

# CIRCLE/BMI UNDERTAKINGS REVIEW

Revised provisional decision

02 April 2024

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The Competition and Markets Authority has excluded from this published version of the revised provisional decision information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets. Non-sensitive wording is also indicated in square brackets.

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# SUMMARY

1. In June 2020 the Competition and Markets Authority (the **CMA**) accepted undertakings from Circle Health Holdings Limited (**Circle**) in lieu of referring its acquisition of BMI Healthcare Limited (**BMI**) to an in-depth 'Phase II' investigation. The undertakings required Circle to divest hospital sites in Bath and Birmingham to address the competition concerns the CMA identified with the acquisition. These undertakings were accepted during the 2020 COVID pandemic, an event that had a significant effect on healthcare services in the UK, in particular, in relation to lengthy waiting lists. The challenges associated with the pandemic resulted in significant delays in the implementation of the undertakings.
2. Circle successfully divested the Bath site in June 2021 but was unable to find a buyer for the Birmingham site. On 23 June 2021, it asked the CMA to accept revised undertakings requiring Circle to divest an alternative hospital site in Edgbaston. On November 2021, the CMA made an initial provisional decision, which it consulted on between 10 to 24 December 2021. Following that consultation, and further submissions of evidence from Circle and other relevant parties, the CMA has now revised that provisional decision.
3. The CMA has now provisionally found that there has been a change of circumstances as a result of which Circle's undertaking to divest the Birmingham site is no longer appropriate to deal with the relevant competition concerns the CMA identified. Having considered the responses to the consultation conducted in 2021 and further evidence provided by relevant parties, the CMA has provisionally found that divestment of the Edgbaston site would instead resolve those competition concerns in a clear-cut manner.
4. The CMA has now provisionally decided to accept revised UILs to give effect to the divestiture of the Edgbaston site instead of the Birmingham site. In this regard, the CMA has provisionally approved Practice Plus Group (**PPG**) as an upfront buyer of the Edgbaston site. Implementation would occur by the CMA accepting Circle's variation request submitted in June 2021.
5. The CMA now seeks views on the text of the revised undertakings, published alongside this decision.<sup>1</sup> Any representations must be made by 16 April 2024 in writing to Marta Freire ([marta.freire@cma.gov.uk](mailto:marta.freire@cma.gov.uk)).

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<sup>1</sup> Please visit the [Circle/BMI review of undertakings case page](#).

# FINDINGS

## 1. CONTEXT

- 1.1 On 8 January 2020, Circle acquired all the issued share capital of GHG Healthcare Holdings Limited, the indirect parent company of BMI (the **Merger**).
- 1.2 On 8 April 2020, the CMA decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in relation to the supply of private hospital medical services in Birmingham (the **SLC Decision**)<sup>2</sup>.<sup>3</sup>
- 1.3 On 23 June 2020, the CMA accepted undertakings in lieu of a reference under section 73(2) of the Act (the **UILs**)<sup>4</sup>, under which Circle agreed to divest Circle Birmingham Limited, operator of Circle Birmingham Hospital (**Circle Birmingham**), to a purchaser approved by the CMA within a defined period.<sup>5</sup>
- 1.4 However, despite running a divestment process Circle received no formal offers for Circle Birmingham. On 21 June 2021, Circle requested that the CMA vary the UILs to allow divestment of BMI's hospital in Edgbaston (**BMI Edgbaston**) instead of Circle Birmingham.<sup>6</sup>

### Scope and process for varying the UILs

- 1.5 Under section 73(5)(b) of the Act, an undertaking accepted in lieu of a reference '*may be varied or superseded by another undertaking*'. Alternatively, it may be released by the CMA under section 73(5)(c).
- 1.6 Under section 92(2)(b) of the Act, the CMA has a duty to keep undertakings under review and consider, from time to time, whether '*by reason of any change of circumstances, an enforcement undertaking is no longer appropriate*'<sup>7</sup> and whether it needs to be '*varied or superseded by a new enforcement undertaking*'.

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<sup>2</sup> The [SLC Decision](#).

<sup>3</sup> This revised provisional decision focuses on the SLC found in Birmingham as the sole remaining competition concern identified with the Merger. The SLC found in Bath has been addressed by divestment of Circle's Bath site.

<sup>4</sup> The [UILs](#).

<sup>5</sup> The UILs did not include the Circle Rehabilitation Centre which was scheduled to open on the same site as Circle Birmingham, but operated by a different subsidiary (Circle Rehabilitation Services Limited) under a sub-underlease with Circle Birmingham Limited.

<sup>6</sup> The proposal is for divestment of BMI Edgbaston to be a disposal of assets as it sits within BMI as a corporate entity and is not itself incorporated.

<sup>7</sup> Section 89(2) of the Act clarifies that the term '*enforcement undertaking*' includes an undertaking in lieu of a reference accepted under section 73 of the Act.

- 1.7 What constitutes a change of circumstances will vary from case to case. The CMA's published guidance on varying undertakings explains that the change of circumstances must be such that the undertaking is no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy. Examples of circumstances that have led to variation or termination in the past include where undertakings have become clearly obsolete or been affected by new legislation or changes in market conditions.<sup>8</sup>
- 1.8 The CMA has a statutory duty when accepting undertakings in lieu to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC identified and any adverse effects resulting from it.<sup>9</sup> The CMA's published guidance on merger remedies explains that in order to accept undertakings in lieu of a reference, the CMA must be confident that all of the potential competition concerns that have been identified in the SLC Decision would be resolved by means of the undertakings without the need for further investigation. The need for confidence reflects the fact that, once undertakings in lieu of a reference have been accepted, section 74(1) of the Act precludes a reference after that point. Such undertakings are therefore appropriate only where the remedies proposed to address any competition concerns raised by the Merger are clear cut. Further, those remedies must be capable of ready implementation.<sup>10</sup>
- 1.9 In deciding whether to accept revised undertakings in this case, the CMA will therefore consider whether:
- (a) There has been a change of circumstances as a result of which the UILs are no longer appropriate to deal with the competition concerns in the SLC Decision; and
  - (b) Any variation to the UILs resolves those competition concerns in a clear-cut manner.
- 1.10 Unless the CMA varies or releases the UILs, they remain in force and where they are not fulfilled the CMA has power to make an order under section 75 of the Act to ensure that the competition concerns in the SLC Decision are resolved. Any such order would not be limited to enforcing the terms of the UILs.<sup>11</sup> If necessary, the CMA may bring civil proceedings to enforce the UILs and/or any order.<sup>12</sup>

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<sup>8</sup> [Guidance on the variation and termination of undertakings \(CMA11\)](#) Paragraphs 2.4 to 2.6.

<sup>9</sup> Section 73(3) of the Act.

<sup>10</sup> Paragraph 3.27 of the CMA's [Guidance on merger remedies \(CMA87\)](#), December 2018, paragraph 3.27.

<sup>11</sup> See, for example, section 75(5)(b) of the Act.

<sup>12</sup> Section 94(6) of the Act.

## The CMA's initial provisional decision

- 1.11 On 26 November 2021, the CMA issued its initial provisional decision on Circle's request to vary the UILs.<sup>13</sup> The CMA provisionally found that:
- (a) There had not been a change of circumstances relating to the market conditions that led to the SLC. In particular, the two factors cited by Circle in this regard – the impact of the COVID-19 pandemic (the **pandemic**) and the entry of HCA Healthcare UK (**HCA**) – were taken into account in the SLC Decision.
  - (b) However, there had been a change of circumstances relating to whether the UILs were an effective remedy to the SLC and therefore remained appropriate: [redacted] were not known to the CMA at the time it accepted the UILs, and those costs had since increased. As a result, Circle had been unable to find a purchaser for Circle Birmingham, despite [redacted].
  - (c) The divestment of BMI Edgbaston would not resolve the competition concerns in the SLC Decision in a clear-cut manner, and in any event faced material practical issues with implementation.
  - (d) Instead, the UILs could be revised either to:
    - (i) require divestment of Circle Birmingham with greater flexibility on Circle's part (for example, through [redacted]); or
    - (ii) allow a divestment of BMI Priory instead of Circle Birmingham.
- 1.12 The CMA consulted on the initial provisional decision between 10 and 24 December 2021 (see paragraphs 3.5 to 3.6).

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<sup>13</sup> The initial [provisional decision](#).



## 2. REVISED PROVISIONAL DECISION

### Change of circumstances

2.1 The CMA has not changed its view on the change of circumstances. It continues provisionally to find that:

(a) there has not been a change of circumstances relating to the market conditions that led to the SLC;

(b) however, there has been a change of circumstances relating to whether the UILs are an effective remedy to the SLC and therefore remain appropriate.

2.2 In relation to market conditions, the CMA does not accept Circle's arguments that there has been a change of circumstances that means the SLC should be revisited.<sup>14</sup>

2.3 Both factors cited by Circle – the impact of the pandemic<sup>15</sup> and the entry of HCA<sup>16</sup> – were factored into the SLC Decision.<sup>17</sup> HCA has recently entered the Birmingham market in early 2024, significantly later than expected at the time of the CMA's original SLC Decision.<sup>18</sup> The CMA's view is that this entry to the Birmingham market is a welcome development but does not impact the SLC Decision. As noted, this entry was anticipated in the SLC Decision, but given the entry is very recent, the CMA considers that it will take a significant period of time for HCA's impact on the Birmingham market to be known. For example, the CMA considers that the HCA Birmingham hospital will require time to build up its services, reputation and financial stability significantly for its impact on the market to be considered.

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<sup>14</sup> Circle submitted that since the SLC Decision, the pandemic had led to BMI Priory becoming more specialised in high acuity work, substantially reducing the overlap in the parties' activities from three sites (Circle Birmingham, BMI Edgbaston and BMI Priory) to two (Circle Birmingham and BMI Edgbaston). Circle also submitted that this increased the extent to which BMI Priory would compete with HCA, whose entry Circle submitted was now both timely and sufficient.

<sup>15</sup> In its competitive assessment of the Merger, the CMA took into account the fact that private hospitals had effectively put their entire capacity temporarily under the control of the NHS to deal with the pandemic, which might delay the planned opening of Circle's and HCA's hospitals in Birmingham. In particular, the CMA considered that an agreement under which private hospital operators (including Circle and BMI) temporarily allocated their hospital capacity to the NHS was unlikely to impact the long-term competitive dynamics of the private healthcare industry. [SLC Decision](#), paragraphs 9, 21, 56-57 202.

<sup>16</sup> Given the earlier stage of development of HCA's hospital and the uncertainty of its impact on competition in Birmingham, the CMA on a cautious basis assessed HCA's potential entry as part of its competitive assessment of the Merger rather than as part of the counterfactual. Although HCA's entry was likely, the CMA found that it was not timely and sufficient to prevent the realistic prospect of an SLC. [SLC Decision](#), paragraphs 24-25, 55 and 266-316.

<sup>17</sup> The CMA also took into account the impact of the pandemic in its assessment of the UILs. In particular, the CMA took into account that Circle Birmingham was not operational and that during the pandemic it would be hard to operationalise. The CMA therefore accepted undertakings that required Circle to take steps to make the hospital sale-ready; extended the divestiture period; and required no upfront buyer. The CMA accepted these conditions as it had become clear that the impact of the pandemic was likely to be long-lasting as the NHS continued to deal with the pandemic and addressed the backlog caused by cancelled services since the beginning of the crisis. [UIL acceptance decision](#), paragraph 13.

<sup>18</sup> [The Harborne Hospital | Leading Private Healthcare in Birmingham | HCA UK \(hcahealthcare.co.uk\)](#)

- 2.4 In addition, the CMA is aware that [redacted]. On this basis, and because the SLC was not time limited, the CMA remains of the view that the SLC should not be revised.
- 2.5 In relation to Circle Birmingham, the CMA remains of the view that [redacted], since the CMA accepted the UILs constitute a change of circumstances that means divestment of Circle Birmingham in the manner provided for in the UILs is no longer an appropriate remedy to the SLC.

## **Addressing the change of circumstances**

- 2.6 Since the close of the consultation, the CMA has carefully considered the responses and engaged further with Circle and other stakeholders. In addition, Circle launched another sales process on more favourable terms, still yielding no bids for Circle Birmingham. As a result, the CMA has revised its assessment of the appropriate way to address the change of circumstances. The CMA has provisionally decided that divestment of BMI Edgbaston would resolve the competition concerns in the SLC Decision in a clear-cut manner and is capable of ready implementation.
- 2.7 A result of the consultation it has become clear that divestment of BMI Priory is not an appropriate or practicable remedy. Consultation responses emphasised that BMI Priory focuses on high-acuity medical care, which is not an area of focus for either BMI Edgbaston or Circle Birmingham. While the three sites do overlap to some extent, divesting BMI Priory alone would not resolve the SLC. One clinical respondent also emphasised that any disruption to the service of BMI Priory could have significant adverse consequences for the patient population of Birmingham, given the reliance of NHS University Hospital Birmingham on BMI Priory for support with complex care.<sup>19</sup>
- 2.8 The remaining SLC options for addressing the SLC are therefore:
- (a) Continuing with divestment of Circle Birmingham on even more flexible terms; or
  - (b) Divestment of BMI Edgbaston instead of Circle Birmingham.
- 2.9 In addition to Circle, the majority view of respondents to the CMA's consultation who expressed a preference was that divestment of BMI Edgbaston would be preferable to continuing with Circle Birmingham:
- (a) A third-party proposed divestment of BMI Edgbaston as an effective remedy to the SLC. This third party submitted that this would allow the continued and uninterrupted operation of BMI Priory, along with the supporting rehabilitation

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<sup>19</sup> Response of [redacted] dated 22 December 2021.

services of Circle Birmingham, as a viable alternative to the proposed scale of HCA's hospital.<sup>20</sup>

- (b) Another third party also proposed divestment of BMI Edgbaston as '*the better option*'. This third party submitted that from a clinical perspective one provider should remain in control of both Circle Birmingham and BMI Priory.<sup>21</sup>

2.10 On further consideration and having engaged further with Circle to discuss the concerns identified in its initial provisional decision, the CMA's view is that divestment of BMI Edgbaston is both an effective remedy and more capable of ready implementation than continuing with divestment of Circle Birmingham. The following section sets out the CMA's assessment.

## Addressing the SLC

### Effectiveness

- 2.11 Circle Birmingham and BMI Edgbaston are broadly equivalent on a number of measures (bed numbers, theatre capacity, services offered and location). In fact, BMI Edgbaston has higher bed capacity than Circle Birmingham. Whereas Circle Birmingham has 35 registered beds, BMI Edgbaston has 36 and capacity for 11 more in an area currently configured for use as an office space.
- 2.12 The key factor in the CMA's initial view that divestment of BMI Edgbaston would not be a clear-cut remedy to the SLC was the difference in revenue expectations between BMI Edgbaston and Circle Birmingham which suggested that BMI Edgbaston was not a close substitute for Circle Birmingham.
- 2.13 The CMA initially considered that the lower revenues of BMI Edgbaston compared to the projected revenues of Circle Birmingham (once operational) indicated that BMI Edgbaston would not be an effective competitive constraint on the Merger parties' combined offering of Circle Birmingham and BMI Priory. The total revenues included in the SLC Decision showed that Circle Birmingham was expected to have more than [X] the revenues of BMI Edgbaston.<sup>22</sup>
- 2.14 However, after publication of the original Provisional Decision Circle submitted that BMI Edgbaston's historic turnover was not representative of its capacity to pose an effective constraint on the Merger parties under an independent owner.<sup>23</sup>
- 2.15 First, Circle submitted that the comparatively lower revenues were not an indication that the site was intrinsically less competitive but a result of BMI's

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<sup>20</sup> [X].

<sup>21</sup> [X].

<sup>22</sup> [SLC Decision](#), table 13, page 79.

<sup>23</sup> Circle response to the CMA's provisional Decision on the review of the UILs, 24 December 2021, paragraph 4.9 – 4.14, page 7 – 9.

historic operational choices, in particular its comparatively greater focus on the high-acuity (and therefore high-revenue) BMI Priory and its decision to operate the Edgbaston site jointly with the Priory site. An independent owner that could focus on BMI Edgbaston would be expected to run the site more efficiently and to generate higher revenue, comparable to that achieved at similar BMI sites elsewhere in the country and to that predicted to be achieved at Circle Birmingham.<sup>24</sup>

2.16 Secondly, Circle submitted that [redacted] Circle Birmingham's projected revenues and BMI Edgbaston's actual revenues [redacted] than assumed at the time of the SLC Decision:<sup>25</sup>

(a) Circle provided updated forecasts showing that Circle Birmingham was expected to generate turnover of around £[redacted] per year ([redacted] forecast at the time of the SLC Decision).

(b) While BMI Edgbaston's latest annual revenue was £[redacted], Circle provided information to support its submission that under an independent owner the site would be capable of generating annual revenue of around £[redacted], comparable to that achieved at similar sites.<sup>26</sup>

2.17 The CMA has also taken into account that the revenues for Circle Birmingham forecast at the time of the SLC decision in 2020 were necessarily uncertain as the site was not yet fully operational.

2.18 The CMA also scrutinised the business plans of PPG, which forecasts business to exceed the past performance of Edgbaston under BMIs stewardship.

2.19 The CMA therefore provisionally finds that BMI Edgbaston is a sufficiently close substitute for Circle Birmingham that divestment of either would effectively resolve the SLC.

## Ready implementation

2.20 The practical concerns identified with divesting BMI Edgbaston in the CMA's initial provisional decision were that BMI Edgbaston relies on shared personnel with BMI Priory and a centralised shared service centre; and that as a much older facility than Circle Birmingham, it may also require refurbishment and upgrades to its equipment.

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<sup>24</sup> Circle response to the CMA's provisional Decision on the review of the UILs, 24 December 2021, paragraph 4.9, page 7 – 8.

<sup>25</sup> Circle response to the CMA's provisional Decision on the review of the UILs, 24 December 2021, paragraph 4.10

<sup>26</sup> Circle response to the CMA's provisional Decision on the review of the UILs, 24 December 2021, paragraph 4.13-17, page 8 - 9.

- 2.21 Circle observed that the issue of shared personnel and services applied equally to Circle Birmingham and to BMI Priory (as well as to its hospital in Bath, which Circle successfully divested).<sup>27</sup> These are therefore neutral factors.
- 2.22 In relation to the age of BMI Edgbaston’s site and equipment, Circle submitted that the cost of any refurbishment or upgrades would be negligible in the context of the greater revenue potential of the site, and that the need for any such expenditure would depend on the requirements of the purchaser and could be taken into account in the sale negotiations. Circle further submitted that there were no relevant physical limitations to the site that would prevent a new purchaser from installing new equipment.<sup>28</sup> The CMA is also satisfied that the prospective purchaser has a credible plan to recruit personnel.
- 2.23 In addition, Circle confirmed its willingness to provide a transitional services agreement (**TSA**) on terms approved by the CMA to assist any purchaser of BMI Edgbaston.
- 2.24 The CMA is therefore satisfied that these practical issues are not a bar to ready implementation of the divestment.
- 2.25 The CMA has also taken into account the failure to find a buyer for Circle Birmingham despite it being offered for a [redacted] and [redacted] failed divestment processes [redacted] lasting several months.
- 2.26 The key factor making the divestment of Circle Birmingham impracticable is its comparatively [redacted]. [redacted].
- 2.27 Although the CMA’s initial view was that divestment of Circle Birmingham might nonetheless be achievable if Circle made [redacted], the CMA no longer holds this view based on responses to our consultation and further failed attempts by Circle to sell Circle Birmingham.
- 2.28 As a result, the CMA no longer considers that the remedy option of divesting Circle Birmingham is capable of ready implementation.
- 2.29 The CMA has considered whether the divestiture of BMI Edgbaston would be capable of ready implementation.
- 2.30 There is a willing purchaser for BMI Edgbaston. Circle has entered into an Asset Purchase Agreement for the sale of BMI Edgbaston (the **APA**) with an upfront buyer before the CMA finally accepts revised undertakings. The APA will be

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<sup>27</sup> Circle response to the CMA’s provisional Decision on the review of the UILs, 24 December 2021, paragraph 4.22 – 4.29, page 10-11.

<sup>28</sup> Circle response to the CMA’s provisional Decision on the review of the UILs, 24 December 2021, paragraph 4.32 – 4.34, page 11-12.

conditional on acceptance by the CMA of the revised undertakings, including approval of PPG as the buyer of BMI Edgbaston.

- 2.31 As part of the CMA's assessment of PPG the CMA required PPG to respond in writing to a detailed questionnaire, provide supporting materials and attend an interview. As part of this the CMA scrutinised PPG's business plans for the Edgbaston hospital, its financial forecasts for the site and the current operating performance of its healthcare division in the UK.
- 2.32 The CMA is satisfied that PPG is independent of the Merger parties; has the necessary capability to compete; is committed to competing in the relevant market; and that divestment to PPG will not create further competition concerns:<sup>29</sup>
- (a) the sale of BMI Edgbaston to PPG would remedy, mitigate or prevent the SLC, and adverse effect resulting from them, achieving as comprehensive a solution as is reasonable and practicable for the SLC.
  - (b) The evidence available to the CMA indicates that PPG is independent and does not appear to have any significant connection to Circle that may compromise its incentives to compete with Circle if it were to acquire the BMI Edgbaston.
  - (c) The evidence available to the CMA indicates that PPG has the appropriate financial resources, expertise (including managerial, operational and technical capability) and assets, and incentive needed to maintain and develop BMI Edgbaston as viable and active competitive business in competition with Circle and other competitors on an ongoing basis.
  - (d) The evidence available to the CMA indicates that the acquisition of BMI Edgbaston by PPG should not create a realistic prospect of further competition concerns.
- 2.33 The CMA therefore currently considers PPG as a suitable purchaser of BMI Edgbaston.
- 2.34 The CMA's view is that a divestment of BMI Edgbaston will remove the prolonged uncertainty that has affected the private healthcare sector in Birmingham since the Merger took place and establish a viable independent competitor immediately.

### **Provisional conclusion**

- 2.35 Taking all of the above factors into account, the CMA provisionally finds that, subject to responses to the consultation required by Schedule 10 of the Act, divestment of BMI Edgbaston to PPG is appropriate to remedy, mitigate or prevent

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<sup>29</sup> CMA [Merger remedies guidance](#) (CMA87), paragraphs 4.39 and 5.21.

the relevant competition concerns identified in the SLC Decision and would achieve as comprehensive a solution as is reasonable and practicable to those concerns.

### 3. NEXT STEPS

- 3.1 Circle has submitted revised undertakings to implement the divestment of BMI Edgbaston (the Revised Undertakings). By this revised provisional decision the CMA gives notice under paragraph 2(1) of Schedule 10 to the Act that it proposes to accept the revised UILs. For more details, see the CMA's Decision that the Revised Undertakings might be accepted and the Consultation Notice in the case page.
- 3.2 Any representations must be made in writing by 16 April 2024 to Marta Freire ([marta.freire@cma.gov.uk](mailto:marta.freire@cma.gov.uk)).
- 3.3 Having considered all responses, the CMA will then decide whether to finally accept the Revised Undertakings in their current form or whether any modification is required. If the CMA considers that material modifications are required before finally accepting the Revised Undertakings, it will conduct a further consultation on those modifications.<sup>30</sup>

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<sup>30</sup> Under paragraph 2(4) of Schedule 10 to the Act.