believe the designated undertaking has not complied with the commitment or where the CMA suspects that information that led to the acceptance of the commitment was false or misleading.

302 Subsection (6) makes provision for the coming into force of commitments.

303 Subsection (7) makes provision for the circumstances in which they cease to have effect. A commitment ceases to have effect when the first of the following events occurs: its terms say it ends, the SMS designation to which the commitment relates ceases to have effect or the CMA releases the undertaking from the commitment. Using the power contained in clause 17, the CMA may make a transitional provision for a commitment when it revokes the relevant SMS designation, or it may continue the commitment where it decides to designate the same, similar or connected activity.

304 Subsection (8) requires the CMA to comply with the procedural provisions in clauses 36 and 37 concerning the review, amendment and release of commitments in respect of PCI commitments. These are the same provisions and requirements set out for conduct requirements (see clause 36).

Chapter 5: Mergers

305 Chapter 5 (Mergers) is concerned with imposing a duty on designated undertakings (or, where a designated undertaking is part of a larger corporate group, the whole group) to report certain possible mergers involving them to the CMA before they take place. It also requires designated undertakings (or, where there is a larger corporate group, the members of the group) not to allow a reported possible merger to take place until the report has been accepted as sufficient by the CMA and then a period of five working days has elapsed. The purpose of these requirements is to ensure that the CMA is made aware of anticipated mergers involving designated undertakings (or larger corporate groups) that will be harmful to competition in the UK, and to give the CMA sufficient information and time to decide, before a reported possible merger takes place, whether to open an investigation into the possible merger under the merger control regime set out in Part 3 of the Enterprise Act 2002, and whether to impose restrictions on the possible merger (such as a block on the integration of the enterprises involved) while an investigation is ongoing, through an initial enforcement order under section 72 of that Act.

Clause 57: Duty to report possible mergers etc

306 This clause sets out the circumstances in which designated undertakings, or where a designated undertaking is part of a larger corporate group (see clause 116), group members, will have a duty to report a possible merger involving them (a "reportable event") to the CMA before it takes place.

307 There are two categories of reportable event. The first category is concerned with designated undertakings (or larger corporate groups collectively) reaching (whether through the acquisition of shares or voting rights or otherwise) certain percentage thresholds of the shares or voting rights held in certain bodies corporate with links to the UK. The second category is concerned with designated undertakings (or one or more members of a larger corporate group) forming certain joint venture vehicles (bodies corporate formed with an unconnected party or parties for the purpose of working together) that are intended or expected to have certain links to the UK. A minimum value requirement also applies in relation to the consideration provided by the designated undertaking (or larger corporate group collectively) for the relevant shares or voting rights, or in relation to the formation of the joint venture vehicle. The purpose of the reporting criteria is to target the "relevant merger situations"

within the investigative jurisdiction of the CMA under the merger control regime that are most likely to raise competition concerns in the UK.

308 Subsection (2) sets out the first category of reportable event: those that result in a designated undertaking or (by virtue of clause 61(2)) larger corporate group collectively having qualifying status (as defined in clause 58(1)) in respect of shares or voting rights in relation to a UK-connected body corporate (as defined in subsections (5) and (6)), where the value of all consideration (as defined in clause 59) provided by the undertaking or group for its shares or voting rights (whichever gives the undertaking or group qualifying status) is at least £25m.

309 Subsection (3) defines the second category of reportable event: those that involve a designated undertaking, or one or more members of a larger corporate group, forming a body corporate (a "joint venture vehicle") with at least one other person (such as a company) that (as stipulated by subsection (7)) is not part of the undertaking or group, in circumstances where: the undertaking or (by virtue of clause 61(2)) larger corporate group collectively acquires qualifying status (as defined in clause 58(2)) in respect of shares or voting rights in relation to the joint venture vehicle; the undertaking or group members involved intend or expect the joint venture vehicle to become a UK-connected body corporate (as defined in subsections (5) and (6)); and, the total value of all capital and assets contributed to the joint venture vehicle by the undertaking or group, and of all other consideration provided by the undertaking or group in relation to the formation of the joint venture vehicle, is at least £25m.

Example (1): Reportable Event (categories 1&2)

Category 1:

If Designated Undertaking A already holds 20% of the shares in Company B, which carries on a digital advertising business in the UK, for which it has provided £20 million consideration, and then seeks to acquire an additional 10% for consideration of £10m, the proposed acquisition must be reported to the CMA prior to completion, as: B carries on activities in the UK and is therefore a UK-connected body corporate; the acquisition will take A from a shareholding in B of 25% or less (20%) to one of more than 25% (30%), giving it qualifying status; and the total consideration for the resulting shareholding will be above the £25 million value threshold (£30m), thus satisfying both limbs of the test in clause 56(2).

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

Category 2:

Designated Undertaking A, which is not part of a larger corporate group, and Company B, which is not part of A, propose to establish Company C together, with A holding 51% of the shares and B the remainder. A and B intend for C to supply digital services to customers in the UK. A agrees to transfer a pre-existing business with a value of £20 million to C and also to pay £10 million to B in

relation to it agreeing to establish C with A. A must report the proposal to establish C to the CMA before C is formed because: C will be a body corporate formed with an unconnected person B and therefore a joint venture vehicle; A will have qualifying status in respect of shares in relation to C, as it will own a percentage of the shares above the 15% threshold for qualifying status in relation to joint venture vehicles; A intends that C will supply services to persons in the UK and therefore that C will be a UK-connected body corporate; and the value of the consideration to be provided by A in relation to the formation of C will be above the £25 million threshold, including the capital and assets that will be contributed to C.

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

310 Subsections (5) and (6) define "UK-connected body corporate" for the purposes of the first and second categories of reportable event. A body corporate is UK-connected if it, or any of its subsidiaries (which clause 117(1) defines as having the same meaning as in section 1159 of the Companies Act 2006), carries on activities in the UK or supplies goods or services to a person or persons in the UK.

311 Subsection (7) clarifies that, in relation to the second category of reportable event, the formation of a joint venture vehicle solely by persons (such as companies) that make up a designated undertaking or larger corporate group is not in scope of the reporting duty.

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

Clause 58: Qualifying status

313 This clause sets out the circumstances in which a designated undertaking or larger corporate group will have qualifying status in relation to a UK-connected body corporate or joint venture vehicle.

314 Subsection (1) provides that, for the purposes of the first category of reportable event, an event will result in qualifying status if it results in the undertaking or group increasing the percentage of shares or voting rights it holds in a UK-connected body corporate to or beyond any of the thresholds set out in paragraphs (a), (b) and (c).

315 Subsection (2) sets out that, for the purposes of the second category of reportable event, the undertaking or group will have qualifying status in relation to a joint venture vehicle if it acquires at least 15% of the shares or voting rights in the vehicle.

316 Subsections (3), (4) and (5) set out how the percentage of shares and voting rights held should be calculated, including in relation to bodies corporate that do not have a share capital or that do not have general meetings at which matters are decided by the exercise of voting rights.

317 Subsection (6) provides that a person (such as an undertaking or group member) should be treated as acquiring an interest (such as a shareholding) or right (such as voting rights) for the purposes of the duty to report where they come to hold the interest or right by virtue of any of the provisions in Schedule 2. For example, when a shareholding comes to be held jointly with another person or becomes subject to a joint arrangement with another person under which the parties are to exercise the rights granted by their shares in a coordinated way.

Clause 59: Value of consideration

318 Subsection (1) explains how the value of consideration should be calculated for the purposes of the first category of reportable event. This is the value of all consideration provided by the undertaking or group, directly or indirectly, for shares or voting rights in the UK-connected body corporate in all transactions which result in the undertaking or group holding shares or voting rights in the body corporate.

319 Subsection (2) defines consideration for the purposes of the duty to report. The intention is for consideration to be given a very broad meaning, encompassing any benefit provided, any detriment suffered, any conditional consideration and any consideration that is deferred to after the relevant event.

320 Subsection (3) creates a delegated power for the Secretary of State to make regulations setting out further provision about how the value of consideration, capital or assets is to be calculated for the purposes of the duty to report. This power is subject to the negative procedure as per subsection (5).

Clause 60: Content of report etc

321 Subsection (1) requires the CMA to set out, in a notice that must be published online (see clause 113(3)), the required form and content of a report.

322 Subsection (2) prohibits the CMA from requiring information in a report beyond that which it considers necessary to decide, in relation to a reportable event, whether to begin an investigation (commonly known as a Phase 1 investigation) into whether it has a duty under section 33 of the Enterprise Act 2002 to refer the matter for an in-depth merger investigation (commonly known as a Phase 2 investigation) , or to make an initial enforcement order under section 72 of that Act.

Clause 61: Application of the duty to report etc

323 This clause explains how the duty to report in clause 57(1) applies in cases where a designated undertaking is part of a larger corporate group (see clause 116). It also sets out circumstances in which this Chapter will not apply or will cease to apply after a report has been made.

324 Subsection (2) provides that the members of the group are to be treated as acting, or failing to act, collectively. It also provides that the combined consideration provided by all members of the group is to be treated as provided by each member individually, and that each member is to be treated as holding the combined interests or rights of all members of the group. This means that if a report is provided to the CMA by one member of the group, all members are deemed to have provided the report. Equally, if one of the members of the group fails to provide a report when required to do so, then all members are deemed to have failed to meet this requirement.

Example (2): Application of the Duty to Report

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

325 Subsection (3) refers to Schedule 2, which sets out further cases in which a person (such as an undertaking or group member) should be considered to hold an interest (such as a shareholding) or right (such as voting rights) for the purposes of the duty to report.

326 Subsection (4) sets out circumstances where the duty to report to the CMA will not apply:

a) Paragraph (a) provides that the duty to report does not apply in relation to an event where a report has already been provided in relation to another event which does not differ from it in a material respect;

b) Paragraph (b) provides that the duty to report does not apply in relation to an event where it, or arrangements which do not differ from it in a material respect, have already been notified to the CMA under the merger control regime set out in Part 3 of the Enterprise Act 2002;

c) Paragraph (c) provides that the duty to report does not apply in relation to an event where the person that would otherwise be required to report has been informed by the CMA that the event, or one that does not differ from it in a material respect, is already subject to a Phase 1 investigation under the merger control regime (see paragraph 322);

d) Paragraph (d) provides that the duty to report does not apply in relation to an event where it, or a situation that does not differ from it in a material respect, has been the subject of a public interest intervention notice issued by the Secretary of State under the merger control regime;

e) Paragraph (e) provides that the duty to report does not apply in relation to an event where it, or a situation that does not differ from it in a material respect, has been the subject of a special public interest intervention notice issued by the Secretary of State under the merger control regime.

327 Subsection (5) sets out circumstances where the requirements of this Chapter will cease to apply to an event after it has been reported to the CMA:

a) Paragraph (a) provides for the requirements to cease to apply where the Secretary of State issues a public interest intervention notice under the merger control regime in relation to the event or a situation that does not differ from it in a material respect.

b) Paragraph (b) provides for the requirements to cease to apply where the Secretary of State issues a special public interest intervention notice under the merger control

regime in relation to the event or a situation that does not differ from it in a material respect.

c) Paragraph (c) provides for the requirements to cease to apply where the CMA makes an initial enforcement order under the merger control regime imposing obligations, prohibitions or restrictions in relation to the event.

d) Paragraph (d) provides for the requirements to cease to apply where the relevant undertaking ceases to be designated.

Clause 62: Acceptance of report

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

Clause 63: Delay to possible mergers etc

329 This clause sets out restrictions on reportable events taking place.

330 Subsection (1) provides that a designated undertaking or group member with a duty to report a reportable event (see clause 57(1)) must not allow the event to take place until a report in relation to the event has been submitted to the CMA and the waiting period in relation to the event has expired.

331 Subsection (2) defines the waiting period as the period of 5 working days beginning with the first working day after the day on which the CMA gives notice to the reporting person that it accepts their report is sufficient. Working day is defined in clause 328.

332 Subsection (3) provides that, where a reportable event takes place in breach of subsection (1), every person with a duty to report the event is to be treated as having breached subsection (1). This means that all members of a group will be treated as having failed to comply where one or some members have failed to do so.

333 Subsection (4) permits the CMA to give its consent to a reportable event happening before the end of the waiting period, including before a report has been accepted by the CMA or submitted to the CMA. The CMA may also revoke its consent before the event takes place.

334 Subsection (5) provides that the restrictions in subsection (1) do not apply in relation to a reportable event where the CMA gives and does not revoke its consent to the event taking place before the end of the waiting period.

335 Subsection (6) applies section 95 of the Enterprise Act 2002, which enables statutory restrictions under the merger control regime to be enforced through the courts, to the restrictions on reportable events taking place set out in subsection (1). This for example enables the CMA to apply for an injunction requiring a designated undertaking or group member to undo a reportable event that has taken place prior to the expiry of the waiting period and for the reporting requirements to be complied with before the event takes place again.

Clause 64: Timing of a reportable event

336 This clause provides that in certain cases a reportable event is considered to take place at the point there is an unconditional obligation to proceed with the event. That is, where a

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

Clause 65: Authorisation for one person to act for another

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

Clause 66: Applications for review of decisions relating to mergers

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

Clause 67: Regulations about duty to report

339 This clause creates a delegated power for the Secretary of State to make regulations about the duty to report.

340 Subsection (3) sets out some of the provision that these regulations may include, including provision which amends this Chapter or Schedule 2.

341 Subsection (4) stipulates that regulations containing provision under any of paragraphs (a), (b), (c), (d), (e) or (h) of subsection (3), including regulations amending this Chapter or Schedule 2, are subject to the draft affirmative procedure (see clause 332(3)).

342 Subsection (5) provides that any other regulations made under subsection (1) are subject to the negative procedure. This includes regulations under subsection (3)(f) which modify how clause 329 applies for the purposes of this Chapter or Schedule 2. This is considered appropriate because these regulations would be of a supplementary procedural nature, limited to modifying the rules for the service of notices by the CMA in the context of merger reporting.

Clause 68: Duty to keep compliance under review

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

Schedule 2: Mergers: Holding of Interests and Rights

344 In conjunction with clauses 61(3) and 58(6) respectively, Schedule 2 sets out further circumstances in which interests (such as shareholdings) and rights (such as voting rights) are deemed to be held or acquired for the purposes of the duty to report, and therefore provides for further ways in which reportable events may take place.

345 Paragraph 1 provides that jointly held interests or rights are treated as held by each person that holds them.

346 Paragraph 2 provides that parties acting through joint arrangements are treated as holding the collective interests and rights that each party to that arrangement holds individually.

347 Paragraph 3 provides that where an interest is held by a nominee on behalf of another person, the interest is treated as held by that person. For example, where the legal owner of shares in a company (the person in whose name the shares are registered) holds the shares on behalf of the beneficial owner (the actual owner) under a declaration of trust, the shares are treated as held by the beneficial owner.

348 Paragraph 4 provides that a person who controls a right is deemed to hold that right. This means that the controller of the right - and not the holder unless they are also a controller - will be considered to hold the right. Paragraph 4(2) sets out that control can be held through an arrangement between a person and others (see paragraph 7, Schedule 2).

349 Paragraphs 5 and 6 provide for rights that are exercisable only in certain circumstances and rights attached to shares held by way of security respectively and replicate corresponding provisions in Schedule 1A to the Companies Act 2006.

350 Paragraph 7 defines an arrangement for the purposes of this Schedule in broad terms. In particular, an arrangement need not be legally enforceable but there must be a degree of stability about it.

Chapter 6: Investigatory Powers etc and Compliance Reports

Investigatory powers etc

Clause 69: Power to require information

351 This clause gives the CMA the power to require any person (subject to clause 111 (Extra-territorial application)), including a designated undertaking and any other party believed to hold relevant material, to provide information needed for its operation of the regime. This includes information in any form, which might include data, correspondence, forecasts and estimates.

352 Subsection (1) sets out that the CMA can require any person, including a designated undertaking, to produce any information which the CMA considers relevant to its operation of the regime. Clause 117(1) (General interpretation) defines "information".

353 Subsection (3) sets out content requirements for an information notice. The notice must set out the time and place it requires the information to be produced as well as how it must be shared with the CMA. For example, a notice might specify the format in which a dataset should be provided and how it should be transferred (e.g. by hard drive or uploaded to a secure server).

It must also set out the consequences of not complying with the notice, as a person could face penalties or prosecution for failing to comply.

354 Subsection (4) provides a non-exhaustive description of what the recipient of an information notice could be required to produce or generate.

a) Paragraph (a) covers copies of or extracts from information.

b) Paragraph (b) covers obtaining or generating information, including information that does not yet exist.

c) Paragraph (c) covers enabling the CMA to compel evidence collection by requiring a person to collect and retain information that it may not otherwise collect and retain.

d) Paragraph (d) imposes a duty on the recipient of an information notice - in cases where specified information is not given to the CMA - to explain where the requested information might be and why it has not been shared with the CMA.

355 Subsection (5) sets out how the CMA may require information to be obtained or generated under subsection (4), paragraph (b). Subsection (5), paragraph (a) specifies that the CMA can require an undertaking to amend its business processes, including processes that might affect its users, and report the outcomes. Subsection (5), paragraph (b) specifies that the CMA can require a person to carry out a specified demonstration or test. For example, under subsection (5) the CMA might require a designated undertaking to demonstrate a technical process with examples, such as how an algorithm operates, or to undertake testing or field trials of its algorithms and report the outcomes. This could include the CMA specifying relevant input data, parameters and other aspects of the test or demonstration.

356 Subsection (7) specifies that the CMA can require the recipient of an information notice to give the CMA information - either in physical or electronic form - which is located outside the United Kingdom.

Clause 70: Requirement to name a senior manager

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

Clause 71: Power of access

358 This clause gives the CMA the power to require a designated undertaking (and an undertaking subject to existing obligations under clause 17(1)) or an undertaking subject to a breach investigation to obtain, generate, collect or retain information (which includes information in any form) or to conduct a specified demonstration or test of a business system or process under the supervision of the CMA. This power can be exercised where the undertaking has failed to comply with a previous request for information under clause 69 or it has failed to provide sufficient assistance to a skilled person under clause 79.

359 Subsection (1) sets out the circumstances in which the CMA can exercise this power. The CMA can only use this power where a designated undertaking or an undertaking subject to a breach

investigation has failed to comply with the requirements of an information notice under clause 69, or has failed to comply with a duty to assist a skilled person under clause 79. This might include situations where an undertaking has failed to provide the information requested, or has not carried out the request in the way specified in the information notice, or where information provided is incomplete or inaccurate.

360 Subsection (2) gives the CMA the power to require that an undertaking gives access to relevant business premises, equipment, services, information or individuals for the purpose of the CMA supervising the undertaking obtaining, generating, collecting or retaining information, or for the CMA to observe the operation of the undertaking's business process or a specified demonstration or test of a system. For example, under this subsection the CMA could supervise a test or be provided with a demonstration of an undertaking's systems or technical processes (including algorithms), where an undertaking has failed to comply with a request to conduct a test itself and report the results to the CMA under clauses 69 and 79. This could include the CMA specifying relevant input data, parameters and other aspects of the test or demonstration. Securing compliance for the purpose of this clause includes the ability for the CMA to require information requested under clauses 69 and 79 or to verify any reasons an undertaking has given for not complying with clauses 69 and 79.

361 Subsection (3) requires that any notice given under subsection (2) must describe the access the CMA requires, and the date by and manner in which the undertaking must provide access to the CMA. The CMA could, for example, require that it supervise a test being carried out in the presence of an undertaking's engineers, either at the undertaking's business premises or remotely.

362 Subsection (4) imposes a duty on the undertaking to comply with the access required by the CMA.

363 Subsection (5) specifies that the CMA may only require access to premises, equipment or individuals which are located in the United Kingdom under subsection (2). However, subsection (6) specifies that the CMA may require access to information or services under subsection (2) regardless of whether they are located in the United Kingdom or not.

364 Subsection (7) defines a "business premises" as a premises, or any part of premises, not used as a dwelling. This is the same definition as in section 27 of the Competition Act 1998.

Clause 72: Power to interview

365 This clause gives the CMA the power to require any individual to attend an interview and answer questions for the purposes of a digital markets investigation. This is consistent with the amendments to section 26A of the Competition Act 1998 made under clause 141 of the Bill, which will enable the CMA to interview any individual for the purposes of an investigation. The CMA has existing powers under sections 109 and 174 of the Enterprise Act 2002 to require any person to attend an interview for the purpose of a mergers or markets inquiry.

366 Subsection (1) gives the CMA the power to give notice to any individual it considers has information relevant to a digital markets investigation requiring them to answer relevant questions at a place or in a manner specified in the notice, and either at a specified time or on receipt of the notice. This could include a remote interview.

367 Subsection (2) requires that the notice must set out the details of the investigation. It must also set out the consequences of failing to comply with the notice, as a person could face penalties for failing to comply, or prosecution for the offences under clauses 93 or 94 of destroying or falsifying evidence or providing false or misleading evidence.

368 Subsection (3) requires that, where the individual subject to the notice under subsection (1) is connected to an undertaking subject to an SMS investigation, the CMA must also give a copy of the notice to that undertaking. Clause 117(3) defines how a person can be "connected to" an undertaking.

369 Subsection (4) requires the CMA to give a copy of the notice to connected undertakings at the same time the notice is given to the individual, or as soon as possible afterwards.

370 Subsection (5) gives the CMA the power to interview individuals on oath in relation to digital markets investigations.

371 Subsection (6) specifies that the CMA cannot require an individual outside the United Kingdom to answer questions in relation to a digital markets investigation.

Clause 73: Use of interview statements in prosecution

372 This clause lists the circumstances in which interview statements in answer to questions under clause 72 may be used as evidence against that individual in a criminal prosecution.

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

Clause 74: Power to enter business premises without a warrant

374 This clause gives the CMA the power to enter business premises without a warrant for the purposes of a breach investigation. A breach investigation is defined in clause 117(1), and includes an investigation into whether an undertaking is breaching or has breached a requirement. The power can be exercised both with and without notice. The CMA has existing powers of inspection without a warrant under section 27 of the Competition Act 1998.

375 Subsection (1) gives an investigating officer of the CMA the power to enter any business premises for the purposes of a breach investigation. The CMA must have reasonable grounds to suspect that information relevant to the breach investigation can be accessed from or on the premises.

376 Subsections (2) and (3) set out that an investigating officer must give notice prior to entry in all circumstances, except where they suspect that the premises are or have been occupied by the undertaking subject to the breach investigation, or where they have taken reasonable steps to give notice but have failed to do so.

377 Subsection (2) sets out that, where an investigating officer is required to give notice, the notice must give the occupier at least two working days' notice of entry and give details of the breach investigation. It must also indicate the consequences of failing to comply with the notice, as an individual could be subject to penalties or prosecution for obstructing an officer exercising their power of entry under clauses 87(4) and 95.

378 Subsection (4), where an investigating officer is not required to give notice, requires the officer to produce, on entry, evidence of their authorisation by the CMA and a document specifying the same information that a notice would include under subsection (2), paragraphs (b) and (c).

379 Subsection (5) lists the powers an investigating officer will have once they enter the business premises. This includes the power to take necessary equipment with them, to require any person on the premises to produce and explain relevant information, and take copies or extracts from any information given to them.

380 Subsection (6) specifies that any information given to an officer must be provided in a form in which it can be taken away and either is, or can easily be made, visible and legible. This includes the ability for the CMA to require information to be provided in electronic form.

381 Subsection (7) specifies that the CMA cannot enter premises outside the United Kingdom under this clause. However, subsection (8) specifies that the CMA can access information regardless of where it is physically stored.

Clause 75: Power to enter premises under a warrant

382 This clause gives the CMA the power to enter business and domestic premises under a warrant, without notice and using reasonable force, for the purposes of a breach investigation. A breach investigation is defined in clause 117(1), and includes an investigation into whether an undertaking is breaching or has breached a requirement. The CMA has existing powers of entry under a warrant under sections 28 and 28A of the Competition Act 1998.

383 Subsection (1) sets out the circumstances in which the High Court, the Court of Session or the CAT may issue a warrant to the CMA under this clause. The CMA must prove that (a) there are reasonable grounds to suspect that there is information relevant to the breach investigation on or accessible from the premises, and (b) the CMA has already attempted to use another investigatory power to obtain the relevant information unsuccessfully, or suspects that no other investigatory power would enable it to obtain the relevant information it needs.

384 Subsection (2) lists the powers an authorised officer of the CMA, and any officers authorised to accompany them, will have under a warrant issued under this Part of the Bill. This includes the power to enter the premises using reasonable force, to search the premises for relevant information, to operate equipment to produce information, and to require assistance and explanations from any person on the premises. The officer will have the power to require the production of any information which is accessible from the premises, including material stored remotely or online in electronic form. This includes the power to take copies of or extracts from, or take possession of, any relevant information that is given to them.

385 Subsection (3) specifies that any information given to an officer must be provided in a form in which it can be taken away and either is, or can easily be made, visible and legible. This includes the ability for the CMA to require information to be provided in electronic form.

386 Subsection (4) provides that a warrant may also authorise people who are not employees of

the CMA to accompany and assist the authorised officer who is exercising the powers under this clause. This might include individuals who have expertise that is not available within the CMA but is required to fully carry out the terms of the warrant (e.g. technical or IT experts).

387 Subsection (7) defines "domestic premises" in relation to the premises the CMA will be empowered to enter, and "occupier" and "premises" for the purposes of this clause and clause 76.

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

388 This clause sets out supplementary requirements for the exercise of the power under clause 75 to enter premises under a warrant.

389 Subsection (1) requires the warrant to set out the subject matter and purpose of the breach investigation. It must also indicate the consequences of obstructing an officer exercising their power of entry, as a person could be subject to penalties or prosecution for obstructing an officer under clause 95.

390 Subsection (2) provides that an authorised officer must have a warrant to exercise the powers listed under clause 75.

391 Subsections (3) and (4) apply when there is no one at the premises when the authorised officer proposes to execute the warrant. Subsection (3) requires an authorised officer to take reasonable steps to inform the occupier of entry and give them, or a representative, a reasonable opportunity to be present before executing the warrant. Subsection (4) requires the officer to leave a copy of the warrant in a prominent place on the premises if they are unable to inform the occupier prior to entry.

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

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

393 This clause amends sections 50, 57, 63, 64, 65, 66 and Part 1 of Schedule 1 of the Criminal and Justice Police Act 2001 to enable the CMA to seize information and take copies of, or extracts from, information when exercising its power to enter business and domestic premises under a warrant under clause 75. Clause 122 of this Bill makes similar amendments to these sections of the Criminal and Justice Police Act 2001 to enable the CMA to seize documents when entering domestic premises under a warrant under section 28A of the Competition Act 1998. The CMA has existing powers to seize documents from business premises under section 28 of the Competition Act 1998.

Clause 78: Application for a warrant

394 This clause requires the CMA to follow the respective rules of the High Court, the Court of Session or the CAT when making an application to one of those courts for a warrant to exercise its power to enter premises under clause 75.

395 Subsection (2) amends Schedule 4 of the Enterprise Act 2002 to specify that Competition Appeal Tribunal rules (made under section 15 of the Enterprise Act 2002) may make provision for proceedings when the CMA applies for a warrant under clause 75.

Clause 79: Reports by skilled persons

396 This clause gives the CMA the power to require a skilled person, which could be a legal or natural person, to provide a report to it on a matter relevant to the operation of the regime. A similar power is available to the FCA under section 166 of the Financial Services and Markets Act 2000.

397 Subsection (1) sets out that the CMA can use this power when exercising, or deciding whether to exercise, any of its digital markets functions. The CMA can only exercise this power in relation to a designated undertaking (and an undertaking subject to existing obligations under clause 17(1)) or an undertaking subject to either a breach investigation or an SMS investigation.

398 Subsections (2) and (3) set out that the CMA may appoint a skilled person to provide a report. Where it does so, the CMA must give notice of the appointment, and the relevant matters to be included in the report, to the undertaking in question. The CMA may specify the form of the report.

399 Subsection (4) specifies that the CMA can make the designated undertaking (and undertaking subject to existing obligations under clause 17(1)) or the undertaking subject to either a breach investigation or an SMS investigation liable to pay the skilled person directly for producing the report.

400 Subsections (5) and (6) set out that the CMA can also give notice to an undertaking requiring it to appoint a skilled person to produce a report to the CMA. The notice should specify the form of the report, the relevant matters that it must deal with and the date by which it must be provided. The CMA must approve any appointments made by an undertaking, including details of how payment will be made to the skilled person.

401 Subsections (7) to (10) state that the payment due to the skilled person from an undertaking under subsection (4) and subsection (6), paragraph (b) can be recovered through the courts.

402 Subsection (11) provides that the CMA must be satisfied that the skilled person has the necessary skills to report on the relevant matters. This could include an external third party with relevant expertise, such as an accounting firm, management consultancy or an individual with technical expertise such as a software engineer.

403 Subsection (12) imposes a duty on the designated undertaking (and undertaking subject to existing obligations under clause 17(1)) or undertaking subject to either a breach investigation or an SMS investigation, and any person connected to those undertakings, to assist the skilled person in any way reasonably required to prepare the report. Clause 117(3) defines how a person can be connected to an undertaking. If an undertaking or connected person fails to comply with this duty, the CMA may impose a penalty in accordance with clause 87 of the enforcement provisions under this Part of the Bill.

404 Subsection (13) specifies that the duty to assist a skilled person in subsection (12) does not include giving access to individuals, premises, equipment or individuals outside the United Kingdom. However, subsection (14) clarifies that the skilled person can require access to information and services within and outside the United Kingdom.

Clause 80: Duty to preserve information

405 This clause creates a legal duty to preserve evidence which is relevant to a digital markets investigation, a compliance report by an undertaking or where the CMA is providing investigative assistance to an overseas regulator. Where the CMA has made a request for information, there are penalties for non-compliance, or for falsifying, concealing or destroying information. The purpose of this clause is to preserve evidence before and after the CMA has made a formal request. This is consistent with an existing duty to preserve evidence in section 201, subsection (4) of the Enterprise Act 2002 in relation to cartel offence investigations and the creation of a new duty to preserve evidence under section 28B of the Competition Act 1998 made under clause 120 of this Bill.

406 Subsection (1) sets out that in the circumstances described in subsections (2), (3), (4) and (5), a person must not carry out, cause or permit the destruction, disposal, falsification or concealment of relevant information. This duty does not apply where the person has a reasonable excuse to do so.

407 Subsections (2), (3), (4) and (5) set out the circumstances in which this duty applies. This includes situations where a person knows or suspects that a breach or PCI investigation is being or is likely to be carried out, but - for example - where the CMA has not yet formally opened an investigation or required information to be produced. The duty also applies where an undertaking, or a person connected to an undertaking, knows that the undertaking is subject to an initial SMS investigation. This also includes where an undertaking, or a person connected to an undertaking, knows that the undertaking is required to produce a compliance report under clause 84, or is subject to a further SMS investigation. The duty also applies where an undertaking, or a person connected to an undertaking, knows or suspects that the CMA is, or is likely to, provide investigative assistance to an overseas regulator in relation to that undertaking. Clause 117, subsection (3) defines how a person can be connected to an undertaking.

408 Subsection (6) sets out the circumstances in which information would be considered relevant for the purposes of this clause.

Clause 81: Privileged communications

409 This clause specifies that the CMA cannot require any information subject to legal professional privilege or (in Scotland) confidentiality of communications - i.e. the principle that legal advice is confidential to the client to whom it is given - when exercising its investigatory powers under this Part of the Bill. Subsection (2) specifies that this limitation applies to producing, taking possession of, taking copies of, or extracts from, a privileged communication.

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

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

Compliance reports etc

Clause 83: Nominated officer

411 This clause requires an undertaking subject to a digital markets requirement under the regime to assign an appropriate senior manager to the role of "nominated officer", for the purpose of monitoring the undertaking's compliance with a digital markets requirement. A penalty may be imposed on a nominated officer of an undertaking that fails to comply with a relevant compliance reporting obligation (see clause 87).

412 Subsection (2) sets out the tasks of the nominated officer and requires them to carry out those tasks in relation to "digital markets requirements and each related requirement". For example, if a nominated officer is assigned to a conduct requirement, they are automatically assigned to any subsequent enforcement orders made in connection to it.

413 Subsection (5) requires that the individual assigned to the role of nominated officer must be a "senior manager" as defined in clause 70 and must be able to carry out the tasks required.

Clause 84: Compliance reports

414 This clause requires undertakings subject to a digital markets requirement under the regime to provide the CMA with reports setting out how they are complying with requirements imposed upon them. The CMA has a duty to notify an undertaking of any compliance reporting requirements and will specify in the notice when reports should be submitted, what information they should contain, and what form they should take. The CMA can alter the reporting requirements on an undertaking by giving the undertaking a further notice.

415 Subsection (5) permits the CMA to require an undertaking to publish a compliance report or a summary of a compliance report. This could include publication on the undertaking's website or in hard copy at a registered office of the undertaking. The version the undertaking is required to publish may be different to the version provided in private to the CMA under subsection (1), for example some information may be redacted for confidentiality purposes.

Chapter 7: Enforcement and Appeals

Civil penalties

Clause 85: Penalties for failure to comply with competition requirements

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

Clause 86: Amount of penalties under section 85

417 This clause sets the maximum penalties that the CMA can impose under clause 85. The CMA is able to impose penalties of up to 10% of worldwide turnover, and in the case of breaches of orders or commitments up to 5% of daily worldwide turnover for each day a breach continues.

418 Subsections (2) and (3) state that the CMA will in most situations have the discretion to choose whether to impose a fixed penalty or a daily rate penalty, or both. However, where an undertaking breaches a conduct requirement (as opposed to an enforcement order) or

breaches any requirements under Chapter 5 of Part 1 (mergers), the CMA will only be able to impose a fixed penalty.

Clause 87: Penalties for failure to comply with investigative requirements

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

Clause 88: Amount of penalties under section 87

420 This clause sets the maximum fixed and daily rate penalties that the CMA can impose under clause 87 on persons.

421 Subsection (3) sets out that the CMA may impose a fixed penalty on persons other than an individual, including undertakings, of up to 1% of worldwide turnover, or a daily penalty of up to 5% of daily worldwide turnover for each day non-compliance continues, or both. Subsection (5) sets out that the CMA may impose a fixed penalty on an individual of up to £30,000, or a daily penalty of £15,000, or both. Within those limits, the level of penalty will be an amount that the CMA considers appropriate given the circumstances of the case.

422 Subsections (6) to (8) set out that the Secretary of State has the power to amend the maximum amounts of penalty that can be imposed on an individual under clause 87.

Clause 89: Procedure and appeals etc

423 This clause sets out which sections of the Enterprise Act 2002 apply to the CMA's decision to impose a penalty under clause 85 or clause 87, following a finding that a person has breached a requirement imposed under this Part. Section 112 of the 2002 Act covers the main procedural requirements for giving notice of a penalty. Section 113 covers procedural requirements for payment of a penalty and interest. Section 114 covers appeals in relation to penalty decisions (set out below). Section 115 sets out the procedure for recovering a penalty which has not been paid.

424 As a result of the provision made by subsection (1), section 114 of the Enterprise Act 2002 applies to appeals which are brought under clause 89 against the decision to impose penalties under either clauses 85 or 87, the amount of one of those penalties and the date by which the penalty is required to be paid. Appeals against all other decisions taken under Part 1 are to be brought under clause 103, with the exception of those decisions taken in connection with the CMA's functions under Chapter 5 which clause 66 applies to.

Clause 90: Calculation of daily rates and turnover

425 This clause sets out how the CMA will calculate daily rates and turnover for the purpose of imposing a monetary penalty. Daily penalties are calculated from the date that the relevant party is served notice of the penalty by the CMA. Daily penalties will accumulate until the person complies with the requirement (e.g. the requested information is provided) or, where the penalty is incurred in relation to an overseas investigation, when the overseas regulator no

longer requires assistance. The CMA has the discretion to determine an earlier date for the amount payable to cease accumulating.

426 Subsections (2) to (4) set out that the Secretary of State has the power to specify how turnover is calculated in secondary legislation.

Clause 91: Statement of policy on penalties

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

Clause 92: Monetary penalties: criminal proceedings and convictions

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

Offences

Clause 93: Destroying or falsifying information

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

Clause 94: False or misleading information

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

Clause 95: Obstructing an officer

431 This clause sets out that obstructing an investigating officer is a criminal offence. The clause mirrors Section 42 of the Competition Act 1998.

Clause 96: Offences by officers of a body corporate etc

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

433 This clause mirrors Section 72 of the Competition Act 1998 and Section 125 of the Enterprise Act 2002.

Clause 97: Offences: limits on extra-territorial jurisdiction

434 This sets out that unless they are a 'relevant person' an individual cannot commit an offence under clauses 93, 94 and 95, if they are outside the UK when they perform the act.

Clause 98: Sentences

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

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

Further enforcement provisions etc

Clause 99: Director disqualification

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

Clause 100: Enforcement of requirements

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

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

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

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

Clause 101: Rights to enforce requirements of this Part

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

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

444 Subsection (2) sets out that any person that suffers loss or damage, as a result of a designated undertaking's (or part of a designated undertaking's) breach of a statutory duty, can seek appropriate compensation in the High Court, Court of Session, Sheriff Courts or the CAT. The claimant can seek damages, a court order to restrict the designated undertaking's actions in relation to their legal rights, or any other suitable type of remedy for loss resulting from the undertaking's breach of its statutory duty.

445 Subsection (4) sets out that the relevant statutory duties for which redress is available are: conduct requirements, pro-competition intervention orders and commitments.

446 Subsection (5) sets out that, outside of the CAT, claimants can choose to bring a private action case in the High Court for England & Wales; the Court of Session and the Sheriffdom courts for Scotland; and the High Court for Northern Ireland.

447 Subsection (6) allows for the CAT to refer a designated undertaking's breach of an injunction to the High Court. If the High Court is satisfied that the designated undertaking would have been in contempt of court if the injunction had been granted by the High Court, the High Court may deal with the designated undertaking as if it were in contempt.

Clause 102: Treatment of CMA breach decisions etc

448 This clause sets out that the courts and Tribunal are bound by the CMA's finalised breach decisions. This means that for any private action brought by a person following a finalised CMA breach decision, the court or Tribunal will not consider whether a breach was made, but instead will consider what a suitable remedy would be.

449 Subsection (2) details the appeals criteria that have to be met for the CMA's breach decision to be considered final. These criteria are: a) once the deadline has passed for a designated undertaking to submit an appeal against the CMA's breach decision, without a claim being submitted; b) once the final appeal decision has been made and the deadline has passed for any further appeals.

450 Subsection (4) defines a "CMA breach decision" as a decision by the CMA that a designated undertaking has breached a statutory duty imposed on it by the regime. These statutory duties are: conduct requirements, pro-competition intervention orders and commitments.

451 Subsection (5) sets out that the courts or Tribunal rules can be amended to allow the CMA to assist in private action cases brought in relation to the digital regime. For example, the CMA may assist by providing interpretations of the pro-competition interventions it imposed, or information about enforcement decisions relevant to the case.

Applications for review

Clause 103: Applications for review etc

452 The clause allows decisions taken by the CMA in connection with its digital markets functions to be reviewed by the CAT. It applies to any decision taken by the CMA in connection with its digital markets functions, other than decisions made in connection with the CMA's mergers functions (see clause 66) and decisions to impose a penalty under clause 85 or clause 87 (see clause 89). The CAT will decide these challenges on the same basis as the courts decide

applications for judicial review. Case law suggests possible grounds of challenge include: (i) that an error of law was made; (ii) that there was a material procedural error; (iii) that a material error as to the facts has been made; and (iv) that there was some other material illegality (such as unreasonableness or lack of proportionality).

453 Subsections (1) and (2) set out that, any party with a "sufficient interest" in a decision has the right to make an appeal. "Sufficient interest" is a test for who has standing to bring a challenge, which is already used by the CAT and also the Administrative Court. These provisions mean that undertakings who are subject to the decision as well as third parties, which may include competitors of the undertaking, who have a particular interest in the subject matter of the decision can challenge that decision.

454 Subsection (3) provides that a designated undertaking will always be expected to comply with a decision until the outcome of an appeal is known, unless the CAT makes an interim order to the contrary.

455 Subsections (6) to (8) provide that decisions of the CAT may be appealed to the appellate court for that jurisdiction. As the CAT is a UK-wide tribunal, at the beginning of a case, the CAT will decide which of the UK's three legal jurisdictions it is sitting in for the purposes of that case. If the CAT decides it is sitting in Scotland, for example, subsection (6) means that any appeals of CAT decisions in that case should be made to the Court of Session.

Chapter 8: Administration etc

Administration

Clause 104: Extension etc of periods

456 This clause sets out the powers the CMA has to extend the statutory deadlines established in Part 1 of this Bill.

457 Subsections (1) and (2) establish the CMA's power to extend the relevant investigation period or a period when the final offer mechanism is being used by up to three months for special reasons. Subsection (8) defines 'relevant investigation period' as being the statutory deadlines for SMS investigations, conduct requirement breach investigations, and pro-competition intervention investigations. The clause does not further define 'special reasons', but it is anticipated that they would include occasions where there are specific reasons which justify an extension of the normal time limits. These might include matters such as the illness or incapacity of members of an investigation team that has seriously impeded its work, an unexpected event such as a merger of competitors, or new relevant information. These reasons will depend on the relevant circumstances of each case. The CMA must publish a notice to trigger the beginning of any extension. The CMA must also specify in the notice how long the extension will be for (up to a maximum of three months).

458 Subsection (3) establishes the CMA's power to extend a relevant investigation period or period when the final offer mechanism is being used in the case of failure to comply with an information request (see clause 69) or an interview request (clause 72). The CMA must publish a notice to trigger the extension. The following conditions must be met before a notice can be published:

a) First, the CMA has issued an information request under clause 69 or an interview request under clause 72, as part of an SMS designation investigation, PCI investigation or conduct breach investigation, and the recipient of those requests has failed to comply. For example, a firm may have failed to return requested information or turn up to an interview.

b) Second, by virtue of their request not being complied with, the CMA has been unable to properly carry out the function that the request was in relation to. For example, failure to supply information has led to the CMA being unable to properly assess whether a conduct requirement breach has taken place.

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

460 Subsection (7) explains the interaction between extensions to SMS investigations and active SMS designations. If the CMA is carrying out a further SMS investigation for a designated undertaking, and they need to extend that investigation, it is possible that the investigation would not conclude until the original designation has expired, meaning that undertaking would fall out of the regime before the need for continued SMS designation is confirmed. This subsection allows an SMS designation to be extended to match the length of the SMS investigation period. If the extension is made under subsection (3), an extension to the SMS designation can only be made if the person not complying is, or is connected to, the designated undertaking in question. Clause 117, subsection (3) sets out when a person is "connected to" an undertaking.

Clause 105: Extensions: supplementary

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

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

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

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

465 Subsection (4) clarifies that for periods where multiple 103 (3) extensions are active at the same time, they are considered to run concurrently rather than cumulatively. For example, if a 9-month SMS investigation had been extended for two months under clause 104, subsection (3), and one month into that extension a further two-month extension under clause 104, subsection (3) occurs, then those extensions would run concurrently for one month, and that period of overlap would be ignored when calculating the total length of the extension made. The total length of that investigation would be nine months plus two months for the initial extension, plus one month for the remainder of the second extension, for a total of 12 months.

Clause 106: Exercise and delegation of functions

466 This clause explains how decisions will be made under the digital markets regime.

467 Subsections (1) to (5) give the CMA the discretionary power to create groups (under Schedule 4 to the Enterprise and Regulatory Reform Act 2013) to carry out functions of the new regime that have not been reserved for the CMA Board or its committees. The functions that are reserved for the Board and its committees are described at subsections (7) and (8). The CMA must state the function that such a group is being established for and the group will be required to fulfil that function. For example, the CMA could constitute a Group to consider PCI orders, and subsequently all PCI orders would need to be seen by that Group.

468 Subsections (6) and (7) add functions to the list of non-delegated functions at paragraph 29(2) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013. As a result, the following decisions will need to be made by the CMA Board:

a) Whether to launch an initial SMS investigation

b) Whether to launch a further SMS investigation (for example if the CMA decides to launch a designation investigation ahead of the requirement to do so before the end of the 5-year designation period)

c) Whether to begin a pro-competition intervention investigation

469 Subsection (8) adds a new sub-paragraph (2A) to paragraph 29 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013. This paragraph lists out functions that can only be undertaken by the CMA Board or delegated to a committee of the Board. These functions are:

a) Whether to make an SMS designation

b) Whether to apply existing obligations or make transitional, transitory or saving provisions in relation to them (see clause 17)

c) Whether to impose or vary conduct requirements

d) Whether to revoke conduct requirements

e) Whether to make an enforcement order (not including an interim enforcement order)

f) Whether to accept a commitment

g) Whether to adopt the final offer mechanism

h) Whether to make a pro-competition intervention

i) Deciding the contents of the notice of decision at the end of a pro-competition

investigation

j) Whether to replace a pro-competition order

k) Whether to revoke a pro-competition order

l) Whether to impose a penalty

m) Deciding the amount of a penalty

470 Sub-paragraph (2B) clarifies that to be eligible to carry out the functions under (2A) a committee must include at least two CMA Board members, which can include the Chair. At least half of the committee's membership must be non-staff or CMA panel members.

471 Subsection (9) creates a delegated power for the Secretary of State to amend the lists of decisions reserved to the Board or a Committee. A draft of this statutory instrument would need to be laid before and approved by each House of Parliament before it can be enacted.

Regulatory coordination and information sharing

Clause 107: Consultation with relevant regulators

472 This clause sets out requirements for the CMA to consult specific named regulators when proposing to exercise certain significant digital markets functions (a "regulatory digital markets function", as defined in clause 117(1)), where certain specified conditions are met. These functions include the discretionary opening of an SMS investigation, SMS designation, the imposition of a conduct requirement and the making of a PCI. The five regulators that these requirements apply to are the Bank of England, the Financial Conduct Authority, the Information Commissioner, the Prudential Regulation Authority and the Office of Communications.

473 Subsections (1) and (2) require the CMA to consult the Financial Conduct Authority and the Office of Communications respectively on proposals which the CMA considers fall within the sectoral remit of the relevant regulator. In relation to the Financial Conduct Authority, this is the provision of financial services and the provision of claims management services in Great Britain, and in relation to the Office of Communications, commercial activities connected with communications matters. This could involve the CMA seeking the view of the relevant regulator on the impacts that the proposal may have on the sector the regulator is responsible for as well as any other relevant expertise the regulator might have.

474 Subsection (3) requires the CMA to consult the Information Commissioner on proposals which the CMA considers are likely to have a non-negligible adverse impact on the Commissioner's ability to exercise their functions under data protection and related legislation (see subsection (7)).

475 Subsection (4) requires the CMA to consult the Bank of England on proposals which the CMA considers are likely to have a non-negligible adverse impact on the Bank's ability to advance its Financial Stability Objective (as defined in section 2A of the Bank of England Act 1998).

476 Subsection (5) requires the CMA to consult the Prudential Regulation Authority on proposals which the CMA considers are likely to have a non-negligible adverse impact on the Authority's ability to advance its general objective under section 2B of Financial Services and Markets Act 2000, or its insurance objective under section 2C of that Act.

477 Subsection (6) provides that the CMA is only required to consult a regulator to the extent that the CMA considers the burden on it of conducting the consultation not to outweigh the benefits that it would bring.

Clause 108: Recommendations to the CMA

478 This clause sets out a formal mechanism for the Financial Conduct Authority or the Ofcom to make a recommendation to the CMA for it to exercise a regulatory digital markets function. This term is defined in clause 117(1) and encompasses certain significant functions under the digital markets regime, including the discretionary opening of an SMS investigation, the imposition of a conduct requirement and the making of a PCI. This mechanism could for example be used in cases where the Financial Conduct Authority or the Ofcom identify a potential competition concern specifically in digital markets, for which the CMA is considered to have the most suitable powers to take action. The CMA must respond to the relevant regulator within 90 days setting out what action, if any, it has taken or will take and the reasons for its decision. A summary of the CMA's response must also be published online (see clause 113(3)).

Clause 109: Information sharing

479 This clause extends the information provisions of Part 9 of the Enterprise Act 2002 to cover the new functions of the CMA introduced in Part 1 of the Bill. It will also extend the provisions to enable sharing of information between the CMA and the Information Commissioner's Office (ICO) where it facilitates the exercise of one of their respective statutory functions.

480 Subsection (1) adds Part 1 of the Bill to the list of Specified Functions set out in Schedule 14 of the Enterprise Act 2002. This places any information obtained by the CMA through the exercise of any statutory function under the digital markets regime in scope of the general restriction on disclosure set out at section 237 of the Enterprise Act 2002. It is a criminal offence under section 245 of the Enterprise Act 2002 to disclose or use information to which section 237 applies unless that disclosure or use is permitted by Part 9 of the Enterprise Act 2002.

481 Subsection (2) adds several pieces of legislation to Schedule 15 of the Enterprise Act 2002. This would allow - under section 241(3) of the Enterprise Act 2002 - any public authority, such as the CMA, to share information which it holds that is subject to the restriction on disclosure in section 237 with a different party. This would only be possible for the purpose of assisting that party exercise a statutory function under any of the pieces of legislation added to this Schedule. For example, by adding legislation which contains functions of the ICO, the CMA will be able to share information obtained through its functions under this Bill to facilitate the ICO carrying out its functions under that legislation.

482 Subsection (3) amends the Communications Act 2003 to enable Ofcom to share information with the CMA where it is needed to facilitate any function of the CMA under Part 1 of the Bill (subject to the Communications Act's general restrictions on disclosure).

Miscellaneous

Clause 110: Power to charge levy

483 This clause will give the CMA a delegated power to collect a levy from designated undertakings to recoup costs associated with delivering the digital markets regime.

484 Subsection (1) sets out that the CMA can require undertakings which have been designated with SMS to pay a levy, and that the requirement to pay the levy will relate to a given 'chargeable year', which is defined in subsection (10) as the period of 12 months ending with 31 March. It establishes that designated undertakings will be required to pay the levy in any such year where they have an active SMS designation, whether that designation is in place for the full year or only part of it.

485 Subsection (2) sets out that the CMA will make rules to establish the methodology they will use for calculating the levy, and that the CMA must comply with these rules once created. Subsection (3) sets out that the CMA will be able to update or change these rules.

486 Subsection (4) sets out a number of obligations that the levy rules must comply with. These are that:

a) Paragraph (a) - the CMA cannot collect more money through the levy than it spends delivering the regime in any given chargeable year. Subsection (10), paragraph (b) establishes that the cost of delivering the regime should not include costs associated with litigation.

b) Paragraph (b) - the rules must set out how the cost of the levy is split between designated undertakings. For example, split evenly between undertakings which have been designated, or proportionately based on the number of designated activities each undertaking has.

c) Paragraph (c) - if an undertaking only has SMS designation for part of a year, the amount of levy it pays should be proportionate to the amount of time it has a designation. For example, if it had been designated for six months of the year, it would pay 50% of the amount that it would have to pay if it had been designated for the full year.

d) Paragraph (d) - the rules must set out how the CMA calculates its anticipated costs in a year. This will be the amount that it bases its initial levy charges on at the start of the year.

e) Paragraph (e) - as the amount identified when complying with (4)(d) might change if the CMA ultimately carries out more or less work than expected, the rules must also set out how the CMA will calculate its actual costs, so that it can increase or reduce the amount of levy charged to designated undertakings at the end of the year. This will support the CMA's compliance with (4)(a), ensuring that the CMA does not collect more than it actually spends on the regime.

f) Paragraph (f) - the CMA will need to set out how repayment or crediting of overpayment would be carried out if the CMA's estimates for its spending end up being greater than its actual costs.

g) Paragraph (g) - the CMA should make sure that repayment or crediting of designated undertakings is proportionate to the amount that was paid by a designated undertaking in that year.

h) Paragraph (h) - the CMA will need to set out how additional charges would be made to designated undertakings if the CMA's estimates for its spending end up being less than its actual costs.

i) Paragraph (i) - additional charges should be in proportion to the amount already paid by a designated undertaking in that year.

j) Paragraph (j) - the rules will need to set out how the CMA will administer the levy, for example the processes that will be used to design, calculate and charge for it.

487 Subsections (5) to (8) set out how the levy rules will be created and published. Before the levy rules can be implemented, the CMA will need to consult appropriate parties (for example, undertakings which have or who may be designated) on the draft rules and arrange for the draft rules to be laid before Parliament. The same conditions apply should the CMA seek to amend or replace the levy rules. The final rules, including where they are amended or replaced, must be published.

488 If a designated undertaking fails to pay the levy, subsection (9) allows the CMA to recover the amount due through the courts as a debt owed to it by the designated undertaking.

Clause 111: Extra-territorial application

489 This clause specifies that, unless stated otherwise, the digital markets regime applies extraterritorially in relation to persons outside the UK. The CMA's powers to interview (clause 72), enter premises without a warrant (clause 74) and enter premises under a warrant (clause 75) all expressly state that they are not exercisable outside the UK. However, powers conferred by clause 74 and clause 75 are exercisable in relation to information whether it is stored within or outside the United Kingdom.

490 Subsection (2) sets out that the CMA can only give a notice (such as a penalty notice) under this Part to a person outside the United Kingdom if that person meets at least one of the three descriptions set out in subsections (3), (4) and (5).

491 Subsection (3) describes an undertaking (for example a subsidiary firm) that has been designated with SMS, or that is subject to existing obligations (see clause 17), or that is the subject of a digital markets investigation.

492 Subsection (4) describes senior managers (see clause 70) and nominated officers (see clause 83) on whom the CMA has imposed a penalty under section 87(2) or 87(3).

493 Subsection (5) describes four types of link to the United Kingdom in paragraphs (a) to (d), which are self-explanatory. A person with at least one of the four links to the United Kingdom will fall within this subsection.

494 Subsection (6) clarifies that the extra-territorial application powers set out in this clause do not limit the CMA's other powers, either in other Parts of this Bill or as provided for in other legislation, to give a notice outside the United Kingdom.

Clause 112: Defamation

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

Clause 113: Consultation and publication of statements

496 This clause outlines how the CMA must undertake its duties to consult and publish statements online under Part 1 of the Bill.

497 Subsection (1) provides that the CMA, when consulting and publishing statements under this Part, must take into account matters of confidentiality and the timetable for making a decision or taking action following the consultation. Subsection (2) provides that the CMA must include reasons and sufficient information for consultees to understand those reasons.

Clause 114: Guidance

498 This clause sets out the CMA's obligation to publish guidance on how it will exercise its powers under the digital markets regime in Part 1 of the Bill. It will be able to revise or replace any guidance it publishes, but must then publish the revised or replacement guidance.

499 Subsection (2) permits the CMA to update the guidance over time.

500 Subsection (4) places requirements on the CMA in relation to the publication of guidance. It provides that the CMA must consult such persons as it considers appropriate before publishing guidance. For example, this could include industry associations with a particular interest in the specific guidance in question. The CMA must also obtain the approval of the Secretary of State before publishing any guidance under this section.

Clause 115: Protected disclosures

501 This clause sets out that disclosures made by a whistleblower relating to a designated undertaking's compliance with the digital regime, are considered qualifying disclosures under the entry for the Competition and Markets Authority in the Public Interest Disclosure (Prescribed Persons) Order 2014. Therefore, a qualifying disclosure made to the CMA will be protected as it is made to a prescribed person and relates to matters for which the CMA is prescribed, in this case matters relating to the digital markets regime.

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

Interpretation

Clause 116: Groups

503 Subsection (2) provides that an undertaking will be part of a group for the purposes of Part 1 of the Bill if it is part of a larger corporate group. That is, when one or more bodies corporate that make up the undertaking belong to the same corporate group (as explained in subsection (3)) as one or more bodies corporate that do not form part of the undertaking.

504 Subsection (3) sets out that two bodies corporate are members of the same group if one is the subsidiary of the other or if both are subsidiaries of another body corporate. For example, where A is a subsidiary of B, both will be members of the same group. This would also be the case if neither A nor B was a subsidiary of the other but both were subsidiaries of C.

Clause 117: General interpretation

505 This clause defines certain terms for the purposes of Part 1. All terms that are not listed below are self-explanatory (or, where the definition of the term is found in another clause, have been explained elsewhere in these explanatory notes).

a) "Customer" includes customers that are not consumers, for example, business customers.

b) A "digital markets function" is any function of the CMA in Part 1 of the Bill, and the CMA's power to do anything that is calculated to facilitate or is conducive or incidental to, the performance of those functions (this power is bestowed on the CMA in relation to any of its functions by paragraph 20 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013).

c) "Information" is to be understood in the widest possible sense, including estimates and forecasts as well as information that can be generated or brought into being by a party. Where the CMA requires a party to produce information in a visible and legible form, this might include producing estimates based on knowledge or experience in written form, or providing datasets or code in a usable format.

d) "Person" is broader than the definition in the Interpretation Act 1978 and includes any undertaking, as well as legal persons and human individuals.

e) "Undertaking" has the same meaning as it has in Part 1 of the Competition Act 1998. Simply put, an undertaking is an economic entity engaged in an economic activity e.g., placing goods or services on a market. A single undertaking may be comprised of one or more legal entities, where those entities constitute a single economic entity. This will be the case where one company can and does exercise decisive influence over another; for example, a parent company which decides the commercial policy of its subsidiaries.

f) "User" is to be understood in very broad terms to include a person or a business that interacts in any way with the relevant digital activity. This term applies to all parts of the supply chain and regardless of whether or not the person or business provides any form of compensation/payment to interact with the relevant digital activity. Where the Bill refers to "potential users", it applies to people and businesses that are not interacting with the relevant digital activity but may be seeking to do so, or who may seek to do so in the future. For example, a user may include a business whose product depends on interoperating with the relevant digital activity. It may also include a person or business whose content is hosted on or accessible through the relevant digital activity, such as is the case with the platform-press publisher relationship. A potential user may include a person or business that accesses a different undertaking's similar or competing product to the relevant digital activity provided by the designated undertaking.

g) "Using" is similarly to be understood in very broad terms to include any activity carried out by a person or a business that makes use of the relevant digital activity. It also applies to those conducting activities that interact with the relevant digital activity. This term applies to all parts of the supply chain and applies regardless of whether or not the person or business provides any form of compensation/payment to

use the relevant digital activity. For example, if a person is using an undertaking's video streaming service which is not the activity in relation to which it has been designated, but which prompts or otherwise redirects users to use the undertaking's search service for which it has been designated, then the person may be considered to be using or potentially using the search service.

Part 2: Competition

Chapter 1: Anti-trust

The Chapter 1 and 2 prohibitions

Clause 118: Removal of requirement for agreements etc to be implemented in the UK

506 This clause expands the territorial reach of the Chapter 1 prohibition of the Competition Act 1998.

507 The existing Chapter 1 prohibition makes illegal agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition. Such agreements, decisions and practices are currently prohibited only where they are, or are intended to be, implemented in the United Kingdom.

508 Subsections (2) and (3) expand the territorial reach of the Chapter 1 prohibition. Subsection (2) replaces the existing section 2(1) to provide that agreements, decisions and practices which are, or are intended to be, implemented in the United Kingdom continue to fall in scope of the Chapter 1 prohibition insofar as they may affect trade within the United Kingdom, and further that agreements etc. which are likely to have an immediate, substantial and foreseeable effect on trade within the United Kingdom are also within the scope of the Chapter 1 prohibition, even when these are not implemented in the United Kingdom. The expansion of the territorial reach of the prohibition is therefore qualified by the degree to which it has an effect on trade in the United Kingdom. Agreements etc. implemented outside of the United Kingdom which are likely to have a more limited effect in the United Kingdom than those which are immediate, substantial and foreseeable will not be captured by the Chapter 1 prohibition. Subsection (3) repeals the existing section 2(3) of the Competition Act 1998 which sets out that only agreements etc. implemented or intended to be implemented in the United Kingdom are caught by the prohibition.

509 This qualified effects test will ensure that UK trade and businesses and consumers based in the United Kingdom are protected from the detrimental effects of anticompetitive conduct, regardless of where that conduct takes place, even when an agreement is implemented in another jurisdiction.

510 Subsection (4) provides that the expanded scope of the prohibition will only apply to agreements etc. which are made after the coming into force of the section.

511 Subsection (5) applies the interpretative provision made at section 2(5) of the Competition Act 1998 so that the reference to "agreements" in subsection (4) is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

Clause 119: Repeal of exclusions relating to the European Coal and Steel Community

512 This clause repeals paragraph 8 in Schedule 3 to the Competition Act 1998 in order to remove a provision which has been redundant since the expiry of the Treaty establishing the European Coal and Steel Community and make other consequential provision. Schedule 3 sets out general exclusions to the Chapter I and II prohibitions in the Competition Act 1998.

513 Paragraph 8 provided an exclusion for agreements and conduct relating to coal or steel products to the extent to which the European Coal and Steel Community gave the European Community exclusive jurisdiction in the matter. The provision has had no effect since the Treaty expired in 2002.

Investigations

Clause 120: Duty to preserve documents relevant to investigations

514 This clause makes provision amending Part 1 of the Competition Act 1998 to impose a duty to preserve documents where a person knows or suspects that an investigation is, or is likely to be, carried out by the CMA.

515 Subsections (1) and (2) make provision for the insertion of a new section 25B into the Competition Act 1998. The new section 25B(1) sets out that the duty applies where a person knows or suspects that an investigation is, or is likely to be, carried out by the CMA. Subsection (2) of the new section 25B sets out the actions which are prohibited where the duty arises. As defined in section 59 of the Competition Act 1998, documents for this purpose include information recorded in any form.

516 The duty to preserve evidence arises from the point that a person has knowledge of, or suspects, that an investigation under section 25 of the Competition Act 1998 either is being carried out, or is likely to be carried out. In practice, the duty would arise where a business receives a case initiation letter from the CMA and so is aware that its conduct is under investigation. It may further arise where, for example, an individual working for a business is aware that a customer has reported their suspicions of price fixing and that the customer has been interviewed by the CMA, or members of an anti-competitive agreement are "tipped off" that a member of the agreement has blown the whistle to the CMA. The duty would apply in this case to the individual and their employer.

517 Subsection (3) amends the new section 40ZE of the Competition Act 1998 (inserted by paragraph 8 of Schedule 9 to the Bill), which sets out the powers of the CMA (and sector regulators) to impose a financial penalty on a person if, without reasonable excuse, they fail to comply with a requirement specified in that section which has been imposed for the purposes of an investigation under section 25. Subsection (3) amends section 40ZE so that failure to comply with the new duty, without a reasonable excuse, will give rise to liability for a financial penalty.

Clause 121: Production of information authorised by warrant

518 This clause amends sections 28 and 28A of the Competition Act 1998 which make provision regarding the grant of warrants, and the powers of the CMA when executing such warrants, to enter business premises (section 28) and domestic premises (section 28A) for the purposes of an investigation concerning an infringement of either the Chapter I or Chapter II prohibitions. When executing such warrants, a named CMA officer (who may be

accompanied by other CMA officers authorised by the CMA) has power, among other things, to require the production of information which is held electronically and accessible from the premises.

519 Subsection (2) amends section 28(1) of the Competition Act 1998 to expand the powers of the court or CAT to grant a warrant to the CMA on the basis that there are reasonable grounds for suspecting that there documents relevant to an investigation which are accessible from the premises, where the other criteria set out in that section are met.

520 Subsection (3) amends the powers set out in section 28(2) of the Competition Act 1998 which a warrant authorises the CMA officers to exercise. Section 28(2)(f) is amended to broaden the power to require the production of information which is stored in electronic form and which is accessible from the premises. This power will apply to any information stored electronically and accessible from the premises, not only that which the named officer considers relates to a matter relevant to the investigation.

521 Subsection (3) further inserts new paragraphs (g), (h) and (i) into section 28(2). Paragraph (g) enables CMA officers to operate equipment on the premises for the purpose of producing information stored in electronic form and accessible from the premises which is visible and legible or in a form from which it can readily be produced in a visible and legible form. For example, this power could be used to operate equipment so that electronic information can be transferred securely to CMA devices or where an undertaking or its employees cannot or will not produce the required information in such a form. Paragraph (h) enables the named officer to require assistance from any person on the premises to access information held electronically and accessible from the premises (such as the provision of passwords or encryption keys). Paragraph (i) empowers the CMA to take copies of or seize anything produced which the named officer considers relates to any matter relevant to the investigation.

522 Subsections (4), (5) and (6) make amendments which have identical effect in relation to the power at section 28A of the Competition Act 1998 concerning the grant of a warrant, and powers available under that warrant, to enter and inspect domestic premises.

523 Subsection (7) amends section 30 of the Competition Act 1998 which deals with privileged communications. These are communications between a professional legal adviser and a client, or one made in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings. Section 30(1) of the Competition Act 1998 provides that a person shall not be required to produce or disclose a privileged communication under Part 1 of that Act. The clause inserts a new section 30(1A) which sets out that nothing in section 28 or section 28A of the Competition Act 1998 authorises an officer to produce, seize, makes copies of or take extracts from any communication which a person could not be required to produce or disclose, as a result of the protection given by section 30(1).

Clause 122: Additional powers of seizure from domestic premises

524 This clause makes amendments to Part 2 of the Criminal Justice and Police Act 2001; to specify the powers of seizure conferred by section 28A(2) of the Competition Act 1998 for the purposes of section 50 of the Criminal Justice and Police Act 2001; and make clarificatory amendments regarding the existing specification of the power at section 28 of the Competition Act 1998 in light of its amendment by clause 121. Section 28 of the Competition Act 1998

provides the CMA with a power to enter business premises when authorised by warrant, and section 28A of the Competition Act 1998 provides equivalent powers in relation to domestic premises. The powers of seizure conferred by section 28(2) of Competition Act 1998 are already specified for the purposes of section 50 of the Criminal Justice and Police Act 2001, so the amendment aligns the powers available to the CMA whether they are inspecting business or domestic premises under a warrant and makes consequential amendments in light of those made by clause 121.

525 Specification of the powers for the purposes of section 50 of the Criminal Justice and Police Act 2001 provides for a power of seizure, where a named officer of the CMA (or a sector regulator where relevant) is on any premises as a result of a warrant issued under section 28 or 28A, and finds anything which they have reasonable grounds to consider they are authorised to seize, but it is not reasonably practicable on the particular premises either to determine whether the material or information is indeed within the scope of the warrant, or for something they consider to be within scope to be separated from something else located on the premises.

526 Subsection (2) amends section 50(6) of the Criminal Justice and Police Act 2001 to make clear that, as in relation to section 28(2)(b) of the Competition Act 1998, whilst section 50 applies to the section 28A(2)(b) Competition Act 1998 power, it only enables those exercising it to copy material in order to examine it elsewhere to determine or separate out what in fact they would be entitled to copy under section 28A itself. It does not give them the power to seize original documents.

527 Subsection (3) amends section 57(1) of the Criminal Justice and Police Act 2001 to add section 28A(8) of the Competition Act 1998 to the list of provisions. Section 28A(8) of the Competition Act 1998 applies in relation to documents which have been seized under section 28A(2)(c), because they appear to be of the relevant kind and there is a need to take possession of them (rather than copies) because such action appears necessary to preserve the documents or prevent interference with them, or it is not reasonably practicable to take copies of the documents on the premises. Where the power is exercised, section 28A(8) provides that the documents may be retained for no longer than 3 months. The amendment to section 57(1) of the Criminal Justice and Police Act 2001 clarifies that the three-month maximum limit continues to apply where the section 50 power has been relied upon and extends the protections set out in that section regarding the relationship between the Criminal Justice and Police Act 2001 regime and the Competition Act 1998 powers.

528 Subsection (4) amends section 63(2) of the Criminal Justice and Police Act 2001 to provide that the CMA's powers under the new section 28(2)(f) of the Competition Act 1998, and those under section 28A(2)(f) and (g), to take copies of information stored in electronic form which has been produced are to be treated as a power of seizure for the purposes of the Criminal Justice and Police Act 2001 and so subject to the safeguards set out in that regime.

529 Subsection (5) amends section 64(3) of the Criminal Justice and Police Act 2001 to specify that the appropriate judicial authority for an application under section 59 of that Act in relation to material seized in reliance on the section 28A Competition Act 1998 power is, in relation to England and Wales and Northern Ireland, the High Court and, in relation to Scotland, the Court of Session. Section 59 of the Criminal Justice and Police Act 2001 allows any person with

a relevant interest in the seized property to apply to the appropriate judicial authority on certain grounds for the return of the whole or part of the seized property.

530 Subsection (6) amends section 65(2) of the Criminal Justice and Police Act 2001. It ensures that references to items which are subject to legal privilege in the Criminal Justice and Police Act 2001 will be read consistently with the definition of "privileged communications" in section 30 of the Competition Act 1998, when the relevant property which has been seized in exercise, or purported exercise, of section 28A of the Competition Act 1998 or section 50 of the Criminal Justice and Police Act 2001 by reference to section 28A of the Competition Act 1998.

531 Subsection (7) amends section 66(5) of the Criminal Justice and Police Act 2001 to ensure any references to seizure under the Criminal Justice and Police Act 2001 will be read as including the CMA's powers to take possession of items under section 28A(2)(c) of the Competition Act 1998.

532 Subsection (8) amends paragraph 67 in Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001 so that section 50 of that Act applies to the CMA's powers under section 28A(2) of the Competition Act 1998, as it already applies to the powers under section 28(2) of the Competition Act 1998.

Proceedings before the Competition Appeal Tribunal

Clause 123: Standard of review on appeals against interim measures directions

533 This clause changes the standard of review to be applied by the CAT on appeals against interim measures directions under section 35 of the Competition Act 1998 from a determination on the merits by reference to the grounds set out in the notice of appeal to a review which applies the same principles as would be applied by a court on an application for judicial review.

534 Under section 35 of the Competition Act 1998, when an investigation has been commenced but not completed, the CMA has the power to issue directions known as "interim measures" for the purpose of preventing significant damage to a particular person or category of person or protecting the public interest.

535 Subsection (1) amends section 46 of the Competition Act 1998 to make clear that a decision to either make or not make interim measures directions under section 35 can be appealed to the CAT by any party to an agreement in respect of which the CMA has made such a decision or any person in respect of whose conduct the CMA has made such a decision. It is already clear that third parties have such a right of appeal to the Tribunal under section 47(1)(d)-(e).

536 Subsections (2), (3) and (4) amend Schedule 8 to the Competition Act 1998 so that appeals in respect of CMA decisions to make or not make interim measures directions will be determined by the CAT by applying the same principles as would be applied by a court on an application for judicial review.

Clause 124: Declaratory relief

537 This clause introduces Schedule 3 which makes amendments to the Competition Act 1998 in order to give the CAT the power to grant declaratory relief in individual or collective claims made with regards to actual or alleged infringements of the Chapter I or II prohibitions in the Competition Act 1998.

538 Declaratory relief takes the form of a declaration (or declarator in relation to Scotland), which is a remedy whereby the CAT makes a legally binding statement on the application of the law to a particular set of facts. It is granted independently of any other claims or awards such as payment of compensation. A declaration could, for example, be about the interpretation of a clause in a contract, the interpretation of a term or provision in a statute or a statutory instrument or whether a patent is still valid.

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

539 Paragraphs (2) and (3) amend section 47A of the Competition Act 1998 to insert a new subsection (3A) which expands the types of claim which may be made in proceedings before the CAT to include a claim for the making of a declaration (or declarator in relation to Scotland).

540 Paragraph (4) inserts a new section 47DA into the Competition Act 1998. This new section provides that declarations or, in Scotland, declarators, granted by the Tribunal have the same effect as those granted by the High Court or the Court of Session respectively and that the Tribunal must apply the same principles as the High Court and Court of Session when deciding whether to grant a declaration or declarator. Further, the Tribunal may grant a declaration or declarator whether or not any other remedy is claimed.

541 Paragraphs (5) and (6) make a consequential amendment to section 47F of the Competition Act 1998 to reflect that Schedule 8A to that Act now makes provision in respect of declaratory relief as well as other kinds of claims.

542 Paragraph (7) amends section 49 of the Competition Act 1998 to make provision for appeals to be made against a decision by the Tribunal to grant declaratory relief.

543 Paragraph (8) makes consequential amendments to Schedule 8A to the Competition Act 1998 regarding the conduct of claims before a court or the CAT to ensure that claims for declaratory relief may be sought in addition to, or instead of, claims in respect of loss or damages.

544 Paragraph (9) inserts an additional paragraph 21B into Schedule 4 to the Enterprise Act 2002 so as to include declaratory relief to the list of areas which the rules, made by the Secretary of State regarding proceedings before the Tribunal, may cover.

Clause 125: Exemplary damages

545 This clause makes amendments to the Competition Act 1998 to enable the CAT, High Court of England and Wales, the Court of Session and Sheriff Court in Scotland, or the High Court in Northern Ireland to award exemplary damages in competition cases (except in collective claims).

546 Parties who have suffered harm due to a breach of competition law can initiate private damages claims, on a stand-alone or follow-on basis, against individuals or businesses which committed the infringement or alleged infringement.

547 Exemplary damages, in common law, are awarded beyond what is compensatory for the loss or harm which occurred to punish particularly egregious conduct. In cases where compensatory redress is considered insufficient in light of the defendant's conduct, additional and proportionate exemplary damages can be sought. Courts have developed well-

established principles regarding the award of exemplary damages, including when such an award may be made and the quantum thereof.

548 Subsection (1) amends section 47C of the Competition Act 1998 so that exemplary damages cannot be sought or granted in collective proceedings, that is cases where multiple claimants are seeking remedies against the same defendant(s) as part of one case.

549 Subsection (2) makes amendments to Schedule 8A to the Competition Act 1998. Paragraph 15 of Schedule 8A is amended to provide that an immunity recipient can be liable to pay exemplary damages to its direct or indirect customers or suppliers (as defined in subparagraphs (a) to (d) of paragraph 15(1)). However, an immunity recipient cannot be held liable for exemplary damages that the claimant is unable to obtain from other undertakings involved in the cartel infringement. Part 8 of Schedule 8A, which previously prevented the award of exemplary damages, is repealed, and a consequential amendment is made to Part 10.

Clause 126: Use of damages-based agreements in opt-out collective proceedings

550 This clause amends section 47C(9) of the Competition Act 1998 to provide that a damages-based agreement is only unenforceable in opt-out collective proceedings before the Competition Appeal Tribunal if the agreement is with a provider of advocacy or litigation services. This amendment is a response to the Supreme Court judgment in R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28 and means third party litigation funding agreements will not be subject to the restriction which applies in relation to opt-out collective proceedings in competition claims before the Competition Appeal Tribunal. The amendment applies retrospectively, so such agreements will be treated as never having been subject to the restriction.

Chapter 2: Mergers

Clause 127: Relevant merger situations and special merger situations

551 This clause introduces Schedule 4 which makes several changes to the thresholds which determine what transactions are within jurisdiction of UK merger control. Transactions within jurisdiction can be reviewed by the CMA although no obligations or requirements are imposed on businesses by being in scope. Jurisdiction does not trigger automatic CMA review or intervention.

552 Schedule 4 introduces a new acquirer-focused threshold which provides a more comprehensive and effective jurisdictional basis for certain vertical and conglomerate mergers, in particular acquisitions that may reduce dynamic competition and risk the development of new products or services. It also introduces a small merger safe harbour which is primarily targeted at reducing the regulatory burden faced by small and micro businesses.

Schedule 4: Relevant and special merger situations

553 Schedule 4 makes several changes to the thresholds which determine what transactions are within jurisdiction of UK merger control.

554 Section 23 of the Enterprise Act 2002 sets out the criteria for a merger to qualify as a "relevant merger situation" and therefore be subject to potential investigation by the CMA. This is the case where the transaction meets at least one of two "tests" detailed below:

a) the "turnover test": the value of the turnover in the UK of the target exceeds £70m; or

b) the "share of supply test": the merger would result in the creation or enhancement of at least a 25% share of supply of goods or services in the UK, or in a substantial part of the UK. This test is met, for example, for a merger between two enterprises each having a 15% share of supply, as well as for a merger between two enterprises where one which already has a 25% share of supply merges with another having a 5% share.

555 Schedule 4 amends the thresholds in three ways:

a) it increases the level of the turnover test,

b) it introduces a safe harbour for mergers involving parties with low levels of UK turnover, and

c) it introduces a new acquirer-focused threshold for merger review.

556 Paragraph 2 of Schedule 4 implements these three amendments:

a) Subparagraph 2 increases the level of the turnover test from £70m UK turnover to £100m UK turnover.

b) Subparagraph 3 introduces a safe harbour by adding a condition into the existing share of supply test in section 23(2) that requires at least one of the merging enterprises to have UK turnover of more than £10m. This has the effect that any merger involving only enterprises with a respective UK turnover of £10m or less is exempt from UK merger review on competition grounds.

c) Subparagraph 4 prevents turnover of the enterprise being taken over from being double counted in certain merger situations, such as a joint venture.

d) Subparagraph 5 introduces a new acquirer-focused threshold by inserting new subsections (4C) - (4G) into section 23. These specify the conditions which must be met in respect of one of the merging enterprises regarding share of supply (subsection (4D)) and turnover (subsection (4E)) and set out an additional condition intended to ensure the transaction has a sufficient connection with the UK (subsections (4F) and (4G)). The persons carrying on the enterprise concerned need to have at least a 33% share of supply of goods or services in the UK, or in a substantial part of the UK, and the enterprise must have a UK turnover of over £350m. The UK nexus criterion is met where an enterprise other than the one that meets the share of supply and turnover conditions is carried on by a UK business or body, at least part of its activities are carried on in the UK, or it supplies goods or services in the UK. The conditions are to be assessed without taking the merger into account, i.e. on the assumption that it has not taken place or will not do so.

557 Paragraph 3 makes consequential amendments to sections 28(5) and (6) of the Enterprise Act 2002 which includes a delegated power for the Secretary of State to amend section 23 by order so as to alter the turnover figures specified in that section. The changes ensure that the provisions of these subsections are applied not just to the existing turnover test but also the turnover elements of the new acquirer-focused threshold and the safe harbour. The exercise of this power is subject to the negative resolution procedure. The power is limited to substituting one figure for another and the Secretary of State is required to act in accordance with public

law principles when doing so. The overall parameters for the thresholds, e.g. that there should be a safe harbour for mergers involving parties with a specified level of turnover or that there should be a threshold focussed on mergers involving larger, established market players, are set out in the primary legislation.

558 Paragraph 5 amends the provisions in section 59 of the Enterprise Act 2002 on special public interest cases to ensure that public interest interventions in media mergers are not affected by the increase in the turnover test and the small merger safe harbour. The special public interest regime enables the Secretary of State to refer certain mergers for investigation on public interest grounds, even though they do not meet the jurisdictional thresholds outlined above. They are scrutinised against public interest considerations only, with no review on competition grounds. The Secretary of State will retain their ability to intervene in mergers where at least one of the enterprises concerned is a media enterprise or a newspaper enterprise and where the target turnover is over £70m as well as where at least one of the enterprises concerned is a media enterprise or a newspaper enterprise and the share of supply test has been met, even if none of the enterprises has UK turnover of over £10m.

559 Paragraph 5 also amends the existing delegated power in section 59(6A) of the Enterprise Act 2002 to amend the conditions for application of the special public interest merger regime. This currently allows the Secretary of State by order to amend the conditions relating to mergers involving media and newspaper enterprises with an existing share of supply of 25%. Paragraph 5 amends that power so that it allows the Secretary of State to alter the turnover threshold figure of £70 million. The exercise of this power is subject to the negative resolution procedure. The power is limited to substituting one figure for another and the Secretary of state is required to act in accordance with public law principles when doing so. The overall parameters for the thresholds, i.e., that there should be a threshold focused on the target's UK turnover, are set out in the primary legislation. Separately, the non-turnover elements of the thresholds are subject to amendment by a delegated power which is, however, subject to the draft affirmative procedure as it permits a wider range of amendments to the threshold tests than altering a turnover figure.

560 Paragraph 5A amends Schedule 5A to the Enterprise Act 2002 which was recently inserted by Schedule 16 to the Energy Act 2023 as part of the amendments made by that Act to enable the CMA to investigate energy network mergers in Great Britain effectively. Paragraph 5A amends the modifications made by Schedule 5A to Chapter 1 of the Enterprise Act 2002 for the energy network merger regime, to reflect the changes made to the ordinary merger regime by the Bill. Firstly, paragraph 5A, subparagraph 2 amends the level of the turnover test for the energy network merger regime from £70m GB turnover to £100m GB turnover, in line with the amendment raising the threshold in the ordinary turnover test from £70m UK turnover to £100m UK turnover in paragraph 2, subparagraph 2 of Schedule 4. Secondly, paragraph 5A, subparagraph 3 amends Schedule 5A to take account of the amendments made to section 28 of the Enterprise Act 2002 by Schedule 4 to the Bill and corrects the modification made by paragraph 3(c) of Schedule 5A to section 28(6) of the Enterprise Act 2002.

561 Paragraph 7 amends the existing delegated power to alter the share of supply test in section 123 of the Enterprise Act 2002. In future, this power will extend to altering the new thresholds introduced by Schedule 4. The amendments introduce restrictions or safeguards in relation to

these new uses of the power which are similar to those currently applying in relation to amendments of the share of supply test.

562 Paragraphs 4 and 8 make minor consequential amendments.

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

563 This clause introduces Schedule 5 which amends Part 3 of the Enterprise Act 2002 to enable the CMA to fast-track a merger to an in-depth Phase 2 investigation if it receives a request from the parties involved in a merger to do so. It streamlines merger review procedures and timelines by removing certain statutory duties on the CMA that currently limit the benefits and use of the existing, non-statutory fast-track procedure. The fast-track process gives the CMA more flexibility to deliver quicker and more efficient merger investigations without prejudicing the quality of the review.

564 While the legislation does not specify for which reasons the parties involved in a merger can request a fast- track, this is most likely to be helpful where the facts of the case are such that the parties involved in a merger and the CMA both consider at an early stage of the investigation that it is highly likely that the merger will be referred to an in-depth Phase 2 investigation. Under such circumstances, it may be beneficial for all parties to streamline the review process and move straight to Phase 2.

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

565 Schedule 5 amends Part 3 of the Enterprise Act 2002 to enable the CMA to fast track a merger to an in-depth Phase 2 investigation if it receives a request from the parties involved in a merger to do so (paragraph 1).

566 The CMA may only launch a Phase 2 investigation if it believes that it is or may be the case that a completed or anticipated merger has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom. If parties are aware that their merger is likely to fall into this category, moving straight into Phase 2 should speed up the overall process by significantly reducing the timelines to get to the in-depth investigation.

567 Paragraph 2 introduces a new duty in section 22(1A) on the CMA to make a reference for a Phase 2 merger investigation regarding a completed merger if it has accepted a fast-track request from the parties involved in a merger. In a fast-track merger investigation, this duty replaces the ordinary duty in section 22(1) to make a reference for a Phase 2 merger investigation where the CMA believes that it is or may be the case that the completed merger has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom. Paragraph 3 introduces an equivalent duty in section 33(1A) for anticipated mergers.

568 Paragraph 4 amends section 34ZA which sets out the time-limits for decisions about Phase 2 references to include a time limit for fast-track references. It requires the CMA to notify the parties involved in a merger of the making of a fast-track reference within the "initial period" which is the statutory period of 40 working days within which the CMA must complete the initial stage of its merger review process (Phase 1).

569 Paragraph 7 inserts new sections 34ZD, 34ZE and 34ZF setting out the conditions and procedure for fast-track reference requests. Section 34ZD enables the parties involved in a

merger to make such a request either before or after the start of Phase 1. The CMA may publish further guidance on the appropriate timings for such a request. When it receives such a request, the CMA must decide whether to accept it and has to notify the parties involved in a merger of its decision (see new section 34ZE). Where the request is made before the start of the Phase 1 investigation, the CMA can either reject it before or after it launches Phase 1, or accept it after launching Phase 1 and before the end of the initial period. Where the request is made after the start of the Phase 1 investigation, the CMA has to either accept or reject it before the end of the initial period. New section 34ZF sets out the conditions for acceptance of a request. The CMA has broad discretion on whether to accept a fast-track request but can only do so if it is satisfied to the usual standard that a relevant merger situation has been or may be created (i.e. that the merger meets the jurisdictional tests set out in section 23 of the Enterprise Act 2002 – see the note on Schedule 4 for further details). Unlike a standard Phase 1 investigation, however, the CMA does not have to determine whether the merger has resulted, or may be expected to result, in a substantial lessening of competition and therefore does not have to undertake the investigation necessary to come to this decision. Instead, it will investigate the substantive issues at the in-depth Phase 2 investigation. When deciding whether to accept a fast-track reference request, the CMA must have regard to whether the merger could raise public interest issues (see section 58 of the Enterprise Act 2002) or whether a special public interest intervention has been launched under section 59 of that Act, to ensure no such case is unduly fast tracked.

570 Paragraph 8 amends section 39 which sets out the time-limits for Phase 2 investigations and reports. It enables the CMA to extend a Phase 2 investigation following a fast-track reference by up to 11 weeks for 'special reasons' (instead of the normal 8 weeks allowed in a non-fast-tracked Phase 2 investigation). This slightly longer permitted extension period reflects the fact that a fast-track decision in the early stages of a Phase 1 investigation means the CMA may be unable to rely on information gathered and findings made at Phase 1 to the same extent as it would ordinarily. In some cases, the CMA may therefore need to be able to extend the Phase 2 investigation for slightly longer to ensure it can conduct a full and proper investigation.

571 Paragraph 8A amends Schedule 5A to the Enterprise Act 2002 which was recently inserted by Schedule 16 to the Energy Act 2023. It amends the modifications made by Schedule 5A to Chapter 1 of the Enterprise Act 2002 for the energy network merger regime to ensure that a review of a merger between energy network enterprises under that regime cannot be fast tracked.

572 Paragraphs 5-6 and 9-13 make consequential amendments to existing provisions in the Enterprise Act 2002, including by introducing a duty on the CMA to publish a fast-track reference decision under section 107.

Clause 129 and Schedule 6: Mergers of energy network enterprises

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

Clause 130: Mutual agreements to extend time-limits: duty to make reference cases

574 This clause enables the CMA and parties involved in a merger to mutually agree to extend the statutory timetable for Phase 2 investigations (known as stopping the clock) where this is likely to support timely resolution of merger investigations and to create added flexibility to the process.

575 Section 39 of the Enterprise Act 2002 (time limits for investigations and reports) requires the CMA to prepare and publish its report on a merger reference within 24 weeks from the date of the reference.

576 Subsection (2) amends section 39 to give the CMA the power to extend the Phase 2 timetable where it and the parties involved in a merger agree to do so. The length of an extension period has to be agreed between the CMA and parties involved in a merger. The extension comes into force when published under section 107 and continues until the end of the agreed extension period, unless the CMA and the parties involved in a merger agree to an earlier cancellation.

577 Subsection (3) amends section 40 of the Enterprise Act 2002 to make clear that a mutually agreed extension does not prevent the CMA from using its existing powers to extend the Phase 2 timetable for other reasons, e.g. for special reasons (section 39, subsection (3)) or if it considers that a relevant person has failed to comply with any requirement of a formal notice under section 109 to provide information or documents (section 39, subsection (4)). The amendment to section 40(5) ensures that mutually agreed extensions are included when calculating the total length of the Phase 2 timetable in a case where there are multiple extensions.

578 Subsection (4) makes amendments to section 107(2) to ensure that the CMA is required to publish any decision, agreed to by it and the parties involved in a merger, to cancel a previously agreed extension.

579 While the legislation does not specify in which circumstances the CMA and the parties involved in a merger can agree an extension, this is most likely to be helpful in support of early consideration of remedies or in multi-jurisdictional mergers that are being reviewed in other countries in parallel to the UK.

Clause 131: Mutual agreements to extend time-limits: public interest cases

580 This clause enables the CMA and the parties involved in a merger to mutually agree to extend the statutory timetable for Phase 2 investigations where there has been a public interest intervention, replicating the provision in clause 130 for standard merger reviews.

581 Subsection (1) explains that this clause amends Chapter 2 of Part 3 of the Enterprise Act 2002. This Chapter sets out that the Secretary of State may intervene in the consideration of a merger where the Secretary of State believes it raises a public interest consideration that needs to be taken into account (relevant considerations are specified in section 58 of the Enterprise Act 2002).

582 Subsections (2) and (3) make amendments to sections 51 and 52 of the Enterprise Act 2002 which are equivalent to those made by clause 130. The only notable difference is that subsection (2) ensures that the CMA can only make an extension or cancel it in a public interest case, if the Secretary of State consents. This ensures the Secretary of State is

appropriately involved in the decision-making, reflecting their role as decision maker in public interest interventions. This will apply to special public interest cases too as section 65(3) of the Enterprise Act 2002 applies sections 51 and 52 automatically to such cases.

583 Subsection (4) makes amendments to section 107 which are equivalent to those made by clause 130.

Clause 132: Publication of merger notices online

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

Chapter 3: Markets

Clause 133: Market studies: removal of time-limit on pre-reference consultation

585 Clause 133, subsections (1) and (2) amend section 131B Enterprise Act 2002 to remove the restriction on the time period during which the CMA, after the commencement of a market study, is required to either begin a consultation regarding a proposal to make a reference or must publish notice of its decision not to make a reference. The requirement to undertake a consultation in a case where the CMA proposes to make a reference, or where it does not propose to make a reference but has received representations in response to the market study notice indicating that it should make a reference, are set out in section 131A Enterprise Act 2002 and continue to apply. The removal of the time restriction gives the CMA flexibility and more time to gather evidence to determine when the consultation process should commence, provided that it can complete the process and reach a decision on a reference within 12 months of the publication of the market study notice.

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

Clause 134: Power to make a reference after previously deciding not to do so

587 This clause amends Section 131B of the Enterprise Act 2002 to specify the circumstances when a market investigation reference may be made, following an earlier decision by the CMA or a concurrent sector regulator during a market study not to make a market investigation reference in relation to the same matter.

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

Clause 135: Scope of market investigations

589 This clause makes provision regarding the ability of the CMA (or the appropriate Minister, as the case may be) to specify the feature or features of a market it considers require further

investigation when making a reference under section 131 or section 132 Enterprise Act 2002 and amending the questions which the CMA group constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to undertake the investigation must consider accordingly.

590 Subsection (2) inserts new subsections (1A) and (1B) in section 133 Enterprise Act 2002 which make provision so that a reference may require the CMA Group to limit its investigation to the effects of features of the market or markets concerned which are set out in the reference itself ("particular features"). It further amends section 133(2) Enterprise Act 2002 so that the provision sets out examples of the types of feature which the reference may specify.

591 Subsection (3) amends section 134 Enterprise Act 2002 so that the CMA group will only be required to investigate "relevant features", defined in new section 134, subsection (2B) Enterprise Act 2002 as being any features of a relevant market other than features that are excluded by virtue of the above amendments to section 133 Enterprise Act 2002. This ensures that the questions which the CMA Group must consider reflect only the matter or matters it is required to investigate as specified in the reference and prevents unnecessary duplication of work.

592 It will therefore be possible for a reference to be made which refers a whole market for investigation, or specific features of a market, where the person making the reference has identified particular features of concern. This means the question to be considered by the CMA reflects that it should be possible for the CMA to refer the whole market for investigation, or a specific feature of the market where they have identified that specific features require further investigation, rather than the market as a whole.

593 Should it subsequently be identified that it would be appropriate for the terms of a reference to be varied, there are powers for the CMA (or the appropriate Minister, as the case may be), to vary a market investigation reference under section 135 Enterprise Act 2002.

Clause 136: Acceptance of undertakings at any stage of a market study or investigation

594 This clause gives effect to Schedule 7 which expands the temporal scope of acceptance of undertakings, allowing voluntary commitments to be accepted by the CMA during all stages of a market study and a market investigation. It also allows the CMA to accept undertakings partially to narrow the issues which require further investigation.

Schedule 7: Acceptance of undertakings at any stage of a market study or investigation

595 Paragraph 2 of Schedule 7 makes amendments to section 131B Enterprise Act 2002 so that in a case where a market study has been undertaken, and the CMA has accepted an undertaking under the new section 154A, either instead of, or in addition to, making an investigation for a market reference under section 131, the market study report must contain that decision.

596 Paragraph 3 of Schedule 7 makes amendments to section 133A Enterprise Act 2002 which deals with which functions of the CMA must be carried out on its behalf by the group constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 following the making of a reference under any of sections 131, 132 or 140A Enterprise Act 2002 ("the CMA Group") and which may be carried out by the CMA Board. Section 133A(1) lists the decisions

which must be made by the CMA Group. That subsection is amended to include a decision to accept an undertaking in lieu of a report under section 154A. Subsection (2) lists the decisions which may be made by the CMA Board where the CMA Group has ceased to exist. It is amended to include a decision to accept an undertaking in lieu of a report.

597 Paragraph 4 of Schedule 7 amends section 136 to make provision so that a report on a market investigation reference must include any decision made by the CMA during the course of the investigation to accept an undertaking partially in lieu of a report.

598 Paragraph 5 of Schedule 7 makes amendments to section 139 Enterprise Act 2002 as a consequence of the introduction of the new section 154A Enterprise Act 2002. Section 139 concerns the circumstances in which the Secretary of State may give a notice to the CMA ("a public interest intervention notice") that they believe it is or may be the case that one or more public interest considerations is relevant to a matter in relation to which a market study notice has been published, or a consultation regarding a possible reference under section 131 has commenced in accordance with section 169 Enterprise Act 2002.

599 Subparagraphs (2) and (3) of Paragraph 5 amend sections 139(1A)(a) and 139(1B)(a) so that the permitted period within which the Secretary of State may give a public interest intervention notice ends where the CMA accepts an undertaking fully in lieu of a reference under the new section 154A (whether in a case in which a market study notice has been published by the CMA, or a consultation regarding a possible reference commenced under section 169 Enterprise Act 2002). Should the CMA accept undertakings partially in lieu and then plan to make a reference in relation to other features of a market, the Secretary of State retains the power to issue a public interest intervention notice. Subsections (4) and (5) make consequential amendments to reflect the replacement of section 154 with the new section 154A Enterprise Act 2002.

600 Paragraph 6 of Schedule 7 makes amendments to section 140 Enterprise Act 2002. Section 140 makes provision regarding public interest intervention notices which may be given under section 139. By section 140(4) a public interest intervention notice comes into force when it is given and remains in force until the matter to which it relates is "finally determined" under the Chapter. Section 140(5) sets out when a matter is finally determined for the purposes of subsection (4). Paragraph 6 amends the list of circumstances in section 140(5) so that it includes the acceptance by the CMA of an undertaking fully in lieu of a reference. Should the CMA accept undertakings partially in lieu, any public interest intervention notice would remain in force.

601 Subparagraph (3) of Paragraph 6 makes a consequential amendment to section 140(6A) to replace the reference to former section 154 with the new section 154A Enterprise Act 2002.

602 Paragraph 7 of Schedule 7 amends section 150 Enterprise Act 2002 so that the Secretary of State's power of veto over the acceptance of undertakings applies to the new section 154A power to accept undertakings in lieu of a reference as it previously applied to undertakings in lieu under the old section 154.

603 Paragraph 8 of Schedule 7 inserts new section 154A in the Enterprise Act in substitution for section 154 Enterprise Act 2002, replacing the CMA's power to accept undertakings in lieu with a power to accept two types of undertakings: undertakings in lieu of a reference and undertakings in lieu of a report. Both types of undertaking can be accepted either partially or

in full of the reference or report, allowing the CMA to use them to narrow the issues which require further investigation either before, or during the course of, a market investigation.

604 New section 154A(1) Enterprise Act 2002 expands the temporal scope of acceptance of undertakings by the CMA. It provides that the power to accept an undertaking applies where no market study notice has been published under section 130A but the CMA considers it has the power to make a market investigation reference under section 131, and otherwise intends to make a reference, where a market study notice has been published under section 130A but no market investigation reference has been made under section 131, or where a market investigation reference has been made under section 131, but no report published under section 136. Acceptance of undertakings after a market investigation reference has been made will allow the CMA to use them to narrow issues during the course of a market investigation.

605 New section 154A(2) Enterprise Act 2002 mirrors former section 154(3) Enterprise Act 2002, and provides that the new power is to accept, from such persons as it considers appropriate, and to take such actions as it considers appropriate, for the purpose of remedying, mitigating or preventing an adverse effect on competition or any detrimental effect on customers so far as it has resulted from the adverse effect on competition, or may be expected to result from it.

606 New section 154A(3) Enterprise Act 2002 provides that undertakings accepted in circumstances where the CMA considers it has power to make a reference and otherwise intends to make a reference, or where a market study notice has been published up to the making of a market investigation reference are known as "undertakings in lieu of a reference". Undertakings accepted after the making of a reference under section 131 or 132, but before the publication of a report under section 136 are known as "undertakings in lieu of a report".

607 New section 154A(4) Enterprise Act 2002 provides that undertakings in lieu of a reference may be accepted instead of making a reference, in which case they are "undertakings fully in lieu of a reference", or in addition to making a reference under section 131 in which case they are "undertakings partially in lieu of a reference". Any reference made would have to relate to features other than those to which the undertakings relate, as a result of the restrictions in section 156 Enterprise Act 2002 (see further below). Undertakings in lieu of a report may be accepted either instead of publishing a report under section 136 ("undertakings fully in lieu of a report"), or in addition to publishing such a report ("undertakings partially in lieu of a report"). Where undertakings are accepted partially in lieu of a report, the questions which must be addressed in the report are amended by section 156 Enterprise Act 2002.

608 New section 154A(5) Enterprise Act 2002 mirrors former section 154(3) Enterprise Act 2002, but is applied only in relation to undertakings accepted fully in lieu of either a reference or a report. The CMA is required to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable as regards the adverse effect they are targeted at. That the duty is not applied to undertakings accepted partially in lieu of a reference or report recognises that the CMA may continue its inquiry in relation to other features which give rise to competition concerns.

609 New section 154A(6) Enterprise Act 2002 provides that when accepting undertakings under the section, the CMA may in particular have regard to the effect on any action on any relevant customer benefits or the feature or features concerned, mirroring former section 154(4).

610 New section 154A(7) Enterprise Act 2002 follows the approach in former section 154(5) and the restriction in section 138(6) Enterprise Act 2002. This provision prevents the CMA taking action in relation to a potential detrimental effect on customers unless they are also taking action in relation to the underlying adverse effect on competition. Where a detrimental effect on customers has already materialised, the CMA is able to address the adverse effect or the customer detriment, in the alternative.

611 Subsections (8), (9) and (10) of the new section 154A Enterprise Act 2002 mirror the previous section 154(6), (7) and (8) Enterprise Act 2002 respectively. Undertakings accepted under the new section 154A come into force when accepted, and may be varied, or superseded by other undertakings and may be released by the CMA. The CMA is required, as soon as reasonably practicable, to consider any representations received by it in relation to the variation or release of any undertaking accepted under the section. The powers to accept undertakings are subject to the Secretary of State's power of veto at section 150 Enterprise Act 2002, and the procedural requirements set out in section 155 Enterprise Act 2002.

612 Paragraph 9 of Schedule 7 amends section 155 Enterprise Act 2002 (undertakings in lieu: procedural requirements).

613 Sub-paragraph (2) of Paragraph 9 amends subsection 155(1) so that the procedural requirements and restrictions set out in the section apply to the new undertakings to be accepted under section 154A as they applied to undertakings in lieu under section 154. These include specific consultation and publication requirements.

614 Sub-paragraph (3) of Paragraph 9 repeals subsection 155(3), replacing it with a new subsection (3A). This requires the CMA to set out, in a notice detailing an undertaking which it proposes to accept, the adverse effect on competition and any detrimental effect on customers resulting from the adverse effect on competition, which the CMA has identified. The obligation to include the terms of the reference which the CMA considers it has the power to make, and would otherwise intend to make, is omitted. This reflects that in the early stages of a market study, the CMA may not be in a position to set out the terms of the market investigation reference in full, even in circumstances where it is satisfied that there is an adverse effect on competition in the market which the undertaking would remedy, mitigate or prevent.

615 Sub-paragraph (4) of Paragraph 9 makes consequential changes to amend references to former section 154 to refer to new section 154A Enterprise Act 2002.

616 Paragraph 10 of Schedule 7 amends section 156 Enterprise Act 2002 which deals with the effects of undertakings and the bar on making future references, to reflect the new types of undertaking created by the new section 154A.

617 Sub-paragraphs (3) and (4) of paragraph 10 of the Schedule amend section 156(A1) and (1) so that the restrictions set out in those sub-sections apply to undertakings accepted under the new section 154A as they applied to undertakings in lieu accepted under section 154. The references to "any feature" in the amended section 156(A1)(b) and new section 156(1)(ab) reflects that undertakings may be accepted partially in lieu. Where undertakings have been accepted in relation to particular features, or combinations of features, a reference may not be made in relation to the same feature or combination of features within the following 12 months, however this does not prevent the making of a reference in relation to another feature in the same market.

618 This also means that where undertakings in lieu have been accepted in relation to a specific feature in a market, that will have the effect of preventing the making of an ordinary reference which relates to the market as a whole (i.e. any feature of the market which may be present) within 12 months following the acceptance of those undertakings. In contrast, where the CMA Board narrows the scope of a reference under section 133 Enterprise Act 2002, this would not prevent the reference of the entire market where this is considered appropriate.

619 For example, where an undertaking in lieu has been accepted in relation to feature A in market Z, it would not be possible for an ordinary reference to be made in the following 12 months relating to feature A in market Z, nor a cross-market reference which includes feature A in relation to market Z. The CMA would be able to make an ordinary reference in relation to any other feature in market Z, and a cross-market reference which includes feature A in relation to any other market except Z.

620 Sub-paragraph (6) of paragraph 10 of the Schedule inserts new subsections (4), (5), (6) and (7) into section 156 Enterprise Act 2002 to address the effects of undertakings in lieu of a report under new section 154A.

621 New subsections 156(4) and (5) Enterprise Act 2002 provide that where the CMA has accepted an undertaking in lieu of a report, the CMA's obligation to consider the questions set out in section 134 Enterprise Act 2002 does not apply in relation to the feature, or features, to which the undertakings relate. Where an undertaking is accepted partially in lieu of a report, the report will therefore only be required to address the features which are not resolved by the acceptance of the undertaking or group of undertakings. Where an undertaking is accepted fully in lieu of a report, there is therefore no obligation to publish a report under section 136 and the duty under section 138 does not arise.

622 The new subsection 156(6) provides that where the CMA accepts an undertaking fully in lieu of a report, the CMA must, instead of the section 136 report, prepare and publish a report setting out its decision to accept the undertaking, reasons for the decision and such information as it considers appropriate for facilitating a proper understanding of the decision and reasons.

623 Paragraph 13 of Schedule 7 amends section 162 Enterprise Act 2002 which sets out the duty on the CMA to keep the carrying out of undertakings under review, and from time to time consider whether they have been or are being complied with, and or need to be varied or superseded by another undertaking. Paragraph 13 amends sections 162(4) and (8) Enterprise Act 2002 so that this duty will apply to undertakings accepted under section 154A as it applied to undertakings accepted under section 154 and includes the new types of undertaking in the definition of "enforcement undertaking". This has the effect of making undertakings under new section 154A Enterprise Act 2002 enforceable by virtue of existing section 167 Enterprise Act 2002 which applies to any enforcement undertaking.

624 Paragraph 14 of Schedule 7 makes amendment to section 169 Enterprise Act 2002. Section 169 requires a relevant authority (that is the CMA, or the Secretary of State in cases involving a full or restricted reference) so far as practicable, to consult where it proposes to make a relevant decision if it considers such decisions are likely to have a substantial impact on the interests of any person. Section 169(6) Enterprise Act 2002 sets out a list of "relevant decisions". Paragraph 14 of Schedule 7 amends this list so it includes decisions to accept an

undertaking in lieu of a reference under section 154A as it previously applied to decisions to accept undertakings in lieu under section 154.

625 Paragraph 15 of Schedule 7 makes consequential changes to section 174C Enterprise Act 2002 to amend references to former section 154 to refer to new section 154A Enterprise Act 2002. Section 174C supplements section 174B which sets out a restriction on the exercise of powers to impose penalties under section 174A for non-compliance with an information notice issued under section 174. There is a limitation period imposed on the issue of a civil penalty for non-compliance with an information notice, which, as amended by Schedule 9, is 10 weeks from the "relevant day". By section 176B(6), where the information gathering power is exercised for the purpose of the CMA's enforcement functions in relation to a matter that is the subject of a possible reference under section 131, the relevant day is the day when the CMA finally decides whether to make the reference.

626 Section 174C(3) makes provision regarding when the relevant day is for the purposes of section 176B(6). Paragraph 15 amends section 174C(3) so that the decision to accept an undertaking fully in lieu of a reference under section 154A will be taken as the day the CMA finally decides whether to make a reference under section 131 for this purpose, and so the limitation period will run from that date.

627 Paragraph 16 of Schedule 7 amends the list of circumstances where a market investigation reference is deemed to be finally determined set out in section 183(3)(a) Enterprise Act 2002 to include the acceptance of an undertaking fully in lieu of a report under new section 154A Enterprise Act 2002.

628 Paragraph 17 of Schedule 7 makes consequential changes to amend references to former section 154 to refer to new section 154A Enterprise Act 2002.

Clause 137: Final undertakings and orders: power to conduct trials

629 Subsection (1) gives effect to Schedule 8 which makes provision to enable the CMA, and as the case may be, the Secretary of State, to conduct trials of remedies before settling a final remedy package.

Schedule 8: Final undertakings and orders: power to conduct trials

630 Paragraph 2 of Schedule 8 makes amendment to section 133A Enterprise Act 2002, which deals with which functions of the CMA must be carried out on its behalf by the group constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 following the making of a reference under any of sections 131, 132 or 140A Enterprise Act ("the CMA Group") and which may be carried out by the CMA Board. Section 133A(1) sets out the decisions which must be carried out by the CMA Group. Section 133A(2) sets out the decisions which may be carried out by the CMA Board where the CMA Group has ceased to exist.

631 Paragraph 2(2) amends subsection 133A(1) so that the decisions under sections 138 to 138B which must be made by the Group are limited to those which relate to an adverse effect on competition in respect of which the CMA is required to take action in accordance with section 138(2) within the period permitted by section 138A(1). It further inserts decisions made under the new section 161C into subsection 133A(1). The CMA Group is thereby required to make decisions regarding any remedies which are to be settled within the period required by

section 138A(1) immediately following the conclusion of a market investigation reference, and the design and commencement of any implementation trial to be undertaken under new section 161C, however decisions to be taken at the conclusion of an implementation trial may be taken by the CMA Board, as may decisions to revise remedies in accordance with section 138(2) following a decision made under the new section 162A(5).

632 Paragraph 2(3) amends subsection 133A(2) to include decisions made under the new section 162B concerning the variation of any undertakings accepted or orders made for the purpose of a trial undertaken under the new section 161C. This allows the CMA Board to vary remedies during the implementation trial period once the CMA Group has ceased to exist.

633 Paragraph 3 of Schedule 8 amends section 138A Enterprise Act 2002 which deals with the time limits within which the CMA is required to take action by either accepting undertakings or imposing orders, following a finding of an adverse effect on competition in a market investigation report published under section 136. By section 138A(1) the CMA is required to discharge its duty under section 138(2) within 6 months from the date of the publication of its report. That time period may be extended by no more than 4 months where the CMA considers there are special reasons for doing so.

634 Paragraph 3(2) inserts new subsections 138A(A1) and (A3) which have the effect of disapplying the time limit in relation to any adverse effect on competition in relation to which an implementation trial takes place, or where, as a result of an implementation trial, it is not reasonably practicable for the CMA to discharge its duty in relation to another adverse effect on competition identified in the report. Instead, the time in which the section 138(2) duty must be discharged is the date specified under the new section 161D(5)(b)(ii); that is the date specified in the final implementation trial notice as the last date on which any implementation trial measure (undertaking or order) is to have effect. The new subsection (A2) confirms that the existing time limits apply to any other adverse effects on competition. This means that where, in a report published under section 136, the CMA identifies multiple adverse effects on competition, and considers that an implementation trial should be undertaken in relation to one or more of those adverse effects, the existing 6+4 month window will apply to remedies which relate to any adverse effect on competition which are not the subject of a trial, and which is it is reasonably practicable for the CMA to settle before the trial is concluded. The extended period will apply to the remedies which are the subject of the trial, and those which it is not reasonably practicable for the CMA to make a final decision about before the trial concludes.

635 Paragraphs 3(3) and 3(4) make consequential amendments to section 138A Enterprise Act 2002 to reflect that the existing window for action to be taken under section 138(2) Enterprise Act 2002 will continue to apply in all other cases except those indicated at section 138A(A1).

636 Paragraph 4 of the Schedule inserts new sections 161B, 161C, 161D and 161E which provide powers for the CMA (and Secretary of State, in public interest cases) to undertake trials of different packages of qualifying remedies before reaching a decision as to the final measures to be accepted or imposed under section 159 or section 161 Enterprise Act 2002.

Section 161B: Implementation trials: purpose and interpretation

637 New section 161B Enterprise Act 2002 introduces new sections 161C to 161E and makes interpretative provision for the purpose of those sections.

638 New section 161B(2) defines "relevant authority" as the CMA or the Secretary of State. The CMA has responsibility for making decisions regarding remedies in relation to cases which have not involved a full or restricted reference. In the case of the latter, decision making powers regarding remedies lie with the Secretary of State.

639 New section 161B(3) makes interpretative provision which applies in relation to Part 4. It further includes a power for the Secretary of State to specify in regulations matters in relation to which remedial action will be "qualifying remedial action" and so in scope of the power to conduct an implementation trial. This power is subject to the draft affirmative procedure, see clause 144 and paragraph 3(8) in Schedule 13.

640 New section 161B(4) provides that the last day on which an implementation trial measure may have effect is the earlier of either the day specified in the final implementation trial notice as the last day on which any undertaking or order made under the new powers is to have effect, or the day on which a decision is made regarding the final remedy package under the relevant power concerned. There is no limit on how long an implementation trial may last, as each trial will need to be designed according to the needs of the particular market. The CMA (or Secretary of State, as the case may be) will be required to set out in the final implementation trial notice how long the specific trial measures are to last for, and will be required to make a decision regarding the final remedy package within that period.

641 New section 161B(5) provides that where the CMA makes a decision under section 138A(3) to extend the period within which it must make a decision regarding the final remedy package, as a result of a person failing to comply with a requirement of an information notice under section 174, where such failure prevents the CMA properly discharging its duty under section 138(2), then the last day on which an implementation trial measure is to have effect is the last day of that period as so extended. This ensures that in the event the CMA has not been provided with information it needs to evaluate the effectiveness of remedies to enable it to make a decision regarding the final remedy package, it will not be forced to make a decision without this as a result of the time restriction that would otherwise apply.

Section 161C: Power to conduct implementation trials

642 New section 161C(1) gives the CMA the power to begin an implementation trial where it is under a duty to take remedial action in accordance with section 138(2), (which may be either because it has identified an adverse effect on competition in a report prepared and published under section 136 within the required time period following the making of a market investigation reference, or because it is required to take action under the new section 162A(5)), and it has not taken, but is minded to take qualifying remedial action, that is action which relates to the provision of information to consumers, whether directly or through an intermediary, or any other matter which may be specified in regulations made by the Secretary of State. That regulation making power is subject to the draft affirmative procedure. Consumer is defined in section 183 Enterprise Act 2002 for the purposes of Part 4.

643 New section 161C(2) gives the Secretary of State the power to begin an implementation trial where (i) the Secretary of State has the power to take action under section 159 or section 161 by virtue of section 147(2) or section 147A(2), (ii) and they have not taken, but are minded to take qualifying remedial action.

644 New section 161C(3) provides that the powers of both the CMA and Secretary of State to

undertake implementation trials are subject to the requirements in new section 161D Enterprise Act 2002 concerning the publication of notices.

645 New section 161C(4) provides that an implementation trial is begun by the CMA, or the Secretary of State, as the case may be, by the acceptance of an undertaking or making of an order under section 161C for the purposes of assessing, during the implementation trial period, the likely effectiveness of the qualifying remedial action.

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

Section 161D: Implementation trials: notices

647 New section 161D Enterprise Act 2002 makes provision regarding the procedural steps which the relevant authority is required to follow before it may begin an implementation trial.

648 New section 161D(1) requires that the relevant authority must publish both a provisional implementation trial notice, and a final implementation trial notice.

649 New section 161D(2) specifies the matters that must be included in the provisional implementation trial notice. The relevant authority must set out details of each implementation measure, that is undertaking and order, it is minded to accept or impose, and the relevant adverse effect each is intended to address must be specified. The relevant authority must state any other facts that they consider justify the imposition of the measure, and set out how it intends to assess the effects of the measure, and the last day on which it intends for the measure to have effect. It must further invite the making of representations by the persons on which it is minded to impose measures, and specify how, and by when, such representations must be made. New subsection (3) specifies that at least 15 days after the date on which the provisional implementation trial notice is published must be allowed for the making of representations.

650 New subsection 161D(4) makes provision requiring the relevant authority to take into account any representations received in response to the provisional implementation trial notice, and where they consider it appropriate to begin an implementation trial, to publish a final implementation trial notice.

651 New section 161D(5) specifies the matters which must be set out in the final implementation trial notice. This must include the implementation trial measures the relevant authority intends to impose, and in relation to each such measure, how they intend to assess the effect of the measure, and the last day on which the measure is to have effect. Since trials are to be undertaken in circumstances where it is not clear what the most effective approach to the

remedy is, there is no statutory time limit set in relation to the trial period itself. To ensure that a trial cannot continue indefinitely, the final implementation trial notice must specify the last day on which each implementation trial measure is to have effect. This specified day acts as a long stop on the implementation trial, and is the date by which the final action under section 138(2) by the CMA must be taken. The period specified will therefore take account of both the time needed to allow the remedy to take effect, its effectiveness to be assessed, and to allow any consultation to take place about the final measure to be imposed taking into account the conclusions of the trial.

Section 161E: Implementation trials: supplementary

652 New section 161E Enterprise Act 2002 makes provision regarding the applicability of other provisions in Part 4 to the new powers to undertake implementation trials, and other procedural provisions.

653 New section 161E(1) requires the CMA, before accepting an undertaking for a purpose permitted by new subsection 161C, to provide the person with information about the possible consequences of failing to comply with it. Any person to whom an undertaking accepted under section 161B relates has a duty to comply with it, which is owed to any person who may be affected by a contravention of it and which is actionable under section 167(4) Enterprise Act 2002. Further, the new subsection 167A inserted by Schedule 10 makes provision for a relevant authority to impose a civil penalty for failure to comply with undertakings accepted under Part 4 of the Enterprise Act 2002.

654 New section 161E(2) requires the CMA to begin an implementation trial either within the 6 month window (extendable by 4 months) under section 138A Enterprise Act 2002, where the trial immediately follows a market investigation, or within 6 months of the decision to vary a remedy following a decision that action should be taken under section 162A(5) as a remedy has been ineffective.

655 New section 161E(3) applies the provisions at section 138(3), (5), and (6) to decisions regarding remedies for implementation trials as they apply to decisions concerning action to be taken under section 138(2). That is, decisions concerning implementation trial measures must be consistent with the decisions included in the relevant report published under section 136, unless there has been a material change in circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently. The CMA may have regard to the effect of any action on any relevant customer benefits of the feature or features of the market or markets concerned. The CMA may not take action to remedy, mitigate or prevent any detrimental effect on customers which is anticipated to arise from the adverse effect on competition if that detrimental effect has yet to arise, unless the adverse effect on competition is being remedied, mitigated or prevented. There is no requirement for the CMA to have regard to the need to ensure that remedies are as comprehensive as is reasonably practicable, given the nature of an implementation trial.

656 New section 161E(4) applies the provisions in section 147(3)(b), (4), (5) and (6) Enterprise Act 2002 to decisions made regarding implementation trials by the Secretary of State in a restricted public interest case as they would apply to final remedies imposed in those cases. These are the requirement for the Secretary of State to have regard to the CMA's report, the bar on the Secretary of State challenging the CMA's decision as to whether there is an adverse effect on competition, the power to have regard to the effect of any action on any relevant

customer benefits of the feature or features concerned and the restriction on the Secretary of State taking action in relation to potential detrimental effect on customers unless the underlying adverse effect on competition is being remedied.

657 New section 161E(5) applies the provisions in section 147A(3) and (4)(b) Enterprise Act 2002 to decisions made regarding implementation trials by the Secretary of State in a full public interest reference case as they would apply to a final remedy in those cases. These are the requirement for the Secretary of State to have regard to the CMA's report and the power to have regard, in particular, to any detrimental effect on customers so far as resulting from effects adverse to the public interest concerned.

658 New sections 161E(6) and (7) apply the procedural obligations to undertakings accepted and orders made under section 161C for the purposes of an implementation trial as they apply to the making of any final order under section 161 Enterprise Act 2002 or acceptance of an undertaking under section 159 Enterprise Act 2002.

659 Paragraph 5 of Schedule 8 inserts new Section 162B Enterprise Act 2002 which provides a power for the CMA or the Secretary of State to vary implementation trial remedies. By new subsection (1), the section applies where the CMA or Secretary of State has imposed implementation trial measures in accordance with section 161C.

660 New section 162B(2) requires the CMA to keep under review the effectiveness of any measure which has been imposed.

661 New section 162B(3) requires the CMA, from time to time, to consider whether a measure has been, or is being, complied with, and whether any undertaking accepted or order imposed, is no longer appropriate and needs to be varied or revoked, or in the case of undertakings, one or more parties could be released from it, or it should be superseded by a new undertaking.

662 New section 162B(4) requires the CMA, within the implementation trial period, to provide the Secretary of State with such advice as it considers appropriate in relation to the variation of any measure accepted or imposed by the Secretary of State under section 161C.

663 New section 162B(5) makes provision for the CMA and Secretary of State to take such action as they consider appropriate in relation to the variation or release of undertakings or orders, or replacement by new undertakings or orders during the implementation trial period.

664 New section 162B(6) prevents the CMA or Secretary of State from varying an implementation trial measure in such a manner that it would extend the implementation trial period and requires any varied measure to remain in compliance with section 161C.

665 New sections 162B(8), (9) and (10) apply the provisions at sections 138(3), (5) and (6) to variations of implementation trial measures by the CMA, and the provisions at sections 147(3)(b), (5) and (6) and sections 147A(3) to variations of implementation trials measures by the Secretary of State, as they apply to measures imposed at the outset of an implementation trial.

666 Paragraph 6 of Schedule 8 makes amendments to section 165 Enterprise Act 2002 to apply the procedural requirements set out in Schedule 10 (other than the provision in paragraph 9 of that Schedule, which allow the relevant authority to dispense with the requirements where there are special reasons for doing so) to any decision to accept an undertaking or make an

order for the purpose of an implementation trial under section 161C, as they apply in relation to undertakings accepted under section 159 and orders made under sections 160 and 161 Enterprise Act 2002. Schedule 10 sets out specific consultation and publication requirements.

667 Paragraph 7 of Schedule 8 makes amendments to section 167 Enterprise Act 2002 so that enforcement action can be taken in relation to undertakings accepted and orders imposed for the purpose of an implementation trial, as can be taken in relation to other types of order and undertaking under Part 4 Enterprise Act 2002.

668 Paragraph 8 of Schedule 8 makes amendments to new section 167A Enterprise Act 2002 (inserted by paragraph 17 of Schedule 10 - Civil penalties in connection with breaches of remedies), so that penalties can be imposed in relation to undertakings accepted and orders imposed for the purpose of an implementation trial, as will be the case in relation to other types of order and undertaking under Part 4.

669 Paragraph 9 of Schedule 8 makes amendments to new section 167B Enterprise Act 2002 (inserted by paragraph 17 of Schedule 10 - Civil penalties in connection with breaches of remedies), so that the penalty amount payable by reference to a daily rate ceases to accumulate at the beginning of the day on which the undertakings accepted and orders imposed for the purpose of an implementation trial are complied with, as will be the case in relation to other types of order and undertaking under Part 4.

670 Paragraph 10 of Schedule 8 makes amendment to section 169 Enterprise Act 2002 so that it requires a relevant authority to consult, so far as practicable, where it proposes to make a relevant decision, if it considers such decisions are likely to have a substantial impact on the interests of any person. Section 169(6) sets out a list of "relevant decisions". Paragraph 10 amends the list so this includes decisions to impose implementation trial measures, and decisions to vary or replace existing remedies.

671 Paragraph 11 of Schedule 8 amends section 172 Enterprise Act 2002 which sets out specific decisions which the CMA is required to publish. Subsection 172(2) is amended to include a reference to a decision under section 138A(A1)(b) that the CMA considers it is not reasonably practicable to separate the element of the remedy package undergoing an implementation trial from an element of the remedy package that is not undergoing an implementation trial, but might be influenced by the results of that implementation trial and so the time for complying with the section 138(2) duty is extended to the end of the implementation trial.

672 Subsection (2) of clause 137 gives the Secretary of State a delegated power, by regulations, to amend specified sectoral legislation, and section 168 of the Enterprise Act 2002 in connection with the provision made by Schedule 8 to this Bill, that is the ability to undertake trials of different packages of market investigation remedies.

673 Where a market investigation takes place in a regulated sector, to ensure there is no conflict between the regime in Part 4 of the Enterprise Act 2002 and for instance, regulatory licensing schemes, the existing legislative framework makes provision so that the CMA, or Secretary of State (as the case may be), are given powers to modify regulatory conditions directly, or can request that relevant regulatory authority does so. These powers sit within the sectoral enactments.

674 Where the CMA and Secretary of State have powers to take action directly, section 168

Enterprise Act 2002 makes provision so that, when taking such action, they are required to have regard to the functions of the regulatory authority which would ordinarily be responsible for such actions.

675 Without amendment of the sectoral enactments, the CMA or Secretary of State may be unable to take action to trial different regulatory conditions when undertaking implementation trials. Should the sectoral enactments be amended to give this power to the CMA and Secretary of State, section 168 of the Enterprise Act 2002 would also require amendment to ensure that they were required to take relevant regulatory functions into account appropriately. Subsection (2) provides the power for the Secretary of State, by regulation, to make these amendments.

676 Subsection (3) provides examples of the types of provision which the power may be used to make in the specified sectoral enactments.

677 Subsection (4) limits the power in subsection (2) so that where it is used to amend a sectoral enactment listed in section 168 of the Enterprise Act 2002, it may only make provision in connection with a relevant action mentioned in section 168(3) Enterprise Act 2002. This means that, in relation to those enactments, the power can only be exercised to allow the CMA or Secretary of State to take the same types of action during an implementation trial as they can already take when settling a final remedy package following a market investigation.

678 Subsection (5) lists the relevant sector legislation that may be amended using the power at subsection (2).

679 Subsection (6) imposes a requirement that the relevant regulators must be consulted before the Secretary of State makes regulations to amend the sectoral legislation. If section 168 Enterprise Act 2002 is amended, such sectoral authorities as the Secretary of State considers are likely to have an interest in the amendment must be consulted.

680 Subsection (7) lists the relevant sectoral authorities for the purposes of the consultation requirements.

681 Subsection (8) provides a power for the Secretary of State, by regulations, to add or remove an enactment in scope of the power at subsection (2) and to amend subsection (7) so as to add, amend or vary an entry.

682 Subsection 9 makes provision so that any Regulations made under section 137 are subject to the draft affirmative procedure.

Clause 138: Duty of CMA to monitor undertakings and orders

683 This clause makes provision regarding the review of remedies by the CMA and for new powers for the CMA or the Secretary of State (as the case may be) to vary remedies accepted or imposed following a market investigation which are subsequently found to have been ineffective.

684 Subsection (2) amends section 161(5) Enterprise Act 2002 to broaden the Secretary of State's power to vary or revoke an order. At present, the Secretary of State may only vary or revoke an order where the CMA advises that such variation or revocation is appropriate by reason of a change of circumstances. Section 161(5) is amended so that the Secretary of State has the

power to vary or revoke an order following the receipt of advice from the CMA under either 162(3) (in relation to a change in circumstances) or section 162A(8).

685 Subsection (3) amends section 162 Enterprise Act 2002 to repeal subsections (5) to (7). The heading before the section is also amended to reflect that the duty under the section is thereby limited to require the CMA to monitor the carrying out of remedies accepted or imposed at the end of a market investigation, as opposed to the effectiveness of those remedies.

686 Subsection (4) inserts new section 162A Enterprise Act 2002 which imposes a separate duty on the CMA to monitor the effectiveness of undertakings and orders accepted or imposed under Part 4 of the Enterprise Act 2002 and makes provision for powers to amend remedies which are found to have been ineffective.

687 New sections 162A(1) to (3) re-enact previous section 162, subsections (5) to (7) and require the CMA to keep the effectiveness of remedies under review and report its findings to the Secretary of State when requested to do so, and otherwise from time to time. A copy of that report must be given to the Secretary of State and published.

688 The new sections 162A(4) to (6) provide a new power for the CMA to vary undertakings accepted or orders imposed by it which are subsequently identified to be ineffective for the purpose of remedying, mitigating or preventing the adverse effect on competition, or any actual or potential detrimental effect on customers resulting from it which was identified in a market investigation.

689 New section 162A(4) provides that the new power arises in relation to action taken by the CMA under section 138(2) Enterprise Act 2002, (that is undertakings accepted under section 159 or orders imposed under section 161), in relation to an adverse effect on competition identified in a report published by the CMA under section 136, subsection (1) within the preceding 10 years, where the CMA's review under subsection 162A, paragraph (1) has concluded that the undertaking or order has been ineffective for the purpose of remedying, mitigating or preventing the adverse effect on competition, or detrimental effect on customers resulting from it. The power is not available where the CMA took action under section 138, subsection (2) less than 2 years ago. This provides a "cooling-off" period after undertakings are accepted or orders imposed (whether immediately following a market investigation reference, or after action taken under the new section 162A(5), and a "long stop" of 10 years on the exercise of the power.

690 New section 162A(5) provides that where the power arises, the CMA must take such action as it considers appropriate in relation to the variation or release of undertakings or orders, or replacement by new undertakings or orders.

691 New section 162A(6) provides that where the CMA decides to take action under subsection (5), it must do so within 6 months of the date of publishing its decision to do so.

692 New sections 162A(7) and (8) set out an obligation for the CMA to provide advice to the Secretary of State in relation to remedies accepted or imposed by the Secretary of State under either section 147 in relation to a restricted PI reference, or section 147A in relation to a full PI reference which it concludes have been ineffective for the purposes of remedying, mitigating or preventing the adverse effects they were intended to address.

693 New section 162A(7) provides that the new obligation arises in relation to action taken by the Secretary of State under section 147(2) or section 147A(2) Enterprise Act 2002, (that is undertakings accepted under section 159 or orders imposed under section 161), in relation to an adverse effect on competition, or effect adverse to the public interest identified in a report prepared and published by the CMA and laid before each House of Parliament by the Secretary of State within the preceding 10 years, where the CMA's review under subsection 162A(1) has concluded that the undertaking or order has been ineffective for the purpose of remedying, mitigating or preventing the adverse effect it was intended to address. The obligation does not arise where the Secretary of State took action under section 147(2) or section 147A(2) no less than 2 years prior. As under subsections (4) and (5), this provides a "cooling-off" period of 2 years after undertakings are accepted or orders imposed (whether immediately following a reference, or after action taken after advice provided under section 162A(8)), and a "long stop" of 10 years on the obligation to provide advice, and therefore the exercise of the expanded power of the Secretary of State to make variations following the receipt of such advice.

694 Subsection (6) of clause 138 amends section 169 (certain duties of relevant authorities to consult: Part 4) Enterprise Act 2002. Section 169 requires a relevant authority to consult, so far as practicable, where it proposes to make a relevant decision if it considers such decisions are likely to have a substantial impact on the interests of any person. Section 169(6) sets out a list of "relevant decisions". Subsection (6) amends the list so this includes decisions by the CMA to take action under section 162A(5).

695 Subsection (7) amends section 172 (further publicity requirements) Enterprise Act 2002 to include a decision made to take action under the new section 162A(5) power in the list of decisions which the CMA is required to publish. It further inserts a new section 172(11) into the Enterprise Act 2002 which requires the Secretary of State, where they have decided to take action to vary or revoke an order or undertaking following the receipt of advice from the CMA under either section 162(3) or section 162A(8), to lay details of the decision and reasons for it, and the CMA's advice, before each House of Parliament, after the relevant variation action has been taken.

696 Subsection (8) amends section 177 (excisions from reports: Part 4) Enterprise Act 2002 to make provision so that the Secretary of State may exclude a matter from the CMA's advice before laying it before Parliament in accordance with the new section 172(11) obligation, where they consider that inclusion would be inappropriate. Depending on the nature of the public interest consideration, it may be that there is information within the advice that it would not be appropriate for this to be disclosed in a document which will be made public.

Clause 139: Taking action in relation to regulated markets

697 Clause 139 makes amendments to section 168 Enterprise Act 2002, to tidy up the section and correct references to enactments which have become out of date.

Chapter 4: Cartels

Clause 140: Production of information authorised by warrant

698 This clause amends section 194 of the Enterprise Act 2002 which makes provision regarding the grant of warrants, and the powers of the CMA when executing such warrants, to enter premises for the purposes of an investigation concerning the cartel offence. That offence is set

out at section 188 of the Enterprise Act 2002. In England and Wales, and Northern Ireland, proceedings for the offence may only be brought by the Director of the Serious Fraud Office, or by, or with the consent of, the CMA.

699 Section 194, among other things, enables a named officer of the CMA (who may be accompanied by other CMA officers authorised by the CMA) to require the production of information held electronically and accessible from a premises during an inspection under a warrant. These investigative powers apply to the CMA only; where the Serious Fraud Office is investigating a suspected commission of the cartel offence it uses its powers under the Criminal Justice Act 1987.

700 Subsection (2) amends section 194(1) of the Enterprise Act 2002 to expand the powers of, in England and Wales or Northern Ireland, the High Court or the CAT, and in Scotland, the sheriff, to grant a warrant to the CMA on the basis that there are reasonable grounds for suspecting that there are relevant documents accessible from any premises, where the other criteria set out in that section are met.

701 Subsection (3) amends the powers set out at section 194(2) of the Enterprise Act 2002 which a warrant authorises the CMA officers to exercise. Section 194(2)(d) is amended to broaden the power to require the production of information stored electronically and accessible from the premises. This power will now apply to any information stored electronically and accessible from the premises, not only that which the named officer considers relates to a matter relevant to the investigation.

702 Subsection (3) further inserts new paragraphs (e), (f) and (g) into section 194(2) of the Enterprise Act 2002. Paragraph (e) enables the CMA officers to operate equipment on the premises for the purpose of producing information stored in electronic form and accessible from the premises in a form in which it is visible and legible or in a form from which it can readily be produced in a visible and legible form. For example, this power could be used to operate equipment so that electronic information can be transferred securely to CMA devices or where an undertaking or its employees cannot or will not produce the required information in such a form. Paragraph (f) enables the CMA officers to require assistance from any person on the premises to access information held electronically and accessible from the premises (such as the provision of passwords or encryption keys). Paragraph (g) empowers the CMA to take copies of or seize anything produced which the named CMA officer considers relates to any matter relevant to the investigation.

703 Subsection (4) amends section 196 of the Enterprise Act 2002 which deals with privileged information etc. Section 196(1) of the Enterprise Act 2002 provides that a person may not, under the powers at section 193 or 194, be required under the powers to produce or disclose a privileged communication, except that a lawyer may be required to provide the name and address of his client. Section 196(2) provides that a person may not be required under sections 193 or 194 to disclose any information or produce any document in respect of which they owe an obligation of confidence by virtue of carrying on any banking business, unless certain exceptions apply. Subsection (4) inserts a new section 196(2A) which sets out that nothing in section 194 authorises an officer to produce, seize, makes copies of or take extracts from any communication which a person could not be required to produce or disclose, as a result of the protection given by section 196(1) or (2).

Chapter 5: Miscellaneous

Clause 141: Attendance of witnesses etc.

704 This clause makes provision which amends section 26A of the Competition Act 1998, and sections 109 and 174 of the Enterprise Act 2002. Section 26A of the Competition Act 1998 sets out the power of the CMA (and so where relevant the sector regulators exercising functions on a concurrent basis) to require persons to answer questions with respect to any matter relevant to an investigation under section 25 of that Act into a suspected infringement of either the Chapter I or Chapter II prohibitions. Section 109 of the Enterprise Act 2002 makes provision regarding the CMA's powers to require the attendance of witnesses and production of documents etc. for the purposes of its functions under Part 3 of that Act (mergers). Section 174 of the Enterprise Act 2002 makes provision regarding the powers of the CMA (and so the sector regulators exercising functions on a concurrent basis) to require the attendance of witnesses and production of documents etc. for the purposes of its functions under Part 4 of that Act (market studies and market investigations).

705 Subsection (2) amends section 26A(1) of the Competition Act 1998 to broaden the power, by enabling the CMA, by notice, to require any individual to attend an interview at a time and place specified, and answer questions for the purpose of an investigation, rather than only those who have a connection to a relevant undertaking. A person has a connection with an undertaking if they are, or have been, concerned with the management or control of the undertaking, employed by or otherwise working for the undertaking. A relevant undertaking means an undertaking whose activities are being investigated under section 25 of the Competition Act 1998. Subsection (2) further amends section 26(1)(a) to specify that a person may be required to answer questions remotely.

706 Subsection (3) amends section 26A(2) so that a copy of the notice which must be given to an individual who is required to attend and answer questions must also be given to any relevant undertaking that the individual in question has a current connection with.

707 Subsection (5) amends section 109(1) of the Enterprise Act 2002 to specify that a person may be required to answer questions remotely.

708 Subsection (6) amends section 174(3) of the Enterprise Act 2002 to specify that a person may be required to answer questions remotely.

Clause 142: Civil penalties etc in connection with competition matters

709 This clause introduces Schedule 9, 10 and 11.

710 Subsection (1) introduces Schedule 9 which amends existing powers of the CMA to issue civil penalties and introduces new powers for the CMA to issue civil penalties where previously only criminal offences existed, for failure to comply with investigative measures and information requirements under Part 1 of the Competition Act 1998 (competition) and Parts 3 (mergers) and 4 (market studies and market investigations) of the Enterprise Act 2002.

711 Subsection (2) introduces Schedule 10 which provides for new powers for the CMA to issue civil penalties for breaches of interim measures, commitments and directions under Part 1 of the Competition Act 1998 (competition) and interim measures, undertakings in lieu, final undertakings and orders under Parts 3 (mergers) and 4 (market studies and market

investigations) of the Enterprise Act 2002. Collectively, these measures are known as "remedies".

712 Subsection (3) introduces Schedule 11 which provides for consequential amendments related to the legislative framework which provides for the exercise of some functions of the CMA concurrently by sector regulators. The amendments provide that some of the new functions, in particular those which relate to the publication of statements of policy, are not to be exercisable by the sector regulators.

Schedule 9: Civil Penalties etc in connection with competition investigations

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

714 These powers also apply to concurrent regulators (under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002), and functions of the Secretary of State and Ofcom relating to public interest cases under the Enterprise Act 2002. In the following paragraphs references to the CMA should be read to include "and others where relevant" unless indicated otherwise.

715 Part 1 of Schedule 9 makes amendments to Part 1 of the Competition Act 1998.

716 Paragraphs 2, 3, 4, 5 and 6 of Schedule 9 amend sections 26, 26A, 27, 29 and 40ZD of the Competition Act 1998 respectively to insert provision which requires that notices issued under those sections (or a warrant, in the case of section 29) must include the possible consequence of failing to comply with the relevant information gathering power, rather than only information regarding the offences at sections 42 to 44 of the Competition Act 1998. This will ensure that those who are required to produce or provide information are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse at the time the obligation is imposed or arises.

717 Paragraph 8 of Schedule 9 inserts a new section 40ZE into the Competition Act 1998.

718 New section 40ZE, subsection (1), makes provision to empower the CMA to impose a penalty on a person in accordance with section 40A where the CMA considers that they have, without reasonable excuse:

a) failed to comply with a requirement imposed on them under any of sections 26 (power to require documents and information), 26A (power to ask questions), 27 (power to enter business premises without a warrant), 28 (power to enter business premises under a warrant), 28A (power to enter domestic premises under a warrant) or 40ZD (information relating to transferred EU anti-trust commitments and transferred EU anti-trust directions);

b) obstructed an officer acting in the course of their powers under section 27, or under a warrant issued under sections 28 or 28A;

c) destroyed or otherwise disposed of, falsified or concealed, or caused or permitted such action, a document which had been required to be produced under any of sections 26, 27, 28 or 28A;

d) provided information that was false or misleading in a material particular to the CMA in connection with any function of the CMA under Part 1 (whether or not the information had been required to be provided by the CMA);

e) provided information that was false or misleading in a material respect to another person, knowing that it was to be used for the purpose of providing information to the CMA in connection with any of its functions under Part 1.

719 This introduces civil penalties where only criminal offences existed previously (in relation to the destruction etc. of documents which had been required to be produced, and the provision of false or misleading information to the CMA), and in relation to the new duty to preserve documents (as provided by clause 120 of the Bill). The "without reasonable excuse" threshold is consistent with the threshold for existing civil penalties (under section 40A of the Competition Act 1998, and sections 110 and 174A of the Enterprise Act 2002).

720 New section 40ZE, subsection (2) makes provision which prevents a civil penalty being issued in relation to an act or omission which constitutes an offence under any of sections 42 (offences), 43 (destroying or falsifying documents) or 44 (false or misleading information), if the person has by reason of the act or omission, been found guilty of the offence. Similar provision is inserted in relation to the offences, in order to prevent a person being penalised under both the civil and criminal enforcement regimes.

721 New section 40ZE, subsection (3) requires the CMA to have regard to the statement of policy most recently published under section 40B when deciding whether, and if so how, to proceed in relation to the issue of a civil penalty.

722 New section 40ZE(5) applies sections 112 to 115 of the Enterprise Act 2002 in relation to penalties imposed under section 40ZE(1) as they apply to penalties issued under section 110(1) or (1A) of that Act, with relevant modifications. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties.

723 Paragraph 9 of Schedule 9 amends section 40A of the Competition Act 1998 so that it deals with the amount of a penalty imposed under the new section 40ZE. New section 40A(1A) is inserted so that a penalty imposed is to be of such amount as the CMA considers appropriate. Section 40A(2) is amended so that penalties issued in relation to failures to comply with an information requirement which are continuing may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. New section 40A(2A) makes provision so that a penalty imposed in relation to the obstruction of an officer in the exercise of his powers under section 27, or a warrant issued under sections 28 or 28A, or the destruction etc. of documents which have been required to be produced, or the provision of false or misleading information, must be a fixed amount. This reflects that these breaches are not capable of remedy. Section 40A(3) is amended to set out the maximum penalty on a person who is not an undertaking. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not

exceed £15,000 per day. Section 40A(3A) is inserted to set out the maximum penalties which may be imposed on a person who is an undertaking. In the case of a fixed amount, the penalty must not exceed 1% of the turnover of the undertaking. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily turnover of the undertaking. Section 40A(6) is amended to reflect the amendments to the procedural requirements in section 112 of the Enterprise Act 2002 made by paragraph 18 of Schedule 9, and the provision made by the new section 40ZE. New section 40A(7A) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who is not an undertaking. This power is subject to the draft affirmative procedure, see clause 144 and paragraph 1(3) of Schedule 13. New sections 40A(10) to (12) enable the Secretary of State to make provision by way of regulations for determining the turnover and daily turnover of an undertaking for the purposes of the section. This power is subject to the negative procedure.

724 Paragraph 10 of Schedule 9 amends section 40B of the Competition Act 1998 which requires the CMA to prepare and publish a statement of policy in relation to the use of its powers to impose civil penalties. New section 40B(5A) introduces a requirement for the statement of policy to be approved by the Secretary of State before it can be published.

725 Paragraphs 11, 12 and 13 of Schedule 9 make amendments to sections 42, 43 and 44 of the Competition Act 1998 respectively. Section 42 sets out the offence in relation to obstructing officers acting under sections 27, 28 or 28A of the Act. Section 43 sets out the offence relating to the destruction etc. of documents which have been required to be produced by the CMA, and section 44 the offence relating to the provision of false or misleading information to the CMA. New subsections are inserted into each of those sections to provide that a person does not commit an offence by reason of any act or omission in relation to which the CMA has proceeded by issuing a civil penalty under the new section 40ZE(1). Paragraph 11 also amends the heading for section 42 to clarify the offence to which the provision relates.

726 Part 2 of Schedule 9 makes amendments to Part 3 (mergers) of the Enterprise Act 2002.

727 Paragraph 15 amends section 110 of the Enterprise Act 2002 which makes provision regarding the issue of penalties for non-compliance with any requirement of a notice issued under the information gathering power at section 109. Section 110(1) is substituted to empower the CMA to impose a penalty on a person in accordance with section 111 where it considers that the person has, without reasonable excuse:

a) failed to comply with any requirement of a notice issued under section 109;

b) obstructed or delayed a person in the exercise of that person's powers under section 109(6) (which permits the copying of any document produced);

c) altered, suppressed or destroyed any document which the person had been required to produce by notice under section 109.

728 Section 110(1A) is inserted to allow the appropriate authority (being the CMA, Ofcom, or the Secretary of State, who all have functions under Part 3 in relation to mergers which raise public interest considerations as a result of which they may be provided with information even though they do not have compulsory information gathering powers), to impose a penalty on a person where it considers that they have, without reasonable excuse:

a) supplied information that was false or misleading in a material respect to the authority in connection with any of its function under Part 3;

b) supplied information that was false or misleading in a material respect to another person, knowing that it was to be used for the purpose of providing information to the appropriate authority in connection with any of its functions under Part 3.

729 New section 110(1C) is inserted to make provision which prevents a civil penalty being issued in relation to an act or omission which constitutes an offence under section 116A (Intentional destruction etc. of documents, inserted by this Schedule) or section 117 (False or misleading information) if the person has by reason of the act or omission, been found guilty of the offence. Similar provision is inserted in relation to the offences, in order to prevent a person being penalised under both the civil and criminal enforcement regimes.

730 Section 110(9) is amended to require the CMA to have regard to the statement of policy most recently published under section 116 when deciding whether, and if so how, to proceed in relation to the issue of a civil penalty either under section 110(1) or (1A), or under section 39(4) or 51(4) (which concern the CMA's powers to extend the time within which a reports under sections 38 and 50, respectively) are to be prepared and published where a relevant person has failed to comply with a requirement in a section 109 notice). Where Ofcom is the appropriate authority, it must have regard to the statement of policy most recently published under section 392 of the Communications Act 2003.

731 Paragraph 16 of Schedule 9 amends section 110A of the Enterprise Act 2002. It makes amendments which are consequential to the amendments to section 110(1) and further extends the limitation period which applies to the issue of a penalty in relation to non-compliance with a requirement imposed by a notice issued under section 109, or the obstruction or delay of another person in the exercise of their powers under section 109(6), from 4 weeks to 10 weeks from the relevant day, as determined in accordance with that section.

732 Paragraph 17 of Schedule 9 amends section 111 of the Enterprise Act 2002 so that it deals with the amount of a penalty imposed under section 110(1) or (1A). Section 111(1) is amended so that a penalty imposed is to be of such amount as the appropriate authority considers appropriate. Section 111(2) is amended so that penalties issued by the CMA in relation to failures to comply with an information requirement which are continuing may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. Section 111(3) is amended so that a penalty imposed by the CMA in relation to the obstruction of an officer in the exercise of his powers under section 109(6), or the destruction etc. of documents which have been required to be produced, and penalties imposed by an appropriate authority in relation to the provision of false or misleading information, must be a fixed amount. This reflects that these breaches are not capable of remedy. Section 111(4) is amended to set out the maximum penalty on a person who does not own or control an enterprise. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. Section 111(4A) is inserted to set out the maximum penalties which may be imposed on any other person. In the case of a fixed amount, the penalty must not exceed 1% of the global turnover of the enterprises owned or controlled by the person. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily global

turnover of the enterprises owned or controlled by the person. Section 111(5) is amended to reflect the amendments to the procedural requirements in section 112 of the Enterprise Act 2002 made by paragraph 18 of this Schedule. New section 111(7A) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who does not own or control an enterprise. This power is subject to the draft affirmative procedure, see clause 144 and paragraph 2(6) of Schedule 13. New sections 111(9) to (11) enable the Secretary of State to make provision by way of regulations for determining when an enterprise is to be treated as being controlled by a person, and the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise for the purposes of the section. This power is subject to the negative procedure.

733 Paragraph 18 of Schedule 9 makes amendments to section 112 of the Enterprise Act 2002. Section 112 sets out the main procedural requirements which apply in relation to the imposition of penalties. New subsection (A1) is inserted to require the appropriate authority to issue a provisional penalty notice before it may impose a penalty. New subsection (A2) requires that the provisional penalty notice must contain a draft of the final penalty notice the appropriate authority is minded to give, invite the making of representations from the recipient and set out how and by when, such representations must be made. New subsection (A3) requires the appropriate authority to have regard to any representations received and prevents the issue of a penalty before the time specified in the provisional notice for the making of representations has expired. Section 112(2) and (3) are amended to reflect that it may be the Secretary of State, or Ofcom, which issue a penalty rather than the CMA.

734 Paragraph 19 of Schedule 9 makes amendments to section 113 of the Enterprise Act 2002 to reflect that it may be the Secretary of State, or Ofcom, who issues a penalty rather than the CMA.

735 Paragraph 20 of Schedule 9 amends section 114 (appeals in relation to penalties) of the Enterprise Act 2002. The amendments to section 114(4) and (5) reflect that it may be the Secretary of State, or Ofcom, who issue a penalty rather than the CMA. New subsection (5A) requires the CAT, in cases of penalties imposed by the CMA or Ofcom, to have regard to relevant guidance when considering what is appropriate for the purposes of section 114(5). Section 114(5) allows the CAT, on an application under the section, to quash the penalty, substitute a penalty of a different nature or of such lesser amount or amounts as it considers appropriate, or substituting the date or dates by which the penalty must be paid, where this has been the subject of the appeal. The relevant guidance, in relation to a penalty imposed by the CMA, is the statement of policy published under section 116 of the Enterprise Act 2002 at the time the act or omission occurred. The relevant guidance, in relation to a penalty imposed by Ofcom, is the statement of policy published under section 392 of the Communications Act 2003 at the time the act or omission occurred.

736 Paragraph 21 of Schedule 9 amends section 115 (Recovery of penalties) of the Enterprise Act 2002 to reflect the insertion of section 110(1A) and that penalties may be issued by the Secretary of State and Ofcom, in addition to the CMA.

737 Paragraph 22 of Schedule 9 amends section 116 (Statement of policy) of the Enterprise Act 2002 to reflect the broadening of the power to issue penalties in section 110. It further amends section 116(4) and inserts new section 116(5) which require the CMA to consult the Secretary of State specifically, in addition to such other persons it considers appropriate, when

preparing or revising its statement of policy, and requires that the statement be approved by the Secretary of State prior to publication.

738 Paragraph 23 of Schedule 9 inserts new section 116A (Intentional destruction etc. of documents) into the Enterprise Act 2002. This repositions the provisions regarding the offence previously found at section 110(5) to (7) of the Enterprise Act 2002, omitted by paragraph 15. It also applies in relation to the offence previously found at section 174A(3) to (7), omitted by paragraph 26 of Schedule 9. The new section 116A is applied for the purposes of Part 4 of the Enterprise Act 2002 by section 180.

739 Paragraph 24 of Schedule 9 amends section 117 (false or misleading information) to reflect the insertion of the definition of "appropriate authority" in section 110(1B) by paragraph 15. It further inserts section 117(2A) which provides that no offence is committed in relation to any act or omission in relation to which a penalty has been issued under section 110(1) or (1A).

740 Part 3 of Schedule 9 makes amendments to Part 4 (market studies and market investigations) of the Enterprise Act 2002.

741 Paragraph 26 amends section 174A of the Enterprise Act 2002 which makes provision regarding the issue of penalties for non-compliance with any requirement of a notice issued under the information gathering power at section 174. Section 174A(1) is substituted to empower the CMA to impose a penalty on a person in accordance with section 174D where it considers that the person has, without reasonable excuse:

a) failed to comply with any requirement of a notice issued under section 174;

b) obstructed or delayed a person in the exercise of that person's powers under section 174(7) (which permits the copying of any document produced);

c) intentionally altered, suppressed or destroyed any document which the person had been required to produce by notice under section 174.

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

a) supplied information that was false or misleading in a material respect to the relevant authority in connection with any of its function under Part 4;

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

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

provision is inserted in relation to the offences, in order to prevent a person being penalised under both the civil and criminal enforcement regimes.

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

745 Paragraph 27 of Schedule 9 amends section 174B (restrictions on powers to impose penalties under section 174A) of the Enterprise Act 2002. It makes amendments which are consequential to the amendments to section 174A(1) and further extends the limitation period which applies to the issue of a penalty in relation to non-compliance with a requirement imposed by a notice issued under section 174, or the obstruction or delay of another person in the exercise of their powers under section 174(7), from 4 weeks to 10 weeks from the relevant day, as determined in accordance with that section.

746 Paragraph 28 of Schedule 9 amends section 174D (penalties) of the Enterprise Act 2002 so that it deals with the amount of a penalty imposed under section 174A(1) or (1A). Section 174D(1) is amended so that a penalty imposed is to be of such amount as the relevant authority considers appropriate. Section 174D(2) is amended so that penalties issued by the CMA in relation to failures to comply with an information requirement which are continuing may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. Section 174D(3) is amended so that a penalty imposed by the CMA in relation to the obstruction of an officer in the exercise of his powers under section 174(7), or the destruction etc. of documents which have been required to be produced, and penalties imposed by an relevant authority in relation to the provision of false or misleading information, must be a fixed amount. This reflects that these breaches are not capable of remedy. Section 174D(4) is amended to set out the maximum penalty on a person who does not own or control an enterprise. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. Section 174D(4A) is inserted to set out the maximum penalties which may be imposed on any other person. In the case of a fixed amount, the penalty must not exceed 1% of the global turnover of the enterprises owned or controlled by the person. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily global turnover of the enterprises owned or controlled by the person. New section 174D(6A) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who does not own or control an enterprise. This power is subject to the draft affirmative procedure, see clause 144 and paragraph 3(8) of Schedule 13. Section 174D(8) is amended to reflect the amendments to the procedural requirements in section 112 of the Enterprise Act 2002 made by paragraph 18. New sections 174D(11) to (13) enable the Secretary of State to make provision by way of regulations for determining when an enterprise is to be treated as being controlled by a person, and the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise for the purposes of the section. This power is subject to the negative procedure.

747 Paragraph 29 of Schedule 9 amends section 174E (Statement of policy on penalties) of the Enterprise Act 2002 to reflect the broadening of the power to issue penalties in section 174A. It further amends section 174E(4) and inserts new section 174E(5) which require the CMA to consult the Secretary of State specifically, in addition to such other persons it considers appropriate, when preparing or revising its statement of policy, and requires that the statement be approved by the Secretary of State prior to publication.

748 Paragraph 30 of Schedule 9 amends section 179 (review of decisions under Part 4) of the Enterprise Act 2002 to reflect the amendments made to section 174A.

749 Paragraph 31 of Schedule 9 amends section 180 (offences) of the Enterprise Act 2002 to apply the offence at new section 116A Enterprise Act 2002, which is a repositioning of the offence at section 110(5) to (7), for the purposes of Part 4, with relevant modifications.

Schedule 10: Civil penalties etc in connection with breaches of remedies

750 Schedule 10 introduces new powers for the CMA to issue civil penalties for breaches of interim measures, commitments and directions under Part 1 of the Competition Act 1998 (competition) and interim measures, undertakings in lieu, final undertakings and orders under Parts 3 (mergers) and 4 (market studies and market investigations) of the Enterprise Act 2002. Collectively, these measures are known as "remedies".

751 The new powers to issue civil penalties also apply to concurrent regulators (under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002) and the Secretary of State insofar as remedies may be accepted or imposed in relation to public interest cases under the Enterprise Act 2002. In the following paragraphs references to the CMA should be read to include "and others where relevant" unless indicated otherwise.

752 Part 1 of Schedule 10 amends Part 1 of the Competition Act 1998.

753 Paragraph 2 of Schedule 10 amends sections 31A (commitments) of the Competition Act 1998, to insert provision which requires that, before accepting commitments from a person, the CMA must have provided them with information about the possible consequence of non-compliance. This ensures that those who offer commitments are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse before the commitment is accepted and the obligation crystallises.

754 Paragraphs 3 and 5 of Schedule 10 amend sections 31E and 34 of the Competition Act 1998 respectively. Sections 31E and 34 deal with the enforcement of commitments and directions, and allow the CMA to make an application to the court for an order to secure compliance. New sections 31E(4) and 34(4) are inserted to require the CMA, before taking such action, to have regard to the statement of policy most recently published by it under the new section 35C at the time of the non-compliance.

755 Paragraph 6 of Schedule 10 inserts new sections 35A, 35B and 35C into the Competition Act 1998.

756 New section 35A makes provision to empower the CMA to impose a penalty on a person in accordance with section 35B where the CMA considers that, without reasonable excuse:

a) a person from whom the CMA has accepted commitments under section 31A has failed to adhere to them (and not been released from them);

b) a person to whom the CMA has given a direction under section 32 (Directions in relation to agreements), section 33 (Directions in relation to conduct) or section 35 (Interim measures) has failed to comply with the direction.

757 New section 35A(2) requires the CMA to have regard to the statement of policy most recently published under section 35C at the time of failure to adhere or comply.

758 New section 35B makes provision regarding the amount of the penalty which may be imposed. New section 35B(1) makes provision so that a penalty imposed is to be of such amount as the CMA considers appropriate. New section 35B(2) sets out that a penalty may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. New sections 35B(3) makes provision regarding the maximum amounts of penalties in relation to a person who is not an undertaking. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. New section 35B(4) makes provision regarding the maximum amounts of penalties in relation to a person who is an undertaking. In the case of a fixed amount, the penalty must not exceed 5% of the turnover of the undertaking. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily turnover of the undertaking. Section 35B(5) provides that where a penalty is to be calculated by reference to a daily rate, no account is to be taken of days before a person is served with a provisional penalty notice, or after the day on which the person complies with the remedy. New section 35B(6) applies sections 112 to 115 of the Enterprise Act 2002 with modifications in relation to penalties issued under section 35A(1) as they apply to penalties under section 110(1) or (1A) of the Enterprise Act 2002. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties. New section 35B(7) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who is not an undertaking. This power is subject to the draft affirmative procedure, see clause 144 and paragraph 1(3) of Schedule 13. New sections 35B(9) to (11) enable the Secretary of State to make provision by way of regulations for determining the turnover and daily turnover of an undertaking for the purposes of the section. This power is subject to the negative procedure.

759 New section 35C of the Competition Act 1998 requires the CMA to prepare and publish a statement of policy in relation to the use of its functions under sections 31E, 34 and 35A. By new section 35C(2) the statement must deal with the considerations relevant to the determination of the nature and amount of any penalty imposed under section 35A. New subsection (4) and (5) require the CMA to consult the Secretary of State and such other persons as it considers appropriate when preparing or revising the statement, and where the statement or revision relates to a matter in which a regulator exercises concurrent jurisdiction, they must also be consulted. New subsection (6) requires that the Secretary of State must approve the statement and any revisions before it is published.

760 Part 2 of Schedule 10 makes amendments to Part 3 (mergers) of the Enterprise Act 2002.

761 Paragraph 8 of Schedule 10 amends section 34C (functions to be exercised by CMA Groups) of the Enterprise Act 2002 to reflect the omission of section 94A of the Enterprise Act 2002 and insertion of the new section 94AA. This will ensure that where a CMA Group has been constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013, it will have

the function of determining whether, and if so how, the new functions under section 94AA should be exercised while it is in existence.

762 Paragraph 9 of Schedule 10 amends section 89 (subject matter of undertakings) of the Enterprise Act 2002 to insert provision so that before accepting undertakings, the CMA (or the Secretary of State, as the case may be) must have provided them with information about the possible consequence of non-compliance. This ensures that those who offer undertakings are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse before the undertaking is accepted and the obligation crystallises.

763 Paragraph 10 amends section 94 (rights to enforce undertakings and orders) of the Enterprise Act 2002. Section 94(6) enables the CMA to enforce compliance with enforcement orders and enforcement undertakings by way of application to the court for an injunction, or interdict or any other appropriate relief or remedy. Paragraph 10 inserts new section 94(10) which requires the CMA to have regard to the statement of policy most recently published by it under section 94B at the time of the failure to comply with the undertaking or order.

764 Paragraph 11 of Schedule 10 replaces existing section 94A of the Enterprise Act 2002 with new sections 94AA and 94AB.

765 New section 94AA empowers the appropriate authority (that is the Secretary of State in relation to an enforcement undertaking or enforcement order made by the Secretary of State in a case which has involved a public interest consideration, and in relation to any other enforcement undertaking or enforcement order, the CMA) to impose a penalty on a person in accordance with section 94AB where they consider that the person has, without reasonable excuse, failed to comply with an enforcement undertaking or enforcement order. The CMA must, in deciding whether and if so how to proceed under section 94AA(1), have regard to the most recent statement of policy published by it under section 94B at the time of the failure to comply.

766 New section 94AB makes provision regarding the amount of the penalty which may be imposed. New section 94AB(1) makes provision so that a penalty imposed is to be of such amount as the appropriate authority considers appropriate. New section 94AB(2) sets out that a penalty may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. New sections 94AB(3) makes provision regarding the maximum amounts of penalties in relation to a person who does not own or control an enterprise. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. New section 94AB(4) makes provision regarding the maximum amounts of penalties in relation to any other person. In the case of a fixed amount, the penalty must not exceed 5% of the global turnover of the enterprises owned or controlled by the person on whom it is imposed. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily global turnover of the enterprises owned or controlled by the person. Section 94AB(5) provides that where a penalty is to be calculated by reference to a daily rate, no account is to be taken of days before a person is served with a provisional penalty notice, or after the day on which the person complies with the remedy. New section 94AB(6) applies sections 112 to 115 of the Enterprise Act 2002 with modifications in relation to penalties issued under section 94AA(1) as they apply to penalties under section 110(1) or (1A) of the Enterprise Act 2002. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to

procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties. New section 94AB(7) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who does not own or control an enterprise. This power is subject to the draft affirmative procedure, see clause 144 and paragraph 2(6) of Schedule 13. New sections 94AB(9) to (11) enable the Secretary of State to make provision by way of regulations for determining when an enterprise is to be treated as being controlled by a person, and the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise for the purposes of the section. This power is subject to the negative procedure.

767 Paragraph 12 of Schedule 10 amends section 94B (statement of policy in relation to powers under sections 94 and 94A) of the Enterprise Act 2002 to reflect the removal of section 94A and insertion of section 94AA.

768 Part 3 of Schedule 10 makes amendments to Part 4 (market studies and market investigations) of the Enterprise Act 2002.

769 Paragraph 14 of Schedule 10 amends section 133A (functions to be exercised by CMA Groups) of the Enterprise Act 2002 to reflect the insertion of the new section 167A. This will ensure that where a CMA Group has been constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013, it will have the function of determining whether, and if so how, the new functions regarding the imposition of penalties under section 167A should be exercised while it is in existence.

770 Paragraph 15 of Schedule 10 inserts new section 161A (Acceptance of enforcement undertakings: Part 4) into the Enterprise Act 2002. This makes provision so that before accepting undertakings, the CMA, or the Secretary of State, as the case may be, referred to as "the relevant authority", must have provided the person offering the undertaking with information about the possible consequence of non-compliance. This ensures that those who offer undertakings are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse before the undertaking is accepted and the obligation crystallises.

771 Paragraph 16 amends section 167 (rights to enforce undertakings and orders) of the Enterprise Act 2002. Section 167(6) enables the CMA to enforce compliance with enforcement orders and enforcement undertakings to which the section applies by way of application to the court for an injunction, or interdict or any other appropriate relief or remedy. Paragraph 16 inserts new section 167(10) which requires the CMA to have regard to the statement of policy most recently published by it under section 167C at the time of the failure to comply with the undertaking or order.

772 Paragraph 17 of Schedule 10 inserts new sections 167A, 167B and 167C into the Enterprise Act 2002.

773 New section 167A empowers the relevant authority (that is the Secretary of State in relation to an enforcement undertaking or enforcement order made by the Secretary of State in a case which has involved a public interest consideration, and in relation to any other enforcement undertaking or enforcement order, the CMA) to impose a penalty on a person in accordance with section 167B where they consider that the person has, without reasonable excuse, failed to comply with an enforcement undertaking or enforcement order. The CMA must, in

deciding whether and if so how to proceed under section 167A(1), have regard to the most recent statement of policy published by it under section 167C at the time of the failure to comply.

774 New section 167B makes provision regarding the amount of the penalty which may be imposed. New section 167B(1) makes provision so that a penalty imposed is to be of such amount as the relevant authority considers appropriate. New section 167B(2) sets out that a penalty may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. New section 167B(3) makes provision regarding the maximum amounts of penalties in relation to a person who does not own or control an enterprise. In the case of a fixed amount, the penalty must not exceed £30,000. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed £15,000 per day. New section 167B(4) makes provision regarding the maximum amounts of penalties in relation to any other person. In the case of a fixed amount, the penalty must not exceed 5% of the global turnover of the enterprises owned or controlled by the person on whom it is imposed. In the case of an amount calculated by reference to a daily rate, the penalty must not exceed 5% of the daily global turnover of the enterprises owned or controlled by the person. Section 167B(5) provides that where a penalty is to be calculated by reference to a daily rate, no account is to be taken of days before a person is served with a provisional penalty notice, or after the day on which the person complies with the remedy. New section 167B(6) applies sections 112 to 115 of the Enterprise Act 2002 with modifications in relation to penalties issued under section 167A(1) as they apply to penalties under section 110(1) or (1A) of the Enterprise Act 2002. Sections 112 to 115 of the Enterprise Act 2002 make provision in relation to procedural requirements which must be followed, the making of payments and interest by instalments, appeals in relation to penalties and the recovery of penalties. New section 167B(7) makes provision for the Secretary of State to amend by regulations the maximum penalties which may be imposed on a person who does not own or control an enterprise. This power is subject to the draft affirmative procedure, see clause 144 and paragraph 3(8) of Schedule 13. New sections 167B(9) to (11) enable the Secretary of State to make provision by way of regulations for determining when an enterprise is to be treated as being controlled by a person, and the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise for the purposes of the section. This power is subject to the negative procedure.

775 New section 167C makes provision which requires the CMA to prepare and publish a statement of policy in relation to the exercise of the new functions under sections 167 and 167A. New subsection (2) requires that the statement must include the considerations relevant to the determination of the amount of any penalty imposed under section 167A. New subsection (4) requires the CMA to consult the Secretary of State and such other persons as it considers appropriate when preparing the statement and any revisions, and new subsection (5) provides that the statement and any revision may not be published without the approval of the Secretary of State.

Schedule 11: Civil penalties: amendments relating to sectoral regulators

776 Schedule 11 makes amendments to the legislation by virtue of which sector regulators are able to exercise some functions under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002 on a concurrent basis with the CMA.

777 Schedules 9 and 10 make amendments which introduce new functions which, without provision otherwise, would fall to be exercised by the concurrent regulators. The new functions under section 35C in Part 1 of the Competition Act 1998 and section 167C in Part 4 of the Enterprise Act 2002 which relate to the preparation and publication of statements of policy concerning the exercise of the new powers to impose financial penalties are not to be exercised by the concurrent regulators. The function at existing section 174E in Part 4 of the Enterprise Act 2002 is also not to be exercised by concurrent regulators. The statements of policy to be prepared by the CMA will apply to the exercise of the functions by the concurrent regulators, and the CMA will be required to consult with the concurrent regulators in the preparation of the statements. Schedule 11 makes provision which amends the sector specific legislation so that the functions at section 35C of the Competition Act 1998 and section 167C and 174E of the Enterprise Act 2002 are not exercisable concurrently by the sector regulators.

Clause 143: Service and extra-territoriality of notices under CA 1998 and EA 2002

778 This clause gives effect to Schedule 12 which makes provision regarding the service and extra-territorial application of notices under Part 1 of the Competition Act 1998 and Parts 3 and 4 of the Enterprise Act 2002.

Schedule 12: Service and extra-territoriality of notices under CA 1998 and EA 2002

779 Schedule 12 makes provision regarding the service of documents and the extraterritorial application of notices under Part 1 of the Competition Act 1998 and Parts 3 and 4 the Enterprise Act 2002.

780 Paragraph 1 of Schedule 12 replaces the existing section 126 of the Enterprise Act 2002 with comprehensive provisions on the service of documents which reflect modern business practices. For example, comprehensive provisions on service of documents by email reflect its everyday use as a method of communication by businesses and individuals.

781 New section 126(1) provides that the section applies in respect of documents required or authorised to be served under Part 3 on a person by the CMA, Ofcom, or the Secretary of State, each of whom exercise functions under that Part.

782 New section 126(2) sets out the methods of service which may be used: either delivering it to the person, leaving at their proper address, sending it by post to that address, or sending by email to the person's email address.

783 New sections 126 (3), (4) and (5) make specific provision in relation to the service of documents on a body corporate, a partnership or an unincorporated body or association. In particular, these subsections set out specific classes of person (legal or natural) to whom a notice may be given to so as to effect service on the body corporate, a partnership or an unincorporated body or association.

784 New sections 126 (6) and (7) make provision to determine what is to be considered as a person's "proper address" for the purpose of subsection (2).

785 New section 126(8) makes provision regarding the email address which may be used for the purposes of subsection (2).

786 New section 126 (9) makes provision regarding service which is to be effected outside the United Kingdom.

787 New section 126(11) provides that section 126 does not limit any other lawful means of serving a document on a person.

788 Paragraph 2 of Schedule 12 inserts a new section 44A into the Competition Act 1998 which applies the new section 126 of the Enterprise Act 2002 to the giving of notices under Chapter 3 of Part 1 of the Competition Act 1998. Chapter 3 of Part 1 sets out the powers of the CMA (and sector regulators where relevant) to investigate and enforce the prohibitions in Part 1 of the Competition Act 1998.

789 Paragraphs 3 to 14 make amendments to the legislation by virtue of which sector regulators are able to exercise the specified functions in Part 1 of the Competition Act 1998 on a concurrent basis with the CMA. That legislation contains a provision which glosses references to the CMA in Part 1 of the Competition Act 1998 so that they are read appropriately as a reference to the sector regulator concerned. Paragraphs 3 to 14 amend the legislation to ensure that the gloss applies to provisions of the Enterprise Act 2002 applied by Part 1 of the Competition Act 1998, as it applies to provisions in the Competition Act 1998 itself. This ensures that references to the CMA in section 126 of the Enterprise Act 2002, as applied by the new section 44A of the Competition Act 1998, are read as a reference to the sector regulator concerned.

790 Paragraph 15 of Schedule 12 inserts a new section 44B into the Competition Act 1998.

791 New section 44B(1) provides that the new section applies to the exercise of the CMA's power to give a person a notice under section 26 (Investigations: power to require documents and information) and section 40ZD (Information relating to transferred EU anti-trust commitments and transferred EU anti-trust direction).

792 New section 44B(2) sets out that the powers may be used, to give the notice to a person outside the United Kingdom (subject to the conditions in new subsections (3) and (4), and to require the production of a specified document or the provision of specified information held outside the United Kingdom.

793 New section 44B(3) provides that the power to give a section 26 notice to a person outside the United Kingdom may only be exercised if the person's activities are being investigated as part of an investigation under section 25, or they have a "UK connection". Persons whose activities are being investigated as part of an investigation under section 25 includes parties to an anti-competitive agreement etc. whose activities are being investigated in relation to the Chapter I prohibition, and those whose conduct is being investigated in relation to the Chapter II prohibition. In effect, this will allow information to be required to be produced from those persons who are the subject of an enforcement investigation and, also, third parties where there is a sufficient UK connection.

794 New section 44B(4) makes provision regarding the CMA's power under section 40ZD of the Competition Act 1998. Section 40ZD enables the CMA to issue a notice under section 40ZD to a person outside of the United Kingdom if that person is bound by transferred EU anti-trust commitments (within the meaning of section 40ZA of the Competition Act 1998) or is subject to a transferred EU anti-trust direction (within the meaning of that same section).

795 New section 44B(5) sets out the circumstances in which a person has a UK connection for the purposes of the new section 44B(2)(b). A third party (that is a person other than an

enforcement subject) may only be given a section 26 notice outside the United Kingdom if they are a United Kingdom national, an individual habitually resident in the United Kingdom, a body incorporated under the law of the United Kingdom or any part of the United Kingdom, or they carry on business in the United Kingdom.

796 New section 44B(6) defines a United Kingdom national for the purposes of section 126(5)(a).

797 New section 44B(7) provides that nothing in the new section 44B of the Competition Act 1998 is to be taken to limit any other power of the CMA to give a notice under section 26 or 40ZD to a person outside the United Kingdom.

798 Paragraph 16 of Schedule 12 inserts a new section 109B into Part 3 of the Enterprise Act 2002 to make provision for the extra-territorial reach of information notices under section 109.

799 New section 109B(1) provides that the section applies to the exercise of the CMA's power to give a person a notice under section 109(2) or (3), that is for the production of specified documents, or the supply of such estimates, forecasts, returns or other information as may be specified or described in the notice.

800 New section 109B(2) sets out that the powers may be used to give the notice to a person outside the United Kingdom (subject to the conditions in new subsection (3), and to require the production of a specified document or the provision of specified information held outside the United Kingdom.

801 New section 109(3)(a) provides that a notice may be issued to a person outside of the United Kingdom where that person is or was, part of, or involved with or carrying on an enterprise which is, or has been involved in a transaction in circumstances which have been or may be, the subject of a reference under sections 22, 33, 45 62, 62B or 62C of the Enterprise Act 2002. This allows the CMA to exercise the section 109 information gathering powers extraterritorially in relation to any person involved in a merger which either has been, or may be, the subject of a reference, so allowing it to use the power for the purposes of both reviewing merger transactions, and for the purpose of any subsequent enforcement action following a review. This includes mergers where there has been a public interest intervention or special intervention notice as well as mergers reviewed under the energy network merger regime.

802 New section 109B(3)(b) allows the CMA to send notices extraterritorially to third parties to merger investigations if that third party is a person that has a UK connection as defined in the new section 109B (which is in identical terms to the definition of UK connection under the new section 44B of the Competition Act 1998).

803 New section 109B(5) provides that nothing in the new section 109B is to be taken to limit any other power of the CMA to give a notice under section 109(2) or (3) to a person outside the United Kingdom.

804 Paragraph 17 of Schedule 12 inserts a new section 174ZA into Part 4 of the Enterprise Act 2002 to make provision for the extra-territorial reach of information notices under section 174.

805 New section 174ZA(1) provides that the section applies to the exercise of the CMA's power to issue notices under section 174(4) or (5) of the Enterprise Act 2002, that is for the production of

specified documents, or the supply of such estimates, forecasts, returns or other information as may be specified or described in the notice.

806 New section 174ZA(2) sets out that the powers may be used to give the notice to a person outside the United Kingdom where they have a UK connection, and to require the production of a specified document or the provision of specified information held outside the United Kingdom. The requirement for a UK connection when serving a notice outside the United Kingdom is in line with the amendments set out above in the new section 44B of the Competition Act 1998 and section 109B of the Enterprise Act 2002 but reflects the fact that in the context Part 4 of the Enterprise Act 2002, there are no specific enforcement subjects who are suspected of infringing the law or specific enterprises ceasing to be distinct pursuant to a merger.

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

808 New section 174ZA(5) provides that nothing in the new section 174ZA is to be taken to limit any other power of the CMA to give a notice under section 174(4) or (5) to a person outside the United Kingdom.

Clause 144: Orders and regulations under CA 1998 and EA 2002

809 This clause introduces Schedule 13 which makes provision about the making of orders and regulations under the Competition Act 1998 and Parts 3 and 4 of the Enterprise 2002.

Schedule 13: Orders and regulations under CA 1998 and EA 2002

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

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

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

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

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

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

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

Clause 145: Meaning of "working day" in Parts 3 and 4 of EA 2002

817 This clause amends Parts 3 and 4 of the Enterprise Act 2002, and the Enterprise Act 2002 (Merger Prenotification) Regulations 2003, so that they are consistent in providing that a bank holiday in any part of the United Kingdom is not a working day. This aligns with the definition of "working day" in clause 328 of this Bill.

Part 3: Enforcement of Consumer Protection Law

818 Part 3 provides for two regimes for the civil enforcement of consumer protection law to protect the collective interests of consumers: a court-based regime (which simplifies and enhances the regime provided by Part 8 of the Enterprise Act 2002) and a direct enforcement regime which will be administered by the CMA (the "Part 3 enforcement regimes"). In particular, Part 3 provides for a single category of infringement to which the Part 3 enforcement regimes will apply (instead of the two categories of infringements which feature in Part 8 of the Enterprise Act 2002, domestic infringements and Schedule 13 infringements). Subject to the transitional provisions set out in clause 214 and Schedule 18, the Part 3 enforcement regimes will replace the regime provided by Part 8 of the Enterprise Act 2002 for conduct which takes place after commencement.

Chapter 1: Overview

Clause 146: Overview

819 This clause provides an overview of the structure of this Part.

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

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

- Enforcement orders,
- Interim enforcement orders,
- Online interface orders (only the CMA may apply), or
- Interim online interface orders (only the CMA may apply).

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

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

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

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

826 Chapter 4 provides a new direct enforcement regime for the CMA in respect of the consumer protection laws listed in Schedule 15. Chapter 4 provides a new express power for the CMA to investigate suspected infringements (subsection 4). It provides new powers for the CMA to give provisional and final infringement, breach of undertakings and breach of directions enforcement notices. These notices may include compliance directions, impose monetary penalties and for infringement notices only, attach enhanced consumer measures.

827 Chapter 4 provides new powers for the CMA to give online interface notices. The CMA may accept an undertaking instead of giving a final infringement notice or online interface notice. Chapter 4 provides for the CMA to make an application to the court where a direction included in a final notice has not been complied with.

828 Finally, it provides a new power for the CMA to give provisional and final false information notices to any person who provides the CMA with materially false or misleading information in connection with the exercise of the CMA's functions under Chapter 4 or the direct enforcement of non-compliance with CMA information notices (see explanatory note for clause 207 and Schedule 16 below in relation to direct enforcement of non-compliance with CMA information notices).

Chapter 2: Relevant Infringements

Clause 147: Relevant infringements

829 This clause defines the relevant infringements to which the Part 3 enforcement regimes apply and sets out the conditions that must be met for a commercial practice to amount to a relevant infringement (subsection (1)).

830 The main underlying policy purpose is to define the scope of the Part 3 enforcement regimes. The act or omission must harm the collective interests of consumers (subsection (1), paragraph (a)). There must be harm or a risk of harm to a section of the public who are consumers, and this harm can be inferred from the accumulation of individual instances of harm.

831 Subsection (5), paragraph (a) makes it clear that continuation or repetition of an act or omission could harm the collective interests of consumers, since the interests of future customers of the trader can be affected. For example, if a trader has not complied with the requirement to give information relating to the right to cancel an off-premises or distance contract under regulations 10(1) and 13(1) of, and paragraph (l) of Schedule 2 to, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, the court or the CMA could consider that this omission harms the collective interests of consumers, on the basis that repetition of this omission would harm the interests of potential future customers of the trader.

832 Subsection (5), paragraph (b) makes it clear that a single act or omission is also capable of harming the collective interests of consumers. For example, a supplier who puts on to the market a single, large consignment of a beverage stated to be a healthy drink for a baby that is wholly unsuitable for this purpose.

833 Subsection (2) sets out key definitions of "commercial practice", "trader" and "consumer". The main policy purpose for the use of the concept of "commercial practice" here is to limit the scope of the Part 3 regimes to those acts or omissions which amount to commercial practices, i.e. interactions between traders and consumers. This is because several of the enactments, obligations and rules of law within scope of Part 3 (see note for clause 149 below) apply also to solely trader to trader interactions.

834 The definition of "commercial practice" is broad and far reaching. A commercial practice can be derived from a single act or omission, depending on the relevant circumstances, as well as from repeated behaviour and a course of conduct (*R v X Ltd [2013] EWCA Crim 818, at paragraph 22, Warwickshire County Council v Halfords Autocentres Ltd [2018] EWHC 3007 (admin), at paragraph 28*).

835 Subsection (2), paragraph (b) makes it clear that the definition includes an act or omission by a trader relating to a third party trader's goods, services or digital content. Subsection (2), paragraph (c) establishes that an act or omission by a trader that enables private individuals (i.e. consumers) to sell products to that trader or to each other are also included in the definition of commercial practice. For example, this would bring the acts or omissions of an online marketplace that designs their website in such a way that the consumer goods advertised are misleadingly described into scope of the Part 3 enforcement regimes.

836 Subsection (3) makes it clear that the definition includes acts or omissions which take place before, during or after promotion or supply (if any). For example, the acts or omissions of a debt collection agency who acquires claims derived from consumer credit agreements with consumers and seeks to recover these debts some considerable time after the original consumer credit agreements were concluded can amount to a commercial practice. An act or omission need not relate to a promotion or supply to or from consumers which actually occurs, in order to amount to a commercial practice. The concept is concerned with systems rather than individual transactions between a consumer and a business (*Warwickshire County Council v Halfords Autocentres Ltd [2018] EWHC 3007 (admin), at paragraph 29*).

837 The definition of "consumer" makes it clear that a consumer is an individual, i.e. a natural person. Body corporates, including small and micro companies, are excluded from the definition of consumer. However, businesses may be protected under other legislation governing trader-to-trader transactions, e.g. the Business Protection from Misleading Marketing Regulations 2008 which prohibit advertising that is misleading to traders.

838 The court or the CMA, as relevant, must consider whether the individual is acting for purposes wholly or mainly outside of their business to determine if they fit the definition of consumer. It is irrelevant whether the individual is supplying, or receiving, a good, service or digital content. The words "wholly or mainly" make it clear that:

a) the individual is still a consumer when acting for dual purposes (a consumer purpose and a business purpose) as long as the consumer purpose is the main purpose. This means, for example, that a person who buys a kettle for their home, works from home one day a week and uses it on the days when working from home would still be a consumer. An individual who occasionally sells their unwanted and used clothes on eBay is also likely to be a consumer. Conversely, a sole trader who operates from a

private dwelling and buys a printer of which 95% of the intended use is for the purposes of their business, is unlikely to be a consumer.

b) An individual who supplies goods or services for mainly non-business purposes to a person who receives them for business purposes will still be a consumer. For example, an individual who sells their personal vinyl record collection to a second-hand record shop is likely to be a consumer.

839 Further, an individual who acts for the purpose of a future business, which is not yet up and running, is likely to be a consumer. For example, an individual who participates in training to gain skills or a qualification with a view to supply goods or services for business purposes in the future is likely to be a consumer.

840 Limb (a) of the definition of "trader" extends to any person who is acting for purposes relating to his business. Subsection (4), paragraph (a) makes it clear that acts or omissions "by" such a person may include acts or omissions done or made by a person acting in their name or on their behalf (for example, their agent, subcontractor or representative), where this liability is imposed by the enactment, obligation or rule of law in question or other rules of law of general application. For example, where a building company subcontracts part of a building contract, the court or the CMA could consider the actions or omissions of the subcontractor carried out on behalf of the building company to be acts done or omissions made by the building company itself.

841 Limb (b) of the definition of trader makes it clear that a person (for example, an agent, subcontractor or representative) acting in the name of, or on behalf of, another for purposes relating to the other's business, may also be held personally liable, where this liability is imposed by the enactment, obligation or rule of law in question or other rules of law of general application. It is irrelevant whether a person acting in the name of, or on behalf of, another is also acting for their own business or private purposes in relation to the same act or omission (subsection (4), paragraph (b)).

Clause 148: The UK connection condition

842 This clause sets out the jurisdictional test which must be met for a commercial practice to fall within scope of the Part 3 enforcement regimes. It limits the extraterritorial reach of the regimes to acts or omissions done or made by a trader who satisfies at least one of conditions set out in subsection (1). These are not mutually exclusive.

843 Subsection (1), paragraph (a) applies where the trader has a place of business in the UK. This means that traders with a place of business in the UK will be in scope of the Part 3 enforcement regimes regardless of whether they have been incorporated in the UK or overseas.

844 Subsection (1), paragraph (b) applies where the trader carries on business in the UK. This does not require the trader to have a place of business in the UK and this condition can be satisfied by management activity taking place abroad (*Akzo Nobel N.V. v Competition Commission & Ors, [2014] EWCA Civ 482, at paragraphs 30 - 38).*

845 Subsection (1), paragraph (c) brings in scope commercial practices occurring as part of activities directed to consumers in the UK by any means.

846 To satisfy this condition, the trader's relevant activities must demonstrate an intention of being directed to consumers in the UK. This is an objective test: while evidence of "actual intention" may assist in resolving the question it is not a necessary ingredient (*see Merck KGaA v Merck Sharp & Dohme Corp & Or's [2017] EWCA Civ 1834 at paragraph 165, Argos Limited v Argos Systems Inc. [2018] EWCA Civ 2211 at paragraph 51 and Bitar v Banque Libano-Francaise [2021] EWHC 2787 (QB) at paragraph 26*). The question is whether average consumers in the UK would consider that the activities are directed at them.

847 It follows that the fact that the trader's goods, services or digital content are accessible by consumers in the UK (for example, through a website) is insufficient to establish that the trader's relevant activities are directed to consumers in the UK (*see Merck KGaA v Merck Sharp & Dohme Corp & Or's [2017] EWCA Civ 1834 at para 168, Nifty v Soleymani [2022] EWHC 773 at para 69).*

848 Whether the trader's activities are directed to consumers in the UK by any means will be a question of fact requiring evaluation of all the relevant circumstances. These may include (alone or in combination) (*see Merck KGaA v Merck Sharp & Dohme Corp & Or's [2017] EWCA Civ 1834 at para 170, Bitar v Banque Libano-Francaise [2021] EWHC 2787 (QB) at para 28*):

a) The nature of the activity,

b) The nature of the goods, services or digital content,

c) The relevant contact details – for example, use of a telephone number with an international dialling code,

d) The relevant domain name (for a website),

e) The language used,

f) The currency indicated,

g) List or map of areas for delivery or provision of the goods, services or digital content, or

h) Any past transactions with consumers in the UK.

849 The UK connection condition may be met, for example:

- by an overseas trader who promotes and sells, via its website, services to consumers in the UK;
- by an overseas platform which promotes, via its website, a third party's services to UK consumers. For example, an overseas platform whose website promotes holiday clubs and add-on trips to consumers in the UK, whilst a third-party resort operator is responsible for the actual sale and provision of these goods and services to the consumer;
- where the consumer is the supplier. This clause does not require the supply in question to be made by the trader, only that the trader has a place of business in or carries on business in the UK or that its commercial practice occurs in the carrying on of activities directed to consumers in the UK.

850 The effect of this clause is to enable enforcement using the Part 3 regimes to protect consumers within the UK no matter where the trader is based, as long as the UK connection condition is met.

Clause 149: The specified prohibition condition

851 This clause limits the application of the Part 3 enforcement regimes to the commercial practices which breach an enactment, obligation or rule of law listed, or to the extent listed, in Schedules 14 or 15 - in these notes, "infringing practices" (subsections (1) and (2)).

Schedule 14: Consumer protection enactments

852 The table in Schedule 14 lists the enactments, obligations and rules of law to which the court-based enforcement regime in Chapter 3 of this Part applies. The corresponding entry in the second column of the table sets out which enforcers can use the court-based enforcement regime to enforce that enactment, obligation or rule of law (subsections (3) and (4)).

Schedule 15: Direct enforcement enactments

853 The table in Schedule 15 lists the enactments to which the CMA direct enforcement regime in Chapter 4 of this Part applies (subsection (2)).

Chapter 3: Consumer Protection Orders and Undertakings

Clause 150: Enforcers

854 This clause restates and updates section 213 of Part 8 of the Enterprise Act 2002 and sets out which persons can use the court-based enforcement regime set out in this Chapter. The category of "Schedule 13 enforcer" under Part 8 of the Enterprise Act 2002 (section 213, subsection (5A)) is not re-stated as the Government considers it is no longer necessary to maintain a separate category of enforcers whose powers are limited to enforcing consumer protection laws of EU origin. Relevant enforcers are re-categorised by this clause as public designated enforcers.

855 Two categories of enforcer are defined: public designated enforcers (subsection (1)) and private designated enforcers (subsection (2)).

856 The category of public designated enforcers consolidates the two previous categories of public enforcers in Part 8 of the Enterprise Act 2002 – general enforcers (i.e. the CMA, local weights and measures authorities in Great Britain, i.e. Trading Standards departments, or the Department for the Economy in Northern Ireland) and public bodies designated by order of the Secretary of State under section 213, subsection (2) of the Enterprise Act 2002.

857 Subsection (3) sets out a delegated power for the Secretary of State to add or remove an enforcer or to amend their entry. Regulations made by the Secretary of State under this clause are subject to the draft affirmative procedure (subsection (7)), see clause 332, subsection (3). As per subsection (4) and subsection (5), paragraph (c), the power to add a new enforcer is subject to the limitation that the enforcer has, as one of its purposes, the collective interests of consumers. This power cannot be used to remove or vary the enforcement powers of the CMA, local weights and measures authorities in Great Britain and the Department for the Economy in Northern Ireland under this Chapter. Any changes to the powers of these enforcers could fundamentally reshape the consumer protection regime in the UK, given their

cross-economy remits. Therefore, the Government considers their powers should not be capable of alteration through secondary legislation (subsection (6)).

858 Subsection (5) further limits the Secretary of State's power to add a person as a private designated enforcer to where the Secretary of State considers that the person is not a public body and also satisfies the designation criteria in clause 151.

Clause 151: Designation criteria

859 This clause sets out the criteria which a person must satisfy for the Secretary of State to designate it as a private designated enforcer. Applicant organisations will need to provide evidence to the Secretary of State that they meet the designation criteria listed in subsection (1). This is likely to include, for example, their legal status and constitution, a list of directors, examples of situations in which the organisation has protected the collective interests of consumers etc.

860 The Government intends that any subsequent failure to meet the criteria will form the basis for the Secretary of State to change or withdraw the designation of a person as a private designated enforcer.

861 The criteria listed in this section replicate the criteria listed in Articles 3 and 4 of the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, with some minor amendments for simplification.

862 The designation criteria establish certain minimum standards of governance, transparency and competence that a person must meet in order for it to carry out enforcement action under this Chapter (subsections (1) to (3)). The underlying policy intent is to mitigate the risk of private organisations (especially those with trading arms) using the enforcement process for competitive advantage or commercial gain.

Applications for enforcement orders and interim enforcement orders

Clause 152: Applications

863 This clause identifies which categories of person an application for an enforcement order or an interim enforcement order may be made against, and the types of infringements in relation to which an application may be made. This clause restates most of section 215 of the Enterprise Act 2002 and updates it as needed.

864 An enforcer may apply for an order against the infringer (the person considered to have engaged in, be engaging in or be likely to engage in the infringing practice) or an accessory (subsections (1) and (3)). Where the infringer is a body corporate, an accessory is any person who has a special relationship with the infringing body corporate and who consented or connived in the infringing practice – this and the meaning of "special relationship" is defined in clauses 217 and 218. An enforcer may apply for an order against an accessory even if no application is made in respect of the infringer. These notes use the term "enforcement subject" to mean both the infringer and any accessories to the infringing commercial practice.

865 Subsection (2) sets out that enforcers may make applications under this section only for breaches of those enactments, obligations or rules of law which they have been authorised to enforce as per Schedule 14.

866 Subsection (4) limits the power to apply for the imposition of a monetary penalty for past or ongoing infringing practices to public designated enforcers only (i.e. private designated enforcers may not apply to court for the imposition of penalties). This application can be made as part of the application for an enforcement order.

867 Subsection (5) precludes the application for a penalty where the infringer is likely to engage in an infringing practice. A similar qualification is not needed for accessories as clause 217(2)(c) has the effect that an accessory cannot be an accessory to future infringing practices.

Clause 153: CMA directions to other enforcers

868 This clause provides a direction-making power for the CMA. This clause restates and updates section 216 of the Enterprise Act 2002.

869 If it appears to the CMA that an enforcer other than itself intends to apply for an enforcement order or an interim enforcement order in respect of a particular infringement, it may direct which enforcer may make the application, that only the CMA may do so or that an application should not be made at all (subsections (1) and (2)). The underlying policy intent is for the CMA to be able to prevent businesses being faced with multiple applications for interim enforcement or enforcement orders in respect of the same potentially infringing practice. The Government considers that the CMA will be able to decide which enforcer is best placed to proceed with the application.

870 Subsection (4) limits the CMA's power to direct that an application should not be made to where the particular infringement is or may be investigated by the CMA under the direct enforcement regime in Chapter 4.

871 Where the CMA directs that only it may make such application, this does not prevent the CMA or another enforcer from agreeing an undertaking with the enforcement subject or the CMA from taking other steps to prevent the infringing practice or bring the infringing practice to an end (subsection (3)).

872 Subsection (5) provides a power for the CMA to vary or withdraw a direction under this clause.

Clause 154: Consultation

873 This clause provides that where an enforcer thinks that a relevant infringement has, is or is likely to occur, they must consult the enforcement subject before making an application for an enforcement order or interim enforcement order (subsection (1)). This clause restates, consolidates and updates the duty to consult set out in section 214 of the Enterprise Act 2002 and the underlying secondary legislation on making and receipt of an initial consultation request.

874 The requirement to consult is suspended if the CMA thinks that an application for an enforcement order or an interim enforcement order should be made without delay (subsection (5)). The enforcer is required to notify the CMA of its intention to apply for an enforcement order or an interim enforcement order under clause 168 which will enable the CMA to assess whether a prospective application is urgent and should be made without consultation with the enforcement subject.

875 Subsection (2) defines the purposes of consultation under this clause. In particular, the consultation should alert the enforcement subject to the possibility of a monetary penalty being sought alongside an enforcement order.

876 The underlying policy intent is that in most cases prior consultation will provide an opportunity to stop or prevent the relevant infringement without the need for court action. It may be, for example, that the enforcement subject was not aware that their practice (if they are the person considered to have engaged in, be engaging in or be likely to engage in the infringing practice) or conduct (if they are the person considered to be an accessory to such a practice) constituted a relevant infringement. Following consultation, the enforcer may then decide it is not necessary to make an application. The enforcement subject may decide to offer an undertaking to the enforcer under clause 162.

877 Subsections (3) and (4) require the enforcer to give a written consultation request - by notice - to the enforcement subject. Clause 329 sets out the process for giving notices under this Part to persons within and outside of the UK.

878 Subsections (6) to (9) set out the minimum periods for consultation for enforcement orders and interim enforcement orders and related definitions.

Powers of court on application under section 152

Clause 155: Enforcement orders and undertakings

879 This clause sets out that where the court considers that the respondent to an application for an enforcement order has engaged, is engaging in or is likely to engage in an infringing practice, or is an accessory to an infringing practice, it may either make an enforcement order against, or accept an undertaking from, the infringer or an accessory (for the purpose of these notes, the "enforcement subject") (subsections (1) and (2)). This clause restates, simplifies and updates section 217 of the Enterprise Act 2002

880 In considering whether to exercise its discretion to make an enforcement order, the court must have regard to whether the enforcement subject has failed to comply with any undertaking given under clause 162 or clause 184 relating to the ongoing or likely infringing practice (subsection (3)). Failure to comply with an undertaking may be relevant to the question of whether an enforcement order should be made (rather than another undertaking accepted). However, there is no requirement for an undertaking to have been breached before an order can be granted.

881 An enforcement order must set out the nature of the infringing practice (e.g. past, ongoing or likely) and give directions to the enforcement subject in order to achieve compliance. The order must direct the infringer to not continue or repeat the infringing practice. The order must direct any accessory to not consent or connive in the infringing practice. The order must direct the enforcement subject (infringer and accessory) to not engage in the infringing practice in the course of their business or another business, and to not consent or connive in the carrying out of the infringing practice by a body corporate with which they have a special relationship (subsections (4) and (6)). The underlying policy intent is to prevent, for example, a sole trader from evading the scope of an enforcement order by setting up a company to operate the same business and continue the infringing practices.

882 In addition, the court may order the enforcement subject to publish at their expense its order (in full or in part) and/or a corrective statement in such form and manner as deemed adequate to publicly correct any information provided to consumers and the general public (subsections (8) and (10)). This discretionary power may be used, for example, in respect of an advert that has been found to be misleading, to prevent further distorting consumers' purchasing decisions based on the misleading contents of the advert. Whether or not the court exercises this power, enforcers will be able to publish the terms of court orders and undertakings given to the court (see below).

883 As an alternative to making an enforcement order, the court may accept an undertaking from the enforcement subject (subsection (2), paragraph (b)). The undertaking may take the same form as the order or may be to take such steps as the court believes will achieve compliance (subsection (5)). The court may also accept a further undertaking from the enforcement subject to publish at his expense the terms of the undertaking (in full or in part) or a corrective statement (subsection (9)).

884 Where the court accepts an undertaking under this clause, it may also vary the undertaking if it considers that would achieve compliance or release the undertaking if it is no longer needed (for example, if the original compliance concerns no longer apply or the enforcement subject's business model has changed such that the undertakings are no longer needed) (subsection 11)). It is open to enforcement subjects who have given the undertakings to seek their release, but this could be done at the court's own initiative too.

Clause 156: Enforcement orders and undertakings: enhanced consumer measures

885 This clause empowers the court to include enhanced consumer measures that it considers to be just, reasonable and proportionate in an enforcement order or undertaking. This clause partially restates and updates section 219B of the Enterprise Act 2002. Enhanced consumer measures are defined by clause 219.

886 Subsections (2) and (3) require the court to consider the likely benefits and costs of the measures, as part of its assessment of the proportionality of the measures. In particular, the court must take into account for this assessment the costs of the measures themselves to the enforcement subject, as well as administrative costs.

887 Subsection (4) stipulates that the enforcement subject may also be required to provide information or documents to the court to enable it to determine if they are carrying out the enhanced consumer measures as stipulated.

888 Subsections (5) and (6) set out that where a settlement agreement is entered into in connection with the payment of compensation required as an enhanced consumer measure, any waiver of consumers' rights to bring civil proceedings is not valid to the extent that it purports to extend beyond the conduct covered by the order or undertaking.

Clause 157: Enforcement orders: requirement to pay monetary penalty

889 This clause gives a new, discretionary power to the court to require payment of a monetary penalty through an enforcement order (subsection (2)). This power is limited to where the application for the order was made by a public designated enforcer (subsection (1)).

890 Only infringing practices that have taken place (or are currently happening) can be penalised with a monetary sanction (subsection (3)).

891 Clause 202 makes further provisions for what information must be included in an enforcement order which includes a requirement to pay a monetary penalty (subsection (4)).

892 The court has discretion to impose a monetary penalty as it considers appropriate, subject to the statutory maxima set out in subsection (5).

893 The underlying policy intent is to provide for a penalty of up to the higher of a fixed amount or a percentage of turnover because:

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

894 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £300,000 or, if higher, 10% of the total value of the enforcement subject's turnover. Clause 203 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £300,000.

895 Subsections (6) and (7) make provision to prevent a person from being subjected to both civil and criminal sanctions in respect of the same conduct.

896 Subsection (6) prevents an enforcement subject who has been found guilty of an offence from being required to pay a monetary penalty in respect of the same conduct.

897 Subsection (7) clarifies that an enforcement subject does not commit an offence by conduct in respect of which a monetary penalty under this clause has been imposed.

898 Subsection (8) provides an enforcement subject who is required to pay a monetary penalty with a right to appeal the decision to impose a penalty, its nature or amount "on the merits", in addition to their existing appeal rights.

Clause 158: Interim enforcement orders and undertakings

899 This clause gives a discretionary power to the court, where the conditions in subsection (1) are satisfied, to make an interim enforcement order or accept an undertaking as an alternative. An undertaking accepted as an alternative may take the same form as the interim enforcement order or may be to take such steps as the court considers will secure compliance (subsection (2), paragraph (b)). This clause restates and updates section 218 of the Enterprise Act 2002.

900 An interim enforcement order may be made without notice to the enforcement subject if the court considers that appropriate (subsection (3)). An enforcer other than the CMA must not make an application for an interim enforcement order without complying with the prior notification requirements in clause 168. A notice period of up to 7 days, and CMA consent to the making of the application, is required under that clause.

901 Secondly, subsection (7) requires that where an application for an interim enforcement order is made without notice, the application must explain why no notice has been given, alongside all other relevant information supporting the application, to enable the court to decide if the conditions for making an interim order have been met.

902 An application for an interim enforcement order without notice may be considered to be necessary, for example, if an enforcer becomes aware that a misleading advertisement is about to be published in a national publication or if a trader sets up in temporary premises to sell goods of unsatisfactory quality or to mislead consumers as to the goods they are purchasing (so-called "one day sales").

903 An interim enforcement order must stipulate the nature of the infringing practice and how compliance is to be achieved (subsections (4) and (5)).

904 An application for an interim enforcement order may be made at any point in time, subject to the exception that the application cannot be made after an application for an enforcement order, or a final infringement notice, against the same enforcement subject in respect of the same conduct, has been determined or given (subsection (6)).

905 Subsections (8) and (9) provide for the variation or discharge of an interim enforcement order.

Online interface orders and interim online interface orders

Clause 159: Applications

906 This clause and clause 160 replace and update sections 218ZA to 218ZD of Part 8 of the Enterprise Act 2002. Those sections limit the CMA's, and the court's, online interface powers to infringements of EU-derived consumer protection laws. With the consolidation of infringements of domestic and EU-derived laws into a single category of infringement, this limitation is being removed. Therefore, this clause extends the courts' online interface powers to the enactments, obligations and rules of law categorised as domestic infringements as under Part 8.

907 The following examples illustrate where online interface orders and interim online interface orders could potentially be useful in relation to consumer protection law within the category of domestic infringements in Part 8:

- Underage sales products: Several consumer protection enactments of domestic origin restrict the display or supply of certain products until the consumer is at an age to make informed decisions as to the risks (fireworks and tobacco for example). An online platform based overseas could be promoting the supply of such third-party products to consumers in the UK.

- Hallmarking: There is a strict legal requirement for domestic suppliers of precious metals to consumers (such as gold, silver and palladium) to have their articles appropriately assessed as to their authenticity and quality - and stamped (or hallmarked) by an assay office. A trader based overseas may decide to direct its sales to consumers in the UK, supplying falsely described – or highly substandard – "precious" metals directly to UK consumers in breach of UK hallmarking requirements. Where the trader cannot be identified or is not responsive to enforcement measures against them, the CMA might wish to apply for an online

interface order against a third party UK-based website through which the trader's sales are directed at consumers in the UK.

- Weights and measures: Under the UK's weights and measures regime, there are systems of control for the sale of packaged or short-weight goods as well as the prescribed measurements and descriptions as to their mass, volume or number. It is possible that, in order to avoid local inspection systems in the UK, there may be online supply of goods to UK consumers which have the aim of overcoming legal restrictions or avoiding inspection. Where the trader cannot be identified or is not responsive to enforcement measures against them, the CMA might wish to apply for an online interface order against the third-party overseas website through which the trader's goods are sold to UK consumers.

908 Subsection (1) sets out the circumstances when the CMA may apply to court for an online interface order or an interim online interface order.

909 Subsection (2) sets out the categories of person in respect of whom the application may be made: the infringer or a third party. Subsection (3) sets out a jurisdictional test which limits the CMA's power to apply for an order to a third party overseas who satisfies at least one of the conditions listed in that subsection. See the explanatory note for clause 148 regarding the "carries on business in the UK" and the "directs activities … to consumers in the UK" limbs of this jurisdictional test.

910 Subsection (5) clarifies that the power to apply for an online interface order or interim online interface order does not preclude the use of the other powers provided by this Chapter. It is possible that the CMA might wish to apply for an enforcement order against the infringer and, simultaneously, for an online interface order against a third party (where, for example, the CMA does not consider that an enforcement order against the infringer would, by itself, be wholly effective and considers that the online interface order is therefore necessary to avoid the risk of serious harm to the collective interests of consumers).

Clause 160: Online interface orders

911 This clause gives the court a discretionary power to make an online interface order, in response to an application from the CMA under clause 159, where the conditions set out in subsection (1) are met. The court must have found that there is, has been or is likely to be a relevant infringement, that there are no other available means under Chapter 3 of Part 3 of the Bill which would be wholly effective by themselves to stop or prohibit the infringement and it is necessary to make an order to avoid the risk of serious harm to the collective interests of consumers.

912 Subsection (2) lists what a person can be required to do through an online interface order, including displaying warnings to consumers or removing infringing content from an online interface. The meaning of an "online interface" is given by subsection (5) and includes websites and apps.

913 Subsections (3) and (4) enable the CMA to publicise any online interface orders made by the court under this clause and to identify the infringer, where known, in order to raise awareness of that enforcement intervention and stop any continuing effects of the infringing practice.

Clause 161: Interim online interface orders

914 This clause gives the court a discretionary power to make an interim online interface order, in response to an application from the CMA under clause 159, where the conditions set out in subsection (1) are met. The court can make an interim online interface order only if the court considers that the strict criteria for making a final online interface order under clause 160 would be likely to be met (if the application had been for a final online interface order). This enables the court to take urgent action in respect of infringing online content while ensuring the imposition of potentially intrusive requirements is commensurate with the alleged harm they address.

915 The court may make an interim online interface order without the CMA having given notice of the application to the respondent if the court considers that appropriate (subsection (2), paragraph (b)). Subsection (2), paragraph (a) and subsection (5) require that where an application for an interim online interface order is made without notice it must explain why no notice has been given, alongside all other relevant information supporting the application, to enable the court to decide if the conditions for making an interim online interface order have been met.

916 Subsection (3) lists what a person can be required to do through an interim online interface order. The requirements are the same as those that can be imposed under a final online interface order under clause 160 (for example, removal of content from an online interface). The meaning of an "online interface" is given by clause 160, subsection (5).

917 An application for an interim online interface order may be made at any point in time, subject to the exception that the application cannot be made after an application for an online interface order, or an online interface notice, against the same respondent in respect of the same relevant infringement, has been determined or given (subsection (4)).

918 Subsections (6) and (7) provide for the variation or discharge of an interim online interface order.

Undertakings and further proceedings

Clause 162: Acceptance of undertakings by enforcers

919 This clause provides that where an enforcer could make an application to the court for an enforcement order or interim enforcement order, it may accept an undertaking from the enforcement subject (infringer or an accessory) (subsection (1)). This clause restates and updates section 219 of the Enterprise Act 2002.

920 The enforcer is not required to have notified the CMA before accepting an undertaking under this clause (subsection (8)). An enforcer may decide that such an undertaking will avoid the need for it to apply for an order.

921 Subsection (2) sets out the scope of an undertaking under this clause:

a) for the infringer, not to continue or repeat the infringing practice,

b) for the accessory, not to consent or connive in the infringing practice,

c) for both the infringer and accessory, not to engage in the infringing practice in the course of their business or another business, and to not consent or connive in the

carrying out of the infringing practice by a body corporate with which they have a special relationship.

922 Subsections (4) and (5) enable enforcers to exercise discretion as to publishing undertakings agreed under this clause to, for example, raise consumer awareness, maintain market confidence and deter future infringing practices or conduct. Such publicity is not an enhanced consumer measure. The party giving an undertaking may publish the undertaking instead of the enforcer.

923 Under clause 155, if an enforcement subject gives an undertaking to an enforcer under this clause, the court must take into account any failure to comply with the undertaking when exercising its discretion to make an enforcement order on any subsequent application in relation to the same conduct.

924 Under clause 169, an enforcer must notify the CMA of the terms of any undertaking given to it under this clause and the identity of the person giving it. This is to enable the CMA to fulfil its coordination role.

925 Where an enforcer accepts an undertaking under this section, it may accept from the enforcement subject any variation of the undertaking if it considers that would achieve compliance. An enforcer may also release the undertaking if it is no longer needed (for example, if the original compliance concerns no longer apply or the enforcement subject's business model has changed such that the undertaking is no longer needed) (subsection 6)). It is open to enforcement subjects who have given undertakings to seek their release, but this could be done at the enforcer's own initiative too (subject to the procedural requirements set out in clause 164).

926 Subsection (7) imposes record-keeping requirements on enforcers in relation to undertakings they accept and reviews of their effectiveness they carry out.

Clause 163: Undertakings under section 162: enhanced consumer measures

927 This clause empowers an enforcer to include enhanced consumer measures that it considers to be just, reasonable and proportionate in an undertaking. It partially restates and updates section 219B of the Enterprise Act 2002.

928 Subsections (2) and (3) require the enforcer to consider the likely benefits and costs of the measures, as part of its assessment of the proportionality of the measures. In particular, the enforcer must take into account for this assessment the costs of the measures themselves to the enforcement subject, as well as administrative costs.

929 Subsection (4) stipulates that the enforcement subject may also be required to provide information or documents to the enforcer to enable it to determine if they are taking any enhanced consumer measures required.

930 Subsections (5) and (6) set out that where a settlement agreement is entered into in connection with the payment of compensation as a result of an enhanced consumer measure, any waiver of consumers' rights to bring civil proceedings is not valid to the extent that it purports to extend beyond the conduct covered by the undertaking.

Clause 164: Undertakings under section 162: procedural requirements

931 This clause sets out the process to be followed where an enforcer, upon its own initiative, proposes to materially vary, or release, an undertaking it has previously accepted (subsections (1) to (4)).

Clause 165: Consumer protection orders or undertakings to court: further proceedings

932 This clause, which restates and updates section 220 of the Enterprise Act 2002, applies where the court has made a consumer protection order against an enforcement subject or member of the same interconnected corporate group (see clause 175), or the court has accepted an undertaking from an enforcement subject. Where there is a failure to comply with the order or undertaking, the enforcer who made the original application or any public designated enforcer is able to make a further application to the same court that made the order or accepted the undertaking (subsections (1), (2) and (3)).

933 In an application relating to a failure to comply with an undertaking given to the court, where the enforcer has the power under Chapter 3 of Part 3 to make the application, an enforcer can include an application for an enforcement order, an interim enforcement order, an online interface order or an interim online interface order (subsection (4)). This will enable the court to act not only in respect of non-compliance with the undertaking, but also the infringing practice and any related consent or connivance to it by an accessory.

934 An application cannot be made for a failure to comply with an undertaking or order which consists solely of a failure to provide information or documents required by the undertaking or order to determine whether the enforcement subject is taking any enhanced consumer measures required (subsection (7)).

935 Breach of a consumer protection order will be a contempt of court (breach by disobedience). The enforcer must establish liability to the criminal standard of proof.

936 Where the court finds that undertakings given to it have been breached, it may also treat the breach as a contempt of court. Alternatively, as indicated above, this clause provides that the court may make an enforcement order, an interim enforcement order, an online interface order or an interim online interface order (as applicable) and/or require the enforcement subject to pay a monetary penalty (subsection (5)).

937 The court will not be able to accept another undertaking in response to an application for a consumer protection order under this clause (subsection (6), paragraph (c)) and will be able to impose a monetary penalty (under subsection (5), paragraph (b)) regardless of whether the enforcement subject has a reasonable excuse (also see clause 166 in relation to monetary penalties for non-compliance with undertakings given to enforcers), reflecting the serious nature of breaching an undertaking given to the court.

938 Subsection (6), paragraph (a) removes the requirement for an enforcer to consult with the CMA and the enforcement subject before making an application for an enforcement order or interim enforcement order following on from non-compliance with an undertaking. Those consultation requirements aim to resolve infringing practices without the need for court action. Where an enforcer believes a person has breached an undertaking given to the court,

which is itself an alternative to a court order, the Government considers that another round of out-of-court consultation would fail to resolve the underlying infringing practice.

939 Subsection (8) provides an enforcement subject who is required to pay a monetary penalty with a right to appeal the decision to impose a penalty, its nature or amount "on the merits", in addition to their existing appeal rights.

940 Clause 167 sets out the maximum monetary penalties that the court may impose under this clause and clause 202 makes further provisions for what information must be included in an order that includes a requirement to pay a monetary penalty (subsection (9)).

Clause 166: Undertakings to public designated enforcers: further proceedings

941 This clause sets out that where a public designated enforcer has accepted an undertaking and believes that there has been a failure to comply with it, the enforcer is empowered to make an application to the court.

942 An application cannot be made for a failure to comply with an undertaking which consists solely of a failure to provide information or documents required by the undertaking to determine whether the enforcement subject is taking any enhanced consumer measures attached to the undertaking (subsection (7)).

943 In its application, a public designated enforcer can request the imposition of a monetary penalty for the alleged failure to comply with the undertaking. If the court finds that the undertaking is not being complied with and is satisfied that this failure is without a reasonable excuse, the court may make an order requiring the payment of a monetary penalty (subsection (4), paragraph (b) and subsection (5)).

944 In its application under this clause, an enforcer can also include an application for a consumer protection order. This means that where the enforcer has the power under Chapter 3 of Part 3 to make the application, they may apply for an enforcement order, an interim enforcement order, an online interface order or an interim online interface order (subsection (3)). By making such an order, the court will be able to address the infringing practice and any related consent or connivance to it by an accessory (subsection (4), paragraph (a)). A consumer protection order can be made by the court instead of or in addition to making an order to pay a monetary penalty for failure to comply with an undertaking, without reasonable excuse. An enforcement order made by the court may include the imposition of a monetary penalty (see clause 157). Therefore, the court has discretion to impose monetary penalties following an application made by a public designated enforcer under this clause in respect of failure to comply with the undertaking and/or in respect of the relevant infringement.

945 Subsection (6), paragraph (a) removes the requirement for an enforcer to consult with the CMA and the enforcement subject before applying for a consumer protection order under this clause. Those consultation requirements aim to resolve infringing practices without the need for court action or to facilitate enforcement action by the most appropriate enforcer in the circumstances of the case. Where an enforcer believes an enforcement subject has breached an undertaking, which is itself an alternative to a court order, this may strongly suggest that another round of out-of-court consultation would fail to resolve the underlying infringing practice. Similarly, given the enforcer had already agreed an undertaking with the enforcement subject, it is likely that it is well positioned to carry out further enforcement action as needed.

946 Subsection (8) provides an enforcement subject who is required to pay a monetary penalty with a right to appeal the decision to impose a penalty, its nature or amount "on the merits", in addition to their existing appeal rights.

947 Clause 167 sets out the maximum monetary penalties that the court may impose under this clause and clause 202 makes further provisions for what information must be included in an order that includes a requirement to pay a monetary penalty (subsection (9)).

Clause 167: Monetary penalties under sections 165 and 166: amount

948 This clause sets out the maximum monetary penalties that the court may impose for failure to comply with undertakings given to public designated enforcers or to the court. It specifies the maximum fixed penalty and the maximum daily rate penalty.

949 The court has discretion to impose a penalty of a fixed amount and/or a penalty based on a daily rate as it considers appropriate, subject to the statutory maxima set out in subsection (3).

950 See explanatory note to clause 157 for the policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.

951 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £150,000 or, if higher, 5% of the total value of the enforcement subject's turnover. Clause 203 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £150,000 (subsection 3, paragraph (a)).

952 Where the enforcement subject has a turnover that can be determined, a daily penalty must not exceed £15,000 or, if higher, 5% of the total value of the enforcement subject's daily turnover. Where the enforcement subject does not have a turnover, the daily penalty must not exceed £15,000 per day (subsection 3, paragraph (b)).

953 Subsection (4), paragraph (a) has the effect that a daily penalty imposed by the court on the enforcement subject can only begin to accrue after the enforcer has served the application to the court to determine whether the undertaking has been breached on the enforcement subject, i.e. the point when the enforcement subject is clearly made aware of their failure to comply with an undertaking. A daily penalty stops accruing when the enforcement subject fulfils the relevant requirements unless the court determines an earlier date (subsection (4), paragraph (b)).

Notification of CMA

Clause 168: Notification requirements: applications

954 This clause restates and updates the effect of sections 214 and 215 of the Enterprise Act 2002 to the extent they include obligations on enforcers who are not the CMA. This clause requires these enforcers to notify the CMA of their intention to apply for an enforcement order and to only make an application 14 days after the notice was given (beginning with the day the notice was given). There is a corresponding requirement – subject to a 7-day period from the day the notice was given – when an enforcer intends to apply for an interim enforcement order (subsections (1) to (3)). These waiting periods can be shortened if the CMA consents by notice to the enforcer making the application sooner (subsection (2), paragraph (b)).

Subsection (4) requires the enforcer to inform the CMA of the outcome of any application it makes.

955 The policy intent underlying the notification requirement in this clause is for the CMA to be able to perform a coordinating role in relation to enforcement under this Part. The notification requirement will enable the CMA to facilitate the sharing of information between enforcers and to make directions under clause 153. The Government considers that this will mitigate the risk of traders facing multiple actions in relation to the same infringing practice.

956 Subsections (5) and (6) require an enforcer to inform the CMA of the making, and outcome, of applications to the court under clause 165 in respect of a failure to comply with a previous enforcement order, interim enforcement order or undertaking.

Clause 169: Notification requirements: undertakings

957 This clause requires enforcers to notify the CMA of the terms of any undertaking given to them under clause 162 and of the identity of the person(s) giving it (subsections (1) and (2)).

958 The underlying policy intent is to enable the CMA to fulfil its coordination role. This clause restates equivalent provisions in section 219 of the Enterprise Act 2002.

Clause 170: Notification requirements: proceedings

959 This clause, which restates section 230 of the Enterprise Act 2002, applies if a local weights and measures authority (i.e. Trading Standards department) in England and Wales intends to start proceedings for an offence under an enactment listed in Part 1 of Schedule 14 (subsection (1)).

960 The authority must give the CMA notice of its intention to start proceedings (subsection (2)). Subsection (3) sets out the notice period. The authority must also notify the CMA of the outcome of the proceedings (subsection (4)).

961 The underlying policy intent is to enable the CMA to fulfil its coordination role. For example, the CMA could inform one authority that another is prosecuting, or that an enforcement order has been granted, in respect of the same infringing practice.

962 Any criminal proceedings will not be invalid simply because the prosecuting authority has not given the CMA notice (subsection (5)).

963 This clause is not relevant to Scotland, where all criminal prosecutions are brought by the Procurator Fiscal, nor to Northern Ireland where public law enforcement of consumer protection legislation rests with the Department for the Economy.

Clause 171: Notification requirements: convictions and judgments

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

Jurisdiction etc

Clause 172: Appropriate court

965 This clause sets out the criteria to determine which courts within the UK have jurisdiction to hear and determine applications for consumer protection orders. This clause restates and updates relevant provisions in section 215 of the Enterprise Act 2002.

966 The starting point is subsection (2), which provides for the appropriate courts where the respondent has a place of business in, or carries on business in England and Wales, Scotland or Northern Ireland.

967 Subsection (3) provides for the appropriate court where the respondent does not have a place of business in, nor carries on business in England and Wales, Scotland or Northern Ireland. In such cases, the relevant consumer's domicile determines which court or courts have jurisdiction.

968 Subsections (4) and (5) define who is a relevant consumer for this purpose.

Clause 173: Effect of orders in other parts of the United Kingdom

969 This clause provides for consumer protection orders made by a court in one part of the UK to have effect in another part of the UK, as if they were made by the court that could make an order in that other part of the UK. This provision eliminates any jurisdictional gap within the UK, ensuring consumer protection orders made within one part of the UK will apply across its nations.

970 This clause restates and consolidates the corresponding provisions provided for in section 217, section 218, section 218ZB, and section 218ZC of the Enterprise Act 2002.

Clause 174: Evidence

971 This clause, which restates and updates section 228 of the Enterprise Act 2002, allows convictions in the criminal courts and findings in the civil courts to be admitted in evidence for the purpose of proving that an infringing conduct has occurred. It will still be necessary to prove, for example, that the conduct harms the collective interests of consumers.

972 Subsection (1) provides that convictions in any related criminal proceedings in the UK may be used as evidence in proceedings under this Part.

973 Subsection (2) enables findings in civil proceedings to be admitted in evidence under this Part, except where the findings have been overturned on appeal (subsection (3)). Subsection (4) defines in respect of whose conduct findings may be made and evidence may be admitted under this clause.

Miscellaneous

Clause 175: Interconnected bodies corporate

974 This clause restates and updates section 223 of the Enterprise Act 2002. It sets out that where the court makes a consumer protection order against a body corporate that is, or becomes, a member of a group of interconnected bodies corporate, the court has a discretionary power to direct that the order is binding upon one or more other members of the same corporate group (subsections (1) and (3)). The court has discretion to make some or all of the requirements of the order, i.e. compliance directions, enhanced consumer measures and monetary penalties,

binding on other members of the same corporate group but only if the court considers it just, reasonable and proportionate to do so (subsection (4)).

975 In considering whether it is just, reasonable and proportionate to exercise this power, the court may take into account, for example:

a) to what extent any other group members have been the "brains" behind the infringement or have benefitted from it,

b) whether the infringing body corporate has sufficient funds to pay the penalty, and whether to ensure the penalty is paid it is necessary to make the requirement to do so binding on one or more members of the same corporate group. The underlying policy intent is to help prevent the infringing body corporate from engaging in corporate restructuring to minimise or avoid liabilities.

976 Subsection (2) sets out the circumstances in which a body corporate is considered to be or becomes a member of a group of interconnected bodies corporate (when the interconnection condition applies). These include where the infringing body corporate becomes a member of a group of interconnected bodies corporate after the order is made, or an existing group of which it is a member is enlarged.

977 Subsection (5) defines what a group of interconnected bodies corporate is and subsection (6) defines when any two bodies corporate are interconnected with each other.

978 Subsection (7) requires an order to be given to any group member on whom it is made binding.

Clause 176: Enhanced consumer measures: private designated enforcers

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

980 Subsection (3) sets out the first condition, which is that the enforcer must have been specified by the Secretary of State in regulations for this purpose (i.e. regarding securing enhanced consumer measures) and subsection (6) provides the conditions which must be satisfied before an enforcer may be specified in the regulations. This clause gives the Secretary of State a delegated power to make regulations subject to the negative parliamentary procedure (subsection (9)).

981 Subsection (4) sets out the second condition, which is that the enhanced consumer measures must not directly benefit the enforcer or an associated undertaking. Subsection (5) sets out, non-exhaustively, particular types of measures that would be considered to directly benefit the enforcer or an associated undertaking. Subsection (10) defines associated undertaking.

982 Subsections (7) and (8) require private designated enforcers, where including enhanced consumer measures in an undertaking, to have regard to any relevant advice or guidance given by a Primary Authority. The policy objective is to support consistency in achieving business compliance, given that a Primary Authority enables businesses to form a legal partnership with one local authority, which then provides assured and tailored advice on

complying with, inter alia, trading standards regulations, that other local regulators must respect.

Clause 177: Substantiation of claims

983 This clause enables the court to require evidence from traders substantiating the factual claims used in their commercial practices with consumers, which are at issue in an application for a consumer protection order involving alleged contravention of Chapter 1 of Part 4 (protection from unfair trading) to this Bill (subsections (1) and (2)). This clause restates and updates section 218A of the Enterprise Act 2002.

984 The effect of this provision is that the burden of proof regarding the accuracy of the claim rests on the trader and any claim (such as claims about products having various positive effects on health) should be based on evidence which can be verified by the court.

985 The content and scope of the documentation to be supplied will depend on the specific content of the factual claim and it is for the court to decide if any evidence provided is adequate. If the court considers that it is not, or if no evidence is produced, the court can decide the claim is inaccurate (subsection (3)).

Clause 178: Crown application

986 This clause confirms that this Chapter binds the Crown if it engages in an infringing practice (see clause 147) or consents or connives in such a practice (subsection (1)).

987 Subsection (2) makes an exception for monetary penalties.

988 This clause restates and updates section 236 of the Enterprise Act 2002. It ensures that if an emanation of the Crown is acting as a trader, for example a government agency providing services to members of the public for a fee, it can be enforced against if proven to have engaged in infringing practices.

Chapter 4: Direct Enforcement Powers of CMA

Investigations

Clause 179: Power of CMA to investigate suspected infringements

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

990 The CMA can conduct investigations under Chapter 4 of Part 3 if it reasonably suspects that an infringing practice has occurred, is occurring or is likely to occur. The CMA can investigate the person committing the actual or likely infringing practice (the "infringer"), an accessory to such a practice, or both (together the "enforcement subject") (subsection (1)).

991 The CMA may publish a notice of investigation under this clause, setting out what and, so far as possible, whom, it is investigating and indicating the investigation timetable (subsection (3)). This will signal to other market participants that the CMA has reasonable grounds for suspecting either that the practice constitutes a relevant infringement or that there has been or is consent or connivance in the practice by another relevant person. This may encourage consumers, other traders or other entities to come forward with relevant information or evidence. Publication of a notice is not mandatory in all cases (e.g. it may not be appropriate if potential prejudice may be caused to the investigation).

992 If the CMA has published an investigation notice, then if it decides to close the investigation, it must publish a notice of termination of the investigation (subsection (4)).

Infringement notices and penalties

Clause 180: Provisional infringement notice

993 This clause allows the CMA, once it has started an investigation under clause 179, to give a provisional infringement notice to the enforcement subject (subsections (1) to (3)). This power is discretionary. The CMA may choose not to exercise it where, for example, it considers that the infringing practice of concern can be resolved by means of accepting undertakings under clause 184.

994 As it represents the CMA's provisional view, the provisional infringement notice does not mean that the CMA has made a finding that the enforcement subject has engaged in or is likely to engage in the infringing practice or has consented or connived to it. The provisional infringement notice gives the enforcement subject an opportunity to know the case against them, and if they choose to do so, to respond in writing and orally.

995 The provisional infringement notice must specify certain details (subsection (4)), including:

a) the grounds for the CMA's belief that there has been or is likely to be an infringing practice or consent or connivance to such a practice (as relevant);

b) proposed directions, which specify any conduct required to ensure compliance as defined in subsection (5). If the proposed directions include such enhanced consumer measures as the CMA considers to be just, reasonable and proportionate, the notice must state that and the details of those measures (subsection (6)); and

c) the representations process that applies. If the enforcement subject wishes to make oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional infringement notice (subsection (7)).

996 If the CMA is considering the imposition of a monetary penalty, further information must be included in the provisional infringement notice regarding the penalty, including its proposed amount and factors justifying both its imposition and amount (subsection (8)).

Clause 181: Final infringement notice

997 This clause gives a discretionary power to the CMA to issue a final infringement notice where it is satisfied that the enforcement subject has engaged, is engaging or is likely to engage in the infringing practice or is an accessory to such a practice. The CMA may exercise this power following the issue of a provisional infringement notice under clause 180, the expiry of the time for the enforcement subject to make representations on it, and after considering any representations received (subsections (1) and (2)).

998 In deciding whether to give a final infringement notice, the CMA must have regard to whether the enforcement subject has already given an undertaking (covering the infringing practice or an accessory's conduct currently under investigation) under Chapters 3 and 4 of Part 3 (subsection (3)). Failure to comply with an undertaking would be relevant to the question of whether it is proportionate to issue a final infringement notice (as opposed, for example, to accepting a further undertaking).

999 The final infringement notice may include directions to achieve compliance (see clause 180, paragraph (5)), including such enhanced consumer measures as the CMA considers to be just, reasonable and proportionate and may require payment of a monetary penalty (subsection (4)). The CMA may wish to give directions (including enhanced consumer measures) to rectify an infringement without imposing a penalty and vice versa.

1000 A monetary penalty cannot be imposed where the CMA is satisfied that an infringing practice is likely to occur only and therefore has not actually occurred or is not currently occurring (subsection (5)). The effect is that only actual infringing practices that have taken place (or are currently happening) can be penalised with a monetary sanction on the infringer. A similar qualification is not needed for accessories as clause 217(2)(c) achieves the effect that an accessory cannot be an accessory to future conduct.

1001 The CMA has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in subsection (6).

1002 See explanatory note to clause 157 for the policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.

1003 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £300,000 or, if higher, 10% of the total value of the enforcement subject's turnover. Clause 203 concerns the calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £300,000.

1004 The final infringement notice must specify certain details (subsection (7)), including:

- the CMA's findings of facts relating to the infringing practice or conduct,
- other factors which justify the issuing of the notice,
- where a penalty is imposed, the information specified in clause 202,
- the enforcement subject's appeal rights.

1005 In addition, the CMA may require the enforcement subject to publish at their expense the final infringement notice (in full or in part) and/or a corrective statement (subsections (8) and (9)). For example, a corrective statement may be required in respect of an advertisement that has been found by the CMA to be misleading, to prevent further distorting consumers' purchasing decisions based on the misleading contents of the advert.

Clause 182: Final infringement notice: directions to take enhanced consumer measures

1006 This clause empowers the CMA to include enhanced consumer measures that it considers to be just, reasonable and proportionate in a final infringement notice.

1007 Subsections (2) and (3) require the CMA to consider the likely benefits and costs of the measures, as part of its assessment of the proportionality of the measures. In particular, the CMA must take into account for this assessment the costs of the measures themselves to the enforcement subject, as well as administrative costs.

1008 Subsection (4) provides that the enforcement subject may also be required to provide information or documents to the CMA to enable it to determine if the enforcement subject is carrying out the enhanced consumer measures as stipulated.

1009 Where a settlement agreement is entered into in connection with the payment of compensation required as an enhanced consumer measure, any waiver of consumers' rights to bring civil proceedings is not valid to the extent that it purports to extend beyond the conduct covered by the final infringement notice (subsections (5) and (6)).

Online interface notices

Clause 183: Online interface notices

1010 This clause empowers the CMA to give an online interface notice as a last resort to prevent serious harm to the collective interests of consumers where there has been, is, or there is likely to be, an infringing practice (subsections (1) and (5)).

1011 The notice can be given to the infringer or any third party (subsection (2)). Subsection (3) sets out a jurisdictional test which limits the CMA's power to give a notice to a third party overseas who satisfies at least one of the conditions listed in that subsection. See the explanatory note for clause 148 regarding the "directing activities to consumers in the UK" limb of this jurisdictional test.

1012 It is possible that the CMA might give a final infringement notice under clause 181 to the infringer and, simultaneously, an online interface notice to a third party (where, for example, the CMA is not satisfied that the giving of the final infringement notice to the infringer would, by itself, be wholly effective and is satisfied that the directions in the online interface notice are therefore necessary to avoid the risk of serious harm to the collective interests of consumers).

1013 Subsection (4) lists what a person can be required to do through an online interface notice, including displaying warnings to consumers or removing infringing content from an online interface. The meaning of "online interface" is given by subsection (10) and includes websites and apps.

1014 Subsection (6) sets out certain details which the online interface notice must specify, including:

a) the CMA's findings in relation to the circumstances justifying the notice,

b) the appeal rights of those who have received the notice.

1015 Subsections (7) and (8) enable the CMA to publicise any online interface notices given under this section and to identify the infringer to raise awareness of that enforcement intervention and stop any continuing effects of the infringement.

Undertakings

Clause 184: Undertakings

1016 This clause applies where the CMA has started an investigation under clause 179 which has not yet resulted in the CMA giving a final infringement notice under clause 181 or an online interface notice under clause 183, in relation to the matter under investigation.

1017 In that case, the CMA may accept an undertaking from a person who it believes has, is or is likely to engage in an infringing practice or is an accessory to such a practice (subsections (1) and (2)). The CMA may decide that such an undertaking will avoid the need for it to give a final infringement notice as the acceptance of an undertaking can lead to faster resolution of consumer protection concerns and shorten the enforcement process. This is underlined by the fact that when giving an undertaking to the CMA, the enforcement subject does not need to admit that it has engaged in the alleged infringing practice and the CMA, upon accepting the undertaking, will make no finding to that effect.

1018 The undertaking must include provisions which effectively stop the alleged infringing practice and hence ensure compliance (subsection (4)). It may also include such enhanced consumer measures as the CMA considers just, reasonable and proportionate (subsection (3)). The CMA cannot impose any monetary penalties in an undertaking (though it may subsequently impose monetary penalties for any breaches without reasonable excuse of the terms of the undertaking - see clause 188).

1019 Under clause 181, if an enforcement subject gives an undertaking to it pursuant to this clause, the CMA must take this, as well as whether they have failed to comply with it, into account in considering whether to give a final infringement notice.

1020 Subsection (5) makes provision, in certain circumstances, for the CMA to vary the terms of the undertaking at the enforcement subject's initiative. It is also open to the CMA to release them from the undertaking, whether on its own initiative (subject to the procedural requirements set out in clause 186) or at the enforcement subject's request. This may be appropriate, for example, if the original compliance concerns no longer apply.

1021 The CMA's power to accept an undertaking under this clause does not limit, or take away from, the CMA's enforcement powers (as a public designated enforcer) under Chapter 3 of this Part (subsection (6)). Such Chapter 3 powers include the acceptance of an undertaking during an investigation under the court-based enforcement regime (see clause 162).

Clause 185: Effect of undertakings under section 184

1022 This clause prevents the CMA, once it accepts an undertaking under clause 184, from giving a final infringement notice (under clause 181) or an online interface notice (under clause 183) to the same enforcement subject in relation to the same matter (subsections (1) and (2)). The underlying policy intent is that undertakings are an alternative to final infringement or online interface notices and therefore the effect is that a person cannot be subjected to multiple enforcement resolutions of the same matter.

1023 Nevertheless, subsection (3) provides that, where the CMA accepts an undertaking, it is not prevented from giving a final infringement notice or online interface notice (to the same enforcement subject in relation to the same matter covered by the undertaking) in circumstances which:

a. either are not covered by the undertaking, e.g. if the CMA investigates multiple parties in relation to the same matter, and only a few are prepared to offer undertakings (subsection (3), paragraph (a)), or

b. cast doubt on the effectiveness of the undertaking to stop or prevent the consumer detriment because of non-compliance with the undertaking (subsection (3), paragraph

(c)), or a change to, or revelation regarding, the basis on which the undertaking was accepted (subsection (3), paragraphs (b) and (d)).

1024 However, subsection (3) does not remove the need to meet the requirements in clauses 181 and 183 before a final infringement notice or an online interface notice is given, i.e. subsection (3) does not permit the CMA to automatically issue a final infringement notice or online interface notice.

1025 Subsection (4) has the effect that undertakings are to be treated as released from the date the CMA gives a final infringement notice or an online interface notice in these circumstances.

Clause 186: Undertakings under section 184: procedural requirements

1026 This clause sets out the process to be followed where the CMA, upon its own initiative, proposes to materially vary, or release, an undertaking it has previously accepted (subsections (1) and (5)).

1027 The CMA must first give notice of its intention and rationale to the person who is party to the undertakings (subsections (2) and (3)). The CMA must consider any representations by that person and confirm its decision to that person (subsection (4)).

Clause 187: Provisional breach of undertakings enforcement notice

1028 This clause, in conjunction with clause 188, sets out the CMA's powers to enforce compliance with undertakings accepted under clause 184.

1029 The CMA may give a provisional breach of undertakings enforcement notice to a person, if it reasonably believes that they have failed to comply with one or more of the terms of the undertaking (subsections (1) and (2)).

1030 The provisional breach of undertakings enforcement notice does not constitute a finding that a person has failed to comply with the terms of the undertaking and, where the notice provides that the CMA is considering imposing a monetary penalty, does not constitute a finding by the CMA that there is no reasonable excuse for the alleged breach.

1031 The provisional breach of undertakings enforcement notice represents the CMA's provisional view and proposed next steps. It allows the enforcement subject to know the case against them and, if they choose to do so, to respond in writing and orally.

1032 The provisional breach of undertakings enforcement notice must specify certain details (subsection (3)), including:

- the terms of the undertaking which are alleged to be breached and the acts or omissions which constitute the breach,
- proposed directions to achieve compliance as defined in subsection (5):
    - for the infringer, not to continue or repeat the infringing practice,
    - for the accessory, not to consent or connive in the infringing practice,
    - for the enforcement subject(s) (infringer and accessory), not to engage in the infringing practice in the course of their business or another business,

and not to consent or connive in the carrying out of the infringing practice by a body corporate with which they have a special relationship.

- the representation process that applies. If the enforcement subject wishes to make oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional breach of undertakings enforcement notice (subsection (4)).

1033 Further information must be included in the provisional breach of undertakings enforcement notice if the CMA is considering imposing a monetary penalty on the enforcement subject, including factors which justify the imposition of a penalty and its proposed amount (subsection (6)).

Clause 188: Final breach of undertakings enforcement notice

1034 This clause allows the CMA to issue a final breach of undertakings enforcement notice where it is satisfied that the enforcement subject has failed to comply with one or more terms of the undertaking. The CMA may issue a final breach of undertakings enforcement notice following the issue of a provisional breach of undertakings enforcement notice under clause 187, the expiry of the deadline to make representations to the CMA and after considering any representations received (subsections (1) and (2)).

1035 The notice may specify directions to achieve compliance (see explanatory note for clause 187, subsection (5)), a monetary penalty or both (subsection (3)). The CMA may give directions without imposing a penalty and vice versa.

1036 A monetary penalty can only be imposed if the CMA is satisfied that there is no reasonable excuse for the breach of the undertakings (subsection (4)). This means, for example, an enforcement subject may be able to avoid a requirement to pay a monetary penalty if they can provide evidence of an externally verifiable and unforeseen factor(s) outside of their control, which resulted in the breach of the term or terms of the undertaking.

1037 The final breach of undertakings enforcement notice must specify certain details (subsection (5)), including:

a) the acts or omissions which constitute the breach,

b) further factors, which justify the giving of the notice,

c) if directions are imposed, specify any action to be taken (or stopped) to ensure the breach ceases, will not be repeated or to prevent it from arising (as applicable),

d) if a penalty is imposed, the penalty notice information specified in clause 202,

e) the applicable rights and procedures to appeal the notice.

1038 The CMA has discretion to publish a final breach of undertakings enforcement notice (subsection (6)).

Clause 189: Monetary penalties under section 188: amount

1039 This clause sets out the maximum monetary penalties (a fixed amount or an amount based on a daily amount or both) that the CMA may impose in a final breach of undertakings enforcement notice under clause 188.

1040 The CMA has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in subsection (3).

1041 See the explanatory note for clause 157 for the policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.

1042 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £150,000 or, if higher, 5% of the total value of the enforcement subject's turnover. Clause 203 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £150,000 (subsection (3), paragraph (a)).

1043 Where the enforcement subject has a turnover that can be determined, a daily penalty must not exceed £15,000 or, if higher, 5% of the total value of the enforcement subject's daily turnover. Where the enforcement subject does not have a turnover, the daily penalty must not exceed £15,000 per day (subsection 3, paragraph (b)).

1044 Subsection (4), paragraph (a) means that a daily penalty imposed by the CMA can only begin to accrue after the CMA has given a provisional breach of undertakings enforcement notice to the enforcement subject, i.e. the point when the enforcement subject is clearly made aware of their failure to comply with the terms of the undertaking. A daily penalty stops accruing when the enforcement subject fulfils the requirements of the final breach of undertakings enforcement notice, unless the CMA determines an earlier date (subsection (4), paragraph (b)).

Directions

Clause 190: Provisional breach of directions enforcement notice

1045 This clause, in conjunction with clause 191, sets out the CMA's powers to enforce compliance with enforcement directions given in its final infringement notices under clause 181, online interface notices under clause 183 and final breach of undertakings enforcement notices under clause 188. This is the final step in the CMA's own control under the direct enforcement regime.

1046 The CMA may give a provisional breach of directions enforcement notice to an enforcement subject, if it reasonably believes that they have failed to comply, without a reasonable excuse, with an enforcement direction (subsections (1) and (2)).

1047 As it represents the CMA's provisional view, the provisional breach of directions enforcement notice does not mean that the CMA has made a finding that the enforcement subject has failed to comply with an enforcement direction or that it considers that they do not have a reasonable excuse for failing to do so. The provisional breach of directions enforcement notice allows the enforcement subject an opportunity to know the case against them, and if they choose to do so, to respond in writing and orally.

1048 The provisional breach of directions enforcement notice must specify certain details (subsection (3) and (5)), including:

a) the grounds of the alleged failure to comply with an enforcement direction(s), without reasonable excuse,

b) proposed directions to achieve compliance with the enforcement direction(s),

c) the intent and rationale to impose a penalty and its proposed amount,

d) the representation process that applies and a deadline for the enforcement subject to respond. If the enforcement subject wishes to make oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional breach of directions enforcement notice (subsection (4)).

Clause 191: Final breach of directions enforcement notice

1049 This clause allows the CMA to issue a final breach of directions enforcement notice requiring the payment of a monetary penalty where the CMA is satisfied that the enforcement subject has without reasonable excuse failed to comply with an enforcement direction. The CMA may issue a final breach of directions enforcement notice following the issue of a provisional breach of directions enforcement notice under clause 190, the expiry of the time to make representations and after considering any representations received (subsections (1) and (2)).

1050 Subsection (3) reflects that at this late stage of giving a final breach of directions enforcement notice and given the seriousness of failing to comply with its previous directions without a reasonable excuse, the CMA will wish in every case to impose a penalty. Subsection (5) provides that the CMA has a discretion to vary or revoke its original directions and to specify new directions to achieve compliance.

1051 The final breach of directions enforcement notice must specify certain details (subsections (4) and (5A)), including:

a) the CMA's findings in relation to the circumstances of the breach,

b) the penalty notice information specified in clause 202,

c) the applicable rights and procedures to appeal the notice.

1052 The CMA has discretion to publish a final breach of directions enforcement notice (subsection (6)).

Clause 192: Monetary penalties under section 191: amount

1053 This clause stipulates the maximum monetary penalties that the CMA may impose in a final breach of directions enforcement notice under clause 191. It specifies the maximum fixed penalty and the maximum daily rate penalty.

1054 The CMA has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in subsection (3).

1055 See the explanatory note to clause 157 for the policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.

1056 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £150,000 or, if higher, 5% of the total value of the enforcement subject's turnover. Clause 203 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £150,000 (subsection (3), paragraph (a)).

1057 Where the enforcement subject has a turnover that can be determined, a daily penalty must not exceed £15,000 or, if higher, 5% of the total value of the enforcement subject's daily turnover. Where the enforcement subject does not have a turnover, the daily penalty must not exceed £15,000 per day (subsection (3), paragraph (b)).

1058 Subsection (4), paragraph (a) means that a daily penalty imposed by the CMA can only begin to accrue after the CMA has given a provisional breach of directions enforcement notice to the enforcement subject, i.e. the point when enforcement subject is clearly made aware of their failure to comply with an enforcement direction. A daily penalty stops accruing when the enforcement subject fulfils the requirements of the final breach of directions enforcement notice, unless the CMA determines an earlier date (subsection (4), paragraph (b)).

Clause 193: Powers of court to enforce directions

1059 This clause provides a backstop power for the CMA to apply to an appropriate court where it considers that a person has failed to comply with a direction given in a final breach of directions enforcement notice under clause 191.

1060 This clause also sets out an alternative means for the CMA to enforce compliance with enforcement directions, i.e. those given in its final infringement notices under clause 181, online interface notices under clause 183 and final breach of undertakings enforcement notices under clause 188 – by means of applying to court for an order.

1061 It is for the CMA to decide whether to enforce directions itself (using powers under clauses 190 and 191) or by making an application to the court under this clause. The underlying policy intent is that the direct enforcement route may be appropriate where the prospect of a CMA-imposed monetary penalty would incentivise compliance. There may be cases where this prospect is potentially ineffective or insufficient and the prospect of a court order (which would result in contempt proceedings if breached) would act as an appropriately stringent sanction.

1062 An order made by the court under this clause may require the enforcement subject to take such steps as the court considers appropriate to achieve compliance with the enforcement direction in issue (subsection (3)). The court may also order that the enforcement subject(s) pay all the costs or expenses of the application (subsection (4)).

1063 The CMA may also apply for an enforcement order, an interim enforcement order, an online interface order or an interim online interface order under Chapter 3 (subsection (5)). This will enable the court to take action in respect of any practice or conduct which amounts to a relevant infringement (by making a consumer protection order) in addition to, or instead of, making an order in respect of the breach of directions.

1064 Subsection (6) applies provisions in Chapter 3 concerning which court has jurisdiction to hear and decide applications, and relevant court powers to a court order under this clause.

Clause 194: Substantiation of claims

1065 This clause enables the CMA, where it gives a provisional notice (defined in subsection (4)) to an enforcement subject, to require evidence from the enforcement subject substantiating the factual claims used in their commercial practices with consumers, which are at issue in CMA direct enforcement involving alleged contravention of Chapter 1 of Part 4 (protection from unfair trading) to this Bill (subsections (1) and (2)).

1066 The effect of this provision is that the burden of proof regarding the accuracy of the claim rests on the trader and any claim (such as claims about products having various positive effects on health) should be based on evidence which can be verified by the CMA.

1067 The content and scope of the documentation to be supplied will depend on the specific content of the factual claim and it would be up to the CMA to decide if the evidence provided is satisfactory. If the CMA considers that it is not, or if no evidence is produced in the first place, the CMA can decide the claim is inaccurate (subsection (3)).

Clause 195: Variation or revocation of directions

1068 This clause sets out the process to be followed where the CMA proposes to make a material variation of, or to revoke, a direction it has given through a final infringement notice under clause 181, an online interface notice under clause 183, a final breach of undertakings enforcement notice under clause 188 or a final breach of directions enforcement notice under clause 191 (subsection (1) and (5)).

1069 The CMA must first give notice of its intention and rationale to the person subject to those directions (subsections (2) and (3)). The CMA must consider any representations by that person and confirm its decision to that person (subsection (4)).

False or misleading information

Clause 196: Provisional false information enforcement notice

1070 This clause, in conjunction with clause 197, gives discretionary power to the CMA to enforce against the provision of materially false or misleading information provided to it in connection with the exercise of its direct enforcement functions under this Chapter or under paragraph 16B or 16C of Schedule 5 to the Consumer Rights Act 2015 (as inserted by paragraph 2 of Schedule 16 to this Bill).

1071 The CMA's power under this clause may be used where, for example, the CMA has reasonable grounds to believe that it has been given materially false or misleading information in written representations on a provisional infringement notice, during an oral hearing, or in response to proposed undertakings or proposed material variations of undertakings.

1072 Subsection (1) sets out the circumstances in which the CMA may give a provisional false information enforcement notice under subsection (2).

1073 The provisional false information enforcement notice must specify certain details (subsection (3)), including:

a) the information in question and why the CMA believes that it is materially false or misleading,

b) the CMA's reasons for proposing a monetary penalty and its proposed amount,

c) the representation process that applies. If the respondent thinks that their circumstances warrant oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional false information enforcement notice (subsection (4)).

Clause 197: Final false information enforcement notice

1074 This clause allows the CMA to issue a final false information enforcement notice following the issue of a provisional false information enforcement notice under clause 196 and after considering any representations received. The notice is to require payment of a monetary penalty.

1075 The CMA may impose a monetary penalty of the amount that it considers to be appropriate, subject to the statutory maxima set out in subsection (4).

1076 See the explanatory note to clause 157 for background on providing for a penalty of up to the higher of a fixed amount or a percentage of turnover.

1077 Where the enforcement subject has a turnover that can be determined, a fixed amount penalty must not exceed £30,000 or, if higher, 1% of the total value of the enforcement subject's turnover. Clause 203 concerns calculation of the enforcement subject's turnover. Where the enforcement subject does not have a turnover, the fixed penalty must not exceed £30,000.

1078 Subsection (5) sets out the information that must be contained in the final false information enforcement notice.

Miscellaneous and appeals

Clause 198: Statement of policy in relation to monetary penalties

1079 This clause requires the CMA to produce and publish a statement about the considerations relevant to the exercise of its powers to propose and to impose monetary penalties in respect of:

a) relevant infringements (clauses 180 and 181),

b) breaches of undertakings (clauses 187 and 188),

c) breaches of directions (clauses 190 and 191),

d) provision of materially false or misleading information in connection with the exercise of the CMA's direct enforcement functions (clauses 196 and 197).

1080 Subsection (2) specifies particular considerations which the statement must include.

1081 Subsection (3) provides for the CMA to revise its statement from time to time.

1082 Subsections (4) and (5) set out the process to be followed before the CMA first publishes or subsequently revises the statement. In particular, the Secretary of State must approve the final statement before first publication, and any subsequent revisions to it.

1083 Subsections (6) and (7) require the CMA to have regard to the most recent, Secretary of State-approved statement in deciding whether to propose (where relevant) or impose a penalty under this Chapter and if so, the nature and the amount of the penalty.

Clause 199: Interconnected bodies corporate

1084 Where the CMA gives a body corporate a final infringement notice, an online interface notice or a final breach of directions enforcement notice, this clause gives the CMA a discretionary power to make the requirements of the notice binding upon one or more

members of the same interconnected corporate group (subsections (1), (3) and (8)). The CMA has discretion to make some or all of the requirements of the notice, i.e. directions, enhanced consumer measures and monetary penalties, binding on other members of the same corporate group but only if the CMA considers it just, reasonable and proportionate to do so (subsection (4)).

1085 In considering whether it is just, reasonable and proportionate to exercise this power, the CMA may take into account, for example:

a) to what extent any other group members have been the "brains" behind the infringement or have benefitted from it,

b) whether the infringing body corporate has sufficient funds to pay the penalty, and whether to ensure the penalty is paid it is necessary to make the requirement to do so binding on one or more members of the same corporate group. The underlying policy intent is to prevent the infringing body corporate from engaging in corporate restructuring to minimise or avoid liabilities.

1086 Subsection (2) sets out the circumstances in which a body corporate is considered to be or becomes a member of an interconnected corporate group for the purposes of this clause. These include where the body corporate that is subject to the notice becomes a member of a group of interconnected bodies corporate after the order is made, or an existing group of which it is a member is enlarged.

1087 Subsection (5) defines what an interconnected corporate group means for the purposes of this clause.

1088 Any two bodies corporate are interconnected if one of them is a subsidiary of the other, or if both are subsidiaries of the same company (subsection (6)).

1089 Where the CMA imposes requirements on other members of the interconnected corporate group, it must give the final notice to them in addition to giving it to the enforcement subject (subsection (7)).

Clause 200: Record-keeping and reporting requirements

1090 This clause requires the CMA to keep a record of undertakings it has accepted and directions it has given under the direct enforcement regime provided through this Chapter, and any reviews it carries out of their effectiveness (subsection (1)).

1091 In addition, the CMA must prepare and publish a report on the effectiveness of its undertakings and enforcement directions, and the number and outcome of appeals brought under this Chapter, if requested to do so by the Secretary of State (subsections (2) and (3)). These reports will assist the Secretary of State in monitoring and evaluating the operation of the direct enforcement regime.

Clause 201: Appeals

1092 This clause provides for appeals from certain direct enforcement decisions taken by the CMA under this Chapter.

1093 Subsection (1) sets out the CMA decisions and directions against which an appeal under this clause can be brought, when given by a relevant notice or imposed by virtue of a

relevant notice. Subsection (8) defines "relevant notice" for the purpose of this clause. These are any final direct enforcement notices under this Chapter through which a penalty may be imposed on the respondent.

1094 Subsection (1) also sets out that any person to whom a relevant notice is given may bring an appeal. This includes a member of the same interconnected corporate group, to whom a relevant notice has been given under clause 199.

1095 Grounds for appeal are set out in relation to a monetary penalty and directions in subsections (2) and (3) respectively. These provide for a right of appeal "on the merits". The appeal court will be able to:

a) inquire into the correctness of the CMA's findings of fact and into the correctness of the CMA's analysis of, and conclusions drawn from, those facts,

b) inquire into the correctness of the CMA's interpretation of the law,

c) inquire into the correctness of the discretion exercised by the CMA.

1096 The final ground of appeal, in subsections (2), paragraph (d) and (3), paragraph (d), reflects in particular the Government's intention that the appeal court will have discretion to hear fresh evidence on appeal. There could therefore arise circumstances where the appeal court finds that on the evidence before it, the CMA arrived at a reasonable conclusion, but on the basis of the new evidence before the court, the CMA's conclusions were nonetheless wrong. This reflects the observation of the Court of Appeal in *CMA v Flynn Pharma, [2020] EWCA Civ 339, at paragraph 146.*

1097 Appropriate appeal courts (subsection (8)) are as follows:

a) The High Court in England and Wales or Northern Ireland, or

b) The Outer House of the Court of Session in Scotland.

1098 Powers of appeal court (subsection (4)). The appeal court will be able to confirm, vary or set aside the CMA's notice, or any part of it, as well as being able to:

a) Impose, revoke or vary the amount of any penalty imposed by virtue of a notice,

b) Remit the matter to the CMA, save where an appeal relates to a final false information enforcement notice,

c) Give such directions, or take such other steps, as the CMA could have given or taken,

d) Make any other decision which the CMA could itself have made,

e) Confirm the CMA's decision and dismiss the appeal, including if the court concludes that the decision was the right one but for different reasons than those given by the CMA.

1099 The policy intent is that a court conducting an appeal on the merits under this clause should interfere only if it concludes that the decision is wrong in a material respect (reflecting the observation of the Court of Appeal in *T-Mobile v Ofcom [2008] EWCA Civ 1373*, as approved by the Court of Appeal in *CMA v Flynn Pharma, [2020] EWCA Civ 339, at paragraphs 143 to 147).*

1100 Timing to bring an appeal (subsections (5), (6) and (8)):

a) Within 60 days of the CMA giving a final notice to a person,

b) Except for appeals of final false information enforcement notices which must be brought within 28 days of the CMA giving that notice to a person,

c) The appeal court may extend the period for bringing an appeal, for example, to further the overriding objective set out in rule 1.1 of the Civil Procedure Rules (England and Wales).

1101 Effect of appeals (subsection (7)): The requirement to pay a penalty, and the requirement to comply with enhanced consumer measures in the redress category will be suspended until an appeal of these decisions is determined. Otherwise, the making of an appeal will not automatically suspend the effect of any directions to which the appeal relates.

Chapter 5: Monetary Penalties: General Provisions

Clause 202: Information to accompany orders or notices imposing monetary penalties

1102 This clause prescribes the information that must be stated in an order made by the court, or a final notice given by the CMA, that includes a requirement to pay a monetary penalty (subsections (1) and (2)).

1103 Subsections (3) and (4) provide for a person who receives an order or notice imposing a monetary penalty to apply to the court or the CMA, respectively, to vary the date or dates by which the penalty or portions of it are required to be paid.

Clause 203: Determination of turnover

1104 Chapters 3 and 4 give discretionary powers to the courts and the CMA to impose monetary penalties of up to the higher of two caps – a specified amount or a percentage of a person's worldwide turnover.

1105 Subsection (1) of this clause defines "turnover", for the purposes of calculating a penalty based on the recipient's turnover, as the recipient's global turnover (i.e. both in and outside the UK) as well as the turnover of any person who controls the recipient and the turnover of any person whom the recipient controls.

1106 Subsections (2) to (4) give a delegated power to the Secretary of State to provide, by regulations:

a) for when a person is to be treated as controlled by another, and

b) methodologies for determining turnover for different types of entity.

1107 Regulations under this clause are subject to the negative parliamentary procedure (subsection (5)).

Clause 204: Power to amend amounts

1108 This clause gives a delegated power to the Secretary of State to make regulations to amend the stated maximum monetary amounts of both the fixed penalties and fixed daily penalties imposable under this Part. The effect would be that any updated amounts specified

by the Secretary of State will offset the erosion of the real value of the fixed maxima through inflation. This power does not allow for amendment to the percentage amount, which is stated for the purpose of determining a maximum penalty by reference to the enforcement subject's turnover.

1109 The Secretary of State must consult with relevant parties before making these regulations (subsection (2)).

1110 Regulations under this clause are subject to the draft affirmative procedure (subsection (3)), see clause 332, subsection (3)).

Clause 205: Recovery of monetary penalties

1111 This clause provides that if the period during which an appeal against a penalty may be made has expired without an appeal having been made, or such an appeal has been made and determined, the CMA may commence proceedings to recover the penalty and any unpaid interest as a civil debt (subsections (1) to (3)).

1112 Subsections (4) and (5) provide that where the CMA has given a final infringement notice requiring the payment of both a penalty and consumer compensation as an enhanced consumer measure, it must first consider whether any of the compensation it has ordered is due to consumers and it may choose to delay commencing penalty recovery proceedings until affected consumers get their money back. This means the CMA can be flexible in weighing up the direct benefit to affected consumers from receiving compensation against the need to enforce a penalty as soon as feasible. Such flexibility is desirable where an enforcement subject may lack sufficient financial resources to pay both compensation and the monetary penalty.

Clause 206: Monetary penalties: further provision

1113 Subsection (1) provides for interest at the statutory rate (as specified in section 17 of the Judgments Act 1838) to be incurred on the unpaid balance if a penalty imposed by the court or the CMA is not paid by its deadline.

1114 Where a person applies to change the date or dates by which the penalty, or different portions of it, are to be paid, the payment(s) cannot be required from the person before the application is dealt with (subsection (2)).

1115 Where a person applies to appeal the penalty, its payment cannot be required from the person before the application is dealt with (subsection (3)).

1116 Subsection (4) enables the court to require immediate payment of outstanding penalties. Subsection (5) enables the CMA to do the same.

1117 If a penalty is varied by the court on appeal from a CMA final notice, the appeal court can decide when interest on the substituted penalty can be charged from (subsection (6)).

1118 Subsection (7) deals with the payment of monetary penalties by entities that are not a body corporate, for example partnerships or unincorporated associations. Such penalties are to be paid out of the assets or funds of the entity.

1119 Receipts from the courts' or the CMA's exercise of the power to impose monetary penalties will be paid into the relevant Consolidated Fund (subsection (8)).

Chapter 6: Investigatory Powers

Clause 207: Investigatory powers of enforcers

1120 Schedule 5 of the Consumer Rights Act 2015 details the information gathering powers available to consumer enforcers for the purposes of civil enforcement of consumer protection law. This clause introduces Schedule 16 to this Bill, which amends Schedule 5 of the Consumer Rights Act 2015 to enhance the enforceability of statutory information notices given to a person under paragraph 14 of Schedule 5 and to clarify enforcers' ability, during onsite inspections, to access material which is held remotely. The key amendments in this Chapter and its corresponding Schedule are to:

a) provide the courts with a power to impose a civil monetary penalty (subject to maximum amounts) where the court finds there has been non-compliance with an information notice without reasonable excuse,

b) provide a direct enforcement power for the CMA to decide whether an information notice that it has issued has been complied with and if not, to impose a civil monetary penalty (subject to the same maximum amounts referred to above in the context of the court's equivalent fining power) for any non-compliance without reasonable excuse,

c) set out the extra-territorial reach of enforcers' powers to request information by notice, to which the above sanctions apply, for purposes including the Part 3 enforcement regimes,

d) provide rules for service of notices, and

e) amend the prescribed conditions for seeking a premises entry warrant to make clear that they cover documents accessible from the premises as well as documents located on the premises.

Schedule 16: Investigatory powers

Paragraph 2: Penalties for non-compliance with information notices

1121 Paragraph 15 of Schedule 5 to the Consumer Rights Act 2015 sets out the procedure and required content of an information notice issued under paragraph 14 of Schedule 5 to the Consumer Rights Act 2015. This paragraph makes limited amendments to Schedule 5 of the Consumer Rights Act 2015 so that an information notice has to specify the circumstances in which non-compliance with the information notice could result in the imposition of a monetary penalty (subparagraph (2)).

1122 Subparagraph (3) inserts a new paragraph 16A into Schedule 5 to the Consumer Rights Act 2015, which will give the court the power to impose a civil monetary penalty where the court finds that there has been a failure to comply with an information notice without reasonable excuse (paragraph 16A, subparagraph (3)). "Without reasonable excuse" means, for example, that the recipient of an information notice may not be subject to a penalty if they can provide evidence of an externally verifiable and unforeseen factor, outside of their reasonable control, that resulted in non-compliance with the information notice.

1123 The new paragraph 16A is in addition to the existing power of the court under paragraph 16 of Schedule 5 to the Consumer Rights Act 2015 to make an order requiring the

recipient of the information notice to do anything that the court thinks is reasonable for them to do to ensure compliance with the information notice as well as ordering the recipient of the notice to pay the costs or expenses of the enforcer's application. Paragraph 16A, subparagraph (9) enables enforcers to combine an application for an order under paragraph 16 and an application for the imposition of a monetary penalty under paragraph 16A of Schedule 5 to the Consumer Rights Act 2015, or to apply for one instead of the other.

1124 The Government considers that the provision of false or misleading information in response to an information notice constitutes a failure to comply with the information notice. Similarly, the destruction, disposal, concealment or falsification of requested information (e.g. destruction of a document or part of a document which contains the required information) also constitutes a failure to comply with the information notice.

1125 Paragraph 16A, subparagraph (4) covers the nature of the penalty that a court may impose where it finds that there has been a failure to comply with an information notice, without reasonable excuse. It specifies that the court may impose a fixed amount penalty or a penalty calculated by reference to a daily rate, or a combination of both. The court has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in paragraph 16A, subparagraph (5).

1126 The policy rationale for providing for a penalty of up to the higher of a fixed amount or a percentage of turnover is because:

a) a penalty of up to only a fixed amount might not act as a meaningful deterrent for large companies with substantial turnover,

b) conversely, there may be smaller companies (such as a new start up) which have a low or negligible turnover, so a penalty of up to only the relevant percentage of turnover might not act as a meaningful deterrent, and

c) some individuals in scope of the penalty powers, such as a company director who consents or connives in the infringing practice (as an accessory) will not have a turnover and therefore the higher penalty will necessarily be a penalty of up to the fixed amount.

1127 Where the recipient of the information notice has a turnover that can be determined, a fixed amount penalty must not exceed £30,000 or, if higher, 1% of the total value of their turnover. Paragraph 16H concerns calculation of turnover for these purposes. Where the recipient of the notice does not have a turnover, the fixed penalty must not exceed £30,000 (paragraph 16A, subparagraph (5), sub-point (a)).

1128 Where the recipient of the information notice has a turnover that can be determined, a daily penalty must not exceed £15,000 per day or, if higher, 5% of the total value of their daily turnover. Where the recipient of the information notice does not have a turnover, the daily penalty must not exceed £15,000 (paragraph 16A, subparagraph (5), sub-point (b)).

1129 Paragraph 16A, subparagraph (6), sub-point (a) means that a daily penalty imposed by the court can only begin to accrue after the enforcer has served the court application on the recipient of the information notice, i.e. the point when they are clearly made aware of their failure to comply with the requirements of the information notice. A daily penalty stops accruing when the requirements of the information notice are met unless the court determines

an earlier date (paragraph 16A, subparagraph (6), sub-point (b)).

1130 Paragraph 16A, subparagraph (7) sets out the information that must be included in a court order that requires payment of a monetary penalty, including the type, amount and grounds for imposition of the penalty, the process and timing for its payment, and relevant rights to apply to change a payment date or to appeal against the order.

1131 Paragraph 16A, subparagraphs (8) and (10) set out applicable rights for the recipient of the penalty to seek an amended payment schedule for, or to bring an appeal against, a penalty. A person who is required to pay a monetary penalty has a right to appeal the decision to impose a penalty, its nature or amount "on the merits", in addition to their existing appeal rights.

1132 Where the recipient of the information notice applies to appeal the penalty, its payment cannot be required before this application is decided (paragraph 16A, subparagraph (11)).

1133 Paragraph 16A, subparagraph (12) extends the court's powers under paragraph 16(4) and (5) to require payment of costs to its order-making powers under paragraph 16A.

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

1134 Paragraph 16B empowers the CMA to give a provisional enforcement notice if it reasonably believes that a recipient of an information notice it has given under paragraph 14 of Schedule 5 to the Consumer Rights Act 2015 has failed to comply with it (paragraph 16B, subparagraphs (1) and (2)).

1135 The provisional enforcement notice does not mean that the CMA has made a finding that the recipient of the information notice has failed to comply with its requirements and, where the provisional notice provides that the CMA is considering to impose a monetary penalty for the alleged failure, does not constitute a finding by the CMA that there is no reasonable excuse for such a failure. Rather, the provisional enforcement notice represents the CMA's provisional view and proposed next steps. It allows the recipient of the information notice to know the case against them and, if they choose to do so, to respond in writing or orally to the provisional enforcement notice.

1136 This provisional enforcement notice must specify the CMA's grounds for giving it including the alleged compliance failure(s) and any actions which the CMA considers should be taken to secure compliance with the information notice. It must also invite the recipient of the provisional enforcement notice to make representations and set out the process for doing so (paragraph 16B, subparagraph (3)). If the respondent wishes to make oral representations, the CMA must arrange for an oral hearing and this opportunity must be specified in the provisional enforcement notice (paragraph 16B, subparagraph (4)).

1137 Where the CMA considers the alleged compliance failure with the information notice warrants imposing a monetary penalty, the provisional enforcement notice must also state that and give details about the type, amount and grounds for the proposed penalty (paragraph 16B, subparagraph (5)).

1138 The Government considers that the provision of false or misleading information in

response to an information notice constitutes a failure to comply with the information notice. Similarly, the destruction, disposal, concealment or falsification of requested information (e.g. destruction of a document or part of a document which contains the required information) also constitutes a failure to comply with the information notice.

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

1139 Paragraph 16C sets out when and how the CMA may issue a final enforcement notice for non-compliance with an information notice it has given under paragraph 14 of Schedule 5 to the Consumer Rights Act 2015. It can do so only after the end of the period for representations by the recipient on the provisional enforcement notice and after considering such representations (if any) (paragraph 16C, subparagraph (1)).

1140 The final enforcement notice can impose a requirement to pay a monetary penalty or a requirement to comply with directions that the CMA considers appropriate to secure compliance with the information notice or both (paragraph 16C, subparagraph (2)).

1141 The CMA can impose a monetary penalty only if the person lacks a reasonable excuse for the compliance failure (paragraph 16C, subparagraph (3)). This means that a person will be able to avoid a penalty if they can provide evidence of externally verifiable and unforeseen factors outside the person's control that resulted in the non-compliance.

1142 Paragraph 16C, subparagraph (4) covers the nature of the penalty that the CMA may impose. It specifies that the CMA may impose a fixed amount penalty or a penalty calculated by reference to a daily rate, or a combination of both. The CMA has discretion to impose such a monetary penalty as it considers appropriate, subject to the statutory maxima set out in paragraph 16C, subparagraph (5).

1143 See the explanatory note to paragraph 16A for the policy rationale for providing a penalty of up to the higher of a fixed amount or a percentage of turnover.

1144 Where the recipient of the information notice has a turnover that can be determined, a fixed amount penalty must not exceed £30,000 or, if higher, 1% of the total value of their turnover. Paragraph 16H concerns calculation of turnover for these purposes. Where the recipient of the notice does not have a turnover, the fixed penalty must not exceed £30,000 (paragraph 16C, subparagraph (5), sub-point (a)).

1145 Where the recipient of the information notice has a turnover that can be determined, a daily penalty must not exceed £15,000 per day or, if higher, 5% of the total value of their daily turnover. Where the recipient of the information notice does not have a turnover, the daily penalty must not exceed £15,000 (paragraph 16C, subparagraph (5), sub-point (b)).

1146 Paragraph 16C, subparagraph (6), sub-point (a) means that a daily penalty imposed by the CMA can only begin to accrue after the CMA has given a provisional enforcement notice, i.e. the point when the person is clearly made aware of their failure to comply with the requirements of the notice. A daily penalty stops accruing when the person fulfils the requirements of the notice unless the CMA determines an earlier date (paragraph 16C, subparagraph (6), sub-point (b)).

1147 Paragraph 16C, subparagraph (7) sets out what information must be included in a

final enforcement notice that includes a requirement to pay a monetary penalty, including the type, amount and grounds for imposition of the penalty, the process and timing for its payment, and relevant rights to apply to change a payment date or to appeal against the final enforcement notice.

1148 Paragraph 16C, subparagraph (8) sets out applicable rights for a person to seek an amended payment schedule for a penalty.

1149 The CMA must have regard to the most recent published statement of policy detailing the considerations relevant to whether to impose a penalty under this paragraph, and the nature and amount of any such penalty (paragraph 16C, subparagraph (9)).

1150 The CMA may publish a final enforcement notice it has given under this paragraph in a manner it thinks appropriate, e.g. on its website (paragraph 16C, subparagraph (10)).

1151 Paragraph 16C, subparagraph (11) applies clauses 190 to 195 of the Bill to directions given by the CMA in a final enforcement notice under this paragraph.

Appeals against final enforcement notice

1152 Paragraph 16D provides for appeals from final enforcement notices given by the CMA under paragraph 16C.

1153 Appealable decisions: an appeal under this paragraph can be brought against the requirement to pay a monetary penalty for failure to comply with an information notice or directions aimed at achieving compliance with an information notice, or both (paragraph 16D, subparagraph (1)).

1154 Persons able to bring appeals (paragraph 16D, subparagraph (1)): Any recipient of the final enforcement notice has the right to bring an appeal against the notice.

1155 Grounds for appeal are set out in paragraph 16D, subparagraph (2) in relation to appeals against the imposition of a monetary penalty and paragraph 16D, subparagraph (3) in relation to appeals against CMA directions given through a final enforcement notice. These provide for a right of appeal on the merits. The appeal court will be able to:

a) inquire into the correctness of the CMA's findings of fact and into the correctness of the CMA's analysis of, and conclusions drawn from, those facts,

b) inquire into the correctness of the CMA's interpretation of the law,

c) inquire into the correctness of the discretion exercised by the CMA.

1156 The final ground of appeal, in paragraph 16D, subparagraph (2), sub-point (d) and subparagraph (3), sub-point (d) reflects in particular the Government's intention that the appeal court will have discretion to hear fresh evidence on appeal. There could therefore arise circumstances where the appeal court finds that on the evidence before it, the CMA arrived at a reasonable conclusion but on the basis of the new evidence before the court, the CMA's conclusions were nonetheless wrong. See also the explanatory note for clause 201.

1157 Appropriate appeal courts (paragraph 16D, subparagraph (8))

a) The High Court in England and Wales or Northern Ireland, or

b) The Outer House of the Court of Session in Scotland

1158 Powers of appeal court (paragraph 16D, subparagraph (4)). The appeal court will be able to confirm, vary or set aside the CMA's notice, or any part of it, as well as

a) Impose, revoke or vary the amount of any penalty,

b) Give such directions, or take such other steps, as the CMA could have given or taken,

c) Make any other decision which the CMA could itself have made,

d) Confirm the CMA's decision and dismiss the appeal, including if the court concludes that the decision was the right one but for different reasons than those given by the CMA.

1159 The policy intent is that a court conducting an appeal on the merits under this clause should interfere only if it concludes that the decision is wrong in a material respect (reflecting the observation of the Court of Appeal in *T-Mobile v Ofcom [2008] EWCA Civ 1373*, as approved by the Court of Appeal in *CMA v Flynn Pharma, [2020] EWCA Civ 339, at paragraphs 143 to 147).*

1160 Timing to bring an appeal (paragraph 16D, subparagraphs (5) and (6)):

a) Within 28 days of the CMA giving a final enforcement notice to a person

b) The appeal court may extend the period for bringing an appeal, for example, to further the overriding objective set out in rule 1.1 of the Civil Procedure Rules for England and Wales.

1161 Effect of appeals (paragraph 16D, subparagraph (7)): The requirement to pay a civil monetary penalty will be suspended until the appeal is determined. Otherwise, the making of an appeal will not automatically suspend the effect of any directions to which the appeal relates.

Recovery of penalties imposed under paragraph 16C

1162 Paragraph 16E provides that if the period during which an appeal against a penalty for non-compliance with an information notice may be made has expired without an appeal having been made, or such an appeal has been made and determined, the CMA may commence proceedings to recover the penalty and any unpaid interest as a civil debt due to the CMA (paragraph 16E, subparagraphs (1) to (3)).

Statement of policy in relation to penalties under paragraph 16C

1163 Paragraph 16F requires the CMA to produce and publish a statement about the considerations relevant to the exercise of its powers to propose and to impose monetary penalties for non-compliance with information notices given by the CMA.

1164 Paragraph 16F, subparagraph (2) specifies particular considerations which the statement must include.

1165 Paragraph 16F, subparagraph (3) provides for the CMA to revise its statement from time to time, and to publish the revised statement.

1166 Paragraph 16F, subparagraph (4) sets out the process to be followed before the CMA first publishes or subsequently revises the statement. In particular, the Secretary of State must approve the final statement before first publication, and any subsequent revisions to it.

1167 Paragraph 16F, subparagraph (5) requires the CMA to have regard to the most recent, Secretary of State-approved statement in deciding whether to propose (where relevant) or impose a civil monetary penalty for non-compliance with information notices given by the CMA and if so, the nature and the amount of the penalty.

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

1168 Paragraph 16G makes further provisions for penalties imposed by the court under paragraph 16A and those imposed by the CMA under paragraph 16C. It provides for interest at the statutory rate (as specified in section 17 of the Judgments Act 1838) to be incurred on the unpaid balance of a penalty if a penalty imposed by the court or the CMA is not paid by its deadline (paragraph 16G, subparagraph (1)).

1169 Where a person applies to change the date or dates by which the penalty, or different portions of it, are to be paid, the payment(s) cannot be required from the person before the application is dealt with (paragraph 16G, subparagraph (2)).

1170 Paragraph 16G, subparagraph (3) enables enforcers to require immediate payment of outstanding penalties.

1171 If upon the appeal of the final enforcement notice, the penalty imposed by the CMA is varied by the court, then the court can decide the date from when interest on the substituted penalty can begin to be charged (paragraph 16G, subparagraph (4)).

1172 Paragraph 16G, subparagraph (5) deals with the payment of monetary penalties by entities that are not a body corporate, for example partnerships or unincorporated associations. Such penalties are to be paid out of the assets or funds of the entity.

1173 Money received from the courts' or the CMA's exercise of the power to impose monetary penalties will be paid into the relevant Consolidated Fund (paragraph 16G, subparagraph (6)).

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

1174 Paragraph 16H, subparagraph (1) defines "turnover", for the purposes of calculating a penalty based on the recipient's turnover, as the recipient's global turnover (i.e. both in and outside the UK) as well as the turnover of any person who controls the recipient and the turnover of any person whom the recipient controls.

1175 Paragraph 16H, subparagraphs (2) to (4) give a delegated power to the Secretary of State to provide, by regulations:

a) for when one person is to be treated as controlled by another, and

b) methodologies for determining turnover for different types of entity.

1176 Regulations under paragraph 16H are subject to the negative parliamentary procedure (paragraph 16H, subparagraph (6)).

Power to amend amounts

1177 Paragraph 16HA gives a delegated power to the Secretary of State to make regulations to amend the stated maximum monetary amount of both the fixed penalties and fixed daily penalties imposable under paragraphs 16A(5) and 16C(5). The effect would be that any updated amounts specified by the Secretary of State will offset the erosion of the real value of the fixed maxima through inflation. This power does not allow for amendment to the percentage amount, which is stated for the purpose of determining a maximum penalty by reference to the enforcement subject's turnover.

1178 The Secretary of State must consult with relevant parties before making these regulations (subparagraph (2)).

1179 Regulations under this clause are subject to the draft affirmative procedure (subparagraph (4)), see clause 332, subsection (3)).

Miscellaneous

1180 Paragraph 16I, subparagraph (1) prevents the CMA from using the court-based enforcement regime in Chapter 3 to enforce against failure to comply with an information notice where it has used the direct enforcement regime in respect of the same failure, i.e. given the information notice recipient a final enforcement notice in respect of the same failure.

1181 Paragraph 16I, subparagraph (2) prevents the CMA from using the direct enforcement regime in respect of a failure to comply with an information notice where the CMA has already used the court-based regime in Chapter 3 in respect of the same failure. As a result, the CMA will only be able to use either the court-based enforcement regime (under paragraphs 16 and 16A) or its own direct enforcement regime (under paragraphs 16B and 16C) in relation to a failure to comply with a CMA information notice.

Paragraph 3: extra-territorial application in relation to notices

1182 Paragraph 3 inserts new paragraph 17A in Schedule 5 to the Consumer Rights Act 2015 which sets out the express extra-territorial reach of enforcers' powers to request information by notice under paragraph 14 of Schedule 5, to which the new monetary penalty powers described above will apply.

1183 An information notice may be given to a person who is outside the UK (paragraph 17A, subparagraph (2), sub-point (a)). (This paragraph does not affect the enforcers' ability to give information notices to persons in the UK).

1184 Paragraph 17A, subparagraph (2), sub-point (b) provides that the information notice may require the provision of information, which includes documents, held outside the UK. For instance, if the person to whom the information notice is addressed is inside the UK and can access required information held outside of the UK (e.g. in offshore cloud storage), they will be obliged to bring this information into the jurisdiction and produce it.

1185 The power to give a person a notice under paragraph 14 may be exercised in respect of two categories of recipients – potential enforcement subjects (defined in paragraph 17A, subparagraph (6)) and third parties. The latter category includes, for example, banks, payment systems service providers, domain name registrars, operators of servers or internet platforms or other intermediaries.

1186 An additional test needs to be met for an information notice to be given to a third party overseas, namely they must have a UK connection (paragraph 17A, subparagraphs (3) to (5)). Persons who are incorporated, serviced and operated outside the UK can meet the UK connection test if they direct their business activities to UK consumers (paragraph 17A, subparagraph (5), sub-point (d)). See the explanatory note for clause 148 in relation to the "directing activities" test.

1187 For example, if the enforcer considered that details from a trader's bank account were relevant to determining whether the trader had engaged in a relevant infringement, the enforcer could give an information notice to the trader's bank seeking the relevant information as long as the bank directed its business activities to consumers in the UK.

Paragraph 4: Means of giving notices

1188 Paragraph 4 inserts new paragraph 17B in Schedule 5 to the Consumer Rights Act 2015 which sets out the process by which enforcers may give notices to persons under Part 3 of Schedule 5, including to business entities registered or operating outside the UK.

1189 Paragraph 17B, subparagraph (2) sets out four main means of service applicable to notices to be given to any person whether an individual or an artificial entity (referred to here, in either case, as the 'recipient').

1190 Paragraph 17B, subparagraphs (6) and (7) expand on the meaning of a recipient's proper address for the purposes of subparagraph (2), sub-points (b) and (c), including, in relation to partnerships and any other type of firm, provision for service to the recipient's principal office.

1191 Paragraph 17B, subparagraph (8) expands on the meaning of a recipient's email address for the purposes of subparagraph (2)(d).

1192 Paragraph 17B, subparagraphs (7) and (8) respectively provide, where no other definition of the recipient's proper address or (as the case may be) the recipient's email address applies, for service to an address, or email address, by means of which the enforcer reasonably believes that the notice will come to the attention of the recipient.

1193 Paragraph 17B, subparagraphs (3) to (5) provide that service on each of the listed kinds of business entity can be effected by serving on an individual with the specified office or role in relation to the entity. The means of service provided for service on recipients in subparagraph (2) and related subparagraphs equally apply for the purposes of service on the specified individual.

Paragraph 5: Access to documents

1194 This paragraph makes clarificatory amendments to Part 4 of Schedule 5 to the Consumer Rights Act concerning enforcers' ability, during onsite inspections, to access material which is held remotely, off-site – in particular where it is stored electronically. These amendments cover paragraph 32 of Part 4 of Schedule 5 only, which provides the conditions for a warrant in the context of an enforcer exercising its onsite investigatory powers. Save for this provision, the Government considers that Part 4 of Schedule 5 is clear that enforcers have the appropriate powers to require the production of information held remotely, when exercising their relevant onsite investigatory powers without a warrant.

1195 Sub-points (a) and (b) to this paragraph amend paragraph 32 of Schedule 5 to make clear that the conditions for a warrant to enter premises apply where (i) documents are accessible from the premises (even if the documents are not located on the premises), and (ii) it is likely that documents accessible from the premises would be concealed or interfered with, or access to them would otherwise be restricted, if notice of entry on the premises were given to the occupier.

1196 The effect of these amendments is that enforcers can obtain a warrant in relation to premises on the basis that it would give them access to information which may be remotely stored in electronic form but still be accessible from the premises – for example information held in a "cloud" platform rather than saved on a physical device on the business premises. Before the rise of cloud computing, that information might previously have been held in physical files on the premises or saved on a computer hard drive on the premises.

Paragraph 6: Meaning of firm

1197 This paragraph makes an amendment to paragraph 8 of Schedule 5 to the Consumer Rights Act 2015 to define "firm" for the purposes of that Schedule.

Chapter 7: Miscellaneous

Clause 208: Powers to amend Schedule 14 and Schedule 15

1198 The court-based regime provided by Chapter 3 of this Part is limited in scope to commercial practices which contravene the enactments, obligations and rules of law listed, or to the extent listed in Schedule 14. Among other matters, this clause gives a delegated power to the Secretary of State to make regulations that add, remove or vary the enactments listed in Schedule 14 and hence to amend or update the scope of the court-based enforcement regime going forward (subsection (1), paragraph (a)).

1199 The effect of subsection (1), paragraphs (b) and (d) is that responsibilities of enforcers for enforcing different consumer protection enactments, obligations and rules of law may be updated if and when they evolve over time – for example, if it is no longer appropriate for a particular enforcer to be able to enforce particular consumer protection enactments because of a change in enforcement and/or regulatory remits.

1200 The CMA direct enforcement process provided by Chapter 4 of this Part is limited in scope to commercial practices which contravene the enactments specified, or to the extent specified in Schedule 15. This clause allows the Secretary of State to add, remove or vary the enactments listed in Schedule 15 and hence to amend the scope of the CMA direct enforcement regime going forward (subsection (1), paragraph (e)).

1201 The effect is that the scope of the CMA direct enforcement regime can be updated if and when regulation necessary to protect the economic interests of consumers changes in line with changes in market, trader and consumption behaviour.

1202 Subsections (2) and (3) limit the types of enactments that can be added to, or varied in, Schedules 14 and 15.

1203 Regulations made under this clause are subject to the draft affirmative procedure (subsection (4)), see clause 332, subsection (3)).

Clause 209: Rules

1204 This clause allows the CMA to make rules, subject to approval by the Secretary of State through secondary legislation, to set out procedural administrative details of the CMA direct enforcement regime. These rules will supplement the framework provided in Chapter 4 of this Part.

1205 The rules made under this clause may provide for the delegation of the exercise of CMA functions under the direct enforcement regime to CMA staff etc. (subsection (2)) and may cover a range of investigation procedures including arrangements for ensuring confidential information is appropriately protected, arrangements for enforcement subjects to make representations to the CMA and arrangements for complaints' handling (subsection (3)).

Clause 210: Procedural requirements for making of rules

1206 This clause sets down the process for the exercise of the rule-making power under clause 209. Firstly, subsection (1) requires the CMA to consult with stakeholders during its preparation of the rules. The effect is that the rules (or variations to them) will be subject to the scrutiny of traders, their representatives and other interested parties.

1207 Secondly, subsection (2) requires the CMA to obtain the Secretary of State's approval (by regulations) before bringing any rule into operation or varying any rule. Subsection (3) empowers the Secretary of State to approve a rule made or varied by the CMA or to approve a rule after modification. Where the Secretary of State proposes modifications to a rule or variation of it, subsection (4) requires the Secretary of State to first notify the CMA and take into account the CMA's comments on the proposed modifications before approving the rule.

1208 Subsection (5) empowers the Secretary of State to vary or revoke rules or to direct the CMA to vary or revoke rules. The process described in the paragraph above does not apply where the Secretary of State directs the CMA to vary or revoke rules in accordance with the direction (subsection (6)).

1209 Regulations containing the rules are subject to the negative parliamentary procedure (subsection (7)).

Clause 211: Guidance

1210 This clause requires the CMA to prepare and publish guidance about its general approach to carrying out its direct enforcement functions. The guidance will provide a greater level of detail and clarity to traders and other stakeholders about how this direct enforcement regime will operate in practice.

1211 Subsection (2) sets out the information that the guidance must include. Subsection (3) enables the CMA to prepare and publish guidance on further matters at its discretion. Subsection (4) sets out what the CMA must and may do in reviewing and updating this guidance.

1212 Subsections (5) and (6) place requirements on the CMA in relation to consultation and approval preceding any publication or revision of this guidance.

Clause 212: Defamation

1213 This clause protects the CMA against actions for defamation as a result of the exercise of functions under or by virtue of this Part.

Clause 213: Minor and consequential amendments relating to this Part

1214 This clause introduces Schedule 17 which contains minor and consequential amendments in relation to this Part.

Schedule 17: Part 3: Minor and consequential amendments

1215 Schedule 17 contains minor and consequential amendments in relation to this Part.

Clause 214: Transitional and saving provision relating to this Part

1216 This clause introduces Schedule 18 which provides transitional and saving provision in connection with this Part.

Schedule 18: Part 3: Transitional and saving provisions in relation to Part 3

1217 Schedule 18 contains transitional and saving provisions regarding:

a) the operation of "the new law", i.e. Chapters 3 and 4 of Part 3 to the Bill (and any legal provisions relating to those Chapters), including Schedule 5 to the Consumer Rights Act 2015 as amended by this Bill), and

b) the operation of "the old law", i.e. Part 8 of the Enterprise Act 2002 as it had effect immediately before the commencement of this Bill (and any provisions of law relating to that Part, including Schedule 5 to the Consumer Rights Act 2015, as they had effect immediately before the commencement of this Bill).

1218 General rules: The starting position is that the new law will apply to conduct that takes place on or after the commencement date of Chapters 3 and 4 of Part 3 to the Bill. The new law will also apply to conduct of concern that a person is likely to engage in (but has not started) where such conduct is likely to take place on or after the commencement date (paragraph 2, subparagraph (1)).

1219 The old law continues to apply (paragraph 2, subparagraph (2)):

a) to conduct which takes place before the commencement date of Chapters 3 and 4;

b) to enforcement action regarding breach of (i) a Part 8 court order or (ii) an undertaking given to the court under Part 8 of the Enterprise Act;

c) where proceedings have been started under Part 8 of the Enterprise Act against a person before the commencement of the new law.

1220 Paragraph 3 makes provision for how the new law applies to continuing conduct and paragraph 4 makes provision for its application to Part 8 undertakings given to an enforcer.

1221 Continuing conduct is essentially an act or omission which starts before the new law has commenced (i.e. pre-commencement) but is repeated or continues on or after the new law's commencement (i.e. post-commencement). Paragraph 3, subparagraph (2) provides that the new law will apply in full to the continuing conduct to the extent that it takes place post-commencement.

1222 In these circumstances, regard may be had to the part of the continuing conduct which takes place pre-commencement for the purpose of enabling enforcement action in respect of the post-commencement conduct under the new law (paragraph 3, subparagraphs (3) and (5)). This ensures, for example, that the CMA can use its new direct enforcement

powers (under Chapter 4 of Part 3) against a trader who is misleading a consumer by continuing to rely upon unfair contract terms post-commencement of the CMA's new powers, albeit the relevant contract (containing the unfair terms) was agreed between the trader and the consumer pre-commencement of Chapter 4.

1223 Paragraph 3, subparagraph (4) provides that in relation to the pre-commencement conduct of concern, the CMA may impose a requirement on the trader in respect of that conduct but only to the extent that such a requirement could be imposed under Part 8 of the Enterprise Act. This means that new enforcement powers, such as monetary penalties, cannot be applied retrospectively.

1224 Paragraph 4, subparagraphs (1) and (2) provide that where a breach of a Part 8 undertaking given to an enforcer takes place on or after the date of commencement of the new law, then the enforcer may only enforce this undertaking under the old law.

1225 If the enforcer considers that alongside the breach of the undertaking there may also be a breach of consumer protection law, the enforcer has a choice whether to enforce that breach of the law under the old or new law (paragraph 4, subparagraphs (3) to (5)). If the enforcer decides to pursue the breach under the new law (i.e. under Chapter 3 or, in the case of the CMA, under Chapter 4 of Part 3), then the matter must be treated as a "new" case. For example, in relation to beginning Chapter 3 enforcement, it may be appropriate to commence consultation under clause 154. This approach ensures that a breach of a Part 8 undertaking given to an enforcer cannot result in a penalty being imposed retrospectively under the Part 3 enforcement regimes.

1226 Paragraph 5 sets out the transitional provisions that apply to information notices under paragraph 14 of Schedule 5 to the Consumer Rights Act 2015. The new powers in Schedule 16 to the Bill for the court and the CMA to enforce compliance with these information notices may only be exercised in relation to information notices given on or after the commencement date of the Bill. This means that monetary penalties for non-compliance with information notices cannot be imposed retrospectively.

Chapter 8: Interpretation of Part

Clause 215: Supply of goods or digital content

1227 This clause provides for how references to the supply of goods or digital content should be construed across Part 3. It restates, simplifies and updates relevant provisions in section 232 and section 233 of the Enterprise Act 2002.

1228 Subsection (2) provides that references to a person making the actual supply of goods and digital content is to be read as including references to a person seeking to make such supply.

1229 Subsection (3) provides a non-exhaustive list of matters which constitute the supply of goods for the purpose of Part 3.

1230 The effect of subsections (4) and (5) is that in these types of agreements the dealer will be treated as the supplier alongside the finance company which is technically the supplier under the contract with the consumer.

Clause 216: Supply of services

1231 This clause provides how references to the supply of services should be construed across Part 3. It restates and updates section 234 of the Enterprise Act 2002.

1232 Subsection (2) provides that references to a person making the actual supply of services is to be read as including references to a person seeking to make such supply and subsection (5) provides a non-exhaustive definition for what constitutes supplying services.

1233 Subsections (3) and (4) excludes a contract of employment between an employer and employee from the definition of supply of services.

Clause 217: Accessories

1234 This clause sets out who can be regarded as an accessory to the commercial practice of a body corporate. This clause and clause 218 replace section 222 of the Enterprise Act 2002.

1235 Where a body corporate has committed or is committing a relevant infringement, an accessory to such practice is a person who has a special relationship with the infringing body corporate and has consented or connived in the practice (subsection (2)). Subsection (2), paragraph (c) has the effect that an accessory cannot be an accessory to future infringing practices. An accessory could be subject to enforcement action under this Part in addition to or instead of the infringing body corporate.

Clause 218: Special relationships

1236 This clause defines what constitutes having a special relationship with a body corporate. It covers two scenarios – where a person is a controller of the body corporate (subsections (2), paragraph (a) and subsections (3) to (7)) or where a person is an officer of a body corporate or purporting to act in such capacity (subsection (2), paragraph (b)).

Clause 219: Enhanced consumer measures

1237 This clause defines three types of enhanced consumer measures, referred to as "redress", "compliance" and "choice" measures. It substantively replicates the definitions in section 219A of the Enterprise Act 2002.

1238 Subsection (2) describes redress measures, which include offering compensation or other redress to affected consumers. Subsection (5) explains that affected consumers are not limited to those consumers who have suffered loss as a result of the infringing practice but also covers consumers who have been otherwise affected. This may include non-financial losses or instances of distress or inconvenience.

1239 Where the alleged infringing practice relates to a contract, subsection (2), paragraph (b) states that measures in the redress category can include giving consumers the option to terminate that contract. Subsection (2), paragraph (c) allows for measures intended to be in the collective interests of consumers in cases where affected consumers cannot be identified or it would require a disproportionate cost to do so. Measures in these circumstances could include, for example, the business making an appropriate charitable donation (where that charity acts in the interests of consumers). Subsection (2), paragraph (c) only applies in the circumstances outlined above. It does not apply in circumstances where affected consumers have been identified and choose to decline the redress offered. Consumers retain the right to

refuse offers of redress, whether in an enforcement order or undertaking, and instead take their own civil action against the person that has caused them detriment.

1240 Subsections (3) and (4) describe compliance and choice measures. Compliance measures are intended to increase business compliance with the law and to reduce the likelihood of further breaches.

1241 Compliance measures might include the person subject to the order, undertaking or notice:

a) appointing a compliance officer;

b) introducing a complaints handling process;

c) improving their record keeping; or

d) signing up to an established customer review / feedback site.

1242 Choice measures help consumers obtain relevant information to enable them to make better purchasing decisions.

Clause 220: Other interpretative provisions

1243 This clause defines certain terms for the purposes of this Part. All terms that are not listed below are self-explanatory (or, where the definition of the term is found in another clause, have been explained elsewhere in these explanatory notes).

1244 The definition of business is non-exhaustive and widely drawn. It includes a trade, craft or profession (whether or not they are carried on for gain and reward), the activities of public bodies and the activities of others carried on for gain or reward (monetary or otherwise). For example, a trader may offer free repairs forever to obtain goodwill or reputational advantage. The underlying policy intent is for any commercial practices where non-monetary gain is made by a trader, such as the act(s) of providing free repairs, to be within scope of the enforcement regimes.

1245 The definition of goods is non-exhaustive and includes buildings and other structures (as a subcategory of immovable property).

Clause 221: Index of defined expressions

1246 This clause is self-explanatory.

Part 4: Consumer Rights and Disputes

Chapter 1: Protection from Unfair Trading

Introduction

Clause 222: Overview

1247 This Chapter largely recreates the legal effect (with minor amendments) of the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277) and has the same core objective of protecting consumers from unfair commercial practices. The regulations were made to implement in the UK the Unfair Commercial Practices Directive 2005/29/EC.

1248 This clause provides an overview of the sections in this Chapter on unfair business to consumer commercial practices.

1249 Clause 223 sets out the unfair commercial practices that are prohibited.

1250 Clauses 224 to 228 set out details of commercial practices that are misleading, aggressive, omit material information, or contravene the requirements of professional diligence.

1251 Clause 229 sets out how the unfair commercial practices are enforced by public bodies.

1252 Clauses 230 to 233 set out the consumer rights in relation to unfair commercial practices.

1253 Clauses 235 to 239 set out the criminal offences in relation to unfair commercial practices.

1254 Clause 234 sets out what the consumer may do when they are supplied with a product from a trader that they did not request.

1255 Clauses 240 to 250 set out miscellaneous and interpretative provisions as well as consequential and transitional provisions.

Prohibition of unfair commercial practices

Clause 223: Prohibition of unfair commercial practices

1256 This clause sets a general prohibition on unfair commercial practices.

1257 Subsection (2) prohibits any person who is responsible for the content of a code of conduct or for monitoring compliance with a code of conduct from promoting unfair commercial practices through the content of that code or in connection with that code. A code of conduct means an agreement or set of rules that define the behaviour of traders who agree to be bound by it. This includes codes of conduct relating to specific trades or industries.

1258 Subsection (3) defines "commercial practice", "consumer" and "trader" for the purposes of this Chapter.

1259 The definition of a commercial practice is broad and far reaching. A commercial practice can be derived from a single act or omission, depending on the relevant circumstances, as well as from repeated behaviour and a course of conduct (*R v X Ltd [2013] EWCA Crim 818, at paragraph 22, Warwickshire County Council v Halfords Autocentres Ltd [2018] EWHC 3007 (admin), at paragraph 28)*. Subsection (3), paragraph (b) makes it clear that a commercial practice includes acts or omissions by a trader relating to a third party trader's goods, services or digital content. Subsection (3), paragraph (c) of the definition of commercial practice establishes that an act or omission by a trader that enables private individuals (i.e. consumers) to sell products to that trader or to each other are included in the definition of commercial practice. Subsection (5) makes it clear that a commercial practice includes acts or omissions which take place before, during or after promotion or supply (if any). For example, the acts or omissions of a debt collection agency who acquires claims derived from consumer credit agreements with consumers and seeks to recover these debts some considerable time after the original consumer credit agreements were concluded can

amount to a commercial practice. An act or omission need not relate to a promotion or supply to or from consumers which actually occurs, in order to amount to a commercial practice. This concept is concerned with systems rather than individual transactions between a consumer and a business *(Warwickshire County Council v Halfords Autocentres Ltd [2018] EWHC 3007 (admin), at paragraph 29).*

1260 The definition of "consumer" makes it clear that a consumer must be an individual (i.e. a natural person) and so excludes body corporates. The individual must be acting for purposes wholly or mainly outside of their business. It is irrelevant whether the individual is supplying, or receiving, a good, service, or digital content. The words "wholly or mainly" make it clear that:

a) the individual is still a consumer when acting for dual purposes (a consumer purpose and a business purpose) as long as the consumer purpose is the main purpose. This means, for example, that a person who buys a kettle for their home, works from home one day a week and uses it on the days when working from home would still be a consumer. An individual who occasionally sells their unwanted and used clothes on eBay is also likely to be a consumer. Conversely, a sole trader who operates from a private dwelling and buys a printer of which 95% of the intended use is for the purposes of their business, is unlikely to be a consumer.

b) An individual who supplies goods or services for mainly non-business purposes to a person who receives them for business purposes will still be a consumer. For example, an individual who sells their personal vinyl record collection to a second-hand record shop is likely to be a consumer.

1261 Further, an individual who acts for the purpose of a future business, which is not yet up and running, is likely to be a consumer. For example, an individual who participates in training to gain skills or a qualification with a view to supply products for business purposes in the future is likely a consumer.

1262 Subsection (3), paragraph (a) of the definition of trader states that any person who is acting for purposes relating to their business is a trader. It makes it clear that acts or omissions by such a person may include acts or omissions done or made by another person acting in their name or on their behalf (for example, their agent, subcontractor or representative). For example, where a building company subcontracts part of a building contract, the court or the CMA could consider the actions or omissions of the sub-contractor carried out on behalf of the building company to be acts done or omissions made by the building company itself.

1263 Subsection (3), paragraph (b) of the definition of trader says that a person (for example, an agent, subcontractor or representative) acting in the name of, or on behalf of, another person, for purposes relating to that other person's business, is also considered a trader for the purposes of this chapter. It is irrelevant whether a person acting in the name of, or on behalf of, another is also acting for their own business or private purposes in relation to the same act or omission.

1264 Subsection (4) provides that for the purposes of the prohibition in subsection (1), unfair practices are commercial practices that are likely to cause the average consumer to take a transactional decision they would not have taken otherwise as a result of misleading actions, misleading omissions, aggressive practices, or a contravention of the requirements of

professional diligence; that omit material information from an invitation to purchase; and commercial practices specified in Schedule 19. Omitting material information from an invitation to purchase and commercial practices specified in Schedule 19 are considered unfair practices in all circumstances.

Schedule 19: Commercial practices which are in all circumstances considered unfair

1265 This schedule lists the commercial practices which are automatically considered unfair in all circumstances, and which are prohibited. The transactional decision test does not apply to these practices, meaning that a trader that carries out any of these commercial practices can be sanctioned by enforcers without assessing whether it is likely to cause the average consumer to take a different decision in relation to a product.

Clause 224: Misleading actions

1266 This clause defines commercial practices that are misleading actions. The clause prohibits traders from using misleading actions in a wide range of circumstances, including the use of misleading information relating to a product, a trader, or any other matter relevant to a transactional decision. A commercial practice can also be a misleading action if its overall presentation is likely to deceive the average consumer. Transactional decision is a broad concept covering both pre-purchase and post-purchasing decisions and includes decisions on whether to do something, or not to do something, there does not need to be an actual transaction between the consumer and trader. For example, it includes decisions on whether to visit a shop, to click through a website, to exercise a cancellation right or to pay a debt as well as a decision to purchase a product or to enter a contract.

1267 For a commercial practice to be a misleading action, it must meet two conditions: first, the practice matches at least one of the descriptions outlined within subsection (1), and second, it is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.

1268 Subsection (2) and (3) clarify that even if information provided to consumers is factually correct, it can still be misleading as a result of the way it has been presented. For example, if a product has more than one charge, and a trader highlights just one of those charges on their website and provides less conspicuous information about the other charge(s), the information provided may be misleading by creating the impression that the product is cheaper than it really is (see for example C-611/14, *Canal Digital Danmark A/S* at paragraph 49). A practice like this could also amount to a misleading omission.

1269 Subsection (4) clarifies that 'another trader' refers to a different trader to the trader supplying the marketed product for subsection (1), paragraph (c).

1270 Subsection (5) relates to failure to comply with a requirement in a code of conduct and states that subsection 1 paragraph (d) applies to a requirement imposed on a trader where compliance can be verified and in relation to which the trader does not have discretion.

Clause 225: Misleading omissions

1271 This clause defines commercial practices that are misleading omissions. The clause prohibits traders from omitting or hiding information, or providing it in an unclear (which includes, unintelligible and ambiguous) or untimely manner. The clause ensures that

consumers get from traders all the information they need to make informed decisions in an upfront, clear, and timely manner.

1272 For a commercial practice to be a misleading omission, it must meet two conditions: first, the practice must fall into subsection (1) by a omitting material information, b) omitting information which the trader is required to give to the consumer under another enactment or c) failing to identify its commercial intent, and, second, the practice is likely to cause the average consumer to take a transactional decision they would not otherwise have taken. Transactional decision is a broad concept covering both pre-purchase and post-purchasing decisions such as a decision about whether, how or on what terms to purchase, retain or dispose of a product. It includes decisions whether to do something, or not to do something. For example, it includes decisions whether to visit a shop, to click through to a website, to exercise a cancellation right or to pay a debt as well as a decision to purchase a product or to enter a contract. It does not have to lead to a purchase. There does not need to be an actual transaction between the consumer and trader.

1273 Subsection (2) defines that "material information" is the full information that the average consumer needs to have, given the context, to make an informed transactional decision.

1274 As indicated, a commercial practice also falls within this section if it omits information which the trader is required under any other enactment to give to the consumer as part of the practice or where a commercial practice does not identify its commercial intent. Examples of how commercial intent may be made clear include the presence of price, or a statement making it obvious that the practice is commercial. The context may also make clear that the intent is commercial - for example, information on a billboard that is obviously intended to market or advertise a product.

1275 Subsection (3) provides that when considering whether material information has been omitted, account must be taken of the means of communication and what that allows for, including any limitations that are the result of space or time constraints, as well as the steps taken by the trader to overcome those limitations. For example, a trader selling cereal bars advertises a 't-shirt for £1' offer on the wrappers. The wrapper is too small to include all of the information on the various conditions that apply (such as restrictions on the availability of the t-shirts). The trader is less likely to commit a misleading omission if they include important information on the wrapper, and make clear on the wrapper that terms and conditions apply and provide details of where they can be found.

1276 Subsection (4) elaborates on the meaning of omitting information and clarifies that it applies when a trader provides material information in an unclear or untimely manner, or in a way that the consumer is unlikely to see, as well as when a trader fails to provide material information at all. The effect is that as well as considering how the words used in the commercial practice may be interpreted by the consumer, consideration also needs to be given to how the information is displayed, such as the font size used, the positioning and colour of text, and whether material information is sufficiently prominent. Examples of material information that a consumer is unlikely to see could include information provided only in the 'small print' terms and conditions, or which is only accessible by the consumer if they click on a hyperlink that could be missed or not opened.

Clause 226: Aggressive practices

1277 This clause defines commercial practices that are aggressive practices, which can involve behaviour before a contract or purchase is made (if any) but can also occur after a transaction has taken place.

1278 For a commercial practice to be an aggressive practice, it must meet two conditions:

- first, the practice uses harassment, coercion or undue influence (as defined); and
- second, it is likely to cause the average consumer to take a transactional decision they would not otherwise have taken. Transactional decision is a broad concept covering both pre-purchase and post-purchasing decisions and includes decisions whether to do something, or not to do something. For example, it includes decisions whether to visit a shop, to click through to a website, to exercise a cancellation right or to pay a debt as well as a decision to purchase a product or to enter a contract.

1279 Subsection (2) lists the factors that must be considered in determining whether a commercial practice uses harassment, coercion or undue influence.

1280 Subsection (3) provides more detail on the use of coercion and defines the meaning of "undue influence." In relation to undue influence, there are numerous circumstances where a trader may be in a position of power, for example this may arise because of the trader's expertise regarding a product or as a result of the particular circumstances of the consumer, for example if the consumer is indebted to the trader or otherwise is in a vulnerable position. The application of pressure in a way which significantly limits the consumer's ability to make an informed decision can also arise in numerous circumstances. For example, where a consumer is informed that if they do not sign a contract immediately any subsequent contract entered into with the trader would be on less favourable terms.

1281 Subsection (3), paragraph (a) also clarifies that coercion includes physical force.

Clause 227: Contravention of the requirements of professional diligence

1282 This clause defines commercial practices that contravene the requirements of professional diligence. It sets an objective standard, determined in light of what is reasonable reflecting what traders ought to do, measured by reference to honest market practice or the principle of good faith in the trader's field of practice.

1283 For a commercial practice to contravene the requirements of professional diligence, it must meet two conditions: first, the practice falls below the standard of skill and care which a trader may reasonably be expected to exercise towards consumers is, and second, it is likely to cause the average consumer to take a transactional decision they would not otherwise have taken.

1284 "Honest market practice" means no more than the market practices of reasonable and honest traders in the field of activity. However, poor practice that may be widespread in a particular industry or sector does not equate to an acceptable objective standard. Considerations of honest market practices and good faith also involve looking at whether the legitimate interests or expectations of the average consumer in the particular sector have been taken into account by a trader (see for example C-310/15 *Vincent Deroo-Blanquart v Sony Europe Limited* at paragraph 34).

1285 "'Good faith" means one of fair and open dealing. For example, a trader should not take advantage of the consumer's lack of experience or unfamiliarity with a product. "Standard of skill and care" is not intended to convey or require more than would be reasonably expected of a trader in their field of activity.

Clause 228: Omission of material information from invitation to purchase

1286 This clause sets out the conditions under which a commercial practice that is an invitation to purchase omits material information. However, if context makes information apparent, it does not need to be provided by the trader to the consumer as part of the invitation to purchase.

1287 "Invitation to purchase" is defined in subsection (7). An invitation to purchase can exist in the entire phase before it is possible to make a purchase, not just immediately before entering the contract. The effect of the definition is that a commercial practice can constitute an invitation to purchase even where the information indicating the price and product's characteristics is minimal. For example, in the case of C-122/10 *Konsumentombudsmannen v Ving Sverige AB*, an entry level price was held to be sufficient and only a visual or verbal reference was held to be necessary to describe a product that was available in many versions.

1288 Following an invitation to purchase, the next step or likely transactional decision taken by the consumer does not necessarily have to be to purchase, and an invitation to purchase does not need to include an actual opportunity or mechanism to enable the consumer to purchase the product (nor does such an opportunity need to appear in close proximity to the communication).

1289 Subsection (2) lists the categories of information considered to be material when a commercial practice is an invitation to purchase.

1290 Subsection (4) outlines what "identity" in relation to a trader means and subsection (5) outlines what the trader's "business address" means.

1291 Subsection (6) provides that when considering whether material information has been omitted, account must be taken of any limitation resulting from the means of communication used and steps taken by the trader to overcome those limitations.

1292 Subsection (7) elaborates on the meaning of omitting information. It clarifies that omitting information includes the provision of material information in an unclear or untimely manner, or in a way that the consumer is unlikely to see, as well as a failure to provide material information at all. The effect is that consideration is required of not only how the words used in the commercial practice may be interpreted by the consumer but also how the information is displayed, for example the font size used, the positioning and colour of text, and whether material information is sufficiently prominent. Examples of material information that a consumer is unlikely to see could include information provided only in the 'small print' terms and conditions, or which is only accessible by the consumer if they click on a hyperlink that could be missed or not opened.

Public enforcement

Clause 229: Public enforcement

1293 This clause provides for the enforcement of the prohibition of unfair commercial practices set out in clause 223. Local weights and measures authorities in Great Britain (known as Trading Standards) have a duty to enforce the prohibition of unfair commercial practices in their areas. Similarly, the Department for the Economy in Northern Ireland has a duty to enforce the prohibition of unfair commercial practices in Northern Ireland.

1294 The CMA has the power to enforce the prohibitions of unfair commercial practices in clause 223.

Consumers' right to redress relating to unfair commercial practices

Clause 230: Right to redress

1295 This clause sets out the conditions under which a consumer has a right to redress. Consumers can make a claim in the civil courts against traders who commit misleading actions or aggressive practices. The conditions are outlined through subsections (2) to (5).

1296 Subsection (1) provides that a consumer has a right to redress if the four conditions set out in subsections (2) to (5) are met.

1297 Subsection (2) provides that the first condition can be satisfied where:

a) the consumer enters into a contract with a trader for the supply of a product from the trader to the consumer ("business to consumer contract"),

b) the consumer enters into a contract with a trader for the supply of a product from the consumer to the trader ("consumer to business contract, or

c) the consumer makes a payment to the trader for the supply of a product (see clause 246, subsection (1)).

1298 Subsection (3) sets down the second condition namely that the trader engages in a misleading action or aggressive practice in relation to the product or, where a business to consumer contract for goods or digital content is entered into by the consumer, a producer (as defined in subsection (6)) engages in a misleading action or an aggressive practice and the trader is aware of the prohibited practice or could reasonably be expected to be aware of it.

1299 Subsection (4) sets down the third condition, which is that the misleading action or aggressive practice is a significant factor in the consumer's decision to enter the contract or to make payment for the product.

1300 Subsection (5) sets down the fourth condition, which specifies that the product or goods are not excluded products as defined in clause 231.

1301 Subsection (6) defines "producer" and subsection (7) defines "prohibited practice" (i.e. a misleading action or an aggressive practice) for the purpose of this chapter.

1302 Subsection (8) sets out how the reference to transactional decision in the definition of aggressive practice and misleading action in clause 223 is to be applied for the purpose of this clause.

Clause 231: Right to redress: further provision

1303 This clause sets out a delegated power for the Secretary of State to provide for the exercise of rights of redress for a consumer under this Chapter in relation to a right to unwind in respect of a contract; a right to a discount in respect of a supply of a product under a contract; and a right to damages.

1304 Subsection (2) sets out examples of what the regulations under this section may include for the purposes of this delegated power, and subsection (3) provides examples of what the consequences of the exercise of a right specified under subsection (2), paragraph (e) may be.

Clause 232: Enforcement of rights of redress

1305 This clause sets out how a consumer can enforce a right to redress.

1306 Subsection (1) provides that a consumer with the right to unwind, the right to a discount or the right to damages under regulations made under clause 231 may take civil action in court to enforce that right and seek redress. If the legal action succeeds, the court must make an order that gives effect to the consumer's right and any associated consumer obligations under Part 4, Chapter 1 (see subsection (3)).

1307 Subsections (4) and (5) explain that in relation to a claim (under this clause) in England, Wales and Northern Ireland, the usual contractual limitation period of six years applies.

Clause 233: Relationship between rights of redress and other claims relating to prohibited practices

1308 This clause outlines the relationship between the right to redress and other claims that are related to prohibited practices (i.e. misleading actions and aggressive practices).

1309 Subsection (1) ensures that nothing in Chapter 4, Part 1, prevents a consumer pursuing a claim under a rule of law, equity, or other legislation.

1310 Subsection (2) has the effect that the consumer cannot recover compensation twice for the same conduct.

Inertia selling

Clause 234: Inertia selling

1311 This clause sets out the circumstances whereby a trader demands immediate or deferred payment for the return or safekeeping of products supplied by the trader but not solicited by the consumer. The consumer is not required to pay for the products supplied by the trader.

1312 Subsection (3) explains that when a consumer is provided with goods that they did not request, the consumer may treat them as though they were an unconditional gift.

1313 Subsection (4) explains that the absence of a response from a consumer following the supply of the product they did not request does not mean the consumer consents to any demands by the trader for the consumer to pay, return, or safely store the product.

Offences relating to unfair commercial practices

Clause 235: Offences

1314 This clause sets out the conditions under which unfair commercial practices amount to criminal offences.

1315 Subsection (1) sets out that it is a criminal offence for a trader to engage in a commercial practice that involves a misleading action.

1316 Subsections (2) and (3) set out that it is also a criminal offence for a trader to engage in a commercial practice that is a misleading omission or an aggressive practice.

1317 Subsection (4) provides that it is a criminal offence for a trader to knowingly or recklessly (see clause 227) engage in a commercial practice that contravenes the requirements of professional diligence.

1318 Subsection (5) explains that a trader who fails to regard whether a commercial practice contravenes the requirements of professional diligence is to be considered as being reckless regardless of whether the trader has reason to believe that it might.

1319 Subsection (6) sets out that it is a criminal offence for a trader to engage in a commercial practice that omits material information from an invitation to purchase.

1320 Subsection (7) sets out that it is a criminal offence for a trader to engage in any of the practices outlined in the schedule of commercial practices which are in all circumstances considered unfair (Schedule 19), other than an excluded description.

1321 Subsection (8) outlines that the practices mentioned at paragraphs 12 and 29 of Schedule 19 are excluded descriptions for the purposes of this clause- namely criminal liability does not attach to them.

Clause 236: Defence of due diligence and innocent publication

1322 This clause sets out the circumstances in which the person accused (defendant) may rely on the due diligence and innocent publication defences for offences under clause 235 that are misleading actions, misleading omissions, aggressive practices, omitting material information from an invitation to purchase, and the specific practices outlined in the schedule of commercial practices in Schedule 19. The defences do not apply in relation to an offence involving the contravention of the requirements of professional diligence.

1323 Subsection (1) covers the defence of due diligence and sets down what the defendant charged with a relevant offence (see above) must prove to rely on this defence. Subsection (4) requires the defendant to obtain the court's permission before relying on a third- party defence (i.e. the offence was due to the act or omission of a person other than the defendant) unless written notice of such a defence has been given to the prosecuting enforcer at least 7 days before the hearing and containing the information set out in subsection (4), paragraph (a).

1324 Subsections (2) and (3) cover the defence of innocent publication, which is available when the defendant is charged with a relevant offence (see above) that is alleged to have been committed by the publication of an advertisement. Subsection (3) sets down what the defendant must prove to rely on a defence of innocent publication.

Clause 237: Offences: Criminal liability of others

1325 Subsections (1) to (3) have the effect that if a trader commits a relevant offence under clause 235 (see clause 235), or would have done so but for a defence under clause 236, and this is due to the act or omission of another person, that person commits the offence and can also be charged with an offence, regardless of whether action is taken against the trader.

1326 Subsection (4) specifies that references to a relevant offence under clause 235 include references to an offence under that section by virtue of subsection (2) (where the commission of the offence, or of what would have been the offence, is due to the act or omission of another person, 'P', and 'P' commits the offence whether or not 'P' is a trader and whether or not P's act or omission is a commercial practice).

1327 Subsection (5) sets out that where a body corporate commits an offence with the consent or connivance of an officer of that body, both the officer and the body corporate is guilty of the offence and liable to be prosecuted and punished. This also applies if the offence is attributable to neglect on the part of the officer. Where the offence is committed by a limited liability partnership (LLP), subsection (5a) sets out that members who hold a management function in that LLP may be guilty of an offence should the LLP engage in an offence by virtue of subsection 5. Subsection 6 sets out where a Scottish partnership commits an offence with the consent or connivance of a partner or due to neglect on the part of the partner, the partner as well as the partnership is guilty of the offence and liable to be prosecuted and punished.

1328 Subsection (7) specifies that references to offences under clause 235 in other parts of the Chapter include reference to offences by virtue of subsection (5) or (6).

Clause 238: Penalty for offences

1329 This clause sets out the penalty for offences and is self-explanatory.

Clause 239: Time limit for prosecution

1330 This clause outlines the time limits for prosecution.

1331 Subsection (1) states that time limits for prosecution apply either within 3 years of the offence taking place, or within 1 year of the discovery of the offence by the prosecutor, whichever is earlier.

1332 Subsection (2) explains how the period of 1 year beginning with the date of discovery of the offence by the prosecutor may be evidenced.

Miscellaneous

Clause 240: Powers to amend this Chapter

1333 This clause sets out delegated powers for the Secretary of State to amend this Chapter.

1334 Under subsection (1), the Secretary of State may add practices, delete practices, or modify existing practices in Schedule 19 (commercial practices which are in all circumstances considered unfair).

1335 Under subsection (3), the Secretary of State may extend the private rights of redress to unfair commercial practices to which redress rights currently do not apply.

1336 Under subsection (4), the Secretary of State may add descriptions, delete descriptions added under subsection (4), or modify existing descriptions in the list of categories deemed to be 'material information' in the context of an invitation to purchase for the purpose of omission of material information in relation to an invitation to purchase. Before making regulations under this section, the Secretary of State must consult as required by subsection (5).

Clause 241: Crown application

1337 This clause establishes that the Crown is not criminally liable for any infringement of these regulations but that does not affect the application of a provision of regulations in relation to a person in public service of the Crown.

Clause 242: Validity of agreements

1338 This clause establishes that except as resulting from a consumer's right to redress, an agreement shall not be void or unenforceable by reason only of a breach of the prohibition of unfair commercial practices in clause 223, subsections (1) and (2).

Interpretation

Clause 243: Meaning of "transactional decision"

1339 This clause defines "transactional decision" for the purposes of this Chapter. The definition is broad in scope. It includes decisions taken by a consumer to both do something and not do something as well as a decision about whether, how or on what terms to retain or dispose of a product. In assessing whether a commercial practice is likely to cause the average consumer to take a different transactional decision, it is relevant to take into account the combined effect of any or all of the misleading acts and omissions that the trader may have engaged in (see for example *Office of Fair Trading v Purely Creative Ltd & Ors* 2011 EWHC 106 (Ch) (02 February 2011) at paragraph 72). There may be multiple transactional decisions as part of a single engagement with a trader. Complex transactions may therefore require the provision of information to a consumer at several points.

1340 Subsection (1) has the effect that a transactional decision covers a wide range of decisions, including decisions pre-contract (regardless of whether a contract is made or not), at the time of contract, and post-contract.

1341 For example, pre-contract decisions may include a decision to travel to a shop as a result of a commercial offer (see for example C-281/12, *Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl*); a decision to agree to a sales presentation by a trader; and a decision to click through to a website as a result of information relating to the product. A transactional decision also includes decisions regarding payment such as whether to pay a deposit, whether to pay in full, or to make a payment, and how payment should be made.

1342 Post-contract decisions may include a decision to withdraw from or terminate a service contract and a decision to switch to another service provider.

Clause 244: Meaning of "average consumer": general

1343 This clause defines "average consumer" for the purposes of this Chapter.

1344 Subsection (2) outlines the characteristics of the average consumer. While the standard is objective in character, it recognises that the average consumer's level of attention

is likely to vary according to the category of goods or services in question. Also, for example, it recognises that an average consumer is likely to not be a technical expert. The average consumer definition is not a statistical test or statistical average.

1345 Subsection (3) specifies that the average consumer cannot be expected to know anything that a trader hides from the consumer.

1346 Subsection (4) sets out that where a commercial practice is directed at a particular group, the average consumer is to be understood as the average member of that targeted group.

Clause 245: Meaning of "average consumer": vulnerable persons

1347 This clause defines "vulnerable persons" as a particular group for the purposes of this Chapter.

1348 This clause is applied in two parts. First, when a person is vulnerable to a commercial practice, or vulnerable to the product related to a commercial practice, in a way that the trader can reasonably be expected to foresee. Second, as a result of the vulnerability, the practice is likely to impact the vulnerable person's ability to make an informed decision, and therefore they are likely to take a transactional decision that they otherwise would not have taken.

1349 Subsection (2) states that references to the average consumer in this Chapter in cases involving vulnerable persons, are to be read as references to an average consumer of a group of consumers who are vulnerable.

1350 Subsection (4) outlines some of the ways by which a group of consumers may be vulnerable to commercial practices, or products relating to commercial practices. For example, elderly consumers may be more vulnerable to certain practices like pressure selling because of their age, and consumers affected by a serious illness or physical injury may be more vulnerable to misleading advertising that presents products able to cure them. Vulnerability can also be context dependent, so a group of consumers may become vulnerable due to the 'circumstances they are in.' This may include, among other things, being in mourning, going through a divorce, or losing a job.

Clause 246: Meaning of "product"

1351 This clause defines "product" for the purposes of this Chapter.

1352 Subsection (2) specifies that a trader who demands payments from a consumer in settlement of liabilities or purported liabilities is to be treated in this Chapter as offering to supply a product to the consumer. In this case, the product that the trader offers to supply is the full or partial settlement of the payment owed.

Clause 247: General interpretation

1353 This clause summarises how various terms are to be read for the purposes of this Chapter. Many of these terms are defined in other sections of this Chapter.

Clause 248: Index of defined terms

1354 This clause is self-explanatory.

Consequential amendments and transitional provision

Clause 249: Consequential amendments etc relating to this Chapter

1355 This clause outlines the consequential amendments to legislation relating to this Chapter.

Clause 250: Transitional and saving provisions relating to this Chapter

1356 This clause sets out how this Chapter is to apply in relation to an act or omission which takes place on or after the commencement date of this Chapter. This Chapter applies to an act or omission which takes place on or after the commencement date. The Consumer Protection from Unfair Trading Regulations 2008 (S.I.2008/1277) will apply to any act or omission which takes place before the commencement date.

1357 In the case of an act or omission that takes place before the commencement date, and is repeated or continues to take place after that date (continuing conduct), "the commencement date" is to be understood as the date on which clause 223 (prohibition of unfair commercial practices) comes into force. The Consumer Protection from Unfair Trading Regulations (S.I.2008/1277) will apply in respect of the private rights to redress until regulations for this Chapter are made under clause 231.

Chapter 2: Subscription Contracts

Introduction

Clause 251: Overview

1358 This clause provides an overview of the chapter, which provides for duties on traders in relation to subscription contracts, the rights of consumers if those duties are breached, rights for consumers to cancel subscription contracts during cooling-off periods, powers to make further provision in relation to cancellation, offences for failing to provide information about cooling-off rights, and miscellaneous provisions.

Clause 252: Meaning of "subscription contract"

1359 This clause defines the scope of "subscription contracts".

1360 Subsection (2), paragraphs (a) and (b) provides that a fixed term contract or a contract with an indefinite period will be considered a subscription contract if it has auto-renewing features as well as a right to bring the contract to an end, which mean a consumer must take action to stop the continuation of the contract beyond a mandatory period, or stop the renewal or extension of the existing contract period, rather than it terminating by default.

1361 Subsection (3) provides that a contract which involves the supply of goods, services or digital content as a free-trial or at reduced cost for a specified period of time, after which the contract continues at full cost (or the trader has an option to impose a charge or an increase in the existing charge), will be considered a subscription contract if the consumer must take action to avoid defaulting to contract terms which involve paying the full or a higher price.

1362 Subsection (4) clarifies that references to a consumer's right to bring a contract to an end only extend to contractual rights to end the contract which can be exercised by the consumer without incurring a penalty which is more than nominal. In relation to a fixed term

contract, this could include an early - cancellation right which allows a consumer to exit the contract before the end of the fixed term period.

1363 Where a contract does not meet the definition of 'subscription contract' set out in this Chapter, the Consumer Contract Regulations (Information, Cancellation and Additional Charges) Regulations 2013 will continue to apply unless otherwise excluded by those regulations.

Clause 253: Excluded contracts

1364 This clause and Schedule 20 define "excluded contracts" which could otherwise meet the definition of subscription contract in clause 252. Certain contracts that would otherwise be within the scope of this Chapter have been excluded either because there are already regulations that apply to these contracts which provide equivalent or higher consumer protection or where there is another relevant public policy reason. Definitions and descriptions of excluded contracts are provided in Schedule 20.

1365 The Secretary of State has power, by regulations, to amend Schedule 20 to add, modify or remove a description of contract which is excluded. Regulations made under subsection (2) are subject to the draft affirmative procedure, see clause 332, subsection (3).

Schedule 20: Excluded contracts

1366 Schedule 20 sets out the types of contracts and products which are wholly excluded from the regulatory duties and consumer rights under Part 4 Chapter 2.

1367 Paragraph 1 specifies that contracts for the supply of regulated utilities, consisting of electricity, gas, supplies of heating, cooling or hot water made by a relevant heat network, the supply of water or sewerage services are all excluded from rules under Part 4 Chapter 2.

1368 Paragraph 2 specifies that contracts for the supply of services of a banking, credit, insurance, personal pension, investment or payment nature are excluded.

1369 Paragraphs 3 and 4 outline the kind of healthcare and medical contract that are excluded from the regulatory requirements under Part 4 Chapter 2. The scope of paragraph (2) is intended to closely follow the scope of the exclusion from the cancellation provisions outlined in regulation 27, subparagraph (2), sub-points (a) and (b) under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. There are two related categories of excluded contract; first, contracts for the supply of a healthcare product under prescription, and second, contracts for the supply of a healthcare product by a healthcare professional under arrangements in the health service and where such products are, in some circumstances, provided free or on prescription. Generally, the specified contracts cover 2 elements, the purpose of the product and who is providing it. If the product is related to achieving a health outcome and is given by a relevant healthcare professional for that purpose, or is supplied following a prescription or directions from a prescriber, it will be exempt.

1370 Paragraphs 5 to 7 outline legislation which sets the regulatory scope of Ofcom and the Phone-paid Services Authority (PSA) by extension. Contracts which are regulated by either organisation are excluded from Part 4 Chapter 2.

1371 Paragraph 8 specifies that any contract to rent a home is excluded from regulatory duties under Part 4 Chapter 2.

1372 Paragraph 9 is an exclusion intended for micro businesses conducting small scale operations to deliver everyday consumables akin to the exclusion effected by regulation 6(1)(f) of The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. The exemption in Schedule 20, paragraph 9 is narrower than that in the CCRs and subparagraph (9), sub-point (2)(b) ensures that only businesses which are neither a body corporate nor use third party businesses to provide at least most of their deliveries of product are able to take advantage of this exemption.

1373 Paragraph 10 excludes regulated package holidays and other package travel contracts from Part 4 Chapter 2.

1374 Paragraph 11 excludes regulated timeshares and other holiday products from Part 4 Chapter 2.

1375 Paragraph 12 excludes contracts for the supply of childcare and provision of school age education, as well as ancillary products, such as food and drink, supplied in the course of providing childcare, and similar items intended for pupils in connection with childcare activity that may be provided by a separate party to the childcare provider. Childcare includes childcare regulated by Ofsted, childminders, providers on domestic and non-domestic premises and nannies.

1376 Paragraph 13 excludes contracts for forms of gambling which are covered by certain prescribed legislation from the requirements of Part 4 Chapter 2.

Duties of traders

Clause 254: Pre-contract information etc.

1377 This clause sets out the requirements of traders in relation to information that must be provided prior to the consumer entering into the contract. The pre-contract information consists of 10 items of "key pre-contract information" (in Schedule 21 Part 1) that must be provided for all subscription contracts, regardless of whether this information is apparent from the context. Additional information, if it is not already apparent from context to the consumer, will also have to be provided together with the key pre-contract information and is set out in a list of 'full' pre-contract information (in Schedule 21 Part 2).

1378 Pre-contract information must be provided in clear and plain language, in a legible form (if in writing) or in a way that is audible and comprehensible (where the contract is entered into orally and otherwise than face-to-face with the trader). If the pre-contract information is not provided in a "durable medium" before the contract is concluded, it must be provided in this format as soon as reasonably practicable afterwards. "Durable medium" is defined in clause 278 and means a format that the consumer can store under their control and refer back to, such as on paper or in an email. Information provided in a format that the trader is able to change or remove from the consumer, such as information on a poster in the trader's business premises or via a link on their website, does not amount to information on a durable medium.

1379 Subsection (1), paragraph (a) requires the trader to give the key pre-contract information to the consumer, and paragraph (b) specifies that the full pre-contract information (set out in Part 2 of Schedule 21) must be given or made available to the consumer together. There are no specific requirements as to how information is made available, as it will depend on the context and the individual product, however subsection (5) indicates that the test will be satisfied only if the consumer can reasonably be expected to know how to access the information and be able to access it. Information is unlikely to be "made available" if it is not clearly and prominently signposted or if it is obscured in some way either physically, or by being buried within lengthy documents. This may also constitute a misleading action or omission pursuant to Chapter 1 of this Part.

1380 Subsection (2), paragraph (a) specifies that the prescribed information (set out in parts 1 and 2 of Schedule 21) must be provided by the trader to the consumer as close in time to the consumer entering the contract as is practicable. This means immediately before the consumer places their order and/or enters into the contract (whichever is the earlier) where possible. This applies no matter where the subscription contract is entered into (i.e. it applies to contracts concluded online, over the telephone, face-to-face or any other way). How this might look in practice might vary depending on the type of contract and the consumer journey. The key difference is whether a consumer can see and read the pre-contract information because it is presented on a durable medium or otherwise in writing (i.e. online on the trader's website, paper) or not (i.e. telephone).

1381 Paragraphs (b) and (c) of subsection (2) also require that the requirements on providing pre-contract information must be carried out in accordance with subsections (3) and (4) of clause 255 and any other requirements set out in regulations under clause 275 subsection (1) paragraph (a).

1382 For either an online contract or one entered into face-to-face at a business premises, the consumer's home or elsewhere, the pre-contract information should be given to the consumer in writing so they have an opportunity to review it prior to entering into the contract. Where a subscription contract is to be entered into in the course of a phone call, the consumer will be relying on the verbal information communicated by the trader or his agent. In those circumstances, the key pre-contract information must be relayed orally to the consumer, and the consumer must be referred to a place where they can see the full pre-contract information and offered an opportunity to read that information before going ahead with the contract.

1383 Subsection (3), paragraph (a) requires the key pre-contract information to be given together, as one whole set of information.

1384 Subsection (3), paragraph (b) requires the key pre-contract information to be given separately and distinctly from the full pre-contract information and from any other information that might relate to the product. The purpose of this requirement is to prevent the key pre-contract information being obscured or reducing its prominence.

1385 Generally, how traders comply with the various requirements in this clause will depend on the product and the medium used to conclude contracts with consumers and communicate the prescribed information, but it should mean:

a) in the case of online contracts, key pre-contract information is clearly and prominently visible in the location where the consumer will enter into the contract and is directly accessible without a need for the consumer to take any further steps to access and read it;

b) the key pre-contract information is provided first, prominently and separate from the full pre-contract information;

c) the pre-contract information should not be obscured by the addition of other information which may compete for the consumer's attention;

d) all the pre-contract information should be easily understood by the average consumer; and

e) all the pre-contract information should be presented in such a way as to come to the consumer's attention so as to enable the consumer to easily identify and read the information; in an appropriate font, size, colour and position.

1386 Subsection (3), paragraph (c) requires that where the contract is entered into in the simultaneous presence of the trader and the consumer, the pre-contract information must be provided in writing and on a durable medium. In respect of "durable medium" that means a format (such as paper or email) which a consumer can easily store under their control and refer to if needed. However, that does not mean the onus should be on a consumer to save a web page, or print off a copy for their records. A mere provision of information on a website does not constitute "durable medium".

1387 Specific conditions relating to whether information provided via a website will qualify as durable medium include:

a) whether the website allows the consumer to store information addressed to her/him personally in such a way that s/he may access it and reproduce it unchanged for an adequate period, without any unilateral modification of its content by the service provider or by another trader being possible; and

b) if the consumer is obliged to consult that website in order to become aware of the information, the transmission of that information must be accompanied by behaviour on the part of the provider aimed at drawing the consumer's attention to the existence and availability of that information on that website.

1388 Subsection (3), paragraph (d) means that during the process towards completing the purchase the consumer should see the key pre-contract information at least once and is not required to take any further action, such as click on links or download separate documents, to access the information. To comply with the requirements, it should not be possible for the consumer to navigate e.g. a website ordering process, without seeing all of the key pre-contract information prior to being able to complete a purchase.

1389 In the situation covered by subsection (3) paragraph (e) where it is not possible to provide the key pre-contract information in writing prior to the point of purchase, it must be

relayed orally to the consumer. Where the information provided is spoken rather than written, it must be audible, clear and spoken at a pace that enables the consumer to fully understand all the information provided. The trader must still make available the full pre-contract information before the contract is made although need not orally provide it. One way the trader could do this is to refer the consumer to a webpage, or written document previously sent to the consumer, where the full pre-contract information is set out.

1390 In circumstances where information outlined in Part 2 of Schedule 21 ("full pre-contract information") is not already clear to the consumer, it must be made available or given together; the consumer should be able to view that information in one place. The requirements for the information to be given in writing and on a durable medium for contracts entered into in person under subsection (4), paragraph (b) are the same as those under subsection (3), paragraph (c).

1391 The Secretary of State may by regulations amend Parts 1 and 2 of Schedule 21 so as to add, modify or remove descriptions of information. Subsection (8) provides that regulations made under this subsection (7) are subject to the draft affirmative procedure, see clause 332, subsection (3).

Schedule 21: Pre-contract information and reminder notices

1392 Part 1 of the Schedule sets out the key pre-contract information which is required to be given to consumers under clause 254, subsection (1), paragraph (a).

1393 Paragraph 2 applies where the proposed contract falls within clause 252, subsection (2) of the definition of subscription contract, and specifies that the consumer must be notified of the on-going obligation to pay unless steps are taken to cancel and the minimum commitment period e.g. "you have subscribed for a minimum of 6 months, you may cancel any time after 02/12/2023".

1394 Paragraph 3 applies where the proposed contract falls within clause 252, subsection (3) of the definition of subscription contract, and specifies that the consumer must be notified that they will be charged, or charged a higher rate than the initial one, and the date on which the consumer will become liable for the first charge, or first higher charge.

1395 Paragraph 4 refers to how often payments will be taken, e.g. monthly, weekly annually etc. as well as the amount that will be taken, or the minimum amount if the payment is variable. For certain contracts it may not be possible to specify the amount of the payments, for example, where the consumer is liable for a minimum payment under the contract but the actual amount payable each payment period will be calculated according to the consumer's usage or choice of product for that period. In such cases it will be necessary to provide the consumer with information on how the price will be calculated. Any term of a consumer contract that allows for a price to be varied during the course of the contract must comply with the requirement of fairness in Part 2 of the Consumer Rights Act 2015.

1396 Paragraph 5 is intended as a clarifying measure to enable consumers to compare prices. If contracts are not paid for monthly, consumers should be provided with a "pro-rata" cost per month. This requirement does not apply to contracts which are paid for monthly.

1397 Paragraph 6 requires the trader to state the minimum total amount for which a consumer will be liable under the contract.

1398 Paragraph 7 requires the trader to outline particulars of any terms within the contract that allow the trader to vary the frequency or amount of payments under the contract.

1399 Paragraph 8 requires the trader to outline how the consumer can exit the contract and signpost to the location online or provide the necessary contact details to enable the consumer to do so.

1400 Paragraph 9 requires the trader to state the amount of notice that the consumer must give to bring the contract to an end and requires the trader to specify the earliest date when the consumer can give notice to end the contract and avoid further payment.

1401 Paragraph 10 requires the trader to specify when a reminder notice will be sent to consumers in accordance with clause 257 subsection (3).

1402 Paragraph 11 requires traders to provide a summary of the consumer's right to cancel the contract within the initial cooling-off period, and a summary of any right the consumer might have to cancel the contract within a renewal cooling-off period. The trader must also state that further details about the rights are set out in the full pre-contract information.

1403 Part 2 of the Schedule sets out the full pre-contract information which a trader is required to give consumers under clause 254. This includes the key pre-contract information that was already required to be provided under Part 1 of Schedule 21. The requirements in addition to this are broadly the same as those requirements under schedule 2 of The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 that are not already reflected in the key pre-contract information specified in Part 1 of the Schedule.

1404 Paragraph 14 requires the trader to describe what the product is and to give as much information as is appropriate to the means of communication.

1405 Paragraph 18 requires the trader to specify the costs of any additional charges such as delivery charges, which is inclusive of tax (such as VAT).

1406 Paragraph 27 requires the trader to provide information on digital content functionality and compatibility. This might cover information such as information about its computer language, file type, access requirements, updates, tracking, internet connection, geographical restrictions, any additional purchases required and information regarding compatibility of the product with both hardware and other software.

1407 Paragraph 28 refers to the existence of any 'alternative dispute resolution' schemes that the trader is subject to and how the consumer may access them.

1408 Part 3 of the Schedule sets out the reminder notice information which a trader is required to give consumers under clause 257, subsection (1), paragraph (a).

1409 Paragraph 30 requires the trader to highlight that the consumer will become liable for the renewal payment.

1410 Paragraph 31 requires the trader to provide the date the renewal payment is due and the amount the consumer is liable to pay, in the reminder notice. Paragraph 31 requires the trader to specify the amount of the previous renewal payment (if any) for comparison.

1411 If the consumer will be liable to pay further recurring payments in addition to the renewal payment, if the contract renews, paragraph 34 requires the trader to disclose the amount and the frequency of those additional payments.

1412 Paragraphs 33 and 36 require the trader to highlight any differences in the amounts of the renewal payment or the further recurring payments, as between the current contract period which is due to expire, and the renewed contract period in the event the contract were to renew.

1413 Paragraph 37 requires the trader to specify the total minimum amount to which the consumer will become liable under the contract (additional to their liability under the contract before it renews) if it renews to a further term.

1414 Paragraph 38 requires the trader to specify the date on which the consumer will become liable for the next following renewal payment (after the forthcoming renewal payment) or, if no further renewal payments will arise under the contract, the date on which the contract will come to an end.

1415 Paragraph 39 requires the trader to specify means by which the consumer can bring the contract to an end to avoid further liability.

Clause 255: Pre-contract information: additional requirements

1416 This clause outlines requirements in addition to clause 254 around pre-contractual information.

1417 Subsection (2) requires that the last step a consumer takes when entering an online contract is one where they would be expressly made aware and acknowledge that by entering into the contract, they will be obligated to make payments to the trader.

1418 Subsection (4) requires traders to provide certain further information when consumers are invited to enter contracts online, namely whether there are any restrictions on the delivery of any goods to be supplied under the contract, and which means of payment can be used by the consumer. Subsection (3) requires that information to be presented in such a way that a consumer should not be required to take any other steps to view it other than going through the contracting process, and in accordance with any other requirements specified in regulations under clause 275, subsection (1), paragraph (a).

1419 Subsection (5) specifies that where the trader has not complied with subsection (2), the consumer is not bound by the contract.

1420 Subsection (7) applies to contracts entered into orally and remotely, such as those concluded via a video or phone call. In such cases where the trader contacts the consumer, the trader is required to inform the consumer at the outset of the trader's identity, the identity of any person on whose behalf the trader is acting, and the commercial purpose of the call.

1421 Where the consumer has signed a contract in the course of entering into it face-to-face with the trader, the trader must give the consumer a copy of the signed contract immediately afterwards (subsection (8)).

1422 If the trader has not given the pre-contract information to the consumer in writing and on a durable medium before a contract was entered into, subsection (9) requires the trader to provide the information in this format as soon as reasonably practicable after the

contract has been entered into. This should always be before any goods or services are supplied under the contract.

Clause 256: Reminder notices

1423 This clause, along with clause 257, details requirements for "reminder notices". "Reminder notices" are written notifications to consumers that a subscription contract is continuing and a renewal payment will fall due unless they act to end the contract. These notifications must contain the information prescribed in Schedule 21, Part 3. The notice is designed to inform the consumer in simple terms of certain important information including the cost and features of the contract that is about to renew and the actions the consumer should take should s/he wish to avoid renewal. They must be given separately from other information that does not relate to the prescribed information that is being communicated, e.g. they must not also serve as marketing material.

1424 Subsection (1) provides that, where a trader enters into a subscription contract with a consumer without a concessionary period, the trader must give the consumer a reminder notice before each renewal payment that relates to the end of a relevant six-month period, as set out in subsection (2). "Renewal payments" are payments which can be avoided by a consumer where they exercise their existing rights under the contract to end the contract (subsection (4)). A payment cannot be "avoided" for the purposes of this section by the use of any early termination clause of the contract that involves the consumer paying a fee, or which involves the consumer breaching the contract.

1425 Subsection (2) sets out what is considered a relevant six-month period for the purposes of subsection (1). It sets out that the relevant six-month period is considered to be six 6 months after the day after the day contract was entered into. Each subsequent six-month period is determined by each six-month period after the day the consumer became liable for a renewal payment in which a reminder notice was required to be sent under subsection (1).

1426 Subsection (3) provides that, where a trader enters into a subscription with a consumer with a concessionary period, the trader must send the consumer a reminder notice before the first renewal payment the consumer is liable for under the contract, and each subsequent payment that related to the end of a relevant six-month period. A contract is considered to include a concessionary period if it meets the requirements set out in 252(3).

1427 A renewal payment will fall within subsection (4)) and therefore trigger a reminder notice where it is the last (or only) renewal payment falling due within a six-month period, or the very first renewal payment after that six-month period. The purpose of this provision is that a reminder notice is not required to be given more frequently than once every six months even if renewal payments fall due more frequently than this.

1428 Subsection (7) defines a renewal payment as a payment which a consumer can avoid liability for, by exercising their right to bring the contract to an end.

1429 Subsection (8) provides that the reminder notices requirements are subject to requirements on content, timing and how notices must be given under clause 257.

1430 Subsection (9) provides the Secretary of State with the power to disapply or modify the application reminder notice requirements in sections 251 and 252 in respect of certain entities, traders or contracts types.

1431 Subsection (10) provides that any regulations made under subsection (9) are subject to the affirmative procedure.

Clause 257: Content and timing etc. of reminder notices

1432 This clause defines the requirements a trader must follow as to timing and content of a reminder notice and how the notice must be given.

1433 Subsection (1) requires that the information prescribed in Part 3 of Schedule 21 must be included in a reminder notice together with any other information required by regulations under section 275, subsection (1), paragraph (b). The information must be given all together.

1434 Subsection (2) provides that a reminder notice must be given separately to any other information and in accordance with any requirements prescribed in regulations under section 275, subsection (1), paragraph (a) additional to those requirements set out in subsections (3) to (7).

1435 The purpose of the reminder notice is to give the consumer sufficient notice to decide if they still want the contract to continue, and if necessary, cancel their contract before the renewal payment is incurred. Subsection (3) sets out that a trader must specify the period in which consumers will receive a reminder notice in pre-contract information they provide to the consumer.

1436 Subsection (4) specifies that the reminder notice period set out in the pre-contract information must be reasonably in advance of the last cancellation date. This period must be reasonable for the purposes of informing the consumer that they will soon be liable for a renewal payment. This period must also be reasonable for the purposes of enabling the consumer to take the necessary steps before incurring liability for the next renewal payment.

1437 Subsection (5) defines the "last cancellation date". This is the last day on which the consumer can exercise a right to bring the contract to an end and thereby avoid liability for the renewal payment.

1438 Subsection (7) specifies when the trader is required to serve an additional reminder under subsection (6). Subsection (6) applies where the next following renewal payment that the consumer could avoid by ending the contract would be a year or more after the forthcoming renewal payment. (Or if no further renewal payments would arise under the contract, the contract would continue for at least a year after the forthcoming renewal payment.) The effect of these provisions is that for subscription contracts that will renew to a period of 12 months or more, a trader must send an additional reminder notice prior to the notice set out in subsection (3). This must be sent at a time which is reasonable for the purposes of notifying the consumer that they will soon become liable for a renewal payment in addition to the notices set out in subsection (3).

1439 Subsection (8) defines a "12- month period" for the purposes of the test in subsection (7) triggering a trader's duty to serve an additional reminder.

Clause 258: Arrangements for consumers to exercise rights to end contract

1440 This clause imposes requirements on traders that are designed to ensure they provide an easy and accessible means for consumers to end the contract. It makes it clear that consumers should not be hindered when trying to leave a subscription contract or stop it

renewing. A consumer should be able to signal their intent to end the contract through a single communication. For the purposes of this section, switching off auto-renewal in an online account interface or clicking a "cancel" button online is a communication.

1441 Subsection (1), paragraph (a) requires that traders enable consumers to end the contract in a single communication.

1442 Subsection (1), paragraph (b) provides that the process for consumers to end the contract should not require them to take unnecessary steps. This requirement precludes traders adopting practices which unnecessarily hinder a consumer exercising their right to exit.

1443 Examples of practices that are likely to breach subsection (2), paragraphs (a) and/or (b) could include:

a) For online contracts (where consumers have been able to sign up at the click of a button online), making the process to exit the contract more onerous e.g. requiring customers to phone a call centre.

b) When a consumer contacts the trader by phone to end the contract, they are required to answer questions about the quality of the product, or why they're leaving.

c) Requiring customers to go through an excessive number of steps, or unnecessary steps, to turn off auto-renewal online e.g. requiring them to complete a mandatory free text box or by not giving them the clear and prominent option to turn off auto-renewal or press a cancel button.

1444 Subsection (2) and subsection (6) specify that the consumer may choose an alternative to the method provided by the trader to communicate an intention to end the contract, however, that method must be sufficiently clear of intention to allow the trader to process the cancellation.

1445 Subsection (3) provides that a consumer may exercise a right to bring a subscription contract to an end at any time permitted by regulations under section 275, subsection (1), paragraph (c), and subsection (5) provides that arrangements under clause 258 must comply with any other requirements specified in such regulations.

1446 Subsection (4), paragraph (a) provides that where a contract is entered into online, there must be a way for the consumer to exercise their right to cancel online.

1447 Subsection (4) paragraph (b) provides that traders must ensure that consumers do not find it hard to locate and access the mechanism for turning off auto-renewal or cancelling the contract online. An online mechanism offered by traders for consumers to end a subscription contract may breach this requirement if e.g. it is not clearly and prominently labelled, or it is only accessible by the consumer activating hover text or a drop down menu.

Clause 259: Duties of traders on cancellation or end of subscription contract

1448 This clause sets out requirements on the trader where the consumer has exercised a right to cancel under Chapter 2 or taken the necessary steps to end the contract under its terms.

1449 The trader must give the consumer an 'end of contract notice'. Regardless of the medium used by the trader for the consumer to end or cancel the contract, there is a requirement on the trader to acknowledge the cancellation request (once received) on a durable medium without delay and in accordance with any other requirements specified in regulations under section 275 subsection (1) paragraph (a). This must be within the period specified in regulations under clause 275, subsection (1), paragraph (a). If no such period is specified in regulations, the notice must be given within three working days after the consumer giving notice of termination, or, where the consumer notifies cancellation online, the trader must give the end of contract notice within 24 hours of cancellation. The end of contract notice must contain clear information that the contract has been or will be cancelled or ended, together with the date on which this occurred or will occur.

1450 Additionally, any overpayment received must be refunded. An overpayment is defined in subsection (6) as being any payment already made by the consumer for which they are no longer liable as a result of the contract termination.

Rights of consumers to cancel contract for breach

Clause 260: Terms implied into subscription contracts

1451 This clause provides that every subscription contract is deemed to contain terms to the effect that the trader has complied with the statutory obligations imposed by Chapter 2. These include:

a) The requirement to give pre-contract information (clause 254)

b) The requirement to give a reminder notice (clause 256)

c) The requirement to provide reminder notices in a reasonable period, and to specify this period in pre-contract information (Clause 252 and 257)

d) The requirement to enable a consumer to easily bring a subscription to an end (clause 258)

e) The requirement to acknowledge a consumer having brought the subscription contract to an end and the requirement to refund any overpayments (clause 259).

Clause 261: Right to cancel for breach of implied term

1452 This clause provides a cancellation right for consumers for breaches of certain terms in relation to subscription contracts.

1453 Subsection (1) confers the right for a consumer to cancel a contract for a breach of an implied or statutory requirement as set out in clause 260, paragraphs (a), (c), (d) and (e).

1454 Subsection (2) provides that, in the event of a breach by the trader, the consumer gains cancellation rights.

1455 The breach could be a failure to comply with any part of the requirements outlined in clause 260, subsection (1), paragraphs (a), (c), (d) or (e). For example:

a) failure by a trader to give the consumer notice reminding them before the end of a commitment period that the contract will automatically continue and they will be charged payment unless they take action to end the contract;

b) failure to provide all of the prescribed information in the reminder notice (i.e. non-compliant reminder providing partial information);

c) obscuring the prescribed pre-contract information by including additional information with it which is not prescribed;

d) failure to comply with the rules relating to timings for reminders; or

e) failure to comply with the rules relating to the method for sending reminders.

1456 Subsection (3) provides that all a consumer must do to exercise this right is communicate their intent to cancel to the trader in accordance with subsection (4).

1457 Subsection (4), paragraph (a) provides that any method of communication can be used to exercise the right to cancel. Even if the trader mandates a specific process for ending the contract in accordance with its terms e.g. that cancellation must be communicated through the trader's website, cancellation following a breach of terms will be effective if the consumer chooses another method, such as the model cancellation form in Schedule 3 to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 or by sending an email to the trader.

1458 Subsection (4), paragraph (b) provides that this communication must be one that is clear enough for the trader to understand the consumer's intention to cancel the contract.

1459 Subsection (5) clarifies that the cancellation will take effect from the time the notification is given. However, this is subject to clause 270, subsections (4) and (5) which have the effect that the consumer is to be treated as having given notice within a cancellation period specified for the exercise of a cancellation right under this chapter, or by a date specified in the contract for giving notice to end the contract, if the communication is sent before the deadline.

1460 Subsection (6), paragraph (a) provides that any rights and obligations under the contract that would have arisen no longer apply after it is cancelled.

1461 Subsection (6), paragraph (b) provides that following such cancellation, the consumer's liability for previous payments will be extinguished, and the resulting rights to a refund will apply, to the extent provided for in regulations made under clause 265, subsection (1). Paragraph (c) provides that any other provision made under those regulations about the treatment of any products supplied under a cancelled subscription contract applies.

1462 Subsection (7) means that the trader cannot apply any fees, penalties, charges or similar arrangements that would involve the consumer paying to cancel the contract under subsection (2).

Cooling-off rights

Clause 262: Rights to cancel during cooling-off periods

1463 Subsection (1) sets out that a consumer has the right to cancel a subscription contract during the initial cooling-off period and any renewal cooling-off period that applies.

1464 Subsection (2) specifies that no restrictions or conditions may be placed on this right, except those specified within the Chapter or regulations made under it.

1465 Subsection (4) has the same meaning as clause 258, subsection (6) and clause 261, subsection (4).

1466 If the consumer sent the notice of cancellation within the cooling-off period, then they are deemed to have cancelled it within the cooling-off period even if it is not received by the trader until after that period has expired (see clause 270, subsections (4) and (5)). However, subsection (5) means that a contract is cancelled with effect from when the notification is given. This might be deemed to be the date when the notification would be normally received according to the means used to send it. For example, where a notification is given by post, it will be deemed to be received as specified under section 7 of the Interpretation Act 1978, specifically, effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved.

1467 Under subsection (6), cancellation under clause 262 will end parties' obligations under the contract and the consumer will be entitled to any extinguishment of liability or resulting refund to such extent as is prescribed in regulations under clause 265, subsection (1), paragraph (b), and the treatment of any goods or other products supplied under the contract will be determined in accordance with provisions in such regulations.

Clause 263: Meaning of "initial cooling-off period" and "renewal cooling-off period"

1468 This clause outlines the consumer's right to cancel during the "cooling-off period". A "cooling-off period" is a 14-day period where a consumer may cancel their contract for any reason and receive such refund as is prescribed under regulations made under clause 265, subject to any deductions that may apply under those regulations. This clause provides cooling-off cancellation rights similar to those currently available under The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

1469 This clause defines what a "cooling-off period" is and explains the distinction between an "initial" cooling-off period and a "renewal" cooling off period.

1470 Subsection (1) describes the initial cooling-off period, which is similar to the cancellation period in The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. It starts from the date of the contract and ends 14 days after this date or, in the case of contracts for the supply of goods, the period ends 14 days after the date when the first goods are received.

1471 Subsection (2) describes the renewal cooling-off period, which only applies in the case of a 'relevant renewal' of a subscription contract. It provides that the renewal cooling-off period starts on the day of the relevant renewal, and ends 14 days after that date.

1472 Subsection (3) indicates that relevant renewals are:

a) The first renewal payment to which a consumer becomes liable following the end of an initial free or discounted period; and

b) Any other renewal payment where:

i. the next following renewal payment will not be due for 12 months or more, or

ii. no further renewal payments will be payable but the contract will continue for a period of 12 months or more.

1473 Subsection (4), paragraph (b) defines how the "12-month period" is to be assessed for the purposes of determining whether a renewal is a 'relevant renewal'.

1474 Subsection (5) clarifies that, to identify when the first supply of goods has taken place for the purposes of determining the commencement of the initial cooling-off period under subsection (1), paragraph (b), subparagraph (i), when that supply consists of multiple goods, the 14-day period would only start to run once all of the goods are received.

1475 Subsection (6) provides that clause 263 is subject to any extensions of a cooling-off period that may be provided for by regulations under clause 265, subsection (1), paragraph (c).

Clause 264: Cooling-off notice

1476 This clause details the requirement for a trader to give a consumer a "cooling-off notice" in relation to each renewal cooling-off period. "Cooling-off notices" are written notifications to consumers that their contract is continuing and they have a renewal cooling-off cancellation right. These notifications must contain the other information prescribed in subsection (2) and any other information prescribed in regulations under clause 275, subsection (1), paragraph (b). The notice is designed to inform the consumer in simple terms of their cooling-off cancellation right.

1477 Subsection (3) specifies that the notice must be given on the first day of the renewal cooling-off period or as soon as reasonably practicable afterwards, separately from the giving of any other information, and in accordance with any requirements in regulations made under clause 275, subsection (1), paragraph (a).

Cancellation of contracts under this Chapter: further provisions

Clause 265: Cancellation of subscription contract: further provision

1478 This clause provides a delegated power for the Secretary of State to make provision, by regulations, about the exercise of a consumer's rights to cancel a subscription contract under Part 4 Chapter 2.

1479 Subsection (1) details the scope of the delegated power, specifically empowering the Secretary of State to make provision on the exercise of the rights by the consumer and the consequences which may follow the cancellation. Subsection (1) also empowers the Secretary of State to make regulations extending a cooling-off cancellation period to any extent.

1480 Subsection (2) includes detail that the regulations may set the length limit to exercise a cancellation right and may impose any other conditions on the exercise of that right.

1481 Subsection (3) includes further details on what regulations may be made by the Secretary of State. This covers matters such as the extinguishment of the consumer's liability for payments previously made under the contract, and the resulting right to a refund, as well as the trader's right to recover products that have already been supplied under the contract. Subsection (3) also allows for provision to be made setting out the consequences, firstly, where a consumer ends a contract under its terms in circumstances where s/he has one or more rights to cancel the contract under this Chapter, and secondly, where a consumer cancels a contract in circumstances where s/he has more than one cancellation right under this Chapter.

1482 Subsection (4) requires that the Secretary of State's power to make regulations setting out consequences of a consumer cancelling a contract when they have one or more cancellation rights under Part 4 Chapter 2 (subsection (3), paragraph (e), subparagraphs (ii)) must be exercised such that the consumer should be deemed to be exercising the most advantageous right available to them under Chapter 2. This means that the regulations must have the effect that where there is any overlap in such rights, the most advantageous rights must prevail. Specifics on what that could mean may be included in the regulations.

1483 Subsection (5) imposes a duty on the Secretary of State to consult relevant persons prior to making any regulations under subsection (1), paragraph (c) (provision extending a cooling-off period).

1484 Subsection (6) specifies that the first regulations made under this clause, or any regulations made that include provision within subsection (1), paragraph (c) are subject to the draft affirmative procedure, see clause 332, subsection (3).

1485 Subsection (7) specifies that regulations which are made under this clause but where subsection (6) does not apply are subject to the draft negative procedure.

Offence of failing to provide information about cooling-off rights

Clause 266: Offence of failing to provide pre-contract information about cooling-off rights

1486 This clause creates an offence where a trader fails to provide the relevant information listed in paragraph 11, subparagraph (a) or paragraph 21 of Schedule 21 (information on a consumer's initial cooling-off cancellation rights) in a manner compliant with clause 254, subsection (1), paragraph (a) or (b) (as the case may be), before entering into an off-premises subscription contract. These paragraphs of Schedule 21 include information on when the consumer's initial cooling off right will begin and end, how it can be exercised and the consequences of exercising the right. The offences reproduce offences that currently apply under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

1487 Subsection (5) defines what an "off-premises subscription contract" is. Examples would include contracts concluded by door-to-door sellers and by traders using temporary high-street stands.

1488 Subsection (6) defines "business premises".

Clause 267: Defence of due diligence

1489 This clause provides traders with a defence of due diligence to the offence specified in clause 261 where the trader can prove that another person was responsible for the offence and the trader took all reasonable precautions and exercised all due diligence to avoid committing the offence.

Clause 268: Offences by officers of a body corporate etc

1490 This clause establishes direct liability for company officers for offences committed by the body corporate.

1491 Subsection (1) specifies that the officer is liable if the offence was committed with their consent, connivance or due to their neglect.

1492 Subsection (2) defines what an officer of the body corporate includes. This is not an exhaustive list.

1493 Subsection (3) establishes that subsection (1) applies to body corporates which are managed by its members. Members of these body corporates with functions of management may therefore be found liable for an offence under this Chapter.

1494 Subsection (4) establishes the same principles as subsection (1), but for Scottish Partnerships in relation to individual partners.

1495 Subsection (5) specifies that a partner includes those which may not be legally partners of the organisation but purporting to act as one.

Clause 269: Penalty for offence and enforcement

1496 Subsection (1) specifies that a person convicted of a clause 266 offence is liable on summary conviction to a fine. Subsections (2) to (5) provide for enforcement by local weights and measures authorities in Great Britain, and the Department for the Economy in Northern Ireland.

General and miscellaneous provisions

Clause 270: Information and notices: timing and burden of proof

1497 This clause specifies the timing and burden of proof for information and notices that are given (or required to be given) under Part 4 Chapter 2.

1498 Subsection (1) specifies that this section applies in relation to the entire chapter relating to subscription contracts.

1499 Subsection (2) specifies that for electronic communication of notices or information sent by a trader to a consumer, delivery timing is deemed as instantaneous.

1500 Subsection (3) clarifies that subsection (2) applies even if the consumer does not receive the notice if that was due to a reason beyond the trader's control.

1501 Subsection (4) provides that subsection (5) applies to determine whether the consumer has effectively exercised their statutory cancellation rights conferred by this Chapter, or their contractual rights to end the contract, by having given notice within the specified period or by the relevant date.

1502 Subsection (5) provides that the consumer is to be treated as having given notice within the required period, or before the specified date, if the communication by which the notice is given is sent before the end of that period.

1503 Subsection (6) specifies that the burden of proof is on the trader in any dispute between the trader and a consumer as to whether any information or notice has been given to the consumer by the trader in accordance with Chapter 2.

1504 Subsection (7) specifies that the burden of proof is on the consumer in any dispute between the consumer and a trader regarding whether a notice to end a contract or cancel it under Chapter 2 was sent by the consumer to the trader in accordance with the requirements

of this Chapter. This includes ensuring the consumer has cancelled their contract in a way which is sufficiently clear for the purposes of informing the trader that they are bringing their contract to an end.

1505 Subsection (8) requires that any information that a trader gives to a consumer under this Chapter must be given in clear and plain language and must be legible if in writing, and audible and comprehensible, if given orally.

Clause 271: Terms of a subscription contract which are of no effect

1506 Subsection (1) means that any term in a contract which contravenes this Chapter has no legal effect to that extent, including any term that seeks to exclude or restrict a trader's liability arising from the terms implied into the contract by clause 260.

1507 Subsection (2) provides that in cases to which this subsection applies, any term of a subscription contract has no effect to the extent that it makes consumers liable for a renewal payment prior to the day the contract renews.

1508 Subsection (3) provides that subsection (2) applies in such cases as are specified in regulations made under clause 275, subsection (1), paragraph (e) and that the regulations may include provision for determining when a contract renews in each category of case.

Clause 272: Other remedies for breach by trader

1509 This clause clarifies that any rights the consumer may have under common law or statute for breach of any term of a subscription contract are not limited by any rights specified in this chapter and the consumer may exercise both kinds of right in combination, as long as the consumer does not recover twice for the same loss.

1510 Subsection (3) provides examples of what other such remedies may be available to the consumer.

Clause 273: Application of this chapter

1511 This clause specifies that if a consumer and trader choose the law of any other country to govern their contract, but the contract has a close connection to the UK, this chapter will apply. Subsection (3) provides that Chapter 2 does not apply to subscription contracts entered into before clause 252 comes into force.

Clause 274: Crown application

1512 This clause specifies that the Crown is bound by the provisions in this chapter, however, may not be criminally liable as a result.

Clause 275: Power to make further provisions in connection with this Chapter

1513 This clause gives a delegated power to the Secretary of State to make regulations, which are subject to the draft negative procedure, in relation to:

a) how and when information or a notice required to be given by traders to consumers under Chapter 2 may or must be given,

b) what information notices given under Chapter 2 must contain,

c) what arrangements a trader must make under clause 258 to enable consumers to end contracts, and about when a consumer may exercise such a right. This may include

provision restricting the period of notice that a trader may require a consumer to give to bring a subscription contract to an end;

d) specifying the period within which a trader must refund an overpayment under clause 259, subsection (2), paragraph (b).

e) specifying cases to which clause 271, subsection (2) will apply and making provision about the date when a contract renews for that purpose.

Consequential and other minor amendments

Clause 276: Amendments of the Consumers Rights Act 2015

1514 This clause makes consequential amendments to sections 11, 12, 36, 37 and 50 of the Consumer Rights Act 2015.

1515 The amendments ensure that information that is given to consumers as part of the pre-contract information required under Part 4 Chapter 2 is treated as a term of the contract. This has the effect that traders cannot make changes to the matters covered by this pre-contract information without the agreement of the consumer, and if the trader breaches any such term, the consumer remedies provided for in Part 1 of the Consumer Rights Act will apply.

1516 The amendment to paragraph 10 of Schedule 5 to the 2015 Act secures that the investigatory powers set out in that Schedule are available to domestic enforcers for the purposes of enforcing the offences in subsection (1) of clause 266.

Clause 277: Other consequential amendments

1517 This clause makes further consequential amendments to other legislation including amending the Enterprise Act 2002. This will ensure that information which comes to a public authority in connection with the exercise of any function it has under, or by virtue of, Chapter 2 Part 4 of the Bill. It also permits disclosure of that information to any other person for the purpose of facilitating the exercise by that person, of any function they have under or by virtue of Chapter 2 Part 4.

1518 In addition, this clause amends the Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013 to remove subscription contracts as defined by clause 252 from the scope of Part 2 of those Regulations on information requirements, and Part 3 of those Regulations on rights to cancel.

General interpretation

Clause 278: Interpretation

1519 This defines certain terms and phrases in the subscription contracts chapter and explains how certain references should be interpreted.

Clause 279: Index of defined expressions

1520 This clause is self-explanatory.

Chapter 3: Consumer Savings Schemes

Clause 280: Meaning of "consumer savings scheme contract"

1521 This clause provides the definition of a "consumer savings scheme contract" which is in scope of the Bill. They are contracts in which consumers make payments as a form of saving for goods, services or digital content to be supplied by the trader usually at a later date. They should meet at least one additional criterion outlined in subsections (2) to (4) and they should not be explicitly excluded by virtue of clause 282, subsection (1) and Schedule 22.

1522 The policy is to regulate such contracts, in particular to protect consumers who have made payments to a trader which becomes insolvent before receiving the goods, services or digital content they were saving towards.

1523 In subsection (1), paragraph (a), sub-paragraph (ii) the words "to an account that is held by the trader for the consumer" ("the consumer's account")" simply mean the trader holds money on the consumer's behalf.

Clause 281: Other defined terms

1524 This clause defines terms used in Chapter 4. Subsection (2) provides further clarification of the words "consumer account" in clause 280, subsection (1), paragraph (a), sub-paragraph (ii).

1525 Subsection (3) defines the term "protected payment" used in clause 283, subsection (1) and clause 284, subsection (2), paragraph (d).

Clause 282: Excluded arrangements

1526 This clause introduces Schedule 22 which sets out arrangements excluded from the scope of a consumer savings scheme contract.

1527 Subsection (2) provides a delegated power for the Secretary of State to add, remove or modify arrangements excluded by Schedule 22, which is subject to the draft affirmative procedure, see clause 332, subsection (3).

Schedule 22: Excluded arrangements

1528 Schedule 22 lists seven arrangements which are excluded from the scope of a consumer savings scheme contract. Excluded arrangements include those in sectors which have their own regulatory regimes e.g. consumer contracts whose subject matter is regulated financial services activity (paragraph (1)), or where the trader is a small business (paragraph (3)).

Clause 283: Insolvency protection requirement

1529 The primary purpose of this clause is to mitigate the risk of loss to consumers upon the insolvency of a trader offering consumer savings scheme contracts. The clause provides that consumer savings schemes must be underpinned by arrangements that will cover, in the event of the trader's insolvency, the cost of refunding payments made by a consumer which have not been redeemed at the time of insolvency. A trader can choose whether to protect payments by way of a trust arrangement or through insurance cover but cannot choose a mix of both options.

1530 The requirement to protect payments made by consumers to consumer savings scheme contracts is intended to extend to traders who are established outside the United Kingdom and offer such schemes to consumers located in the United Kingdom.

1531 A trader's insolvency is defined by reference to the trader being subject to insolvency proceedings, the meaning of which is defined in clause 283, subsection (4), paragraphs (a) to (c). This is a well precedented definition – see most recently paragraph 21(33) of Schedule 2 to the Economic Crime (Transparency and Enforcement) Act 2022. The same definition is also used in a different context in the Bill – see paragraph 5 of Schedule 2 on mergers. The Government thinks this approach might provide more certainty for business and consumers alike.

Clause 284: Insurance arrangements

1532 This clause requires that a trader who intends to comply with the insolvency protection requirement in clause 283 by way of an insurance policy (or policies) must ensure that the said policy (or policies) is an "appropriate policy".

1533 Subsection (2) sets out the meaning of an "appropriate policy" and requires a trader to ensure that consumers are insured persons under the policy required under subsection (1), in respect of the costs of refunding payments in the consumer's account which have not been redeemed at the time of the insolvency.

1534 The meaning of funds which have not been redeemed shall be interpreted such that "redeemed" has the same meaning as in clause 281, subsections (4) and (5). The purpose of clause 284, subsection (2) is to ensure protected payments are returned directly to the consumer, in the event of the trader's insolvency.

1535 Subsection (3) requires a trader to pay the costs of arranging and paying for an appropriate policy and any related charges or taxes without recourse to the consumer payments which are to be protected under that policy.

Clause 285: Trust arrangements

1536 This clause requires a trader who intends to comply with the insolvency protection requirement in clause 283 by using a trust arrangement to ensure consumer payments are held in a trust located in the United Kingdom.

1537 Subsection (2) requires the consumer's payments to be held in the trust until either the funds have been redeemed by the consumer, or the payments have been returned to the consumer, unless payments can be released for one of the authorised purposes set out in subsection (3) and once the declaration in subsection (4) has been received in respect of a payment under clause 285, subsection (3), paragraph (a).

1538 Subsection (5) is intended to ensure a level of independent scrutiny of the use of funds held in Trust.

1539 Subsection (6) provides clarification of the meaning of "independent of the trader" specified in subsection (5).

1540 Subsection (7) requires the trader to meet any costs associated with setting up and managing the trust arrangement; consumer payments to the trust cannot be used to pay such costs.

1541 Subsection (8) requires the trader operating a consumer savings scheme to arrange for the trust's accounts to be audited by an independent auditor every three years.

1542 Subsection (9) requires trustee(s) of a trust set up to receive consumer payments under a consumer savings scheme contract to ensure funds which have not been redeemed at the date of the trader's insolvency are returned to those consumers. This subsection ensures monies held in trust are returned to consumers in the event of an insolvency, i.e. treated separately from other assets of the business.

Clause 286: Information requirements

1543 This clause sets out information to be provided to the consumer by the trader once the consumer has joined a consumer savings scheme, the time for providing that information and the manner of its provision.

1544 Subsection (1) sets out the information a trader must provide to a consumer when using an insurance or trust arrangement to protect consumer funds. The trader is required to provide the information to the consumer within 30 working days of the consumer's first payment into the consumer savings scheme.

1545 Subsection (2) sets out the information a trader must provide where there is a change to the information in subsection (1) and the time within which the consumer should be notified.

1546 Subsection (3) makes provision for a consumer to request the information in subsection (1) and for the trader to provide the information for free within 30 working days of receiving the request.

1547 Subsections (4) to (6) set out how the information should be provided to the consumer; it takes into account the way the consumer savings scheme contract was entered into.

1548 Subsection (7) mirrors clause 283, subsection (3) - in other words, the information requirements apply to traders established outside the UK who operate consumer savings schemes in the UK.

1549 Subsection (8) makes it an implied term of contract that the trader operating a consumer savings scheme comply with the information requirements set out in this clause.

1550 Subsection (9) sets out that, in addition, the Consumer Contracts (Cancellation and Additional Charges) Regulations 2013 will apply to consumer savings schemes insofar as obligations under those regulations are not met by the trader complying with the information requirements in this clause.

Clause 287: Consequential amendments

1551 This clause will make appropriate consequential amendments to primary legislation by adding Chapter 3 of Part 4 to the list of enactments listed in Schedules 14 and 15 of the Enterprise Act 2002 and Schedule 3 of Regulatory Enforcement and Sanctions Act 2008.

Clause 288: Interpretation

1552 This clause defines key terms for the purposes of Chapter 3 of Part 4. There are terms which are given a narrower meaning for the purposes of Chapter 3 of Part 4 as compared to their corresponding meaning in Part 3. For example, the definition of a trader in Chapter 3 of Part 4 does not include the activities of any Government department or local or public authority.

Chapter 4: Alternative Dispute Resolution for Consumer Contract Disputes

Interpretation of Chapter 4

Clause 289: Meaning of "ADR" and related terms

1553 This clause defines ADR and related terms.

1554 Subsections (2) to (5) define "ADR". This includes, but is not limited to, mediation, arbitration, early neutral evaluation and action under an ombudsman scheme. These examples are taken from the Practice Direction on pre-action conduct and protocols of the Civil Procedure Rules. In relation to the reference to arbitration in subsection (4) and to resolutions which are binding on the consumer in subsection (5), paragraph (a), nothing in this Chapter is intended to qualify sections 89-91 of the Arbitration Act 1996 and the unfair terms provisions of Part 2 of the Consumer Rights Act 2015 in relation to the use of such forms of ADR in a consumer context.

1555 Subsection (6) defines an "ADR provider" as a person who carries out ADR in relation to a dispute or who makes special ADR arrangements for doing so.

1556 Subsections (7) and (8) define "special ADR arrangements" as arrangements made by an ADR provider for ADR to be carried out by another person. Special ADR arrangements are explained in more detail in the context of clause 291, subsection (2).

1557 Subsection (9) provides a signpost to clause 293 which sets out the definitions of "exempt ADR provider" and "exempt redress scheme" and identifies those who are exempt ADR providers for the purposes of Chapter 4.

1558 Subsection (10) defines "accredited ADR provider", and subsection (11) defines "judge" for the purpose of the clause.

Clause 290: Other definitions

1559 This clause lists additional relevant definitions in relation to applicable consumer contracts and disputes.

1560 Subsection (2) to (7) defines a "consumer contract". Subsection (1) provides that a consumer contract is a contract to which Part 1 (consumer contracts for goods, digital content and services) of the Consumer Rights Act 2015 applies. Under subsections (3) to (6), those contracts are taken to include arrangements for the supply to consumers of electricity, gas and water, whatever their volume or quantity, and the provision of heating, cooling or hot water from a heat network.

1561 Subsections (8) to (10) allow the Secretary of State, by regulations, to provide that

contracts of a description specified in those regulations are not consumer contracts for the purposes of this Chapter. Regulations made under these subsections will be subject to the affirmative parliamentary procedure.

1562 Subsections (11) to (13) define a "consumer contract dispute". Consumer contract disputes relate not only to the contract but also to its making and the performance of obligations under the contract. Accordingly, the subject matter of the dispute may extend beyond the matters dealt with in Part 1 of the Consumer Rights Act 2015: for instance, the dispute might relate to a misleading action which the consumer contends was a significant factor in their decision to enter the consumer contract in question. The dispute must be one that may be determined by a court or tribunal: the requirements of Chapter 4 do not apply to more general complaints made by a consumer in so far as they relate to non-justiciable subject matter.

1563 Subsection (14) provides that some other terms are to be interpreted in accordance with the Consumer Rights Act 2015 but with modification in relation to the term "consumer".

Prohibition on acting as ADR provider without accreditation etc

Clause 291: Prohibitions relating to acting as ADR provider

1564 Subsection (1) prohibits a person from carrying out ADR in relation to a consumer contract dispute unless (and to the extent that) that person is accredited, exempt (see clause 293) or is acting in pursuance of special ADR arrangements made by an accredited or exempt ADR provider.

1565 Subsection (2) prohibits a person from making special ADR arrangements unless that person's accreditation or exemption allows them to make special ADR arrangements.

1566 Special ADR arrangements are arrangements made by an ADR provider with another person to carry out ADR on that ADR provider's behalf. They are designed to cover ADR schemes under which the ADR is provided through persons who might, for instance, be styled as "case handlers", "adjudicators"' or "ombudsmen" who are employed, or engaged by, or on behalf of, an ADR provider running the scheme. In that case, the person carrying out the ADR would not need accreditation, so long as the ADR provider running the scheme is accredited or exempt and is permitted to make those arrangements.

Clause 292: Prohibitions relating to charging fees to consumers

1567 This clause restricts the fees that accredited ADR providers may charge consumers.

1568 Subsections (1) and (2) prohibit accredited ADR providers, whether they provide the ADR themselves or through another person under special ADR arrangements, from charging the consumer fees for the ADR, unless those fees are charged in accordance with provisions approved by the Secretary of State. Any fees charged must be clearly published in a way that will come to the attention of consumers.

1569 The objective of subsections (1) and (2) is to ensure that accredited ADR providers do not charge consumers excessive fees for their ADR services, and for there to be consistency and transparency about those fees.

1570 Subsection (3) prevents a person who is carrying out ADR under a special ADR arrangement made by another ADR provider from charging the consumer any fee. This is to

prevent a situation in which a consumer is charged twice, by the ADR provider making the special ADR arrangement and then by the person carrying out the ADR under it.

1571 In this clause, the "consumer" is intended to be the person who is the consumer in the consumer contract dispute in question. There is no restriction on the fees that an accredited ADR provider, or person acting under special ADR arrangements, may charge the person who is the trader in that dispute.

Exempt ADR providers

Clause 293: Exempt ADR providers

1572 This clause provides for the exemption of persons from the prohibitions in clause 291 and 292.

1573 Under subsection (1), a person is an "exempt ADR provider" if they are listed, or of a description listed, in Part 1 of Schedule 23 or are acting under, or for the purposes of, one of the "exempt redress schemes" listed or described in Part 2 of that Schedule.

1574 Subsections (2) to (7) allow the Secretary of State, by regulations, to amend Schedule 23 to add new exemptions, or to vary or remove existing ones. This will allow the exemptions to be kept under review and for possible additional exemptions in the future. Regulations made under these subsections will be subject to the negative parliamentary procedure.

1575 The use of the negative procedure to update the list of exempt ADR providers is appropriate as updating the list of exemptions does not present a substantive change in policy or approach. 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.

1576 Under subsection (3), the regulations may limit the scope of an exemption, for example by reference to the purposes for which an otherwise prohibited activity is carried out.

1577 In accordance with subsection (5), the exemptions in Schedule 23 are of general application unless the Schedule provides for an exemption to be more limited.

Schedule 23: Exempt ADR providers

1578 Part 1 of Schedule 23 lists persons, or descriptions of persons, which (so far as those persons provide ADR for consumer contract disputes) are exempt ADR providers for the purposes of Chapter 4 of Part 4 (ADR). These are statutory bodies, or persons performing statutory functions, which it is not considered appropriate to regulate.

1579 Part 2 of Schedule 23 lists redress schemes or similar arrangements that are to be "exempt redress schemes" for the purposes of Chapter 4 of Part 4 (ADR). These redress schemes are regulated under other legislation and the exemption avoids duplication or conflict between the relevant statutory regimes.

1580 Part 3 specifies in further detail the redress scheme to which Part 2 of the Schedule applies.

1581 This Schedule may be amended by regulations under clause 293 (2) which are subject to the negative parliamentary procedure.

Accreditation: procedure etc

Clause 294: Applications for accreditation or variation of accreditation

1582 This clause sets out requirements for applicants seeking accreditation, or seeking to vary their accreditation, to carry out ADR or make special ADR arrangements.

1583 Subsection (1) requires applications for accreditation to be made to the Secretary of State and applicants to pay any applicable application fee as set out by fee regulations (see clause 298).

1584 Subsection (4) allows an accredited ADR provider to apply to the Secretary of State to change its accreditation. This might involve changes to the ADR that the ADR provider can provide or the special ADR arrangements it can make and changes to any conditions attached to its accreditation. In accordance with subsection (5), the application must be accompanied by any applicable fee set out by clause 298, the fee regulations. An accredited ADR provider may also apply for revocation of their accreditation under clause 296(2).

1585 Subsection (6) enables the Secretary of State to determine the application procedures by virtue of subsections (7) and (8), this includes: the descriptions of ADR and special ADR arrangements for which limited accreditation may be applied for, which may be framed by reference to kinds of ADR and/or types of dispute; the form in which applications are made; and information applicants must provide.

1586 Subsection (9) requires the Secretary of State to publish any application procedures determined under subsection (6).

1587 Subsection (10) states that the powers of Secretary of State under (6) must be adapted as per the circumstances and case.

Clause 295: Determination of applications for accreditation or variation of accreditation

1588 This clause sets out requirements applying to the Secretary of State on receipt of applications for accreditation or for variations of accreditation.

1589 Subsections (2) to (7) and (14) deal with the determination of applications for accreditation and subsections (8) to (13) deal with the determination of applications for variations.

1590 Subsection (2), paragraphs (a) and (b), requires that the Secretary of State must, as soon as reasonably practicable, consider an application for accreditation and make a decision.

1591 Subsection (2), paragraph (b), and subsection (3) allow the Secretary of State to: grant the accreditation applied for; grant an accreditation which is more limited in terms of the ADR that the ADR provider is permitted to carry out or the special ADR arrangement the ADR provider is permitted to make; or reject the application.

1592 Subsection (2), paragraph (c), requires the Secretary of State to notify applicants of the decision in writing and to provide reasons for any decision to grant a limited accreditation or reject the application.

1593 Subsection (4) provides that the Secretary of State may impose conditions on an accreditation.

1594 Subsection (5) provides that the Secretary of State can only approve an application for accreditation if the Secretary of State is satisfied that the applicant will meet the accreditation criteria set out in Schedule 24 when the accreditation is granted.

1595 Subsection (6) provides that, as a default, an accreditation is not time limited but the Secretary of State may grant accreditation on a time limited basis. If the accreditation is time limited, the notice of decision must say so and specify the period of the accreditation.

1596 Subsections (8) to (12), relating to the determination of applications for variations of accreditation, largely reflect subsections (2) to (7) with appropriate modification.

1597 Subsection (13) requires that the notice of the decision to accredit or vary the accreditation of an ADR provider must set out any conditions applicable to the accreditation or its variation and provide reasons for them.

1598 Subsection (14) enables an accreditation to be subject to conditions which make the ADR provider responsible for the acts or omissions of persons carrying out ADR under special ADR arrangements made by that ADR provider. This is to ensure that regulatory action under clause 296 or 300 can be taken against the accredited ADR provider in relation to acts or omissions of that person.

Clause 296: Revocation or suspension of accreditations etc

1599 This clause enables the Secretary of State to revoke or suspend accreditation, limit the accreditation or impose further accreditation conditions. These powers are exercisable by notice.

1600 Subsection (2) enables ADR providers to apply to have their accreditation revoked.

1601 Subsection (3) sets out the grounds on which the Secretary of State may impose the sanctions.

1602 Those grounds are: contravention of the prohibitions in clauses 291 (carrying out ADR, or making special ADR arrangements, where the ADR provider is not permitted to do so) or 292 (charging fees where the ADR provider is not permitted to do so); failure to comply with the accreditation criteria (see clause 299); failure to comply with any conditions imposed on the ADR provider's accreditation (see clause 295, subsection (4))); and failure to comply with an enforcement notice (see clause 300).

1603 Subsection (4) sets out the sanctions.

1604 Subsection (5) requires that, before imposing the relevant sanction, the Secretary of State must give the ADR provider an opportunity to make representations about its conduct and the action the ADR provider considers appropriate for the Secretary of State to take.

1605 Subsection (6) limits the additional accreditation conditions that can be imposed to those that the Secretary of State considers necessary to ensure compliance with the accreditation criteria or existing conditions.

1606 Subsection (7) requires the Secretary of State to keep those conditions under review and revoke any condition that the Secretary of State no longer considers necessary.

1607 Subsections (8) to (11) set out requirements to ensure certainty as to when any revocation or suspension has effect and when any suspension ceases.

1608 By virtue of clause 303, subsections (1) and (2), the Secretary of State may publish information about sanctions imposed under this clause to bring these to the attention of consumers.

Clause 297: Fees payable by accredited ADR providers

1609 This clause requires accredited ADR providers to pay any fees as set by the fees regulations. It is intended that, in addition to any application fees under clause 294, once accredited ADR providers will be required to pay periodic fees for their continuing accreditation.

Clause 298: ADR fees regulations

1610 Subsection (1) allows the Secretary of State, by regulations, to set fees for applications for accreditation and accreditation variation and periodic fees for maintaining accreditation.

1611 The power to make regulations will allow fees charged to be kept under review in the future. Regulations made will be subject to the negative parliamentary procedure.

1612 Subsection (2) clarifies that the regulations may set different fees for different cases or circumstances and may provide for cases or circumstances where no fees may be required. The regulations may set payment schedules for periodic fees.

1613 Subsection (3) ensures that, in setting fees, the Secretary of State has regard to the need to ensure that the fees are set at levels commensurate, over a reasonable course of time, with the anticipated costs of the Secretary of State in performing the related administrative functions.

Clause 299: Accreditation criteria

1614 Subsection (1) introduces Schedule 24 which lists the accreditation criteria, with which an ADR provider must comply to be, and remain, accredited.

1615 Subsections (2) and (3) allow the Secretary of State, by regulations, to amend Schedule 24, either by adding a new criterion, or by varying or removing any existing criteria. Regulations made under these subsections will be subject to the affirmative parliamentary procedure.

Schedule 24: Accreditation criteria

1616 Schedule 24 sets out the accreditation criteria which, in relation to the provision of ADR in consumer contract disputes, an ADR provider must comply to become, and remain, accredited under Chapter 4 of Part 4.

1617 Part 1 sets out the criteria. These are designed to ensure that ADR providers meet standards of accessibility, expertise, fairness, independence, impartiality, and transparency so that consumers receive better outcomes in resolving disputes with traders.

1618 Part 2 contains supplementary provisions on the interpretation and application of the criteria in Part 1. In particular, paragraph 9 clarifies that the accreditation criteria only apply to ADR providers when it is reasonable to regard them as applicable in relation to the ADR and activities of the ADR provider and any special ADR arrangements that it makes. This recognises that the criteria in Part 1 are criteria in the nature of general principles, not all of which will be relevant in the same way to all forms or contexts of consumer ADR.

1619 This Schedule may be amended in accordance with clause 299, subsections (2) and (3), ensuring that the criteria listed in Part 1 are under review and modified if necessary.

Enforcement of prohibitions etc

Clause 300: Enforcement notices

1620 This clause allows the Secretary of State to issue enforcement notices to an ADR provider for contraventions of Chapter 4.

1621 Subsection (1) specifies the contraventions for which the Secretary of State may give an enforcement notice. These consist of carrying out ADR or making special ADR arrangements without being accredited to do so; charging consumers unauthorised fees for that ADR; breaching accreditation conditions; failing to pay fees required by the Secretary of State; failing to provide information required by the Secretary of State.

1622 Subsection (2) requires that, before deciding to issue an enforcement notice, the Secretary of State must give the provider a chance to make representations about its conduct and whether an enforcement notice should be given.

1623 Subsection (3) specifies that an enforcement notice may require the ADR provider to do, or not do, such things as are specified in the notice in order to ensure compliance with a requirement that has been breached.

1624 Subsection (4) and (5) deal with the contents of enforcement notices and are self-explanatory.

1625 Subsections (6) and (7) enable the Secretary of State to revoke enforcement notices or any requirements they contain and, in the latter case, make consequential changes to any remaining requirements which are not revoked.

1626 Subsection (8) provides that, with permission of the relevant court, the enforcement notice may be enforced as if it is a court order.

1627 Subsection (9) provides authority for the Secretary of State to publish information about enforcement notices. The objective is to enable the Secretary of State to publicise enforcement notices, to bring them to the attention of consumers.

1628 Breach of the requirements of this Chapter may also constitute a relevant infringement to which the civil enforcement regime provided by Chapter 3 of Part 3 of this Bill (enforcement of consumer protection law) apply.

Provision of information etc

Clause 301: ADR information regulations

1629 This clause allows the Secretary of State, by regulations, which are subject to the negative parliamentary procedure, to require ADR providers and other persons to provide the Secretary of State (or other persons to which functions are conferred under clause 305), and/or consumers, with information.

1630 Subsection (2) specifies the persons on whom the requirements may be imposed. These are persons who are or have been: accredited ADR providers; exempt ADR providers; persons carrying out ADR under special ADR arrangements; and, in relation to relevant information (see clause 304, subsection (2)), regulators. The purpose of including regulators is to elicit information about ADR provision in regulated sectors which may, in particular, be useful for ascertaining the appropriateness of exempting, or continuing to exempt, relevant ADR providers.

1631 Subsection (3) limits the purposes for which information may be required, these being publication of information for the benefit of customers and monitoring or evaluating the accreditation regime and the provision and quality of ADR in the United Kingdom.

Clause 302: ADR information directions

1632 This clause allows the Secretary of State to give a direction requiring a person to provide information.

1633 The purpose of this clause is to allow the Secretary of State to require information of a specific kind from a particular person, as and when it is needed, in contrast with the requirements imposed by regulations under clause 301 which are more general in their application and envisage provision of information at regular intervals.

1634 Subsection (1) sets out the Secretary of State's substantive power.

1635 Subsection (2) specifies the persons to whom directions may be given and mirrors clause 301, subsection (2).

1636 Subsection (3) specifies the purposes for which a direction may be given. The purposes mirror those in clause 301, subsection (3) but, in addition, include any other purposes connected with the exercise of the Secretary of State's functions under Chapter 4.

Clause 303: Disclosure of ADR information by the Secretary of State

1637 This clause provides for publication or disclosure of information by the Secretary of State.

1638 Subsection (1) specifies the information to which the clause applies, this is both information provided to the Secretary of State under clauses 301 and 302 as well as information held by the Secretary of State for the purposes of any function of the Secretary of State under Chapter 4. The latter category of information would, for instance, include information relating to any sanctions imposed under clause 296 such as a revocation or suspension of accreditation.

1639 Subsection (2) allows the Secretary of State to publish that information for the purpose of providing information to consumers.

1640 Subsection (3) lists persons to which the information may be disclosed.

1641 Subsections (4) to (6) are self-explanatory.

Clause 304: Meaning of "ADR information" and other terms in sections 301 to 303

1642 This clause defines terms used in clause 301 to 303.

1643 Subsection (1) defines "ADR information".

1644 Subsections (2) and (3) define "relevant ADR information" and this includes information relating to: ADR carried out by a relevant ADR provider; special ADR arrangements made by a relevant ADR provider; ADR carried out in pursuance of those arrangements; and anything done by a regulator which affects the relevant ADR provider in those activities.

1645 Subsection (3) clarifies that, in relation to a regulator, a "relevant ADR provider" is an ADR provider regulated by that regulator whether that ADR provider is accredited or exempt.

1646 Subsection (4) clarifies that references to information about ADR carried out by ADR providers or special ADR arrangements includes information about fees charged to consumers or traders.

Involvement of other bodies in the regulation of ADR providers

Clause 305: Power to provide for other persons to have accreditation functions etc

1647 This clause allows the Secretary of State, by regulations, which are subject to the affirmative parliamentary procedure, to confer certain functions on another person. This might, for instance, allow for some decision-making by a regulator or other person who has expertise in disputes of a particular kind.

1648 Subsection (2) lists the functions that can be conferred.

1649 Subsections (3) and (4) ensure that, when functions are conferred under this clause, the persons on whom the functions are conferred can exchange information with each other and with the Secretary of State (who can similarly disclose information to them). Subsection (3) also enables the regulations to abolish functions conferred by regulations under this clause.

1650 Subsection (5) enables the regulations to amend Chapter 4. This may be necessary to allow relevant requirements of the Chapter to function effectively where functions are conferred on another person, such as for provisions of the kind in subsections (3) and (4). This power is in addition to, and does not limit, the power in clause 331 for the Secretary of State to amend other primary legislation and the ability of regulations to include consequential, supplementary, incidental, transitional or saving provisions under clause 332.

Complaints by consumers to traders

Clause 306: Duty of trader to notify consumer of ADR arrangements etc

1651 This clause requires traders to provide consumers with information about ADR or other complaint resolution arrangements in which the trader is required to participate.

1652 Subsection (1) provides that the clause applies where a trader responds to a complaint from a consumer in relation to a consumer contract.

1653 Subsection (2) illustrates the subject matter of complaints pertaining to a consumer contract to which the clause applies.

1654 Subsection (3) imposes the substantive requirement and is to be read with subsection (4). The requirement arises when the trader communicates the outcome of the complaint. At that point, the trader must inform the consumer about any ADR or other arrangements which

are available to the consumer and in which the trader is required to participate. The obligation ensures that the consumer, if dissatisfied with the outcome of the complaint, is made aware of those arrangements.

1655 Subsection (4) defines "ADR or other arrangement". These are any scheme or other arrangement for securing or facilitating the resolution of disputes or other complaints in which the trader is required to participate by legislation or by a contractual obligation. They are not limited to accredited ADR and are wider than the definition of ADR in clause 289.

1656 Subsection (5) provides that, where a trader does not comply with this clause, the Secretary of State may give that trader an enforcement notice in accordance with clause 300, subsection (1).

1657 Subsection (6) clarifies that the trader notification obligation does not qualify any other obligation a trader may be under to provide information.

Consequential amendments etc and transitional provision

Clause 307: Consequential amendments etc relating to this Chapter

1658 This clause gives effect to Schedule 25 which makes consequential changes to other legislation.

Schedule 25: Chapter 4 of Part 4: consequential amendments etc

1659 This Schedule modifies other legislation for the purpose of Chapter 4 of Part 4.

1660 In particular, this Schedule:

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

Clause 308: Transitional provisions relating to this Chapter

1661 This clause makes transitional provisions.

1662 Subsections (1) and (2) provide that the prohibitions on carrying out ADR under clause 291, subsection (1) and on charging fees to consumers under clause 292, subsection (1) do not apply in relation to ADR started before these prohibitions come into force. Subsection

(3) defines when ADR is started for these purposes, which is when the dispute was first sent to or otherwise communicated to the ADR provider.

1663 Subsection (4) provides that the prohibition in clause 292, subsection (3) on the charging of fees by a person carrying out ADR under special ADR arrangements does not apply to ADR started before that prohibition comes into force.

1664 Subsection (5) provides that the prohibition in clause 291, subsection (2) on a person making special ADR arrangements does not apply in relation to special ADR arrangements made by that person before that prohibition comes into force where that person is an exempt or accredited ADR provider whose exemption or accreditation would cover the making of those special ADR arrangements.

1665 However, subsection (6) provides that, where that prohibition does apply, subsection (5) does not prevent the continuation of special ADR arrangements relating to ADR started before that prohibition comes into force.

1666 Subsection (7) provides that, for the purposes of the transitional provisions in subsections (4) and (6), ADR is taken as starting when the dispute is first referred to the ADR provider making the special ADR arrangements or the person carrying out the ADR under those arrangements, whoever receives it first.

1667 Subsection (8) provides that the requirement under clause 306, subsection (3) to inform consumers about ADR or other arrangements available to them does not apply where the consumer's complaint was received by the trader before the coming into force of that requirement.

Part 5: Miscellaneous

1668 Part 5 deals with cross-cutting provisions across the digital markets, competition and consumer regimes.

1669 Clauses 309 to 316 set out provisions that provide the CMA with information gathering powers enabling it to obtain specified information relevant to the retail of motor fuel. The provisions give the CMA power to request undertakings involved in the distribution, supply or retail of petrol and diesel for information to assess competition in the retail of motor fuel retail and impact on consumers.

1670 Clauses 317 to 323 set out new provisions to facilitate the provision by relevant UK regulators of investigative assistance to overseas regulators who have functions corresponding to those of the UK regulators in relation to competition, consumer protection and digital markets.

1671 Clause 324 amends Part 9 of the Enterprise Act 2002 (information) insofar as it relates to international information sharing. Clause 324 repeals the existing overseas disclosure 'gateway' in section 243 of that Act and replaces it with new provisions governing the ability of the CMA and other UK public authorities to exchange information with overseas public authorities.

1672 Clause 325 introduces a statutory duty of expedition in relation to the CMA's competition and consumer law functions, as well as the CMA's functions relating to the new

digital market's regime. Clause 325 makes provisions regarding the application and extent of the duty of expedition.

1673 Clause 326 amends the Serious Organised Crime and Police Act 2005 to add the CMA to the list of prosecutors specified in section 71 of that Act and make associated provision.

1674 Clause 327 removes the prohibition on a person being a chair of the Competition Appeal Tribunal for more than 8 years.

Chapter 1: Competition in connection with motor fuel

Clause 309: Power to require information about competition in connection with motor fuel

1675 This clause gives the Competition and Markets Authority (CMA) power to request information from undertakings in, or connected with, the distribution, supply or retail of petrol and diesel. Such information should assist the CMA in assessing competition in the retail market for petrol and diesel and to provide updates and advice on proposals to increase competition and benefit consumers. This includes any information, such as estimates, forecasts, and returns. The use of "undertaking" means the CMA will not have the power to issue information notices to individuals, unless that individual is engaged in economic activity in relation to distribution, supply or retail of petrol and diesel, for example a sole trader that operates a filling station.

1676 Subsection (1) sets out that the CMA can request information from undertakings operating in the road fuel supply chain to support the operation of the function. This includes assessing competition in the retail of motor fuel and providing updates, recommendations, and advice on the state of competition in the sector to increase competition or benefit consumers.

1677 Subsection (3) sets out the content requirements for an information notice. The notice must set out the time and the frequency with which the information must be given to the CMA, as well as the form the information must take. For example, a notice might specify how the information should be transferred. The notice must also set out the consequences of not complying with the information request.

1678 Subsection (4) sets out the non-exhaustive requirements that the CMA can place upon businesses in an information request, including the provision of copies of or extracts from information, to obtain or generate information, collect, or retain information and to justify why information has not been given to the CMA.

1679 Subsection (8) outlines definitions and source of definitions for certain words used in this clause. "Motor fuel" means petrol or diesel. These definitions set the parameters for the purposes of the function as outlined in subsection (1).

1680 Subsection (9) allows for the Secretary of State to amend the definition outlined in subsection (8) and is subject to the negative procedure. As the power relates to the detailed technical definitions, it was considered that the matter warrants a degree of scrutiny, but not necessarily prior Parliamentary debate and draft affirmative approval. In addition, the definition used in the amendment comes from the Motor Fuel (Composition and Content) Regulations 1999, which uses powers under section 30 of the Clean Air Act 1993. Regulations

made under that section are subject to the negative procedure and therefore to ensure consistency with that the negative procedure is appropriate.

Clause 310: Penalties for failure to comply with notices under section 309

1681 This clause sets out that the CMA can impose financial penalties on undertakings that fail to comply with an information notice issued under clause 309 without reasonable excuse. This includes:

- failing to comply with an information notice under clause 309;
- destroying, falsifying or concealing any document that is required as part of an information notice under clause 309;
- providing information which is false or misleading;
- providing information which is false or misleading to another undertaking knowing that the information was for the purpose of responding to an information notice under clause 309. (subsection 1)

1682 Subsection (2) sets out a penalty imposed is to be of such amount as the CMA considers appropriate.

1683 Subsection (4) defines the maximum amounts of fixed and daily rate penalties that the CMA can impose under subsection (1). It sets out that the maximum fixed amount is an amount equal to 1% of the total value of the undertaking's turnover (both inside and outside the UK) or a daily rate up to 5% of the total value of the undertaking's daily turnover (both inside and outside the UK).

1684 Subsection (5) sets out how the CMA will calculate daily rates for the purpose of imposing a monetary penalty. Daily penalties are calculated from the date that the undertaking is served notice of the penalty by the CMA. Daily penalties will accumulate until the person complies with the requirement (e.g. the requested information is provided). The CMA has the discretion to determine an earlier date for the amount payable to cease accumulating.

1685 Subsection (6) to (8) allows for the Secretary of State, by way of regulations, to determine the turnover of an undertaking. The power is subject to the negative procedure.

Clause 311: Procedures and appeals

1686 This clause sets out which section of the Enterprise Act 2002 apply for penalties imposed under clause 310. Section 112 covers the main procedural requirements for giving notice of a penalty. Section 113 covers the procedural requirements for payment of a penalty and interest. Section 115 sets out the procedure for recovering a penalty which has not been paid.

Clause 312: Statement of policy on penalties

1687 This clause sets out that the CMA must publish and have regard to a statement of policy in deciding how to make use of the powers to impose penalties under clause 310. It requires the CMA to consult the Secretary of State and then publish the statement of policy, which will include the considerations relevant to determining the nature and amount of any monetary penalty.

Clause 313: Offences etc.

Destroying or falsifying information

1688 Subsection (1) sets out that it is a criminal offence to destroy, falsify or conceal information that has been requested by the CMA. The clause mirrors section 43 of the Competition Act 1998. The offence can only be committed in relation to information that has been requested by the CMA.

False or misleading information

1689 Subsection (2) and (3) sets out that it is a criminal offence to provide information to the CMA which is false or misleading. It also sets out that a person commits an offence if a person knowingly, recklessly, or intentionally gives information to another person that is false or misleading. This clause mirrors section 44 of the Competition Act 1998 and section 117 of the Enterprise Act 2002.

Sentences

1690 Subsection (4) sets out the punishments that can be imposed by the relevant courts on conviction of a criminal offence under subsections (1) and (2).

1691 In England, Wales and Northern Ireland, a summary offence is triable in the Magistrates' Courts and an indictable offence, in the Crown Courts. In Scotland, a summary offence is triable in the Justice of the Peace Courts or the Sheriff Courts, and an indictable offence in the Sheriff Courts or High Court of Justiciary. In Scotland and Northern Ireland, there are statutory limits on fines that can be imposed by courts on conviction. In England and Wales, there is no such limit.

Offences by officers of a body corporate

1692 Subsections (5) to (8) provides for the circumstances in which individual officers of companies, partners of Scottish partnerships and members of limited liability partnerships may be held responsible for the conduct of their companies or partnerships in committing offences. Offences may be attributable to consent and connivance, or to neglect.

Clause 314: Penalties under section 310 and offences under section 313

1693 This clause provides that where a person has been found guilty of a criminal offence committed under clause 313, they will not be required to pay a civil penalty for that same offence. Likewise, where a person has paid a civil penalty for an act of the kind referenced under clause 310, they cannot be criminally convicted for that same offence. The clause does not prevent criminal or civil proceedings from being started where, respectively, a penalty has been imposed but not paid or someone has been charged but not convicted.

Clause 315: Information sharing

1694 This clause provides that the restrictions on the disclosure of information contained in Part 9 of the Enterprise Act 2002 apply to the information that comes to the CMA in connection with the exercise of its functions under the Chapter of Part 5 of the Bill to be formed by clauses 309 to 316. This Chapter 1 of Part 5 of the Bill is added to the list of Specified Functions set out in Schedule 14 of the Enterprise Act 2002. This places any information obtained by the CMA through the exercise of any statutory function under this Chapter in scope of the general restriction on disclosure set out at section 237 of the Enterprise Act 2002. It is a criminal offence under section 245 of the Enterprise Act 2002 to disclose or use

information to which section 237 applies unless that disclosure or use is permitted by Part 9 of the Enterprise Act 2002.

Clause 316: Expiry of this chapter

1695 This clause provides that the Chapter in Part 5 formed by clauses 309 to 316, expires five years after it comes into force, unless the Secretary of State makes regulations extending the period for which the Chapter has effect. This power to extend the period is subject to the affirmative procedure.

Chapter 2: Provision of investigative assistance to overseas regulators

Clause 317: Provision of investigative assistance to overseas regulators

1696 This clause acts as the gateway into the provisions allowing relevant UK regulators to provide investigative assistance to overseas regulators who have functions corresponding to those of the UK regulators in relation to competition, consumer protection and digital markets. Subsection (1) sets out the three core requirements for a relevant regulator in the United Kingdom ("R") to assist an overseas regulator ("O") and introduces a table in subsection (2) which provides more detail regarding the scope of the assistance and the manner in which it may be provided. A "relevant regulator" is one listed in the second column of the table (see definitions in subsection (5) which also defines "overseas regulator").

1697 Subsection (1), paragraph (a) provides that, at O's request, R may assist O in carrying out functions which correspond or are similar to functions of R under a relevant enactment listed in the first column of the table in subsection (2). For example, with regards to competition law, the CMA may use its investigative powers in Part 1 of the Competition Act 1998 (competition) and Part 3 of the Enterprise Act 2002 (mergers) to assist O with equivalent functions overseas. The ability to assist with functions which "correspond" or "are similar" to R's functions is intended to provide some flexibility in assessing the degree to which O and R's functions are comparable. This is in recognition of the fact that while the precise legal nature of statutory provisions may vary between the UK and other jurisdictions, the intended purpose of the provisions and the conduct at which they are directed may be similar. Investigative assistance should be possible where this is the case.

1698 Subsection (1), paragraphs (b) and (c) specify two further conditions for the provision of assistance: that R must consider that it would be appropriate to assist O (further details in relation to this requirement are set out in clause 319) and that except where the request for assistance is made in accordance with a qualifying cooperation arrangement, assistance must be authorised by the Secretary of State (see clause 320). "Qualified cooperation arrangement" is defined in subsection (5) and, for the purposes of this chapter, refers to any government-to-government arrangement or agreement which provides for mutual assistance between the UK and the country or territory of the overseas regulator, in relation to competition or consumer protection matters (including matters relating to digital markets).

1699 The table in subsection (2) specifies which regulators may provide assistance, and identifies the statutory powers which may be exercised and how they can be used. The CMA is the regulator who may provide assistance where O's functions correspond or are similar to the CMA's functions under specified domestic competition and digital markets legislation.

Those enforcers who have investigatory powers for consumer protection purposes under Schedule 5 to the Consumer Rights Act 2015 may use those powers in connection with infringements of overseas laws or other requirements which correspond or are similar to domestic consumer protection laws or requirements (as listed in Schedule 14 to the Bill).

1700 Column 3 in the table in subsection (2) specifies how assistance may be provided. For example, the CMA may exercise its powers under the Competition Act 1998 as if it were carrying out an investigation under section 25 of that Act, and its powers under section 109 of the Enterprise Act 2002 as if providing investigative assistance were a "permitted purpose" for the purposes of that section. This helps ensure that other relevant provisions and safeguards under those Acts which apply where the CMA is using its powers for a domestic competition or merger investigation will apply where those powers are exercised to assist an overseas regulator. This would include, for example, section 30A of Competition Act 1998 (use of statements in prosecutions) which provides protection against self-incrimination in criminal proceedings. In addition, civil sanctions (including those being amended and added through this Bill) and offences for non-compliance with investigatory measures available to R via these enactments in domestic investigations will also be available when investigative assistance is provided (see also the note on subsection (4) below).

1701 Subsection (3) modifies the application of Parts 3 and 4 of Schedule 5 to the Consumer Rights Act 2015 to allow those Parts to operate effectively in the context of the provision of investigative assistance under this clause. Under paragraph (a), paragraphs 13, 19 and 20 of that Schedule, which set out which categories of enforcer may exercise various powers in Parts 3 and 4, are to be disregarded in the context of overseas assistance. Under paragraph (b), a power which is described elsewhere in Parts 3 and 4 as being exercisable by an enforcer of a particular category can only be exercised by R for the purposes of providing assistance if R is an enforcer of that category. Paragraph (c) concerns Part 4 of Schedule 5 to the Consumer Rights Act 2015. In Part 4 of that Schedule, references to the "enforcer's legislation" with regards to an enforcer of the "domestic enforcer" category of enforcer under that Schedule should be interpreted as references to the laws or other requirements in the country or territory of O.

1702 Subsection (4) ensures that where there are references in enactments other than Chapter 1 of Part 5 of the Bill to the functions of a relevant regulator under an enactment specified in the table in subsection (2), the references include those functions when they are exercised to assist an overseas regulator. This means, for example, that section 117 in Part 3 of the Enterprise Act 2002, which makes it an offence to supply false or misleading information to the CMA in connection with its "functions under this Part", will apply to information supplied to the CMA in connection with its functions in gathering information for an overseas regulator.

Clause 318: Requests for investigative assistance

1703 This clause prescribes how O should make a request for assistance.

1704 Subsection (2) explains that a request must be made by O in writing, should describe the matter in respect of which assistance is being requested, and should include details of any penalty or sanction that could be imposed as a result of O exercising the functions in respect of which R's assistance is being requested.

Clause 319: The appropriateness of providing investigative assistance

1705 This clause makes provision about how R is to consider whether it would be appropriate to assist O for the purposes of clause 317, subsection (1), paragraph (b).

1706 Subsection (2) outlines three factors which R must have regard to in considering whether it would be appropriate to provide investigative assistance. Specifically:

a) whether R would be able to exercise its powers under the relevant enactment concerned in a corresponding or similar domestic case,

b) the existence of a regulator-to-regulator or government-to-government cooperation agreement covering competition or consumer protection matters, and

c) whether the matter in respect of which the request was made is considered to be sufficiently serious to warrant R providing investigative assistance.

1707 For example, subsection (2), paragraph (a) should mean that while O will be able to seek assistance from R to gather missing information for the purpose of an investigation being carried out by O, it will not generally be appropriate for R to provide assistance in relation to, for example, a procedural case where O is taking action or imposing sanctions for non-compliance with its investigation if R's powers are not available for such purpose domestically.

1708 Subsection (3) provides that R may consider that it should not provide investigative assistance if O was unable or unwilling to contribute towards the financial cost of providing that assistance.

1709 Subsection (3A) provides that where any of subsections (4), (4A), (4B) or (5) apply, R must consider that it would not be appropriate to assist O (and should therefore reject an incoming request for investigative assistance).

1710 Subsection (4) applies where:

a) R considers that O would not provide corresponding or substantially similar assistance in return. Reciprocity is an important factor in the provision of investigative assistance. However, even if R considers that reciprocal support would not be forthcoming, it may still consider providing assistance to O would be appropriate should there be an overriding UK public benefit in doing so.

b) Providing assistance would be contrary to the UK public interest.

1711 Subsection (4A) applies where assistance is requested concerning a criminal investigation or criminal proceedings and the request is not made under or in accordance with a qualifying cooperation arrangement.

1712 Subsection (4B) applies where R would be unable to share the information gathered with O through any of the disclosure gateways in Part 9 of the Enterprise Act 2002 (including as amended under Chapter 2 of Part 5 of this Bill). This is to ensure that early consideration is given to whether information gathered could be disclosed to O taking into account the safeguards under the disclosure gateways in Part 9 of the Enterprise Act 2002.

1713 Subsection (5) applies where a request relates to a matter where R would not, should the case arise domestically, have the power to use its investigatory powers unless there were

reasonable grounds for suspecting a breach of the law; and R does not have reasonable grounds to suspect a breach of the law of the country of O which corresponds or is similar to the equivalent UK law. Subsection (6) provides that a certificate from O stating there has, or may have been, a breach of the overseas law is to be regarded as conclusive.

Clause 320: Authorisation of the provision of investigative assistance

1714 The provision of investigative assistance by R is subject to authorisation by the Secretary of State unless it is provided under or in accordance with a qualifying cooperation arrangement - see clause 317, subsection (1), paragraph (c). This clause sets out how the Secretary of State authorises R to provide assistance to O.

1715 Subsection (2) provides that the Secretary of State can authorise individual requests or give a general authorisation for requests of a particular description by, for example, granting a general authorisation for a UK authority to carry out any request received from a specific overseas regulator in respect of a particular activity (such as gathering information relevant to a merger review) under the terms of a specific regulator-to-regulator international cooperation agreement. A general authorisation can be withdrawn at any time (subsection (3)). The Secretary of State must publish the giving and the withdrawal of any general authorisation (subsection (4)).

1716 Subsection (5) outlines the factors to which the Secretary of State must have regard when considering whether to approve the provision of investigative assistance. The Secretary of State must have regard to whether the request is made in accordance with any arrangements or agreements to which the UK is a party (whether legally binding or non-legally binding), whether it would be more appropriate for R to carry out an investigation (under one of the enactments listed in the table in clause 317, subsection (2)) solely for its own purposes or that action should be taken in relation to the subject matter of the request by another UK body or by a body in a country or territory other than the requesting regulator's country or territory; or whether any assistance which R provides would be contrary to the public interest.

1717 Subsection (6) details that the Secretary of State may approve R's provision of assistance to O but impose conditions on the assistance which R provides. These conditions are set out in subsection (7) and enable the Secretary of State to ensure that any assistance provided is appropriate.

Clause 321: Notifications in respect of requests for investigative assistance

1718 This clause states that R must notify the Secretary of State where it has received a request for assistance from O and is inclined to provide the requested assistance. This requirement does not apply where the Secretary of State has previously approved the assistance requested as part of a general authorisation (subsection (2), paragraph (b)) or where the overseas regulator is making a request in accordance with a qualifying cooperation agreement (subsection (1A)). Subsection (2) requires R to notify O as to whether R will be providing the assistance requested and, whether there are any conditions imposed on that assistance by the Secretary of State.

Clause 322: Guidance in connection with investigative assistance

1719 This clause places a duty on the CMA to prepare and publish guidance in connection with the making and considering of requests for investigative assistance and the provision of

such assistance. Guidance must be approved by the Secretary of State (subsection (3)) and consulted on (subsection (4)).

1720 Subsection (5) stipulates that regulators with powers to provide investigative assistance under this Chapter of Part 5 of the Bill (i.e. consumer protection enforcers as well as the CMA) must have regard to the guidance published by the CMA under this section.

Clause 323: Amendments to other legislation

1721 This clause details that Schedule 26 makes a series of consequential amendments to other pieces of legislation to accommodate the provision of investigative assistance brought forward by this Act.

Schedule 26: Provision of investigative assistance to overseas regulators

1722 This Schedule makes a number of amendments to other legislation as follows:

Amendments to Part 3 of the Enterprise Act 2002	There are time limits which apply for the CMA to impose civil penalties for failures to comply with or obstruction in connection with merger information notices issued by the CMA under section 109 of the Enterprise Act 2002. Section 110A of that Act is amended to include a provision to specify the time limit in a case where the section 109 power is being used for purposes of providing investigative assistance. Section 111 is also amended to provide that where the CMA has imposed a daily default penalty in connection with an information notice which it has issued to assist O, such penalty will cease to accumulate on the day on which O no longer requires assistance. Section 120 of the Enterprise Act 2002 concerns the right for a person aggrieved by a decision to appeal to the Competition Appeal Tribunal. An amendment is made to extend this right to decisions of the CMA or the Secretary of State in connection with the CMA's provision of investigative assistance to an overseas regulator.
Amendments to Part 9 of the Enterprise Act 2002	Chapter 2 of Part 5 of this Bill replaces section 243 in Part 9 of the Enterprise Act 2002 with new sections 243A to 243F. New section 243E relates to the directions which the Secretary of State can make preventing disclosures to an overseas authority. An amendment is made to clarify that the Secretary of State may not make a direction as set out in section 243E where the disclosure relates to investigative assistance provided by virtue of Chapter 2 of Part 5 of the Bill (i.e. assistance which has been authorised by the Secretary of State or is provided under a qualifying cooperation arrangement).
Amendments to the Competition Act 1998	Section 25A of the Competition Act 1998 deals with the CMA's power to publish notice of investigation. This section is amended to permit the CMA to publish a Section 25A notice in connection with the use of its investigatory powers under Part 1 of the Competition Act 1998 to assist O.

	Section 25B (duty to preserve documents relevant to investigations) is also amended to ensure that the duty to preserve should apply to investigative assistance being carried out by the CMA. Section 40A is amended to provide that the daily penalty for failure to comply with a requirement imposed by the CMA in connection with the provision of investigative assistance to O will cease to run where O no longer requires assistance.

Chapter 3: Miscellaneous

Clause 324: Disclosing information overseas

1723 This clause relates to the ability of the CMA and other UK public authorities to exchange specified information with overseas public authorities. It replaces the existing overseas disclosures gateway under section 243 in Part 9 of the Enterprise Act 2002 (which sets out the circumstances under which public authorities may share specified information with overseas public authorities) with three new gateways. These gateways allow for overseas disclosures in defined circumstances and are subject to safeguards necessary to protect specified information.

1724 Part 9 of the Enterprise Act 2002 sets out general restrictions and conditions for the disclosure of specified information held by public authorities. "Specified information" (as defined in section 238 of the Enterprise Act 2002) is information which comes to a public authority in connection with the exercise of any of the functions that it has under competition and consumer enforcement related Parts of the Enterprise Act 2002, under legislation listed in Schedule 14 of the Enterprise Act 2002 or under any secondary legislation specified by the Secretary of State in an order.

1725 Subsection (2) replaces the existing gateway in section 243 of the Enterprise Act 2002 with new sections 243A-243F.

243A - Overseas disclosures for both overseas and domestic purposes

1726 New section 243A provides a gateway for a UK public authority to disclose specified information to an overseas public authority for the purposes of facilitating both its own functions and those of the overseas public authority.

1727 Subsection (1) provides that a UK public authority may make an overseas disclosure where this is intended to support both:

a) the delivery of any of its own statutory functions (subsection (1), paragraph (a)), including functions under any enactment in an Act of the Scottish Parliament, Northern Ireland legislation or any subordinate legislation (as specified in subsection (3)), and

b) the delivery by the overseas public authority of any of its functions in connection with any criminal investigations or proceedings, or civil investigations or proceedings that relate to the enforcement of "relevant law" (subsection (1), paragraph (b)).

1728 Subsection (4) defines "any relevant law" to encompass a range of competition, consumer protection and other related matters. It includes disclosure for the purposes of overseas civil proceedings in connection with breaches of legislation, obligations or rules of law that are equivalent to those listed in Schedule 14 of the Bill.

1729 Together subsection (1), paragraph (b) and subsection (4) are designed to ensure that specified information can be disclosed through this gateway where an overseas authority has criminal enforcement functions of any kind or civil enforcement functions aligned with those of UK authorities who enforce competition, digital competition or consumer law.

1730 Similar to the corresponding provision in the existing gateway under section 243 of Part 9 of the Enterprise Act 2002, subsection (2) of section 243A sets limits on disclosures. It prevents a UK public authority from disclosing to an overseas public authority:

a) information which is held by a person who is a private designated enforcer for the purposes of Chapter 3 of Part 3 of the Bill;

b) certain commercially sensitive information including, for example, information in connection with market investigations under Part 4 of the Enterprise Act 2002, and

c) legacy information which is defined in subsection (5) and includes information in connection with undertakings and orders arising out of past monopoly and merger investigations under the Fair Trading Act 1973 and information held before 21st July 2021 in connection with merger investigations under Part 3 of the Enterprise Act 2002.

243B – Overseas disclosures for overseas purposes only

1731 Section 243B provides a gateway for a UK public authority to make a disclosure to an overseas public authority solely for the purpose of facilitating the enforcement functions of the overseas public authority (as those functions are defined in section 243A, subsection (1), paragraph (b)). The exceptions to disclosure set out in subsection (2) of section 243A apply in the same way to the section 243B gateway.

243C – Overseas disclosures for designated cooperation arrangement purposes

1732 Section 243C provides a gateway for overseas disclosures by a UK public authority for the purposes of facilitating the terms of a "designated cooperation arrangement". A UK authority may enter into an agreement or non-legally binding arrangements with an overseas counterpart setting out how they intend to cooperate in relation to, for example, information sharing or coordinating their activities in connection with investigations. Section 243C confers a power on the Secretary of State to designate such arrangements and sets out the factors that they must have regard to or must satisfy themselves of before doing so.

1733 Subsection (1) allows specified information to be shared with an overseas public authority for a purpose permitted by a designated cooperation arrangement. This information sharing gateway does not specify, for example, the precise purposes for which specified information may or may not be shared or dictate appropriate safeguards. This is because this detail will be provided for in individual cooperation agreements or arrangements with the process of designation by the Secretary of State providing assurance that information will only be shared where appropriate and subject to relevant safeguards.

1734 A designated cooperation arrangement is defined in subsection (2) as an arrangement or agreement, which meets all of Conditions A to D that are set out in subsections (3) to (6):

a) Condition A is that the arrangement is between either the UK and another country or territory, or directly between the UK and the overseas authority;

b) Condition B is that the arrangement relates to cooperation between either the UK and the overseas country or territory; or between the UK and the overseas authority in connection with the enforcement functions mentioned in section 243A(1)(b);

c) Condition C is that the arrangement provides for reciprocal assistance to be given for those purposes; and

d) Condition D is that the arrangement is designated by the Secretary of State by regulations (subject to the negative resolution procedure as set out in subsection (10)).

1735 Subsection (7) provides that before designating a cooperation arrangement, the Secretary of State must have regard to whether it contains provision restricting or preventing (a) the use of information disclosed under the arrangement for a purpose other than the one for which it was disclosed and (b) its further disclosure to another person for any reason.

1736 In addition, under subsection (8), the Secretary of State cannot designate an agreement or arrangement unless they are satisfied that there will be appropriate protection against self-incrimination in criminal proceedings and in relation to the storage and disclosure of confidential information (as defined in new section 246A of the Enterprise Act 2002 inserted by clause 324, subsection (5)). Subsection (9) states that protection in relation to self-incrimination and the storage and disclosure of information will be adequate if it corresponds, or is substantially similar, to that provided for in any part of the United Kingdom.

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

1737 Section 243D sets out additional restrictions on the use and further disclosure by overseas public authorities of information disclosed through the gateways in sections 243A (disclosure of information for facilitating both overseas and domestic purposes) and section 243B (disclosure of information for overseas purposes only).

1738 Subsections (2) and (3) concern restrictions on the use and further disclosure of information disclosed under the section 243A gateway to facilitate the exercise by the disclosing UK authority of any of its statutory functions. Subsection (2) sets out that information disclosed for these purposes cannot be used by the overseas authority for any purpose other than the one for which it was originally disclosed unless the disclosing UK authority consents to use for another purpose and that purpose is also to facilitate its own functions. Subsection (3) provides similarly that information disclosed to facilitate the functions of a UK authority must not be further disclosed by the overseas authority unless the UK authority gives its consent and the further disclosure also facilitates a function of the UK authority. Consent may be given either subsequently or at the point the information is originally disclosed.

1739 Subsections (5) and (6) of section 243D apply to information disclosed under either the section 243A or the section 243B gateway to facilitate the exercise of any of the overseas authority's enforcement functions as set out in section 243A, subsection (1), paragraph (b). Subsection (5) prevents information disclosed for these purposes from being used by the

overseas public authority for any purpose other than the one for which it was originally disclosed unless the disclosing UK authority consents to its use for another purpose and that other purpose is also to facilitate one of the overseas authority's enforcement functions.

1740 Similarly, subsection (6) provides that information disclosed to facilitate an overseas authority's enforcement functions must not be further disclosed by the overseas authority unless the UK authority gives its consent and the further disclosure also facilitates an overseas enforcement function. Again, consent may be given either subsequently or at the point the information is originally disclosed.

1741 Subsection (7) specifies that where a UK authority is deciding whether to give consent under any of the relevant provisions of section 243D for an overseas authority to use or further disclose information, it must have regard to the considerations set out in section 243F in the same way that it would have to when making an initial disclosure under the relevant gateway.

1742 Subsection (8) makes it clear that the restrictions in section 243D do not prevent any use and further disclosure of information by an overseas public authority that is required under the law of the country or territory of the authority.

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

1743 Section 243E provides the Secretary of State with a power to prevent disclosure of information to overseas public authorities via the new gateways in sections 243A and 243B. This replaces the existing power to make such a direction in section 243, subsection (4) of the Enterprise Act 2002.

1744 Subsection (1) provides that the Secretary of State may direct that information should not be disclosed overseas under section 243A or 243B if they think the proceedings or investigation for which the information has been requested would be more appropriately carried out by authorities in the UK or in another country. Subsection (3) requires the Secretary of State to take appropriate steps to bring any direction made under subsection (1) to the attention of persons likely to be affected by it.

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

1745 To ensure that information shared via the new gateways in sections 243A and 243B is appropriately protected, section 243F sets out the factors to which a UK public authority must have regard before making a disclosure.

1746 Under subsection (2), when deciding whether to make a disclosure to an overseas public authority under section 243A for the purpose of facilitating both its functions and the functions of the overseas public authority, a UK public authority must have regard to the existence of appropriate protections against self-incrimination in criminal cases and in relation to the storage and disclosure of confidential information (as defined in new section 246A of the Enterprise Act 2002 inserted by clause 324, subsection (5)).

1747 Under subsection (3), when a UK public authority is deciding whether to make a disclosure to an overseas authority under section 243B for the purpose of facilitating the functions of the overseas authority only, the UK public authority must have regard both to the considerations in subsection (2) and to the following additional considerations:

a) whether the reason for the request is sufficiently serious to justify disclosure,

b) whether the disclosure would further the aims or purposes of any convention or treaty between the United Kingdom and the overseas country relating to cooperation in connection with competition (including matters relating to digital markets (Part 1 of this Bill)) or consumer protection,

c) the existence of any mutual assistance arrangements with the requesting country covering the kind of information protected under Part 9, and

d) whether a body or person in the overseas country would provide corresponding or substantially similar assistance to the UK public authority.

1748 Subsection (4) states that protection will be appropriate if it corresponds or is substantially similar to that provided in any part of the United Kingdom.

1749 Subsections (5) and (6) give the Secretary of State a delegated power to alter, add to or remove any of the considerations set out in subsections (2) and (3) by regulations made by statutory instrument. The exercise of this power is subject to the negative resolution procedure which is consistent with the existing arrangements under section 243 of the Enterprise Act 2002. This procedure is appropriate because the power is limited as the Secretary of State would not be able to use it in ways which reduced the protections provided by, for example, the data protection legislation or Article 8 of the European Convention on Human Rights, and the safeguards provided for in section 244 of the Enterprise Act 2002.

1750 Subsection (3) of clause 323 makes consequential amendments to section 244 of the Enterprise Act 2002 to update subsection (2) and (3) in the light of the new definitions of "commercial information", "private information" and "sensitive information" included in new section 246A of the Enterprise Act 2002.

1751 Subsection (4) of clause 323 makes a consequential amendment to section 245 of the Enterprise Act 2002 which deals with offences related to information sharing. The effect of this amendment (which replicates the existing position under section 243) is that a person will have committed an offence if they disclose information in contravention of a direction given by the Secretary of State under section 243E preventing overseas disclosure.

1752 Subsection (5) of clause 323 replaces section 246 of Enterprise Act 2002 with new section 246A (interpretation) which includes a new definition of "overseas public authority" and definitions of "confidential information", "commercial information", "private information" and "sensitive information".

1753 Subsection (6) of clause 323 makes a consequential amendment to section 59, subsection (6) of the Companies (Audit, Investigations and Community Enterprises) Act 2004.

Clause 325: Duty of expedition on the CMA and sectoral regulators

1754 This clause makes provision for a duty of expedition on the CMA (and the sector regulators where relevant (see Schedule 27) in relation to specified competition, consumer and digital markets functions, expanding and replacing the duty which previously applied in relation to its functions in relation to mergers under Part 3 of the Enterprise Act 2002. It further makes amendments to sector specific legislation to impose an equivalent duty when sector regulators exercise competition functions.

1755 Subsection (1) inserts a new subsection (4) into section 25 of the Enterprise and Regulatory Reform Act 2013 so that, when making any decision, or otherwise taking action, for the purposes of any of its functions listed in Schedule 4A the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable. The obligation applies to all steps of any relevant investigatory, regulatory or enforcement process.

1756 Subsection (2) inserts Schedule 4A into the Enterprise and Regulatory Reform Act 2013 and sets out the competition, consumer and digital markets functions to which the duty of expedition applies. The functions listed are those where the CMA has casework functions.

1757 Subsection (3) repeals the former duty of expedition which applied in relation to the CMA's merger functions under Part 3 of the Enterprise Act 2002, and the modifications made to the application of duty by the Water Mergers (Modification of Enactments) Regulations 2004 (S.I. 2004/3202) for the purposes of the water merger regime set out in the Water Industry Act 1991.

1758 Subsection (4) gives effect to Schedule 27 which amends the relevant sectoral legislation to apply an equivalent duty of expedition to sector regulators when exercising competition functions.

Schedule 27: Duty of expedition on sectoral regulators in respect of their competition functions

1759 This Schedule amends the relevant sectoral legislation to apply a duty of expedition to regulators when they exercise competition functions under Part 1 of the Competition Act 1998 or Part 4 of the Enterprise Act 2002. In relation to concurrent functions under Part 1 of the Competition Act 1998, the concurrent regulators exercise some functions which are not listed in Schedule 4A to the Enterprise and Regulatory Reform Act 2013. To ensure the regulators are in a consistent position with the CMA, the amendments made to the sectoral legislation ensure that the duty applies only to the extent that a function under Part 1 of the Competition Act 1998 is both exercisable concurrently by the sector regulator, and specified in the new Schedule 4A.

1760 Paragraphs (1) and (2) insert a duty of expedition into sections 61 and 63 of the Civil Aviation Act 2012 and section 86 of the Transport Act 2000, which applies when the Civil Aviation Authority exercises its concurrent competition functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.

1761 Paragraph (3) inserts a duty of expedition into sections 234I and 234J of the Financial Services and Markets Act 2000 which apply when the Financial Conduct Authority (FCA) exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.

1762 Paragraphs (4), (5) and (6) insert a duty of expedition into Article 29 of the Water and Sewerage Services (Northern Ireland) Order 2006 and Article 23 of the Gas (Northern Ireland) Order 1996, and Article 46 of the Electricity (Northern Ireland) Order 1992 respectively. These apply when the Northern Ireland Authority for Utility Regulation exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.

1763 Paragraph (7) inserts a duty of expedition into sections 370 and 371 of the Communications Act 2003 which apply when the Office of Communication (Ofcom) exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.

1764 Paragraphs (8) and (9) insert a duty of expedition into section 36A of the Gas Act 1986 and section 43 of the Electricity Act 1989 which apply when the Office of Gas and Electricity Markets (Ofgem) exercise concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.

1765 Paragraph (10) inserts a duty of expedition into section 67 of the Railways Act 1993 which applies when the Office of Rail and Road (ORR) exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.

1766 Paragraph (11) inserts a duty of expedition into sections 59 and 61 of the Financial Services (Banking Reform) Act 2013 which applies when the Payment Systems Regulator exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998.

1767 Paragraph (12) inserts a duty of expedition into section 31 of the Water Industry Act 1991 which applies when the Water Services Regulation Authority (Ofwat) exercises concurrent functions under Part 4 of the Enterprise Act 2002 and Part 1 of the Competition Act 1998 that are concurrent with the CMA.

Clause 326: Offenders assisting investigations and prosecutions: powers of the CMA

1768 This clause amends section 71 of the Serious Organised Crime and Police Act 2005 to add the CMA to the list of prosecutors specified in that section.

1769 Subsection (2) amends section 71, subsection (4) to add the CMA to the list of specified prosecutors.

1770 Subsection (3) amends section 71, subsection (6A) so that the CMA is included in the list of prosecutors who are permitted to designate only one chief prosecutor at a time and one alternative prosecutor for when they are unavailable.

1771 Subsection (4) inserts a new section 71, subsection (8) which prohibits the CMA from giving a notice providing immunity from prosecution under section 71, but allows it to exercise the other powers available to specified prosecutors. This has the effect of allowing the CMA to make a formal agreement regarding the use of evidence against an assisting offender, in accordance with section 72 Serious Organised Crime and Police Act 2005. It further means that the provisions at sections 74 and sections 387 and 388 of the Sentencing Act 2020 (in respect of England and Wales) and sections 73 to 74 of the Serious Organised Crime and Police Act 2005 (in respect of Northern Ireland) in relation to reduction in sentence for assistance to prosecution, and review by the courts of sentence, will apply to any written agreements made between an assisting offender and the CMA.

Clause 327: Removal of limits on the tenure of a chair of the Competition Appeal Tribunal

1772 This clause amends paragraph 2 of Schedule 2 to of the Enterprise Act 2002 to remove the prohibition on a person being a chair of the Competition Appeal Tribunal for more than eight years.

Part 6: General

Clause 328: Interpretation

1773 This clause defines abbreviations and terms that are used throughout the whole Bill.

1774 In relation to the definition of "digital content", "data" would include software.

Clause 329: Notices under this Part

1775 This clause sets out the process for giving notices under Part 1 and 3 of the Bill, and the new Chapter 1 of Part 5 of the Bill to persons within and outside of the UK, including to business entities registered or operating outside the UK.

1776 Subsection (2) sets out four main means of service applicable to notices to be given to any person whether an individual or an artificial entity (referred to here, in either case, as the "recipient").

1777 Subsections (6) and (7) expand on the meaning of a recipient's proper address for the purposes of subsection (2), paragraphs (b) and (c), including, in relation to partnerships and any other type of firm, provision for service to the recipient's principal office.

1778 Subsection (8) expands on the meaning of a recipient's email address for the purposes of subsection (2), paragraph (d).

1779 Subsections (7) and (8) respectively provide, where no other definition of the recipient's proper address or (as the case may be) the recipient's email address applies, for service to an address, or email address, by means of which the enforcer reasonably believes that the notice will come to the attention of the recipient.

1780 Subsections (3) to (5) provide that service on each of the listed kinds of business entity can be effected by serving on an individual with the specified office or role in relation to the entity. The means of service provided for service on recipients in subsection (2) and related subsections equally apply for the purposes of service on the specified individual.

Clause 330: Financial provision

1781 This clause sets out that expenditure incurred under the terms of this Bill is to be met from supplies provided by Parliament.

Clause 331: Power to make consequential provision

1782 This clause confers a power on the Secretary of State to make provision that is consequential on this Bill or any provision made under it. This includes the ability to amend provisions made by enactments (as defined in clause 328) (but only in relation to any enactment passed or made before the end of the Parliamentary Session in which this Bill is

passed as an Act). An enactment in this context includes an Act of the UK Parliament, primary legislation made by the devolved administrations and assimilated direct legislation.

1783 This power is exercised by way of regulations. The use of this power to amend, repeal or revoke provisions made in primary legislation is subject to the affirmative Parliamentary procedure (see clause 332(3)), otherwise the negative procedure applies.

Clause 332: Regulations

1784 This clause sets out various procedural aspects relevant to the making of regulations under the Bill by statutory instrument (except for commencement regulations made under clause 334).

1785 Subsections (3) and (4) explain what is meant by references in the Bill to the affirmative procedure and the negative procedure. References to "the affirmative procedure" are to the draft affirmative procedure, whereby regulations must be debated and affirmed by both Houses of Parliament before they can be made. Under the negative procedure, regulations must be laid after making, and can be annulled by resolution in either House.

Clause 333: Extent

1786 This clause sets out the territorial extent of the Bill. The Bill extends to the whole of the UK.

Clause 334: Commencement

1787 This clause outlines the details of the commencement of the Bill. Generally, commencement will be by way of regulations made by the Secretary of State.

1788 The exceptions are Part 6 of the Bill and any powers to make regulations (and any provisions necessary to enable the making of regulations), which will commence on Royal Assent. In addition, clause 126 which amends section 47C of the Competition Act 1998 and applies retrospectively, comes into force on Royal Assent, and the amendments to Part 3 of the Enterprise Act 2002 made by clause 129 and Schedule 6 in connection with the investigation of mergers involving energy network enterprises will commence two months after Royal Assent.

1789 There is power for the Secretary of State to commence different provision on different days, and to make transitional or saving provision in relation to commencement.

Clause 335: Short title

1790 This clause establishes the short title of this legislation, when enacted, as the Digital Markets, Competition and Consumers Act 2023.

Commencement

1791 Clause 334 provides for the commencement of the provisions in this Bill.

1792 Part 6 comes into force on the day of Royal Assent. For the most part these are powers to make consequential and financial provision. Provisions which confer powers to make regulations, and provisions which are necessary for enabling the exercise of such powers on or after the day on which Royal Assent is given, come into force on Royal Assent.

1793 Clause 126 which amends section 47C of the Competition Act 1998 and applies retrospectively, comes into force on Royal Assent, and the amendments to Part 3 of the Enterprise Act 2002 made by clause 129 and Schedule 6 in connection with the investigation of mergers involving energy network enterprises will commence two months after Royal Assent.

1794 The remaining provisions of this Act will come into force on such day as the Secretary of State may appoint by regulations. Different days may be appointed for different purposes.

Financial implications of the Bill

1795 The monetised costs and benefits of the Bill have been set out in the accompanying impact assessment.

Parliamentary approval for financial costs or for charges imposed

1796 A money resolution is required where a bill gives rise to, or creates powers that could be used so as to give rise to, new charges on the public revenue (broadly speaking, new public expenditure). This Bill requires a money resolution because it confers new functions on the CMA, which will result in a significant increase in its costs. This is particularly the case for Part 1, which establishes the new pro-competition regime for digital markets.

1797 This Bill also requires a ways and means resolution. Generally, a ways and means resolution is required where a bill creates or confers power to create new charges on the people (broadly speaking, new taxation or similar charges). The Bill requires a ways and means resolution because it provides for the payment of receipts not arising from taxation into the Consolidated Fund of the United Kingdom through its levy on designated undertakings and through financial penalties applicable as part of the consumer and competition administrative enforcement regimes. A ways and means resolution is also required because of the Bill's penalty charging provisions; the receipts from penalties are also payable into the Consolidated Fund of the United Kingdom.

1798 The House of Commons approved the money resolution and ways and means resolution at Second Reading on 17 May 2023.

Compatibility with the European Convention on Human Rights

1799 The Government considers that the Bill is compatible with the European Convention on Human Rights. Accordingly, Lord Offord of Garvel has made the following statement under section 19(1)(a) of the Human Rights Act 1998: "In my view, the provisions of the Bill are compatible with the Convention rights".

1800 The Government's analysis underpinning this statement can be found in the ECHR Memorandum published alongside the Bill.

Compatibility with the Environment Act 2021

1801 Lord Offord of Garvel is of the view that the Bill as brought from the House of Commons does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

Related documents

1802 The following documents are relevant to the Bill and can be read at the stated locations:

Digital Markets

- Consultation: A new pro-competition regime for digital markets[5]
- Government's Consultation Response: A new pro-competition regime for digital markets[6]
- Unlocking Digital Competition: Report of the Digital Competition Expert Panel[7]
- CMA Market study final report: Online platforms and digital advertising[8]
- CMA Market study final report: Mobile ecosystems[9]
- Impact Assessment: A new pro-competition regime for digital markets[10]
- House of Lords: Communications and Digital Committee Report - *Free for all? Freedom of expression in the digital age*[11]
- Relevant overseas legislation: EU's Digital Markets Act[12]

Competition and Consumer Protection Law

- Consumer Green Paper: Modernising Consumer Markets[13]
- Reforming Competition and Consumer Policy consultation[14]
- Government Consultation Response: Reforming Competition and Consumer Policy[15]
- Letter from Lord Tyrie as Chair of the CMA to the Secretary of State at the Department

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073164/E02740688_CP_657_Gov_Resp_Consultation_on_pro-comp_digital_markets_Accessible.pdf

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

[8] https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138104/Mobile_Ecosystems_Final_Report_amended_2.pdf

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003915/DMU_Impact_Assessment.pdf

[11] https://publications.parliament.uk/pa/ld5802/ldselect/ldcomuni/54/54.pdf

[12] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

[13] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699937/modernising-consumer-markets-green-paper.pdf

[14] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf

[15] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1069663/reforming-competition-consumer-response-cp656-web-accessible.pdf

for Business, Energy and Industrial Strategy[16]

- CMA's response to CitA's Super-complaint on the Loyalty Penalty[17]
- Relevant documents from the BEIS Select Committee inquiry on 'Post-pandemic economic growth: State Aid and Post-Brexit Competition Policy[18]
- Consumer Protection Survey[19]
- John Penrose MP's independent report to HM Government ('Power to the People')[20]
- CMA State of Competition Report (2020)[21]
- CMA 'State of Competition' Report (2022)[22]
- Smarter regulation: improving price transparency and product information for consumers[23]
- Package travel legislation: updating the framework[24]

[16] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf

[17] https://www.gov.uk/cma-cases/loyalty-penalty-super-complaint

[18] https://committees.parliament.uk/work/1534/postpandemic-economic-growth-state-aid-and-post-brexit-competition-policy/publications/

[19] https://www.gov.uk/government/publications/consumer-protection-study-2022

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf

[21] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf

[22] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1075230/State_of_Competition.pdf

[23] https://www.gov.uk/government/consultations/smarter-regulation-improving-price-transparency-and-product-information-for-consumers

[24] https://www.gov.uk/government/calls-for-evidence/package-travel-legislation-updating-the-framework

Annex A – Territorial extent and application in the United Kingdom

1803 The Bill extends and applies to England and Wales, Scotland, and Northern Ireland. Competition policy and internet services are reserved matters in all three jurisdictions. Consumer protection policy is reserved for Wales and Scotland, and devolved to Northern Ireland.[25]

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
1 Digital Markets Clauses 1-114, 116-117, Schedules 1-2	Yes	Yes	No	Yes	No	Yes	No
2 Digital Markets Clause 115	Yes	Yes	No	Yes	No	No	No
3 Competition Clauses 118-145, Schedules 3-13	Yes	Yes	No	Yes	No	Yes	No
4 Enforcement of Consumer Protection Law Clauses 146-221, Schedules 14-18	Yes	Yes	No	Yes	No	Yes	Yes
5 Consumer Rights and Disputes Clauses 222-308, Schedules 19-25	Yes	Yes	No	Yes	No	Yes	Yes
6 Competition in connection with motor fuel Clauses 309-316	Yes	Yes	No	Yes	No	Yes	No
7 Miscellaneous - investigative assistance Clauses 317 - 323 Schedule 26	Yes	Yes	No	Yes	No	Yes	Yes

[25] References in Annex A to a provision being within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

8 Miscellaneous - information sharing Clause 324	Yes	Yes	No	Yes	No	Yes	Yes
9 Miscellaneous – duty of expedition sharing Clauses 325	Yes	Yes	No	Yes	No	Yes	Yes
10 Miscellaneous - Offenders assisting investigations and prosecutions: powers of the CMA Clause 326 Removal of limits on tenure of a chair of the Competition Appeal Tribunal Clause 327	Yes	Yes	No	Yes	No	Yes	No
11 General Clauses 328-335	Yes	Yes	No	Yes	No	Yes	No

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Digital Markets, Competition and Consumers Bill as brought from the House of Commons on 22 November 2023 (HL Bill 12).

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