

## SCHEDULES

### SCHEDULE 2

Articles 39 and 40

#### ORDERS ALTERING LICENSABLE ACTIVITIES

##### *Introductory*

- 1.—(1) In this Schedule references to an order are to an order under Article 39 or 40.
- (2) An order providing for activities to become licensable activities may only be made on the application of the Authority made in accordance with paragraph 2.
- (3) An order providing for activities to cease to be licensable activities may be made either—
  - (a) on the application of the Authority made in accordance with paragraph 7; or
  - (b) following consultation by the Department in accordance with paragraph 8.

##### *Application by Authority for order including new activities*

- 2.—(1) If the Authority proposes to make an application for an order providing for activities to become licensable activities, it shall give notice—
  - (a) stating that it proposes to make an application for an order providing for the activities to become licensable activities;
  - (b) setting out any conditions which it would expect to be included in such licences; and
  - (c) specifying a reasonable period (not being less than 28 days from the date of publication of the notice) within which representations or objections may be made with respect to the proposal,and shall consider any representations or objections which are duly made and not withdrawn.
- (2) In the case of an order under Article 40, the notice shall also set out the conditions which the Authority would expect such an order to determine to be standard conditions for the purposes of licences authorising the undertaking of the activities.
- (3) The notice shall be given by serving a copy on the Council and by publishing it in such manner as the Authority considers appropriate for bringing it to the attention of—
  - (a) persons appearing to it to be carrying on, or be intending to carry on, the activities; and
  - (b) any other persons appearing to it to be likely to be affected by an order providing for the activities to become licensable activities.
- (4) If an objection has been duly made (and not withdrawn) by a person who is carrying on or intends to carry on the activities, the Authority shall make a reference to the Competition Commission under paragraph 3 before making the application.
- (5) In any other case where the Authority considers it appropriate to make a reference to the Commission under paragraph 3 before making the application, the Authority may make such a reference.

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(6) If a reference is made to the Commission, the application shall not be made unless the Commission has reported on the reference that the fact that the activities to which the application relates are not licensable activities operates, or may be expected to operate, against the public interest.

(7) The application shall set out—

- (a) the activities which the Authority considers should become licensable activities; and
- (b) the conditions which the Authority would expect to be included in such licences.

(8) In the case of an application for an order under Article 40 the application shall also set out the conditions which the Authority would expect to be determined to be standard conditions for the purposes of licences authorising the undertaking of the activities in question.

### *References to Competition Commission*

**3.—(1)** A reference to the Competition Commission under this paragraph shall require the Commission to investigate and report on whether the fact that the activities specified in the reference are not licensable activities operates, or may be expected to operate, against the public interest.

(2) The Authority may, at any time, by notice given to the Commission vary the reference by adding to the activities specified in the reference or by excluding from the reference some of the activities so specified; and on receipt of such notice the Commission shall give effect to the variation.

(3) The Authority shall specify in the reference, or a variation of the reference, for the purpose of assisting the Commission in carrying out the investigation on the reference—

- (a) the conditions which the Authority would expect to be included in licences authorising the undertaking of the activities specified in the reference and (in the case of a reference in relation to an application for an order under Article 40) the conditions which the Authority would expect to be determined to be standard conditions for the purposes of such licences; and
- (b) any effects adverse to the public interest which, in its opinion, the fact that the activities so specified are not licensable activities has or may be expected to have.

(4) As soon as practicable after making the reference, or a variation of the reference, the Authority shall serve a copy of it on the Council and publish particulars of it in such manner as the Authority considers appropriate for bringing it to the attention of—

- (a) persons appearing to the Authority to be carrying on, or be intending to carry on, the activities specified in it; and
- (b) any other persons appearing to the Authority to be likely to be affected by it.

(5) The Authority shall, for the purpose of assisting the Commission in carrying out the investigation on the reference, give to the Commission—

- (a) any information which is in its possession and which relates to matters falling within the scope of the investigation, and which is either requested by the Commission for that purpose or is information which in its opinion it would be appropriate for that purpose to give to the Commission without any such request; and
- (b) any other assistance which the Commission may require, and which it is within its power to give, in relation to any such matters,

and the Commission shall take account of the information for the purpose of carrying out the investigation.

(6) In determining for the purposes of this paragraph whether the fact that particular activities are not licensable activities operates, or may be expected to operate, against the public interest, the Commission shall have regard—

- (a) in the case of a reference in relation to an application for an order under Article 39 to the matters referred to in Article 12;
- (b) in the case of a reference in relation to an application for an order under Article 40 to the matters referred to in Article 14.

*References under paragraph 3: time limits*

4.—(1) Every reference under paragraph 3 shall specify a period (not longer than six months beginning with the date of the reference) within which a report on the reference is to be made.

(2) A report of the Competition Commission on a reference under paragraph 3 shall not have effect (in particular for the purposes of paragraph 2(6)) unless the report is made before the end of the period specified in the reference or such further period (if any) as may be allowed by the Authority under sub-paragraph (3).

(3) The Authority may, if it has received representations on the subject from the Commission and is satisfied that there are special reasons why the report cannot be made within the period specified in the reference, extend that period by no more than six months.

(4) No more than one extension is possible under sub-paragraph (3) in relation to the same reference.

(5) The Authority shall publish an extension under sub-paragraph (3) in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it.

*References under paragraph 3: application of Enterprise Act 2002*

5.—(1) The following sections of Part 3 of the Enterprise Act 2002 shall apply, with the modifications mentioned in sub-paragraphs (2) and (3), for the purposes of references under paragraph 3 as they apply for the purposes of references under that Part—

- (a) section 109 (attendance of witnesses and production of documents etc.);
  - (b) section 110 (enforcement of powers under section 109: general);
  - (c) section 111 (penalties);
  - (d) section 112 (penalties: main procedural requirements);
  - (e) section 113 (payments and interest by instalments);
  - (f) section 114 (appeals in relation to penalties);
  - (g) section 115 (recovery of penalties); and
  - (h) section 116 (statement of policy).
- (2) Section 110 shall, in its application by virtue of sub-paragraph (1), have effect as if—
- (a) subsection (2) were omitted; and
  - (b) in subsection (9) the words from “or section” to “section 65(3))” were omitted.
- (3) Section 111(5)(b)(ii) shall, in its application by virtue of sub-paragraph (1), have effect as if—
- (a) for the words “published (or, in the case of a report under section 50 or 65, given)” there were substituted “made”;
  - (b) for the words “published (or given)”, in both places where they appear, there were substituted “made”; and
  - (c) the words “by this Part” were omitted.

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(4) Section 117 of the Enterprise Act 2002 (false or misleading information) shall apply in relation to functions of the Competition Commission in connection with references under paragraph 3 as it applies in relation to its functions under Part 3 of that Act but as if, in subsections (1)(a) and (2), the words “the OFT,” and “or the Secretary of State” were omitted.

(5) Provisions of Part 3 of the Enterprise Act 2002 which have effect for the purposes of sections 109 to 117 of that Act (including, in particular, provisions relating to offences and the making of orders) shall, for the purposes of the application of those sections by virtue of sub-paragraph (1) or (4), have effect in relation to those sections as applied by virtue of those sub-paragraphs.

(6) Accordingly, corresponding provisions of this Order, the Electricity Order or the Gas Order shall not have effect in relation to those sections as applied by virtue of those sub-paragraphs.

### *Reports on references*

6.—(1) In making a report on a reference under paragraph 3, the Competition Commission shall include in the report definite conclusions on whether the fact that the activities specified in the reference (or the reference as varied) are not licensable activities operates, or may be expected to operate, against the public interest.

(2) The Commission shall also include in the report such an account of its reasons for those conclusions as in its opinion is expedient for facilitating proper understanding of the questions raised by the reference and of its conclusions.

(3) Where the Commission concludes that the fact that particular activities are not licensable activities operates, or may be expected to operate, against the public interest, it shall specify in the report—

- (a) the effects adverse to the public interest which that fact has or may be expected to have; and
- (b) any modifications to the conditions specified in the reference in accordance with paragraph 3(3)(a) which it considers appropriate.

(4) For the purposes of paragraph 2(6), a conclusion contained in a report of the Commission is to be disregarded if the conclusion is not that of at least two-thirds of the members of the group constituted in connection with the reference concerned in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998.

(5) If a member of a group so constituted disagrees with any conclusions contained in a report made on a reference under paragraph 3 as the conclusions of the Commission, the report shall, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing.

(6) For the purposes of the law relating to defamation, absolute privilege attaches to any report made by the Commission on a reference under paragraph 3.

(7) In making any report on a reference under paragraph 3 the Commission must have regard to the following considerations before disclosing any information.

(8) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest.

(9) The second consideration is the need to exclude from disclosure (so far as practicable)—

- (a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
- (b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual’s interests.

(10) The third consideration is the extent to which the disclosure of the information mentioned in sub-paragraph (9)(a) or (b) is necessary for the purposes of the report.

(11) A report of the Commission on a reference under paragraph 3 shall be made to the Authority.

(12) On receiving the report, the Authority shall send a copy of it to the Department.

(13) Subject to sub-paragraph (14), the Authority shall, not less than 14 days after the copy is received by the Department, send another copy to the Council and publish that other copy in such manner as the Authority considers appropriate for bringing the report to the attention of persons likely to be affected by it.

(14) If it appears to the Department that the publication of any matter in the report would be against the public interest or the commercial interests of any person, it may, before the end of the period of 14 days mentioned in sub-paragraph (13), direct the Authority to exclude that matter from the copy of the report to be sent to the Council and published under that sub-paragraph.

*Application by Authority for order excluding activities*

7.—(1) Before making an application for an order providing for activities to cease to be licensable activities the Authority shall give notice—

- (a) stating that it proposes to make an application for an order providing for the activities to cease to be licensable activities; and
- (b) specifying a reasonable period (not being less than 28 days from the date of publication of the notice) within which representations or objections may be made with respect to the proposal,

and shall consider any representations or objections duly made and not withdrawn.

(2) The notice shall be given—

- (a) by serving a copy on the Department and the Council; and
- (b) by publishing it in such manner as the Authority considers appropriate for bringing it to the attention of persons likely to be affected by such an order.

(3) An application under this paragraph shall set out—

- (a) the activities which the Authority considers should cease to be licensable activities; and
- (b) the Authority's reasons for proposing that the order be made.

*Consultation by Department about order excluding activities*

8.—(1) If the Department proposes to make an order providing for activities to cease to be licensable activities (otherwise than on an application by the Authority under paragraph 7), it shall give notice—

- (a) stating that it proposes to make an order providing for the activities to cease to be licensable activities; and
- (b) specifying a reasonable period (not being less than 28 days from the date of publication of the notice) within which representations or objections may be made with respect to the proposal,

and shall consider any representations or objections duly made (and not withdrawn).

(2) The notice shall be given—

- (a) by serving a copy on the Authority and the Council; and
- (b) by publishing it in such manner as the Department considers appropriate for bringing it to the attention of persons likely to be affected by such an order.