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

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Uk Green Investment Bank Plc

Summary and Background

23. This Part of the Act makes provision relating to the UK Green Investment Bank plc.

24. The UK Green Investment Bank plc is a public company established by the Secretary of State under the Companies Act 2006 ("CA 2006") to facilitate and develop investment in the green economy.

25. The following sections have two main purposes. The first is to ensure that the UK Green Investment Bank plc engages only in activities that contribute to achieving one or more of the statutory 'green purposes' and that its investment activities would, taken as a whole, be likely to contribute to a reduction of global greenhouse gas emissions. The second is to require the Secretary of State to provide an undertaking to the UK Green Investment Bank plc in order to facilitate its operational independence.

26. The sections also permit the Secretary of State to provide funding to the UK Green Investment Bank plc on an ongoing basis, as well as imposing certain enhanced reporting and accounting obligations on the Bank upon designation.

Section 1: The green purposes

27. *Subsection (1)* defines the "green purposes" to which the UK Green Investment Bank plc's activities should be directed. Subsection (1) sets out the following green purposes:

- the reduction of greenhouse gas emissions;
- the advancement of efficiency in the use of natural resources;
- the protection or enhancement of the natural environment;
- the protection or enhancement of biodiversity; and
- the promotion of environmental sustainability.

28. By way of example, the Board of UK Green Investment Bank plc could consider that making investments in offshore wind will reduce greenhouse gas emissions, and that investments in energy from waste generation will promote environmental sustainability.

29. *Subsection (2)* provides that the term 'greenhouse gas' is to have the meaning given by section 92(1) of the Climate Change Act 2008, which definition itself follows that used in the Kyoto Protocol.

Section 2: Designation of the UK Green Investment Bank

30. *Subsection (1)* of section 2 introduces a power for the Secretary of State to designate the UK Green Investment Bank plc by order for the purposes of sections 3 to 6, subject to three conditions being met.

31. S*ubsections (2)* and *(3)* set out the first two conditions. These require the Secretary of State to be satisfied that the UK Green Investment Bank plc's statement of objects, in its articles, is drafted in terms that will ensure that this company engages only in activities that contribute to achieving one or more of the statutory 'green purposes' stated in section 1 and that its investment activities would, taken as a whole, be likely to contribute to a reduction of global greenhouse gas emissions.

32. S*ubsection (5*) sets out the third condition, which is that the Secretary of State must have provided the UK Green Investment Bank plc with an operational independence undertaking and laid this before Parliament. The purpose of the operational independence undertaking is to facilitate the UK Green Investment Bank plc's ability to operate independently, so that it can make investments that it considers appropriate in the light of its statement of objects, at arm's length from Government.

33. *Subsection (6)* introduces a limitation on the power to designate contained in subsection (1). The Secretary of State may only exercise this power if the UK Green Investment Bank plc is wholly owned by the Crown. S*ubsection (7*) provides that an order under subsection (1) cannot be amended or revoked.

34. *Subsection (8)* provides that the power in subsection (1) is subject to the affirmative resolution of Parliament.

Section 3: Alteration of the objects of the UK Green Investment Bank

35. *Subsection (1)* provides that, where the Secretary of State has made an order designating the UK Green Investment Bank plc under subsection (1) of section 2, the UK Green Investment Bank plc may not alter the statement of objects in its articles of association, subject to two exceptions.

36. The first exception is where a court or other relevant authority having the power to do so orders a change to the UK Green Investment Bank plc's articles of association. The second exception is where the Secretary of State has made an order approving the proposed alteration to the UK Green Investment Bank plc's statement of objects.

37. *Subsection (2)* provides a limitation on the power provided in subsection (1)(b). The Secretary of State may only exercise the power to approve an alteration to the statement of the UK Green Investment Bank plc's objects if the two conditions in *subsections (3) and (4)* are met.

38. Subsections (3) and (4) set out the two conditions. The first condition is that the Secretary of State is satisfied that the statement of the UK Green Investment Bank plc's objects, as altered, continues to be consistent with the green purposes identified in section 1, so that the UK Green Investment Bank plc will continue to engage only in activities that contribute to achieving one or more of the green purposes. The second condition is that the Secretary of State is satisfied that the objects, as amended, will continue to ensure that the company's investment activities, taken as a whole, would be likely to contribute to a reduction of global greenhouse gas emissions.

39. *Subsection (5)* provides that an order under this section approving an amendment to the UK Green Investment Bank plc's objects is subject to affirmative resolution of Parliament.

Section 4: Financial assistance

40. Section 4 makes provision with respect to *vires* for funding for the UK Green Investment Bank plc at a time when the Crown owns more than half of its issued share capital.

41. S*ubsection (1)* provides that, where the Secretary of State has made an order designating the UK Green Investment Bank plc under subsection (1) of section 2, the Secretary of State may give financial assistance to the UK Green Investment Bank plc, with the consent of HM Treasury.

42. S*ubsection (2)* clarifies that the financial assistance may be given to the UK Green Investment Bank plc in any form. *Subsection (3)* provides examples of the forms which the financial assistance may take.

43. *Subsection (4)* sets out that any financial assistance provided to the UK Green Investment Bank plc may be subject to terms and conditions that the Secretary of State considers appropriate, with the consent of HM Treasury. For instance, there might be a requirement to repay a grant.

44. S*ubsection (5)* provides that HM Treasury may fund loans to the UK Green Investment Bank plc from the National Loans Fund.

45. *Subsection (6)* provides that this section does not operate to exclude the provision of financial assistance to the UK Green Investment Bank plc by either the Secretary of State or HM Treasury at a time when the UK Green Investment Bank plc is no longer in majority Crown ownership. This may include, but is not limited to, the provision of financial assistance under the Banking Act 2009.

Section 5: Accounts, reports and payments to directors

46. This section provides for the UK Green Investment Bank plc to be subject to certain enhanced obligations under the CA 2006 and to report each year on the contribution of its investment activities to a reduction of global greenhouse gas emissions.

47. *Subsection (1)* provides that, once the Secretary of State has made an order designating the UK Green Investment Bank plc under subsection (1) of section 2, the UK Green Investment Bank plc shall be treated as a "quoted company", as defined by section 385(2) of the CA 2006, for the purposes of Chapters 4 and 4A of Part 10, and Parts 15 and 16 of the CA 2006.

48. The application of Chapters 4 and 4A of Part 10 will require the UK Green Investment Bank to comply with the relevant provisions relating to payments to directors of quoted companies inserted by sections 80 to 82 of this Act.

49. The application of Part 15 of the CA 2006 to the UK Green Investment Bank plc gives rise to enhanced obligations such as providing an enhanced business review under section 417(5) of the CA 2006, producing a directors' remuneration report under section 420 of that Act, ensuring website publication of annual accounts and reports under section 430 of that Act, and complying with the new obligation on a quoted company to move a resolution approving the directors' remuneration policy under section 439A of that Act.

50. The application of Part 16 of the CA 2006 to the UK Green Investment Bank plc includes an obligation for the auditor to report on the auditable part of the directors' remuneration report under section 497 of the CA 2006.

51. *Subsection (2)* of this section provides that, where an order designating the UK Green Investment Bank plc has been made under section 2, each directors' report prepared by the company under section 415 of the Companies Act 2006 must include an explanation of the steps which the Bank took to ensure that the company's investment activities, taken as a whole, would be likely to contribute to a reduction of global greenhouse gas

emissions and a statement of the directors' views on the likely effect of the company's activities on global greenhouse gas emissions.

Section 6: Documents to be laid before Parliament

52. This section makes provision in respect of Parliamentary oversight of the activities of the UK Green Investment Bank plc.

53. *Subsection (2)* requires the Secretary of State to lay a copy of the UK Green Investment Bank plc's annual accounts and reports before Parliament as soon as practicable after the directors have laid copies of them before the company in general meeting under section 437 of the CA 2006. Under s*ubsection (1)*, this requirement applies only if, at the date of the general meeting, the Crown owns at least one share in the UK Green Investment Bank plc.

54. *Subsection (4)* requires the Secretary of State, if he/she makes a material alteration to, or revokes, the operational independence undertaking given to the UK Green Investment Bank plc, to lay a copy of the amended undertaking before Parliament, or lay a statement before Parliament reporting the revocation, as soon as practicable after the date of alteration or revocation. Under *subsection* (3), this requirement applies only if, at the date of the alteration or revocation, the Crown owns more than half of the issued shares in the UK Green Investment Bank plc.

Part 2: Employment

Summary and Background

55. This Part of the Act makes provision to facilitate agreement of employment disputes without the need for determination at an employment tribunal; to introduce a power for an employment tribunal to impose a financial penalty on an employer found to have breached an individual's rights in order to encourage greater compliance with employment obligations; to introduce a power to amend the definition of worker for the purposes of whistleblowing, and extend the scope of protections available for whistleblowing; and to address unintended consequences arising from previous legislation.

Conciliation

Summary and Background

56. The Employment Tribunals Act 1996 ("ETA 1996") provides a discretionary power for the Advisory, Conciliation and Arbitration Service ("ACAS"), to provide pre-claim conciliation to parties in an employment dispute that could be the subject of tribunal proceedings where either party requests it and where the conciliator believes that there is a reasonable prospect of a settlement being reached. In the main, matters are referred to pre-claim conciliation via the ACAS telephone helpline, e.g. where the operator believes that a caller has a justifiable case and is likely to make a claim to an employment tribunal, the operator can offer the caller the opportunity to go to pre-claim conciliation.

57. At present there is no obligation on prospective claimants to contact ACAS and/or consider conciliation at any stage and an employment tribunal cannot refuse to accept a claim on the basis that a claimant has not contacted ACAS. In addition, there is no duty on ACAS to provide conciliation before a claim has been filed at an employment tribunal – there is only a discretionary power.

58. Of all the claims lodged at an employment tribunal, less than a fifth of claimants will have contacted ACAS for advice before submitting their claim. As a result, the opportunity for ACAS to offer pre-claim conciliation is limited. Section 7 therefore requires individuals to contact ACAS with details of their claim and obtain written

confirmation that pre-claim conciliation has been declined or unsuccessful before they can present a claim to an employment tribunal.

Section 7: Conciliation before institution of proceedings

59. This section inserts new sections 18A and 18B into the ETA 1996.

60. Section 18A provides that, other than in certain circumstances (subsection (7)), a prospective claimant must first have submitted the details of their claim to ACAS before they can lodge the claim at an employment tribunal. The kinds of proceedings to which this requirement applies are set out in section 18(1) of the ETA 1996, and are referred to as "relevant proceedings" (see the amendment made by paragraph 5(3) of Schedule 1 to the Act). Under subsection (3) of section 18A, an ACAS conciliation officer will be required to try and achieve a settlement to the dispute, within a prescribed period, so that employment tribunal proceedings can be avoided. Subsection (4) of section 18A provides that, if during that time the conciliation officer concludes that a settlement is not possible, or the period expires with no settlement having been reached, the officer must issue a certificate to the prospective claimant and a claimant will not be able to lodge a claim with an employment tribunal without such a certificate (subsection (8)). The conciliation officer will, however, be able to continue to try and achieve a settlement to the dispute after the prescribed period has expired.

61. Subsection (9) of section 18A provides that, where prospective claimants are no longer employed by the employer, the conciliation officer may attempt to promote either the reinstatement or re-engagement of the individual or, if the individual does not want to be reinstated or re-engaged, or this is not practicable, attempt to achieve an agreement between the parties on the level of compensation to be paid by the employer.

62. Subsections (11) and (12) of section 18A give the Secretary of State the power to make any employment tribunal procedure regulations which are necessary for the operation of the early conciliation process.

63. Section 18B places an additional duty on ACAS to promote settlement in certain cases in which the duty under section 18A does not apply. Subsection (1) of section 18B requires an ACAS conciliation officer to try and achieve a settlement in a dispute where a person contacts ACAS requesting the services of a conciliation officer in a matter that might otherwise result in employment tribunal proceedings against them even though the prospective claimant has not contacted ACAS. Subsection (2) of section 18B requires the conciliation officer to try and achieve a settlement in a dispute where the prospective claimant contacts them, even where that person is exempted by virtue of section 18A(7) from the requirement to provide information to ACAS.

64. Currently, section 18(3) of the ETA 1996 provides a discretionary power for ACAS to provide pre-claim conciliation to parties in an employment dispute, which could be the subject of tribunal proceedings, where either party requests it and where the conciliator believes that there is a reasonable prospect of a settlement being reached.

Section 8: Extension of limitation periods to allow for conciliation

65. This section gives effect to Schedule 2, which sets out how the relevant time limits for bringing a claim will be extended where necessary to provide sufficient time for early conciliation to take place and to ensure that the claimant is not disadvantaged.

Section 9: Extended power to define "relevant proceedings" for conciliation purposes

66. This section amends section 18 of the ETA 1996 to provide that orders made by the Secretary of State and Lord Chancellor may add or remove proceedings from the list in section 18(1) of the ETA 1996. Orders which add proceedings to the list may also amend the applicable time limit in any relevant enactment. Where the order removes

proceedings from the list, consequential changes can be made to any extension to the time limit which is provided in any relevant enactment.

Acas

Section 10: ACAS: prohibition on disclosure of information

67. This section introduces a provision into the Trade Union and Labour Relations (Consolidation) Act 1992 prohibiting ACAS, or those appointed by ACAS, from releasing information relating to a worker, employer of a worker, or a trade union, that they hold in the course of performing their functions. Subsection (2) specifies the circumstances in which the prohibition does not apply, for example if the disclosure is made for the purposes of a criminal investigation, or the disclosure is made in a way that means that no-one to whom the information relates can be identified. Subsection (4) makes a breach of the prohibition a criminal offence, punishable by a fine but, by virtue of subsection (5), any such proceedings in England and Wales can only be instituted with the consent of the Director of Public Prosecutions.

Procedure for deciding tribunal cases

Summary and Background

68. Section 4 of the ETA 1996 sets out the required composition of employment tribunals for the determination of claims and provides that any claim submitted to an employment tribunal that is not withdrawn or settled must be determined at a hearing by either a judge sitting alone or a judge and lay members. The need for parties to attend a hearing for simple or low value claims can often involve costs in excess of the value of the claim, and can involve parties waiting a number of weeks for the case to be heard.

69. At present, legal officers may be appointed in accordance with regulations under section 1(1) of the ETA 1996 and may do certain acts (see section 4(6B) of the ETA 1996), but may not determine proceedings unless the parties agree the terms of the determination or the claim is withdrawn.

70. Currently, section 28(2) of the ETA 1996 provides that proceedings before the Employment Appeal Tribunal shall be heard by a judge and either two or four appointed members, so that in either case there is an equal number of persons whose knowledge and experience of industrial relations is as a representative of (a) employers; and (b) workers. That general rule can be varied, with the consent of the parties, to allow a judge to sit with one or three members (section 28(3)). It can also be varied so that, on an appeal from an employment tribunal constituted by an Employment Judge sitting alone, a judge shall sit alone in the Employment Appeal Tribunal unless the judge directs that proceedings should be heard with members (section 28(4) and 28(4A)).

Section 11: Decisions by legal officers

71. This section amends section 4 of the ETA 1996 to provide that legal officers may make determinations of certain employment tribunal claims. Legal officers will be competent to make determinations where the parties consent in writing and the proceedings are of a type specified in an order made by the Secretary of State and the Lord Chancellor. Any such order will be subject to the affirmative resolution of Parliament.

72. Section 11 would allow employment tribunal claims to be determined by a legal officer without the need for a hearing, subject to the consent of both parties. Cases determined by a legal officer would have the same status as if they had been determined by a judge or a judge and lay members.

Section 12: Composition of Employment Appeal Tribunal

73. This section amends the statutory framework governing the composition of the Employment Appeal Tribunal.

74. *Subsection (2)* substitutes new subsections (2) to (7) for the current (2) to (4A) of section 28 of the ETA 1996. Under the new provisions, proceedings before the Employment Appeal Tribunal are to be heard by a judge alone. However, a judge may direct that proceedings are to be heard by a judge and either two or four appointed members. In addition, a judge may, with the consent of the parties, direct that proceedings are to be heard by a judge and either one or three appointed members.

75. New subsection (5) of section 28 provides that the Lord Chancellor may by order specify that proceedings of a particular description must be heard by a judge and either two or four appointed members.

76. New subsection (6) of section 28 provides that where the judges is to sit with either two or four appointed members there shall be an equal number of worker and employer representative members.

77. *Subsection (4)* provides that any order made by the Lord Chancellor under the power inserted by subsection (2) must be subject to the affirmative resolution of Parliament.

78. *Subsection (5)* repeals paragraph 46 of Schedule 8 to the Tribunals Courts and Enforcement Act 2007; that paragraph made a previous amendment to section 28 of the ETA 1996.

Unfair Dismissal

Summary and Background

79. Employees who have a qualifying period of service of two years, or one year if service commenced before 6 April 2012, are eligible to file a claim if they believe they have been unfairly dismissed (section 94 of the Employment Rights Act 1996 ("ERA 1996")). Section 108(3) of the ERA 1996 lists types of claims for dismissal in which the requirement for an employee to have a qualifying period of employment does not apply; dismissals on the grounds of political opinion or affiliation are not included in that list.

80. The limit on the compensatory award for unfair dismissal has been subject to various changes since the introduction of the right to claim unfair dismissal in 1971. Most recently, the limit was subject to a 'one-off' increase from £12,000 to £50,000 in 1999. The limit has subsequently been linked to a formula that has meant that it has increased slightly in excess of Retail Price Index inflation and is currently £74,200.

81. Where an employer and employee are discussing ending the employment relationship under the terms of a settlement agreement, they can currently have these discussions on a confidential basis if the 'without prejudice' principle applies. The principle of without prejudice developed through case law and prevents written or oral statements which are made in a genuine attempt to settle an existing dispute from being submitted as evidence in court. If the without prejudice principle does apply, it means that a settlement offer and anything said during settlement negotiations cannot be submitted as evidence in a subsequent employment tribunal claim.

82. The without prejudice principle will not apply where there is no formal dispute between the employer and employee. So it will often not apply to a settlement offer, or negotiations about the offer, taking place before the employment relationship has ended. In such cases, the offer or negotiations can be submitted as evidence in a subsequent tribunal claim. The purpose of section 14 is to provide a means for employers and employees to discuss settlement before any dispute has actually arisen, with certainty that the offer and any discussions about it cannot be used as evidence against them in a subsequent unfair dismissal claim.

Section 13: Dismissal for political opinions: no qualifying period of employment

83. This section inserts a new subsection into section 108 of the ERA 1996. The effect of the new subsection is that the two year qualification period for employment will not apply where the reason (or principal reason) for dismissal is the employee's political opinions

or affiliation. Dismissal for political opinions or affiliation will not, however, be an automatically unfair dismissal; where such proceedings are lodged with an employment tribunal, the tribunal will still need to go on to consider reasonableness (section 98(4) of the ERA 1996).

Section 14: Confidentiality of negotiations before termination of employment

84. This section inserts a new section 111A into the ERA 1996. The aim is to facilitate the use of settlement agreements as a means of ending the employment relationship.

85. Subsection (1) of section 111A provides that an offer to terminate the employment relationship on agreed terms is not admissible as evidence in any subsequent unfair dismissal case. This applies to offers made by either the employer or employee. It applies to the offer itself and also to the content of any negotiations about the offer (see subsection (2)).

86. Subsection (3) of section 111A provides that the confidentiality provided by *subsection (1)* does not apply in cases where the employee claims to have been dismissed for an automatically unfair reason. The automatically unfair reasons for dismissal are set out in existing primary and secondary legislation and a number of the reasons are listed in sections 98B to 105 of the ERA 1996.

87. Subsection (4) of section 111A provides that where the employer or employee behaved improperly in making or negotiating the offer the tribunal may consider this as evidence in an unfair dismissal claim. This is intended to mirror the test of 'unambiguous impropriety' which has been established in case law as an exception to the common law principle of without prejudice. It is also expected that a statutory Code of Practice will be issued by ACAS giving guidance as what amounts to improper behaviour in this context.

88. Subsection (5) of section 111A provides that the offer of settlement is not admissible as evidence when the tribunal turns to deciding whether to award costs or expenses at the end of a case (costs are known in Scotland as expenses), unless the party which made the offer stated otherwise when doing so. So it will still be possible to make a settlement offer on the basis that it will be admissible when determining costs or expenses in any subsequent claim.

Section 15: Power by order to increase or decrease limit of compensatory award

89. This section confers a power on the Secretary of State to amend section 124 of the ERA 1996 to increase or decrease the limit of the compensatory award for unfair dismissal. Any new limit must be a set amount (*subsection (2)(a)*), or the lower of a set amount and a certain number of weeks' pay (*subsection (2)(b)*). Different amounts can be specified under subsection (2)(a) or (b)(i) for different kinds of employer; for example there could be a lower amount for small businesses. The power is subject to certain constraints and the affirmative resolution of Parliament.

90. The effect of *subsections (2), (4) and (5)* is that the limit cannot be decreased to less than the lower of median annual earnings (defined in *subsection (9)*) and the individual's annual earnings; and it cannot be increased to more than three times median annual earnings. The figure for median annual earnings will be taken from the Office of National Statistics' Annual Survey of Hours and Earnings publication; the Office of National Statistics is the executive office of the Statistics Board.

91. *Subsection (10)* amends section 34 of the Employment Relations Act 1999 ("ERe1A 1999") (the automatic indexation provision) to prevent section 124(1) of the ERA 1996 having to be amended twice in the same year.

Financial penalties

Summary and Background

92. Where an employment tribunal finds in favour of a claimant, it has the power to award various remedies. However, it currently has no power to penalise an employer for the actual breach of employment law. In order to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment laws, employment tribunals will be given the discretion to impose a financial penalty on any respondent found to have breached the claimant's rights.

Section 16: Power of employment tribunal to impose financial penalty on employers etc

93. This section adds a new section 12A to the ETA 1996. Section 12A gives employment tribunals the discretion to impose a financial penalty on a respondent employer where there has been a breach of a worker's employment right(s) and the employment tribunal considers that, in the circumstances, the employer's behaviour in committing the breach had one or more aggravating features. Section 12A provides that a financial penalty can be imposed on the employer irrespective of the nature of the remedy awarded to the claimant.

94. Subsection (2) of section 12A requires the tribunal to have regard to the employer's ability to pay when deciding whether to order an employer to pay a penalty under this section and, subject to subsections (3) to (7), in deciding the amount of the penalty. An employment tribunal may, for example, conclude that where the employer is a business in formal insolvency proceedings the imposition of a penalty is inappropriate. The tribunal may decide that, in the circumstances and considering that the imposition of a penalty would have the effect of reducing the monies available to satisfy the creditors or would adversely affect the sale of the business as a going concern, a penalty should not be imposed.

95. If the employment tribunal makes a non-financial award (e.g. an order for reinstatement) then any financial penalty imposed must be at least £100 and cannot exceed £5,000 (subsection (3)). If the remedy awarded by the employment tribunal to the claimant is a financial award (e.g. compensation) then any financial penalty imposed must be set at 50% of the amount of the claimant's financial award subject to a minimum of £100 and a maximum of £5,000 (subsections (4) and (5)).

96. Subsection (7) of section 12A will apply where the employment tribunal is dealing with claims brought by different workers against the same employer together, i.e. in what are widely known by employment tribunal users as 'multiple claims'. Where a financial award is made in such cases, the employment tribunal will have a discretion as to the amount of the financial penalty which it can impose in each claim, subject to a total minimum payment of £100 and to a maximum of £5,000 and 50% of the amount of the award for each individual claim.

97. Where a single act by an employer leads to multiple claims by a worker (for example, where a dismissal leads to claims for unfair dismissal and holiday pay), subsection (8) of section 12A provides that only one financial penalty can be imposed by the employment tribunal.

98. The effect of subsection (9) of section 12A is that when *subsections (5) and (7)* refer to "50% of the amount of the award" this does not include any additional compensation awarded for a failure to comply with an order or recommendation of the tribunal.

99. The Secretary of State has the power to change, by regulations, the figures set out in subsections (3), (5), (7) and (10) (subsection (12)). If the employer complies with the order to pay a financial penalty no later than 21 days after the date that written notice of the decision is sent by the employment tribunal to the employer, the amount of the financial penalty is reduced by 50% (subsection (10)). The financial penalty shall be paid into the Consolidated Fund (subsection (13)).

100. Section 12A does not prescribe the features which employment tribunals should take into consideration when determining whether a breach had aggravating features; this is for the employment tribunal to decide, taking into account any factors which it considers relevant, including the circumstances of the case and the employer's particular circumstances. The employment tribunal should only take into account information of which it has become aware during its consideration of the claim. A non-exhaustive list of factors which an employment tribunal may consider in deciding whether to impose a financial penalty under this section could include the size of the employer; the duration of the breach of the employment right; or the behaviour of the employer and of the employee. The concept of aggravating features in section 12A is not the same as the existing regime of aggravated damages in discrimination claims in England and Wales.

101. An employment tribunal may be more likely to find that the employer's behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer's behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake.

Protected disclosures

Summary and Background

102. The Public Interest Disclosure Act 1998 ("PIDA 1998") inserted a new Part 4A into the ERA 1996 to provide protection, in certain circumstances, for whistleblowers (i.e. those who expose evidence of wrongdoing by employers or third parties in the context of the workplace). The ERA 1996 defines the type of disclosures that are protected and also seeks to regulate to whom the disclosures can be made. The relevant provisions came into force on 2 July 1999.

103. The Employment Appeal Tribunal decision in *Parkins v Sodexho Ltd* [2002] IRLR 109 raised the possibility that any complaint about any aspect of an individual's employment contract could lay the foundation for a protected disclosure. This has led to claims being lodged at employment tribunals that would not otherwise have been brought and is contrary to the intention of the legislation.

104. Sections 43C, 43E, 43F, 43G and 43H of the ERA 1996 require that a disclosure be made in good faith in order to be a protected disclosure and benefit from whistleblowing protections.

105. A worker who makes a protected disclosure within the meaning of Part 4A of the ERA 1996 has a right not to be unfairly dismissed and a right not to suffer a detriment as a result of having made such a disclosure. Section 43K of the ERA 1996 defines who is a "worker" for the purposes of the whistleblowing protections contained in Part 4A of the ERA 1996.

106. The definition of "worker" in section 43K of the ERA 1996 is broader than the definition of "worker" in section 230 of the ERA 1996, which applies to rights set out elsewhere in the ERA 1996. The definition serves to ensure that the protection of the statute in relation to whistleblowers applies more broadly than other employment rights.

107. The following four sections amend Part 4A of the ERA 1996 which deals with public interest disclosures.

Section 17: Disclosures not protected unless believed to be made in the public interest

108. The effect of the section is to insert a specific public interest test into the ERA 1996. This ensures that, in order to benefit from protection, whistleblowing claims must in the future satisfy a public interest test and disclosures which can be characterised as being of a personal rather than public interest will not be protected. For example, if a worker does not receive the correct amount of holiday pay (which may be a breach of the terms of his/her contract of employment), this is a matter of personal rather than wider interest. The claimant must also show that the belief that the disclosure was in the public interest was reasonable in the circumstances.

Section 18: Power to reduce compensation where disclosure not made in good faith

109. The effect of this section is to remove the requirement in sections 43C, 43E, 43F, 43G and 43H that a disclosure be made in good faith in order to be a protected disclosure and benefit from whistleblowing protections. In addition, the section amends the ERA 1996 to provide employment tribunals with the power to reduce an award of compensation by up to 25%, where a protected disclosure has not been made in good faith.

110. "Good faith" is not defined in the ERA 1996, but the courts have held that where the predominant motive of the individual making the disclosure was not directed at remedying one of the wrongs listed in section 43B of the ERA 1996, but was instead for some ulterior purpose, the disclosure is unlikely to have been made in good faith. (See *Street v Derbyshire Unemployed Workers' Centre [2004] IRLR 687*)

111. Currently, the requirement for a disclosure to be made in good faith can effect the success of the claim. If an employment tribunal finds that a disclosure was not made in good faith and instead there was an ulterior motive which was the predominant reason for the disclosure, the claim will fail.

112. Section 18 alters the effect of the good faith test; the issue of good faith will now be considered by a tribunal in relation to remedy, rather than liability, so a claim will not fail as a result of an absence of good faith. The employment tribunal will have the discretion to reduce a compensatory award by up to 25% in the event they find the disclosure has not been made in good faith.

Section 19: Worker subjected to detriment by co-worker or agent of employer

113. The effect of this section is to introduce a vicarious liability provision so that where a worker is subjected to a detriment by a co-worker done on the ground that the worker made a protected disclosure, and this detriment is done in the course of the co-worker's employment with the employer, that detriment is a legal wrong and is actionable against both the employer and the co-worker.

114. The employer will only be liable for a detriment where it is done by a worker in the course of employment or by an agent of the employer with the employer's authority. In this context, the term "agent" refers to someone who is appointed by the employer to perform duties on their behalf (such as a contractor).

115. Employers are able to rely on the defence in new subsection (1D) of section 47B of the ERA 1996 if they have taken all reasonable steps to prevent the co-worker from subjecting the whistleblower to a detriment. If the defence applies the employer will not be liable for the actions of the co-worker.

116. Where a whistleblower is bullied or harassed by a co-worker but the employer can use the defence in subsection (1D), the co-worker will still be liable and the worker could bring a claim against that co-worker.

Section 20: Extension of meaning of "worker"

117. The effect of this section is to widen the definition of "worker" in section 43K of the ERA 1996. At present, the NHS has certain contractual arrangements in place for workers in health services in England, Scotland and Wales which are not afforded whistleblowing protection because they fall outside the definition. This amendment will ensure that section 43K will apply to these workers.

118. In addition, the section includes a power so that the definition of "worker" in section 43K can more readily be amended so as to keep it up to date. The power can be used to increase the scope of protection. It can, however, only be used to remove categories of individuals where, in the opinion of the Secretary of State, no such individuals exist (i.e. the category has become obsolete).

Miscellaneous

Summary and Background

119. The Employment Tribunal Rules of Procedure are set out in Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004. These regulations are made under various powers contained in the ETA 1996.

120. As part of his review of the Employment Tribunal Rules of Procedure, Mr. Justice Underhill recommended certain changes that would require amendments to the existing powers in primary legislation.

121. In certain claims, the amount able to be awarded by an employment tribunal is subject to a statutory limit. These limits are subject to annual adjustment in line with the Retail Prices Index. However, the rounding mechanism currently applicable has led to increases in the limits far greater than the rate of inflation. Section 22 will allow the rounding mechanism to be adjusted so that all limits are rounded up or down to the nearest pound, thereby ensuring that the changes closely reflect the rate of inflation.

122. Compromise agreements are being renamed as "settlement agreements". This is the term more generally used for civil claims and is therefore more widely understood than compromise agreement. It also more accurately reflects their use and content.

Section 21: Tribunal Procedure: Miscellaneous

123. This section amends existing powers in sections 9 and 13 of the ETA 1996 to make employment tribunal procedure regulations and introduces a new definition to section 42 of that Act.

124. *Subsection (2)* amends section 9(2) of the ETA 1996, which provides a power to make regulations on the payment of a deposit if a party wishes to continue to participate in proceedings. The amendment has the effect of enabling employment tribunal procedure regulations also to provide for tribunal deposit orders if a party wishes to pursue a specific allegation or argument within proceedings. This will enable the Secretary of State to make tribunal regulations which will allow tribunals to be more targeted with their case management.

125. Section 13(1)(a) of the ETA 1996 authorises employment tribunal procedure regulations to provide for the award of costs or expenses (costs are known in Scotland as expenses); witness expenses are recoverable as part of such a costs or expenses order. At present, section 13A(3) of the ETA 1996 prevents employment tribunal procedure regulations from allowing for costs orders and preparation time orders in favour of the same person in the same proceedings. This could prevent litigants in person from recovering witness expenses and therefore is unfair to such unrepresented parties. *Subsection (3)* amends section 13A of the ETA 1996 so that employment tribunal regulations can be made which allow for a costs order in respect of witness expenses and a preparation time order to be made in favour of the same person in the same proceedings.

126. It is possible to make employment tribunal procedure regulations under section 13(1)(a) of the ETA 1996 to permit costs orders in respect of the costs of lay representatives. However, the Government considers that the scope of this power could be clearer. *Subsection (4)* amends section 42 of the ETA 1996, introducing a definition of the meaning of the word "representative", so that it is clearer that costs of representation by a non-lawyer are covered by the terminology in section 13(1)(a) of the ETA 1996.

Section 22: Indexation of amounts: timing and rounding

127. This section amends section 34(3) of the ERe1A 1999 by introducing a time that orders made under that section are to come into force and amending the calculation which is to be used to increase or decrease the relevant limits.

128. The section means that future changes to the relevant limits would be made on 6 April each year. All limits remain linked to the Retail Prices Index. However, the section changes the rounding calculation so that all limits are rounded up or down to the nearest pound.

129. Section 34(2) of the ERelA 1999 provides that, if the Retail Prices Index for September of a year is higher or lower than the Retail Prices Index for the previous September, the Secretary of State is required to make an order to increase or decrease the limits which apply to certain awards of employment tribunals and other amounts payable under employment legislation.

130. The list of sums to be increased or decreased as a result of a change in the Retail Prices Index is set out in section 34(1) of the ERelA 1999. These include the amount of a week's pay used for statutory redundancy payments and the basic award and compensatory award for unfair dismissal. The sums for the relevant payments and awards were revised by order under the ERelA 1999 for the first time in February 2000 (Employment Rights (Increase of Limits) Order 1999 (S.I. 1999/3375)) and a total of 12 orders have been made.

131. In applying the relevant percentage increase or decrease, the Secretary of State has been required to round up the new sums to the nearest 10 pence, £10 or £100 (as applicable) in accordance with section 34(3) of the ERelA 1999, with the result that variations in the percentage change can occur.

132. In recent years the calculation has led to increases in limits which were significantly above the Retail Prices Index rate of inflation. The most significant impact on business has been the rate at which the limit used for calculating statutory redundancy payments has increased, sometimes by 6-7% more than average earnings or the Retail Prices Index in the applicable period.

Section 23: Renaming of "compromise agreements", "compromise contracts" and "compromises"

133. This section provides for the terms "compromise agreement" and "compromise contract" to be replaced with "settlement agreement" where they appear in specified legislation relating to employment matters.

134. Compromise agreements are a recognised way of dealing with an employment dispute, so that the matter is resolved in accordance with terms agreed by both parties. Provided that the applicable statutory requirements are met, the agreement is legally-binding and the issues covered by it cannot be the subject of a claim to an employment tribunal. Compromise agreements are referred to as compromise contracts in the context of the Equality Act 2010, but they operate in the same way as compromise agreements.

General

Section 24: Transitional provision

135. Section 24 sets out transitional arrangements for some of the sections in Part 2.

Part 3: the Competition and Markets Authority and Part 4: Competition Reform

136. The purpose of Part 3 of the Act is to set up the Competition and Markets Authority ("CMA") and to transfer to it the competition functions of the Office of Fair Trading ("OFT") and the Competition Commission ("CC"), which will be abolished. The CMA will be the main competition regulator in the UK creating a single centre of expertise in public competition enforcement, guidance, advocacy and leadership for the UK and improving utilisation of scarce public resources by eliminating duplication and overlap in the regime. The CMA will seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers.

137. The main purpose of Part 4 of the Act is to reform the competition functions that the CMA will assume to improve the speed, quality and robustness of its decision making.

Background to Parts 3 and 4 of the Act

138. The following paragraphs set out the wider context to the Parts 3 and 4 reforms and describe the main publicly funded competition functions and the main authorities that currently carry them out.

139. The Government's response to the consultation "Growth, Competition and the Competition regime"[1], explains the proposals for reform of the competition framework included in Parts 3 and 4 of this Act.

140. The proposal to set up the CMA is part of a wider institutional reform which also clarifies responsibility for publicly funded consumer activities. These wider proposals are set out in the Government's response to the consultation "Empowering and Protecting Consumers".

141. Under the Government's wider institutional reforms, the majority of functions of public enforcement of consumer rights will be carried out by trading standards, working in partnership with the CMA, which will have a clear focus on competition and markets. For this purpose, as well as its powers to address competition problems in a market, the CMA will have powers under consumer enforcement legislation to address features of a market which impact on consumer choice, even where competition is working well. Secondary legislation will deal with the transfers of these enforcement powers to the CMA.

142. The OFT's responsibilities for consumer advice and education have been transferred to the Citizen's Advice service through an Order made under the Public Bodies Act 2011 - The Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013 (S.I. 2013/783). In addition, under this Order, Trading Standards are now responsible for most business facing consumer education activities.

The competition framework

143. The legislative framework for the UK competition regime is set out, principally, in the Competition Act 1998 ("CA 1998") and the Enterprise Act 2002 ("EA 2002"). The main elements of the current statutory competition functions which are to be reformed by Part 4 of this Act are:

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1 http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf

- Merger control: powers and duties to identify and protect or mitigate against anti-competitive consequences of mergers or acquisitions;
- Market studies and market investigations: powers and duties to examine markets which may not be working well and to address adverse features of markets; and
- Anti-trust enforcement: powers to enforce against undertakings legal prohibitions on anti-competitive business agreements, including cartels, and the abuse of a dominant market position. There is also a specific criminal cartel offence for individuals who engage in certain forms of price-fixing and other forms of 'hard core' cartel activity.

144. These functions are currently carried out by the UK's main competition institutions as follows:

- the OFT is responsible in particular for initial investigation of merger and markets cases (referred to as "Phase 1" in these explanatory notes), including in appropriate cases agreeing voluntary undertakings with parties to address any anti-competitive effects; for investigating and deciding on infringements of anti-trust prohibitions; and for prosecuting the criminal cartel offence. These functions will be transferred to the CMA;
- the CC is responsible in particular for in-depth investigation of merger and market cases referred to it by other relevant competition authorities and, in appropriate cases, remedying any anti-competitive effects (referred to as "Phase 2" in these explanatory notes). The CC also hears appeals against licence and energy code modifications and price determinations in certain regulated sectors. These functions will be transferred to the CMA;
- regulators for sectors such as energy, water and telecommunications, have concurrent powers in relation to the anti-trust prohibitions and to refer markets to the CC. These concurrent powers are retained by the sector regulators but the concurrency arrangements are modified by Part 4, Chapter 5 of this Act; and
- the Competition Appeals Tribunal (the "CAT"), a specialised judicial body, hears appeals in merger, markets and anti-trust cases and decides certain sectoral cases involving competition or economic regulatory issues. The functions and powers of the CAT are not altered by this Act except for the changes being made by sections 41 and 48 which would enable the CAT to issue warrants in relation to investigations of anti-trust breaches and the cartel offence.

145. In addition, the EA 2002 confers on the Secretary of State the ability to intervene in a merger or market case on public interest grounds. The powers of the Secretary of State to intervene in markets cases are altered by section 35.

146. The OFT and the CC have certain other ancillary functions which will, in general, be transferred to the CMA by secondary legislation. The OFT's current duty under the Financial Services and Markets Act 2000, to keep under review the regulating provisions and practices of the Financial Services Authority, is modernised by the Financial Services Act 2012.

Part 3: the Competition and Markets Authority

Section 25: The Competition and Markets Authority

147. This section establishes the CMA to perform functions on behalf of the Crown and gives effect to Schedule 4.

148. Section 25 also sets out the CMA's duty to seek to promote competition for the benefit of consumers. This duty reflects the CMA's position as the UK's principal competition authority, its leadership role in tackling anti-competitive behaviour as part of ensuring

markets work well for consumers, and its domestic and international advocacy role. In its approach to promoting competition for the benefit of consumers, it will be concerned with how firms interact with each other (the supply side) and how firms interact with customers (the demand side).

149. The general duty does not mean that the CMA may only act where doing so would promote competition. For example, it does not constrain the proper exercise of its function of determining licence modification references and appeals, and Energy Code modification appeals. Nor does the general duty constrain the proper exercise of the CMA's consumer functions.

Schedule 4: The Competition and Markets Authority

150. Schedule 4 makes provision for the governance and decision making structure of the CMA.

151. Schedule 4 provides the CMA with a corporate governance structure that ensures independence of its decision making from Government and from the regulators against whose decisions it may hear appeals. This structure also provides for the separation and independence of decision making within the CMA so that certain decisions are taken by the CMA's Board and others are taken by groups of independent members drawn from the CMA's panel. This reflects the two phases of decision-making in merger and markets cases and the CMA's role in relation to regulatory appeals and references.

152. In the current regime, the OFT decides whether to refer a merger or a market for further investigation and the CC carries out that investigation. Decisions made by the OFT are made by its Board or staff where authority has been delegated to them by the Board. The CC's decision-making functions on mergers cases, market investigations and regulatory appeals/references are exercised by inquiry groups of members drawn from a pool of panel members appointed by the Secretary of State. These groups exercise the functions of the CC for the purposes of the inquiries on which they are appointed.

Part 1: General

Membership

153. Paragraph 1 of Schedule 4 provides for the membership of the CMA, with all types of member being appointed by the Secretary of State. The CMA will consist of a chair, Board members, and panel members. The Secretary of State will consult the chair before appointing the other members. At least 5 members must be appointed to the Board (of which the chair will also be a member). At least one of the Board members must also be a panel member. Paragraph 1(5) provides that of the members of the CMA Board appointed under paragraph 1(1)(b), not more than half may be members of staff of the CMA. This provision has the effect of ensuring that a majority of the members of the CMA Board, which also includes the chair, will not be members of the CMA's staff.

154. Paragraph 1(7) and paragraph 11 have the effect of preventing a person holding office in the CAT from being appointed as a member of the CMA or as its chief executive or another member of its staff. Paragraph 2 provides for the terms and conditions of the members of the CMA to be determined by the Secretary of State.

Appointment and re-appointment

155. Paragraphs 3 and 4 set out the terms of appointment and re-appointment to the membership of the CMA. The term of appointment of the CMA chair and Board members is to be for a maximum period of 5 years.

156. Appointment to the CMA panel is to be for a maximum period of 8 years, and is not renewable except for the purpose of seeing out an inquiry to which the panellist has been appointed before the expiry of their original 8 year term. This is to ensure that panel

members are not influenced by the prospect of re-appointment in taking their decisions. The provision on re-appointments replicates the current provision in the CA 1998 (paragraph 6 of Schedule 7) and allows for consistency of decision making throughout the investigation process, including the remedies stage and where an investigation has been remitted to the CMA following an appeal. A CMA panel member is not prevented from being appointed or re-appointed as a member of the Board during or after his or her term as a CMA panel member. Office of the Commissioner of Public Appointments guidance will apply to the appointment process and length of tenure of members of the CMA.

157. Paragraph 5 provides that the CMA must pay members remuneration, pension allowances and where required, compensation for loss of office, as specified by the Secretary of State.

158. Paragraph 6 provides that members of the CMA may resign by notifying the Secretary of State. A panel member who is a member of both the CMA Board and CMA panel can resign one of these appointments whilst remaining in the other. Paragraph 7 provides that a member of the CMA may be removed from office by the Secretary of State on the grounds of incapacity, misbehaviour or failure to carry out their duties.

Status

159. Paragraph 8 provides that, in performing its functions, the CMA acts on behalf of the Crown.

Chief executive and other staff

160. Paragraphs 9 and 10 make provisions for the appointment of a chief executive and staff to the CMA. The Secretary of State is to appoint a chief executive as a member of staff of the CMA following consultation with the chair of the CMA, for a term of no longer than 5 years. This term is renewable. The chief executive and other members of staff may be Board members of the CMA, but neither the chief executive nor any other member of staff may be the chair of the CMA or a panel member.

161. The CMA may appoint additional staff, but the number of other staff and their conditions of service must be approved by the Minister for the Civil Service. Members of staff of the CMA are to be regarded as civil servants.

Annual plan

162. Paragraph 12 provides that the CMA will, before each financial year, publish an annual plan that sets out its main objectives, priorities and resource allocation among the activities to be carried out for the year ahead, and lay the plan before Parliament. These requirements are similar to those for the OFT set out in section 3 of the EA 2002, but aim to provide additional transparency on how the CMA intends to allocate resources against its objectives before each financial year. It does not prevent the CMA from re-allocating resources to respond to issues emerging in the course of the year. Paragraph 13 provides for the CMA to consult on its proposals for the annual plan.

Performance report

163. Paragraph 14 provides that, after the end of each financial year, the CMA will publish an annual report on its activities and performance, and lay the report before Parliament. It stipulates that the annual report will include a survey of developments in respect of matters falling within the scope of the OFT's functions; an assessment of progress against the year's annual plan prepared under paragraph 12; a summary of the CMA's significant decisions, investigations and activities; a summary of how the CMA has allocated resources; and an assessment of its activities relating to enforcement functions. This is the minimum that must be included in the report; it is open for the

CMA to include more information if it wishes. The CMA may also, as paragraph 15 makes clear, prepare and publish other reports on any matters relating to its functions.

Concurrency report

164. Paragraph 16 provides that the CMA will publish an annual report on how arrangements for co-operation between the CMA and the sectoral regulators with concurrent competition powers have worked. The report must include information about the use by the CMA and sector regulators of their anti-trust powers (under Part 1 of the CA 1998) and market investigation referral powers (under Part 4 of the EA 2002) and any decision of a regulator that its CA 1998 powers were applicable but that it was more appropriate for it to use its other powers.

Documents

165. Paragraph 17 provides for the authentication of the CMA's seal by a member of the CMA Board or by a person authorised for that purpose and for the admissibility in evidence of documents executed under the CMA's seal. Where a document is to be signed in accordance with Scottish law this provision does not apply.

Members of committees and sub-committees

166. Paragraph 18 provides that committees and sub-committees of the CMA may include people who are not members of the CMA and that sub-committees of the CMA may include people who are not members of the committee that established the sub-committee. Paragraph 29(3) provides that the CMA Board may not delegate anything that it is required or permitted to do to committees and sub-committees that include people who are not members of the CMA or staff.

Additional Powers

167. Paragraph 19 makes provision for the CMA to take an international role as regards certain matters, including consumer matters. The provision will enable the CMA to represent the UK Government in international *fora* in any field connected to its functions when requested by the Secretary of State. The provision also enables the CMA to assume the OFT's role in promoting good consumer practice outside the UK, for example as a member of the International Consumer Protection and Enforcement Network and the London Action Plan (which seeks to promote international spam enforcement cooperation and address spam related problems).

168. Paragraph 20 makes provision for supplementary powers that are necessary or appropriate for the CMA to carry out its functions. Both the CC and OFT have similar powers (paragraph 8 of Schedule 7 to the CA 1998; and paragraph 13 of Schedule 1 to the EA 2002 respectively). Typically these powers have been used by the CC to conduct preliminary work on competition cases, and to carry out post inquiry evaluations of the impact of their decisions.

Consequential amendments (Public records, Parliamentary Commissioner, Disqualification, Freedom of information, and Equality)

169. Paragraphs 21 to 26 make consequential amendments to a number of Acts to make them applicable to the CMA. These are: the Public Records Act 1958, the Parliamentary Commissioner Act 1967, the House of Commons Disqualification Act 1975, the Northern Ireland Assembly Disqualification Act 1975, the Freedom of Information Act 2000, and the Equality Act 2010.

Part 2: The Competition and Market Authority Board

170. Part 2 of the Schedule provides for the CMA Board. The Board, in line with general corporate governance standards, and the Treasury/Cabinet Office Guidance

on Corporate Governance in Central Government Departments[2] in particular, will be responsible for the strategy and performance of the CMA and oversight of staff as well as being responsible for particular decisions (e.g. Phase 1 merger, Phase 1 markets and anti-trust cases). The Board will also be responsible for making rules of procedure and may issue guidance.

171. Paragraph 27 provides that the CMA Board (as distinguished from the CMA, which also includes the panel) will consist of the chair, and the Board members, at least one of whom will also be a member of the panel. The chief executive may be a Board member, but is not required to be.

172. Paragraph 28 provides that the functions of the CMA will be exercisable by the Board, except where expressly provided otherwise. The result of this approach is that, where an enactment confers functions on the CMA that are to be performed by a CMA group, the enactment in question specifically provides that those functions are to be exercised by a group.

173. Paragraph 29 provides that the Board may delegate any of its functions to particular members of the Board, or to staff, or a committee. This power to delegate does not apply, however, to decisions at key steps of the market study and market investigation processes.

174. Paragraph 30 provides that the Board's power to delegate in relation to certain anti-trust functions is subject to rules made under the CA 1998.

175. Paragraph 31 provides that the CMA Board may make its own rules of procedure. These rules might for instance include rules about Board members deputising for the chair.

176. Paragraph 32 provides that a defective appointment to the Board or a vacancy does not by itself make its actions or decisions invalid.

177. Paragraph 33 provides for a recusal mechanism for Board members where the Board has to consider whether a matter should be referred to the chair for the chair to constitute a group to investigate the matter. The object behind this is to ensure independence of Phase 1 and Phase 2 decision making. Before the Board considers whether to refer the matter, the chair must consider whether a member of the Board who is also a member of the panel might be a member of the group responsible for the investigation. If so, this person cannot take part in the Board's deliberations. This ensures that the same person cannot take part in a referral decision at Phase 1 and also decisions at Phase 2 in the same case.

Part 3: The Competition and Market Authority panel

178. Part 3 of Schedule 4 provides for the establishment of a panel of independent experts to undertake Phase 2 merger and markets inquiries and carry out the CMA's regulatory appeal/reference functions and those ancillary functions that are currently the responsibility of the CC. The panel is another key feature of the governance arrangements intended to ensure robustness and fairness of decisions. The provisions are similar to provisions in Schedule 7 to the CA 1998.

179. Paragraph 35 provides that the CMA panel members are to be available to become members of groups which carry out certain functions. The panellists are categorised as "newspaper panel members" who are available to deal with newspaper merger references, "specialist communications panel members" who deal with certain communications matters, "specialist utility panel members" who deal with utilities matters under various sectoral enactments, and "reporting panel members" who are otherwise appointed to the panel (but may, in accordance with the specific rules on their formulation, sit on any group). There is also provision for panellists to be appointed for

2 Code of good practice, 2011 http://www.hm-treasury.gov.uk/d/corporate_governance_good_practice_guidance_july2011.pdf

the purposes of certain Northern Ireland utility functions. A panellist may be appointed in more than one of these capacities.

180. Paragraph 36 provides that the chair of the CMA is responsible for constituting a group when required under the EA 2002 or other legislation. The constitution of the group must be done in accordance with this Part of this Schedule and other sectoral legislation where applicable.

181. Paragraphs 37 and 38 set out rules on the constitution of groups. The chair of the CMA shall select the members of groups and shall appoint a group's chair. Furthermore, subject to any applicable enactment (and there are certain specific requirements in legislation governing the regulated sectors), each CMA group is to consist of at least three members of the CMA panel. If the group's functions relate to a newspaper merger, then at least one newspaper panel member must be appointed to the group, and any members of the group who are not newspaper panel members must be reporting panel members. If the group's functions relate to the specified communications matters, then at least one specialist communications panel member must be appointed. If its functions relate to the specified utility matters, then at least one of the specialist utility panel members must be appointed. These provisions, and the related sectoral provisions, ensure that where expertise in newspaper or communications or particular utilities matters is required, a specific type of member of the panel is available to provide it to the group. Under paragraph 39 the validity of anything done by a group is not affected by a defective appointment.

182. Paragraph 41 allows the chair of the CMA to remove a group member from a group where they are either not able to carry out the work of the group, or where the member has a conflict of interest. In these circumstances, or if a member leaves a group for any other reason, the chair of the CMA may replace a member (paragraph 43). This latter provision also ensures the chair of the CMA has the power to fulfil his/her duties under paragraph 36 to ensure groups remain properly constituted. Under paragraph 42 a person is automatically no longer a member of the group if they are no longer a member of the panel unless re-appointed under paragraph 4.

183. Paragraphs 46 and 47 provide that prior to a group being constituted the chair of the CMA may take steps to enable the group to carry out its work. These powers allow, for example, the chair of the CMA to make administrative preparations for the work of the group whilst it is being constituted (but this does not extend to doing anything the group could not itself do once constituted and is aimed at facilitating the group's work). But the chair can, at any time before the group concerned has first met, cancel a merger reference if it appears the proposed merger has been abandoned and so no inquiry is required.

184. Paragraph 49 provides that groups must act independently of the CMA Board in taking any decision required or permitted under any enactment. The requirement for groups to take independent decisions does not, however, prevent the Board from giving information to a group or a group from giving information to the Board.

185. Paragraph 50 gives the group chair a casting vote if the group's vote on a decision is tied.

186. Paragraph 51 requires the CMA Board to make, following a consultation process and subject to the provisions made by or under any enactment, rules of procedure for groups that undertake market investigations, merger inquiries and appeal/reference functions under legislation governing the regulated sectors. Further detail on how the Act affects the OFT and CC's current regulatory appeal, reference and ancillary functions is contained in the Explanatory Notes on Schedule 6. Detailed provisions on the CMA Board's rule making powers are contained in paragraph 53.

187. Paragraph 51(5) provides that subject to rules made under paragraph 51, and the provisions of any legislation, groups may also decide their own procedure. The CMA Board may also issue guidance on procedure (paragraph 52), on which the Board must

also consult, and groups must take this guidance into account when deciding on their own procedures.

188. Paragraph 54 allows a group which is not a group that undertakes a market investigation, merger inquiry and appeal/reference functions under various sectoral legislation specified in paragraph 51 to make its own rules of procedure, subject to any direction given by the Secretary of State and the provisions of any legislation. Paragraph 54(3) requires groups to have regard to any guidance issued by the Board in deciding their own procedures.

189. Paragraphs 55 to 58 provide that, for the purposes of specified decisions in merger inquiries and market investigations, group decisions are required to have been agreed by at least a two-thirds majority of the group to be valid.

Part 4: Interpretation and transitional and transitory provision

190. Paragraphs 59 and 60 interpret certain terms used in Schedule 4.

191. Paragraphs 61 to 63 restrict the eligibility of CC panel members and former CC panel members to be appointed to the CMA panel. Paragraph 62 provides that an existing or former member of the CC panel may not be appointed to the CMA panel, but paragraph 61 provides two exceptions to this rule. The first is that an existing CC panel member may be appointed to the CMA panel before the abolition of the CC if his or her term of office as a CC panel member is not due to expire before the abolition of the CC. The second exception is that a former CC panel member may be appointed to the CMA panel after the abolition of the CC if he or she was still a CC panel member immediately before the CC was abolished. However, in these cases the terms of the person's appointment to the CMA panel must not be such that his or her total period of service as a member of the CC and CMA panels exceeds eight years. For that purpose, any period when the person holds office both as a CC panel member and as a CMA panel member is not counted towards his period of service as a CC panel member.

192. Paragraph 61 also allows transitional provision to be made (by order) relating to appointments of CC panel members to the CMA panel, and for their re-appointment. The other provisions of paragraph 61 do not restrict the transitional provision which may be made under this power. Among other things, this ensures that provision could be made for the appointment to the CMA panel of individuals who have already served the maximum eight year term as members of the CC panel but who need to be temporarily appointed to the CMA panel in order to complete inquiries on which they began work as members of the CC panel.

193. Paragraphs 64 and 65 make provision about the CMA's first and following financial years and its first annual plan.

Section 26: Abolition of the Competition Commission and the Office of Fair Trading

194. This section abolishes the CC and the OFT. The section also gives effect to Schedules 5 and 6.

195. Schedule 5 amends the CA 1998 and the EA 2002 to make provision for the transfer of the current relevant functions of the OFT and the CC to the CMA where these are not otherwise transferred under the Act. Schedule 6 amends other enactments to make provision for the transfer of functions, predominantly regulatory appeals and ancillary functions, from the CC and OFT to the CMA.

Section 27: Transfer schemes

196. Section 27 confers power on the Secretary of State to make schemes to transfer property, rights and liabilities from the CC and the OFT to the CMA. Such schemes may be made in connection with the establishment of the CMA, the abolition of the OFT or the CC,

or the transfer of functions from the OFT or CC to the CMA. Section 27 also makes provision for transfers to a Minister of the Crown, as well as to the CMA so that, for example, the Secretary of State can dispose of property liabilities in relation to the CC offices, OFT offices, or both.

197. *Subsection (4)* lists the types of provision that may be made in a transfer scheme. These include making provision the same as or similar to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

198. *Subsection (6)* makes provision in relation to individuals holding employment in the civil service to ensure that the schemes can deal with the position of those civil servants who do not have contracts of employment.

Section 28: Transitional provision: consultation

199. Provisions of the Act, and provisions added to other legislation by the Act, provide for the CMA to consult other persons when it prepares particular rules, statements of policy, guidance or general advice and information. Section 28 allows the OFT or the CC (or both jointly) to carry out any such consultation before the provision in question comes into force and, once the provision has come into force, allows the CMA to treat the consultation as having been carried out by the CMA. This will enable consultations to take place on behalf of the CMA on such matters as CMA guidance before the CMA becomes fully operational. *Subsection (4)* also enables the Secretary of State to direct the CC or the OFT (or both jointly) to carry out such consultations.

Schedule 5: Amendments related to Part 3

200. Schedule 5 amends the CA 1998 and the EA 2002 to transfer the following functions from the CC and OFT to the CMA:

- powers relating to obtaining and reviewing information relating to any of its functions, providing information to the public to promote the benefits of competition, and the provision of information to Ministers on its functions;
- functions in relation to investigating and enforcing prohibitions of anti-competitive agreements and abuse of a dominant position (anti-trust cases);
- functions in relation to investigation and prosecution of the criminal cartel offence;
- functions relating to Phase 1 and Phase 2 merger investigations; and
- functions relating to market studies and market investigations.

201. The transfer of the CC's regulatory appeals and reference functions under sector specific legislation (e.g. gas, water, rail) are set out in Schedule 6, which also transfers the various ancillary functions exercisable by it and by the OFT under other legislation (including in legal services).

Part 1: Transfer of functions under the Competition Act 1998 to the Competition and Markets Authority

202. Part 1 of Schedule 5 (paragraphs 1 to 58) provides for the transfer of all of the OFT's functions under the CA 1998 that is, its functions relating to the prohibitions against anti-competitive agreements (Chapter 1 of the Act and Article 101 of the Treaty on the Functioning of the European Union ("TFEU")) and abuse of a dominant position (Chapter 2 of the Act and Article 102 of the TFEU) to the CMA. These include, in particular, functions in relation to exemptions to the prohibitions on anti-competitive agreements and abuse of a dominant position; anti-trust investigation and enforcement functions; the OFT's rule making functions; and functions of assisting the EU Commission in carrying out its investigations under Part 2 of the CA 1998. The

OFT's Board is responsible for decisions in relation to the OFT's functions under the CA 1998. These decisions will be taken by the CMA Board.

Part 2: Transfer of functions under the Enterprise Act 2002 to the Competition and Markets Authority

General functions

203. Paragraphs 60 and 61 transfer the general functions of the OFT in the EA 2002 to the CMA. These include the functions of obtaining and reviewing information about matters relating to the carrying out of its functions (currently section 5 of the EA 2002). This information gathering role, which the OFT currently relies on to carry out research and market studies, is with a view to the CMA having the information it needs to make decisions and carry out its functions. Also included in these general functions is the provision of information to the public (currently section 6 of the EA 2002), which enables the CMA to provide the public with information or advice on matters relating to its functions (including publishing guidance on compliance with competition law and educational literature).

204. Paragraph 62 transfers the OFT's function to provide information and advice to Ministers to the CMA (currently section 7 of the EA 2002). This enables the CMA to make proposals or give other information and advice to Government Ministers or public authorities on matters relating to its functions. Such advice may address the impact of future as well as existing legislation. In addition Government Ministers may also request proposals, information or advice from the CMA on matters relating to its functions.

205. Paragraph 63 provides for the repeal of section 8 of the EA 2002, which makes provision for the OFT to promote good practice in the carrying out of activities that may affect the economic interests of consumers in the UK, and includes the function of setting up and undertaking an enhanced role in respect of consumer codes of practice produced by a variety of bodies. As a result of changes announced on the consumer landscape,[3] the OFT's functions relating to consumer codes will be transferred to the Trading Standards Institute and Citizens Advice will lead on consumer advocacy.

206. The CMA will continue to provide information and education both in the UK and internationally by virtue of its duty to seek to promote competition for the benefit of consumers in section 25, and by virtue of paragraph 61 of this Schedule, which transfers the OFT's function to provide information to the public about ways in which competition may benefit consumers and information in respect to any of its functions. In addition, the CMA will assume the OFT's international role in promoting good consumer practice outside the UK (paragraph 19 of Schedule 4).

207. Paragraph 64 has the effect of transferring the OFT's super-complaint function to the CMA. This enables certain designated consumer bodies to make a 'super-complaint' where they consider that there is any market feature or combination of features, such as the structure of the market or the conduct of those operating within it, that may be harming consumers to a significant extent. Where a super-complaint is made, the CMA must respond within 90 days with a considered response to the super-complaint, setting out what action, if any, it proposes to take. The mechanism was designed to encourage groups who represent consumers to make relevant complaints on their collective behalf.

Competition and Markets Authority's powers to take interim action on anti-trust

208. Paragraph 66 is a consequential amendment arising from the transfer to the CMA of the OFT's powers to take interim action where they have begun an anti-trust investigation

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3 Consultation on Empowering and Protecting Consumers, Government Response, April 2012

http://www.bis.gov.uk/Consultations/empowering-and-protecting-consumers

(section 35 of the CA 1998). Paragraph 22(2), Schedule 4 of the EA 2002 enables the CAT to be given powers similar to those of the OFT under section 35 of the CA 1998. This reference is updated to reflect the fact that the CMA will assume the OFT's powers under that Act.

Competition and Markets Authority's functions in relation to mergers

209. Paragraphs 67 to 162 deal with the transfer of the merger functions of the OFT and the CC to the CMA whilst preserving the two phase approach to decision making. The CMA's merger functions are to be carried out on behalf of its Board unless the Act specifies that functions will be carried out by groups. This approach is given effect by a general provision that CMA functions are to be the responsibility of the Board (contained in Schedule 4), unless specified as being the responsibility of a group. New section 34C (inserted by paragraph 74) sets out the functions that will be exercised by groups. These include the determination of references under sections 22 (completed mergers) or 33 (anticipated mergers). New section 46D (inserted by paragraph 88) provides for functions that will be exercised by groups in relation to references made under section 45 (public interest consideration) and new section 62A (inserted by paragraph 105) provides for functions that will be exercised by groups in relation to special public interest merger investigations.

Competition and Markets Authority's functions in relation to markets

210. Paragraphs 163 to 209 deal with the transfer of the market investigation reference functions of the OFT and CC to the CMA, while preserving the two phase approach to decision-making. Responsibility for the markets functions in the CMA will generally fall to the CMA Board where the function is currently carried out by the OFT, and to groups constituted by the CMA chair where the function is currently carried out by the CC. Section 133A (inserted by paragraph 166) specifies various functions that are to be carried out by a group when a market investigation reference has been made. As set out above, the CMA Board is required to make rules for market reference groups.

Competition and Market Authority's functions in relation to cartels

211. Paragraphs 210–216 deal with the transfer of the functions of the OFT in relation to the cartel offence, which is set out in section 188 of the EA 2002 to the CMA. As with anti-trust functions, the OFT's Board is responsible for decisions in relation to the OFT's functions on the cartels. This decision making power is also transferred to the CMA Board.

Interpretation

212. Paragraph 217 amends the interpretation provisions of section 273 of the EA 2002 to substitute the CC with the CMA and omit the reference the OFT.

Part 3: Abolition of the Competition Commission

213. Paragraphs 218 to 228 provide for amendments to the CA 1998 and the EA 2002 to reflect the abolition of the CC. In relation to the CA 1998 they provide for the repeal of section 45 (which establishes the CC), amend section 55 (relating to the interpretation of Part 1), and repeal Schedules 7 and 7A. They also repeal sections 185 to 187 of and Schedules 11 and 12 to the EA 2002, which set out the governance structure of the CC. Part 2 of Schedule 3 to the EA 2002 (which provides for the transfer of property between the CC and Competition Service) is also repealed.

Part 4: Abolition of the Office of Fair Trading

214. Paragraph 229 provides for amendments to the EA 2002 to reflect the abolition of the OFT. It provides for the repeal of sections 1 to 4 and Schedule 1 on the establishment of the OFT.

215. Replacement provisions, on the governance of the CMA, are set out in Schedule 4.

Schedule 6: Regulatory appeals etc: minor and consequential amendments

Summary and Background

216. This Schedule relates to the CC's current regulatory appeals and reference functions under sector specific legislation (e.g. gas, water, rail) and to the OFT's and CC's current ancillary competition functions under other legislation. It provides for the transfer of these functions, not substantially changed, from the CC and the OFT to the CMA.

217. Under current legislation, the CC receives broadly seven types of reference of regulatory matters from these regulators. These are:

- licence modification references and appeals (for gas, electricity, health, water and sewerage, rail, air traffic and airport operation services);
- references of non-licensable activities in the gas and electricity sectors and on a levy on health providers;
- energy code appeals;
- price control references, in the energy, health, water and communications sectors;
- price control appeals in postal services;
- airport charges, conduct and licence condition references; and
- access charges references in the railways sector.

218. In each of these, the issues that the CC must take into consideration in carrying out its inquiry are adapted according to the particular regulatory regime and usually reflect the considerations to which the relevant regulator is required to have regard in reaching the decision that is subject to the reference or appeal.

219. The CC and/or the OFT also have ancillary functions under other legislation (the Legal Services Act 2007, the Legal Services (Scotland) Act 2010, the Financial Services and Market Act 2000, the Payment Services Regulations 2009, the Competition Act 1980 and the Transport Act 2000), including with regards to local bus schemes or agreements.

220. The current statutory provisions affected by this Schedule are:

Licence modification references/appeals	
Gas	Gas Act 1986
	Gas (Northern Ireland) Order 1996
	Energy (Northern Ireland) Order 2003
Electricity	Electricity Act 1989
	Electricity (Northern Ireland) Order 1992
	Energy (Northern Ireland) Order 2003
Water and sewerage	Water Industry Act 1991
	Water and Sewerage Services (Northern Ireland) Order 2006
	Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005
Rail	Railways Act 1993

Air traffic services	Transport Act 2000
Airport operation services	Civil Aviation Act 2012
Health	Health and Social Care Act 2012
Non-licensable activities	
Gas	Gas Act 1986
Electricity	Electricity Act 1989
Energy code appeals	Energy Act 2004 (read with the Electricity and Gas Appeals (Designation and Exclusion) Order 2005, and the Electricity and Gas Appeals (Designation and Exclusion) Order 2009)
Price control references	
Water	Water Industry Act 1991
	Water and Sewerage Services (Northern Ireland) Order 2006
	Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005
Electronic communications	Communications Act 2003
Postal services price control	Postal Services Act 2011
Health	Health and Social Care Act 2012
Levy on providers reference	
Health	Health and Social Care Act 2012
Railway access charges	
Rail	Railways Act 1993
Other related minor amendments	
Gas and Electricity	Utilities Act 2000
Ancillary Competition Functions	
Legal Services	Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, Legal Services Act 2007, Legal Services (Scotland) Act 2010, the Solicitors (Scotland) Act 1980
Transport	Transport Act 2000
Public bodies and transport	Competition Act 1980

221. The Schedule makes consequential amendments to the sectoral legislation to accommodate the bringing together of the OFT and CC into a single body. In particular, where the CMA decides on references or appeals currently decided by the CC, a group appointed by the CMA's chair – in other words, an independent decision making group – rather than the CMA Board will make these decisions. This is to ensure that these functions are carried out by groups with sufficient expertise and which are independent of the CMA's executive, any overriding duties of the CMA and the CMA's relationship with regulators under their concurrent anti-trust and market investigation referral powers. Further explanation of the CMA's governance structure can be found in the Explanatory Notes on Schedule 4.

222. Where a function under certain sectoral enactments is currently exercisable by the chair of the CC before a group has been constituted, that function will now be exercisable by any member of the CMA Board who is also a member of the CMA panel or any member of the CMA panel authorised by the Secretary of State to exercise that function. For example, with respect to gas licence modification appeals, the definition of 'authorised member of the Competition Commission' in paragraph 13(1) of Schedule 4A to the Gas Act 1986 is amended to effect this change. Unlike the chair of the CC, the chair of the CMA will not be authorised, prior to a group being constituted, to decide on whether permission should be given to hear an appeal. Similar provision is made in respect of the power to issue notices regarding written documents or oral hearings in respect of certain sectoral appeals and references. Schedule 6 sets out the specific variations that apply to each type of regulatory appeal or reference.

223. The Schedule also makes analogous amendments to those Acts under which the CC and OFT currently have ancillary competition functions. Amendments to the Payment Services Regulations 2009 will be made through secondary legislation.

Part 4: Competition Reform

Chapter 1: Mergers

Summary and Background

224. The main provisions of this Chapter:

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

Investigatory powers

Section 29: Investigation powers: mergers

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

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

227. Section 29(2) amends section 109 of the EA 2002 to set out the permitted purposes for which the CMA can use the information gathering powers. These are: assisting the CMA in carrying out any functions relating to a matter which is the subject of, or is the possible subject of, a reference under section 22 or 33 of the EA 2002 (completed or anticipated mergers) i.e. to assist the CMA during Phase 1 and Phase 2 merger investigations (new 109(A1)(a)); and assisting the CMA or the Secretary of State to undertake any functions relating to a matter which is the subject of, or is the possible

subject of, a reference under section 45 or 62 of the EA 2002 i.e. investigations where public interest issues are relevant (new 109(A1)(b)).

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

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

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

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

Interim measures

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

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

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

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

235. *Subsection (5)* and paragraphs 2(3) and 3(3) of Schedule 7 clarify that interim measure powers at Phase 1 (section 72 of the EA 2002) and Phase 2 (sections 80 and 81 of the

EA 2002) can be used to require merger parties to reverse steps that have already been taken (or to reverse the effects of such steps) where the CMA has reasonable grounds for suspecting that pre-emptive action has or may have occurred. This is an additional requirement to having reasonable grounds to suspect that two or more enterprises have ceased to be distinct.

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

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

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

Section 31: Interim measures: financial penalties: mergers

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

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

241. The existing procedural requirements at section 112 of the EA 2002 will apply to these penalties. These include the CMA notifying the amount of the penalty, justification for it, and the date(s) by which it must be paid. This new penalty will apply alongside the existing civil enforcement mechanism for failure to comply with interim measures under section 94 of the EA 2002. As a result, a person could potentially be liable to damages under section 94 and a financial penalty under new section 94A.

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

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

Time limits

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

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

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

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

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

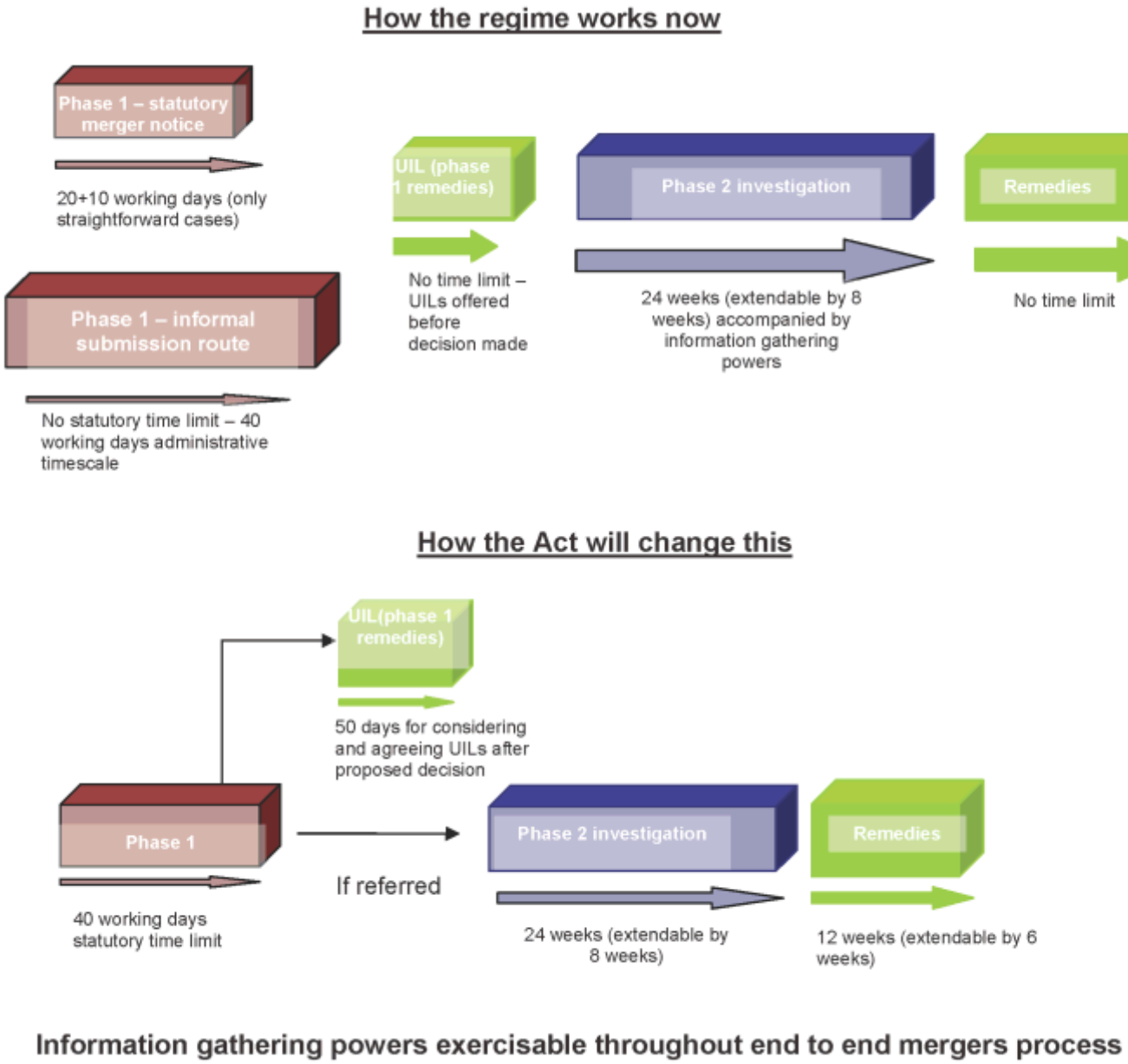
248. On announcement of its Phase 1 decision, the CMA can decide that there are no possible UILs that would address the competition concerns. If the CMA does not make that decision, merging parties will have 5 working days to offer UILs after the CMA announces its Phase 1 decision. The CMA will then have up to the tenth working day after the date of the decision to consider the UILs as proposed by the parties. So, for example, if the parties offer UILs on the third working day after the Phase 1 decision is taken, the CMA will have a further 7 working days to consider the UIL. If it considers that the UIL, or a modified version of the UIL, might be acceptable it must then publish a notice stating this. The CMA must then decide whether to accept the UIL or a modified set of such UIL within 50 days beginning with the date the Phase 1 decision is announced. This period can be extended once by up to 40 working days where there are special reasons. It is expected that such an extension will be primarily

used in cases where the CMA requires the identification and conditional commitment of a suitable purchaser before it will agree an undertaking. The CMA will be required to publish reasons for the use of the extension.

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

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

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



Chapter 2: Markets

Summary and Background

251. The main provisions of this Chapter provide for:

- giving the CMA the power to carry out an investigation into practices across more than one market;
- giving the Secretary of State the power to request the CMA to investigate public interest issues alongside competition issues as part of market investigations;
- introducing and, in some cases, reducing statutory time limits and harmonising information gathering powers for all stages of the markets process;
- removing the OFT's current duty to consult on decisions not to make a market investigation reference, except where there has been a request for a reference to be made during a market study; and
- ensuring that the CMA may use interim measures to reverse as well as to prevent pre-emptive action during a market investigation.

Cross-market investigations

Section 33: Power of Competition and Markets Authority to make cross-market references and Section 34: Ministerial power to make cross-market references

252. Currently under the EA 2002 the OFT is able to carry out market studies into features that are common to a number of markets using its section 5 powers. It cannot, however, make a reference to the CC to investigate those features, without also referring the whole of each market concerned. Upon a reference, the CC assesses competition in the market referred, as a whole.

253. These sections amend sections 131 and 132 of the EA 2002 to enable the CMA (section 131), or the appropriate Minister in certain circumstances (section 132), where the feature or features they are concerned about is or are types of conduct (as opposed to structural features), to refer a specific feature, or combination of features, which exist in more than one market to be investigated, without the CMA having to investigate competition across the whole of each of these markets. These changes are intended to enable a more targeted approach to recurring competition issues, and to provide the ability to investigate conduct which occurs within more than one market or sector, such as, for example, collective licensing of public performances and broadcasting rights in sound recording.

254. Section 33 introduces new definitions for the two different types of reference that will now be possible. The form of reference currently permitted will be termed an 'ordinary reference' and the new reference covering a feature common to more than one market will be termed a 'cross-market reference'.

255. It should be noted that while existing section 131(1) of the EA 2002 refers to features of 'a market', in practice this may constitute more than one economic market and is more akin to a description of goods or services. Section 133(1)(c) of the EA 2002 sets out that a reference under section 131 must include a description of the goods or services to which the feature concerned relates (as opposed to a description of the market). The new provisions do not make any change to these arrangements. Rather they provide for a reference of a feature which is common to the supply or acquisition of a number of different goods or services, each of which may, in fact, cover more than one economic market.

Schedule 9: Markets: cross-market references

256. Schedule 9 contains amendments which are consequential to the introduction of a cross-market reference.

257. Paragraph 2 of the Schedule amends section 133 of the EA 2002 to specify the content of a cross-market reference, in particular that this type of reference needs to set out each description of goods and services to which it relates and the feature or features concerned. Consistent with the existing provisions on ordinary references, it also enables a cross-market reference to be framed in such a way as to focus the CMA's investigation into the effects of the conduct concerned in relation to supplies or acquisitions of goods or services by reference to persons or places.

258. Paragraphs 3 and 5 contain amendments to sections 134 and 141 of the EA 2002 to make provision for the questions which the CMA must answer following a cross-market reference (including where such a reference has been made in a public interest intervention case). These questions are consistent with those the CMA must answer in relation to an ordinary reference, save that the CMA must limit itself to considering whether the feature identified in the cross-market reference, or any combination of the features identified, prevents, restricts or distorts competition, rather than (in the case of an ordinary reference) considering whether 'any' feature or combination of features prevents, restricts or distorts competition.

259. Paragraph 8 contains amendments to section 156 of the EA 2002. Section 156 currently prevents (what will now be known as) an ordinary reference being made where UILs have already been accepted by the OFT in relation to the same goods or services in the past 12 months. The amendments to section 156(1) set out in paragraph 8 clarify that, where UILs have been accepted in lieu of an ordinary reference in relation to goods of a particular description, no reference can be made relating to any feature relating to those goods in the following 12 months. So, for example, if UILs are accepted in lieu of an ordinary reference relating to feature A in market Z, then no ordinary reference can be made relating to any features (e.g. A, B or C) in relation to market Z in the following 12 months.

260. New subsection (A1) of section 156 provides for the following:

i). where UILs have been accepted instead of a cross-market reference being made in relation to feature A in market Z, no ordinary reference can be made in the next 12 months relating to feature A in market Z;

ii). ii). where UILs have been accepted instead of a cross-market reference being made in relation to feature A in market Z, no cross-market reference can be made in the next 12 months which includes feature A in relation to market Z;

iii). where UILs have been accepted instead of an ordinary reference being made in relation to feature A in market Z, no cross-market reference can be made in the next 12 months which includes feature A in relation to market Z.

261. However, these provisions do not prevent cross-market references being made within the 12 months following the acceptance of undertakings relating to another cross-market reference, unless both the feature(s) and goods and/or services to which they relate are the same. So, for instance, if the CMA considers making a cross-market reference in relation to feature A in markets X and Y, but instead accepts UILs which address these issues, the CMA would still be able to make a cross-market reference in relation to feature A in markets P and Q within the next 12 months. Equally the CMA will still be able to make either an ordinary reference of market X or Y (relating to any feature(s) other than feature A), or a cross-market reference in relation to any other features (e.g. B and C) of markets X and/or Y in those 12 months.

262. Schedule 9 also makes a number of other consequential amendments to ensure consistency between the two types of references under Part 4.

Public interest interventions

Section 35: Public interest interventions in markets investigations and Schedule 10: Markets: public interest interventions

263. Under section 139 of the EA 2002 the Secretary of State currently has the power to issue a public interest intervention notice after a market investigation reference has been made to the CC, or when the OFT is considering accepting UILs instead of a reference, when he/she considers a specified public interest consideration is relevant to the case. Following an intervention after a market investigation reference, the CC reports to the Secretary of State on the competition issues and proposed remedies. The Secretary of State must accept the CC's findings in respect of the competition issues. The Secretary of State must decide whether an eligible public interest consideration is relevant to the case and what action should be taken to remedy the competition issue in light of the public interest consideration. The CC currently has no role or powers to investigate and advise on remedies for the public interest issue; its role is limited to assessing competition issues.

264. This section and Schedule give the Secretary of State the power to request the CMA to investigate public interest issues alongside competition issues during a market investigation (Phase 2), and propose remedies which address any adverse effect on competition and any adverse public interest issue. The intention is to bring the public interest markets regime into line with the public interest mergers regime, and to provide a more holistic and expert assessment of the competition and public interest issues together.

265. The changes will not affect the list of specified public considerations under section 153 of the EA 2002 – the only specified public interest consideration will remain national security unless Parliament agrees to other public interest issues being specified in future.

266. Following an intervention on public interest grounds, the Secretary of State will be able to make a reference to the CMA to which the existing regime (restricted public interest ("PI") reference) or the new regime (full PI reference) will apply. Under the first of these, the CMA must simply investigate the competition issues referred. The Secretary of State will consider the public interest issue. Under the second the CMA must, alongside the competition issues, investigate and report on the public interest issue.

267. To enable the CMA to investigate public interest issues alongside competition issues following a full PI reference in the new regime, the section and Schedule provide for a number of other amendments, including regarding the timing of the public interest intervention notice, the procedure for appointment by the Secretary of State and role of public interest experts to advise the CMA, the impact on the investigation and report, and the impact on the Secretary of State's decision-making role. These are explained in more detail below.

268. *Subsection (3)* amends the period in section 139 of the EA 2002 during which the Secretary of State can issue a public interest intervention notice. This will now need to be given during a defined period beginning with a publication of a market study notice, or, where there is no market study notice, during a defined period beginning with the start of the CMA's consultation on making a reference, but before a market investigation reference is made in each case. The intention is to provide sufficient notice to the CMA of the potential public interest issue, and to enable, for example, a public interest expert to be appointed in a timely manner so as not to prolong any market investigation.

269. *Subsection (8)* provides that, where an intervention notice is in force, the CMA must give the market study report or (in a case where there is no market study notice) a document containing its decision about whether a reference is necessary directly to the Secretary of State instead of publishing it. In those circumstances the CMA cannot itself make a reference under section 131 of the EA 2002. The Secretary of State must

then decide whether the public interest consideration stated in the intervention notice is relevant to the matter in question and whether to make a restricted PI reference or a full PI reference to the CMA. If the Secretary of State decides to make a full PI reference he/she must also decide whether to appoint a public interest expert to advise the CMA.

270. Following the market study or (in a case where there is no market study notice) the consultation on the making of a reference, if the Secretary of State decides the public interest matter is not relevant, but the CMA has concluded that a reference should be made on competition grounds, then the Secretary of State must still make a market investigation reference which will then follow the normal markets process.

271. New section 141A set out in *subsection (9)* of section 35 sets out the questions that must be determined by the CMA following a full PI reference. In such cases, the CMA must decide whether or not there is any adverse effect on competition and, if so, whether, taking into account the relevant public interest consideration, the feature or features which gave rise to the adverse effect on competition operate(s) against the public interest. If the CMA finds that there is an adverse effect on the public interest the CMA must advise whether any action should be taken by the Secretary of State to remedy the effect on the public interest. If the CMA does not find any adverse effect on the public interest, but finds adverse effects on competition it must decide what competition remedies it or others should undertake.

272. New section 146A (in paragraph 14 of Schedule 10) sets out the decisions that the Secretary of State is required to make where the CMA has prepared a market investigation report in relation to a full PI reference. The CMA will prepare the report as set out above. On receiving the report the Secretary of State must decide whether to make an adverse public interest finding or whether there is no finding at all in the matter. The Secretary of State will make an adverse public interest finding if he/she decides that there is an adverse effect on competition (the Secretary of State must accept the decision of the CMA on this point), there are one or more relevant public interest considerations and, taken together, the feature or features which gave rise to the adverse effect on competition operate or may operate against the public interest.

273. The Secretary of State must make and publish this decision within 90 days from the date he/she receives the CMA's market investigation report.

274. Paragraph 16 of Schedule 10 sets out what action the Secretary of State may take if he/she makes an adverse public interest finding. In these cases the Secretary of State may accept any undertakings or make any orders he/she sees fit to remedy the adverse effects on the public interest. He/she must have regard to the recommendations included in the CMA's report in making any undertakings or orders.

275. Where the Secretary of State makes no finding at all i.e. he/she decides that there is no public interest consideration relevant to the matter, the case will revert to the CMA as if a reference had been made under section 131 of the EA 2002, and it had prepared its report by virtue of section 136 of the EA 2002. New section 148A (in paragraph 18 of Schedule 10) sets out further provisions around how the CMA must proceed in these instances, including where it is necessary to gain the consent of the Secretary of State (for example if he/she believes any remedies to the adverse effect on competition will operate against the public interest).

276. New section 141B set out in subsection (9) of section 35 sets out the role and certain terms of appointment of any public interest expert(s).

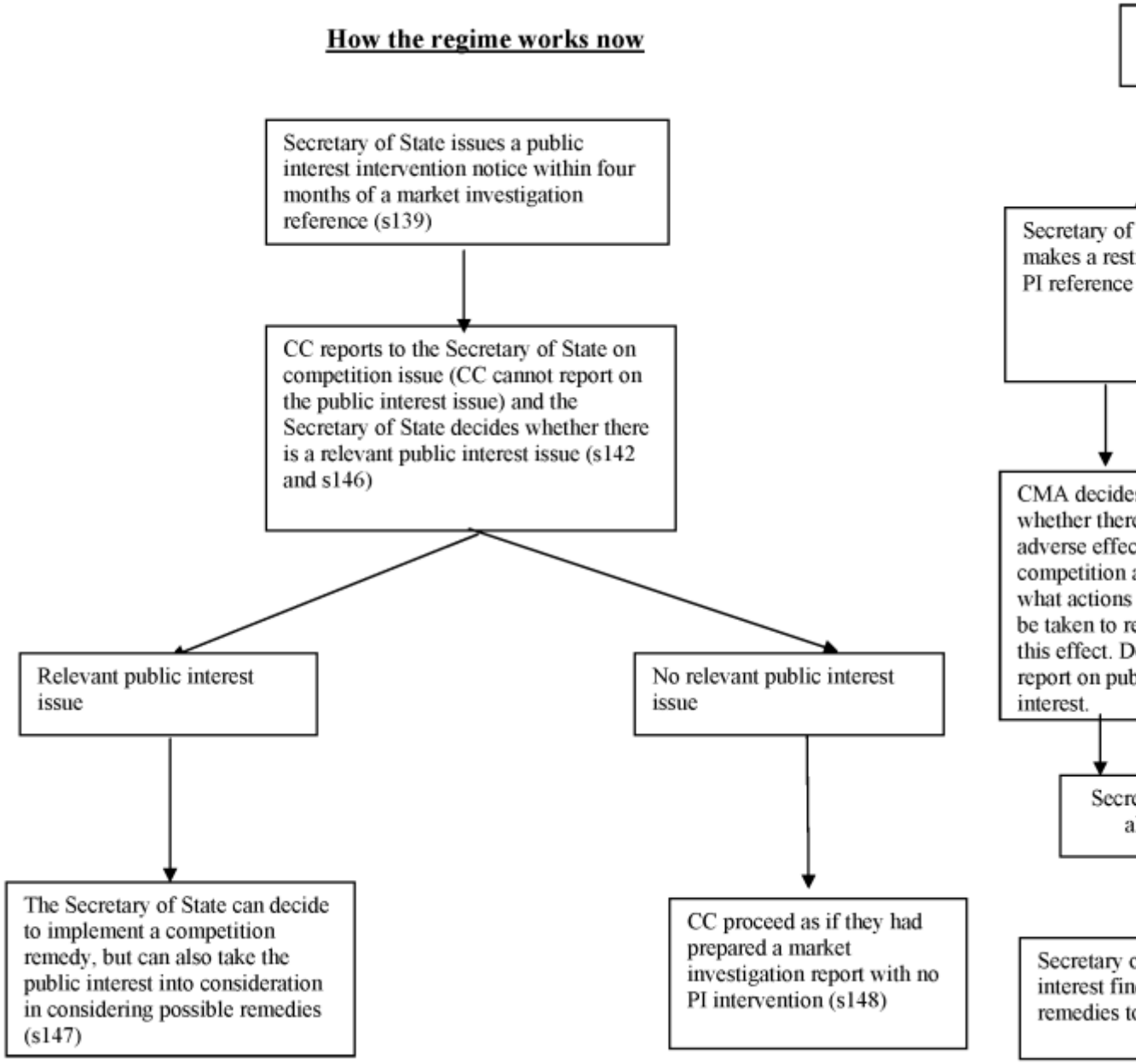
277. Where the Secretary of State appoints public interest expert(s), the CMA must take their views into account and include a summary of the views of the expert(s) in its market investigation report.

278. For cases where the Secretary of State appoints public interest expert(s), Schedule 10 (paragraph 11) amends section 144 of the EA 2002 to allow up to 2 months for the expert(s) to be appointed before the 18-month timescale for a market investigation

begins. The investigation should therefore begin, and the timescale be triggered, on the date of the appointment of the public interest expert(s) or at the end of 2 months from the date of the reference, whichever is sooner.

279. The Schedule contains further consequential amendments to Part 4 as a result of these changes.

Figure 2 below sets out how the existing and new regimes will work.


How the regime works now
Secretary of State issues a public interest intervention notice within four months of a market investigation reference (s139)
CC reports to the Secretary of State on competition issue (CC cannot report on the public interest issue) and the Secretary of State decides whether there is a relevant public interest issue (s142 and s146)
Relevant public interest issue
No relevant public interest issue
The Secretary of State can decide to implement a competition remedy, but can also take the public interest into consideration in considering possible remedies (s147)
CC proceed as if they had prepared a market investigation report with no PI intervention (s148)

Investigatory powers

Section 36: Investigation powers: markets

280. Currently under the EA 2002 the OFT has powers to require persons to give evidence and provide specific documents and information, but can only require information where it already believes it has power to make a market investigation reference. This criterion prevents the OFT requiring the information during the early stages of a market study. The introduction of statutory time limits for market studies and implementation of remedies will mean that the CMA will require appropriate investigatory powers throughout the entire markets process.

281. This section extends the CC's existing investigatory powers so that the CMA will have a single set of powers that can be used consistently across the whole of the end to end markets process.

282. *Subsection (2)* amends section 174 of the EA 2002 to set out the range of permitted purposes for which the CMA can use the information gathering powers. These are: assisting the CMA in undertaking a market study (amended 174(1)(a)); assisting the CMA in carrying out any functions relating to a case which the CMA or Secretary of State is either considering referring, including any period of considering UILs, or where a reference has been made i.e. to assist the CMA during the market investigation (amended 174(1)(b)). Amended 174(1)(c) enables the CMA or the Secretary of State to use the powers to assist in any functions relating to a restricted or full PI reference, including any period considering UILs instead of any PI reference.

283. New subsections (1)(b) and (c) of section 174 also enable the CMA, or the Secretary of State where relevant, to exercise the investigatory powers during any period of monitoring and enforcement relating to any remedies implemented either following a market investigation, or UILs implemented instead of a reference. New subsection (9A) of section 174 sets out the enforcement functions that are covered by these powers.

284. The CMA will not be able to use these investigation powers before publishing a market study notice. It will not be able to use the powers in relation to its other functions under section 5, if these are not a market study and no market study notice has been published.

285. The CC's existing investigatory powers set out in section 176 of the EA 2002 will be repealed and replaced with these amendments to section 174 of the EA 2002 to provide harmonised information gathering powers across the markets process.

286. A similar extension of investigatory powers will operate in mergers inquiries (see section 29).

Schedule 11: Investigatory powers: markets

287. This Schedule makes provision for the enforcement of investigatory powers under section 174 of the EA 2002. The intention is to align the enforcement of information gathering powers relating to the markets process with those relating to the mergers process.

288. Under existing section 175 of the EA 2002 failure to comply with an information request from the OFT in relation to a potential market reference is a criminal offence. This differs to civil penalties that apply in failing to comply with a CC information request relating to either mergers (section 109) or markets (section 176) inquiries.

289. Paragraph 3 of the Schedule repeals section 175 of the EA 2002 so that failure to comply with a section 174 request will no longer be a criminal offence. However, paragraph 1 of the Schedule extends the existing civil enforcement for Phase 2 requests so that financial penalties can be imposed if there is a failure to comply with investigatory requests at any stage of the markets process. This aligns the civil enforcement and penalties across mergers and markets processes.

290. The level of penalty imposed is described in new 174D, set out in paragraph 1 of Schedule 11.

291. Penalties for non-compliance can continue to be imposed up to 4 weeks after the investigatory powers cease to be exercisable for the purpose for which, in that case, they were exercised.

292. Under the existing section 176(1)(b) (markets) and section 110(5) (mergers) of the EA 2002 it is a criminal offence to intentionally alter, suppress or destroy any document which is required to be produced as a result of information gathering powers for Phase 2 investigations (mergers and markets). Paragraph 4 of the Schedule repeals section 176 of the EA 2002, and paragraph 1 replaces it, mirroring the provisions set out in section 110 of the EA 2002. The result is that the application of the criminal offence described here is consistent with the extended investigatory powers and will apply to the end to end markets process.

Interim measures

Section 37: Interim measures: pre-emptive action: markets

293. The purpose of this section is to ensure that the CMA's powers to impose interim measures include the power to require parties to take steps to reverse pre-emptive action taken, or to reverse the effects of such action, following a market investigation reference being made. The intent is to prevent parties from taking pre-emptive action which may impede implementation of measures required by the CMA following a market investigation.

294. The section enables the CMA to order actions to be taken which may either restore the position to what it otherwise would have been, or, if this is not possible, to mitigate the effects of the pre-emptive action.

295. *Subsections (2) and (3)* apply to interim undertakings (section 157 of the EA 2002) and *subsections (4) and (5)* to interim orders (section 158 of the EA 2002), so enforcement action can flow from a failure to comply with an interim order or an interim undertaking. The powers only apply to actions taken after the order (or undertaking) has been issued.

296. The powers will also apply in cases where the Secretary of State is the relevant authority, that is, if he/she has made a market investigation reference under the new section 140A in a case where he/she gave a public interest intervention notice.

Time limits and procedure

Section 38: Market studies and market investigations: consultation and time-limits and Schedule 12: Markets: time-limits

297. Under the EA 2002 there are no time limits on the OFT undertaking a market study, or on the CC implementing remedies. There is a 24 month time limit for completion of a market investigation by the CC. This section and Schedule introduce statutory time limits for all stages of the markets process and specify circumstances in which extensions to those time limits are permitted. These are explained in more detail below. The introduction of time limits should be considered together with the extension of investigatory powers through section 36 and Schedule 11, and are also mirrored in a similar way for the mergers regime. Taken together, these sections limit the time period during which parties may be subject to markets work, but give the CMA a strengthened ability to gather information in order that the timescales can be met.

298. New section 130A, set out in paragraph 1 of Schedule 12, introduces a requirement on the CMA to publish a market study notice on commencement of a market study under section 5 of the EA 2002 and to set out the timescales in which that study will be completed, the scope of the study, and the period during which representations may be

made to the CMA in relation to the matter (this is additional to any specific information requests the CMA makes to specific parties which will detail the particular requirements and timescales around which these requests are to be fulfilled). The publication of the market study notice triggers the start of a new statutory time period for completion of the market study, which is set out in new section 131B, in paragraph 2 of the Schedule. Information powers provided for by section 36 and Schedule 11 are triggered when a market study notice is published.

299. It should be noted that the CMA will continue to carry out a wider range of work under section 5 of the EA 2002 than just market studies – for example, economic research and calls for evidence. However, none of these will be termed a market study and will not trigger the market study notice requirement, statutory timeframes or information gathering powers under section 174.

300. Paragraph 2 of the Schedule sets out new section 131A which contains provisions for consulting on whether or not to make a reference. Section 169 of the EA 2002 currently contains a duty on the OFT, CC, and Ministers to consult on 'relevant decisions', which include decisions on whether or not to make a market investigation reference. This paragraph varies the duty to consult so that it only applies to proposals to make a reference, or proposals not to make a market investigation reference where third parties request that such a reference be made during the period set out in the market study notice for representations.

301. The intention is to ensure that representations are made in good time to enable the CMA to fully consider them as part of the market study, and to make clear to parties the timetable on which they are expected to make their representations. Where no representations are made during the specified period requesting that a reference be made, the CMA must, if it decides not to make a reference, publish its decision within 6 months of the market study notice being published, and it is not required to consult on this decision (see section 131B(2) and (3)).

302. Where the CMA is required to consult on its proposed decision around whether to make a reference or not, the new timescales state that it must publish its proposal within 6 months of a market study notice being published. At the same time it must also initiate a consultation on this proposed decision, although it is not required to complete this consultation within the 6 month period.

303. New section 131B requires the CMA to publish a market study report setting out its findings and actions (if any) which will be taken as a result of the study, within 12 months of the original market study notice being published. Any consideration required of actions to be taken, including completing the consultation described above and negotiating and agreeing any UILs, must be completed within this 12 month period and detailed in the market study report. In cases where a market investigation reference is to be made this should be made at the same time as the market study report is published, within the 12 month deadline.

304. In the case of a public interest intervention the timescales will still apply to the CMA in terms of its initial proposal on whether to make a reference or not after 6 months, and to prepare its market study report within 12 months. However, the CMA's duty to make a reference within that period falls away in such a case (since in a public interest intervention it is the Secretary of State who makes a reference).

305. New section 131C provides for the Secretary of State, by order, to vary the timescales set out above. However, these cannot be increased beyond 6 months for the initial notice of whether or not the CMA intends to make a reference, and beyond 12 months for publication of the final market study report. Therefore the timescales can be reduced and subsequently increased back up to these limits only. Where the Secretary of State considers that, for example, the CMA ought to be tasked with completing market studies more quickly, s/he could use these powers.

306. Under section 137 of the EA 2002 a market investigation and its report must be completed within 2 years. Paragraph 3 of Schedule 12 reduces this to 18 months. It also allows for the CMA to extend this deadline by up to a further 6 months if there are special reasons why it cannot publish its report within the original 18 month period.

307. Paragraph 3(4) of the Schedule also provides for the Secretary of State, by order, to vary the timescales set out above. However, these cannot be increased to more than 18 months, for a market investigation, and more than 6 months for an extension where there are special reasons. Therefore the timescales can be reduced and increased back up to these limits only. Where the Secretary of State considers that, for example, the CMA ought to be tasked with completing Phase 2 market investigations more quickly, he/she could use these powers.

308. Paragraphs 4 and 5 of Schedule 12 introduce time limits for the CMA's implementation of remedies to address findings from a market investigation. The amendments in the Schedule require the CMA to accept final undertakings or make a final order, within 6 months of the date of publication of its market investigation report. Consultation on the proposed remedies will need to happen during this 6 month period.

309. The CMA may extend this period by up to 4 months, but only if there are deemed to be special reasons for doing so. The CMA may also extend this period if it believes that a person has failed to adequately respond to any investigatory powers under section 174 of the EA 2002. The extension will last for the time it takes for the person to provide the information requested to the satisfaction of the CMA, or until the CMA publishes a notice to cancel it. These two extensions can be used together if circumstances allow, and the extension periods should be added together.

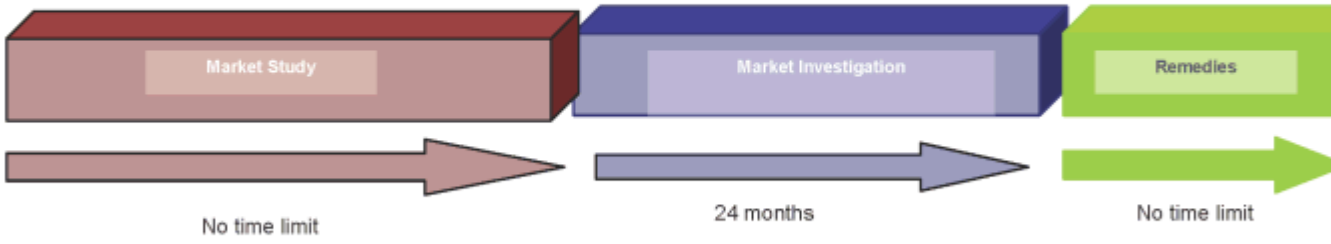
310. The Schedule also provides for the Secretary of State, by order, to vary the timescales set out above. However, these can not be increased to more than 6 months, for the original implementation of remedies phase, and more than 4 months for an extension where there are special reasons. Therefore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

311. Paragraph 6 of Schedule 12 mirrors the amended 18 month timescale for market investigations in cases where there is a public interest intervention. It enables the CMA to extend for an additional 6 months in cases where there are special reasons why the original 18 month timescale cannot be met.

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

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

How the regime works now



How the Act will change this

Chapter 3: Anti-Trust

Summary and Background

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

314. The main provisions of this Chapter provide for:

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

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

Investigation powers

Section 39: Investigations: power to ask questions

315. This section amends the CA 1998 to provide the CMA[4] with a new power to require individuals to answer questions as part of an investigation under that Act. It places limits on the use in criminal proceedings of answers as evidence against either the individual or an undertaking with which they are connected.

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

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

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

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

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

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

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

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

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

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

Section 40: Civil enforcement of investigation powers

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

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

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

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

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

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

329. Section 40B is similar to section 116 of the EA 2002. It requires the CMA[5] to consult on and then to publish a statement of policy in relation to the use of its powers under section 40A. This statement of policy will include the considerations that will be relevant to determining the nature and amount of any monetary penalty. These considerations will be for the CMA to identify, but it is envisaged that they could include:

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

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

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

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

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

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

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

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

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

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

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

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

337. The second set of procedural changes made by section 42 involves Schedule 9 to the CA 1998, which illustrates and makes further provision concerning the rules on procedural and other matters which may be made by the OFT (and in future the CMA)[6] under section 51 of the CA 1998 (without restricting the powers under that section).

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

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

Interim measures and other sanctions

Section 43: Threshold for interim measures

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

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

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

Section 44: Penalties; guidance etc.

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

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

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

Miscellaneous

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

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

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

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

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

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

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

Chapter 4: Cartels

Summary and Background

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

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

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

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

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

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

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

Section 47: Cartel offence

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 5: Miscellaneous

Enforcement orders: markets and mergers

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

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

Section 50: Enforcement orders: provision of information

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

Concurrency

Summary and Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 53: Orders under section 52: procedural requirements

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

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

a) Ofcom;

b) Ofgem;

c) Ofwat;

d) ORR

e) NIAUR

f) CAA

Miscellaneous

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

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

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

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

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

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

Section 55: Disclosure etc. of information: offences

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

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

391. This section requires the Government to review certain provisions of the Act every 5 years, with the first review taking place no later than 5 years after these provisions come into force. The Government's policy of sunset and review of regulations can be found in *Sunsetting Regulations: Guidance* (2011)[7].

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

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

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

Schedule 15: Minor and Consequential Amendments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part 5: Reduction of Legislative Burdens

Sunset and review

Section 59: Sunset and review provisions

410. This section amends the Interpretation Act 1978 to help give effect to the Government's policy on the use of sunset and review provisions which was first published in March 2011[8]. A sunset provision provides for legislation to cease to have effect at a particular point in time. A review provision requires a person to review the effectiveness of the legislation within or at the end of a specified period.

411. Section 59 inserts a new section 14A into the Interpretation Act 1978. This ensures Ministers and other people making subordinate legislation may include sunset and review provisions in that legislation and in other subordinate legislation where that is being amended. A review provision may include an obligation to consider whether the objectives of the legislation remain appropriate, and whether they could be achieved in another way. Review or sunset provisions may apply to all or part of the legislation or to its application in particular circumstances. Subordinate legislation including sunset or review provisions may also include certain supplementary provisions, for example transitional or consequential provisions or savings in connection with the sunset or review provision. New section 14A does not apply to Scottish Ministers, or to non-Ministerial Scottish bodies and other persons exercising powers in areas where legislative competence is devolved to the Scottish Parliament.

8 http://www.bis.gov.uk/policies/bre/effectiveness-of-regulation/sunsetting-regulations

Heritage planning etc.

Section 60: Listed buildings in England: agreements and orders granting listed building consent

Heritage partnership agreements

412. *Subsection (2)* of section 60 inserts new section 26A into the Planning (Listed Buildings and Conservation Areas) Act 1990 ("P(LBCA)A 1990"), which makes provision for heritage partnership agreements. A relevant local planning authority may make such an agreement with an owner of a listed building, or part of a listed building, in England and any of the persons mentioned in new section 26A(2) may be an additional party to the agreement. A heritage partnership agreement may contain provision granting listed building consent ("LBC") under section 8(1) of the P(LBCA)A 1990 for the execution of specified works for the alteration or extension of the building to which it relates, and setting out any conditions attached to that consent. The specified works will still require any other relevant permission, such as planning permission. A heritage partnership agreement cannot be used to grant LBC for demolition. Subsection (6) of new section 26A sets out the range of additional matters that may be covered in a heritage partnership agreement, including which works the parties consider would not, affect the character of the listed building.

413. Subsection (2) also inserts new section 26B into the P(LBCA)A 1990, which makes supplemental provision in relation to heritage partnership agreements. Section 26B(1) provides that such agreements must make provision for review, termination and variation by the parties. Section 26B(1) also makes it clear that more than one listed building or part can be the subject of an agreement, provided that in each case a relevant local planning authority and an owner are parties to the agreement. Section 26B(2) sets out a range of further matters on which the Secretary of State may make regulations, including:

- any consultation that must take place before a heritage partnership agreement is made or varied;
- any publicity requirements;
- any particular terms that must be included in an agreement;
- the termination of an agreement, or of any provision in an agreement, by order of the Secretary of State or any other person specified in the regulations;
- the application or reproduction of sections 10 to 26 and 28 of the P(LBCA)A 1990, which set out certain procedures for listed building consent, for the purposes of heritage partnership agreements; and
- the application, with any modifications consequential on the application or reproduction of sections 10 to 26 and 28, of other specified sections and parts of the P(LBCA)A 1990 for the purposes of heritage partnership agreements.

414. Section 26B(4) provides that, if a heritage partnership agreement grants LBC for specified works, the benefit of such consent is conferred on the listed building and any person interested in it (whether or not that person is a party to the agreement). Section 26B(5) ensures that persons who are not party to the agreement are not subject to any burdens, and do not enjoy any other rights, under the agreement.

Listed building consent orders

415. Currently, works affecting the special architectural or historic interest of a listed building must be authorised through written consent, listed building consent, granted by the local planning authority or the Secretary of State, and must be executed in accordance with the terms of the consent and of any conditions attached to it. Section 60

amends the P(LBCA)A 1990 to allow the Secretary of State or a local planning authority to make an order granting LBC applying (subject to any restrictions) to all works falling within categories specified in the order, known as a "listed building consent order" or "local listed building consent order" respectively. These provisions are broadly based on the provisions set out in sections 59 to 61D of the Town and Country Planning Act 1990 ("TCPA 1990") in respect of development orders and local development orders.

416. *Subsection (3)* of section 60 inserts new section 26C into the P(LBCA)A 1990 to allow the Secretary of State to make a listed building consent order which grants LBC for works of any description for the alteration or extension, but not the demolition, of listed buildings of any description in England. Such orders will be subject to the affirmative resolution procedure. It will be possible to apply conditions to any LBC granted by a listed building consent order, which may include any conditions subject to which LBC may be granted under section 16 of the P(LBCA)A. Section 26C(4) provides that the order may grant consent subject to conditions about the making of an application to the local planning authority to determine whether prior approval is required for certain details of works and the outcome of that application or the way it is dealt with. Under section 26C(5), a listed building consent order may contain provision allowing the Secretary of State or the local planning authority to direct that the order does not apply to a specified building, or to buildings of a specified type or in a specified area: this will allow the order to be disapplied, for instance, within the area of a local planning authority where the order is not suitable for the character of the buildings in that area. This reflects the mechanism provided under section 60(3) of the TCPA 1990, which allows the Secretary of State or local planning authorities to direct that planning permission granted by a development order shall not apply in certain circumstances.

417. New section 26D of the P(LBCA)A 1990 allows a local planning authority to make a local listed building consent order which grants LBC for works of any description for the alteration or extension, but not the demolition, of listed buildings of a specified description or in a specified part of their area. The order will be able to specify the conditions that apply to any LBC granted by the order, which may include any of the conditions subject to which LBC may be granted under section 16 of the P(LBCA)A 1990. Section 26D(6) provides that the order may contain provision allowing the local planning authority to direct that the order does not apply to a specified building, or to buildings of a specified type or in a specified area. Under section 26D(2) regulations may provide that the power to make a local listed building consent order does not apply to listed buildings of any description or in any area.

418. New section 26E of the P(LBCA)A 1990 gives the Secretary of State the power to direct that a local listed building consent order, or any part of it, is submitted to the Secretary of State for approval before it is adopted. These provisions reflect the 'call in' procedures provided for in section 61B of the TCPA 1990, in respect of local development orders. Under section 26E(2), if the Secretary of State directs that an order is submitted for approval, the order may not be adopted by the local planning authority and it will not have any effect until it has been approved by the Secretary of State. The Secretary of State may approve or reject any order or part of it, or may direct the local planning authority to modify the order, giving reasons for any decision. Under section 26E(7), the local planning authority must comply with a direction from the Secretary of State to modify the order, and may not adopt the order unless the Secretary of State is satisfied that the direction has been complied with. Section 26E(8) allows the Secretary of State at any time, by order, to revoke a local listed building consent order, if of the opinion that it is expedient to do so. The Secretary of State must give reasons for revoking the order. The Secretary of State must also, if proposing to revoke an order, serve notice on the local planning authority giving them at least 28 days, within which time they may request an oral hearing, which the Secretary of State must provide.

419. New section 26F reflects section 16 of the P(LBCA)A 1990 so that in considering whether to make a listed building consent order or local listed building consent order, the Secretary of State or local planning authority must have special regard to the

desirability of preserving the listed buildings to which the order applies, as well as their setting and any features of special architectural or historic interest of such buildings. Section 26F(2) requires the Secretary of State to consult English Heritage before making a listed building consent order.

420. New section 26G reflects the provisions set out in section 61D of the TPCA 1990 in providing that a listed building consent order or local listed building consent order may allow for works to be completed when an order is revoked or varied or revised so that it ceases to grant LBC, or if a specified building or building of a specified type or in a specified area is excluded from the order, and as a result the consent granted by the order is withdrawn.

421. *Subsection (4)* of section 60 inserts new section 28A into the P(LBCA)A 1990 to allow compensation to be paid, as set out in section 28 of the P(LBCA)A 1990, where LBC granted by a listed building consent order or a local listed building consent order is withdrawn, whether by the revocation or amendment of the order or by exclusion by direction of a specified building or building of a specified type or in a specified area. Section 28 will have effect only where: an application for LBC is made, within a time period to be set out in regulations, after the withdrawal of the order; and consent for works formerly authorised by the order is refused or is granted subject to conditions that were not included in the order. The provision for compensation will not apply however where: works have started before consent granted by order is withdrawn and the order included provision to permit the works to be completed after the withdrawal; or the works were not started before the notice of withdrawal was published and notice of the withdrawal was published in the prescribed manner and within the prescribed period.

Schedule 16: Local listed building consent orders: procedure

422. Schedule 16 inserts Schedule 2A into the P(LBCA)A 1990, setting out the procedure for local listed building consent orders. This replicates the procedures set out in Schedule 4A to the TCPA 1990 for local development orders. Paragraph 1 of Schedule 2A provides that a local listed building consent order must be prepared in accordance with such procedure as is prescribed by regulations. The regulations may include provision about the preparation, submission, approval, adoption, revision, revocation and withdrawal of an order. It may also cover any notice, publicity and public inspection requirements, and any provision about consultation. Paragraph 2 provides that a local planning authority may at any time prepare a revision of a local listed building consent order, and must do so if directed by the Secretary of State. Paragraph 2(4) provides that a local authority may not vary or revise a local listed building consent by any means other than under paragraph 2. Paragraph 3 provides that a local listed building consent order must be adopted by resolution of the local planning authority if it is to have effect. Paragraph 4 sets out reporting requirements.

Section 61: Listed buildings in England: certificates of lawfulness

423. Section 7 of the P(LBCA)A 1990 requires a person to obtain LBC for the alteration or extension of a listed building in any manner which would affect its character as a building of special architectural or historic interest. Section 61 is intended to provide clarity as to whether any proposed works to a listed building fall within this broad definition by providing for a "certificate of lawfulness of proposed works".

424. Section 61 inserts new section 26H into the P(LBCA)A 1990, mirroring the provisions of section 191 of the TCPA 1990 in respect of certificates of lawfulness of existing use or development in the planning system. Anyone who wishes to ascertain whether proposed works for the alteration or extension of a listed building would be lawful – that is, would not affect the character of the listed building as a building of special architectural or historic interest - will be able to make a simple application to the local planning authority, describing the works, in order to receive a formal response. Under section 26H(3), if the local planning authority is satisfied the works described will

be lawful, they must issue a certificate to that effect, or if not, they must refuse the application for a certificate. Section 26H(5) provides that the lawfulness of any works for which a certificate is in force will be conclusively presumed, provided that the works are carried out within 10 years beginning with the date of issue of the certificate, and the certificate is not revoked under section 26I. Reflecting the provisions of section 193 of the TCPA 1990, new section 26I enables the application process for certificates of lawfulness of proposed works to be set out by regulations. Regulations under this section may make provision about how applications for certificates are to be dealt with by the local planning authority. Section 26I(5) provides the certificate must be in a prescribed form. To enable a precise definition of which works do not require LBC it will be possible for a certificate to cover all or part of the listed building which is the subject of the application and all or part of the works described in the application. Under section 26I(6), a local planning authority may revoke a certificate if an application is made on the basis of false information, or if any material information is withheld. The manner in which certificates are revoked may be set out by regulations.

425. Section 26J is inserted into the P(LBCA)A 1990 to replicate the offence set out in section 194(1) of the TCPA 1990 in respect of certificates of lawfulness of proposed works, where false or misleading information is used or information is withheld in an application for a certificate. Section 26J(2) sets out the penalties for a person guilty of this offence, reflecting those in section 194(2) of the TCPA 1990.

426. Following the precedent in section 195 of the TCPA 1990, section 26K provides for a right of appeal to the Secretary of State against refusal or part refusal of a certificate, or against non-determination of an application within the time set by the Secretary of State, as provided for in section 26I, or as extended by written agreement between the applicant and the local authority. The Secretary of State may prescribe in regulations the manner in which a notice of appeal must be served, but at least 28 days must be allowed from the date of notification of the decision on the application, or the end of the period for determination of applications. The time which may be prescribed for an appeal replicates that set out in section 21(2) of the P(LBCA)A 1990 in respect of LBC on an application. In response to an appeal, the Secretary of State may grant or modify a certificate, or dismiss the appeal.

Section 62: Osborne estate

427. Section 62 amends the Osborne Estate Act 1902 ("OEA 1902") to remove the Secretary of State for Culture, Media and Sport's existing statutory obligation to use parts of Osborne House and grounds for the benefit of members of the armed forces and civil service, while retaining the obligation to preserve the royal apartments and keep them open to the public. *Subsection (2)* of this section changes the basis on which Osborne House and grounds are managed, so that the Secretary of State's powers and duties are governed by section 21 rather than section 22 of the Crown Lands Act 1851. Section 21 of that Act already applies to unoccupied Royal Palaces such as Hampton Court Palace and the Tower of London and is more suitable to a property like the Osborne Estate which consists primarily of a substantial house rather than a park or garden.

428. *Subsection (3)* removes the requirement in section 1(4)(b) of the OEA 1902 for parts of Osborne House and grounds other than the royal apartments to be used for the benefit of naval and military officers, their wives, widows or families. *Subsection (4)* removes obsolete provisions of the OEA 1902 which relate to a part of the Osborne estate (Barton House and its grounds) which was sold to a private purchaser in 1922 and so no longer forms part of the estate. *Subsection (5)* repeals the Osborne Estate Act 1914, which gave power to extend the classes of persons who may benefit under section 1(4)(b) of the OEA 1902.

429. The statutory obligation for the Secretary of State (in practice carried out by English Heritage under a direction given under section 34 of the National Heritage Act 1983)

to manage the estate and preserve the royal apartments in Osborne House and to keep them open to the public as a memorial to Queen Victoria is not affected.

Section 63 and Schedule 17: Heritage planning regulation

Conservation area consent in England

430. Currently, certain buildings in a conservation area must not be demolished without conservation area consent from the local planning authority. Under Schedule 17, the requirement to have such consent would cease to apply to those buildings situated in England. Instead of having a separate system of conservation area consent, proposals to demolish certain buildings in a conservation area would be considered by the local planning authority as part of the application for planning permission.

431. Paragraph 12 of this Schedule amends section 74 of the P(LBCA)A 1990 to remove the system of conservation area consent as it applies to buildings in conservation areas in England. Planning permission will instead be required under the TCPA 1990. The TCPA 1990 already provides that demolition of buildings requires planning permission under Part 3 of that Act (see section 55), so it is not necessary to make changes to the TCPA 1990 to apply the planning regime to the demolition of buildings in conservation areas. It will be necessary however to amend the Town and Country Planning (General Permitted Development) Order 1995 ("GPDO 1995") which currently provides that the demolition of a building is, subject to certain conditions, permitted development. The GPDO 1995 will be amended by secondary legislation and, in effect, the amendments will provide that the demolition of certain buildings in a conservation area in England is not permitted development and, therefore, requires planning permission.

432. Paragraphs 3 to 6 of this Schedule amend the TCPA 1990 so that the planning regime offers the same level of protection as the current system of conservation area consent. Paragraph 3 amends section 108 of the TCPA 1990 so that the compensation provisions that apply to the withdrawal of permitted development rights do not apply to development that would previously have required conservation area consent. Paragraph 4 amends section 171B of the TCPA 1990 to provide that there is no time limit on when enforcement action may be taken in relation to a breach of planning control with respect to "relevant demolition", that is the demolition of certain buildings in a conservation area as defined in section 196D(3). Paragraph 5 amends section 174 of the TCPA 1990 to insert a new ground of appeal against an enforcement notice. This replicates the ground of appeal currently in section 39(1)(d) of the P(LBCA)A 1990 in relation to listed building enforcement notices (so far as relevant to the total demolition of a building). This reflects the defence to the new offence in section 196D (described below) except that it is not necessary under section 174 for the person appealing the enforcement notice to prove that they notified the local planning authority of the relevant demolition, unlike in section 196D(4).

433. Paragraph 6 inserts new section 196D into the TCPA 1990 to create an offence of failing to obtain planning permission for the demolition of certain buildings in a conservation area in England. Where planning permission is obtained for such demolition, it is also an offence to fail to comply with any condition or limitation subject to which the permission was granted. The effect of 196D(3)(b) is that the offences do not apply to listed buildings, certain ecclesiastical buildings being used for ecclesiastical purposes, scheduled monuments (within the meaning of the Ancient Monuments and Archaeological Areas Act 1979) and other buildings described in a direction of the Secretary of State under section 75 of the P(LBCA)A 1990. These buildings are not currently subject to the requirement to obtain conservation area consent. In each case these buildings are either protected by other procedures or are trivial and do not justify additional control.

434. It would be a defence for a person accused of an offence under new section 196D to prove that:

a) the demolition was urgently necessary in the interests of safety or health;

b) it was not practicable to secure safety or health by works of repair or works for affording temporary support or shelter;

c) the demolition was the minimum measure necessary; and

d) notice in writing of the demolition was given to the local planning authority as soon as reasonably practicable.

435. This defence replicates the defence to unauthorised works affecting a listed building (section 9(3)(a) to (d) of the P(LBCA)A 1990) but modifies the defence so it is relevant to unauthorised demolition in a conservation area. A person guilty of an offence under section 196D is liable to the penalties set out in section 196D(5).

436. Paragraph 1 of this Schedule provides English Heritage with equivalent powers to those that it currently has in relation to conservation area consent under P(LBCA)A 1990. This is achieved by amending section 33 of the National Heritage Act 1983 to provide English Heritage (referred to in that Act as the "Commission") with the power to bring a prosecution for an offence under section 196D of the TCPA 1990 and to apply to the court for an injunction under section 187B of that Act if it considers it necessary or expedient in relation to an actual or apprehended unauthorised demolition.

Listing of buildings of special architectural or historic interest in England

437. Paragraph 8 of this Schedule amends section 1 of the P(LBCA)A 1990, which deals with the listing of buildings of special architectural or historic interest. Section 1(5) of the P(LBCA)A 1990 provides that a listed building includes any object or structure fixed to the building or within the curtilage of the building, which although not fixed to the building, forms part of the land and has done so since before 1 July 1948. Paragraph 8 of this Schedule inserts new subsection (5A) into section 1 of the P(LBCA)A 1990 which allows the list, for buildings situated in England, to provide that such objects or structures are not to be treated as part of the listed building. It also allows the list, again for buildings situated in England, to state definitively that a particular part or feature of the building is not of special architectural or historic interest.

Certificates of immunity from listing

438. Paragraph 9 of this Schedule amends section 6 of the P(LBCA)A 1990. Section 6 of the P(LBCA)A 1990 currently provides a system of certificates of immunity from listing ("COIs"). A COI is a legal guarantee, in England issued by the Secretary of State, that a building will not be listed for 5 years from the date of issue. COIs are a useful tool where development is intended that would impact on a building that may be eligible for listing. They give certainty to developers and owners by removing the risk of a building being listed at a late stage in the preparation of planning proposals, thereby causing delay or even the abandonment of redevelopment schemes. Currently a person can apply for a COI for a building only where an application has been made for planning permission, or planning permission has been granted, for any development involving the alteration, extension or demolition of the building. Paragraph 9 of this Schedule amends section 6 to remove that restriction so that a COI can be applied for at any time for a building situated in England.

Equality Acts

Section 64: Commission for Equality and Human Rights

439. This section amends Part 1 of the Equality Act 2006, which makes provision for the Commission for Equality and Human Rights, to clarify the Commission's remit by removing some of its powers and duties and by reducing the frequency with which the Commission is required to report on progress in society so that its reports capture more

meaningful change over time. This section also makes consequential amendments to the Equality Act 2006 and the Equality Act 2010.

440. Specifically, the section makes the following amendments to the Equality Act 2006:

- repeals section 10(1) and 10(4) to (7), which imposes a duty on the Commission to promote good relations between members of different groups, and section 19, which gives the Commission powers associated with section 10;
- repeals section 27, which enables the Commission to make arrangements for the provision of conciliation in certain non-employment-related disputes;
- amends section 12, to require the Commission to monitor and report on changes and developments in society which are consistent with its duties in sections 8 (Equality and diversity) and 9 (Human rights) instead of reporting on changes relevant to section 3. It also reduces the frequency with which the Commission is required to publish a report on progress from every 3 years to every 5.

441. The section also makes further amendments, consequential on these changes, to provisions in the Equality Act 2006 and the Equality Act 2010.

Section 65: Equality Act 2010: third party harassment of employees

442. Following a review of current legislation (sections 65 and 66) remove from the Equality Act 2010 measures which are considered to impose an unnecessary burden on business. The Government consulted on the repeal of these provisions.

443. Section 65 removes the provisions in section 40 of the Equality Act 2010 which make an employer liable for repeated instances of harassment of its employees by third parties, such as customers or clients, over whom the employer does not have direct control, where the employer knows about the harassment and does not take reasonable steps to stop it happening again.

Section 66: Equality Act 2010: obtaining information for proceedings

444. Section 66 removes section 138 of the Equality Act 2010 which provides a mechanism and statutory forms for a person who thinks that he or she may have been unlawfully discriminated against, harassed or victimised to obtain information from the person he or she thinks has acted unlawfully against him or her (that is to say, the potential respondent or defendant).

445. A potential complainant may still seek information from a potential respondent without the statutory procedure and a court or tribunal may consider any relevant questions and answers as part of the evidence in a case.

Regulatory Enforcement and Sanctions Act 2008

Section 67: Primary authorities

446. Sections 67 and 68 make amendments to provisions contained in Part 2 of the Regulatory Enforcement and Sanctions Act 2008 ("RESA 2008"). Those provisions, introduced as a response to the Hampton Review, Reducing Administrative Burdens: Effective Inspection and Enforcement published in March 2005[9], sought to promote co-ordination of regulatory enforcement amongst local authorities by establishing the Primary Authority Scheme ("PAS").

447. Until 1 April 2012 the PAS was administered by the Local Better Regulation Office ("LBRO"), a statutory corporation created by the RESA 2008. On that date the Local Better Regulation Office (Dissolution and Transfer of Functions, Etc.) Order 2012

9 http://www.berr.gov.uk/files/file22988.pdf

(SI No. 246 of 2012) dissolved LBRO and its functions in relation to the PAS were transferred to the Secretary of State.

448. The PAS enables a business trading across local authority areas to form a primary authority partnership with a single local authority in relation to regulatory compliance across all the local authority areas in which it operates. Through the partnership the business receives advice on compliance from the primary authority which other local authorities who regulate it must follow. This provides the business with certainty and consistency.

449. Section 67 amends section 22 of the RESA 2008 to broaden the eligibility requirements for the PAS.

450. Under the existing PAS a person is eligible only if they carry out an activity in the area of 2 or more local authorities, and each of those authorities has the same relevant function in relation to that activity. For example a business would be eligible where it sells a product in two different local authorities' areas and is subject to regulatory enforcement by trading standards in both those authorities' areas. The intention behind the amendments is to extend the PAS to businesses who share an approach to regulatory compliance, such as the members of a trade association, even if not all of them operate in the area of more than one local authority.

451. *Subsection (4)* inserts new subsections (1A) and (1B) into section 22 of the RESA 2008. These mean that a person is also eligible for the PAS if the Secretary of State is satisfied that they share an approach to regulatory compliance in relation to an activity with at least one other person and between them those persons are regulated, as regards the activity, by more than one local authority.

452. This means, for example, that where a number of members of a trade association are small businesses operating from single stores they could all be eligible for the PAS if the effect of their arrangements with their trade association meant that they shared an approach to compliance in relation to the same activity with other members operating in different local authority areas. Those arrangements might be, for example, that the trade association provides its members with regulatory guidance.

453. Those members of the trade association who had multiple sites across different local authority areas would be eligible for the PAS without needing to satisfy the conditions in new subsection (1B) because they would already come within the test in section 22(1) of the RESA 2008. However, the conditions in new subsection (1B) have deliberately been made fairly wide in order that, continuing with the above example, members of the trade association may apply to join the PAS on the basis of guidance from their association that is applicable to all of its members, without having to distinguish between members who do and do not happen to satisfy the existing eligibility test in section 22(1) of the RESA 2008.

454. *Subsection (5)* amends section 22(2) of the RESA 2008 to include a provision that the Secretary of State may publish guidance about the matters likely to be taken into account when deciding whether two or more persons share an approach to compliance for the purposes of new subsection (1B)(b) .

455. *Subsections (6)* and *(7)* make necessary consequential amendments.

Section 68: Inspection plans

456. Section 68 makes amendments to section 30 of the RESA 2008. That section makes provision for primary authorities that exercise the function of inspection to draw up inspection plans in respect of the regulated person with whom they have a relationship. These inspection plans are intended to act as a guide for other local authorities who also carry out inspections in relation to that person. For example, an inspection plan may set out details of compliance procedures established by a business on a national basis and may indicate areas which do not require inspection, or areas which should be focused

upon for inspection purposes. Local authorities, including the primary authority, must have regard to these plans. The intention behind the amendments is to strengthen inspection plans and increase their use.

457. *Subsection (2)* inserts new subsection (3A) into section 30 of the RESA 2008 so that an inspection plan may require a local authority to provide the primary authority with a report on its inspection activities in respect of the regulated person. *Subsection (4)* inserts new subsection (7E) into section 30 of the RESA 2008 so that where an inspection plan includes such a requirement the local authority must provide this report.

458. Subsection (4) also inserts new subsections (7A), (7B), (7C) and (7D) into section 30 of the RESA 2008.

459. New subsection (7A) means that local authorities may not deviate from an inspection plan unless the primary authority has been given written notification of the deviation and given its consent (new subsections (7A)(a) and (b)). These provisions do not apply to inspections carried out by the primary authority but the amendments made by *subsection (3)* mean that primary authorities remain under their existing obligation to have regard to inspection plans.

460. Where a local authority has notified the primary authority of its intention to deviate from an inspection plan when carrying out an inspection and the primary authority has failed to respond within 5 working days, the primary authority will be treated as having given consent to the deviation (new subsections (7B), (7C) and (7D)).

461. Subsection (7) inserts new subsections (9A) and (9B) into section 30 of the RESA 2008 which allow a primary authority to revoke an inspection plan and require that such revocation be brought to the attention of local authorities who may wish to carry out inspections.

462. *Subsections (5), (6) and (8)* make necessary consequential amendments.

463. *Subsection (9)* inserts a definition of "working day".

Miscellaneous

Civil liability for breach of health and safety duties

Summary and background

464. Professor Löfstedt's review *Reclaiming health and safety for all: An independent review of health and legislation* (November 2011) identified the potential unfairness that arises where health and safety at work regulations impose a strict liability on employers, making them legally responsible to pay compensation despite having done all that was reasonable to protect their employees. Professor Löfstedt recommended that regulatory provisions which impose strict liability should be reviewed. In its response to the review the Government recognised this unfairness and agreed to look at ways to redress the balance, in particular by preventing civil liability from attaching to a breach of such provisions.

465. The amendment to the Health and Safety at Work etc. Act 1974 ("HSWA 1974") reverses the present position on civil liability, with the effect, unless any exceptions apply, that it will only be possible to claim for compensation in relation to breaches of affected health and safety legislation where it can be proved that the duty holder (usually the employer) has been negligent. This means that in future, for all relevant claims, duty-holders will only have to defend themselves against negligence.

Section 69: Civil liability for breach of health and safety duties

466. Section 69 amends the HSWA 1974 in order to provide that there should be no civil right of action for breach of a duty imposed by certain health and safety legislation, other than where such a right is specifically provided for.

467. Previously, section 47(2) of the HSWA 1974 provided a right of action for breach of a duty contained in a health and safety regulation (a regulation made under section 15 of the HSWA 1974) if that breach caused damage. The section contained a power to make exceptions to this rule in the regulations that imposed the duty.

468. In addition, section 47(1)(b) provided that Part 1 of the HSWA 1974 did not affect whether or not a duty in one of the "existing statutory provisions" gave rise to a right of action. The "existing statutory provisions" are statutes listed in Schedule 1 to the HSWA 1974 that existed before the HSWA 1974 came into force (for example the Factories Act 1961) and secondary legislation made under those statutes. The effect of this was that if a right of action for breach of statutory duty existed (or had been excluded) under one of these statutes the position was not altered after the HSWA 1974 was enacted.

469. *Subsections (2) and (3)* taken together change the position by repealing section 47(1)(b), replacing section 47(2) and inserting sections 47(2A) and (2B).

470. New section 47(2) provides that there is no right of action for a breach of a health and safety regulation unless the regulations expressly provide for this. The provision applies to health and safety regulations (i.e. those made under section 15 of the HSWA 1974) and includes regulations which are made in reliance on other powers in addition to section 15 of the HSWA 1974, for example regulations that also rely on section 2(2) of the European Communities Act 1972.

471. The effect of the removal of section 47(1)(b) and the insertion of section 47(2A) is to remove any pre-existing rights of action accrued under the "existing statutory provisions" and exclude any claims for breach of statutory duty under those statutes. Regulations made under section 47(2A) can provide for an exception to this rule, and there is a power to modify the existing statutory provisions in order to create such an exception.

472. Previously section 47(3) of the HSWA 1974 enabled regulations to include a defence to an action and section 47(5) provided that any terms of an agreement which purported to exclude or restrict liability for a breach of duty would have no effect unless a regulation provided to the contrary. As there is no automatic right of action these provisions are no longer needed but a power has been provided so that similar provisions can be included in regulations that create any exceptions to the general rule. Accordingly section 47(2B)(a) provides that where exceptions have been made and a right of action created under either section 47(2) or section 47(2A) the regulations that create those exceptions can also provide the duty holder with a defence or defences to the action. Section 47(2B)(b) gives a power to include a provision in the regulations that would make agreements trying to exclude liability for breach of the duty ineffective.

473. *Subsection (8)* provides for the amendments of section 47 to have effect in relation to matters outside Great Britain if an Order in Council is in force (under section 84(3) of the HSWA 1974) that applies section 47 to matters (which means persons, premises, work, articles, substances or other matters) outside Great Britain.

474. The subject matter of the HSWA 1974 is reserved to the UK government but there are minor exceptions relating to fire safety. *Subsection (9)* excludes the application of any of the amendments to section 47 to a breach of duty which could be imposed in legislation made by the Scottish Parliament.

475. The effect of *subsection (10)* is that the relevant date for determining whether a claim can be brought is the date on which the breach took place, not the date on which the action is brought. Therefore as long as the alleged breach of statutory duty takes place before the amendments come into force a claim can still be brought, even if it is after the commencement of the amendments, subject to the usual time limits. For example, in an illness with a long latency period, such as mesothelioma (asbestos related cancer) a claim could still be brought in the future, where the breach of duty that led to the

exposure to asbestos that caused the illness is shown to have taken place before the new provisions had come into force.

476. Other subsections make minor amendments consequent on the main changes set out above.

Estate Agents etc.

Summary and Background

477. The section extends a current exemption to the definition of 'estate agency work' within the Estate Agents Act 1979 ("EAA 1979") to update and clarify the scope of that legislation.

478. The EAA 1979 regulates persons engaging in estate agency work. Section 1 of the EAA 1979 sets out the definition of estate agency work. The definition provides that anyone acting on instructions from a client (who wants to buy or sell an interest in land) falls within the scope of the EAA 1979 if they do anything for the purpose of, or with a view to, introducing a prospective buyer and seller, and then for the purpose of securing the sale or purchase. The definition is subject to certain exemptions. The current section 1(4) of the EAA 1979 exempts the publication of advertisements or the dissemination of information, but does not allow for any other act covered by the general definition to be done. Section 1(4) of the EAA 1979 pre-dates the growth of the internet. Currently, some private sales internet portals may be exempt from the EAA 1979 whilst others may be within its scope, depending on whether they simply provide advertising space or enable prospective parties to a property transaction to make contact in response to an advertisement, for example through an online messaging board.

Section 70: Estate agency work

479. Section 70 extends a current exemption to the definition of 'estate agency work' within the EAA 1979.

480. Section 70 excludes from regulation under the EAA 1979 businesses such as private sales internet portals which provide a means for prospective parties to a property transaction to make contact in response to an advertisement or property information. The exemption applies provided that such businesses do nothing further that is covered by the general definition. The intention of the amendment is to update and clarify the law regarding businesses such as private sales portals and to deregulate those businesses in providing services which simply allow buyers and sellers to find and communicate with one another, provided they do not otherwise participate in the transaction for example by advising, negotiating or providing other services.

Adjudicators

Summary and Background

481. Section 71 primarily makes provision amending Parts 9 and 14 of the Insolvency Act 1986 ("IA 1986"). Part 9 provides the legislative framework for bankruptcy proceedings in England and Wales. The purpose of the amendments is to reform the debtor bankruptcy petition procedure for obtaining a bankruptcy order under the IA 1986 by transferring the procedure from the civil court system to a new administrative system. The reforms are intended to free up court resources to deal with matters which do require judicial input, and to improve the accessibility of bankruptcy by facilitating the introduction of a flexible, electronic application process for debtors.

Section 71 and Schedules 18 and 19: Adjudicators: bankruptcy applications by debtors and bankruptcy orders

482. The IA 1986 currently makes provision for debtors to petition the court to be made bankrupt. *Subsection (1)* of section 71 inserts new section 398A into Part 14 of the IA 1986, and through *subsection (2)* and Schedule 18 inserts a new Chapter A1 (comprising

new sections 263H to 263O) into Part 9 of the 1986 Act. *Subsection (3)* introduces Schedule 19 which makes minor and consequential amendments to the IA 1986. These amendments provide that debtors who wish to be made bankrupt must apply to an adjudicator for a bankruptcy order. A debtor will no longer be able to petition the court for such an order.

483. New section 398A of the IA 1986 provides for the Secretary of State to appoint persons to the new office of adjudicator.

484. New sections 263H to 263J of the IA 1986 provide that a debtor may apply to an adjudicator to be made bankrupt on the ground that he or she is unable to pay his or her debts, provided that other specified conditions are met. An application will not be regarded as having been made until any fee or deposit that is required by an order made under section 415 of the IA 1986 has been properly paid.

485. New section 263I sets out the jurisdiction requirements to be met by a debtor when making a bankruptcy application to the adjudicator. These are unchanged from the current requirements that apply in relation to debtor and creditor bankruptcy petitions under section 265 of the IA 1986. However, the drafting of the jurisdiction requirements in new section 263I is intended to make the requirements more easily understood by users of the legislation; and to better reflect the practical application of this provision in the light of European law. Paragraph 7 of Schedule 19 makes a consequential amendment to section 265 of the IA 1986 to narrow the scope of this section so that it applies to creditor bankruptcy petitions only and to adopt the approach taken in new section 263I. This will avoid any possible confusion arising out of having two sections with different drafting that purport to have an identical effect. It will ensure that both creditor bankruptcy petitions and debtor bankruptcy applications will be subject to exactly the same, unchanged, jurisdiction requirements.

486. New section 263K provides that where the specified conditions are met, the adjudicator must make a bankruptcy order. A bankruptcy application must be refused by the adjudicator if the conditions are not met. The form and content of the application will be prescribed in Rules made under section 412 of the IA 1986 ("the Rules"). Paragraph 65 of Schedule 19 amends Schedule 9 to the IA 1986 to provide powers to make such provision, and provision about the practice and procedure of adjudicators generally. Under *subsection (4)* an adjudicator must determine a bankruptcy application within a time period that will be prescribed in the Rules.

487. New section 263L(1) to (3) permits an adjudicator to request further information from the debtor provided it is necessary for the purposes of determining whether a bankruptcy order must be made. Subsection (4) provides that the Rules may make provision for the adjudicator to request information from a third party. The Government's intention is to use this provision to require an adjudicator to undertake checks with a credit reference agency for the purpose of verifying information contained in the bankruptcy application.

488. New section 263M sets out what an adjudicator must do when making a bankruptcy order. *Subsection (2)* provides that bankruptcy orders made by an adjudicator must be made in the form prescribed in the Rules.

489. Where a bankruptcy application is refused, new section 263N provides the debtor with the right to request a review of the adjudicator's decision before the end of the time period prescribed in the Rules. Where the review upholds the decision to refuse to make a bankruptcy order, the debtor has a right of appeal to the court. In the event that the appeal is successful, the court will have the power to make a bankruptcy order. The court will retain general jurisdiction over bankruptcy proceedings after a bankruptcy order has been made by an adjudicator under the IA 1986.

490. New section 263O creates two offences relating to the provision of information to adjudicators. Paragraph 66 of Schedule 19 amends Schedule 10 to the IA 1986 to

provide for the maximum punishments for these offences. Section 432 of the IA 1986 (offences by bodies corporate) will apply to an offence under section 263O.

491. Beyond the amendments already mentioned, Schedule 19 makes minor and consequential amendments to the IA 1986. In particular, Chapter 1 of Part 9 is amended to remove provision relating to debtor bankruptcy petitions, and the appointment by the court of insolvency practitioners in relation to such petitions. There will be no equivalent in respect of applications to an adjudicator.

492. Paragraphs 20, 21, 23 and 24 of Schedule 19 amend sections 293, 295, 298 and 299 of the IA 1986 to provide that certain documents relating to the appointment, removal and release of trustees, currently filed with the court, must instead be filed with the persons prescribed in the Rules. That is likely to continue to be the court in creditor initiated bankruptcies and could, for example, be the Official Receiver, Adjudicator, Secretary of State or the court in debtor initiated bankruptcies. The purpose of these amendments is to enable the Government to modernise and make more efficient all of the filing and document inspection processes that govern bankruptcies.

493. Paragraph 59 of Schedule 19 amends section 415 of the IA 1986 to provide that a fees order made under that section may make different provision for different purposes, including by reference to the manner or form by which proceedings are commenced. The purpose of this amendment is to provide the Lord Chancellor with some flexibility in fixing fees so as to take account of more cost-efficient ways of submitting, processing and determining applications.

494. Paragraph 65(4) of Schedule 19 inserts new paragraphs 24A to 24D into Schedule 9 to the 1986 Act. Schedule 9 sets out the provision which may be included in the Rules. New paragraphs 24A, 24C and 24D provide powers to make provision about the responsibility of specified persons (namely, the adjudicator, the official receiver and persons prescribed under sections 293, 295, 298 or 299 of the IA 1986) to keep files and records relating to bankruptcy applications, and to allow for the inspection of such by prescribed persons. New paragraph 24B provides a power to require an adjudicator to make returns to the Secretary of State of the adjudicator's business under Part 9 of the IA 1986.

495. Provision for such other consequential and transitional amendments as may be necessary will be made using the powers contained in sections 99 (consequential amendments, repeals and revocations) and 100 (transitional, transitory or saving provision).

Agricultural Wages Board

Section 72 and Schedule 20: Agricultural Wages Board

496. Section 72 and Schedule 20 abolish the Agricultural Wages Board for England and Wales and related English bodies

497. The Agricultural Wages Act 1948 ("AWA 1948") established the Agricultural Wages Board ("AWB") for England and Wales as an independent body with a statutory duty to set a minimum wage rate for agricultural workers and with discretion to set other minimum terms and conditions. The AWA 1948 provides that the AWB's functions exist in relation to each of the counties and combinations of counties for which Agricultural Wages Committees ("AWCs") have been established. There are 15 AWCs in England and 1 AWC for the whole of Wales.

498. Agricultural Dwelling House Advisory Committees ("ADHACs") were established under the Rent (Agriculture) Act 1976. They provide advice upon request on the urgency and agricultural need of an application by a landlord for re-housing a tenant in tied accommodation in order to provide accommodation for an incoming agricultural

worker. There are 16 ADHACs in England and 1 ADHAC for the whole of Wales. Members of ADHACs are appointed by the Chair of the local AWC as necessary.

499. This section provides for the abolition of the AWB in England and Wales and the 15 AWCs and 16 ADHACs in England. The AWC and ADHAC for Wales are not abolished.

500. The section also introduces Schedule 20, which makes consequential provision in respect of relevant primary and secondary legislation. In particular, the Schedule amends the Rent (Agriculture) Act 1976 to remove the ability to apply for the advice of an ADHAC in England, repeals the main provisions of the AWA 1948 and amends the National Minimum Wage Act 1998 to bring agricultural workers in England and Wales within scope of that Act.

Section 73, Schedule 21: Unnecessary regulation: miscellaneous

Part 1, Schedule 21: Notification of TV sales etc.

501. The purpose of Part 1 of Schedule 21 is to repeal the requirement under the Wireless Telegraphy Act 1967 on retailers to notify TV Licensing of sales and rentals of television sets. TV Licensing is the BBC agency responsible for the collection of the television licence fee and the enforcement of the television licensing system. The definition of television sets for these purposes set out in regulation 11 of the Communications (Television Licensing) Regulations 2004 (S.I. 2004/692) covers analogue and digital TV sets, DVD and video recorders, digital boxes and computers (including laptops) with TV cards.

502. The aim of the current requirement is to assist TV Licensing in maximising television licence revenue. The information provided by retailers helps TV Licensing to identify those individuals, businesses and bodies which must hold a television licence. TV Licensing can then take steps to ensure that the individual, business or body purchases a TV Licence, which helps to maximise the television licence revenue provided to the BBC.

503. A Government review of the requirement concluded that it imposed an undue administrative burden on retailers. For example, many purchases are by people who already own a set.

504. Paragraph 1 in Part 1 of Schedule 21 repeals the Wireless Telegraphy Act 1967, the remaining provisions of which impose requirements on television dealers in relation to the notification of the sale or hire of television sets, as defined in the Communications (Television Licensing) Regulations 2004.

505. Paragraph 2 lists consequential repeals which will also have effect.

506. Paragraph 3 is a saving provision in relation to the repeal of section 3 of the Post Office Act 1969.

Part 2, Schedule 21: Water undertakers: in-area ban

507. The removal of the in-area trading ban, included in standard licence conditions by virtue of section 2(3)(d)(iii) of the Water Industry Act 1991, will remove barriers to retail competition in the water sector. The removal of this provision was recommended in Ofwat's review of the water supply licensing regime, which allows large users of water to change their water supplier.

508. The in-area trading ban prevents associate suppliers of water undertakers from trading in the area of their parent water company and therefore prevents them from competing for national multi-site contracts. This puts them at a competitive disadvantage with other water suppliers who have no restrictions on where they can supply water.

509. The repeal of section 2(3)(d)(iii) of the Water Industry Act 1991 will remove the requirement on the Secretary of State or Ofwat to impose a condition in the licence of a licensed water company associated with a water undertaker to prevent the licensed water company from trading in the area of that undertaker. This provision is implemented by a statutory licence condition determined by the Secretary of State under section 17H of the Water Industry Act 1991 and imposed on all companies. Once the requirement has been removed, Ofwat will need to follow the statutory mechanisms for amending licence conditions in sections 17I to 17R of the Water Industry Act 1991.

510. As a result, licensed water companies that are associated with undertakers will be able to compete for multi-site water supply contracts, once Ofwat amends the standard licence conditions.

Part 3, Schedule 21: Bankruptcy early discharge procedure

511. The EA 2002 introduced provisions into the Insolvency Act 1986 reducing the duration of bankruptcy to 12 months. It also introduced the early discharge provisions. The intention behind the early discharge provisions was to benefit those bankrupts who co-operated with the official receiver's inquiries and who posed no risk to the public or commercial community. These bankrupts would be allowed a 'fresh start' sooner than 1 year.

512. An evaluation of the provisions introduced was carried out in 2007 (as part of the "Enterprise Act 2002 - the Personal Insolvency Provisions: Final Evaluation Report"[10]). This evaluation found that early discharge from bankruptcy did not have the desired impact of encouraging early rehabilitation.

513. Part 3 of Schedule 21 repeals section 279(2) of the Insolvency Act 1986 which allows a bankruptcy to end within a year in certain limited circumstances. Discharge from bankruptcy happens in most cases automatically one year from the date of the bankruptcy order (see section 279(1) of that Act). Under section 279(2), a bankrupt may be discharged earlier than the automatic one year by the official receiver filing a notice of early discharge at the court stating that inquiries into the conduct and affairs of the bankrupt under section 289 of that Act are unnecessary or concluded.

514. Before filing this notice the official receiver is required by Rule 6.214A of the Insolvency Rules 1986 (SI 1986/1925) to send notice of his or her intention to begin the early discharge process to all the bankrupt's creditors and to any trustee (if one has been appointed). The official receiver may only file the notice with the court if no objections have been received or if any objections which have been received have been finally determined.

Part 6: Miscellaneous and General

Copyright and rights in performances

Section 74: Exploitation of design derived from artistic work

515. Section 74 repeals section 52 of the Copyright, Designs and Patents Act 1988 ("CDPA 1988"). The repeal of section 52 means that articles to which the section applies will have full copyright protection for the period of the life of the author plus 70 years. Accordingly, the exception provided by section 52 cannot be relied upon, and the copy of a copyright work will in future be an infringing copy. The Copyright (Industrial Process and Excluded Articles) (No.2) Order 1989 No. 1070 made under section 52 would therefore cease to have effect.

516. Section 52 applies where an artistic work, following the authorisation of the copyright holder, has been copied by an industrial process and marketed anywhere in the world.

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10 www.insolvency.gov.uk

Twenty-five years after copies of the artistic work were first marketed, the work may be copied by third parties without infringing copyright. The 1989 Order also defines when an article is to be regarded as being made by an industrial process. This is where the article is one of more than 50 copies of an artistic work or it consists of goods manufactured in lengths or pieces except where those are hand-made. An example of the application of section 52 is as follows, a jeweller makes a ring which qualifies for copyright protection as a work of artistic craftsmanship. The ring is then manufactured with more than 50 copies being made and it is marketed throughout the world. Twenty-five years after the end of the year in which the ring was first marketed, third parties can make their own copies without infringing copyright in the original ring.

517. Section 52(6)(a) excludes films from the scope of the section. The Copyright (Industrial Process and Excluded Articles) (No.2) Order 1989 No. 1070 made under section 52(4) also excludes from the scope of the section sculptures (other than casts or models used or intended to be used as models or patterns to be multiplied by any industrial process), wall plaques, medals and medallions and printed material primarily of a literary or artistic character.

Section 75: Penalties under provision amending exceptions: copyright and rights in performances

518. The section ensures that where section 2(2) of the European Communities Act 1972 ("ECA 1972") is used to narrow or remove exceptions to copyright and performance rights the restriction to criminal penalties as detailed in paragraph 1 of Schedule 2 to the ECA 1972 does not apply and the current level of criminal penalties can be maintained.

519. Current penalties for copyright infringement exceed the limits provided for implementation under the ECA 1972. For example the current maximum terms of imprisonment in the most serious cases of copyright infringement are set by section 107 of the CDPA 1988 (which was amended by the Copyright etc. Trade Marks (Offences and Enforcement) Act 2002) at ten years on indictment and six months for summary offences. According to paragraph 1 of Schedule 2 to the ECA 1972 the penalties which can be imposed by regulations which are made under that Act are restricted. The maximum term of imprisonment that can be applied is three months for summary offences and two years for those on indictment.

Section 76: Power to reduce duration of copyright in transitional cases

520. Section 76 amends section 170 of the CDPA 1988 (transitional provisions and savings) and gives the Secretary of State a power to reduce the duration of copyright in certain unpublished works which are currently subject to the transitional provisions (set out in Schedule 1 of the CDPA 1988). The section allows for regulations to provide for different provisions for different types of work and of different ages. This would mean that recent works, for example, could be treated differently to centuries' old works.

521. Under this section, no works will receive a shorter term of copyright protection than set out in the EU Term Directive. For example, for literary works by a known author, the standard term is life of the author plus 70 years. Where an author is unknown, the standard term is 70 years from the year in which the work was created or first made available.

522. Currently, some works caught by the existing transitional provisions enjoy copyright protection until 2039 if this date falls after the standard terms set out in the EU Term Directive 2006/116/EC. This means that works such as centuries' old unpublished manuscripts in archives, libraries and museums are still in copyright. Also, recent unpublished works that were in existence when the CDPA came into force such as unpublished minutes of meetings from the 20th century, where the author died before 1st January 1969, remain in copyright until 2039. These unpublished works enjoy a period of copyright protection longer than the standard terms set out in the EU Term Directive.

523. Many of these unpublished works are orphan works because it is not possible to contact the rights holder, who may be a long lost historical figure or a beneficiary who cannot be located, to ask permission to use them. By reducing the term of copyright protection to the standard terms, many of these works will fall into the public domain and could be made accessible to the public by archiving institutions.

524. Unpublished films and unpublished photographs are excluded from the section because of the possibility of their being exploited commercially without having been published.

Section 77: Licensing of copyright and performers' rights and Schedule 22: Licensing of copyright and performers' rights

525. Section 77 inserts new provisions into the CDPA 1988. This will allow (through regulations) for a system for the licensing of "orphan works" (works for which the copyright owner/s is not known or cannot be located), the authorisation of applications to operate voluntary extended collective licensing schemes, and a reserve power which could be used to require a collecting society to adopt a code of practice.

526. The section responds to recommendations to modernise copyright licensing made in the Hargreaves Review of Intellectual Property and Growth. These recommendations were broadly accepted by Government and the proposals contained in this section were subject to consultation in 2011-12.

527. *Subsection (2)* inserts provisions into section 116 of the CDPA 1988 which enable the Secretary of State to make regulations to require a licensing body (usually known as a collecting society) to adopt a code of practice that must be consistent with criteria specified in the regulations. The power includes provision for enforcement and sanctions where a licensing body fails to comply with the provisions contained in their codes of practice. The details of the power are described in Schedule 22 of the Act which inserts a new schedule into the CDPA 1988. This provides a backstop power to put in place statutory codes in the event that self-regulation fails. Under self regulation collecting societies will adopt and adhere to codes of practice containing minimum standards set by Government.

528. *Subsection (3)* introduces a series of new sections to follow section 116 of the CDPA 1988, which makes provision regarding the licensing of copyright works. These are:

- section 116A, which gives the Secretary of State power to appoint a body or bodies to license the use of orphan works through secondary legislation. Orphan works are copyright works (such as books, photographs, films and music) for which one or more of the copyright owners is unknown or cannot be found. Public and private libraries, archives, museums and galleries may hold the original or a copy of such works but, without the permission of one or all of the rights holders, they are limited in what they can do to make such works available to the public without threat of legal challenge. These works could include published or broadcast works or unpublished works such as diaries and photographs.

- section 116A also sets out the areas which the regulations on orphan works will cover. Under the regulations the Secretary of State may appoint appropriate bodies - this can never be a body which wishes to use the work – to license orphan works. The regulations will also set out the requirements for the diligent search that must be conducted by potential licensees before a work qualifies as an orphan work. In addition, the section states that the regulations may apply where it is not clear whether an orphan work is in copyright or not as may be the case when the date of the author's death is not known. The regulations limit the licences to non-exclusive rights so that more than one person or organisation can obtain a licence to use the same work. Subsection (6) of section 116A includes provisions for dealing with the possible re-appearance of the copyright holder while the licence is extant and for orphan works registers.

- section 116B, which creates a power to enable the Secretary of State to make regulations for the authorisation of applications by licensing bodies to operate voluntary extended collective licensing schemes. Subsections (2) to (6) describe limitations that would apply to any such schemes, including the stipulation that a rights holder must have the ability to opt out of any extended collective licensing scheme. Currently, a collecting society can only license on the basis of express permissions to do so from its members, the copyright owners. A collecting society which applied and was authorised to operate an extended collective licensing scheme would be able to grant non-exclusive licences for specified uses of copyright works on behalf of all rightsholders, of works of the type covered by the scheme. Rights holders who chose to opt out would not be covered by the scheme.
- section 116C, which makes general provision about the powers in sections 116A and 116B. It states that the Secretary of State can impose conditions on any body authorised to license in accordance with 116A or 116B. It also makes provision regarding the treatment of fees, royalties and other sums paid in respect of a licence in relation to orphan works licensing and extended collective licensing. The section allows the Secretary of State to define what happens to end orphan work status and what happens if a rights holder wishes to opt out of an extended collective licensing scheme that is already operational.
- section 116D, which makes general provision about the regulations which could be made using the powers in this section. These include that regulations would be made by the affirmative procedure.

Part 1, Schedule 22: Regulation of licensing bodies

Codes of Practice

529. Paragraph 1 of Schedule 22 inserts a new Schedule A1 into the CDPA 1988. Paragraphs 1 and 2 of Part 1 of Schedule A1 enable the Secretary of State to establish procedures, through secondary legislation, to require a licensing body to adopt a code of practice that complies with criteria specified in the regulations. This is intended to be used where a licensing body fails to adhere to a self-regulatory code containing minimum standards set by Government.

Licensing code ombudsman

530. Paragraph 3 enables the Secretary of State to make provision for the appointment, remit and powers of an Ombudsman to investigate disputes.

Code reviewer

531. Paragraph 4 enables the Secretary of State to make provision for the appointment, remit and powers of a person to review and report on compliance with the codes of practice adopted by licensing bodies. It makes further provision for the provision of information to the code reviewer and for payments to him.

Sanctions

532. Paragraph 5 makes provision through the regulations for sanctions, including financial penalties (at a maximum £50,000), to apply to licensing bodies for failures to comply with requirements set out in the regulations. There are provisions for the imposition of sanctions on a director, and other responsible personnel, where that is deemed appropriate. The regulations must also include provisions for a licensing body to appeal against the imposition of a sanction or penalty.

Fees

533. Paragraph 6 enables the Secretary of State to charge fees to a licensing body that becomes subject to statutory regulation. The amount charged in fees must not be more than the cost of administering the regulation.

General

534. Paragraph 7 sets out the ambit of any regulations made under this Schedule.

535. Regulations would be made by the affirmative procedure.

Part 2, Schedule 22: Performers' rights

536. Part 2, Schedule 22 makes a number of amendments to Schedule 2A to the CDPA 1988, which makes provision for the licensing of performers' rights. They will have the effect of making equivalent provision in relation to these rights which apply to the licensing of copyright as set out at section 77. That is they mirror the provisions made for copyright in works for copyright in performer's rights. New paragraph 1A covers the licensing of "orphan works", new paragraph 1B the voluntary extended collective licensing scheme and new paragraphs 1C and 1D covers both the "orphan works" and voluntary extended collective licensing schemes.

Section 78: Penalties under provision implementing Directive on term of protection

537. This section ensures that when section 2(2) of the ECA 1972 is used to implement EU Directive 2011/77/EU on the term of protection of copyright and certain related rights the restriction to criminal penalties as detailed in paragraph 1 of Schedule 2 to the ECA 1972 does not apply and the current level of criminal penalties can be maintained.

538. The primary function of the Directive is to extend the copyright term for sound recordings and performers' rights from 50 to 70 years. The impact of extending the duration of copyright term in the way proposed by the Directive will be to criminalise acts which under the current law would be lawful.

539. Current penalties for copyright infringement exceed the limits provided for implementation under the ECA 1972 . The current maximum terms of imprisonment for the most serious cases of copyright infringement are set by section 107 of the CDPA 1988 (as amended by the Copyright etc. Trade Marks (Offences and Enforcement) Act 2002) at ten years on indictment and six months for summary offences. According to paragraph 1 of Schedule 2 to the ECA 1972 the penalties which can be imposed by regulations which are made under that Act are restricted. The maximum term of imprisonment that can be applied is three months for summary offences and two years for those on indictment.

Payments to directors of quoted companies

Summary and Background

540. Under the CA 2006, quoted companies[11] are required to produce a directors' remuneration report (section 420) as part of the annual reports and accounts, and to put this directors' remuneration report to the company's members at the annual general meeting. At the meeting, shareholders are asked to approve the report by means of an ordinary resolution (section 439). This resolution is 'advisory' in nature and the company is not required by law to take any action in response to the vote. As such, no individual directors' pay is contingent on the outcome of the vote.

Section 79: Members' approval of directors' remuneration policy

541. *Subsection (1)* inserts a new subsection (2A) into section 421 (Content of directors' remuneration report) of the CA 2006 and requires that, in making regulations on the required content of a directors' remuneration report, the Secretary of State must specify that the company's policy on remuneration of directors must be in a separate part of the report.

542. *Subsection (2)* inserts a new section 422A which makes it possible for a company to revise the directors' remuneration policy part of the directors' remuneration report. Section 422A(5) applies certain provisions in the CA 2006 to the revised report, as they apply to a directors' remuneration report.

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11 Quoted company, as defined in section 385 of the Companies Act 2006.

543. *Subsection (4)* inserts a new section 439A of the CA 2006 alongside the existing requirement under section 439 (Quoted companies: members' approval of directors' remuneration report) to put the directors' remuneration report to a shareholder resolution at every accounts meeting. This new section provides for a separate shareholder resolution on the directors' remuneration policy part of the directors' remuneration report.

544. Section 439A(1) requires companies to put the directors' remuneration policy to a shareholder resolution at an accounts or other general meeting in the first financial year commencing on or after the day on which the company becomes a quoted company, and at least every three financial years thereafter.

545. Section 439A(2) has the effect of requiring companies to put the directors' remuneration policy to a shareholder resolution at the accounts meeting if, at the last accounts meeting, the shareholder resolution on the directors' remuneration report put forward under section 439 of the CA 2006 was not passed; and if, at that last accounts meeting or other general meeting held since, there was no shareholder resolution on the directors' remuneration policy under section 439A.

546. Section 439A(5) applies subsections (2) to (4) of existing section 439 of the CA 2006 to section 439A, therefore requiring: notice to be given in any manner permitted for the service on the member of notice of the meeting; for the business of the meeting to include the resolution; and for the existing directors to ensure the resolution is put to the vote of the meeting.

Section 80: Restrictions on payments to directors

547. Section 80 makes provision about the effect of the shareholder resolution on the directors' remuneration policy provided for by section 79. It inserts a new Chapter 4A into the part of the CA 2006 which deals with payments to directors.

548. Section 226A defines the type of remuneration payments to people who are directors, are to be directors, or have been directors, and payments for directors' loss of office, to which the rest of the Chapter applies.

549. Sections 226B and 226C place restrictions on the remuneration payments and payments for loss of office that can be made to directors of quoted companies. All such payments to directors will need to be consistent with the directors' remuneration policy of the company of which the person is a director. Alternatively, payments will need to be approved by a separate shareholder resolution.

550. Section 226D specifies the process by which a company must approve a remuneration payment or payment for loss of office as part of a separate shareholder resolution under section 226B(1)(b) or 226C(1)(b). The details of any proposed payment, including an explanation of how it is inconsistent with the approved directors' remuneration policy, will need to be set out in a memorandum made available to shareholders. Subsection (6) of section 226D will mean that the restrictions on payments to directors contained in the new Chapter 4A will not apply to a payment made by a company until the earlier of the end of the financial year which begins on or after the day on which it becomes a quoted company or the date on which the company decides the first directors' remuneration policy approved under section 439A is to take effect for the purpose of Chapter 4A.

551. Section 226E clarifies the consequences of making payments which are not either consistent with the last directors' remuneration policy to have been approved by shareholders, or approved by a specific shareholder resolution. In doing so, it makes provision comparable to existing section 222 of the CA 2006 (Payments made without approval: civil consequences) relating to the consequences of making unapproved payments to directors.

552. Section 226E, subsection (1), will mean that any legal obligation, such as a contract with a director, which gives rise to a payment to a director which would be deemed unauthorised under section 226B or 226C, is unenforceable.

553. Section 226E, subsection (5), provides a court the discretion to decide, having regard to all the circumstances of the case, to relieve a director from liability in proceedings brought under section 226E if that director can prove that he or she acted honestly and reasonably.

554. Certain transactions such as substantial property transactions, loans and certain credit transactions require approval by a resolution of members under Chapter 4 of Part 10 of the CA 2006. Section 226F has been included because of the possibility that a transaction dealt with in Chapter 4 might also be regarded as a remuneration payment or loss of office payment for the purposes of Chapter 4A. In a case where approval under Chapter 4 and approval under section 226B(1)(b) or 226C(1)(b) would otherwise be required, section 226F(2) ensures that approval under Chapter 4 is sufficient for both purposes. The company will not be required to seek approval through two separate resolutions.

Section 81: Payments to directors: minor and consequential amendments

555. *Subsection (3)* amends section 190 of the CA 2006 to preserve the existing position that transactions relating to payments for loss of office to directors of quoted companies are not subject to the requirements of Chapter 4 of the CA 2006 relating to substantial property transactions.

556. *Subsection (4*) disapplies existing provisions on payments for loss of office in sections 216 to 222 (inclusive) of the CA 2006 for those companies (i.e. quoted companies falling within section 385) that will in future be required to comply with the new sections on the directors' remuneration policy and payments to directors, from the point at which Chapter 4A applies to those companies. Sections 216 to 222 (inclusive) of the CA 2006 will continue to apply to all other types of companies.

557. *Subsection (6)* inserts two new subsections into the existing section 430 of the CA 2006 (Quoted companies: annual accounts and reports to be made available on website). Subsection (2A) requires that any revised directors' remuneration policy (as revised under new section 422A) is to be made available on the company's website in the same manner as other reports and accounts. Subsection (2B) requires that companies publish, in a similar manner, details of payments for loss of office and remuneration payments made or to be made to a departing director as soon as reasonably practicable after a person ceases to be a director. *Subsections (7) to (9)* make further minor amendments to section 430 to clarify the process by which information under sections 430(2A) and 430(2B) must be made available.

558. *Subsection (10)* amends existing section 440 of the CA 2006 (Quoted companies: offences in connection with procedure for approval) so as to preserve the criminal offences that are committed where there is a failure to comply with the requirements about giving notices, and putting resolutions to the vote, in relation to directors' remuneration reports (including the part of the report containing the directors' remuneration policy).

Section 82: Payments to directors: transitional provision

559. *Subsection (1)* specifies that companies that are quoted companies on the day immediately before section 79 comes into force will be required to give notice of the intention to move, as an ordinary resolution, a resolution approving the relevant directors' remuneration policy at the accounts meeting in the first financial year which begins on or after the day section 79 comes into force, or at an earlier general meeting.

560. *Subsection (2)* specifies that where a company is a quoted company on the day immediately before section 79 comes into force, a remuneration or loss of office payment made to a director in the first financial year to begin on or after the day section 79 comes into force will not be subject to the restrictions set out in section 226B or 226C (unless the company has decided that the first directors' remuneration policy approved under section 439A should take effect on a date before the end of that year).

561. *Subsection (3)* excludes from Chapter 4A payments required to be made to directors under agreements entered into, or under other obligations arising, before 27 June 2012.

562. *Subsection (4)* has the effect of treating agreements entered into, or other obligations arising, before 27 June 2012 but which are modified or renewed on or after that date, as having been made on the date of the modification or renewal. The effect of this is that, if an agreement is changed or renewed after that date, a requirement to make payment under that agreement will be subject to the restrictions in Chapter 4A.

563. *Subsection (5)* will mean that sections 216 to 222 of the CA 2006 will continue to apply to payments for loss of office which are, for the reasons set out in subsection (3), not covered by the proposed new Chapter 4A.

Redress schemes for lettings agency work and property management work

Summary and Background

564. Sections 83 to 88 introduce powers for the Secretary of State to require persons who engage in lettings agency work and property management work in respect of dwelling-houses in England to belong to an approved redress scheme or government administered redress scheme. The intended effect is that complaints against all (or a specified class of) such persons conducting such activities could be investigated and determined by an independent person.

Section 83: Redress schemes: lettings agency work

565. This section introduces powers for the Secretary of State to require persons who engage in lettings agency work to be members of a redress scheme for dealing with complaints in connection with that work.

566. *Subsection (1)* provides that a redress scheme for these purposes may either be a scheme that is approved by the Secretary of State or a scheme that is administered by or on behalf of the Secretary of State and designated for such purposes. Whilst, the expectation is that third parties would come forward with schemes for approval, the power to create a government administered redress scheme could be invoked if, for example, schemes capable of being approved were not available or in case it were considered necessary to introduce a government administered scheme as a response to existing approved schemes being discontinued.

567. *Subsection (6)* requires the Secretary of State to be satisfied that all persons who are to be subject to the duty will be eligible to join a redress scheme before the duty applies to them. This is to provide a safeguard against letting agents being in breach of a duty that they do not have the ability to satisfy.

568. *Subsection (7)* defines lettings agency work as work undertaken on behalf of prospective landlords or prospective tenants and covers the process both of finding a tenant for the landlord or a property for the tenant and the work done to put the tenancy in place. It applies only to privately rented homes in England (see the commentary on subsection (10) below).

569. *Subsections (8) and (9)* exclude certain organisations from the requirement to belong to a redress scheme. Subsection (8) mirrors the amendment made to the Estate Agents Act 1979 by section 70 by excluding from that requirement those businesses that simply allow landlords and tenants to find and communicate with one another, provided they do not otherwise participate in the transaction.

570. *Subsection (9)* provides that local authorities are not included and thereby ensures that, for example, any local letting agency business established by local authorities is not caught by section 83. The Local Government Ombudsman already provides a mechanism for people to complain against local authorities. However, there is nothing to stop a local authority which undertakes any work that would (in the absence of subsection (9)) fall within section 83 from choosing to join a redress scheme approved under this section (see section 88 (Redress schemes: supplemental) (5)). Subsection (9) also gives powers to the Secretary of State to exclude other activities by order.

571. This section applies only to properties that are to be let under a domestic tenancy. *Subsection (10)* defines a domestic tenancy as an assured tenancy under the Housing Act 1988, other than a long lease or a tenancy granted by a private registered provider of social housing. Assured tenancies are the most common type of tenancy in the private rented sector. Subsection (10)(b) gives the Secretary of State power to add other types of tenancy to the definition of a domestic tenancy; however, *subsection (11)* ensures that such an order cannot include a long lease or any property let by a local authority or private registered provider of social housing.

572. Long leases are excluded under subsection (10), on the basis that agents handling the sale of long leases are already covered by the Estate Agents Act 1979. Private registered providers of social housing are excluded as the intention is that the section should apply to the private rented sector, not to social housing.

Section 84: Redress schemes: property management work

573. This section introduces powers for the Secretary of State to require persons who engage in property management work to be members of a redress scheme for dealing with complaints in connection with that work.

574. *Subsection (6)* defines property management work. The premises managed must be located in England and consist of or include a dwelling-house let under a relevant tenancy (as defined in subsection (8)). *Subsection (7)* excludes property management work undertaken by local authorities and private registered providers of social housing and enables the Secretary of State to exclude other activities from the scope of property management work. Local authorities and private registered providers of social housing are excluded by subsection (6) as Schedule 2 to the Housing Act 1996 already requires those landlords to belong to an approved Scheme. The approved scheme under that Act is the Housing Ombudsman Service.

575. *Subsection (8)* defines a relevant tenancy as an assured tenancy (which is the most common type of tenancy in the private rented sector); a regulated tenancy under the Rent Act 1977 (which applies to tenancies in the private rented sector granted before 15 January 1989); or a long lease of residential property. Subsection (8) also enables the Secretary of State to designate further types of tenancy as a 'relevant tenancy'; however *subsection (9)* ensures that a business lease cannot be a 'relevant tenancy'.

Section 85: Orders under section 83 or 84: enforcement

576. *Subsection (1)* enables the Secretary of State to prescribe the sanctions that may apply for the breach of an order made under sections 83 and 84 and to make provision for investigation of suspected breaches. *Subsection (2)* sets out the sanctions which the Secretary of State may impose.

577. *Subsections (3) to (5)* set out further matters relating to enforcement, including the requirement that provision must be made for appeals to a court or tribunal and the ability to confer responsibilities for enforcement on (and pay money to) persons that exercise functions of a public nature.

Section 87: Approval of redress schemes for the purposes of section 83 or 84

578. *Subsection (1)* introduces powers for the Secretary of State to prescribe the procedure for the approval of redress schemes, including such matters as the making of applications, the conditions to be satisfied before approval is given, the conditions which must be complied with by administrators of schemes and the withdrawal of approval.

579. *Subsection (2)* makes provision for the Secretary of State to set out the conditions which must be satisfied in order for a government-administered redress scheme to be designated.

Section 88: Redress schemes: supplemental

580. *Subsections (1) to (4)* make provision in relation to the order making powers of the Secretary of State under sections 83 (Redress schemes: lettings agency work); 84 (redress schemes: property management work) and 87 (Approval of redress schemes for the purposes of section 83 or 84).

581. *Subsection (5)* clarifies that nothing in sections 83 to 87 prevents a redress scheme from: providing for membership by persons who are not subject to the duty to belong to a scheme; investigating and determining complaints not covered by the duty, where members have voluntarily chosen to accept the jurisdiction of the scheme; or excluding complaints from the scheme in specified cases or circumstances.

Supply of customer data

Summary and Background

582. These sections reflect the Government's desire for customers to have electronic access to details of transactions they enter into when buying goods and services, which they can then use to inform future purchasing and consumption behaviours.

583. The Government's view is that a consumer who can make informed decisions about the goods and services they buy is more likely to seek better quality and value for their money, which in turn can help stimulate competition.

584. Existing legislation, notably the Data Protection Act 1998, gives customers access to their data but in a format to be determined by the provider, which may therefore be hard copy only. This does not allow them easily to use that information to compare prices or interrogate their consumption behaviour.

585. The Government has been working with suppliers in certain sectors to develop a voluntary programme for the release of electronic data to customers. These sections provide a backstop power for the Secretary of State to make regulations (a) requiring regulated persons to supply their customers, on request, with transaction data held in electronic form, and (b) providing an enforcement regime in the case of non-compliance.

Section 89: Supply of customer data

586. *Subsection (1)* contains the substantive power of the Secretary of State to make regulations. It enables provisions to be made compelling a "regulated person" (as defined in subsections (2) and (10)) to provide "customer data" (as defined in subsection (3)) to a customer at their request or to a person authorised by the customer to receive it ("the customer data regulations").

587. *Subsection (2)* identifies four types of supplier who may be required to supply data (energy suppliers, mobile phone network providers, and financial services providers offering current accounts or credit cards). Subsection (2)(d) provides the power to designate other regulated persons although before doing so the Secretary of State has to have regard to a number of factors set out in *subsection (7)*.

588. *Subsection (3)* defines "customer data" as information held electronically by or on behalf of the regulated person and that relates to transactions between the regulated person and the customer. For example this could be a customer's purchasing history represented by a quarterly energy statement. It does not extend to data not already held in electronic form.

589. *Subsection (9)* describes what is meant by a customer for the purpose of this section. It covers persons who have at any time purchased goods or services from the regulated person or received them free of charge from them. The intention is that this should generally apply to consumers (subsection (9)(b)(i)) but subparagraph (ii) allows this to be extended to specified forms of business. This is most likely to be used to treat micro businesses (who, like consumers, may suffer difficulties in identifying their consumption behaviour) as customers for these purposes.

590. *Subsections (4) and (5)* make further provision about the scope of the power, including allowing the regulations to specify the format and timeframe in which the data is to be delivered and to permit the regulated person to charge for the supply of data (though any such charge could not exceed the cost borne by the supplier in providing the data).

591. *Subsection (8)* is included to give the Secretary of State the flexibility to apply the regulations in different ways depending on the types of regulated person, customer or customer data, but also depending on where in the UK those persons are located. It also enables regulations to provide for exceptions from any requirement imposed by them, including if the cost of compliance proves to be prohibitive (subsection (8)(d)).

Section 90: Supply of customer data: enforcement

592. This section empowers the Secretary of State to make provision for the enforcement of the customer data regulations. It provides for a model of civil enforcement as opposed to criminal penalties (subsection (2)) and enables regulations to be made allowing customers to bring their own actions for breach of the regulations before a court or tribunal (subsection (5)). By virtue of *subsections (6) and (8)* some of the provisions of section 89 apply to this section also.

593. *Subsection (1)* identifies the Information Commissioner as a potential enforcer but empowers the Secretary of State to designate other persons to act as enforcers. The regulations may also designate more than one enforcer and provide for their functions to be exercisable concurrently or jointly (see further the explanation of subsection (4) below).

594. *Subsection (2)(a) and (b)* set out the enforcement options referred to above. The regulations will be able to provide for enforcers to apply to a court (or tribunal) for an order that a regulated person comply with the regulations. Alternatively an enforcer may be allowed to serve an enforcement notice on a regulated person without a court order. In both cases breach of the order/notice could amount to a contempt of court.

595. *Subsection (3)* provides that regulations may confer on enforcers investigatory powers to enable them to fulfil their functions. The regulations may also set out sanctions for non-compliance with requirements made by an enforcer when exercising its investigatory powers (for example if a regulated person fails to provide information on request). The words in parenthesis in subsection (3)(b) make clear that the enforcement provisions should be comparable to those for breach of the customer data regulations (namely civil enforcement not criminal penalties).

596. As explained above, under *subsection (4)(b)* provision can be made for functions to be exercisable by more than one enforcer, whether concurrently or jointly. Where functions are exercised concurrently, s*ubsection (4)(c)* allows the regulations to make provision for a lead enforcer to take on a co-ordination role, namely to direct which enforcer can act in a particular case. To assist with that role, that subsection also allows

the regulations to require the other enforcers to consult with the lead enforcer before exercising enforcement functions.

597. Finally, *subsection (4)(a)* enables regulations to be made requiring an enforcer (if not the Information Commissioner) to inform the Commissioner if they intend to exercise functions under the regulations. The intention is to make the Commissioner aware of potential breaches of the customer data regulations in case they raise wider subject access issues.

Section 91: Supply of customer data: supplemental

598. This section provides for supplemental matters including the power to make consequential amendments to legislation and to enable a person to exercise a discretion in a matter such as the exercise of the powers conferred by these sections (*subsection (1)*). It also describes the Parliamentary procedure for the regulations; those made under section 89 are subject to the negative resolution procedure, except where regulations are applied to persons by virtue of section 89(2)(d) in which case the affirmative resolution procedure is to be used. Regulations made under section 90 are also subject to the affirmative resolution procedure as are any instruments that make regulations under section 89(2)(d) or 90 together with any other provision under section 89.

Insolvency: protection of essential supplies

Section 92: Power to add to supplies protected under the Insolvency Act 1986

599. This section gives the Secretary of State a power to make an order amending sections 233 and 372 of the Insolvency Act 1986 ("IA 1986"). These sections currently allow for certain providers of gas, electricity, water and communications services ("utility supplies") to seek a personal guarantee from an insolvency practitioner before continuing to supply an insolvent business and prevent such suppliers from demanding that pre-insolvency arrears are cleared as a condition of continuing supply.

600. *Subsections (1) and (2)* provide a power to enable IT suppliers to be added to the present list of utility supplies to which sections 233 and 372 apply. This reflects the increasing importance of IT supplies to the functioning of modern businesses since these two sections were enacted.

601. Subsections (1) and (2) also enable the Secretary of State to widen the application of these provisions to providers of utility services who are not presently covered by sections 233 and 372. The Government considers this is necessary in order to be able to reflect the way the utility and telecoms markets have evolved and deregulated since these statutory provisions were enacted.

Section 93: Corporate insolvency: power to give further protection to essential supplies

602. This section gives the Secretary of State a power to make an order that renders void certain contractual terms in contracts for the supply of essential goods or services where a company goes into administration or a voluntary arrangement takes effect if certain conditions are met. The supplies that may be protected are those to which section 233 applies, i.e. supplies of gas, electricity, water, communications and IT supplies if added through exercise of the power in section 92.

603. *Subsection (2)* requires the provision of express safeguards that must be included in an order made under this power. Those safeguards include granting the right to a supplier to terminate a contract of supply where any charges for post-insolvency supply remain unpaid after 28 days beginning with the day on which payment is due regardless of the terms of the contract. A supplier may also terminate the contract if given permission by the insolvency office-holder or by the court.

604. *Subsection (3)* requires a further safeguard to be provided for affected suppliers by giving such suppliers a right to request a personal guarantee for payment from the insolvency office-holder as a condition of continuing the supply. *Subsection (4)* provides scope for the Secretary of State to provide exceptions to this right.

605. *Subsection (5)* gives the Secretary of State the power to add any other safeguards that might be felt necessary, in order to protect suppliers who may be affected.

606. *Subsection (7)* defines which contractual terms may be rendered void by the order for the purposes of this power. These are those contractual terms that would allow providers of essential IT or utility supplies to alter the terms of a contract or withdraw the supply from an insolvent company on account of the insolvency. It also includes those that allow a supplier to terminate the contract on account of a termination event that occurred before the insolvency but which had not been exercised by the time of insolvency.

Section 94: Individual insolvency: power to give further protection to essential supplies

607. This section makes comparable provision to section 93 for cases where an individual becomes subject to an individual voluntary arrangement. *Subsection (2)* provides that this power is restricted to supplies made to individuals subject to an individual voluntary arrangement for the purpose of carrying on a business.

Section 95: Sections 93 and 94: supplemental

608. This section gives the Secretary of State the power in an order under sections 93 and 94 to make different provision for different cases, to provide for persons to exercise discretion and to make incidental, supplementary, consequential and transitional or saving provision in relation to the exercise of the powers. It also restricts the powers so that they may not be exercised retrospectively in a way which would affect contracts of supply which pre-date the introduction of any order made and ensures that any order made is subject to the affirmative resolution procedure.

Royal Charters

Section 96: Royal Charters: requirements for Parliamentary approval

609. On 29th November 2012 the Report of An Inquiry into the Culture, Practices and Ethics of the Press was presented to Parliament (HC 780) ("the Leveson Report"). In the report, the Rt. Hon. Lord Justice Leveson makes a range of recommendations to reform the regulatory framework for the press, creating a new system for press regulation, with the principle of industry self-regulation at its heart. One of the recommendations of the Leveson Report was that a body should be given responsibility for recognising whether any independent self-regulator established by the press met certain criteria (principally set out in recommendations 1 to 24 of the Leveson Report). On 18th March 2013, the Government published and laid before Parliament its proposals for a royal charter for the establishment of such a body, with the agreement of the Official Opposition.

610. Section 96 will apply to a body established by a Royal Charter after 1st March 2013 where the Charter contains a requirement that Parliament must approve amendments to the Charter or the dissolution of the body the Charter establishes. It will provide that such a requirement contained in the Charter on the date it is granted must be satisfied before steps can be taken to recommend, via the Privy Council, dissolution or amendment to Her Majesty in Council.

Caste as an aspect of race

Section 97: Equality Act 2010: caste as an aspect of race

611. This section amends section 9(5) of the Equality Act 2010 so as to place a duty on a Minister of the Crown to make an order which includes "caste" within the definition of "race" in section 9 of that Act.

612. Under section 9(5)(b), a Minister of the Crown may also by order amend that Act to include exceptions for caste, or make particular provisions of that Act apply in relation to caste in some but not other circumstances.

613. This section also provides a power to enable a Minister to review section 9(5) of the Equality Act 2010 and any orders made under it. The Minister must publish a report on the outcome of any such review.

614. The power to review cannot be exercised earlier than five years after the day on which the Act was passed, which was 25 April 2013. Once the five year period has passed, this power may be exercised more than once.

615. If it is considered appropriate, in the light of the outcome of a review, the Minister may by order repeal or otherwise amend section 9(5) of the Equality Act 2010.

Equal Pay Audit

Section 98: Power to provide for equal pay audits

616. This section amends the Equality Act 2010 to enable a Minister of the Crown to make regulations to require employment tribunals to order employers to carry out equal pay audits where they have been found to have breached equal pay law or to have discriminated because of sex in non-contractual pay such as discretionary bonuses.

617. Regulations made under this power will be subject to the affirmative resolution procedure, requiring approval in both Houses of Parliament and may only be made following consultation with the Minister responsible for employment tribunals. The section spells out the circumstances to be set out in regulations in which a pay audit cannot be ordered by an employment tribunal and that the regulations may set out the content of pay audits. Regulations made under this section may provide than an employment tribunal may order an employer to pay a penalty not exceeding £5000 for failure to comply with an equal pay audit order and that such a penalty may be repeated. The first regulations made under this power must include an exemption for certain types of new or small businesses.

General

Section 99: Consequential amendments, repeals and revocations

618. This section provides a power for Secretary of State to make changes to other legislation in consequence of the provisions of the Act. Where those changes include the transfer of functions from the OFT and CC to the CMA (such as the transfer of the OFT's consumer enforcement powers), the functions may be modified to reflect the remit of the CMA. Any changes are to be made in an order subject to the affirmative or negative procedure. Where the changes are to an Act, an Act of the Scottish Parliament, a Measure of the National Assembly for Wales or Northern Ireland legislation, the order must follow the affirmative procedure.

Section 102: Extent

619. Section 102 provides for the extent of the Act.