Department for Business & Trade

Department for Science, Innovation & Technology

November 2023

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM FOR THE BILL AS INTRODUCED IN THE HOUSE OF LORDS

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Digital Markets, Competition and Consumers Bill ("the Bill"). It has been prepared by the Department for Science, Innovation and Technology and the Department for Business and Trade.

2. The purpose of the Bill is:
    a. to ensure effective competition in digital markets through the introduction of an ex ante regulatory regime, enforcement of which will be the responsibility of the Competition and Markets Authority ("CMA");
    b. to make amendments to competition law to ensure the CMA's powers and processes are efficient and effective;
    c. to reform and enhance the civil processes for the enforcement of consumer protection law and to amend consumer protection law to ensure effective consumer protection measures are in place; and
    d. to make provision of a cross-cutting nature which applies to the powers and functions of the CMA and other regulators, in particular through the introduction of a duty of expedition in relation to competition, consumer and digital markets functions, and amendments in relation to the sharing of information and ability to provide investigative assistance to international partners.

3. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). On introduction of the Bill in the House of Lords, Lord Offord of Garvel, Parliamentary Under Secretary of State in the Department for Business and Trade made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

Summary of Bill provisions

4. The Bill includes three sets of reforms to drive growth. It will establish new tools to drive competition in digital markets, update the existing competition regime, and improve outcomes for consumers.

5. The digital markets measures establish a new pro-competition regime for digital markets. The regime will be overseen and enforced by the Digital Markets Unit (DMU), an administrative unit of the Competition and Markets Authority (CMA). The DMU will be able to designate a small number of firms as having Strategic Market Status (SMS), where they are very powerful in particular digital activities. The CMA will have the power to define digital activities, but examples could include social media and online search. Firms which are designated are called “designated undertakings”. This status enables the CMA to impose legally enforceable rules and obligations on designated firms to address both the effects and root causes of competition issues in digital markets. The Bill will also improve transparency of harmful mergers by requiring designated undertakings and associated persons to report to the CMA certain possible mergers pre-completion and to not complete the mergers until the CMA has had time to decide whether to investigate.

6. The competition measures will speed up and focus the CMA’s work, enhancing its ability to deter, prevent and, where necessary, take enforcement action against monopolistic behaviours to ensure that the free market can operate more effectively. This will be delivered through changes to the market inquiry process, updates to the merger regime, and amendments to existing legislation to combat anti-competitive conduct and abuse of a dominant position. The Bill will also enhance and update the CMA’s

investigative and enforcement toolkit to promote competition in a modern economy.

7. The consumer measures reform and enhance the civil enforcement of consumer protection law to protect the collective interests of consumers. The measures provide a court-based regime and a direct enforcement regime which will be administered by the CMA. They provide new powers for the court and the CMA to impose civil monetary penalties for non-compliance with consumer protection laws, undertakings, CMA directions, information notices and the provision of materially false or misleading information to the CMA in connection with the new direct enforcement regime.

8. Secondly, the consumer measures will update and improve existing consumer protection law. The measures will replace existing protections for consumers from unfair trading, which are currently set out in secondary legislation. The measures will also provide new rights for consumers, and consolidate existing rights, in respect of subscription contracts, protect consumer payments specified saving schemes and replace existing provision for alternative dispute resolution ("ADR").

9. Part 5 of the Bill deals with cross-cutting provisions across the digital markets, competition and consumer regimes. Chapter 1 confers statutory information gathering powers on the CMA in relation to the retail of motor fuel as part of its function to assess competition in the sector. Chapter 2 contains new provisions to facilitate the provision by relevant UK regulators of investigative assistance to overseas regulators who have functions corresponding to those of the UK regulators in relation to competition, consumer protection and digital markets. It further amends Part 9 of the Enterprise Act 2002 to repeal and replace the gateway under which the CMA and other UK public authorities may exchange information with overseas public authorities. Part 5 also introduces a statutory duty of expedition in relation to the CMA's competition and consumer law functions, as well as the CMA's functions relating to the new digital market's regime and removes the current time limit for which a person may serve as a Chair in the Competition Appeal Tribunal.

Article 6 – right to a fair trial

Overview

10. Article 6(1) provides that: “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

11. The CMA's officials will not constitute an "independent and impartial tribunal" for the purposes of Article 6. However, this can be "cured" on appeal so as to render the overall process compliant with the right to a fair trial. The standards required to achieve "fairness" will depend in particular on whether the circumstances involve determination of a criminal charge or a civil right.

Civil rights and obligations

12. Broadly, the civil rights at issue are the right of an undertaking to carry on a business, as it sees fit, without undue state interference. The right to carry on a business involves freedom of contract, the free exercise of property rights and the right to protect confidentiality and trade secrets. Provisions aimed at regulating the conduct of undertakings constitute interference with these rights.

13. Where an administrative decision does not involve the determination of a criminal charge, but nevertheless determines a person’s civil rights or obligations, a broad and holistic view is taken of whether the overall process suffices to provide fair determination of civil rights by a system that is characterised by an appropriate degree of independence and procedural safeguards. It may not be necessary for the Court to have power to itself assess whether the administrative body’s findings in relation to all matters of fact and law were correct. Rather, it may be sufficient that the Court has power to examine whether the administrative decision-maker followed a fair procedure, took account of all relevant considerations, excluded irrelevant considerations, and gave reasons for its decision[1].

[1] See *R (Wright and Others) v Secretary of State for Health* [2009] UKHL 3, *per* Hale LJ at §23; and *Fazia Ali v United Kingdom* (Application no. 40378/10, judgment of 20 October 2015) at §§75-79.

Criminal charges

14. The ECHR concept of a criminal charge is broader than just those charges which are tried in domestic criminal courts. In considering whether a decision of the CMA about a breach of legal obligations by an undertaking should be categorised as a "criminal charge" a court should have regard to the following criteria:
    a. the legal classification of the measure in question in national law,
    b. the nature of the measure, and
    c. the severity of the "penalty".[2]

    These criteria are alternative and not cumulative.

15. A decision is likely to constitute the determination of a criminal charge where the decision-maker imposes a non-trivial penalty. A decision is unlikely to constitute the determination of a criminal charge where the decision cannot lead *directly* to the imposition of a penalty, but may lead to other obligations being imposed, breach of which may be punished with a penalty.

16. In terms of whether the remit of a reviewing court is sufficient, the standard of review applied by a court exercising its judicial review jurisdiction is flexible and will be influenced by the nature and subject matter of the administrative decision, and whether that decision was taken by a body with specific relevant expertise (*R (Mott) v Environment Agency* [2016] EWCA Civ 564, paras. 68-77). The court will modulate the intensity of its review in line with those factors, in a manner that enables the requirements of Article 6 to be met.

17. In relation to penalties, a review court must not be bound by any aspect of the administrative body's decision and can decide the correctness of the administrative body's findings in relation to all matters of fact, law, and assessment.[3]

18. The following paragraphs explain where Article 6 is engaged and how it is satisfied in relation to the various Parts of the Bill.

[2] *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22.

[3] *Steininger v Austria* (2012) ECHR 21539/07

Part 1 – Digital Markets

19. In relation to digital markets generally, the Government considers that the regulation of businesses by way of the SMS regime constitutes interference with the civil rights described above. The Government notes it is arguable that certain provisions may be characterised as quasi-criminal matters for Article 6 purposes, in particular penalty provisions.

20. The following provisions are considered to engage and/or interfere with the right to a fair trial under Article 6:
    a. SMS designation
    b. Conduct requirements
    c. Final offer mechanism
    d. Pro-competitive interventions (PCIs)
    e. Interim/final orders
    f. Civil sanction regime
    g. Decision making
    h. Information powers and offences
    i. Production of information authorised by warrant
    j. Appeals

21. SMS designation: Pursuant to clause 2, the CMA will have the power to designate undertakings as having SMS in respect of a digital activity. Designation will in most, if not all, cases lead to the imposition of conduct requirements and also, potentially, PCIs. It is likely that the designation decision would therefore amount to a determination of the designated undertaking's civil rights and obligations, especially when viewed with accompanying regulatory interventions.

22. Conduct requirements: Pursuant to clauses 19 to 25, once an undertaking is designated with SMS, the CMA will be able to impose conduct requirements as to how the designated undertaking must conduct itself in relation to the relevant digital activity, provided that the CMA considers it would be appropriate to do so for the purposes of one of the statutory objectives, and the requirement is within one or more of the permitted types of requirement specified in the legislation.

23. Conduct requirements are ex-ante regulation. There is no need to prove that the firm's conduct to date is the cause of any specific harm. As imposition of

conduct requirements cannot itself lead to a penalty, these are likely to be a determination of the designated undertaking's civil rights and obligations.

24. However, the finding by the CMA of a breach of a conduct requirement empowers the CMA to impose a civil penalty for the breach. The penalty may be of a non-trivial amount and for punitive purposes. The process by which decisions are made by the CMA regarding a breach of a conduct requirement engage Article 6, including arguably the criminal limb.

25. Final offer mechanism (FOM): this is a power for the CMA to impose a particular procedure to determine prices/values when a party is in a monetary dispute with a designated undertaking in relation to payment terms. It is available to the CMA only when a conduct requirement to have fair and reasonable contract terms has been imposed on the designated undertaking, there has been a breach of that conduct requirement in relation to the payment terms, the CMA has tried to use the usual enforcement mechanism of giving directions to the designated undertaking by way of an enforcement order, and there are no other tools available to the CMA that would resolve the situation within a reasonable time.

26. As imposition of FOM and a FOM enforcement order cannot in themselves lead to a penalty, these are likely to be a determination of a designated undertaking's civil rights and obligations. However, a finding by the CMA of a breach of a FOM enforcement order empowers the CMA to impose a civil penalty for the breach. The penalty may be of a non-trivial amount and for punitive purposes, and so a decision by the CMA as to a finding of breach of a FOM enforcement order engages Article 6 including, arguably, the criminal limb.

27. Pro-competitive interventions: While imposition of a PCI cannot itself lead to a penalty, imposition of these are likely to be a determination of the designated undertaking's civil rights and obligations. However, a finding by the CMA of a breach of a pro-competition order empowers the CMA to impose a civil penalty for the breach. The penalty may be of a non-trivial amount and for punitive purposes. A decision by the CMA as to a finding of breach of a pro-competition order therefore engages Article 6, including, arguably, the criminal limb.

28. Interim and final enforcement orders: In the event of a designated undertaking being suspected of breaching a conduct requirement that has been imposed upon it, the CMA may investigate the suspected breach, and can impose an

interim enforcement order on the firm or, if a breach is found, a final enforcement order. The CMA can give directions to the firm in the order as it considers appropriate for the purposes of remedying the breach. The ECtHR has held that whether Article 6 can be engaged in relation to interim enforcement measures will depend on "the nature of the interim measure, its object and purpose as well as its effects on the right in question" (*Micallef v Malta* (2010) 50 E. H.R.R. 37).

29. Breach of an interim or final enforcement order enables the CMA to impose a civil penalty. These penalties may be of a non-trivial amount and punitive in nature. A decision by the CMA as to a finding of breach of an interim or final enforcement order therefore engaged Article 6, including, arguably, the criminal limb.

30. Information-gathering powers and offences: Under clause 72 the CMA has the power to require the attendance of natural persons at an interview, and a power to require that those natural persons answer questions with respect to any matter relevant to that digital markets investigation. Article 6 and common law provides protection against self-incrimination in criminal prosecution, in particular in respect of an individual's compelled testimony, subject to specific exemptions, cannot normally be used against them.

31. Production of information authorised by warrant: Clause 75 (*Power to enter premises under a warrant*) introduces the power for the CMA to require production of material accessible from the premises during inspections authorised by warrant for the purpose of a breach investigation. This power mirrors the powers in sections 28 and 28A Competition Act 1998 ("CA98") and section 194 Enterprise Act 2002 ("EA02"), as amended by this bill. This power is discussed in more detail in the section on Part 2 of the Bill below, in the entries relating to the production of information authorised by warrant - the content is not repeated here to avoid duplication.

32. Civil sanction regime: Civil penalties can be imposed for breach of 'competition requirements' (see clause 85). In addition, where the CMA considers that an undertaking has intentionally or negligently failed to comply with a conduct requirement it may impose a penalty on the firm.

33. The level of penalty that can be imposed is set by clause 86, and are potentially significant levels of fine. A decision to impose a penalty engages Article 6, including arguably, the criminal limb.

34. Civil penalties can also be imposed on individuals, including senior managers and nominated officers, and legal entities for breaches of investigation requirements. While the maximum penalty that can be imposed for breach of investigation requirements is less than the maximum penalty for breach of competition requirements, a decision to impose such a penalty engages Article 6 including, arguably, the criminal limb.

35. Decision making: In order to ensure compliance with Article 6, the decision as to whether to launch an SMS designation investigation, including for redesignation, or a PCI investigation, as well as enforcement decisions, will be reserved for the board and the following decisions can only be delegated by the board to a sub-committee whose membership is majority non-executive directors and panel members and must consist of either at least two non-executive directors or one non-executive director and the chair of the CMA (see clause 106(8)):
    a. making a SMS designation;
    b. making provision to apply obligations from a SMS designation to another subsequent designation for the same, or a similar or connected digital activity, or making transitional provision in respect of obligations after designation ends;
    c. imposing, amending or revoking Conduct Requirements;
    d. whether to make, and the form of, an enforcement order in respect of a breach of Conduct Requirements;
    e. whether to accept a commitment (a voluntary binding obligation) under clauses 36 or 56;
    f. whether to adopt the Final Offer Mechanism;
    g. making, and the form of, PCI decisions; and
    h. imposing, replacing or revoking PCI orders;
    i. whether to impose a penalty, and the amount of any such penalty.

36. While the CMA's non-executive directors cannot be seen as being an "independent and impartial tribunal" for the purposes of Article 6, reserving certain decisions for bodies with non-executives appointed by the Secretary of State introduces a degree of independence from the CMA's officials in the decision making process.

37. Appeals: The Bill provides for a right to appeal to the CAT, which is an independent and impartial tribunal which sits in public, in order to respect individuals' Article 6 rights.

The provisions are considered to be compatible with Article 6 for the following reasons:

38. The principal way this Part of the Bill maintains its compatibility with Article 6 is through its appeals provisions. This is because the Government recognises that the CMA's officials do not constitute an independent and impartial tribunal for the purposes of Article 6, meaning that additional provision is required to satisfy the requirements of Article 6.

39. With the exception of challenges to decisions to impose penalties, the CAT will decide appeals by the application of judicial review principles. This means that the CAT will have only the ability to quash and remit decisions back to the CMA, rather than to be able to substitute its own judgment.

40. The appeals provisions at clause 103 are sufficient to ensure the compatibility of this Part of the Bill with Article 6. As a public authority, the CAT will be required by section 6 HRA98 to ensure that its review of the CMA's decision suffices to meet the requirements of Article 6; i.e. by hearing evidence and disagreeing with the decision-maker's finding of fact if necessary.

41. In terms of penalties imposed under clauses 85 and 87, as section 114 EA02 will apply for appeals of those decisions, the CAT will be able to vary the amount of those penalties. The Government considers the provisions of section 114 EA02 are sufficient to satisfy the requirements of the criminal limb of Article 6.

42. SMS designation: In addition to the appeals provisions, the designation investigation process is in itself subject to various safeguards. It will last for up to nine months and the CMA is required to carry out a public consultation on any decision that it is considering making (clause 13). The undertaking subject to the designation investigation will therefore have the opportunity to make representations to the CMA, as will other persons who may be affected. Further, clause 104 gives the CMA the power to extend SMS investigation periods in certain circumstances: either for up to three months where there are "special reasons" (clause 104(1)), or in response to failures to comply with the

investigation (clause 104(3)). The CMA is required to publish certain information when beginning an SMS investigation and in relation to the outcome of that investigation. The Government considers that these provisions are compatible with Article 6, taking into account both the design of the designation process and the possibility of review of designation decisions by the CAT.

43. Conduct requirements: In addition to the appeals provisions, conduct requirements can only be imposed if considered by the CMA as proportionate for the purposes of one or more of the three statutory objectives, and also they must be of a permitted type of requirement listed in the legislation (see clauses 19 and 20). Before imposing conduct requirements on a designated undertaking, the CMA must carry out a public consultation on the proposed conduct requirements. The designated undertaking will therefore have an opportunity to make representations to the CMA as part of the consultation, and so will other persons who will be affected.

44. The requirement that the CMA must publish a notice of the conduct requirement ensures transparency as to the obligations imposed and the reasons for them. Designated undertakings (and also other affected persons) can make representations to the CMA at any time in relation to whether conduct requirements remain appropriate. The Government considers therefore that there are procedural safeguards enabling a designated undertaking subject to regulation to make representations to the CMA in order to satisfy the requirements of natural justice. Combined with the statutory appeal rights for both designated undertakings and third parties, we consider that this constitutes compliance with Article 6.

45. Final offer mechanism: The CMA must have used the normal enforcement order route of imposing directions by way of enforcement order for the purposes of ending the breach, there must be an ongoing breach of the original conduct requirement and the CMA must consider that the final offer mechanism is the most appropriate of its tools to resolve the issue in a reasonable time.

46. The parties will have appeal rights in the normal way, to the judicial review standard, in relation to the decisions of the CMA to impose (or not to impose) the final offer mechanism, to order information-gathering from the parties or information-sharing between the parties, and in relation to the CMA's final choice of the winning bid.

47. Interim/final enforcement orders: these concern enforcement where breaches of conduct requirements have been found by the CMA after a conduct breach investigation. The investigation is begun by giving a notice with details of the suspected breach to the designated undertaking, followed by a public notice containing similar information. The designated undertaking is given the opportunity to make representations in respect of the investigation. The CMA may consult on the terms of the order. When imposing an order, the CMA must give reasons for it.

48. The Government considers that the procedural safeguards provided by the Bill mean that the rules of natural justice are observed for the designated undertaking, which has the opportunity to make representations before an order is imposed, except in the case of an interim enforcement order (but that for an interim order, these are only available in limited circumstances, and, if imposed, the undertaking has the right to make representations at that point). Decisions about imposing interim or final enforcement orders will be subject to review by the CAT on judicial review principles.

49. Pro-competitive interventions: On beginning a PCI investigation the CMA must publish information about the investigation including its purpose and scope, its anticipated length. Before making a final decision on whether to make a PCI, the CMA must carry out a public consultation, including on any proposed PCI along with the reasons for it. The designated undertaking, and affected parties, can therefore make representations. This meets the requirements of natural justice in respect of the designated undertaking.

50. The CMA must publish a notice of the final PCI decision, giving reasons. This is for reasons of transparency. The same procedures apply when the CMA is varying or replacing a pro-competition order as apply to the imposition of an original PCI, and the CMA must keep under review the appropriateness of varying or revoking a pro-competition order. The Government therefore considers that there are sufficient procedural safeguards in place before the final decision to impose (or vary) a pro-competition order to show that there is a fair process, and that any defects coming from the fact that the CMA is not an independent decision maker are cured by the availability of a statutory appeal to the CAT.

51. Production of information authorised by warrant: The Government considers that there is adequate protection for legally privileged material to ensure

compliance with Article 6. Clause 81 (*Privileged communications*) provides protection for privileged communications in relation to the digital markets regime.

52. Civil sanction regime: The CMA is required to prepare and publish a statement of policy in relation to the imposition of penalties, approved by the Secretary of State, so there is transparency as to how the law is applied (see clause 91); an explicit statutory requirement for the CMA to give reasons for issuing a penalty (see clause 89, applying section 112 EA02 as amended by this Bill); a requirement on the CMA to issue a draft penalty notice (see clause 89, applying section 112(A1) EA02 as amended by this Bill); a right to make representations (see clause 89, applying section 112 EA02 as amended by this Bill); and a right of appeal (see clause 89, applying section 114 EA02 as amended by this Bill). These safeguards, when taken with the statutory rights of appeal, are sufficient to ensure that these provisions are compatible.

53. Decision-making: The functions to be expressly reserved to the CMA board under clause 106 are similar to those already expressly reserved under paragraph 29(2) Schedule 4, ERRA. The Government considers that reserving certain matters for the CMA board or sub-committees made up of a specified majority of non-executive directors contributes towards the decision-making part of the process being Article 6 compliant.

54. Information powers and offences: The Government considers there to be sufficient safeguards in place to ensure that these powers and offences are compatible with Article 6. Clause 73, for example, provides additional safeguards, setting out that answers a person is compelled to give, cannot be used in respect of a criminal prosecution of that person (except in respect of a prosecution for giving false/misleading or perjured testimony). Further details as to why these powers are compliant with Article 6 are set out in the competition section below.

Part 2 – Competition

55. The following provisions are considered to engage and/or interfere with the right to a fair trial under Article 6:
    a. Removal of requirement for agreements to be implemented in the UK;
    b. Production of information authorised by warrant;
    c. Amending the standard of review on appeals against interim measures

d. Attendance of witnesses etc.;
e. Civil penalties for breach of the CMA's investigatory powers and for non-compliance with remedies.

56. Removal of requirements etc to be implemented in the UK: Infringement decisions give rise to a liability for penalties of up to 10% of an undertaking's worldwide turnover (section 36 CA98). The position that breaches of competition law are treated as a quasi-criminal matter for Article 6 purposes is well established at European (ECtHR) and domestic levels (*Menarini v Italy*[4]*, Flynn Pharmaceuticals v CMA*[5]*)*. Expanding the reach of the Chapter 1 prohibition will expand the circumstances in which an agreement, decision or concerted practice may be found to be in breach of the prohibition as a consequence. The process by which such decisions are made, therefore engages Article 6 in both its civil and criminal elements.

57. Production of information authorised by warrant: Clause 121 amends the powers of the CMA to require production of material accessible from the premises during inspections authorised by warrant under sections 28 and 28A CA98 and clause 140 makes equivalent amendments to section 194 EA02 (power to enter premises under a warrant) in relation to investigations into the cartel offence.

58. This will lead to an increase in the material which a person (legal or individual) may be required to produce to investigators, and allows the CMA to operate equipment for the purposes of producing material. This engages Article 6 in relation to the right to legal assistance and need for protection of legal privilege. Encroachment on professional secrecy, and in particular the protection of legal privilege, may have repercussions on the proper administration of justice and so on the rights guaranteed by Article 6 (*Niemitz v Germany*, App No 13710/88 at [37])

59. Amending the standard of review of interim measure appeals: Interim measures issued during an investigation are temporary and preliminary. While it is arguable that they are therefore not determinative of civil rights and obligations and so do not engage Article 6 (*Verlagsgruppe News GmbH v. Austria (Dec. no. 62763/00, 16 January 2003)* and *Libert v. Belgium (Dec.) no. 44734/98, 8*

[4] *Menarini Diagnostics SRL v Italy,* App. No. 43509/08, judgment date 27 September 2011
[5] *Flynn Pharmaceuticals v CMA* [2020] EWCA Civ 339

July 1994)), the applicability of Article 6 will depend on the right in question in the main and interim proceedings and the nature of the measure (*Micallef v Malta*).

60. A decision by the CMA to impose, or to refuse to impose, interim measures during an investigation under the CA98 may be appealed by the party or parties affected. At present that appeal is considered by the CAT where the full merits of the decision are reviewed. Clause 123 makes amendments so that the standard of review applicable on appeal will be that of judicial review.

61. Attendance of witnesses: Failure to attend an interview and answer questions when required under s.26A CA98 gives rise to liability for civil penalties, which are arguably quasi-criminal for Article 6 purposes. Widening the group of persons the CMA may require to attend an interview and answer questions, which forms part of the CMA's investigation phase and the administrative decision-making process, engages Article 6; in particular, the privilege against self-incrimination and the right to legal assistance.

62. Civil penalties for breach of the CMA's investigatory powers: Clause 142(1) and Schedule 9 make provision which amends and extends the civil penalties regime which applies in relation to the CMA's information gathering powers under Part 1 CA98, Part 3 EA02 (mergers), Part 4 EA02 (market studies and investigations). Given the punitive nature of the penalties, and the level of maximum penalties which may be imposed, a decision to impose a penalty will engage Article 6, including arguably in the criminal context, and to that extent, must comply with the safeguards required by Article 6.

63. Civil penalties for breaches of remedies: Clause 142(2) and Schedule 10 make provision for the imposition of civil penalties in relation to breaches of any remedies imposed or accepted by the CMA under the CA98 and Parts 3 and 4 EA02. As with the above regime for breach of investigatory powers, given the punitive nature of the penalties and level of penalty which may be imposed, a decision to impose a penalty will engage Article 6, including arguably in the criminal context, and to that extent must comply with the safeguards required by Article 6.

The provisions are considered to be compatible with Article 6 for the following reasons:

64. Removal of requirement for agreements etc to be implemented in the UK: While clause 118 extends the scope of the prohibition, which will potentially bring more agreements etc. in scope, the amendment makes no difference to the process by which infringement decisions are made, which contains adequate safeguards to address any potential interference with this right.

65. The CMA will be required to follow its published guidance, approved by the Secretary of State, so there is transparency as to how the law is applied; and the imposition of the penalty will also be made public. Before a penalty is imposed, the party will be sent a provisional penalty notice and will have the opportunity to make representations to the CMA. The party may appeal the penalty to the CAT, which hears such appeals on a 'full merits' basis. The CAT has the power to reduce, increase or quash the penalty and replace the CMA's decision with its own; which ensures that all procedural protections required for compatibility with Article 6 are complied with. This appeal process to the CAT forms part of the wider penalty-imposition process by the CMA and therefore ensures that the process is Article 6 compliant.

66. Production of information authorised by warrant: The Government considers that the amendments made by the bill ensure continued protection for legally privileged material to ensure compliance with Article 6. Clause 121 amends section 30 CA98 and clause 140 amends section 196 EA02 which provide protection for privileged communications.

67. Standard of review of interim measure appeals: As discussed above, Article 6 does not in general require administrative decisions to be subject to an appeal on the merits, as opposed to a judicial review of the lawfulness of the decision-making process.

68. The Government considers that the process as a whole will be capable of being characterised by an appropriate degree of independence and procedural safeguards that the requirements of Article 6 remain complied with.

69. Attendance of witnesses: This proposal potentially engages two aspects of Article 6: the privilege against self-incrimination and the right to legal representation. The Government considers there to be adequate safeguards in place to ensure that the CMA's enhanced powers are compatible with both these aspects of Article 6.

70. *Privilege against self-incrimination*: The right to not incriminate oneself is a key procedural requirement under Article 6 and applies to all types of criminal proceedings and offences (*Saunders v. the United Kingdom*). This however, does not preclude authorities from obtaining answers during compulsory interviews as long as the evidence given by the interviewee cannot subsequently be used to incriminate them. The CA98 already has a framework in place to protect the interviewees' privilege against self-incrimination, as set out in section 30A (4) and (5) CA98 on 'Use of Statements in prosecution'. No changes are intended to be made to this existing provision, which we consider to be sufficient to protect the rights of all types of interviewees. Therefore, although interviewees' privilege against self-incrimination is engaged by s.26A CA98 and amendment thereto by clause 141, the Government considers that section 30A CA98 provides adequate procedural safeguards to ensure the protection of this Article 6 right.

71. *Right to legal assistance:* The right to legal assistance is one of the fundamental features of a fair trial, and it is considered there are adequate safeguards in place to protect this right.

72. The CA98 (Competition and Markets Authority's Rules) Order 2014 ensures that upon request, an officer must allow a reasonable time for the individual's legal adviser to arrive before starting the interview if the officer considers it reasonable given the circumstances (rule 4(3)).

73. The CMA's Guidance on its investigation procedures in CA98 cases (CMA8 Guidance) also has relevant provisions on legal advice during s.26A witness interviews. Paragraph 6.21 of the guidance provides that any person being formally questioned or interviewed by the CMA may request to have a legal adviser present. And in cases where the CMA has entered premises, questioning may be delayed for a reasonable time to allow the individual's legal adviser to attend. It is considered that these safeguards ensure recognition of the right to legal assistance.

74. Extending the CMA's witness interview powers will also increase the number of people in scope for civil penalties for non-compliance. However, penalties will only be imposed if individuals breach section 26A, and it is considered that the safeguards applicable in the civil sanction regime will ensure compliance with Article 6 for the reasons detailed in paragraph 75 below.

75. Civil sanctions regime for breach of investigatory powers and breach of remedies: Although the increase in civil penalties and introduction of new penalties engage Article 6, it is considered the procedural safeguards set out in the scheme will ensure these rights are not interfered with and the proposals remain compatible with Article 6. Before any penalty notice is issued, a draft will be issued to the party under investigation, who will have the opportunity to make representations. Any penalty will be appealable to the CAT on a full merits basis. These safeguards ensure that the process as a whole is compatible with Article 6.

Part 3 – Enforcement of Consumer Protection Law

76. The following provisions are considered to engage and/or interfere with the right to a fair trial under Article 6 ECHR:
    a. the court-based regime for the civil enforcement of consumer protection law, including the courts' new civil penalty powers, provided through Part 3, in particular Chapter 3 and the amendments made to Schedule 5 of the Consumer Rights Act by clause 207 and Schedule 16 to the Bill, and
    b. the new CMA direct enforcement regime for consumer protection law provided through Part 3, in particular Chapter 4 and the amendments made to Schedule 5 of the Consumer Rights Act by clause 207 and Schedule 16 to the Bill.

77. Part 3 of the Bill provides a court based regime and CMA direct enforcement regime for the enforcement of consumer protection law to protect the collective interests of consumers. The Government considers that these regimes will engage the respondents' (infringer, accessory, interconnected group company or third party's) Article 6 rights.

78. To the extent that the new powers for the court and CMA to impose monetary penalties may be argued to engage Article 6 in the criminal context, the provisions must comply with the safeguards required by Article 6.

    The provisions are considered to be compatible with Article 6 for the following reasons:

    Article 6 (criminal and civil limb) and the court-based process for enforcement of consumer protection law:

79. The court-based process for enforcement of consumer protection law set out in Part 3 of the Bill will be delivered through decisions of the County Court and/or the High Court in England and Wales, the Sheriff and/or the Court of Session in Scotland and the County Court and/or the High Court in Northern Ireland. These are all independent and impartial courts for the purposes of Article 6, and their procedures are compliant with Article 6.

Article 6 ECHR (criminal limb) and CMA direct enforcement process:

80. To the extent that the new powers for the court and CMA to impose monetary penalties may be argued to engage Article 6 in the criminal context, the CMA's new powers to impose a monetary penalty will be set out in law, by Chapter 4 of Part 3 of the Bill, and the amendments made to Schedule 5 of the CRA15 by clause 207 and Schedule 16 to the Bill. In exercising these powers, the CMA will be required to follow its published guidance, approved by the Secretary of State, providing transparency as to how the law is applied. Before a penalty is imposed the respondent will be sent a provisional notice setting out the CMA's proposed penalty, the grounds for imposing the penalty, and will have the opportunity to make oral representations to the CMA (see, for example, clause 180 (4), (7) and (8)). The imposition of any penalty will also be made public. However, the principal way these clauses maintain their compatibility with Article 6 is through the provisions for appeal.

81. Clause 201 and new paragraph 16D (the latter as inserted into Schedule 5 CRA 2015 by clause 207 and Schedule 16 to the Bill) provide new, express statutory appeal rights from the exercise of the CMA's monetary penalty powers to the courts. These clauses provide for a right of appeal "on the merits".

82. In relation to the other requirements of Article 6(2):
    a. *To be informed promptly, in a language which the person understands and in detail, of the nature and cause of the accusation against them*: As a public body, the CMA is equally bound to comply with this requirement through the new direct enforcement regime, the details of which will be set out in secondary legislation (the new CMA Rules – see clause 209), which will be subject to approval by the Secretary of State.
    b. *To have adequate time and facilities for the preparation of their defence*: As a public body, the CMA is equally bound to comply with this requirement through the direct enforcement regime, the details of which the Government anticipates will be set out in the new CMA Rules.

c. *To defend himself in person or through legal assistance of his own choosing, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice require:* Legal aid will not be available for the purposes of both the CMA direct enforcement mechanism nor any appeal from it, but the Government considers that the interests of justice do not require it in this context.
d. *To examine (himself or through his legal representative) witnesses and to obtain the attendance and examination of witnesses on his behalf:* As a public body, the CMA is equally bound to comply with this requirement through the direct enforcement regime. On appeals, the appeal court will be able to receive new evidence, that was not before the CMA at the time when it took the appealable decision, and will be able to hear oral evidence from witnesses who provided only written evidence to the decision-maker. Cross-examination will be possible in principle. Provision to this effect will be made through amendments to the Civil Procedure Rules for England and Wales and the equivalent rules in Scotland and Northern Ireland.
e. *To have the free assistance of an interpreter if the person cannot speak the language of the court:* there is general provision for free interpreters in the civil courts where, broadly, the person cannot afford an interpreter, doesn't qualify for legal aid and doesn't have a friend or family member who the judge says can act as their interpreter.

83. For these reasons, the Government considers that Chapter 4 and the amendments made to Schedule 5 of the CRA15 by clause 207 and Schedule 16 to the Bill powers are compliant with Article 6.

<u>Article 6 (civil limb) and other CMA enforcement decisions:</u>

84. It may be argued that other CMA direct enforcement decisions - which cannot lead directly to the imposition of a monetary penalty - would determine civil rights ("CMA non-criminal decisions"). For example, the CMA's enforcement decisions on whether to accept, vary or release an undertaking (see clause 195).

85. For CMA non-criminal decisions, compliance with the right to a fair trial will be subject to the courts' supervisory jurisdiction of judicial review.

86. The concept of judicial review is sufficiently flexible to enable the relevant court or tribunal to exercise its powers of review in accordance with the requirements

of Article 6. The Government considers that the availability of judicial review is sufficient for the requirements of Article 6 to be met for these provisions.

Part 4 – Consumer rights and disputes

87. The following provisions are considered to engage and/or interfere with Article 6:
    a. Chapter 4 - Alternative dispute resolution for consumer contract disputes.

88. Chapter 4 - alternative dispute resolution for consumer contract disputes: Clauses 295 and 296 engage Article 6, having regard in particular to *Tre Traktörer* (1989 13 EHRR 309). The proposal effectively amounts to a licensing system and decisions of the competent authority not to grant accreditation or to revoke, vary or suspend an ADR provider's accreditation may deprive, or interfere with, the ability of the ADR provider to pursue the activity of providing consumer ADR: Article 6 is engaged in relation to the ability of the ADR provider to challenge that decision.

    The provisions are considered to be compatible with Article 6 for the following reasons:

89. Chapter 4 - alternative dispute resolution for consumer contract disputes: Although there is no dedicated appeal mechanism, the Government considers that the availability of judicial review is sufficient to comply with Article 6. As noted above, the court is required by section 6 HRA98, to ensure that its review of matters of fact and law (and, where relevant, the amount of any penalty) suffices to meet the requirements of Article 6.

Part 5 – Miscellaneous

90. The following provisions are considered to engage and/or interfere with the right to a fair trial under Article 6:
    a. Civil penalties for breach of the CMA's information gathering powers.
    b. International cooperation – Provision of investigative assistance to overseas regulators (clauses 317 to 323) and disclosing information overseas (clause 324)
    c. Duty of expedition on the CMA and sectoral regulators (clause 325 and Schedule 27);

d. Offenders assisting investigations and prosecutions: powers of the CMA (clause 326);
e. Removal of limit on the tenure of a chair of the Competition Appeal Tribunal (clause 327).

91. Civil penalties for breach of the CMA's information gathering powers: Under clause 310, civil penalties can be imposed on undertakings for failure to comply with an information notice or for providing false/misleading information or falsifying/concealing/destroying documents required under an information notice. The maximum penalty that can be imposed for breach of a failure to comply with an information notice is set out under the clause. Given the punitive nature of the penalties, and the level of maximum penalties which may be imposed, a decision to impose a penalty will engage Article 6, including arguably in the criminal context, and to that extent, must comply with the safeguards required by Article 6.

92. International cooperation – investigative assistance and information sharing: Clauses 317 to 323 create powers which permit specified UK regulators to provide investigative assistance to overseas authorities in connection with the civil enforcement of overseas competition law (including digital competition) and consumer law.

93. Clause 324 amends Part 9 (Information) EA02 to facilitate information sharing with overseas authorities and allow for effective cooperation between UK authorities and their overseas counterparts, when applying competition law (including the new digital markets powers), consumer and related law.

94. The privilege against self-incrimination is guaranteed by Article 6. The new investigative assistance framework will enable public authorities to collect and then ultimately disclose information to overseas public authorities for the purposes of relevant civil or criminal investigations or proceedings. This may give rise to concerns about the effect that such disclosure may have in the country or the territory of the authority to whom the disclosure may be made. In particular, it will be important that information is not disclosed unless authorities themselves abide by, and are satisfied that there will be appropriate protection overseas for self-incrimination rights and that nothing that is legally privileged will be disclosed. The same is true as regards the disclosure of information already obtained by the CMA for the purposes of its own functions but then disclosed under the amended Part 9 gateway at the request of an overseas

regulator. Use of investigative assistance powers will potentially also engage the right to legal representation under Article 6.

95. Duty of expedition: Clause 325 and Schedule 27 introduce a new duty of expedition on the CMA, (and sectoral regulators when exercising their competition functions) expanding the duty which already exists under Part 3 EA02 in relation to certain CMA's functions concerning merger review and control and applying it more broadly in relation to mergers, as well as enforcement of the prohibitions in the CA98, markets regulation, consumer functions and the new digital markets functions.

96. The CMA's enforcement functions in each of these spheres require it to make decisions which involve the determination of civil rights and obligations, and in some instances, which are of a quasi-criminal nature. It must therefore ensure that the processes it follows are fair and comply with the requirements of Article 6 ECHR.

97. Offenders assisting investigations and prosecutions: powers of the CMA: Sections 71 to 75 of Serious Organised Crime and Police Act 2005 ("SOCPA"), and provisions in the Sentencing Act 2020, regulate agreements with offenders who have offered to assist the investigation or prosecution of offences committed by others and the powers of the courts to take into account such assistance when sentencing, and review sentences if assistance is not provided in accordance with the terms of such an agreement.

98. Clause 326 specifies the CMA as a prosecutor under section 71 SOCPA, giving it access to the statutory regime (other than in relation to the grant of immunity notices). It is considered the potential engagement of Article 6 arises in relation to the ability of the CMA to refer a case back to court for a review of a sentence after an agreement has been reached.

99. Removal of the limit on the tenure of a chair of the Competition Appeal Tribunal: Clause 327 amends paragraph 2 of Schedule 2 to the Enterprise Act 2002 to remove the 8-year period to which the appointment of a chair of the Competition Appeal Tribunal is currently limited.

100. A fundamental component of a fair hearing is that the tribunal must be established by law, independent and tribunal. An independent and impartial tribunal requires structural and constitutional independence. Relevant to that

are the appointment of tribunal members, the term and nature of their office, whether there are objective guarantees of independence against outside pressures and whether there is an appearance of independence.

101. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.

102. A change to the term for which a person may be appointed as a chair of the Competition Appeal Tribunal therefore has the potential to engage Article 6.

The provisions are considered to be compatible with Article 6 for the following reasons:

103. Civil penalties for breach of the CMA's information gathering powers: Although the introduction of new penalties engage Article 6, it is considered the procedural safeguards set out in the scheme will ensure these rights are not interfered with and the proposals remain compatible with Article 6. The CMA is required to prepare and publish a statement of policy in relation to the imposition of penalties, approved by the Secretary of State, so there is transparency as to how the law is applied (see clause 312); an explicit statutory requirement for the CMA to give reasons for issuing a penalty (see clause 311, applying section 112 EA02 as amended by this Bill); a requirement on the CMA to issue a draft penalty notice (see clause 311 applying section 112(A1) EA02 as amended by this Bill); a right to make representations (see clause 311, applying section 112 EA02 as amended by this Bill); and a right of appeal (see clause 311, applying section 114 EA02 as amended by this Bill). These safeguards are sufficient to ensure that these provisions are compatible.

104. International cooperation – investigative assistance and information sharing: In using its information gathering powers to assist an overseas regulator, a UK authority will be subject to the same requirements as would apply in a domestic case. This includes existing safeguards, such as those in s.30A CA98 or s.197 EA02 which set out that answers a person is compelled to give cannot be used in respect of a criminal prosecution of that person (except in respect of a prosecution for giving false/misleading or perjured testimony).

105. Equally existing provisions relating to the CMA's procedures when gathering information will also apply. For example, when using its powers to assist an overseas regulator in an antitrust case, the CMA's normal rules and investigative procedure guidance would apply.

106. The disclosure of any information to an overseas regulator is subject to the safeguards in Part 9 EA02. Under the amended Part 9 gateways, before disclosing information to an overseas authority the UK authority will need to consider whether the law of the country or territory to whose authority the disclosure would be made provides protection against self-incrimination in criminal proceedings corresponding to that provided in the UK. The same factor must be considered by the Secretary of State before designating a cooperation arrangement, ensuring that arrangements cannot be designated if they do not provide adequate safeguards.

107. The Government considers that the new powers facilitating international cooperation are therefore compatible with Article 6.

108. Duty of expedition: Article 6 itself provides that in the determination of civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing "within a reasonable time". While expedition in itself is a requirement of the provision, this does not override the need for the process as a whole to be fair. The reasonableness of the length of proceedings must be assessed in light of the complexity of the case, the conduct of the subject and of the relevant authorities and what is at stake for the subject in the dispute.

109. Any provision requiring regard to be had to the need to for expedience in proceedings will therefore need to be read with section 3 HRA98, such that it still requires a process to be fair and thorough.

110. The obligation to be imposed is for the CMA to have regard to the need to perform its functions expediently as far as reasonably practicable. The two qualifications here, that the duty is one to have regard rather than an absolute, and the recognition that there will be a limit to how quickly a process can go in any event at a practical level, will mean that the CMA, and courts are able to ensure that processes remain fair and thorough while also recognising the need for swiftness of action. On this basis, the proposal is considered compatible with Article 6 and requirements of procedural fairness.

111. Offenders assisting investigations and prosecutions: powers of the CMA: The designation of the CMA to this existing statutory regime does not introduce a new engagement with Article 6 but rather expands the application of the regime to agreements which may be made between the CMA and an assisting offender.

112. The CMA's ability to refer a sentence for review does not interfere with an offender's right to a fair hearing, despite the fact the CMA is not a tribunal established by law. It does not make the determination itself – rather, it refers the sentence to a court or tribunal. It is the criminal court which determines the offender's guilt and penalty. Even where that penalty was reviewed, whilst the court might remove any discount that had been applied for assistance offered by an offender but not provided, this could not exceed the maximum sentence which was in place at the time the offence was committed.

113. Removal of the limit on the tenure of a chair of the Competition Appeal Tribunal: The removal of the 8-year restriction is intended to allow Chairman to be appointed on a fee paid basis until they reach retirement age. This will be subject to the ability of the Lord Chancellor to remove them on grounds of incapacity or misbehaviour. Life tenure or long terms of office support judicial independence and the Government considers that the amendment is therefore compatible with Article 6.

Article 7 – No punishment without law

Overview

114. Article 7(1) provides that: *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*

115. Article 7(2) further provides that: *"This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."*

116. The following paragraphs explain where Article 7 is engaged and how it is satisfied in relation to the various Parts of the Bill.

Part 1 – Digital markets

117. The following provisions are considered to engage and/or interfere with Article 7:
    a. Civil sanctions regime;
    b. Criminal offences.

118. Civil sanctions regime: To the extent that the civil sanctions are found to be criminal under Article 6, they will need to be considered to be criminal for the purposes of Article 7 as well. The application of the provisions is prospective only.

119. Criminal offences: Clauses 93 to 98 set out criminal offences for
    a. intentionally or recklessly provide false or misleading information in response to a statutory information request;
    b. destroying information relevant for a statutory information request by the CMA; and
    c. intentionally obstruct an investigator.

120. Each offence is liable on summary conviction, to a fine not exceeding the statutory maximum and on conviction on indictment, to imprisonment for a term

not exceeding two years or to a fine or to both. All offences will be prospective. The offences and the maximum punishments for each offence replicate existing criminal offences (and punishments) in CA98.

The provisions are considered to be compatible with Article 7 for the following reasons:

121. Civil sanctions regime: The provisions are considered to be compatible with Article 7 because the possibility of a penalty and the penalty amount are foreseeable. As mentioned above, there is no element of retrospectivity in relation to these powers. If a person has not complied with a competition requirement or an information request, without reasonable excuse, that person will have been aware that non-compliance could lead to the imposition of a penalty up to the relevant statutory maximum. The penalties are also subject to the safeguards detailed in the Article 6 section above, including that a person will also have access to CMA guidance explaining the circumstances in which a penalty will be applied and how it will be calculated.

122. Criminal offences: The provisions are considered to be compatible with Article 7 because they are prospective only and what constitutes a criminal offence is clearly set out in the legislation along with the maximum penalties.

Part 2 – Competition

123. The following provisions are considered to engage and/or interfere with Article 7:
    a. Civil penalties for breach of information gathering measures;
    b. Civil penalties for breach of remedies.

124. Civil sanctions regime for breach of information gathering measures: As civil sanctions for breach of information gathering measures may be argued to be of criminal character under Article 6, the same arguments may be made in relation to Article 7. New fining powers for the CMA will be created for cases of provision of false or misleading information, and the destruction etc., of documents. As these fines can be potentially high and are punitive/deterrent in nature, parties could therefore argue that this proposal engages their Article 7 rights.

125. Civil sanctions regime for breach of remedies: The new fining powers for the CMA for breach of remedies, are punitive/deterrent in nature and the maximum level of penalty is high. The same arguments as can be made in relation to the characterisation of the expansion of the civil penalty regime for information gathering measures can apply to the civil penalty regime for remedies and so it is arguable that Article 7 is engaged.

The provisions are considered to be compatible with Article 7 for the following reasons:

126. Civil penalties for breach of information gathering measures: There is no retrospection, as the CMA's new fining powers will only apply to information notices issued by the CMA after the legislation is in force, and parties will be aware that they could be subject to penalties up to the statutory maximum if they provide false/misleading information or falsify/conceal/destruct documents without reasonable excuse. Further, the penalty provisions will be clearly set out in legislation. The penalties are also subject to the safeguards detailed in the Article 6 section above, including that a person will also have access to CMA guidance explaining the circumstances in which a penalty will be applied and how it will be calculated. Therefore, the law is accessible and foreseeable, and does not interfere with parties' Article 7 rights.

127. Civil penalties for the breach of remedies: As above, the creation of new fining powers for the CMA will be accessible and provided for in law, and foreseeable as they will only apply to breaches which take place after the legislation is in force. The safeguards detailed in the Article 6 section (such as a mandatory guidance) would also be applicable here. In this context, the Government considers these provisions to be compatible with Article 7.

Part 3 – Enforcement of Consumer Protection Law

128. The following provisions are considered to engage Article 7:
    a. the courts' new civil penalty powers, provided through Part 3, in particular Chapter 3 and the amendments made to Schedule 5 of the CRA15 by clause 207 and Schedule 16 to the Bill, and
    b. the new CMA direct enforcement civil penalty powers provided through Part 3, in particular in Chapter 4 and the amendments made to Schedule 5 of the CRA15 by clause 207 and Schedule 16 to the Bill.

129. To the extent that the new powers for the court and CMA to impose monetary penalties may be argued to involve the determination of a criminal charge for the purposes of Article 6, they will need to be considered to be criminal for the purposes of Article 7 as well.

The provisions are considered to be compatible with Article 7 for the following reasons:

130. Firstly, the possibility of a penalty and the penalty amount are foreseeable: the application of these provisions is prospective only. The new powers for the CMA, and the courts, to impose monetary penalties will only be exercisable in respect of conduct which takes place after these enforcement powers come into force (paragraphs 2(1) and 3(4) of Schedule 18).

131. Secondly, a person who is required to pay a monetary penalty by the CMA will also have access to the CMA statement of penalties (mandated by clause 198 and new para 16F inserted into the CRA 15 by Schedule 16) explaining the circumstances in which a penalty will be applied and how it will be calculated.

Part 4 – Consumer rights and disputes

132. The following provisions are considered to engage Article 7 ECHR:
    a. Chapter 1 - protection from unfair trading: criminal offences in respect of unfair trading practices (229 to 233);
    b. Chapter 2 - subscription contracts: criminal offences (266-269).

133. Chapter 1 - protection from unfair trading): criminal liability currently attaches to engagement in unfair commercial practices in certain circumstances (as specified in Part 3 of the Consumer Protection from Unfair Trading Regulations 2008 ("CPUTRs")). Clauses 235 to 239 replace Part 3 of the CPUTRs and almost identically replicate criminal liability for traders who engage in unfair commercial practices in equivalent circumstances, with a technical amendment to the offence of failing to provide material information in an invitation to purchase such that it will no longer be necessary to establish that the failure caused a different transactional decision (see also clause 228).

134. Chapter 2 - subscription contracts: Chapter 2 contains offences in relation to traders' failure, in a prescribed category of contracts ('off-premises contracts'), to comply with the requirements on giving consumers pre-contract information

on their right to cancel the contract during the initial cooling-off period. These offences almost identically replicate the scope of existing offences under Chapter 2 of Part 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ('CCRs'). The restatement of such offences will have the effect of maintaining traders' exposure to the risk of criminal liability and punishment when they fail to comply with certain statutory requirements.

The provisions are considered to be compatible with Article 7 for the following reasons:

135. Chapter 1 - protection from unfair trading: Clauses 235 to 239 are considered to be compatible with Article 7 because the imposition of a penalty will be provided for by law, and the possibility of a penalty and the penalty amount are foreseeable. As explained above, engaging in an unfair commercial practice already carries criminal liability under the CPUTRs. The policy intent is for the offences to almost identically replace the equivalent existing offences under Part 3 of the CPUTRs, and also for the criminal liability created by clauses 235 to 239 to only apply prospectively, to conduct which takes place after commencement.

136. Chapter 2 - subscription contracts: these offences will replace the virtually equivalent existing offences under Chapter 2 of Part 2 of the CCRs as regards traders offering to enter subscription contracts with consumers. The offences, which will only apply prospectively, to acts and omissions occurring after commencement of the provisions, where traders conclude subscription contracts at consumers' homes or other off-business premises (or in prescribed related circumstances) which will be defined as 'off-premises contracts'. The offences consist of failure to comply with requirements to give consumers pre-contract information, in the prescribed manner, on their right to cancel the contract during the initial cooling-off period.

137. The CCRs already apply to contracts constituting subscription contracts within Chapter 2. The CCRs will be amended such that on the date Chapter 2 comes into force, the equivalent offences in the CCRs will no longer apply to traders offering to enter subscription contracts with consumers. The new offences are a near-identical restatement of the CCRs offences. The provision for criminal liability on the part of other individuals responsible for the offence, for the defence of due diligence, and for penalties, identically reproduces current

CCRs provision. In view of all the foregoing, these provisions will not materially increase traders' exposure to criminal liability and punishment from the current position.

Part 5 – Miscellaneous

138. The following provisions are considered to engage Article 7 ECHR:
    a. Civil penalties for breach of the CMA's information gathering powers.
    b. Criminal offences.

139. Civil penalties for breach of the CMA's information gathering powers: To the extent that the civil sanctions are found to be criminal under Article 6, they will need to be considered to be criminal for the purposes of Article 7 as well. The application of the provisions is prospective only.

140. Criminal offences: Clause 313 sets out criminal offences for:
    a. intentionally or recklessly providing false or misleading information in response to a statutory information request;
    b. destroying, falsifying or concealing information relevant for a statutory information request by the CMA.

141. Each offence is liable on summary conviction, to a fine not exceeding the statutory maximum and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both. All offences will be prospective.

The provisions are considered to be compatible with Article 7 for the following reasons:

142. Civil penalties for breach of the CMA's information gathering powers: The provisions are considered to be compatible with Article 7 because the possibility of a penalty and the penalty amount are foreseeable. As mentioned above, there is no element of retrospectivity in relation to these powers. If an undertaking has not complied with an information notice or has provided false/misleading information or falsified/concealed/destroyed documents, without reasonable excuse, that person will have been aware that it could lead to the imposition of a penalty up to the relevant statutory maximum. The penalties are also subject to the safeguards detailed in the Article 6 section above, including that a person will also have access to CMA guidance explaining the circumstances in which a penalty will be applied and how it will

be calculated. Therefore, the law is accessible and foreseeable, and does not interfere with parties' Article 7 rights.

143. Criminal offences: The provisions are considered to be compatible with Article 7 because they are prospective only and what constitutes a criminal offence is clearly set out in the legislation along with the maximum penalties.

Article 8 – right to respect for private and family life

Overview

144. Article 8(1) provides that: *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

145. Article 8 is a qualified right. Article 8(2) further provides that: *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Part 1 – Digital Markets and Part 2 – Competition

146. The following provisions are considered to engage the right to respect for private and family life under Article 8 ECHR:

    a. CMA's power to ask questions (clause 72 and 141);
    b. Production of information authorised by warrant (clause 121 and 140);
    c. Additional powers of seizure from domestic premises (clause 77 and clause 122).

147. CMA's power to ask questions: The proposed power for the CMA to call any person to interview and require them to answer questions under clause 72 and the expansion of the CMA's witness interview powers in section 26A CA98 through clause 141, to interviewing 'any' person rather than just those who have a connection to the business, may lead to an increase in the personal data and confidential material which a person may be required to produce to CMA investigators. Such information in professional or commercial activities of persons, including legal persons, is subject to protection as an element of private life under Article 8 and therefore its disclosure to CMA investigators may interfere with the person's rights under Article 8. Additionally, interviewing third parties could risk information regarding the business under investigation (e.g., its identity) being made public by such third parties, which could also engage and potentially interfere with the party's rights under Article 8.

148. The Government considers that any interference with Article 8 would be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.

149. The requirement for lawfulness is and will continue to be satisfied. Section 26A(1) CA98 provides that the CMA can only exercise its powers to interview witnesses "*for the purposes of an investigation*" and to "*answer questions with respect to any matter relevant to the investigation*". Clause 141 makes no changes to these parameters. Similarly, clause 72 provides that the CMA can only require an interviewee *"to answer questions with any matter relevant to that digital markets investigation*". As such, circumstances in which questions may be asked and the purposes for which they may be asked are limited and clearly connected to what is relevant for the competition investigation, thus ensuring that no arbitrary use of this power can be made by the CMA. Additionally, the CMA must provide a written notice to interviewees beforehand stating the subject matter and purpose of investigation, and the implications of not complying or providing false or misleading information[6]. Therefore, the domestic law is clear and foreseeable, and has sufficient safeguards to protect individuals from arbitrary interference. Additionally, the CMA is under a general duty to carry out its investigations and make decisions in a procedurally fair manner, according to the standards of administrative law, and in a manner which is compatible with HRA98 (as also emphasised in the CMA8 Guidance[7]).

150. The ECtHR has previously concluded that investigations concerning the prevention of anticompetitive practices pursue the legitimate aims of the economic well-being of the country and preventing disorder or crime (*Vinci Construction and GMT genie civil and services v France*, 2015 Nos 63629/10 et 60567/10). Similarly, it has been held that action by a competition authority to protect economic competition is a legitimate aim for the purposes of Article 8(2) (*DELTA PEKARNY a.s.v. the Czech Republic* App. No 97.11, ECHR 279 Judgment 2 October 2014 [81]).

151. The Government considers the proportionality criteria to also be satisfied.
    a. An interference with the Article 8 right can be said to be sufficiently justified by the objective of enhancing effective investigations of anti-

[6] S.26A(2)-(5) CA98; and CMA8 Guidance, paragraph 6.15.

[7] CMA8 Guidance, paragraphs 2.5 and 2.6.

competitive practices, and the proposed expansion of the CMA's interview powers is rationally connected to this objective.

b. Consideration has also been given to whether a less intrusive measure could have been appropriate, in particular, by constraining the group of individuals in scope of the CMA's section 26A CA98 power to those persons who the CMA has reason to believe have relevant information. However, such restricted powers would unacceptably compromise the CMA's information gathering process and hinder its CA98 enforcement functions, leading to a negative impact on the market and consumers.

c. Any information collected will be subject to the protections and restrictions set out in Part 9 EA02, which apply to information obtained by the CMA in the course of a CA98 investigation or a digital markets investigation. Personal data will also be subject to the data protection regime.

152. In relation to Article 8 being engaged as third parties could make information about the business public; the Government also considers the aforementioned criteria (lawfulness, necessity, proportionality) to be satisfied for the reasons given above, and in addition:

a. Notably, the CMA intends to name parties more routinely when opening its investigation proceedings, thus making such concerns less likely to arise in the future.[8]

b. Additionally, s.241 EA02 provides that any information relating to the affairs of an individual or any business of the undertaking, if disclosed to a person, may not be further disclosed by such person (other than through agreement with the concerned public authority); with any disclosure in contravention of Part 9 EA02 being a criminal offence (s.245 EA02).

153. Production of information authorised by warrant: Clause 121 amends the powers of the CMA to require production of material accessible from the premises during inspections authorised by warrant under sections 28 and 28A CA98. Clause 140 makes equivalent amendments in relation to the power at section 194 EA02. Clause 75 introduces the same power to the purpose of a breach investigation under the digital markets regime.

[8] As noted in the Government response to the consultation on *Reforming Competition and Consumer Policy*, in footnote 16 in paragraph 1.127.

154. This will lead to an increase in the material which a person (legal or individual) may be required to produce to investigators. Confidential information in professional or commercial activities, including legal persons, is subject to protection as an element of private life under Article 8 and therefore its disclosure to CMA investigators may interfere with the person's rights under Article 8. Where it is not reasonably practicable for the material which the CMA does and does not have a power of seizure to be separated on the premises, the powers available under s.50(2) of the Criminal Justice and Police Act 2001 ("CJPA01") will apply and the sift can take place off-site.

155. The Government considers the expansion of the power for the competition regime and inclusion of the power for the digital markets regime would be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.

156. The requirement for lawfulness is and will continue to be satisfied.
    a. The expanded power and the new power will only be available where the CMA can show that it has reasonable grounds for suspecting that there are on, or accessible from, the relevant premises (that is business premises under section 28 and domestic premises under section 28A and both under section 194 EA02 and clause 75), documents the production of which has already been required under other powers (sections 26 or 27 CA98, section 193 EA02 or, in the case of the digital markets regime, the powers in Chapter 6 of Part 1, including clause 74), and which have not been so produced, or that if they were required to be produced, they would not be so produced but would be concealed, removed, tampered with or destroyed (or it would prejudice the investigation in relation to the section 194 EA02 power). A warrant may also be granted if an investigating officer has attempted to enter premises in the exercise of inspection powers under section 27 but has been unable to do so, and there are reasonable grounds for suspecting that there are on the premises documents, the production of which could have been required under that section.
    b. Sections 28(1) and 28A(1) CA98, section 194(1) EA02 and clause 75 provide a power for the court or Tribunal to issue a warrant, but no obligation to do so, it will be for the relevant authority to determine whether it considers the application is a reasonable and proportionate one before deciding whether to issue the warrant requested.

c. Section 30 CA98 and section 196 EA02 provide specific protection for legally privileged material. The amendments to those sections provide for the extension of that protection in recognition that the expanded powers enable a CMA officer to produce information rather than the subject of the inspection. Equivalent protection is provided in the digital markets context by clause 81.
d. Where the s.50(2) CJPA01 powers are exercised in order to sift material off-site, the safeguards afforded by that regime will apply. In particular
    i. Section 52 CJPA01 provides that where a power of seizure under section 50 CJPA01 is exercised, the CMA must give the occupier of the premises a written note including information on what has been seized; the grounds on which those powers have been exercised; the scope to apply to a judge for the return of seized material; and applying to attend any examination of the material seized.
    ii. Section 53 CJPA01 sets out additional procedural safeguards in providing for the examination and return of property seized under section 50 CJPA01.
    iii. Section 53(4) CJPA01 makes provision allowing the person from whom the property was seized or has an interest in the property, the opportunity to be present at the examination.
    iv. Further remedies and safeguards are provided for at sections 59 to 62 of the CJPA01. Notably, section 59 CJPA01 provides a right for any person with a relevant interest in seized property to apply to the appropriate judicial authority (this being the High Court in the context of the CA98) for its return. This provides a swift mechanism for challenging the use of the seize and sift powers. On such an application, where one or more of the grounds are met as set out in section 59(3) CJPA01, the Court can order the return of the material, or amongst other things, that it be examined by an independent third party (for example).

157. The power will only be available where required for the purpose of a competition investigation, and a warrant is obtained. The ECtHR has previously concluded that investigations concerning the prevention of anticompetitive practices pursue the legitimate aims of the economic well-being of the country and preventing disorder or crime.

158. The Government considers that the proportionality criteria to also be satisfied:

a. The exercise of the powers will be clearly connected to the objective, given the prevalence of electronic storage arrangements which see files held on remote servers as opposed to on physical equipment kept on a business's or individual's own premises. If the CMA does not have the powers to adequately investigate infringements, it cannot fulfil its enforcement functions, which leads to negative impacts on consumers. Any narrower approach to the powers would compromise the effectiveness of the investigation, given, as is the case at present, it would allow the manner of storage of the information to inhibit access. Information to be produced will need to be set out through clearly defined parameters, to enable the undertaking to provide it themselves, or the CMA to use equipment to extract it, it will not allow a free hand to the CMA. This will still allow the undertaking / individual in question whose premises are being inspected and who is being required to produce material accessible from those premises to question those parameters and their connection to the investigative purpose.
b. Further, information collected will be subject to the protections and restrictions set out in Part 9 EA02, which apply to information obtained by the CMA in the course of a CA98 investigation and a digital markets investigation. Personal data will, in addition, be subject to the data protection regime.
c. As set out above, legally privileged material is protected by both the specific provisions within the CA98 and EA02 amended by the bill, and the new clause 81, and where relevant, by the provisions in the CJPA01 as well as the Police and Criminal Evidence Act 1984.
d. Where the CMA seizes any document, or takes copies of it, to determine whether it is relevant to the investigation when it is not practicable to do so at the premises, and later considers that the information is outside the scope of the investigation, the CMA will return it, and is only permitted to retain these documents for a maximum period of three months under section 28A(8) of the CA98 and clause 75(9).

159. Additional powers of seizure from domestic premises: Designation of the section 28A power and the clause 75 power for the purposes of section 50 CJPA01 will allow the CMA to benefit from enhanced powers to take and sort through certain materials off the premises where it is not reasonably practicable to complete the exercise on site. While the power to seize copies or equipment would mean that such material could be removed from the premises for the purposes of completing the sifting process, the substantive interference is

arguably no greater than that which already exists, in that the CMA already has the power to review the material, but clauses 75 and 122 allow the process to be completed off the premises rather than during the inspection.

160. The Government considers the expansion of the power for the competition regime and inclusion of the power for the digital markets regime would be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society:
    a. The powers will be set out in primary legislation, with a clear framework as to the circumstances in which the powers are available and the safeguards which apply where the power is exercised.
    b. As above, the ECtHR has previously concluded that investigations concerning the prevention of anticompetitive practices pursue the legitimate aims of the economic well-being of the country and preventing disorder or crime (*Vinci Construction and GMT genie civil and services v France*, 2015 Nos 63629/10 et 60567/10).
    c. The Government considers that the proportionality criteria are also satisfied.
        i. Given the increasing trend towards digital record-keeping and working from home, it is necessary for the CMA to be able to seize and sift material from domestic premises under a warrant as well as business premises, given the increased likelihood that relevant material may be stored on domestic premises. Clauses 75 and 122 do not concern so much what the CMA is reviewing; rather, they are concerned with where the material is being reviewed.
        ii. The CMA's underlying power of seizure is considered to be proportionate since it has to be for the purposes of the investigation, and relevant to that investigation in order to qualify for seizure and sifting.
        iii. Further, the additional powers will be subject to safeguards, given that a warrant will only be issued at the Court's discretion where the CMA meets the statutory threshold, pursuant to which a search of domestic premises may be undertaken (these conditions are set out at section 28A(1) CA98 and clause 75(1)).
        iv. As a regulator, the CMA is bound to comply with its obligations under relevant data protection legislation, which provides further protection and safeguarding as to the proportionality of the CMA's exercise of these powers. The existing safeguards set out in data protection legislation on the use (including the storage and

retention) of personal data, will apply to any personal data gathered under this provision.

Part 3 – Enforcement of Consumer Protection Law

161. The following clauses are considered to engage and potentially interfere with the right to respect for private and family life under Article 8:
    a. Clause 207(Investigatory powers of enforcers) and Schedule 16 paragraph 5 – amendments to onsite inspection warrant powers.

162. Amendments to onsite inspection warrant powers: Clause 207 and Schedule 16 para 5 makes some amendments to the provision in Paragraph 32 of Schedule 5 to the CRA 15 for a justice of the peace to issue a warrant authorising an officer of a relevant enforcer to enter premises where satisfied that there are reasonable grounds for believing that a combination of prescribed conditions are met. The effect of the amendments are that:

    a. The prescribed condition that there are on the premises products or documents which an officer of the enforcer could require a person to produce under paragraph 25 or 27 respectively of Schedule 5, is also met where such products or documents are accessible from the premises; and
    b. The prescribed condition that it is likely that products or documents on the premises would be concealed or interfered with if notice of entry on the premises were given to the occupier, is also met where it is likely that products or documents accessible from the premises would be concealed or interfered with, or other steps taken to prevent or restrict their accessibility from the premises;

163. The impact of these amendments, taken together with the further amendment to paragraph 32 of Schedule 5 CRA 15 providing that it is immaterial for the purposes of the above conditions whether a relevant document accessible from the premises is stored within or outside the UK, is assessed to be minor as the amendments are considered to be clarificatory. The provisions therefore do not materially alter the potential of the paragraph 32 power being determined to engage or interfere with a person's Article 8 rights.

Part 5 – Miscellaneous

164. The following provisions are considered to engage and/or interfere with the right to respect for private and family life under Article 8:
    a. Provision of investigative assistance to overseas regulators (Clauses 317 to 323);
    b. Disclosing information overseas (Clause 324).

165. Provision of investigative assistance to overseas regulators: Clauses 317 to 323 create powers which permit specified UK regulators to provide investigative assistance to overseas authorities who have functions equivalent to theirs in connection with the civil and criminal enforcement of competition law (including digital markets) and consumer law. UK regulators will provide assistance by using their existing information gathering powers. The relevant UK authorities will therefore be able to collect, store and ultimately disclose overseas personal data, for example, an individual's name and home address, as well as their professional and business activities. This information is subject to protection as an element of private life under Article 8 and therefore its disclosure to overseas regulators may interfere with the person's rights under Article 8.

166. The Government considers that any interference with Article 8 would be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.

167. The requirement of lawfulness is met because the circumstances in which the investigatory powers can be used to provide assistance will be set out clearly in Part 5 of the Bill. The powers will be exercisable in relation to functions of the overseas authority which correspond or are similar to specified functions of the relevant UK authorities meaning the scope of the discretion of the UK authorities will be sufficiently clear and foreseeable.

168. As above, the ECtHR has previously concluded that investigations concerning the prevention of anticompetitive practices pursue the legitimate aims of the economic well-being of the country and preventing disorder or crime (*Vinci Construction and GMT genie civil and services v France*, 2015 Nos 63629/10 et 60567/10).

169. The Government also considers the proportionality criteria to be satisfied.
    a. The existing procedural safeguards will apply to the use of the information gathering powers, including requirements for warrants in particular cases.

b. The UK regulator will have to have regard to whether the reason for the assistance being requested is sufficiently serious to justify the CMA collecting the information.
c. The UK authorities concerned will be bound to comply with their obligations under relevant data protection legislation, which provides further protection and safeguarding as regards the proportionality of the exercise of these powers.
d. Disclosure of information collected will also be subject to the protections and restrictions set out in Part 9 EA02.
e. Finally, requests for investigative assistance are subject to appropriate levels of oversight from the Secretary of State in that they must either be authorised by the Secretary of State (who must have regard to whether accepting would be in the public interest and whether giving the requested assistance is appropriate in terms of extra territorial jurisdiction) or be made under and in accordance with a government-to-government international cooperation agreement to which the UK is a party.

170. Disclosing information overseas: Clause 324 amends Part 9 (Information) EA02 to facilitate information sharing with overseas authorities and allow for effective cooperation between UK authorities and their overseas counterparts, when applying competition law (including the new digital markets powers) and consumer law. The existing gateway for disclosure to overseas authorities is being amended to facilitate information sharing with overseas authorities, in particular where it is carried out under an agreement or arrangement designated by the Secretary of State. These proposals could increase the amount of confidential information, including personal data, which is shared with overseas authorities and therefore engage and potentially interfere with Article 8 rights.

171. The Government considers that any interference with Article 8 would be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.

172. The proposals to modify the terms on which specified information protected under Part 9 EA02 can be disclosed overseas are considered to meet the requirement of lawfulness. In particular, the purposes for which information may be disclosed will continue to be defined in Part 9 (i.e. to facilitate criminal or civil enforcement in connection with competition, digital markets, consumer

protection and related matters, either overseas or both in the UK and overseas). The new gateway allowing disclosure under a cooperation arrangement makes clear that the arrangement concerned must be for the purposes of cooperation in connection with those enforcement matters and must be designated by the Secretary of State. The circumstances in which specified information may be shared are therefore sufficiently clear and foreseeable. The offence of unauthorised use or disclosure of information under section 245 EA02 provides an additional safeguard.

173. The purposes for which information sharing overseas is permitted relate to the enforcement of the law relating to competition, digital markets regulation and consumer protection and related matters and the enforcement and investigation of crime, all of which are considered to be legitimate aims for the purposes of Article 8(2).

174. As far as proportionality is concerned, the proposals contain safeguards which apply to the disclosure of the information, many of these taken from the existing gateway in section 243 EA02.
    a. Before making an overseas disclosure the authority in question must, in particular, consider if there is adequate protection against self-incrimination in criminal proceedings and as regards the storage and disclosure of the information. Where disclosure is solely for the purposes of the overseas authority's functions, the disclosing authority must also consider whether the matter in respect of which the disclosure is sought is sufficiently serious. Before approving a designated cooperation arrangement, the Secretary of State too must be satisfied that the arrangement offers adequate protection against self-incrimination and as regards confidentiality.
    b. The provisions also include restrictions on the power of the overseas regulator to use the information disclosed for a purpose other than that for which it was provided or to disclose it further without the consent of the disclosing authority. The Secretary of State must also have regard to whether these kinds of protections exist in a cooperation arrangement/agreement before designating it.
    c. The existing protections in section 244 EA02 are also maintained. As a result, the disclosing authority will have to have regard to the need to exclude from disclosure commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates or information relating to the private

affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests (section 244(3)). Any disclosure of such information must be necessary for the purpose for which the authority is permitted to make the disclosure (section 244(4)). Also, public authorities will have to comply with the provisions of the data protection legislation.

Article 14 – Prohibition of discrimination

175. Article 14 provides that:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

176. Article 14 does not provide a free-standing right to non-discrimination; rather, it provides a right to non-discrimination in the enjoyment of other Convention rights.

177. When considering Article 14, the following four questions should be answered:
    a. Are we in the ambit of another Convention right?
    b. Is there a difference in treatment on the basis of a status listed in Article 14?
    c. Are any applicant and chosen comparator(s) in an analogous position?
    d. Is there an objective and reasonable justification for the differential treatment?

178. The Government considers that Article 14 is only engaged in relation to Part 1. The following section explains how Article 14 is engaged and satisfied in relation to Part 1.

Part 1 – Digital Markets

The provisions of Part 1 are considered to engage and/or interfere with Article 14 for the following reasons:

179. The digital markets regime is in the ambit of other Convention rights, with A1P1 being most likely to be cited in any challenge. A *breach* of A1P1 (or any other Convention right) is not required in order for Article 14 to be engaged. That is because the right to non-discrimination arises in relation to the *enjoyment* of Convention rights.

180. There is a risk that the digital competition regime will discriminate against undertakings on grounds of nationality. The provisions in Part 1 of the Bill are

'country-agnostic', applying on their face equally to UK-based and overseas undertakings. They are not therefore directly discriminatory. However, based on the evidence held by the Government, it is expected that the power to designate undertakings as having SMS is currently more likely to be exercised in respect of overseas undertakings. It is therefore possible that an overseas undertaking could succeed in persuading the court that Article 14 is engaged on the basis that in practice the regime involves differential treatment of UK and overseas undertakings. On the other hand, it could be argued that those not designated as having SMS are not in an analogous situation because they do not have the characteristics that would lead the CMA to designate them.

181. The Government considered whether the turnover thresholds set out in clause 7 could count as "other status" for Article 14 purposes. Case law from the ECtHR[9] has held that the size of a person's landholding may count as an "other status" under Article 14. The Court held that there had been a violation of Article 14 when read with the right to peaceful enjoyment of possessions under A1P1. Consequently, the Government considers that the turnover threshold provisions would likely fall within the category of "other status" for Article 14 purposes.

The provisions are considered to be compatible with Article 14 for the following reasons:

182. To the extent that there may be a difference in treatment, that difference will be discriminatory if it "has no objective and reasonable justification"; that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

183. Even if the CMA's exercise of the powers in Part 1 of the Bill prove, in practice, to involve differential treatment of UK and overseas undertakings, the Government contends that there is a reasonable and objective justification for this; namely, the promotion (or protection) of competition for the benefit of consumers. Further, exercise of the designation power is subject to various safeguards, which are designed to ensure that any interference with ECHR rights is proportionate. Specifically, the CMA may only designate a firm as having SMS where the digital activity is linked to the UK, where the CMA

[9] *Chassagnou and others v France*, (2000) 29 E.H.R.R. 615. The case concerned different treatment of landowners in certain French departments, with smaller landowners being required to transfer hunting rights over their land to municipal hunters' associations, whilst larger landowners were able to escape the compulsory transfer of their rights.

considers that the SMS conditions are met in respect of the digital activity and where the turnover condition is met in relation to the undertaking. In considering whether the SMS conditions are met, the CMA will draw on qualitative evidence and consult on any decision it is considering making. There are other procedural safeguards in place, and the CMA's decisions will be appealable.

184. With regard to the turnover thresholds in clause 7, the Government considers that there is good reason for differentiating between the very largest undertakings which exceed the turnover thresholds and others. The regime is intended to provide for *ex ante* regulation of those undertakings whose size and position causes problems for competition in digital activities. Undertakings with very large turnover are more likely to exhibit the characteristics that have potentially negative impacts on competition. They are more likely to have substantial and entrenched market power and a position of strategic significance (based on at least one of the conditions listed in clause 6(1)). Providing for a turnover condition constrains the scope of the regime, thereby providing certainty for a majority of undertakings that they will not be subject to an SMS investigation. It ensures that the regime is targeted and proportionate in its application.

185. In relation to the merger reporting provisions specifically, the Government considers that these are justified because they would enable the CMA to take action to stop anti-competitive mergers and because there is a stronger case for requiring designated undertakings to report their mergers than other undertakings. Mergers involving designated undertakings would appear capable of raising a wider range of risks to competition than those in other industries[10]. In addition, the Digital Markets Taskforce advised that digital mergers are likely to hold particular risks for consumers, and to give rise to particularly acute risks of regulatory underenforcement. The CMA has further advised that it is not aware of any evidence that mergers in other industries take place without being made public, nor is it aware of any evidence of similar underenforcement in other industries.

[10] For example, the potential for companies in other industries to take control of positions in adjacent markets and to exploit these in anti-competitive ways, to build up a suite of complementary products for instance, seems more limited.

Article 1 of Protocol 1 - Right to peaceful enjoyment of property

186. Article 1 of Protocol 1 ("A1P1") provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. A1P1 includes the qualification that it does not impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

187. The concept of "possessions" in A1P1 is autonomous and has been interpreted broadly by the courts to cover existing possessions and assets, as well as encompassing immoveable and moveable property and other proprietary interests. Any interference must be in accordance with the law and also subject to the rule of law, including the principle of foreseeability. The relevant legal provisions must have a sufficient degree of clarity, precision and predictability so that affected parties can inform themselves of risks and consequences.

188. The ECtHR generally affords individual states a wide margin of appreciation when considering this part of the test, especially in relation to economic policies. In the case of *Béláné Nagy v Hungary* [GC] no. 53080/13 13 Dec 2016, it stated at paragraph 113 that:

> *"The Court finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation."*

189. The ECtHR has previously concluded that the prevention of collusive practices and the protection of the public purse and promotion of fair competition are in the public interest (*Kurban v Turkey* no. 75414/10 [78] 24 Nov 2020).

190. The following paragraphs consider, in relation to each Part of the Bill, the provisions that may engage and/or interfere with A1P1 and the reasons why they are justified.

Part 1 – Digital Markets

191. The following provisions are considered to engage and/or interfere with the right to peaceful enjoyment of possessions under A1P1:
    a. Funding (power to charge levy)
    b. SMS designation
    c. Conduct requirements
    d. PCIs
    e. Interim/final orders
    f. the Final Offer Mechanism
    g. Merger reporting requirements
    h. Duty to preserve documents relevant to investigations
    i. Additional powers of seizure from domestic premises

192. Funding (power to charge levy): the Government considers that the ability for the CMA to impose a requirement on a designated undertaking to make a compulsory payment (levy) to the CMA for the purpose of funding the costs of the exercise of the CMA's digital markets functions (except litigation costs) engages A1P1 as it likely amounts to a tax or other contribution, but is justified under the second paragraph of A1P1. The amount of the levy must be calculated in accordance with rules made by the CMA, which are subject to mandatory consultation. The rules must set out how, for each year, the levy is calculated in relation to the CMA's costs, and the distribution of those costs amongst designated undertakings.

193. SMS designation: The Government considers that SMS designation by itself may engage A1P1. This is because the CMA's decision to designate a firm would be published, which could, in principle, have an impact on the value of a designated undertaking, including its marketable goodwill and on any existing contractual rights. It is well-established in case law that marketable goodwill and contractual rights are capable of being possessions for the purposes of A1P1[11].

194. Further, it is intended that SMS designation will lead to the imposition of *ex ante* regulation in the form of conduct requirements and PCIs. Those interventions would interfere with the right to peaceful enjoyment of possessions, with

[11] A discussion of the relevant case law (including from the ECtHR) is set out in the Court of Appeal's judgment in the *Department for Energy and Climate Change v Breyer Group PLC and others* [2015] EWCA Civ 408 (see, in particular, paragraphs 22-49).

justification of that interference relying in part on the fact of SMS designation (in particular, to show proportionality). Similarly, SMS designation would trigger the application of new merger reporting rules specific to designated undertakings, although it is intended that those rules would in themselves set out additional criteria to be met before specific requirements would apply.

195. Conduct requirements: the Government considers that the conduct requirement provisions engage A1P1 because they enable the CMA to regulate the ways in which designated undertakings carry out their businesses, requiring undertakings to stop doing certain things, to begin doing certain things, or to do things in a particular way, as required, which may therefore interfere with existing contractual rights. It is considered that this is more likely to constitute an interference with property rights rather than a deprivation.

196. PCIs: the Government considers that the PCI provisions engage A1P1 in a similar way as conduct requirements because they allow the CMA to regulate the conduct of the designated undertaking's digital activity. However, in addition, under the power to impose a PCI the CMA may require the divestment of assets or parts of the business. This aspect is likely to engage the deprivation of property aspect of A1P1.

197. Interim/final orders: these are the enforcement mechanisms in the Bill that deal with breaches of conduct requirements. They allow the CMA to impose on the undertaking such directions as it considers appropriate for the purposes of remedying the breach. They therefore engage A1P1 in the same way as for conduct requirements.

198. The Final Offer Mechanism: this is a backstop enforcement mechanism in the Bill that relates to a breach of an enforcement order, concerning conduct requirements requiring fair and reasonable payment terms. A1P1 is engaged in the same way as for enforcement orders, see the preceding paragraph.

199. Merger reporting requirements: the merger reporting requirements are considered to engage A1P1 because they impose a temporary prohibition on completion of reportable events (such as certain share purchases) until a report has been filed, the report has been accepted by the CMA as sufficient, and then a waiting period of 5 working days has passed. This is considered by the Government to be capable of amounting to a control on the use of property within the meaning of A1P1, in relation to the right of sellers to sell their

property, and potentially in relation to buyers where there is a legitimate expectation of obtaining property.

200. Duty to preserve documents relevant to investigations: clause 80 establishes a new obligation on persons connected to designated undertakings who either know or suspect that the CMA will exercise its powers to carry out certain investigations, or who know that the undertaking is required to produce a compliance report, and on persons connected with an undertaking who know that the undertaking is the subject of an investigation by the CMA as to whether it has SMS. The new obligation is to preserve any evidence which is, or would be, relevant to that investigation. The Government considers that this may engage A1P1 as constituting a control of use of property. The ECHR issues raised by the nature of this obligation are discussed further below in the section on Part 2 of the Bill in the entries relating to the duty to preserve documents relevant to investigations.

201. Additional powers of seizure from domestic premises: valuable, confidential, commercial information can constitute a possession within the meaning of A1P1. However, designation of the power in clause 75(2) under section 50 of the CJPA01 will mean that this power does not generally permit the seizure of original documents and, as such, copies must be taken. To that extent, this power cannot be considered to amount to a deprivation, control of use or general interference with the peaceful enjoyment of personal property. However, it may engage A1P1 in circumstances where seizure is permitted, being where it is not reasonably practicable to take copies on the premises or where such action is considered necessary for preserving the information or preventing interference with it. These circumstances are discussed in more detail in the section on Part 2 of the Bill below, in the entries relating to additional powers of seizure from domestic premises.

The provisions are considered to be compatible with A1P1 for the following reasons:

202. Regarding the digital markets regime as a whole, the measures are lawful, being subject to conditions provided for by law, either in the primary legislation itself, or in obligations imposed or rules made under the primary legislation. The measures are accessible, precise and foreseeable in their application. The Government considers that any interference with A1P1 would be in the public interest, as the regime is designed to promote (or, in the case of merger

reporting requirements, protect) competition in digital markets for the benefit of consumers in order to tackle and prevent harm. There is a significant body of evidence about the need for these measures, from the Furman Review[12] to the Digital Market Taskforce advice[13], and the CMA's various market studies[14]. The CMA is required, as a public body, to act in accordance with public and administrative law, including human rights law. The Government therefore expects the CMA to exercise its powers in a way that takes into account the requirements of A1P1, including proportionality. Further, the CMA's decisions (including decisions not to exercise a digital markets function) will be appealable to the CAT (see clause 103). The following paragraphs set out further comments specific to the particular measures.

203. Funding (power to impose a levy); The Bill establishes the legislative framework and the CMA must make detailed rules about the levy under those statutory provisions. The legitimate aim is to fund the regulator in its exercise of digital markets functions. The Government considers that it is appropriate to impose the costs of this on designated undertakings rather than on the general public. There are procedural safeguards in place to ensure that regulation is proportionate. Designated undertakings will be very large businesses with high turnover, and the Government considers that it is appropriate for them to bear the costs of regulation of their digital activities which are designated.

204. SMS designation: the CMA's power to designate undertakings as having SMS is subject to various statutory tests and procedural safeguards. Investigations as to whether an undertaking should be designated as having SMS are subject to mandatory public consultation to ensure transparency and to allow representations from all those affected. The Government considers that a nine-month designation process strikes a fair balance between the interest of undertakings for a speedy decision, and the wider public interest for robust investigation. The five-year designation period provides certainty but ensures that regulation does not remain in place for a disproportionate length of time (and provision has been made for earlier review and revocation of designation where justified). Under clause 104(7), a designation period may be extended until the end of a further SMS investigation period in specific and limited circumstances.

[12] *Unlocking digital competition*, Report of the Digital Competition Expert Panel, March 2019
[13] Digital Market Taskforce Advice, December 2020
[14] For example, the Online platforms and digital advertising market study, July 2020; the Mobile ecosystems market study, June 2022

205. The regime is designed to promote competition in digital markets in a targeted manner, by regulating only a small number of undertakings with substantial and entrenched market power and a position of strategic significance in respect of a specified digital activity. SMS designation is the foundation for the regime and has been designed with proportionality in mind. The UK nexus test in clause 4 has been designed to ensure that only digital activities which are sufficiently closely linked to the UK can form the basis for designation.

206. Conduct requirements, PCIs, interim/final enforcement orders and the Final Offer Mechanism: there are various statutory tests and procedural safeguards relating to the CMA's power to impose these measures. There must be public consultation by the CMA about proposed conduct requirements and PCIs, and an opportunity for designated undertakings to make representations. There is a requirement that the imposition of conduct requirements and PCIs be proportionate. PCIs are designed to be used for more significant interventions, including the division or divestment of a business, and that is why they have to be preceded by an investigation, and can only be imposed to address a factor, or combination of factors, giving rise to an identified adverse effect on competition (AEC).

207. A PCI comprising a divestment order would enable an undertaking to obtain full market value for that aspect of the business and so there is no need for compensation. While a divestment order is a draconian order, it must be available in order to tackle structural issues as the source of a designated undertaking's entrenched market power. It could only be justified for use in circumstances where it is appropriate and other remedies are insufficient. The CMA is required to keep the appropriateness of both conduct requirements and PCIs under review, to ensure that regulation is proportionate and only lasts for as long as is needed.

208. Before the CMA can impose an interim or final enforcement order after finding a breach of a conduct requirement, a designated undertaking must be given an opportunity to make representations. The CMA has the power to consult on draft orders. Before imposing the Final Offer Mechanism, the CMA must consider that it could not satisfactorily address the breach of the relevant enforcement order within a reasonable time frame by exercising any of its other digital markets functions. It is also a backstop enforcement power, the usual enforcement process of using enforcement orders first must have been tried.

209. The ability for the CMA to design bespoke measures on the basis of evidence enables obligations to be carefully and appropriately tailored. The CMA will have to consider and justify any obligations imposed on designated undertakings, and so the Government expects the measures to be applied to be the least intrusive to achieve the desired outcome.

210. Merger reporting requirements: the purpose of the provisions is to bring mergers which may be anti-competitive in the UK to the attention of the CMA so that it can take remedial action where appropriate to prevent any harm occurring. The reporting criteria are set out in the primary legislation so as to be clear, precise and foreseeable to affected persons, and target the events which are most likely to be mergers that raise competition concerns in the UK. The Government considers that the prohibition on completion is not overly intrusive as it is for a short period, and that the measures strike a fair balance between the rights of persons affected and the public interest, given that the CMA will not be permitted to require excessive information to be provided in a report, the CMA will be able to consent to early completion of a reportable event, those required to report will be able to challenge reporting decisions through application to the CAT, and there will be a power to provide for exemptions from the duty to report.

211. Duty to preserve documents relevant to investigations: the duty only applies in very specific circumstances to impose an obligation to preserve documents as specified by the primary legislation. The explanation in the section on Part 2 of the Bill below of why the duty to preserve documents is compatible with A1P1 also applies to this duty and is not repeated here to prevent duplication.

212. Additional powers of seizure from domestic premises: Any interference that arises will be in accordance with the law because the section 50 CJPA 2001 designation will apply where an inspection is being carried out under clause 75(2). The specific criteria that must be fulfilled before a warrant may be issued by the court for an inspection to be undertaken are set out in the primary legislation. The explanation in the section below on Part 2 of the Bill about additional powers of seizure from domestic premises sets out further detail as to why, insofar as these powers engage A1P1, the proportionality test is satisfied.

213. It is for these reasons that the Government considers that the provisions of Part 1 of the Bill are compatible with A1P1.

Part 2 – Competition

214. The following provisions are considered to engage and/or interfere with the right to peaceful enjoyment of possessions under A1P1:
    a. Removal of requirements for agreements to be implemented in the UK;
    b. Duty to preserve documents relevant to investigations;
    c. Additional powers of seizure from domestic premises;
    d. Relevant merger situations and special merger situations;
    e. Final undertakings and orders: power to conduct trials;
    f. Duty of CMA to monitor effectiveness of undertakings and orders;

215. Removal of requirement for agreements etc to be implemented in the UK: an agreement found to be in breach of the Chapter 1 prohibition and which is therefore considered void could have an impact on the parties' crystallised contractual obligations. The CMA issuing directions requiring the infringement to be brought to an end could ultimately have an impact on the parties' contractual obligations. The Government therefore considers that as extending the territorial extent of the Chapter 1 prohibition expands the scope of agreements and contractual obligations which could potentially be considered void or otherwise impacted, and given that contractual rights can qualify as possessions for the purposes of this Article, it can therefore be argued that clause 118 engages the parties' A1P1 rights.

216. Duty to preserve documents relevant to investigations: clause 120 establishes a new obligation on persons who know or suspect that the CMA will exercise its powers to investigate a breach of competition law under the CA98, to preserve any evidence which is, or would be, relevant to that investigation. A similar obligation already exists in the context of investigations by the CMA into the criminal cartel offence under the EA02, as a consequence of an offence set out in section 201(4) EA02. The Government considers that clause 120 may engage A1P1, in that it could require a person to retain property that they would not otherwise wish to for a specified period (for example, they may wish to destroy in accordance with their retention and destruction policies), and so may involve a control on possessions.

217. Additional powers of seizure from domestic premises: valuable, confidential, commercial information can constitute a possession within the meaning of A1P1. However, designation of the section 28A(2)(b) CA98 power under section 50 CJPA 2001 will not be a power to seize original documents (as the restriction at section 50(6) CJPA 2001 will be applied to the section 28A CA98 power, meaning the CMA will only be permitted to take copies of the relevant information, and not the original documents), and so the Government considers that A1P1 is not engaged, as this cannot therefore be considered to amount to a deprivation, control of use or general interference with the peaceful enjoyment of personal property.

218. However, there may be situations where the CMA needs to seize property where it is not reasonably practicable to determine on the premises the extent to which information contained therein may be seized, if at all (for example, where information is stored on a hard drive or computer), or where taking possession is required because it is considered necessary to preserve documents or prevent interference with them, or because it is not reasonably practicable to take copies of documents on the premises. In such a scenario, section 50(2) CJPA01 permits a CMA officer to remove such material to image or investigate further off-site for the purposes of determining what information is relevant to the investigation and should be copied. This would constitute an interference with the peaceful enjoyment of personal property for the period in which such objects are seized to be sifted and will therefore engage A1P1 for that period of time.

219. Relevant merger situations and special merger situations: remedies imposed in merger cases are considered to involve a control on the use of property, in relation to the right of sellers to sell their property, and potentially in relation to buyers where there is a legitimate expectation of obtaining property. As a result, the Government considers that the merger control process has the potential to engage A1P1. In the case of the new hybrid threshold, the proposals do expand the circumstances in which mergers will be subject to review and therefore remedies may be accepted and thus the potential situations in which an interference might arise.

220. Final undertakings and orders: power to conduct trials: the Government considers that a decision by the CMA or Secretary of State to undertake a trial before making a final decision regarding the remedy package to be accepted or imposed has the potential to engage rights under A1P1, to the extent that

the remedies concerned may involve a control on their possessions. However, the Government considers that accepting or imposing remedies for the purposes of an implementation trial in relation to a "qualifying remedial action" does not engage A1P1, because "qualifying remedial action" means remedial action in respect of a matter concerning the provision or publication of information to consumers, or otherwise specified in regulations made by the Secretary of State. Remedies here will be directed at requiring businesses to provide information to consumers and to trial the method of delivery: while A1P1 protects existing contracts as possessions, future contracts are not protected.

221. Duty of CMA to monitor effectiveness of undertakings and orders. Clause 138 makes amendments to Part 4 of EA02 to provide for powers for the CMA, and Secretary of State to revise remedies, including by varying or imposing new enforcement orders, in circumstances where a previous remedy or remedy package is found to have been ineffective at remedying, mitigating or preventing the adverse effects it was intended to address. Any order which is varied, or new order imposed, has the potential to engage rights under A1P1. Decisions to replace remedies which have been found to be ineffective could amount to either a deprivation or a control measure, depending on the nature of the remedy deployed and whether it impinges on "possessions" for the purposes of the Article.

The provisions are considered to be compatible with A1P1 for the following reasons:

222. Regarding the competition provisions generally, The Government considers that any interference with A1P1 would be in the public interest. The ECtHR has held that the prevention of collusive practices and the protection of the public purse and promotion of fair competition are in the public interest (*Kurban v Turkey* as cited above).

223. The competition regime as a whole seeks to balance the rights of undertakings to conduct their business as they wish, against the policy objective of ensuring that markets operate in a manner that allows for open and fair competition, to the benefit of customers and consumers. The various procedural and judicial protections set out in the provisions attempt to strike a fair balance between those competing interests.

224. Further, any interference will be provided for by law, more specifically by primary legislation. The following paragraphs set out comments specific to each element of the new regime.

225. Removal of requirement for agreements etc to be implemented in the UK: The Government's proposal is merely to expand the scope of agreements which can be subject to this provision; we are not suggesting any additional or varied consequences for infringement. The interference will be provided for in legislation by way of an express provision setting out the qualified effects test. Further, any interference will only arise where the parties have been found by the CMA to have breached the Chapter 1 prohibition. The CMA's investigative process will be subject to the usual procedural safeguards and any decision made by the CMA can be appealed to the CAT (s.46 CA98), from which further appeals also lie to the Court of Appeal (s.49 CA98).

226. These provisions are in the public interest because they seek to deter agreements with anticompetitive effects in the UK, and will be in the pursuit of addressing economic harms caused by the adverse effects on competition in a market and the detrimental effects on customers arising from those adverse effects. Interference will be proportionate because the CMA can take action against anti-competitive agreements, but this is limited to those which are likely to have immediate, substantial and foreseeable effects on trade in the UK. Any interference will be preceded by the finding that the parties have breached the Chapter 1 prohibition, and there are appeal rights associated with any finding. The objective of the measure is sufficiently important to justify the limitation of a protected right; and, there is a rational connection between the policy objective and the approach taken.

227. Duty to preserve documents relevant to investigations: "Documents" constitute 'possessions' for the purposes of A1P1. The new provision means the CMA is able to impose civil sanctions against a person who has destroyed documentation. Case-law has confirmed that a deprivation of property will not be arbitrary where it is accompanied by appropriate procedural protections to enable affected entities to challenge the application of the measures to them in a specific instance. In this case, clause 120 only imposes an obligation to preserve documents where a person knows or suspects a CA98 investigation is being, or is likely to be carried out - the blanket retention of all records is not required.

228. Liability for a penalty arises only where it can be shown that a person knew, or suspected that a CA98 investigation was being, or was likely to be carried out, in relation to material which was known or suspected to be relevant to the investigation, in order to remedy, mitigate or prevent an adverse effect on competition. The threshold for the CMA to be 'likely' to open an investigation must be more than a hypothetical possibility, and so it is prevented from imposing sanctions for breaches of the prohibition where the limbs of the prohibition are not met or in uncertain circumstances.

229. The new prohibition seeks to balance the rights of undertakings to conduct their businesses according to document retention and destruction timetables of their choosing, against the policy objective of ensuring that the CMA can conduct effective investigations and promote fair and open competition for the benefit of customers and consumers. A defence against breach of the prohibition will be available where a reasonable excuse (which will be assessed according to its own facts) can be made out for the destruction of the relevant material.

230. Additional powers of seizure from domestic premises: the section 50 CJPA01 designation applies where an inspection is being carried out under section 28A CA98. Section 28A of the CA98 sets out the specific criteria which must be fulfilled before a warrant may be issued by the court for an inspection to be undertaken. A warrant can only be granted in relation to material which is considered to be relevant to its investigation in order to remedy, mitigate or prevent an adverse effect on competition.

231. The regime as a whole seeks to balance the rights of undertakings to conduct their businesses in premises of their choosing against the policy objective of promoting open and fair competition for the benefit of customers and consumers. The various procedural and judicial safeguards attempt to strike a fair balance between these two aims. Where the powers are exercised, as set out above, the statutory safeguards afforded by the CJPA01 regime will apply.

232. Relevant merger situations and special merger situations: Part 3 EA02 sets out the UK's merger control regime. Section 23 EA02 specifies the thresholds which must be met before a merger is subject to review on competition grounds, and this where the criteria for application of the new threshold will be included. The new acquirer focussed threshold is being introduced to close enforcement gaps relating to vertical and conglomerate mergers and mergers affecting potential competition. The Government considers that the proposal falls within

the field of socio-economic policy, as it is designed to prevent mergers giving rise to a substantial lessening of competition and is furthering the legitimate public interest in the maintenance of fair competition.

233. The provisions are considered to be necessary and proportionate because the criteria for the threshold have been designed to target only the most relevant vertical and conglomerate merger and acquisition situations (and details of the amount of UK turnover (£350m) and percentage of the share of supply in the UK (33%) required under the different limbs of the test were refined as a result of input from the public consultation on the proposal). In addition, a different merging enterprise (which will usually be the target) needs to have a connection to the UK (such as carrying on activities in the UK). This together with the core limbs of the test helps to ensure the threshold is focussed on mergers likely to have an impact on competition in the UK.

234. There is no less intrusive measure which could meet the aim. Meeting the threshold has no direct impact on a transaction. The test will be applied within the context of the UK's existing voluntary merger control regime, in which merging parties are not required to notify any transaction or to pause a merger pending notification and approval. The CMA will only ever 'call in' a transaction for investigation where there is a reasonable chance that it raises competition concerns in the UK. The CMA would expect merging parties to adopt a similar approach in deciding whether to notify a transaction for review in the UK.

235. The proposed threshold is specifically intended to capture transactions where one (or both) of the merging parties is likely to already hold a significant market position within the UK, and the parties will have the opportunity to challenge substantive decisions about the case in the CAT. Accordingly, the Government considers that the voluntary regime, combined with the existing and new jurisdictional thresholds, effectively balances the need to identify, and prevent or remedy, anti-competitive mergers with the aim of avoiding undue interference with A1P1 rights of the businesses concerned.

236. Final undertakings and orders: power to conduct trials: to the extent that the remedies concerned may involve a control on possessions, the making of orders will be at the discretion of the CMA and Secretary of State and subject to statutory tests and other safeguards.

237. The power to make an order will only arise following a finding of an adverse effect on competition at the conclusion of a market investigation, and a finding that it is a case where it would be appropriate for the remedial action proposed to be tested before a final decision is made about the action to be taken. The CMA will have a wide discretion whether to accept undertakings or make orders for the purpose of an implementation trial (as opposed to proceeding straight to accepting or imposing final remedies) but it will be required to consult with the parties affected by the decision and give reasons for its conclusions in the market investigation report.

238. As with any orders made under Part 4 EA02, any proposed Order would need to be the subject of further consultation before it could be made, and the CMA will be required to keep them under review. Orders will also be subject to judicial review. The Government therefore considers that there are adequate procedural safeguards for the purposes of A1P1 surrounding the exercise of this power.

239. Duty of CMA to monitor effectiveness of undertakings and orders: Clause 138 amends section 162 EA02 to expand the circumstances in which remedies may be varied. The acceptance of undertakings and making of orders will be at the discretion of the CMA and Secretary of State and subject to statutory tests and other safeguards. The power to accept an undertaking or make an order will only arise following a finding of an adverse effect on competition at the conclusion of a market investigation (or a finding of an effect adverse to the public interest in public interest cases), and a subsequent finding that the remedy package previously accepted or put in place has not been effective at addressing that adverse effect.

240. Before being able to exercise the power, the CMA will need to reach the conclusion that a final decision made previously under section 138(2) EA02 has not been effective at remedying, mitigating or preventing the adverse effect on competition or detrimental effect on customers resulting from it, identified in the earlier market investigation. This will implicitly require the CMA to consider whether the adverse effect on competition continues to subsist. The CMA will also have to determine that it considers that further action should be taken by it to remedy, mitigate or prevent that adverse effect on competition or detrimental effect on customers. In a case where there has been a public interest intervention, it will be for the Secretary of State to undertake similar consideration in relation to the action taken under section 147(2), and about the

effectiveness of a decision made previously under section 147A(2) in relation to effects adverse to the public interest, following the receipt of advice from the CMA.

241. The provisions set out parameters for the exercise of the powers, with a long stop and cooling off period provided by the statutory framework. In cases which have previously been the subject of a full or restricted public interest intervention reference, following the receipt of advice from the CMA, the Secretary of State will have a power to take such action as he or she considers appropriate in relation to variation, release or replacement of the remedies. Where the CMA decides to take action under the new power, it is required to publish a notice of that decision and take the action within the period of 6 months from that date. As with any orders made under Part 4 EA02, any proposed Order would need to be the subject of further consultation before it could be made by the CMA or the Secretary of State, and once made, the CMA will be required to keep them under review. Orders will also be subject to judicial review. The Government therefore considers that there are adequate procedural safeguards for the purposes of A1P1 surrounding the exercise of this power.

242. As with implementation trials, the additional powers will not change the basis on which a remedy may be imposed, and each remedy imposed will need to be capable of justification in its own right, with the impacts on property rights of the undertakings concerned assessed on a case-by-case basis. Accordingly, having regard to the importance of the socio-economic objective the measure seeks to pursue, the Government considers that the applicable test for proportionality is made out.

243. It is for these reasons that the Government considers that the provisions of Part 2 of the Bill are compatible with A1P1 to the ECHR.

Part 3 – Enforcement of Consumer Protection Law

244. The following provisions are considered to engage and/or interfere with the right to peaceful enjoyment of possessions under A1P1:
    a. clause 155 (enforcement orders and undertakings) and
    b. clause 181 (final infringement notice).

245. Clause 156 provides for enforcement orders, or undertakings accepted by the court in lieu of making an enforcement order, to include enhanced consumer measures. Clause 182 provides for the CMA to include enhanced consumer measures in a final infringement notice under its new direct enforcement process. Enhanced consumer measures are defined in clause 219 as measures falling into the categories of redress, compliance and choice.

246. The Government considers that A1P1 may be engaged to the extent that the court may impose enhanced consumer measures which interfere with a business's property rights. For example, requiring the business to offer compensation to consumers; or to provide information to consumers which may interfere with intellectual property rights.

The Government considers that the provisions are compatible with A1P1 for the following reasons:

247. The Government considers that the provisions are justified because A1P1 is a qualified right. The State may enforce such laws as it deems necessary to control the use of property in accordance with the general interest. It is in the public interest that there is a flexible and appropriate enforcement regime. Furthermore, neither a court nor the CMA would impose a requirement that was in breach of existing legislative provisions, for example the Data Protection Act 1988.

248. It is for these reasons that the Government considers that the provisions of Part 3 of the Bill are compatible with A1P1.

Part 4 – Consumer rights and disputes

249. The Government considers that the following provisions are considered to engage and/or interfere with the right to peaceful enjoyment of possessions under A1P1:
    a. Chapter 2 – Subscription Contracts;
    b. Chapter 3 – insolvency protection for consumer savings schemes; and
    c. Chapter 4 – alternative dispute resolution for consumer contract disputes.

250. Chapter 2 – subscription contracts: traders are required to give consumers prescribed pre-contract information, reminder notices when a contract is due to

renew or continue after the end of a free or discounted trial period, and provide an easy means for consumers to end a contract where they are contractually entitled to do so. The duty to give consumers specified pre-contract information replaces (with some modifications), for contracts in scope, pre-contract information requirements which currently apply to consumer contracts under the CCRs. Where a trader fails to comply with key elements of these requirements, rights are conferred on the affected consumer to cancel the contract. Chapter 2 contains a delegated power for the Secretary of State to make provision, by regulations, as to the consequences of a consumer exercising this cancellation right, including provision as to refunds and the treatment of any products supplied under the contract.

251. Chapter 2 also confers rights on consumers to cancel a subscription contract within a specified 'initial cooling-off period'. Furthermore, in some cases where a subscription contract renews, or continues after the end of a free or discounted trial period, Chapter 2 confers new cancellation rights for consumers within a further 'renewal cooling-off period'. The delegated power to make provision in regulations for the consequences of consumers exercising a cancellation right following a trader's breach of certain key requirements in Chapter 2, also applies where a consumer exercises a cooling-off cancellation right. Furthermore, the delegated power enables the Secretary of State to extend the cooling-off period in such categories of cases as may be specified.

252. The government considers that it could be argued that the consumer rights in Chapter 2 to cancel subscription contracts, and the delegated power allowing regulations to be made which may entitle affected consumers to full or partial refunds of payments made under cancelled contracts, could engage A1P1. This is because traders could lose the benefit of payments already received under the contract, as well as future payments they would otherwise have received under those contracts had they continued.

253. Chapter 3 - insolvency protection for consumer savings schemes: the government considers that the protection requirements, in particular the restriction on the use of consumer payments as working capital and/or the imposition on business of costs of implementing the protection and information requirements, may engage A1P1. Any restrictions on the use of capital and/or additional costs on business may be deemed to be property within scope of A1P1. In the event that A1P1 is engaged, there may be an interference which is classed as either a deprivation of property and/or a control of use of property.

254. Chapter 4 - alternative dispute resolution for consumer contract disputes: under clause 291 a person is prohibited from providing ADR unless they are accredited and under clause 296 the Secretary of State has the power to revoke, vary or suspend a person's accreditation. The Government considers that these ADR provisions engage A1P1 since they amount to a licensing system for consumer ADR with a person (including a person who might hitherto have provided ADR) being only able to do so if they are, and remain, accredited or exempt. Revocation of a licence has been held to engage A1P1: see *Tre Traktörer* (1989 13 EHRR 309). The licensing system implies control of use of property although arguably a decision not to accredit, or to revoke the accreditation, of an existing ADR provider may be a deprivation.

255. Equally, the restrictions on the ability of ADR providers to charge fees to consumers in clause 292 (albeit reflecting the existing regulations, although these are not mandatory) and the powers of the Secretary of State to charge ADR providers fees for their accreditation which, in practice, are required to be paid for ADR providers to continue to conduct ADR, might constitute interference with property rights or otherwise fall within A1P1.

The provisions are considered to be compatible with A1P1 for the following reasons:

256. Chapter 2 - Subscription contracts: the Government considers that the new provisions do not engage A1P1. This view is based on an assessment that the provisions do not interfere with existing property or rights belonging to affected businesses. The provisions will only apply to subscription contracts entered into after they come into force so businesses can choose whether or not to offer such contracts to consumers on the basis of the new legislative regime. Furthermore, we have not identified any previous domestic or ECHR cases in which consumer protection provisions of this nature were held to engage A1P1.

257. In the event that the new consumer rights and remedies established by the clauses on subscription contracts were deemed to engage A1P1, the Government considers that the provisions would be considered to be in the nature of 'control of use of property' rather than 'deprivation of possessions'. The provisions do not affect a state-implemented forfeiture of businesses' assets, but rather seek to achieve a better balance between the respective private rights and interests of business and consumer parties to a specific kind

of contract which has been assessed as posing significant economic risks and detriment to consumers.

258. The new rights conferred on consumers are prescribed by law and are deemed necessary to control the use of property in accordance with the general interest. They seek to achieve a legitimate aim of balancing business and consumer interests in circumstances where consumers are generally in a weaker position because contracts are drafted and presented by businesses to optimise their financial interests, and consumers' knowledge and understanding of the terms and mechanisms of such contracts is generally inferior to that of the businesses offering them.

259. As regards the cooling-off rights, businesses are already subject to such provisions when entering a wide range of consumer contracts, concluded by distance means or ''off business premises', under the CCRs. The new provisions simply apply similar rights to subscription contracts however concluded. Where consumers exercise the existing CCRs cooling-off rights, in order to be entitled to a refund of payment(s) already made they are required to give up to the supplier any goods already delivered to them, and may be required to take steps to return the goods themselves. Where the supplier has given the required pre-contract information, the consumer will remain liable for the cost of services which have already been supplied to him/her before s/he cancels the contract. The delegated power to make provision about the consequences of exercising cancellation rights allows the Secretary of State to make similar provision in the case of the cooling-off cancellation rights in Chapter 2.

260. Regarding the consumer remedy of a cancellation right following a trader's non-compliance with key Chapter 2 requirements, businesses can avoid the consequences of consumers exercising such rights by complying with the new requirements. Where traders fail to comply and consumers can exercise a cancellation right as a result, the consequences constitute a proportionate means to pursue the legitimate public interest in protecting consumers from the potential detriment of:
    a. unintentionally incurring liability for one or more payments under a free trial contract, or incurring liability for greater payments than intended under a discounted trial contract, and/or

b. unintentionally entering, or finding it difficult to exit, contracts under which continuing payments are taken from them for unwanted or unused products.

261. Chapter 3 - Insolvency protection for consumer savings schemes: To the extent that any interference is considered to be an interference with controlling the use of property, the Government considers that the protection and information requirements will be provided for by law and are likely to be justified and proportionate means of achieving the legitimate aim of protecting consumer payments on retailer insolvency. The provisions will give business a choice about which protection mechanism to use i.e. trust or insurance. In any event the trust arrangement allows a business to access consumer payments to purchase goods or services to fulfil consumer/saver requirements. Flexibility for business has been provided in terms of providing prescribed information to consumers which should minimise the costs of doing so.

262. Chapter 4 - alternative dispute resolution for consumer contract disputes: it is considered that the controls on use of property inherent in accreditation are in accordance with a general interest, that being an objective of ensuring that consumers, who are generally the weaker party in a transaction, have access to ADR that meets appropriate standards. For example, that the ADR provider has appropriate expertise and is independent and impartial. In the main, the requirements are of a high-level such as independence and impartiality and periodic reporting requirements with which it is reasonable to expect an ADR provider to comply.

263. In so far as the system results in an ADR provider being unable to continue to provide ADR by virtue of failing to be accredited, or its accreditation being revoked, this would be because it is failing to meet basic substantive standards or procedural requirements such as reporting. Furthermore, the intention is to allow around a year between Royal Assent and the ADR clauses coming into effect, which will allow time for existing ADR providers to adapt to the new system and obtain the necessary accreditation. It is also expected that most ADR providers are already accredited under the existing, voluntary, regime and it is not envisaged that there will be many ADR providers which do not obtain accreditation.

264. Restrictions on the ability of ADR providers to charge fees to consumers represent existing best practice (albeit not mandatory obligations) under the

2015 Regulations (see paragraph 6(a)(ii) of Schedule 3) and are designed to ensure that ADR is accessible to consumers as a means of inexpensively resolving disputes with traders without the difficulty and expense of court proceedings. Requirements on ADR providers to pay fees for their accreditation fall within the ability of the state to enforce laws considered necessary to ensure the payment of contributions within the second paragraph of A1P1 and ensure the functioning of the regulatory system.

265. It is for these reasons that the Government considers that the provisions of Part 4 of the Bill are compatible with A1P1.

Part 5 – Miscellaneous

266. The following provisions are considered to engage and/or interfere with the right to peaceful enjoyment of possessions under A1P1:
    a. Provision of investigative assistance to overseas regulators (clauses 317 to 323);
    b. Disclosing information overseas (clause 324).

267. Provision of investigative assistance to overseas regulators and disclosing information overseas: valuable confidential commercial information can constitute a possession within the meaning of A1P1 (*Veolia Es Nottinghamshire Ltd v Nottinghamshire County Council* [2010] EWCA Civ 1214 [121]). The collection of confidential commercial information by a public authority when using the investigative powers on behalf of an overseas authority and the disclosure of confidential commercial information by a public authority pursuant to Part 9 EA02 potentially constitute an interference with the right to private property protected by A1P1.

    The provisions are considered to be compatible with A1P1 for the following reasons:

268. The investigative powers which can be used to assist overseas regulators are either already set out in statute (in the case of competition and consumer legislation) or are in the Part of the Bill establishing the digital markets regime. The framework for the use of the powers to assist overseas regulators is also set out in the Bill. The revised information disclosure gateways are to be inserted in Part 9 EA02 to replace the existing section 243 overseas disclosure gateway. The relevant criteria for the use of the information gathering and

disclosure powers (i.e. the purposes for which they can be exercised, the considerations that must be taken into account, safeguards etc.) are set out clearly in each case so that the basis on which the powers can be exercised will be foreseeable.

269. The Government considers that any interference with A1P1 would be in the public interest. The measures are designed to facilitate the CMA and other authorities in cooperating with overseas competition and consumer authorities in order to address competition and consumer harms affecting both UK and overseas markets and consumers. By being able to offer assistance to overseas authorities, the UK authorities will potentially also be unlocking or facilitating the provision of reciprocal assistance from the overseas authorities with their own UK cases. The purposes for which the information gathering and disclosure powers are permitted to be exercised are concerned with protecting the economic well-being of the country and the rights of others and are considered to be legitimate aims.

270. Both proposals create safeguards intended to ensure their proportionality. As far as the investigative assistance measures are concerned, all existing procedural safeguards which apply to the use of the information gathering powers for domestic purposes will also apply to the use of the powers on behalf of an overseas regulator, including requirements for warrants in particular cases. In addition, in deciding whether to accept a request for assistance, the UK authority will have to have regard to whether the matter in respect of which the assistance is sought is sufficiently serious to justify collecting the information.

271. In the same vein, it will not be possible for a UK authority to use its investigatory powers, where reasonable grounds to suspect a breach of the law are required as precondition of their use in the UK, unless the overseas regulator can provide a certificate to the effect that there are such grounds to suspect a breach of the equivalent overseas law. This should ensure proportionality and prevent use of the powers for the purposes of mere “fishing expeditions”.

272. In addition, the UK authorities concerned will be bound to comply with their obligations under relevant data protection legislation, which provides further protection and safeguarding as regards the proportionality of the exercise of these powers. Disclosure of information collected will also be subject to the protections and restrictions set out in Part 9 EA02 and whether disclosure of

the relevant information overseas would be possible under Part 9 is one of the considerations which the UK authority has to take into account before deciding to accept a request for assistance in the first place. Disclosing information in a manner which breaches Part 9 is a criminal offence.

273. Finally, requests for investigative assistance are subject to appropriate levels of oversight from the Secretary of State. They must either be made under and in accordance with a government-to-government international cooperation agreement to which the UK is a party or be authorised by the Secretary of State. In deciding whether to authorise a request, the Secretary of State has to have regard to whether accepting would be in the public interest and to whether it would be more appropriate in terms of jurisdiction for the relevant investigation to be solely a domestic one or one carried out in a different country from that making the request.

274. As far as disclosure overseas is concerned, the provisions replacing the existing gateway in s.243 EA02 contain safeguards, many of these taken from the existing gateway. Before making an overseas disclosure the authority in question must, in particular, consider whether the law and procedures of the country or territory to whose authority the disclosure would be made provides (a) protection against self-incrimination in criminal proceedings which corresponds to the protection provided in the UK and (b) protection as regards the storage and disclosure of the information which corresponds to the protection provided in the UK. Where disclosure is solely for the purposes of the overseas authority's functions, the disclosing authority must also consider whether the matter in respect of which the disclosure is sought is sufficiently serious. As far as disclosure under designated cooperation arrangements is concerned, before approving an arrangement for the purposes of the gateway, the Secretary of State must be satisfied similarly that the arrangement offers adequate protection against self-incrimination and as regards confidentiality.

275. The overseas disclosure provisions also include restrictions on the power of the overseas regulator to use the information disclosed for a purpose other than that for which it was provided or to disclose it further, without the consent of the disclosing authority. Any use has to be for the purposes of the competition, digital markets and consumer and related functions specified in the gateway. The Secretary of State must also have regard to whether these kinds of protections exist in a cooperation arrangement/agreement before designating it.

276. The existing protections in s.244 EA02 are also maintained. As a result, the disclosing authority will have to have regard to the need to exclude from disclosure commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates or information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests (s.244(3)). Any disclosure of such information must be necessary for the purpose for which the authority is permitted to make the disclosure (s.244(4)).

22 November 2023

Glossary

Acronym	Full reference
A1P1	Article 1 of Protocol 1 ECHR
ADR	Alternative Dispute Resolution
AEC	Adverse effect on competition
CA98	Competition Act 1998
CAT	Competition Appeals Tribunal
CJPA01	Criminal Justice and Police Act 2001
CMA	Competition and Markets Authority
CPUTRs	The Consumer Protection from Unfair Trading Regulations 2008
CRA15	Consumer Rights Act 2015
CCRs	Contracts (Information, Cancellation and Additional Charges) Regulations 2013
DMU	Digital Market Unit (administrative part of the CMA handling digital markets regime work)
EA02	Enterprise Act 2002
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ERRA	Enterprise and Regulatory Reform Act 2013
HRA98	Human Rights Act 1998
PCIs	Pro-competitive interventions
SA20	Sentencing Act 2020
SOCPA	Serious Organised Crime and Police Act 2005
SMS	Strategic Market Status