

SCHEDULES

SCHEDULE 9

Section 138

FINAL UNDERTAKINGS AND ORDERS: POWER TO CONDUCT TRIALS

- 1 Part 4 of EA 2002 (market studies and market investigations) is amended as follows.
- 2 (1) Section 133A (functions to be exercised by CMA groups) is amended as follows.
- (2) In subsection (1)—
- (a) in paragraph (a), for “138B” substitute “137”;
- (b) after that paragraph insert—
- “(aa) sections 138 to 138B so far as relating to an adverse effect on competition in respect of which the CMA is required to take action in accordance with section 138(2) within the period permitted by section 138A(1);”;
- (c) after paragraph (f) insert—
- “(fa) [section 161C](#);”.
- (3) In subsection (2), after paragraph (c) insert—
- “(ca) [section 162B](#);”.
- 3 (1) Section 138A (time-limits for discharging duty under section 138) is amended as follows.
- (2) Before subsection (1) insert—
- “(A1) [Subsection \(A3\)](#) applies in relation to an adverse effect on competition in respect of which the CMA—
- (a) has begun an implementation trial under [section 161C](#), or
- (b) considers that it is not reasonably practicable to discharge its duty under section 138(2) in accordance with subsection (1) as a result of such an implementation trial in respect of another adverse effect on competition.
- (A2) Subsection (1) applies in relation to any other adverse effect on competition.
- (A3) Where this subsection applies, the CMA must discharge its duty under section 138(2) before the day specified under [section 161D\(5\)\(b\)\(ii\)](#).”
- (3) In subsection (1), at the beginning insert “Where this subsection applies,”.
- (4) In subsection (2), after “discharged” insert “in accordance with subsection (1)”.
- 4 After [section 161A](#) (acceptance of enforcement undertakings: Part 4) (inserted by [paragraph 16](#) of [Schedule 11](#)) insert—

“Implementation trials of final orders and undertakings

161B Implementation trials: purpose and interpretation

- (1) This section and [sections 161C to 161E](#) make provision in relation to the acceptance of undertakings and making of orders by a relevant authority on a trial basis for the purpose of assessing the effectiveness of qualifying remedial action (and the acceptance of undertakings and making of orders on that basis is referred to in this Part as an “implementation trial”).
- (2) In this section and in [sections 161C to 161E](#) “relevant authority” means the CMA or the Secretary of State.
- (3) In this Part—
 - “implementation trial measure” means an undertaking accepted, or order made, under [section 161C](#) (and references to the imposition of such a measure are to be read as the acceptance of an undertaking or the making of an order, as the case may be);
 - “implementation trial period” means, in relation to an implementation trial measure, the period—
 - (a) beginning with the day on which the relevant authority begins the implementation trial, and
 - (b) ending with the last day on which the implementation trial measure is to have effect (see [subsections \(4\) and \(5\)](#));
 - “qualifying remedial action” means remedial action in respect of—
 - (a) a matter concerning the provision or publication of information to consumers (whether directly or through an intermediary), or
 - (b) any other matter specified in regulations made by the Secretary of State;
 - “relevant adverse effect” means—
 - (a) where the relevant authority is the CMA, an adverse effect on competition identified in the report mentioned in [section 138\(1\)](#);
 - (b) where the relevant authority is the Secretary of State—
 - (i) an adverse effect on competition identified in the report mentioned in [section 146\(1\)](#);
 - (ii) an effect adverse to the public interest identified in the report mentioned in [section 146A\(1\)](#);
 - “remedial action” means an action—
 - (a) where the relevant authority is the CMA, to be taken in accordance with [section 138\(2\)](#) or [section 162A\(5\)](#);
 - (b) where the relevant authority is the Secretary of State, to be taken in accordance with [section 147\(2\)](#) or [147A\(2\)](#) (as the case may be).
- (4) The last day on which an implementation trial measure is to have effect is the earlier of—
 - (a) the day specified under [section 161D\(5\)\(b\)\(ii\)](#), and

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- (b) the day on which action is taken under section 138(2), 147(2) or 147A(2) (as the case may be) in relation to the relevant adverse effect which the relevant authority considers concerns the same qualifying matter.
- (5) But where—
- (a) an implementation trial measure is imposed in accordance with this section, and
 - (b) the CMA extends, under section 138A(3), the period within which its duty under section 138(2) is required to be discharged in accordance with section 138A(A3) in relation to the measure,
- the last day on which the implementation trial measure is to have effect is the last day of that period as so extended.

161C Power to conduct implementation trials

- (1) The CMA may, in relation to a market investigation reference, begin an implementation trial where—
 - (a) subsection (2) of section 138 applies (see subsection (1) of that section), and
 - (b) the CMA has not taken, but is minded to take, qualifying remedial action.
- (2) The Secretary of State may, in relation to a restricted PI reference or a full PI reference, begin an implementation trial where—
 - (a) subsection (2) of section 147, or subsection (2) of 147A (as the case may be), applies (see subsection (1) of the section in question), and
 - (b) the Secretary of State has not taken, but is minded to take, qualifying remedial action.
- (3) Subsections (1) and (2) are subject to the duty to publish notices in section 161D.
- (4) The relevant authority begins an implementation trial by—
 - (a) accepting, from such persons as the relevant authority considers appropriate, undertakings under this section to take action specified or described in the undertakings, or
 - (b) making an order under this section,for the purposes of assessing, during the implementation trial period, the likely effectiveness of the qualifying remedial action.
- (5) Where the relevant authority begins an implementation trial, the relevant authority may also—
 - (a) accept, from such persons as the relevant authority considers appropriate, undertakings under this section to take action specified or described in the undertakings, or
 - (b) make an order under this section,in the circumstances mentioned in subsection (6).
- (6) The circumstances are that the relevant authority considers that accepting the undertakings or making the order would be likely to contribute to, or

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otherwise be of use for purposes of, remedying, mitigating or preventing, during the implementation trial period—

- (a) an adverse effect on competition identified in the report concerned or (as the case may be) an effect adverse to the public interest which has resulted from, or may be expected to result from, the features or combinations of features mentioned;
- (b) any detrimental effect on customers so far as it has resulted from, or may be expected to result from, any such adverse effect on competition.

161D Implementation trials: notices

- (1) Before the relevant authority begins an implementation trial under [section 161C\(4\)](#), the relevant authority must publish—
 - (a) a provisional implementation trial notice, and
 - (b) a final implementation trial notice (but see [subsection \(4\)](#)).
- (2) A provisional implementation trial notice must—
 - (a) specify each implementation trial measure the relevant authority is minded to impose for the purposes of the implementation trial;
 - (b) specify the relevant adverse effect with which each measure is seeking to deal;
 - (c) specify any other facts which the relevant authority considers justify the imposition of each measure;
 - (d) specify, in relation to each measure—
 - (i) how the relevant authority intends to assess the likely effect of the measure, and
 - (ii) the last day on which the relevant authority intends for the measure to have effect;
 - (e) invite the making of representations by the persons on which the relevant authority is minded to impose one or more implementation trial measure (“implementation trial participants”) about the matters set out in the notice;
 - (f) specify the means by which, and the time by which, such representations must be made.
- (3) The time specified under [subsection \(2\)\(f\)](#) by which representations must be made must be at least 15 days after the date on which the provisional implementation trial notice is published.
- (4) A relevant authority may publish a final implementation trial notice only where—
 - (a) the relevant authority has published a provisional implementation trial notice under [subsection \(1\)](#),
 - (b) the time for the implementation trial participants to make representations to the relevant authority in accordance with the notice has expired, and
 - (c) after considering such representations (if any), it appears to the relevant authority that it is appropriate to begin an implementation trial under [section 161C\(4\)](#).
- (5) A final implementation trial notice must specify—

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- (a) the implementation trial measures the relevant authority intends to impose for the purposes of the implementation trial,
- (b) in relation to each such measure—
 - (i) how the relevant authority intends to assess the likely effect of the measure, and
 - (ii) the last day on which the measure is to have effect.

161E Implementation trials: supplementary

- (1) The relevant authority may not accept an undertaking from a person under [section 161C](#) unless it has provided the person with information about the possible consequences of failing to comply with the undertaking.
- (2) The CMA may not begin an implementation trial under [section 161C\(4\)](#)—
 - (a) in respect of qualifying remedial action that would be taken in accordance with subsection (2) of section 138, after the end of the period within which the CMA would otherwise have been required to discharge its duty under that subsection;
 - (b) in respect of qualifying remedial action that would be taken in accordance with [section 162A\(5\)](#), after the end of the period mentioned in [section 162A\(6\)](#).
- (3) Subsections (3), (5) and (6) of section 138 apply to action taken by the CMA under [section 161C](#) as they apply to action taken by the CMA under section 138(2).
- (4) Subsections (3)(b), (4), (5) and (6) of section 147 apply to action taken by the Secretary of State under [section 161C](#) in relation to a restricted PI reference as they apply to action taken by the Secretary of State under section 147(2).
- (5) Subsections (3) and (4)(b) of section 147A apply to action taken by the Secretary of State under [section 161C](#) in relation to a full PI reference as they apply to action taken by the Secretary of State under section 147A(2).
- (6) Subsections (3) to (5) of section 159 apply to undertakings accepted under [section 161C](#) as they apply to undertakings accepted under section 159(1).
- (7) Subsections (3) and (4) of section 161 apply to orders made under [section 161C](#) as they apply to orders made under section 161(1).”

5 After section 162A (inserted by [section 139\(4\)](#)) insert—

“162B Power to vary etc undertakings and orders: implementation trials

- (1) This section applies in relation to implementation trial measures imposed in accordance with [section 161C](#).
- (2) The CMA must keep under review the effectiveness of the implementation trial measures.
- (3) The CMA must, in particular, from time to time consider—
 - (a) whether an implementation trial measure has been or is being complied with;

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- (b) whether an undertaking accepted under [section 161C](#) is no longer appropriate and—
 - (i) one or more of the parties to it can be released from it; or
 - (ii) it needs to be varied or to be superseded by a new undertaking under that section; and
 - (c) whether an order made under [section 161C](#) is no longer appropriate and needs to be varied or revoked.
- (4) The CMA must, within the implementation trial period, give the Secretary of State such advice as it considers appropriate in relation to—
 - (a) any possible variation or release by the Secretary of State of an undertaking accepted by the Secretary of State under [section 161C](#);
 - (b) any possible new undertaking to be accepted by the Secretary of State under that section so as to supersede another undertaking given to the Secretary of State under that section;
 - (c) any possible variation or revocation by the Secretary of State of an order made by the Secretary of State under that section;
 - (d) any possible undertaking to be accepted by the Secretary of State under that section instead of an order made under that section, or any possible order to be made by the Secretary of State under that section instead of an undertaking accepted under that section.
- (5) The relevant authority must, within the implementation trial period, take such action as it considers appropriate in relation to—
 - (a) any possible variation or release by the relevant authority of an undertaking accepted by it under [section 161C](#);
 - (b) any possible new undertaking to be accepted by the relevant authority under that section so as to supersede another undertaking given to it under that section;
 - (c) any possible variation or revocation by the relevant authority of an order made by it under that section;
 - (d) any possible undertaking to be accepted by the relevant authority under that section instead of an order made under that section, or any possible order to be made by the relevant authority under that section instead of an undertaking accepted under that section.
- (6) But the relevant authority may not do anything under this section that would result in—
 - (a) the implementation trial period being extended;
 - (b) an order or undertaking made under [section 161C](#) being out of compliance with any provision of that section.
- (7) In this section “relevant authority” has the meaning given by [section 161B\(2\)](#).
- (8) Subsections (3), (5) and (6) of section 138 apply to action taken by the CMA under this section as those subsections apply to action taken by the CMA under section 138(2).
- (9) Subsections (3)(b), (5) and (6) of section 147 apply to action taken by the Secretary of State under this section in respect of a restricted PI reference

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- as those subsections apply to action taken by the Secretary of State under section 147(2).
- (10) Subsection (3) of section 147A applies to action taken by the Secretary of State under this section in respect of a full PI reference as that subsection applies to action taken by the Secretary of State under section 147A(2).”
- 6 In section 165 (procedural requirements for certain undertakings and orders: Part 4)—
- (a) after “section 159” insert “or 161C”;
 - (b) for “or 161” substitute “, 161 or 161C”;
- 7 (1) Section 167 (rights to enforce undertakings and orders under Part 4) is amended as follows.
- (2) In subsection (1)—
- (a) the words from “any” to the end become paragraph (a);
 - (b) after that paragraph insert “;
(b) any undertaking accepted, or order made, under section 161C.”
- (3) In subsection (5), for “enforcement undertaking or enforcement order” substitute “undertaking or order to which this section applies”.
- (4) In subsection (6), for “enforcement undertaking or an enforcement order” substitute “undertaking or order to which this section applies”.
- (5) In subsection (9), for “enforcement undertaking or an enforcement order” substitute “undertaking or order to which this section applies”.
- 8 (1) **Section 167A** (enforcement of enforcement undertakings and orders: imposition of penalties) (inserted by **paragraph 18** of **Schedule 11**) is amended as follows.
- (2) In the heading, after “orders” insert “etc”.
- (3) In subsection (1)—
- (a) the words “an enforcement undertaking or enforcement order” become paragraph (a);
 - (b) after that paragraph insert “;
(b) any undertaking accepted, or order made, under section 161C.”
- 9 (1) In **section 167B** (penalties under **section 167A**: amount) (inserted by **paragraph 18** of **Schedule 11**), **subsection (5)(b)** is amended as follows.
- (2) The words “the enforcement undertaking or enforcement order” become sub-paragraph (i).
- (3) After that sub-paragraph insert “, or
(ii) the undertaking accepted, or order made, under section 161C.”
- 10 (1) In section 169 (certain duties of relevant authorities to consult: Part 4), in subsection (6), paragraph (a) of the definition of “relevant decision” is amended as follows.
- (2) Omit the “and” at the end of sub-paragraph (iii).

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- (3) after that sub-paragraph insert—
- “(iv) to accept undertakings or make orders under [section 161C](#);
and”.
- 11 In section 172 (further publicity requirements: Part 4), in subsection (2), after paragraph (zb) insert—
- “(zc) any decision made by it under section 138A(A1)(b) that it is not reasonably practicable for the CMA to discharge its duty under section 138(2) in accordance with section 138A(1);”