

*These notes refer to the Enterprise and Regulatory Reform Bill
as introduced in the House of Commons on 23 May 2012 [Bill 7]*

ENTERPRISE AND REGULATORY REFORM BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Enterprise and Regulatory Reform Bill as introduced in the House of Commons on 23 May 2012. They have been prepared by the Department for Business, Innovation and Skills in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY

3. The main purpose of the Bill is to encourage long term growth and simplify regulation.

OVERVIEW OF THE STRUCTURE OF THE BILL

4. The Bill is in six Parts with seventeen Schedules.

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PART SUMMARY

- Part 1 Ensures that the UK Green Investment Bank plc engages only in activities that contribute to achieving one or more of the statutory ‘green purposes’. It also requires the Secretary of State to provide an undertaking to the UK Green Investment Bank plc in order to facilitate its operational independence.
- Part 2 including Makes changes to the employment tribunal process, including
Schedules 1-3 providing for prospective claimants to contact the Advisory, Conciliation and Arbitration Service before they can begin certain types of employment tribunal proceedings, so that parties can be offered conciliation to attempt to resolve their dispute outside the tribunal system, and introduces a series of reforms to streamline the existing system and encourage employer compliance, including a new discretionary 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.
- Part 3 including Establishes the Competition and Markets Authority to form the
Schedule 4-6 UK’s primary competition authority, provides for the transfer to it of the competition functions of the Office of Fair Trading and the Competition Commission and paves the way for the transfer of consumer enforcement functions.
- Part 4 including Reforms the competition functions of the Competition and Markets
5 Chapters and Authority to improve the speed, quality and robustness of its
Schedules 7-15 decision making. The principal competition functions reformed by these provisions are market studies and investigations, merger control, enforcement of the anti-trust prohibitions, prosecution of the criminal cartel offence and operation of sector regulators’ concurrent competition powers.

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Part 5 including Schedule 16-17 Makes provisions to include sunset or review provisions in any secondary legislation. Amends provisions in section 33 of the National Heritage Act 1983; sections 171B, 174 and 196C of the Town and Country Planning Act 1990; and sections 1, 6, 9, 74 and 75 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to abolish Conservation Area Consent and improve the operation of the listed building consent regime. Amends Part 1 of the Equality Act 2006, to clarify the remit of the Commission for Equality and Human Rights. Amends provisions contained in Part 2 of the Regulatory Enforcement and Sanctions Act 2008 (c.13) to extend eligibility for the Primary Authority Scheme and strengthen inspection plans. Repeals unnecessary legislation to reduce burden on business.

Part 6 Repeals section 52 of the Copyright, Designs and Patents Act 1988 so as to provide full copyright protection for the period of the author's life plus 70 years. Creates a power to amend exceptions for copyright and rights in performances without affecting the existing criminal penalties regime. Repeals section 439(5) of the Companies Act 2006, removing the statutory provision which currently prevents the statutory requirement for a vote on the directors' remuneration report having the effect of making a person's entitlement to remuneration contingent on the outcome of the shareholder resolution.

5. The Annex to these notes contains a glossary of terms used in the Bill and the explanatory notes.

TERRITORIAL EXTENT AND APPLICATION

6. This Bill extends to England and Wales, Scotland and Northern Ireland, as described below.

7. Parts 1 (UK Green Investment Bank) and 6 (Miscellaneous and general) extend to the whole of the United Kingdom

8. Part 2 (Employment) extends only to England and Wales and Scotland, but the provisions amending the National Minimum Wage Act 1998 (clause 16(1)(c), paragraph 11 of Schedule 1 and paragraphs 36 to 39 of Schedule 2) also extend to Northern Ireland.

9. Part 3 (The Competition and Markets Authority) extends to the whole of the United Kingdom except for parts of Schedule 6, where the minor and consequential

amendments reflect the territorial extension of the legislation being amended. Thus, in Schedule 6 paragraphs 15 to 44, 69 to 84 and 101 to 107 extend only to England and Wales and Scotland; paragraphs 52 to 68, 96, 108 to 123 and 127 to 139 extend only to England and Wales; paragraphs 9 to 14, 45 to 51, 171 to 180 and 192 to 209 extend only to Scotland; paragraphs 149 to 170 and 181 to 191 extend only to Northern Ireland.

10. Part 4 (Competition Reform) extends to the whole of the United Kingdom except for parts of Schedules 14 and 15. In the Schedules, the amendments that amend the Gas Act 1986, the Electricity Act 1989, the Railways Act 1993, the Utilities Act 2000 and the Railways and Transport Safety Act 2003 (paragraphs 1 to 7 and 11 to 14 of Schedule 14 and paragraphs 2, 3, 7, 13 and 41 of Schedule 15) extend only to England and Wales and Scotland; those that relate to the Water Industry Act 1991 and the Health and Social Care Act 2012 (paragraphs 8 to 10 and 20 to 22 of Schedule 14 and paragraphs 4 to 6 and 47 to 49 of Schedule 15) extend only to England and Wales; and those relating to the Electricity (Northern Ireland) Order 1992, the Energy (Northern Ireland) Order 2003, the Gas (Northern Ireland) Order 1996 and the Water and Sewerage Services (Northern Ireland) Order 2006 (paragraphs 23 to 29 of Schedule 14 and paragraphs 53 to 55 of Schedule 15) extend only to Northern Ireland.

11. In Part 5, clauses 49 (on sunset and review provisions), 52 (on primary authorities) and 53 (on inspection plans) extend to the whole of the United Kingdom, as does Part 1 of Schedule 17 (which relates to the notification of TV sales etc). Clause 51 (on the Commission for Equality and Human Rights) extends only to England and Wales and Scotland. Clause 50 and its associated Schedule 16 which deal with heritage planning regulation extend only to England and Wales. Parts 2 and 3 of Schedule 17 (which covers water undertakers: in area ban and bankruptcy early discharge procedure) extend only to England and Wales.

12. By Order in Council, Her Majesty may extend a repeal contained in Part 1 of Schedule 17 (relating to the notification of TV sales etc) to the Isle of Man or any of the Channel Islands.

13. The effect of the Sewel Convention is that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. As certain of the provisions of the Bill which extend to Scotland relate to matters that trigger the Convention, the consent of the Scottish Parliament is being sought for them through a legislative consent motion.

14. Westminster will not normally legislate with regard to devolved matters in Northern Ireland without the consent of the Northern Ireland Assembly. Some provisions of the Bill extending to Northern Ireland will therefore require the consent of the Northern Ireland Assembly. The consent of the Northern Ireland Assembly is being sought for them through a legislative consent motion.

15. Westminster will not normally legislate with regard to devolved matters

falling within the legislative competence of the National Assembly for Wales. Certain of the provisions of the Bill extending to Wales fall within the legislative competence of National Assembly for Wales. The consent of the National Assembly for Wales is therefore being sought for them through a legislative consent motion.

COMMENTARY ON CLAUSES

PART 1: UK GREEN INVESTMENT BANK PLC

Summary and Background

16. This Part of the Bill makes provision relating to the UK Green Investment Bank plc.

17. 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.

18. The following clauses 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’. 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.

19. The clauses also permit the Secretary of State to provide financial assistance to the UK Green Investment Bank plc, as well as imposing certain enhanced reporting and accounting obligations on the UK Green Investment Bank plc.

Clause 1: The green purposes

20. *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;

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- the protection or enhancement of biodiversity; and
- the promotion of environmental sustainability.

21. 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.

22. *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.

Clause 2: Designation of the UK Green Investment Bank plc

23. *Subsection (1)* of clause 2 introduces a power for the Secretary of State to designate the UK Green Investment Bank plc by order for the purposes of clauses 3-5, subject to two conditions being met.

24. *Subsection (2)* sets out the first condition. This requires 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 clause 1.

25. *Subsection (3)* sets out the second 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.

26. *Subsection (4)* 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. *Subsection (5)* provides that an order under subsection (1) cannot be amended or revoked.

27. *Subsection (6)* provides that the power in subsection (1) is subject to the negative resolution of Parliament.

Clause 3: Alteration of the objects of the UK Green Investment Bank plc

28. *Subsection (1)* provides that, where the Secretary of State has made an order designating the UK Green Investment Bank plc under subsection (1) of clause 1, the

UK Green Investment Bank plc may not alter the statement of objects in its articles of association, subject to two exceptions.

29. 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.

30. *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 condition in subsection (3) is met.

31. *Subsection (3)* provides that the condition is that 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 clause 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.

32. *Subsection (4)* 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.

Clause 4: The UK Green Investment Bank plc: financial assistance

33. Clause 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.

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

35. *Subsection (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.

36. *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.

37. *Subsection (5)* provides that HM Treasury may fund loans to the UK Green

Investment Bank plc from the National Loans Fund.

38. *Subsection (6)* provides that this clause 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.

Clause 5: The UK Green Investment Bank plc: accounts and reports

39. This clause provides for the UK Green Investment Bank plc to be subject to certain enhanced reporting and accounting obligations under the CA 2006.

40. *Subsection (1)* provides that, once the Secretary of State has made an order designating the UK Green Investment Bank plc under subsection (1) of clause 1, 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 Parts 15 and 16 of the CA 2006.

41. The application of Part 15 of the CA 2006 to the UK Green Investment Bank plc gives rise to enhanced reporting 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 and ensuring website publication of annual accounts and reports under section 430 of that Act.

42. 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.

Clause 6: The UK Green Investment Bank plc: documents to be laid before Parliament

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

44. *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 *subsection (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.

45. *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

46. This Part of the Bill 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; and to address unintended consequences arising from previous legislation.

Conciliation

Summary and Background

47. 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.

48. 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.

49. 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. The clauses therefore require 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 file a claim at an employment tribunal.

Clause 7: Conciliation before institution of proceedings

50. This clause inserts new sections 18A and 18B into the ETA 1996.

51. 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 Bill). 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.

52. 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.

53. 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.

54. 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.

55. 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. Clause 8: Extension of limitation periods to allow for conciliation

56. This clause 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.

Clause 9: Extended power to define “relevant proceedings” for conciliation purposes

57. This clause 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.

Procedure for deciding tribunal cases

Summary and Background

58. 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.

59. Clause 10 is intended to support the introduction of a “Rapid Resolution” scheme, for certain simple or low value claims, to allow parties to opt for determination of their claim by a legal officer without the need for a hearing. Cases that are subject to this scheme will be determined by someone other than a judge, but such determinations will have the same status as if they had been determined by a judge or a judge and lay members.

60. 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)).

Clause 10: Decisions by legal officers

61. This clause 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.

62. 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.

Clause 11: Composition of Employment Appeal Tribunal

63. This clause amends the statutory framework governing the composition of the Employment Appeal Tribunal.

64. *Subsection (1)* substitutes new subsections (2) to (8) 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.

65. New subsection (6) of section 28 provides that the Secretary of State, acting jointly with the Lord Chancellor, may by order specify that proceedings of a particular description must be heard by a judge and a specified number of appointed members.

66. *Subsection (4)* provides that any order made by the Secretary of State and Lord Chancellor under the power inserted by subsection (1) must be subject to the affirmative resolution of Parliament.

67. *Subsection (5)* deletes paragraph 46 of Schedule 8 of 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

68. 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 £72,300.

Clause 12: Power by order to increase or decrease limit of compensatory award

69. This clause confers a power on the Secretary of State to amend section 124 of the Employment Rights Act (“ERA 1996”) to increase or decrease the limit on the compensatory award for unfair dismissal. The new limit could be a set amount (subsection (2)(a)), or a certain number of weeks’ pay (subsection (2)(b)), or the lower of those things. Different amounts can be specified under subsection (2)(a) 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.

70. The constraints on the power are that the subsection (2)(a) amount may not be reduced below “median annual earnings” (defined in subsection (9)) or increased above three times median annual earnings; and the lowest number of weeks’ pay that may be specified under subsection (2)(b) is 52. The figure for median salary 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.

71. *Subsection (10)* amends section 34 of the Employment Relations Act 1999 (“EReIA 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

72. 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.

Clause 13: Power of employment tribunal to impose financial penalty on employers etc

73. This clause 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.

74. Section 12A provides that a financial penalty can be imposed on the employer irrespective of the nature of the remedy awarded to the claimant. Any financial penalty imposed must be at least £100 and cannot exceed £5,000 (subsection (2)). 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 the minimum and maximum amounts (subsection (3)). The Secretary of State has the power to change, by regulations, the figures set out in subsections (2) – (4) on the minimum and maximum penalty and the relevant percentage of a claimant's financial award (subsection (9)). 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 (7)). The financial penalty shall be paid into the Consolidated Fund (subsection (10)).

75. 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.

76. 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.

77. Subsection (4) 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 subsection (2) and up to a maximum of 50% of the amount of the award.

78. 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 (5) of section 12A provides that only one financial penalty can be imposed by the employment tribunal.

79. The effect of subsection (6) of the inserted section 12A is that when subsections (3) and (4) 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.

Miscellaneous

Summary and Background

80. The Employment Appeal Tribunal decision in 2002 (*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 under the terms of the Public Interest Disclosure Act 1998 ("PIDA 1998"). This has led to claims being lodged at employment tribunals that would not otherwise have been brought, and contrary to the intention of the legislation. This is an unintended consequence, and the legislation is therefore being amended so that public interest disclosures (otherwise known as 'whistleblowing') must in future satisfy a specific public interest test.

81. 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. Clause 15 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.

82. 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.

Clause 14: Disclosures not protected unless believed to be made in the public interest

83. This clause amends Part IVA of the ERA 1996 which deals with public interest disclosures.

84. The effect of the clause is to insert a specific public interest test into the ERA 1996. In order for a public interest disclosure claim to succeed, the claimant must show that he/she believed that the disclosure was made in the public interest. He/she must also show that the belief was reasonable in the circumstances.

85. The framework for public interest disclosures (otherwise known as ‘whistleblowing’) was established by the PIDA 1998. Its purpose is set out in the preamble as, “an Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation.”

86. The PIDA 1998 amended 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 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.

87. PIDA applies to disclosures about:

- a criminal offence;
- a breach of a legal obligation;
- a miscarriage of justice;
- danger to the health or safety of any individual;
- damage to the environment; or
- the deliberate covering up of information tending to show any of the above.

88. In *Parkins v Sodexho Ltd* [2002] IRLR 109 Mr Parkins claimed that a breach of a contract of employment is a breach of “any legal obligation”. The Employment Appeal Tribunal held that there is no reason to distinguish a legal obligation which arises from a contract of employment from any other form of legal obligation. This

decision has raised the possibility that any complaint about any aspect of an individual's employment contract could lay the foundation for a protected disclosure.

89. The amendment made by this clause means that public interest disclosures must in future satisfy a public interest test and excludes those which can be characterised as being of a personal rather than public interest. For example, if a worker does not receive the correct amount of holiday pay (which may be a breach of the terms of his contract of employment), this is a matter of personal rather than wider interest.

Clause 15: Indexation of amounts: timing and rounding

90. This clause amends section 34(3) 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.

91. The clause 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 clause changes the rounding calculation so that all limits are rounded up or down to the nearest pound.

92. Section 34(2) ERe1A 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.

93. 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) ERe1A 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 ERe1A 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.

94. In applying the relevant percentage increase or decrease, the Secretary of State is required to round up the new sums to the nearest 10 pence, £10 or £100 (as applicable) in accordance with section 34(3) ERe1A 1999, with the result that variations in the percentage change can occur.

95. 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 Retail Prices Index in the applicable period.

Clause 16: Renaming of “compromise agreements”, “compromise contracts” and “compromises”

96. This clause 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.

97. 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 (“EqA 2010”), but they operate in the same way as compromise agreements.

General

Clause 17: Transitional provision

98. Clause 17 sets out transitional arrangements for some of the clauses in Part 2.

PART 3: THE COMPETITION AND MARKETS AUTHORITY AND PART 4: COMPETITION REFORM

99. The purpose of Part 3 of the Bill 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.

100. The main purpose of Part 4 of the Bill 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 Bill

101. 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.

102. 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 Bill.

103. 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".

104. 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.

105. The OFT's responsibilities for consumer advice and education will be transferred to the Citizen's Advice service and the Trading Standards Institute will become responsible for most business facing consumer education activities. Necessary legislative authority for these changes will be sought by order under the Public Bodies Act 2011 ("PBA 2011").

The competition framework

106. 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 Bill are:

- *Merger control*: powers and duties to identify and protect or mitigate against anti-competitive consequences of mergers or acquisitions;

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

*These notes refer to the Enterprise and Regulatory Reform Bill
as introduced in the House of Commons on 23 May 2012 [Bill 7]*

- *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.

107. 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 Bill; 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 Bill except for the changes being made by clauses 33 and 40 which would enable the CAT to issue warrants in relation to investigations of anti-trust breaches and the cartel offence.

108. 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 clause 27.

109. 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, will be modernised by the Financial Services Bill.

PART 3: THE COMPETITION AND MARKETS AUTHORITY

Clause 18: The Competition and Markets Authority

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

111. Clause 18 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).

112. 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

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

114. 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.

115. 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

116. 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.

117. 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

118. 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.

119. 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.

120. 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.

121. 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

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

Chief executive and other staff

123. 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.

124. 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

125. 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

126. 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

127. 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

128. 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

129. 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

130. 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).

131. 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)

132. 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

133. 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 Departments² 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.

134. 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.

135. 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.

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

136. 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.

137. 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.

138. 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.

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

140. 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

141. 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.

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

143. Paragraph 36 provides that the chair of the CMA is responsible for

constituting a group when required under 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.

144. 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.

145. 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.

146. 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.

147. 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.

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

149. 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 Bill 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.

150. 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.

151. 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.

152. 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

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

154. Paragraphs 61 to 63 restrict the eligibility of certain members of the CC for the purposes of appointments to the CMA panel. A person of this type can be appointed to the CMA panel if his or her term of office as a member of the CC panel has not expired as at the date on which the CC is abolished, but in this case the terms of appointment to the CMA panel must be such that the person's total period of service as a member of the CC and the CMA panel does not exceed eight years.

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

Clause 19: Abolition of the Competition Commission and the Office of Fair Trading

156. This clause abolishes the CC and the OFT. The clause also gives effect to Schedules 6 and 7.

*These notes refer to the Enterprise and Regulatory Reform Bill
as introduced in the House of Commons on 23 May 2012 [Bill 7]*

157. Schedule 5 amends CA 1998 and 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 Bill. Schedule 6 amends other enactments to make provisions for the transfer of functions, predominantly regulatory appeals and ancillary functions, from the CC and OFT to the CMA.

Clause 20: Transfer schemes

158. Clause 20 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. Clause 20 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.

159. *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).

160. *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.

Schedule 5: Amendments related to Part 3

161. Schedule 5 amends CA 1998 and 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.

162. 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 Act to the Competition and Markets Authority

163. Part 1 of Schedule 5 (paragraphs 1 to 57) 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 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

164. Paragraphs 59 and 60 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 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).

165. Paragraph 61 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.

166. Paragraph 62 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.

167. 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 clause 18, and by virtue of paragraph 60 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).

168. Paragraph 63 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

169. Paragraph 65 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 (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

170. Paragraphs 66-162 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

³ Consultation on Empowering and Protecting Consumers, Government Response, April 2012 <http://www.bis.gov.uk/Consultations/empowering-and-protecting-consumers>

Bill 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

171. 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

172. 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

173. 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

174. Paragraphs 218 to 228 provide for amendments to the CA 1998 to reflect the abolition of the CC. 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 of the CA 1998; and sections 185-186 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

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

176. 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

177. 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.

178. 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 management 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.

179. 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.

*These notes refer to the Enterprise and Regulatory Reform Bill
as introduced in the House of Commons on 23 May 2012 [Bill 7]*

180. 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.

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

Licence modification references/appeals

- Gas Gas Act 1986
Gas (Northern Ireland) Order 1996
- Electricity Electricity Act 1989
Electricity (Northern Ireland) Order 1992
- 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
- 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

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as introduced in the House of Commons on 23 May 2012 [Bill 7]*

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

Ancillary Competition Functions

- Legal Services 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

182. 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.

183. 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

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as introduced in the House of Commons on 23 May 2012 [Bill 7]*

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.

184. 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 using an order making power under the Bill.

PART 4: COMPETITION REFORM

CHAPTER 1: MERGERS

Summary and Background

185. 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

Clause 21: Investigation powers: mergers

186. Currently under the EA 2002 only 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 clause 24 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.

187. This clause 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.

188. Clause 21(2) amends section 109 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 sections 22 or 33 (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 sections 45 or 62 i.e. investigations where public interest issues are relevant (new 109(A1)(b)).

189. 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.

190. 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.

191. A similar extension of investigatory powers will operate in market investigations (see clause 28 and Schedule 11).

192. *Subsection (12)* provides for when the powers cease to become exercisable and amends section 110 of the EA 2002 to align enforcement provisions for these powers with the amendments. It enables the CMA to enforce the investigatory powers up to 4 weeks after the investigatory powers operate.

Interim measures

Clause 22: Interim measures: pre-emptive action: mergers and Schedule 7 Mergers: Interim Measures

193. This clause strengthens the interim measures powers available to the CMA by making it easier for the CMA to stop 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.

194. This clause 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 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 clause enables the CMA to stop integration of companies involved in a merger immediately and then consider with the parties whether any further integration should be allowed.

195. Under this clause 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 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.

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

197. *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.

198. Schedule 7 amends the provisions in sections 80 and 81 (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 (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 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).

199. 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.

Clause 23: Interim measures: financial penalties: mergers

200. Clause 23 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) or Phase 2 (section 80 and section 81). 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 new strengthened interim measures.

201. *Subsection (3)* 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.

202. The existing procedural requirements at section 112 will apply to these

penalties. These include 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. As a result, a person could potentially be liable to damages under section 94 and a financial penalty under new section 94A .

203. 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.

204. 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

Clause 24: Time-limits etc: mergers and Schedule 8: Mergers: time-limits

205. 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 clause 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.

206. 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). 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). This will continue to apply for Phase 2. The Phase 1 statutory timescale will not be capable of extension for special reasons.

207. New section 34ZC(6) enables the Secretary of State, by order, to reduce the

length of the new statutory timescales that this Schedule introduces.

208. 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.

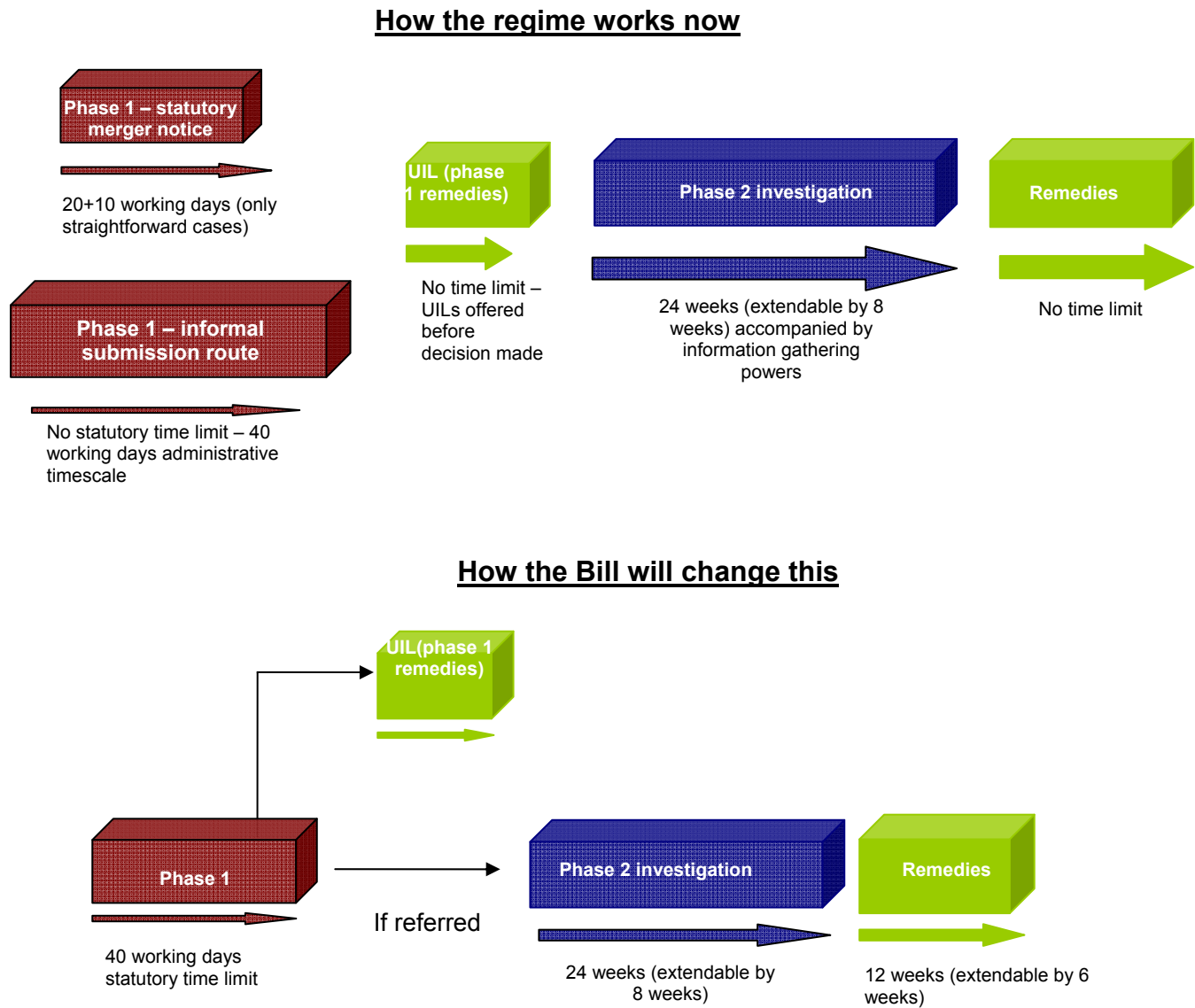
209. On announcement of its Phase 1 decision, the CMA can decide that there are no possible UILs that would address the competition concerns. If the CMA does not make that decision, merging parties will have 5 working days to offer UILs after the CMA announces its Phase 1 decision. The CMA will then 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. It is expected that such an extension will be mainly 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.

210. 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 and if the merger was not abandoned the date by which the Phase 2 report will be published.

211. 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.

These notes refer to the Enterprise and Regulatory Reform Bill as introduced in the House of Commons on 23 May 2012 [Bill 7]

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



Information gathering powers exercisable throughout end to end mergers process

CHAPTER 2: MARKETS

Summary and Background

212. 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

Clause 25: Power of Competition and Markets Authority to make cross-market references and Clause 26: Ministerial power to make cross-market references

213. 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 separately the whole of each market concerned. Upon a reference, the CC assesses competition in the market referred, as a whole.

214. These clauses 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), 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.

215. Clause 25 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’.

216. 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) 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

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

218. Paragraph 2 of the Schedule amends section 133 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.

219. Paragraphs 3 and 5 contain amendments to sections 134 and 141 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 (and accompanying market study report), or any combination of the feature identified, prevent, restrict or distort competition, rather than (in the case of an ordinary reference) considering whether ‘any’ feature or combination of features prevents, restricts or distorts competition.

220. 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

and/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.

221. New subsection 156(A1) 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). 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.

222. 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 undertakings in lieu 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.

223. 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

Clause 27: Public interest interventions in markets investigations and Schedule 10: Markets: public interest interventions

224. 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 and 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 remedy the public interest issue; its role is limited to assessing competition issues.

225. This clause 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, providing a more holistic and expert assessment of the competition and public interest issues together.

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

227. 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.

228. To enable the CMA to investigate public interest issues alongside competition issues following a full PI reference in the new regime, the clause and Schedule provide for a number of other amendments, including regarding the timing of the public interest intervention notice, the procedure for appointment by Secretary of State and role of independent 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.

229. *Subsection (3)* amends the period in section 139 during which the Secretary of State can issue a public interest intervention notice. This will now need to be given after a market study notice has been published, but before a market investigation reference is made. 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.

230. *Subsection (8)* provides that, where an intervention notice is in force, the CMA must give the market study report directly to the Secretary of State instead of publishing it. In those circumstances the CMA cannot itself make a reference under section 131. 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.

231. Following the market study, 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.

232. New section 141A set out in subsection (9) of clause 27 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 public interest the CMA must decide 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.

233. 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, and that there are one or more relevant public interest considerations and that taken together the feature or features which gave rise to the adverse effect on competition operate or may operate against the public interest.

234. 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.

235. 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.

236. 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, and it had prepared its report by virtue of section 136. 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).

237. New section 141B set out in subsection (9) of clause 27 sets out the role and certain terms of appointment of any public interest expert(s).

238. 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.

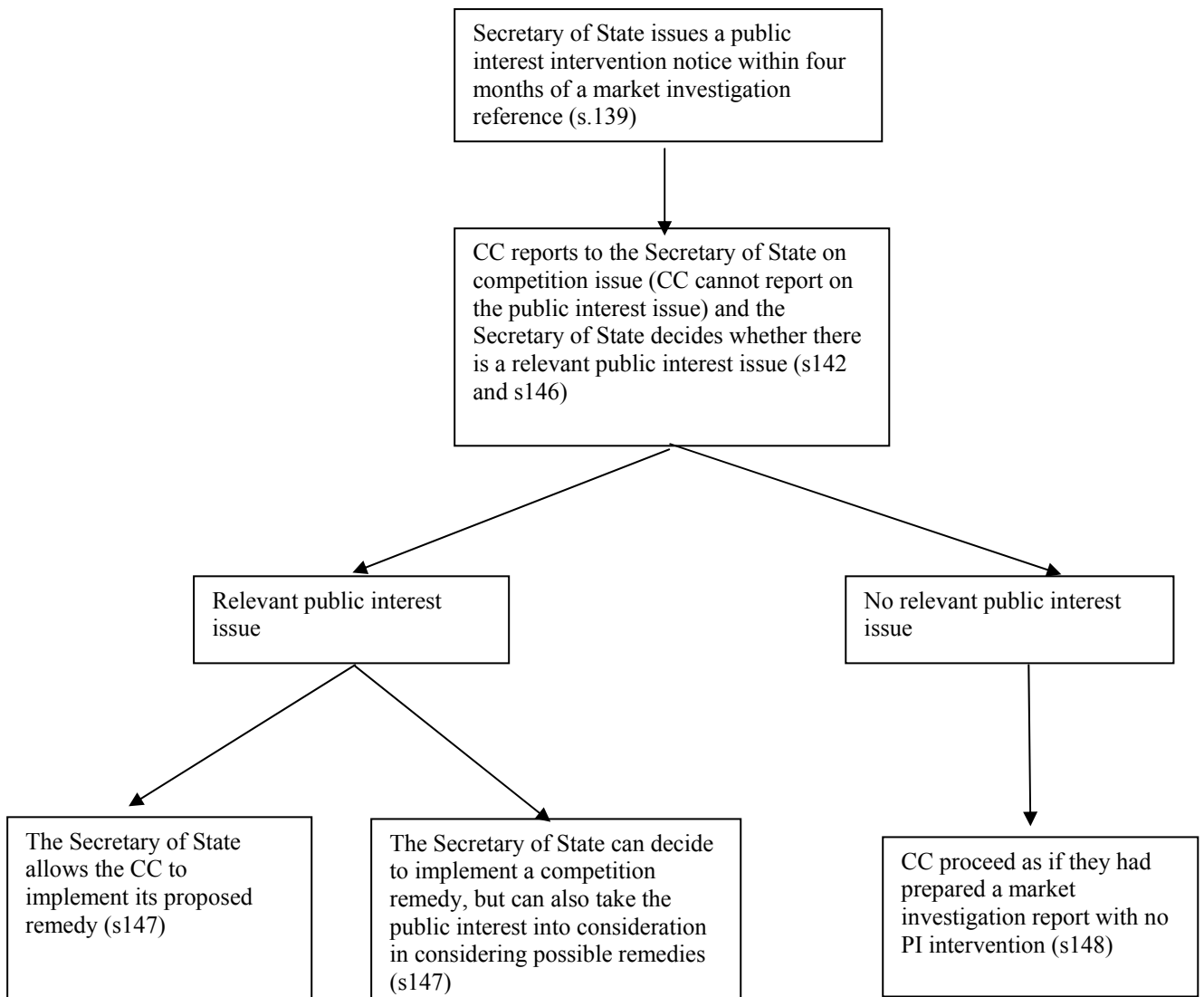
239. For cases where the Secretary of State appoints public interest expert(s), Schedule 10 (paragraph 11) amends section 144 to allow up to 2 months for the expert(s) to be appointed before the 18-month timescale for a market investigation begins. The investigation should therefore begin, and the timescale 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.

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

These notes refer to the Enterprise and Regulatory Reform Bill as introduced in the House of Commons on 23 May 2012 [Bill 7]

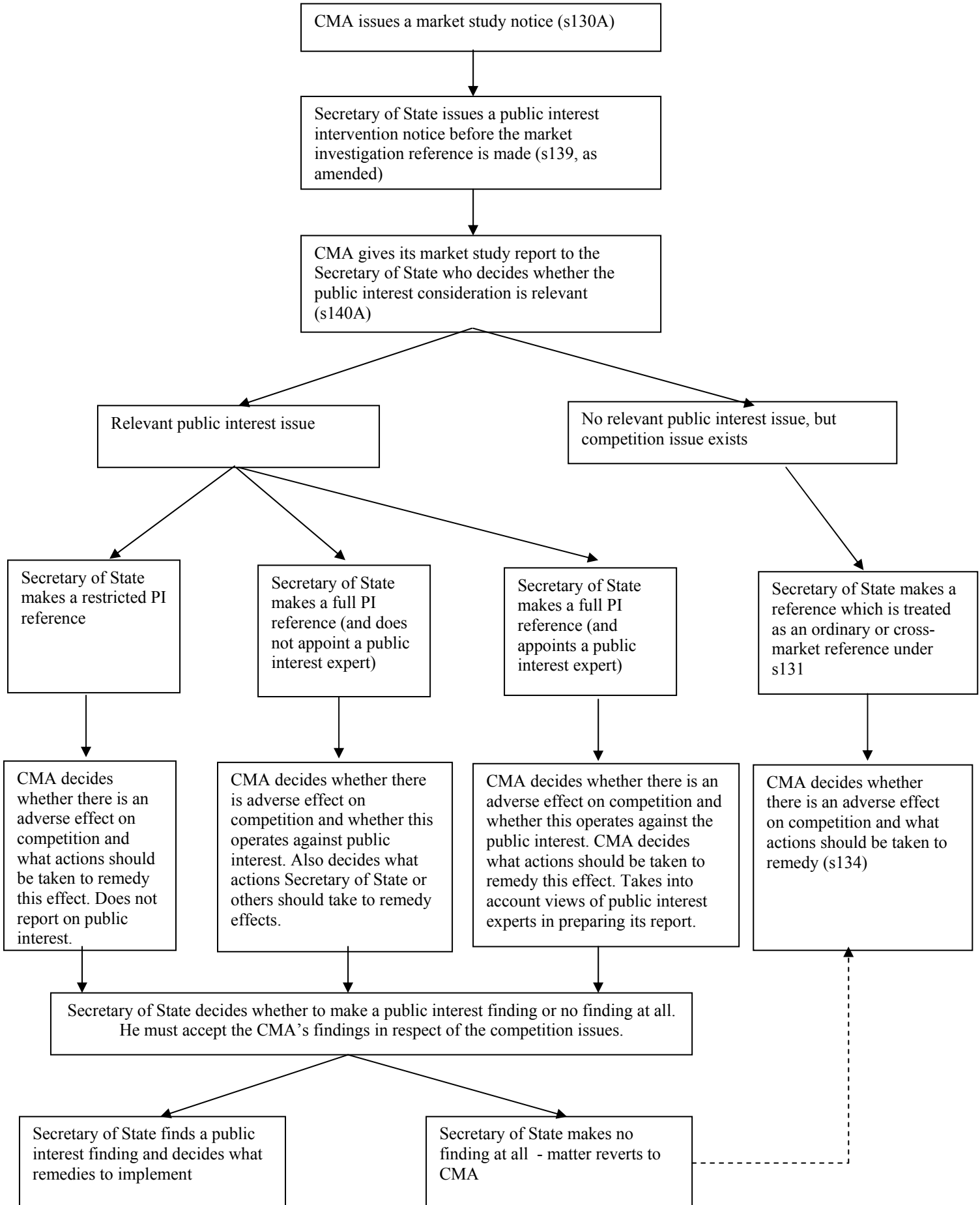
Figure 1 below sets out how the existing and new regimes will work.

How the regime works now



These notes refer to the Enterprise and Regulatory Reform Bill as introduced in the House of Commons on 23 May 2012 [Bill 7]

How the Bill will change this



Investigatory powers

Clause 28: Investigation powers: markets

241. 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.

242. This clause extends the CC's existing 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.

243. *Subsection (2)* amends section 174 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.

244. New subsections 174(1)(b) and (c) 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 174(9A) sets out the enforcement functions that are covered by these powers.

245. 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.

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

247. A similar extension of investigatory powers will operate in mergers inquiries (see clause 21).

Schedule 11: Investigatory powers: markets

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

249. 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).

250. Paragraph 3 of the Schedule repeals section 175 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.

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

252. 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.

253. 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, and paragraph 1 replaces it, mirroring the provisions set out in section 110. 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 markets process.

Interim measures

Clause 29: Interim measures: pre-emptive action: markets

254. The purpose of this clause 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.

255. The clause 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.

256. *Subsections (2) and (3)* apply to interim undertakings (section 157) and *subsections (4) and (5)* to interim orders (section 158), 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.

257. 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

Clause 30: Market studies and market investigations: consultation and time-limits and Schedule 12: Markets: time-limits

258. 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 clause 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 clause 28 and Schedule 11, and are also mirrored in a similar way for the mergers regime. Taken together, these clauses 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.

259. 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 clause 28 and Schedule 11 are triggered when a market study notice is published.

260. 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.

261. 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.

262. 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 market study 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)).

263. 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.

264. 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.

265. 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).

266. 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 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.

267. 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.

268. 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.

269. 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.

270. 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. 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.

271. 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.

272. 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.

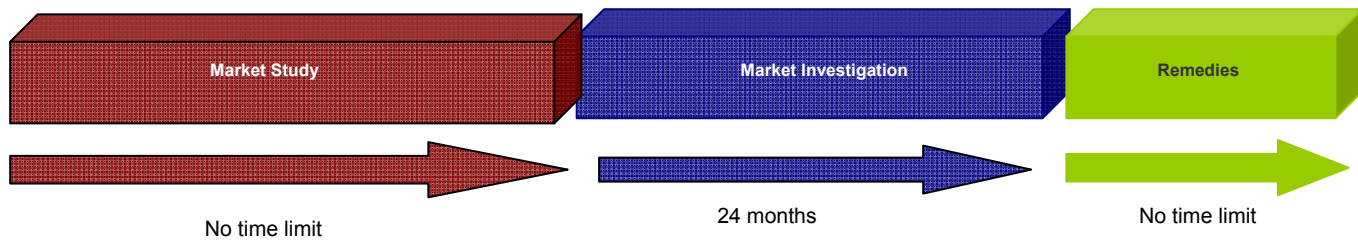
273. Schedule 12 also makes various other amendments to Part 4 which are

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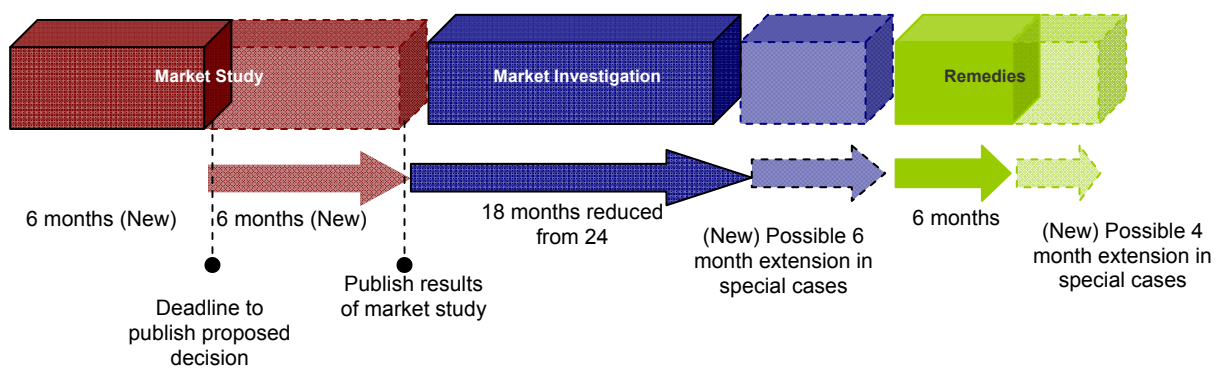
consequential on the new statutory timescales.

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

How the regime works now



How the Bill will change this



CHAPTER 3: ANTI-TRUST

Summary and Background

274. 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.

275. 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;

*These notes refer to the Enterprise and Regulatory Reform Bill
as introduced in the House of Commons on 23 May 2012 [Bill 7]*

- 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

Clause 31: Investigations: power to ask questions

276. This clause amends the CA 1998 to provide the CMA⁴ 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.

277. *Subsection (2)* of clause 31 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.

278. Section 26A(1) enables the CMA 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).

⁴Except 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.

279. 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 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.

280. 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.

281. 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 providing false or misleading information as a prosecution for that offence could result if the individual gave false or misleading answers.

282. Clause 31 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.

283. *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, by virtue of subsection (4), 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.

284. 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).

Clause 32: Civil enforcement of investigatory powers

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

286. 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.

287. *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.

288. 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.

289. 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.

290. Section 40B is similar to section 116 of the EA 2002. It requires the CMA⁵ 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

⁵ This provision is not exercisable concurrently by the sector regulators: see Schedule 16 to the Bill.

- 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.

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

292. *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.

Clause 33: 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

293. This clause 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 clause, 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 clause 40

Clause 34: Part 1 of the Competition Act 1998: procedural matters

294. This clause makes amendments to the CA 1998 in order to effect certain procedural changes.

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

296. 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 clause to the extent it includes information other than that mentioned in subsection (1). Such other information would not therefore benefit from absolute privilege.

297. 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.

298. The second set of procedural changes made by clause 34 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).

299. The clause 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.

300. The clause 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

Clause 35: Threshold for interim measures

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).

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

302. 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 clause 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.

Clause 36: Penalties; guidance etc.

303. This clause 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.

304. 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 clause 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.

305. 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 clause 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

Clause 37: Power for Secretary of State to impose time-limits on investigations etc.

306. This clause 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.

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

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

309. 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.

Clause 38: Review of operation of Part 1 of the Competition Act 1998

310. This clause 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 Bill, 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

311. The main provisions of this Chapter of the Bill 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.

312. This clause amends the cartel offence in section 188 of the EA 2002. The amendments remove the requirement that a person's behaviour must be dishonest for the offence to be committed and introduce new circumstances in which the cartel offence is not committed. The circumstances require certain persons to be notified of relevant information or for that information to be published in a prescribed manner. The clause also makes transitional provision.

313. 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.

314. 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.

315. 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.

316. Section 188(3) requires that, in the case of price-fixing, 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.

317. 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.

Clause 39: Cartel offence

318. Clause 39 amends section 188 by removing the requirement that an individual must be acting dishonestly. It then omits subsection (6) of section 188. This clause introduces new disclosure provisions for all of the four categories of prohibited cartel activity compliance which will take a person outside the criminal offence, and which in the case of bid-rigging largely replicate the effect of subsection (6).

319. 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.

320. 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.

321. 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.

322. 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.

323. *Subsection (6)* of clause 39 makes transitional provision for agreements effective before the coming into force of the new clause. It provides that the amendments made by the clause only apply to agreements falling within section 188(1) which are made after the commencement of the new clause and which relate to arrangements made or to be made afterwards. This means that existing agreements and those made before commencement, provided in each case that they relate to arrangements made or to be 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.

Clause 40: Extension of power to issue warrants to the Competition Appeal Tribunal

324. This clause 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 clause also makes changes to Schedule 4 to the EA 2002 (which deals with the

CAT's procedures) consequent upon this clause and clause 33 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

Clause 41: Enforcement orders: monitoring compliance and determination of disputes

325. Clause 41 amends Schedule 8 to 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.

Clause 42: Enforcement orders: provision of information

326. Clause 42 amends Schedule 8 to 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 to 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

327. 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).

328. 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, under the Civil Aviation Bill currently before Parliament, airports, both in the United Kingdom;
- Monitor: health 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.

329. 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.

*These notes refer to the Enterprise and Regulatory Reform Bill
as introduced in the House of Commons on 23 May 2012 [Bill 7]*

330. The Bill 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.

331. The Bill amends the concurrency arrangements in four 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; and
- 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.

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

Clause 43: Power of sector regulators and Schedule 14: Regulators: use of powers under 1998 Act

333. Clause 43 amends the powers of the Secretary of State under section 54 of the CA 1998 to make regulations governing the operation of concurrency.

334. *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).

335. *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.

336. *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.

337. *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

338. 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.

339. Ofcom's current duty in broadcasting (as opposed to electronic communications and postal services) and the CAA's prospective duties under the Civil Aviation Bill (currently before Parliament) to consider CA 1998 enforcement are not amended by Schedule 14 as these already are, or will be in the case of the CAA, framed in terms of the regulator having first to consider CA 1998 enforcement.

340. 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.

341. Paragraph 15 of Schedule 4 is also relevant to the provisions made by clause 43 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.

Miscellaneous

Clause 44: Recovery of CMA's costs in respect of price control references

342. This clause 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.

343. 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.

344. 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.

345. 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).

Clause 45: Disclosure etc. of information: offences

346. This clause 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.

347. The effect of the amendment will be, in particular, that a member of a confidentiality ring (such as is operated by the OFT when it offers investigated parties access to its investigation file in proceedings under the CA 1998) would commit a criminal offence if they used the information for any purpose other than access to file pursuant to the confidentiality ring arrangements in question.

Clause 46: Review of certain provisions of Chapters 1 and 2

Summary and Background

348. This clause requires the Government to review certain provisions of the Bill 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.

349. In accordance with this guidance, the new provisions to which this clause applies are the information gathering powers for merger and market investigations as well as the enforcement of these powers (contained in clauses 21, 28 and Schedule 11); statutory timescales for mergers and markets (contained in clause 24, Schedule 8, clause 30 and Schedule 12); and strengthened interim measures for merger investigations (contained in clause 22 and Schedule 7).

Clause 47: Minor and consequential amendments and Schedule 15: Minor and consequential amendments: Part 4

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

350. Clause 47 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 to Part 4 of this Bill.

Schedule 15: Minor and Consequential Amendments

351. Paragraph 1 amends paragraph 15 of Schedule 1 to the Civil Aviation Act 1982 (which provides for the Civil Aviation Authority 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 clause 34(4) of the Bill. 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 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 Office of Rail Regulation 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 Northern Ireland Utilities Regulator and the Energy (Northern Ireland) Order 2003).

352. 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 clause 32 of the Bill) 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 44 (Electricity (Northern Ireland) Order 1992), and paragraph 54 (Gas (Northern Ireland) Order 1996).

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

354. 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 clause 32, subsections (7) to (9).

355. 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.

356. 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.

357. 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.

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

359. 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 clause 21, subsection (2). They repeal section 31 (information powers in relation to completed mergers), section 32 (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.

360. Paragraphs 19 to 21, 23 and 24 are consequential to amendments to mergers investigative powers (clause 21) 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.

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

362. Paragraphs 25, 27, 30 to 34, and 38 make consequential amendments resulting from changes to the CMA’s interim powers set out in clauses 23 and 24.

363. 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 clause 21 and new statutory timescales set out in clause 24 and Schedule 8.

364. Paragraph 37 removes the reference to ‘Undertakings under paragraph 1 of Schedule 1’ from the index of define expressions in section 130 of the EA 2002. This is consequential of 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.

365. 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.

366. Paragraphs 42 to 46 make consequential amendments to the Communications Act 2003 arising out of the new section 193A inserted into that Act by clause 44. The new section gives the CMA power to recover its costs in respect of price control references made to it, as set out in clause 44.

PART 5: REDUCTION OF LEGISLATIVE BURDENS

Clause 49: Sunset and review provisions

367. This clause 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 2011⁸. 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.

368. Clause 49 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.

Clause 50 and Schedule 16: Heritage planning regulation

Conservation area consent in England

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

369. Currently, certain buildings in a conservation area must not be demolished without conservation area consent from the local planning authority. Under Schedule 16, 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.

370. Paragraph 10 of this Schedule amends section 74 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (“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 Town and Country Planning Act 1990 (“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.

371. Paragraphs 3 to 5 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 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 4 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).

372. Paragraph 5 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.

373. 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.

374. 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).

375. 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

376. Paragraph 7 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 7 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.

377. Paragraph 8 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 8 of this Schedule will amend section 6 to remove that restriction so that a COI can be applied for at any time for a building situated in England.

Heritage partnership agreements

378. Paragraph 9 of this Schedule inserts new section 9A into the 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 9A(2) may be an additional party to the agreement. A heritage partnership agreement may contain provision granting listed building consent 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 the terms on which that consent is given and any conditions attached to it. The specified works will still require any other relevant permission, such as planning permission. A heritage partnership agreement cannot be used to grant listed building consent for demolition. Subsection (6) of new section 9A sets out the range of additional matters that may be covered in a heritage partnership agreement, including which works the parties consider would not, in their opinion, affect the character of the listed building.

379. Paragraph 9 of this Schedule also inserts new section 9B into the P(LBCA)A 1990, which makes supplemental provision in relation to heritage partnership agreements. Section 9B(1) provides that such agreements must make provision for review, termination and variation by the parties. Section 9B(1) also makes it clear that more than one listed building can be the subject of an agreement, provided that an owner of each building, or of part of each building, is party to the agreement. Section 9B(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; and

*These notes refer to the Enterprise and Regulatory Reform Bill
as introduced in the House of Commons on 23 May 2012 [Bill 7]*

- the application or reproduction of sections 10 to 28 of the P(LBCA)A 1990, which set out certain procedures for listed building consent, for the purposes of heritage partnership agreements.

380. Section 9B(4) provides that, if a heritage partnership agreement grants listed building consent 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 9B(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.

Clause 51: Commission for Equality and Human Rights

381. This clause 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 clause also makes consequential amendments to the Equality Act 2006 and the EqA 2010.

382. Specifically, the clause makes the following amendments to the Equality Act 2006:

- repeals section 3, which sets out the general duty of the Commission;
- repeals section 10, 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, which requires the Commission to monitor and report every 3 years on progress in society relevant to the general duty in section 3. As a consequence of the repeal of section 3, this clause 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 duties) and 9 (Human rights duties). It also reduces the frequency with which the Commission is required to publish a report on progress from every 3 years to every 5 years.

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

Clause 52: Primary authorities

384. Clauses 52 and 53 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 2005⁹, sought to promote co-ordination of regulatory enforcement amongst local authorities by establishing the Primary Authority Scheme (“PAS”).

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

386. 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.

387. Clause 52 amends section 22 of the RESA 2008 to broaden the eligibility requirements for the PAS.

388. 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.

389. *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.

390. 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

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

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.

391. 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.

392. *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) .

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

Clause 53: Inspection plans

394. Clause 53 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.

395. *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.

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

397. 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.

398. 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)).

399. *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.

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

401. *Subsection (9)* inserts a definition of “working day”.

Clause 54, Schedule 17: Unnecessary regulation: miscellaneous

Part 1, Schedule 17: Notification of TV sales etc.

402. The purpose of Part 1 of Schedule 17 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.

403. 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.

404. 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.

405. Paragraph 1 in Part 1 of Schedule 17 repeals the Wireless Telegraph 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.

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

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

Part 2, Schedule 17: Water undertakers: in-area ban

408. The removal of the in-area trading ban, 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. This provision was highlighted in Ofwat's review of the Water Supply Licence regime and its removal was one of the recommendations in the Cave Review of Innovation and Competition in Water markets, published in 2009.

409. 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.

410. The repeal of section 2(3)(d)(iii) of the Water Industry Act 1991 will remove the requirement on the Secretary of State or regulator 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 the regulator, Ofwat, will need to follow the statutory mechanisms for amending licence conditions in sections 17I to 17R of the Water Industry Act 1991.

411. This Part of Schedule 17 removes the requirement to prevent a licensed water company associated with an undertaker from supplying water in the area of that undertaker through the standard licence conditions for water companies.

412. As a result, licensed water companies that are associated with undertakers will be able to compete for multi-site water supply contracts, once the regulator amends

the standard licence conditions through its power under the Water Industry Act 1991.

Part 3, Schedule 17: Bankruptcy early discharge procedure

413. 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.

414. 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.

415. Part 3 of Schedule 17 would repeal 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.

416. 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

¹⁰ www.insolvency.gov.uk

Clauses 55 and 56: Exploitation of design derived from artistic work

417. Clause 55 repeals section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA 1988”). The Copyright (Industrial Process and Excluded Articles) (No.2) Order 1989 No. 1070 made under section 52 would therefore cease to have effect.

418. Section 52 applies where an artistic work, except one falling within the exclusions created by or under that section, has been exploited by or with the licence of the copyright owner by making, by an industrial process, copies of that work and marketing those copies anywhere in the world. At the end of the period of 25 years from the end of the calendar year in which such articles were first marketed, the work may be copied by third parties without infringing copyright. 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. 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.

419. 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 and accordingly where previously a copy of a copyright work would have benefitted from the exception to copyright provided by section 52 such a copy will in future be an infringing copy.

Clause 56: Power to change exceptions: copyright and rights in performances

420. This clause enables the exceptions to copyright set out in Chapter 3 of Part 1 to the CDPA 1988: and the exceptions to rights in performances set out in section 189 of, and Schedule 2 to, of the CDPA 1988 to be amended by secondary legislation.

421. Copyright subsists in original literary, dramatic, musical or artistic works, sound recordings, films or broadcasts and typographical arrangements of published editions. The owner of copyright in a work has the right to control the use of that work including copying the work, issuing copies of the work, renting or lending the work to the public, performing or showing the work in public, communicating the

work to the public or making an adaptation of the work. The rights to control use of a copyright work are subject to certain exceptions which are set out in Chapter 3 of Part 1 to the CDPA 1988.

422. Performers have the right to control the exploitation of their performances. The provisions relating to the rights of performers are set out in Part 2 of the CDPA 1988. Again these rights are subject to exceptions which are set out in Schedule 2 of the CDPA 1988.

423. The scope for creating exceptions to copyright and performers rights is limited by European Union law and in particular the provisions of Directive 2001/29/EC of the European Parliament and of the Council of 22nd May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L167/10 22.6.2001) and Directive 2006/115/EC of the European Parliament and of the Council of 12th December on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L376/28 27.12.2006).

Directors' remuneration

Summary and Background

424. Under the CA 2006, quoted companies¹¹ 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.

Clause 57: Directors' remunerations: effect of remuneration report

425. Section 439(5) of the CA 2006 states that 'no entitlement of a person to remuneration is made conditional on the resolution being passed by reason only of the provision made by this section'.

426. Clause 57 will repeal section 439(5). This will remove the statutory provision which currently prevents the statutory requirement for a vote on the directors'

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

remuneration report having the effect of making a person's entitlement to remuneration contingent on the outcome of the shareholder resolution.

427. The repeal of this section does not automatically have the effect of making directors' remuneration contingent on the outcome of the shareholder resolution on the directors' remuneration report. As such, therefore, the repeal of section 439(5) does not, in itself, mandate a binding vote on the directors' remuneration report.

428. It will be possible for the shareholder resolution to be given that effect where the articles of a particular company state that this is to be the case. To change the articles of a particular company in order to introduce a binding vote on the remuneration report would require the approval of shareholders of that company by means of a special resolution.

General

Clause 58: Consequential amendments, repeals and revocations

429. This clause provides a power for Secretary of State to make changes to other legislation in consequence of the provisions of the Bill. 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.

Clause 61: Extent

430. Clause 61 provides for the extent of the Bill.

FINANCIAL EFFECTS / PUBLIC SECTOR MANPOWER

431. Part 1 provides the Secretary of State with the power to provide financial assistance to the UK Green Investment Bank plc, subject to the consent of HM Treasury.

432. Parts 3 to 4 on the competition reforms and the creation of the CMA will give rise to some transition costs which will be funded from existing budgets. Some efficiency savings will also arise but the primary purpose of the reforms is to improve the working of the UK competition regime. There will be a small impact on the top of the office and back office staff at the CC and the OFT. The reforms will have no

impact on front-line competition enforcement.

433. The implementation of early conciliation, part of the employment reforms, will introduce an additional statutory duty for ACAS which will require additional resource. Specific resourcing requirements will be identified as the underpinning process is developed. The Coalition Government has made a commitment to review all Non-Departmental Public Bodies at least every three years to examine the functions it carries and assess whether or not these need to continue. A 'Triennial Review' of ACAS is currently underway and this will include consideration of the operational requirements of Early Conciliation. Copies of the report of this Review will be placed in the Libraries of both Houses.

IMPACT ASSESSMENT

434. The Impact Assessment (IA) accompanying this draft Bill can be found in hard copy in the Vote Office (House of Commons) or Printed Paper Office (House of Lords).

435. The IA summarises the economic effect of the package of policies contained in the Bill. It shows the overall cumulative net quantified effect (total net present value), and the proportion of which would accrue to business (business net present value). Overall it shows the net benefit to business from implementing the Bill.

436. The IA notes that a key non-monetised benefit is expected to be the range of benefits to business that would flow from the UK Green Investment Bank plc.

437. In line with the Public Sector Equality Duty the Bill has been considered with regard to the characteristics of race, religion and belief; disability; gender; age; gender reassignment; pregnancy and maternity; and sexual orientation. An equality impact assessment questionnaire has been completed. This specifically explored the protected characteristics identified above, in term of discrimination, harassment and victimisation. The result identified no major impact in these communities from the Bill policies.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Compatibility

438. Section 19(1)(a) of the Human Rights Act 1998 requires the Minister in charge of the Bill to make a statement confirming compatibility with the European Convention on Human Rights (ECHR).

*These notes refer to the Enterprise and Regulatory Reform Bill
as introduced in the House of Commons on 23 May 2012 [Bill 7]*

439. Secretary Vince Cable, Secretary of State for Business, Innovation & Skills, has made the following statement:

“In my view the provisions of the Enterprise and Regulatory Reform Bill are compatible with the Convention rights”.

440. Although of the view that the Bill is compatible with the rights in the Convention, the Department has considered the arguments that might be made in relation to the potential engagement of such rights by the provisions in the Bill. The main arguments are identified below.

UK Green Investment Bank plc (clause 3)

441. Clause 3 restricts the UK Green Investment Bank plc’s ability to alter its objects clause in its articles of association. Article 1, Protocol 1 of the ECHR may have relevance to this clause. This may be viewed as a restriction on shareholders’ rights over the company. However, Article 1 is not an absolute right, and it is considered that this restriction is necessary to achieve a legitimate public interest, namely taking action to meet domestic and European obligations to protect the environment.

Employment (clause 10)

442. Clause 10, which provides that legal officers are competent to make decisions in the employment tribunals, engages Article 6 of the ECHR, which includes the right to an independent and impartial tribunal. It is considered that clause 10 does not breach Article 6 and the Government will ensure that the appointment process and terms for the appointment of legal officers will be such as to ensure that the legal officers are independent and impartial.

Financial penalties (clause 13)

443. Clause 13, which introduces a financial penalties regime in the Employment Tribunals, engages Article 1, Protocol 1 of the ECHR as it will lead to people being deprived of their possessions. However, Article 1, Protocol 1 is not an absolute right and it is considered that any interference is justified. The proposed interference with the right to property has the legitimate aim of incentivising employers to comply with employment law, which is clearly in the public interest. In addition, the interference is prescribed by law and subject to safeguards (e.g. minimum and maximum penalties, proportionate to compensation awarded, due process, right of appeal). Clause 13 also engages Article 6 of the ECHR, but it is considered that the financial penalties regime will not breach Article 6(1); the employment tribunals already make determinations on civil rights obligations and are accepted as being an independent and impartial

tribunal established by law. In light of the classification of employment rights as civil matters, the fact that those rights, by their nature, are intended to protect and compensate employees, and that the financial penalty regime will be discretionary, proportionate to the compensation awarded and limited to a maximum of £5,000, it is not considered that the threat of a financial penalty renders the determination of employment rights criminal matters for the purposes of Article 6, therefore the additional rights set out in Article 6(3) are not relevant.

The Competition and Markets Authority (Part 3)

444. Clause 18 and Schedule 4 establish the Competition and Markets Authority which brings the CC's functions and the competition functions of the OFT together in a single body. Article 6 ECHR is relevant to these provisions, which will affect the investigation and decision-making processes under the Competition Act 1998 and, in relation to merger control and markets, under the EA 2002. In relation to the Competition Act 1998, decisions and penalties in relation to anti-competitive behaviour would be characterised as determining a criminal charge for the purposes of Article 6, but the continued availability of an appeal to the CAT, which can fully consider the case on the merits, will ensure the process remains compatible with Article 6. The creation of the CMA will mean that merger and markets decisions under the EA 2002, hitherto taken by separate bodies will be taken within the CMA. However, within the CMA there will remain a separation between the decisions to be taken with the initial referral decision on a case being taken by the CMA's Board and the final decision being taken by a separate group of panellists, required to act independently of the Board. These decisions involve the determination of civil rights and obligations under Article 6, but there are sufficient safeguards, in particular in relation to the independence of the decision-making groups, which, coupled with the availability of judicial review to the CAT will ensure the process remains compatible with Article 6.

Competition Reform (Part 4)

445. Article 6 may also be relevant to the power in clause 23 to impose financial penalties where merger parties breach interim measures that have been put in place. As a safeguard, given that the imposition of such penalties is likely to be characterised as a criminal matter for the purposes of Article 6, decisions to impose such penalties are subject to full right of appeal to the CAT by the party subject to the penalty.

446. Article 6 may also be relevant to clause 32, which will give the CMA the ability to impose financial penalties for non-compliance with requirements imposed in the course of an investigation under the Competition Act 1998 (bringing such investigations into line with those for mergers and markets under the EA 2002). However, the procedure for the imposition of such penalties and the availability of a right of appeal to the Competition Appeal Tribunal will ensure compatibility with

Article 6.

447. Article 8 ECHR (which concerns the right to privacy) may be relevant to clause 39, which amends the cartel offence, by introducing a requirement to inform affected customers or publish details of specified commercial arrangements which fall within the scope of the offence. Whilst this may possibly affect the privacy rights of undertakings involved in such arrangements, any such interference is necessary in the interests of preventing crime and protecting economic well-being. These provisions are necessary as a means of ensuring the offence captures only those cartels which do most damage to customers and economic interests and are framed to ensure that only information necessary to prevent such harm is to be made available or published in order to escape liability.

448. Article 6 may be relevant to the role of the CMA in determining regulatory appeals and references under sector specific legislation in regulated sectors and in relation to the power given to the CMA in the new section 193A of Communications Act 2003 inserted by clause 44 to recover its costs in relation to a reference to it in the context of an appeal under the Communications Act 2003. Safeguards have been put in place to ensure fairness and independence and a full right of appeal is available in relation to a costs order under the 2003 Act.

Heritage planning regulation (Clause 50, Schedule 16)

449. Paragraph 5 of Schedule 16 inserts new section 196D into the TCPA 1990 which creates two new offences relating to unauthorised demolition of certain buildings in a conservation area. The burden of proof for the defence to the new offences rests on the defendant who must prove each of the four limbs to the defence (section 196D(4)). This engages Article 6(2) of the ECHR which provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law. The burden of proof must fall upon the prosecution but it may be transferred to the defendant when he is seeking to establish a defence. The Government considers it both reasonable and necessary for the effective operation of the new offence for the defendant to be required to prove each limb of the defence.

Water undertakers: in-area ban (Schedule 17, Part 2)

450. The repeal of section 2(3)(d)(iii) of the Water Industry Act 1991 is not considered to interfere with rights under Article 1 of Protocol 1. There is a statutory mechanism for amending licence conditions and, where amendments are made to licence conditions with the agreement of relevant licence holders, which is likely to be the case for licensed water companies that are associated with water undertakers, there is no interference with property rights. It is not considered that a competitive advantage enjoyed by licensed water companies which are not associated with water undertakers is an aspect of the property in a licence or gives rise to an expectation that

such an advantage will continue indefinitely.

Copyright (Clauses 55 and 56)

451. Repeal of section 52 of the CDPA 1988 will have the effect that the full term of copyright protection will be restored in relation to certain artistic works where the scope of the copyright had been reduced by the operation of section 52. The repeal of section 52 will therefore prevent third parties from manufacturing, distributing or selling any artistic work without the permission of the owner of any copyright and the term of copyright protection for artistic works will be harmonised at life of its creator plus 70 years. Rights under Article 1 of Protocol 1 are qualified rights; it is considered that this provision represents an acceptable balance between the private rights of persons adversely affected and the public interest in the proper operation of copyright law and the enforcement of that law, and is therefore compatible with the convention.

Directors' remuneration (Clause 57)

452. The repeal of section 439(5) of the CA 2006 will facilitate companies offering their shareholders a binding vote on the directors' remuneration report. Whether or not shareholders are offered a vote which has binding effect on the remuneration of directors will be subject to the articles of the particular company stating that the vote shall be of this nature. Any change to the articles would be subject to shareholder approval. As such, the repeal of 439(5) has no immediate, direct impact on the rights of directors or shareholders. This clause is therefore compatible with ECHR.

COMMENCEMENT

453. Clauses 58 to 63 will come into force on the day of Royal Assent.

454. Clause 51 (Commission for Equality and Human Rights); paragraphs 7 and 8 of Schedule 16 (and section 50 so far as it relates to them); and Parts 1 and 2 of Schedule 17 (and clause 54 so far as it relates to them) will come into force at the end of the period of 2 months beginning with Royal Assent.

455. The remaining provisions of this Bill will come into force on such day as the Secretary of State may appoint by order made by Statutory Instrument. Different days may be appointed for different purposes.

Glossary of abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
CA 1998	Competition Act 1998
CA 2006	Companies Act 2006
CAA	Civil Aviation Authority
CAT	Competition Appeal Tribunal
CC	Competition Commission
CDPA 1988	Copyright, Designs and Patents Act 1988
CMA	Competition and Markets Authority
COI	Certificates of immunity
EqA 2010	Equality Act 2010
EA 2002	Enterprise Act 2002
ECHR 1998	European Convention on Human Rights
ERA 1996	Employment Rights Act 1996
ERelA 1999	Employment Relations Act 1999
ETA 1996	Employment Tribunals Act 1996
GPDO 1995	Town and Country Planning (General Permitted Development) Order 1995
LBRO	Local Better Regulation Office
NIAUR	Northern Ireland Authority for Utility Regulation
Ofcom	Office of Communications

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as introduced in the House of Commons on 23 May 2012 [Bill 7]*

Ofgem	Office of Gas and Electricity Markets
OFT	Office of Fair Trading
Ofwat	Water Services Regulation Authority
ORR	Office of Rail Regulation
PAS	Primary Authority Scheme
PBA 2011	Public Bodies Act 2011
PI	Restricted public interest reference or Full public interest
PIDA 1998	Public Interest Disclosure Act 1998
P(LBCA)A 1990	Planning (Listed Buildings and Conservation Areas) Act 1990
RESA 2008	Regulatory Enforcement and Sanctions Act 2008
TCPA 1990	Town and Country Planning Act 1990
TFEU	Treaty on the Functioning of the European Union
TUPE 2006	The Transfer of Undertakings (Protection of Employment) Regulations 2006
UILs	Undertakings in lieu

ENTERPRISE AND REGULATORY REFORM BILL

EXPLANATORY NOTES

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