

SCHEDULES

SCHEDULE 10

CIVIL PENALTIES ETC IN CONNECTION WITH COMPETITION INVESTIGATIONS

PART 2

INVESTIGATIONS UNDER PART 3 OF EA 2002 (MERGERS)

- 14 In Part 3 of EA 2002 (mergers), Chapter 5 (supplementary: investigation powers) is amended as follows.
- 15 (1) Section 110 (enforcement of powers under section 109: general) is amended as follows.
- (2) In the heading, for “general” substitute “imposition of penalties”.
- (3) For subsection (1) substitute—
- “(1) The CMA may impose a penalty on a person in accordance with section 111 where the CMA considers that—
- (a) the person has, without reasonable excuse, failed to comply with any requirement of a notice under section 109;
 - (b) the person has, without reasonable excuse, obstructed or delayed another person in the exercise of the other person’s powers under section 109(6);
 - (c) the person has, without reasonable excuse, altered, suppressed or destroyed any document which the person has been required to produce by a notice under section 109.
- (1A) The appropriate authority may impose a penalty on a person in accordance with section 111 where the authority considers that—
- (a) the person has, without reasonable excuse, supplied information that is false or misleading in a material respect to the authority in connection with any of the authority’s functions under this Part;
 - (b) the person has, without reasonable excuse, supplied information that is false or misleading in a material respect to another person knowing that the information was to be used for the purpose of supplying information to the authority in connection with any function of the authority under this Part.
- (1B) In this section, and in sections 111 to 117, “the appropriate authority” means—
- (a) the CMA;
 - (b) the Secretary of State;
 - (c) OFCOM.

Status: This is the original version (as it was originally enacted).

- (1C) But the appropriate authority may not proceed against a person under this section in relation to an act or omission which constitutes an offence under section 116A or 117 if the person has, by reason of that act or omission, been found guilty of that offence.”
- (4) In subsection (2), for “subsection (1)” substitute “**subsection (1)(a)**”.
- (5) Omit subsections (3) to (8).
- (6) For subsection (9) substitute—
- “(9) In deciding whether and, if so, how to proceed under subsection (1) or (1A) or section 39(4) or 51(4) (including that enactment as applied by section 65(3))—
- (a) the CMA must have regard to the statement of policy which was most recently published under section 116 at the time when the act or omission concerned occurred;
- (b) OFCOM must have regard to the statement of policy which was most recently published under section 392 of the Communications Act 2003 (penalties imposed by OFCOM) at the time when the act or omission concerned occurred.”
- 16 (1) Section 110A (restriction on powers to impose penalties under section 110) is amended as follows.
- (2) In subsection (1)—
- (a) for “110(1) or (3)” substitute “110(1)(a) or (b)”;
- (b) for “4” substitute “ten”.
- (3) In subsection (2), for “the failure or (as the case may be) the obstruction or delay” substitute “the act or omission giving rise to the penalty”.
- 17 (1) Section 111 (penalties) is amended as follows.
- (2) In the heading, at the end insert “: amount”.
- (3) In subsection (1)—
- (a) for “(3)” substitute “(1A)”;
- (b) for “the CMA” substitute “the appropriate authority”.
- (4) In subsection (2) for “110(1)” substitute “110(1)(a)”.
- (5) In subsection (3), for “section 110(3)” substitute “any of section 110(1)(b), (c) or (1A)”.
- (6) In subsection (4)—
- (a) for the words before paragraph (a) substitute “A penalty imposed under section 110(1) or (1A) on a person who does not own or control an enterprise must not—”;
- (b) in paragraph (a), for “such amount as the Secretary of State may by order specify” substitute “£30,000”;
- (c) in paragraph (b), for “such amount per day as the Secretary of State may so specify” substitute “£15,000 per day”;
- (d) in paragraph (c) omit “as the Secretary of State may so specify”.

Status: This is the original version (as it was originally enacted).

(7) After subsection (4) insert—

“(4A) A penalty imposed under section 110(1) or (1A) on any other person must not—

- (a) in the case of a fixed amount, exceed 1% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person;
- (b) in the case of an amount calculated by reference to a daily rate, for each day exceed 5% of the total value of the daily turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person;
- (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed such fixed amount and such amount per day.”

(8) In subsection (5), in paragraph (a)—

- (a) for “notice under section 112” substitute “provisional penalty notice under section 112(A1)”;
- (b) in paragraph (b), in the words before sub-paragraph (i), for “the CMA” substitute “the appropriate authority”.

(9) Omit subsections (6) and (7).

(10) Before subsection (8) insert—

“(7A) The Secretary of State may by regulations amend subsection (4)(a) and (b) by substituting for either or both of the sums for the time being specified in those paragraphs such other sum or sums as the Secretary of State considers appropriate.”

(11) In subsection (8)—

- (a) for “an order under subsection (4) or (6)” substitute “regulations under subsection (7A)”;
- (b) after “the CMA” insert “, OFCOM”.

(12) After subsection (8) insert—

“(9) The Secretary of State may by regulations make provision for determining, for the purposes of this section—

- (a) when an enterprise is to be treated as being controlled by a person;
- (b) the turnover and daily turnover (both in and outside the United Kingdom) of an enterprise.

(10) Regulations under subsection (9)(b) may, in particular, make provision as to—

- (a) the amounts which are, or which are not, to be treated as comprising an enterprise’s turnover or daily turnover;
- (b) the date, or dates, by reference to which an enterprise’s turnover, or daily turnover, is to be determined.

(11) Regulations under subsection (9) may, in particular, make provision enabling the appropriate authority to determine matters of a description specified in the regulations (including any of the matters mentioned in paragraphs (a) and (b) of subsection (10)).”

- 18 (1) Section 112 (penalties: main procedural requirements) is amended as follows.
- (2) Before subsection (1) insert—
- “(A1) Before the appropriate authority imposes a penalty under section 110(1) or (1A), the authority must give the person concerned a provisional penalty notice.
- (A2) A provisional penalty notice must—
- (a) contain a draft of the final penalty notice the appropriate authority is minded to give to the person under subsection (1),
- (b) invite the making of representations by the person to the authority about the proposed final penalty notice, and
- (c) specify the means by which, and the time by which, such representations must be made.
- (A3) The appropriate authority must have regard to any representations received in accordance with a provisional penalty notice before imposing a penalty under section 110(1) or (1A) (and accordingly may not impose such a penalty before the time for the person concerned to make representations to the authority in accordance with that notice has expired).”
- (3) In subsection (1)—
- (a) for “(3)” substitute “(1A)”;
- (b) for “the CMA shall give notice of the penalty” substitute “the appropriate authority must give the person concerned a final penalty notice”.
- (4) In subsection (2)—
- (a) in the words before paragraph (a), after “The” insert “final penalty”;
- (b) in paragraph (a), for “the CMA” substitute “the appropriate authority”;
- (c) in paragraph (d), for “failure (or as the case may be) the obstruction or delay which the CMA” substitute “act or omission in question which the appropriate authority”;
- (d) in paragraph (e), for “the CMA” substitute “the appropriate authority”;
- (e) in paragraph (f), for “the CMA” substitute “the appropriate authority”.
- (5) In subsection (3), for “the CMA” substitute “the appropriate authority”.
- (6) After subsection (3) insert—
- “(3A) A provisional penalty notice is given by serving a copy of the notice on the person on whom the appropriate authority is minded to impose the penalty.”
- (7) In subsection (4), in the words before paragraph (a), for “notice under this section” substitute “final penalty notice”.
- 19 (1) Section 113 (payment and interest by instalments) is amended as follows.
- (2) In subsection (3), for “the CMA” substitute “the appropriate authority”.
- (3) In subsection (4), for “the CMA” substitute “the appropriate authority”.
- 20 (1) Section 114 (appeals in relation to penalties) is amended as follows.
- (2) In subsection (1), for “(3)” substitute “(1A)”

- (3) In subsection (4), in the words before paragraph (a), for “the CMA” substitute “the appropriate authority”.
- (4) In subsection (5), in paragraph (c), for “the CMA” substitute “the appropriate authority”.
- (5) After subsection (5) insert—
- “(5A) In the case of a penalty imposed on a person by the CMA or OFCOM, in considering what is appropriate for the purposes of subsection (5) the Competition Appeal Tribunal must have regard to the relevant guidance.”
- (6) In subsection (7), in paragraph (b), for “the CMA” substitute “the appropriate authority”.
- (7) In subsection (12)—
- (a) the words from ““the appropriate court”” to the end become paragraph (a);
- (b) after that paragraph insert—
- “(b) “the relevant guidance” means—
- (i) in the case of a penalty imposed on a person by the CMA, the statement of policy which was most recently published under section 116 at the time when the act or omission concerned occurred;
- (ii) in the case of a penalty imposed on a person by OFCOM, the statement of policy which was most recently published under section 392 of the Communications Act 2003 (penalties imposed by OFCOM) at the time when the act or omission concerned occurred.”
- 21 (1) Section 115 (recovery of penalties) is amended as follows.
- (2) In the words before paragraph (a), for “(3)” substitute “(1A)”.
- (3) In the words after paragraph (b), for “the CMA” in both places it occurs substitute “the appropriate authority”.
- 22 (1) Section 116 (statement of policy) is amended as follows.
- (2) For subsection (1) substitute—
- “(1) The CMA must prepare and publish a statement of policy in relation to—
- (a) the imposition of penalties under section 110, and
- (b) the enforcement of notices under section 109.”
- (3) In subsection (2), for “(3)” substitute “(1A)”.
- (4) In subsection (4), for “such” substitute “the Secretary of State and such other”.
- (5) After subsection (4) insert—
- “(5) A statement or revised statement of policy may not be published under this section without the approval of the Secretary of State.”
- 23 After section 116 insert—

“116A Intentional destruction etc of documents

- (1) A person (“P”) commits an offence if the person intentionally alters, suppresses or destroys any document which P has been required to produce by a notice under section 109.
 - (2) But P does not commit an offence under [subsection \(1\)](#) by reason of any act or omission if the CMA has proceeded against P under section 110(1) or [\(1A\)](#) in relation to that act or omission.
 - (3) A person who commits an offence under [subsection \(1\)](#) is liable—
 - (a) on summary conviction, to a fine not exceeding the statutory maximum;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.
 - (4) In this section—
 - (a) the reference to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form;
 - (b) the reference to suppressing a document includes a reference to destroying the means of reproducing information recorded otherwise than in legible form.”
- 24 (1) Section 117 (false or misleading information) is amended as follows.
- (2) In sub-paragraph (1), in paragraph (a) for “the CMA, OFCOM or the Secretary of State” substitute “the appropriate authority”.
 - (3) In sub-paragraph (2), in the words after paragraph (b), for “the CMA, OFCOM or the Secretary of State” substitute “the appropriate authority”.
 - (4) After subsection (2) insert—
 - “(2A) A person does not commit an offence under subsection (1) or (2) by reason of any act or omission if the appropriate authority has proceeded against the person under section 110(1) or [\(1A\)](#) in relation to that act or omission.”
- 25 In section 120 (review of decisions under Part 3), in subsection (2), in paragraph (a), for “(3)” substitute “[\(1A\)](#)”.