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**Changes to legislation:** There are currently no known outstanding effects for the Enterprise and Regulatory Reform Act 2013, Cross Heading: Enforcement of investigation powers. (See end of Document for details)

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## SCHEDULES

### SCHEDULE 11

#### MARKETS: INVESTIGATION POWERS

##### *Enforcement of investigation powers*

1 After section 174 of the 2002 Act insert—

**“174A Enforcement of powers under section 174: general**

- (1) Where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice under section 174, it may impose a penalty in accordance with section 174D.
- (2) The CMA may proceed (whether at the same time or at different times) under subsection (1) and section 138A(3) in relation to the same failure.
- (3) Where the CMA considers that a person has intentionally obstructed or delayed another person in the exercise of its powers under section 174(7), it may impose a penalty in accordance with section 174D.
- (4) A person commits an offence if the person intentionally alters, suppresses or destroys any document which the person has been required to produce by a notice under section 174.
- (5) But a person does not commit an offence under subsection (4) in relation to any act which constitutes a failure to comply with a notice under section 174 if the CMA has proceeded against the person under subsection (1) in relation to that failure.
- (6) A person who commits an offence under subsection (4) 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 2 years or to a fine or to both.
- (7) The CMA shall not proceed against a person under subsection (1) in relation to an act which constitutes an offence under subsection (4) if that person has been found guilty of that offence.
- (8) In deciding whether and, if so, how to proceed under subsection (1) or (3) or section 138A(3), the CMA shall have regard to the statement of policy which was most recently published under section 174E at the time the failure or (as the case may be) the obstruction or delay concerned occurred.
- (9) In this section—

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- (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; and
- (b) the reference to suppressing a document includes a reference to destroying the means of reproducing information recorded otherwise than in legible form.

#### **174B Restriction on powers to impose penalties under section 174A**

- (1) No penalty shall be imposed by virtue of section 174A(1) or (3) if more than 4 weeks have passed since the day which is the relevant day in the case in question; but this subsection shall not apply in relation to any variation or substitution of the penalty which is permitted by virtue of this Part.
- (2) In the following provisions of this section, “the section 174 power” means the power under section 174 to which the failure or (as the case may be) the obstruction or delay in question relates.
- (3) Where the section 174 power is exercised for the purpose mentioned in section 174(1)(a), the relevant day is the day when the CMA finally concludes the carrying out of its section 5 functions.
- (4) Where the section 174 power is exercised in connection with an enforcement function (within the meaning of that section), the relevant day is the day when the enforcement undertaking concerned is superseded or released or (as the case may be) the enforcement order concerned is revoked.
- (5) Except where subsection (3) or (4) applies, the relevant day is the day determined in accordance with the following provisions of this section.
- (6) Where the section 174 power is exercised for the purpose mentioned in section 174(1)(b) in connection with a matter that is the subject of a possible reference under section 131, the relevant day is the day when the CMA finally decides whether to make the reference.
- (7) Where the section 174 power is exercised for the purpose mentioned in section 174(1)(b) in connection with a matter that is the subject of a reference under section 131 or 132, the relevant day is the day when the reference is finally determined (see section 183).
- (8) Where the section 174 power is exercised for the purpose mentioned in section 174(1)(c) in connection with a matter that is the subject of a possible reference under section 140A(5) or (6), the relevant day is the day when the Secretary of State makes the reference.
- (9) Where the section 174 power is exercised for the purpose mentioned in section 174(1)(c) in connection with a matter that is the subject of a reference under section 140A(6), the relevant day is the day when the reference is finally determined (see section 183).

#### **174C Section 174B: supplementary provision**

- (1) For the purpose of section 174B(3), the CMA finally concludes the carrying out of its section 5 functions if—

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- (a) the CMA publishes the market study report under section 131B(4) or (as the case may be) gives it to the Secretary of State under section 140A(3)(b); or
  - (b) the period permitted for the preparation by the CMA of the market study report and for the report to be published under section 131B(4) or (as the case may be) given to the Secretary of State under section 140A(3)(b) expires and no such report has been so prepared or no such action has been taken.
- (2) For the purpose of section 174B(3), the time when the CMA finally concludes the carrying out of its section 5 functions is—
  - (a) in a case falling within subsection (1)(a), the publication of the report or (as the case may be) the giving of it to the Secretary of State;
  - (b) in a case falling within subsection (1)(b), the expiry of the period concerned.
- (3) For the purpose of section 174B(6), the CMA finally decides whether to make a reference under section 131 if—
  - (a) the CMA makes such a reference;
  - (b) the CMA accepts an undertaking under section 154 instead of making such a reference;
  - (c) the CMA publishes notice that it has otherwise decided not to make such a reference; or
  - (d) the period permitted for the preparation by the CMA of a market study report in relation to the matter and for the report to be published under section 131B(4) has expired and no such report has been so prepared or published.
- (4) For the purpose of section 174B(6), the time when the CMA finally decides whether to make a reference under section 131 is—
  - (a) in a case falling within subsection (3)(a), the making of the reference;
  - (b) in a case falling within subsection (3)(b), the acceptance of the undertaking concerned;
  - (c) in a case falling within subsection (3)(c), the publication of the notice concerned;
  - (d) in a case falling within subsection (3)(d), the expiry of the period concerned.
- (5) In subsection (4)(b) the reference to the acceptance of the undertaking concerned shall, in a case where the CMA has accepted a group of undertakings under section 154, be treated as a reference to the acceptance of the last undertaking in the group; but undertakings which vary, supersede or revoke earlier undertakings shall be disregarded for the purposes of subsections (3)(b) and (4)(b).

#### **174D Penalties**

- (1) A penalty imposed under section 174A(1) or (3) shall be of such amount as the CMA considers appropriate.

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- (2) In the case of a penalty imposed under section 174A(1), the amount may be—
  - (a) a fixed amount;
  - (b) an amount calculated by reference to a daily rate; or
  - (c) a combination of a fixed amount and an amount calculated by reference to a daily rate.
- (3) In the case of a penalty imposed under section 174A(3), the amount shall be a fixed amount.
- (4) A penalty imposed under section 174A(1) shall not—
  - (a) in the case of a fixed amount, exceed such amount as the Secretary of State may by order specify;
  - (b) in the case of an amount calculated by reference to a daily rate, exceed such amount per day as the Secretary of State may so specify; and
  - (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 as the Secretary of State may so specify.
- (5) A penalty imposed under section 174A(3) shall not exceed such amount as the Secretary of State may by order specify.
- (6) An order under subsection (4) or (5) shall not specify—
  - (a) in the case of a fixed amount, an amount exceeding £30,000;
  - (b) in the case of an amount calculated by reference to a daily rate, an amount per day exceeding £15,000; and
  - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, a fixed amount exceeding £30,000 and an amount per day exceeding £15,000.
- (7) Before making an order under subsection (4) or (5), the Secretary of State shall consult—
  - (a) the CMA; and
  - (b) such other persons as the Secretary of State considers appropriate.
- (8) In imposing a penalty by reference to a daily rate—
  - (a) no account is to be taken of any days before the service on the person concerned of notice of the penalty under section 112 (as applied by subsection (10)); and
  - (b) unless the CMA determines an earlier date (whether before or after the penalty is imposed), the amount payable ceases to accumulate at the beginning of the earliest of the days mentioned in subsection (9).
- (9) Those days are—
  - (a) the day on which the requirement of the notice concerned under section 174 is satisfied;
  - (b) the day which is the relevant day in the case in question for the purposes of section 174B.

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- (10) Sections 112 to 115 apply in relation to a penalty imposed under section 174A(1) or (3) as they apply in relation to a penalty imposed under section 110(1) or (3).

#### **174E Statement of policy on penalties**

- (1) The CMA shall prepare and publish a statement of policy in relation to the enforcement of notices given under section 174.
- (2) The statement shall, in particular, include a statement about the considerations relevant to the determination of the nature and amount of any penalty imposed under section 174A(1) or (3).
- (3) The CMA may revise its statement of policy and, where it does so, it shall publish the revised statement.
- (4) The CMA shall consult such persons as it considers appropriate when preparing or revising its statement of policy.”

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#### **Commencement Information**

- I1** Sch. 11 para. 1 partly in force; sch. 11 para. 1 in force for specified purposes at Royal Assent, see s.103(1)(i)
- I2** Sch. 11 para. 1 in force at 1.4.2014 in so far as not already in force by S.I. 2014/416, art. 2(1)(d) (with Sch.)

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