These notes refer to the Enterprise and Regulatory Reform Act 2013 (c.24) which received Royal Assent on 25 April 2013

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: the Competition and Markets Authority and Part 4: Competition Reform

Part 4: Competition Reform

Chapter 1: Mergers

Interim measures

Section 31: Interim measures: financial penalties: mergers

239. Section 31 inserts a new section 94A. It enables the CMA to impose a financial penalty on a person who, without a reasonable excuse, fails to comply with interim measures at either Phase 1 (section 72 of the EA 2002) or Phase 2 (section 80 and section 81 of the EA 2002). The level of the penalty is capped at 5% of the aggregate turnover of the enterprises owned or controlled by that person. The purpose is to incentivise compliance with the strengthened interim measures powers.

240. Subsection (3) of new section 94A enables the Secretary of State, by order, to determine when an enterprise is deemed to be controlled by a person, and to make provisions which calculate the turnover of an enterprise. This is often a complex matter and therefore this power provides for order(s) which will set out in detail how these calculations should be undertaken. The intention is to capture the aggregate worldwide turnover of all enterprises owned or controlled by the person who fails to comply with the measure.

241. The existing procedural requirements at section 112 of the EA 2002 will apply to these penalties. These include the CMA notifying the amount of the penalty, justification for it, and the date(s) by which it must be paid. This new penalty will apply alongside the existing civil enforcement mechanism for failure to comply with interim measures under section 94 of the EA 2002. As a result, a person could potentially be liable to damages under section 94 and a financial penalty under new section 94A.

242. Subsection (6) enables the Secretary of State, by order, to reduce the maximum level of the financial penalty to below 5% of turnover. This gives flexibility to amend the penalty in light of experience of how the deterrence is operating in practice. The financial penalty of 5% of the aggregate turnover could be potentially large in some cases and the Secretary of State will have the power to reduce this if that proves to be the case.

243. The CMA will be required by new section 94B to prepare and publish a statement of policy on how it will use its powers to impose financial penalties and how it will determine the level of penalty imposed.