

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Market Investigations

Introduction

292. Sections 131-184 and Schedules 9 and 12 make provision for a system of market investigations to replace the existing FTA 1973 monopoly inquiries regime. The purpose of these investigations is to inquire into markets where it appears that competition has been prevented, restricted or distorted by the structure of a market (or any aspect of its structure), the conduct of persons supplying or acquiring goods or services who operate within it, or the conduct of such persons' customers, but where there has been no obvious breach of the prohibitions on anti-competitive agreements or arrangements or abuse of a dominant position under CA 1998 or Articles 81 or 82 of the EC Treaty. An example of the sort of circumstances in which these provisions might be used would be a situation where a few large firms supplied almost the whole of the market and, without there being any agreement between them (i.e. a non-collusive oligopoly), they all tended to follow parallel courses of conduct (e.g. in relation to pricing), while new competitors faced significant barriers to entry into the market, and there was little or no evidence of vigorous competition between the existing players.
293. As under the FTA 1973 monopolies provisions, market investigation references will be able to be made to the CC by the OFT, certain sectoral regulators, and (under a reserve power) Ministers. The CC will carry out an in-depth investigation of competition in the market or markets concerned. Where the CC identifies competition problems, their findings will be used as the basis for remedial action. The main differences between the market investigations regime and the FTA 1973 monopoly inquiries regime are as follows:
- the tests applied both by OFT and others when making a reference and by the CC when analysing markets referred to it will be focused on identifying adverse effects on the process of competition that arise from the structure of particular markets, the conduct of persons supplying or acquiring goods or services who operate within them, or the conduct of such persons' customers or suppliers (under FTA 1973 the CC's key recommendations are based on the application of a broad 'public interest' test);
 - except in cases where a public interest intervention notice issued by the Secretary of State is in force (see below), the CC will be under a duty to take such steps as it considers reasonable and practicable to remedy the competition problems it identifies as a result of its investigations, together with any 'detrimental effects on customers' (in the form of higher prices, lower quality or less choice of goods or services, or less innovation in relation to goods or services in any UK market) to the extent that they arise from such problems. Under FTA 1973, any remedial action is at the discretion of the Secretary of State. The CC will have powers to accept

remedial undertakings and make remedial orders similar to those that the Secretary of State has under FTA 1973;

- in considering the implications of its duty to remedy in any given case, the CC will in particular be able to take account of ‘customer benefits’ in the form of lower prices, greater quality or choice, or increased innovation that result from the structure or conduct from which adverse effects on competition have been found to arise;
- in certain regulated sectors (e.g. gas, electricity, water), the CC will be able (as the Secretary of State is under the monopolies regime) to exercise its powers to remedy by means of a change to certain aspects of the regulatory framework applicable to companies operating in those sectors (e.g. electricity supply licences; conditions of appointment in the water sector; and rail passenger franchise agreements and access agreements). When considering remedies in this form, the CC must take account of the statutory duties and objectives of the relevant sectoral regulator, as well as being able to take account of the standard set of customer benefits;
- the scope for consideration of any wider ‘public interest’ issues will be restricted to cases in respect of which the Secretary of State issues an intervention notice;
- intervention notices will only be issued in circumstances where the Secretary of State has concerns about the impact that a market investigation may have on national security or other public interest considerations that the Secretary of State believes should be specified by statutory instrument subject to the affirmative resolution procedure. There will also be a requirement to make the scope of such public interest considerations clear at an early stage in the investigation process, and provision is made for cases where an intervention notice has been issued to be considered on a ‘competition-only’ basis, with the CC taking the final decision, where, for example, the Secretary of State decides that a public interest consideration is not after all relevant, or fails to secure Parliamentary approval for the specification of a new public interest consideration;
- the OFT or other referring authority will no longer set a deadline for the CC to conclude its investigation. Instead, the CC will be responsible for setting its own administrative timetable in consultation with parties to the investigation, subject to a two-year statutory long-stop provision;
- the CC’s proceedings will be governed by published procedural rules. It will have a power to impose financial penalties for failure, without reasonable excuse, to produce specified information.

294. Other differences and similarities between the monopolies and market investigations regimes are pointed out in relation to particular sections below.

295. References to the OFT in the explanatory notes on this Part should be construed as including relevant sectoral regulators, unless explicitly stated otherwise (see further the notes on section 136 and Part 2 of Schedule 9).

Chapter 1: Market investigation references

296. **Chapter 1** (sections 131-138) sets out the substantive framework for decision-making in market investigation cases (except for those cases where the public interest intervention regime is engaged, which are covered by sections 139-153). In particular, it deals with the statutory criteria to be applied by the OFT or other referring body when making references and by the CC when investigating markets; it prescribes what the CC must cover in its report; and it sets out the CC’s duty to remedy the competition problems that it identifies.

Making of references

Section 131: Power of OFT to make references

297. This section describes the criteria on which the OFT and certain sectoral regulators may make a market investigation reference. In order to make a reference, the OFT must have reasonable grounds for suspecting that one or more ‘features’ of a market are preventing, restricting or distorting competition in the supply or acquisition of specified goods or services.
298. *Subsection (2)* provides that, for the purposes of Part 4, the following are to be considered features of a market: (a) its structure (or any aspect of its structure); (b) the conduct of persons supplying or acquiring goods or services who operate within it; and (c) the conduct of such persons’ customers.
299. The distinction between ‘structure’ and ‘conduct’ in a market is commonly made in economic analysis, and is intended to provide the framework for a wide-ranging inquiry into how firms compete in a market and the economic context in which they operate.
300. Some of the main elements that it is anticipated might be included in an analysis of market structure are outlined below:
- *Market definition:* the starting point for an analysis of the structure of a market is market definition: the process of deciding what goods or services are included in the product market (e.g. ice creams bought from convenience outlets on the spur of the moment rather than from a supermarket) and what the geographic extent of this market is (e.g. is it local, regional, UK-wide, European, or global).
 - *Measures of market shares and concentration* can provide a rough indication of the competitive strength of those operating in a market, although they will seldom in themselves provide an unambiguous indication of market power and the state of competition in that market (e.g. the fact that three firms each have 30 per cent of a market now does not mean that the market is uncompetitive: it may be that their respective shares a year ago were quite different, or that, although their shares remain broadly stable over time, there is a great deal of customer ‘churn’ between them).
 - *Barriers to entry and expansion in a market:* these are factors that place actual or potential entrants into a market at a competitive disadvantage compared with established suppliers, or make it difficult for new entrants or existing smaller players to grow and thus act as an effective competitive constraint on larger incumbents. High barriers to entry and/or expansion are often a cause of competition problems in a market because they remove a competitive constraint, thus allowing the incumbents to raise prices above the competitive level, secure in the knowledge that new entrants cannot enter the market, undercut them, and win market share. Barriers to entry and expansion arise from a wide variety of causes; for example:
 - laws and regulations (e.g. where only a certain number of licences is issued to operate in a market);
 - sunk costs (investment costs of entering the market that cannot be recovered if the entrant subsequently exits the market) and economies of scale (which make it inefficient to operate in a particular market below a certain scale) will tend to increase the risks and difficulty of entry;
 - information constraints (e.g. where it is difficult or impossible for new entrants to gain the information that they need to compete, or where it is difficult and costly for consumers to gain sufficient knowledge to switch to a new product);

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

- the strategic behaviour of incumbents (who may, for example, have positioned themselves so as to be able to take retaliatory action to eliminate any competitive threat posed by an entrant);
 - the likelihood or rate of market growth (a growing market is more likely to be attractive to new entrants than a declining one).
- *The degree of vertical integration and vertical links:* the extent to which suppliers in a market are also active in upstream and downstream markets, or are linked with suppliers on upstream and downstream markets, may influence their competitive behaviour (as well as having an impact on the ease of entry into the market).
 - *The cost or difficulty of switching from one supplier to another:* such costs can act as a disincentive to vigorous competition either between incumbents or on the part of new entrants.
 - *Buyer power:* the strength of customers' bargaining position relative to that of suppliers can have a significant impact on competition in a market and on the ease of entry into it.
 - *Information asymmetries:* the participants in a market will rarely all have the same information. The asymmetry of information between different participants buying or selling a product can have a significant impact on the nature and extent of competition in the market for that product. For example, in some markets consumers are poorly informed about the product in comparison with sellers (e.g. used cars); in others, sellers are poorly informed about consumers, and this may affect how they price their products (e.g. car insurance). Information asymmetries can feed in to other aspects of market structure (in particular, they may constitute a barrier to entry or a barrier to expansion, for example if information asymmetries make consumers unwilling to switch supplier). They can also play a part in the analysis of conduct where individual suppliers exploit or create informational asymmetries, for example through branding or through price discrimination (charging different prices to different customers).
301. The term 'conduct' includes any acts and omissions, whether intentional or unintentional, of the persons referred to in *subsections (2)(b) and (c)*. By the decisions they take, the way in which they make decisions, and how they respond to their rivals and potential entrants, those operating within a market can prevent, restrict or distort not only competition within that market, but also competition in the markets in which their immediate suppliers (upstream) or customers (downstream) operate, and in complementary markets (e.g. the conduct of suppliers in a market for one of a pair of complementary markets, such as printers and printer cartridges, may prevent, restrict or distort competition in the market for the other product). The conduct of consumers and other customers, as well as that of the businesses that supply them, can also affect the conditions of competition in a market, and it is therefore included in the definition of features of a market in *subsection (2)(c)*.
302. In some cases, it will be open to debate whether a given feature of a market is structural or an aspect of conduct (for example, information asymmetries and barriers to entry arising from the behaviour of incumbents could equally well belong in either category). However in indicating the range of features of a market which the competition authorities may take into account, the separate references to structure and conduct in section 131 do not require either the OFT under section 131 or the CC under section 134 to identify particular features of markets that are the subject of a reference as falling entirely within the terms of one of subsections (a), (b) or (c) to the exclusion of the others.
303. In considering whether it has reasonable grounds to suspect that features of a market are preventing, restricting or distorting competition, the OFT will have to evaluate the evidence available to it in each case. In some cases, it will be possible for a reference

decision to be justified wholly or partly on the basis of indirect evidence, such as the prevailing levels of prices charged for goods or services in a market, or the prevailing levels of profitability or productivity of firms operating in that market (particularly when observed over time, or when compared to another market, in the UK or elsewhere, for similar or related products).

304. The OFT will be obliged to consult before making a reference decision, and to give reasons justifying its decision both before and after it is made (see further sections 169 and 172).
305. The power to make market investigation references is a discretionary one. The OFT is not obliged to make a reference where it has reasonable grounds for suspecting that the reference criteria are satisfied (unlike in the merger regime, where the provisions of Part 3 place it under a duty to refer in certain circumstances). Since potential market investigation cases will often raise many complex issues, the section sets no limits to the matters that may be taken into account in deciding whether or not to make a reference, once the OFT has reasonable grounds to suspect that the reference criteria are satisfied. For example, there could be circumstances in which the reference criteria were satisfied, but the competition problems in the market concerned were of a kind that it was more appropriate for the OFT to address using its powers under CA 1998. Or the OFT might take the view that the competition problems in a market that it had the power to refer were likely only to be temporary, or were too trivial for it to be likely that the costs and burdens of a CC investigation would be justified by any likely outcome of such an investigation.

Section 132: Ministerial power to make references

306. Under FTA 1973, the Secretary of State (acting alone or jointly with other Ministers) and the DGFT each have independent powers to make monopoly references. Certain sectoral regulators have concurrent powers of reference with the DGFT conferred by the relevant utility statutes in respect of the areas that they regulate. However, the DGFT's and sectoral regulators' powers of reference are subject to exclusions in certain sectors (in which references may only be made by Ministers) and a limited power of veto on the part of the Secretary of State. Under the market investigations regime, there will be no such limitations on the OFT's power of reference, and the Secretary of State (acting alone or jointly with other Ministers of the Crown (*subsection (5)*)) retains the ability to make market investigation references only as a reserve power.
307. *Subsections (1)-(3)* set out the circumstances in which this reserve Ministerial power of reference may be used. Like the OFT and sectoral regulators (section 130), Ministers must have reasonable grounds for suspecting that a feature or combination of features of a market are preventing, restricting or distorting competition in the supply of specified goods or services before they can make a reference (*subsection (3)*). However, Ministers must additionally either be dissatisfied with the OFT's decision not to make a reference (*subsection (1)*); or they must be satisfied that the OFT is aware of whatever evidence has led them to form a suspicion and is not likely to reach a decision as to whether or not to make a reference within a reasonable period of time (*subsections (2) and (3)*).
308. *Subsection (5)* provides that references may be made by more than one Minister of the Crown acting jointly, so long as the Secretary of State is one of the Ministers making the reference.

Section 133: Contents of references

309. This section prescribes what a reference made under section 131 or section 132 must contain and provides for the goods or services that are the subject of a reference to be described in such a way as to focus the CC's investigations on particular areas of concern that the referring authority has identified. Any authority making a market investigation reference must also publish its reasons for doing so (see further section 172).

Determination of references

Section 134: Questions to be decided on market investigation references

310. This section sets out the questions that the CC must answer in the course of conducting a market investigation under Part 4.
311. *Subsections (1)-(3)*: the CC is to consider what market or markets exist in connection with the supply or acquisition of the goods or services described in the reference (the 'relevant market(s)'), and then to determine whether any feature or combination of features of the relevant market(s), prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK: where this is the case, there is an 'adverse effect on competition'. Depending on the circumstances, more than one adverse effect on competition may be found (e.g. where there is more than one relevant market).
312. *Subsection (4)-(5)*: where the CC identifies one or more adverse effects on competition, it must further decide what action should be taken to remedy, mitigate or prevent it or them, whether by the CC itself, or by others (including those operating in the market concerned, Ministers - who may, for example, be able to introduce changes to existing laws, so as to remove a regulatory barrier to entry - and other public authorities). The CC must also consider what action it or others should take to remedy, mitigate or prevent any 'detrimental effects on customers' (in the form of higher prices, lower quality or less choice of goods or services, or less innovation in relation to goods or services in any UK market) in so far as they have resulted from, or may be expected to result from, any adverse effect on competition that it has identified.
313. *Subsection (6)*: in deciding what steps should be taken under subsection (4), the CC is to have regard to the need to achieve as comprehensive a remedy as is reasonable and practicable. Thus, all other things being equal, a remedy that, for example, removes an adverse effect on competition will be considered more comprehensive than one that only removes detrimental effects on customers resulting from that adverse effect, since by removing the adverse effect, the CC will also (at least so far as is within its power) remove the detrimental effect on customers. To that extent, there is a presumption in favour of remedial action that deals directly with adverse effects on competition over action that is directed specifically at detrimental effects on customers. The requirement to have regard to reasonableness and practicability means, *inter alia*, that the CC must, in relation to each proposed remedy, consider what effect it will have on the future conduct of those operating in the market, how it will interact with any other proposed remedies, and whether the adverse effect(s) or customer detriment(s) that it was designed to address are sufficiently serious for their removal or mitigation to justify whatever costs and disruption to businesses and others will be involved in the implementation of that remedy.
314. *Subsections (7) and (8)*: in considering what steps should be taken under subsection (4) the CC may further have regard to any customer benefits (in the form of lower prices, or higher quality or greater choice of goods or services, or greater innovation in relation to goods or services in any UK market) arising from the relevant feature or features of the market that have given rise to adverse effects on competition, provided that the benefit has accrued, or may be expected to accrue within a reasonable time, and was or is unlikely to accrue without the feature or features concerned.

Section 135: Variation of market investigation references

315. This section allows the authority that has made a market investigation reference, after consultation with the CC, to widen or narrow the scope of the CC's investigation while it is in progress. The CC itself may ask the OFT or other referring authority to vary the market investigation reference (for example, where it finds that the terms of reference are wider or narrower than are justified by its own view of the market or markets concerned, and the operation of competition within it or them). A variation will be

effective immediately and any variation made to the market reference will have no impact on the statutory timetable for the investigation – i.e. the CC must still conclude their investigation within two years of the date on which the original reference was made (see further section 137).

Section 136: Investigations and reports on market investigation references

316. This section prescribes that the CC must publish a report on a market investigation reference within two years of the date on which the reference was made. *Subsection (2)* prescribes what the report must contain.
317. *Subsections (4)-(5)* provide that, as well as publishing its report, the CC must give a copy of it to the OFT and to the appropriate Minister if he made the reference. Where the reference was made by the OFT or by the appropriate Minister but could have been made by a relevant sectoral regulator the report is also to be given to them.
318. *Subsections (7) and (8)* list the sectoral regulators who have concurrent powers to make market investigation references on the same basis as the OFT in the areas that they regulate ('relevant sectoral regulators') and the provisions of 'relevant sectoral enactments' that (as amended by Part 2 of Schedule 9) confer these concurrent powers on them. Information obtained by relevant sectoral regulators in connection with the exercise of any function under this Act is protected by the information disclosure provisions in Part 9. The provisions governing concurrency between the OFT and relevant sectoral regulators, which are to be found in the sections of the relevant sectoral enactments, are essentially the same as under the FTA 1973 monopolies regime: in particular, the OFT and the relevant sectoral regulator concerned must consult each other before either makes a reference.

Section 137: Time-limits for market investigations and reports

319. This section sets out the statutory maximum period for a market investigation. Initially this is to be set at two years. A market investigation report shall be prepared and published within the statutory maximum period after the reference is made. *Subsection (3)* gives the Secretary of State a power to alter the statutory maximum by order, but not to extend it beyond two years. The making of such an order by the Secretary of State will not affect the statutory maximum period applicable to any investigation that is the subject of a reference made before the date of the order.

Section 138: Duty to remedy adverse effects

320. This section provides that, where the CC has published its report within the statutory time-limit and has found one or more than one adverse effect on competition, it must take such action as it considers reasonable and practicable to remedy, mitigate or prevent that adverse effect and/or any detrimental effect on customers so far as it may have resulted from, or may be expected to result from, each adverse effect on competition. The duty to remedy expressed here is qualified by the same considerations (comprehensiveness, reasonableness and practicability, and discretionary consideration of customer benefits) as the analysis of remedies prescribed by section 134.
321. *Subsection (3)* provides that, unless there has been a material change of circumstances since the preparation of the CC's report, or unless it has special reason for deciding otherwise, any action taken by the CC must be consistent with the course of action decided on under section 134(4)(c), and set out in its report under section 136.
322. *Subsection (6)* provides that, where the CC has found that a detrimental effect on customers may be expected to result from a particular adverse effect on competition, but that no detrimental effect on customers has yet resulted from that adverse effect, then the CC may only take action to remedy, mitigate or prevent the detrimental effect that may be expected to arise if it remedies, mitigates or prevents the adverse effect on competition.

Chapter 2: Public interest cases

323. **Chapter 2** (sections 139-153) establishes a mechanism that allows the Secretary of State to intervene in cases where she considers that her intervention is justified by wider public interest considerations. This arrangement operates independently of the Ministerial power to make references (see section 132). Where an ‘intervention notice’ is in force, the Secretary of State’s approval is required before the acceptance of undertakings in lieu of a reference (see section 150), and the Secretary of State, rather than the CC, becomes the decision-taker on remedies after a CC investigation (see section 147). The flowchart at Annex C illustrates the procedure.

Intervention notices

Section 139: Public interest intervention by Secretary of State

324. This section provides for the Secretary of State to claim an interest in a case by serving an intervention notice on the grounds that it raises a public interest consideration. The Secretary of State is limited to raising issues that are already specified as public interest considerations in section 153 or those that the Secretary of State thinks should be specified. *Subsection (6)* ensures that, where the Secretary of State has raised any non-specified issue in an intervention notice, she will move to specify that issue in legislation as early as practicable.
325. *Subsection (1)* allows the Secretary of State to give an intervention notice to the CC in the first four months after a market reference is made. *Subsection (2)* allows the Secretary of State to give an intervention notice to the OFT when the OFT is considering whether to accept or to vary undertakings in lieu of a reference.

Intervention notices under section 139(1)

Section 140: Intervention notices under section 139(1)

326. This section sets out the content requirements of an intervention notice under section 139(1) and provides when any such intervention notice will be deemed to be in force.
327. *Subsection (1)* provides that intervention notices must include certain details, including which case they relate to, and which public interest considerations may be relevant. *Subsection (2)* gives the Secretary of State discretion to mention such public interest consideration(s) in the intervention notice as she considers appropriate where there may be more than one relevant public interest consideration.
328. *Subsection (4)* provides that an intervention notice will come into force as soon as it is given. *Subsections (4) and (5)* provide that an intervention notice will cease to be in force once the role of the Secretary of State in relation to that case is complete (either because she has acted, including by revoking the intervention notice, or is prevented from acting in a number of circumstances set out in subsection (5)).

Section 141: Questions to be decided by Commission

329. This section sets out the issues to be considered by the CC in a market investigation case where an intervention notice is in force.
330. In addition to the issues that must be considered by the CC in relation to a ‘competition-only’ market investigation (see section 134), including the CC’s preferred remedies in this context (provided for by *subsection (4)*), the CC should consider what course of action would be appropriate in the light of any eligible public interest considerations (*as required by subsection (3)*).

Section 142: Investigations and reports by Commission

331. This section provides that the CC should conduct investigations and prepare a report on a market investigation reference where an intervention notice is in force. The report should include reasoned decisions on those issues that the CC is obliged to consider in such cases.

Section 143: Publication etc. of reports of Commission

332. This section sets out how different types of reports should be dealt with when there is an intervention notice in force.
333. Where the CC has concluded that there is no adverse effect on competition, or that there is one or more than one adverse effect on competition but that no remedies should be imposed, the CC shall publish its own report. This is because there is no further role for the Secretary of State to play.
334. Where the CC has concluded that there is one or more than one adverse effect on competition and that remedies would be appropriate, the CC shall pass the report to the Secretary of State so that she may consider the impact on eligible public interest consideration(s) of the remedies to the adverse effect(s) on competition. If the Secretary of State decides that the public interest consideration(s) are relevant to the CC's preferred remedies, she will publish the report.
335. When the report is published, a copy should go to the OFT, the appropriate sectoral regulator if relevant, and – if different – the Minister that made the reference.

Section 144: Time-limits for investigations and reports: Part 4

336. This section provides that the CC must prepare its report and, depending on its decision, either publish it or give a copy to the Secretary of State within two years. Provision is made for the Secretary of State to reduce the two-year period by order (as under section 137 above). The making of such an order by the Secretary of State will not affect the statutory maximum period applicable to any investigation that is the subject of a reference made before the date of the order.

Section 145: Restrictions where public interest considerations not finalised: Part 4

337. This section provides that the CC's conclusions as set out in its report must not rely on any new public interest consideration cited in the intervention notice, unless that consideration has been approved by Parliament within a given period. This ensures that the Secretary of State is prevented from determining the outcome of a case on grounds that Parliament has not recognised.
338. The CC will be able to consider a public interest consideration cited in a relevant intervention notice only if Parliament has approved an order seeking to create such a public interest consideration, or for a period of up to 24 weeks from the date of the intervention notice. Where Parliament has not yet decided upon such an order, the CC will be prevented from giving its report to the Secretary of State for a period of 24 weeks from the date of the reference.

Section 146: Decision of Secretary of State

339. This section sets out how the Secretary of State will proceed on receipt of a report from the CC in a case raising any public interest consideration(s).
340. The Secretary of State will decide whether the CC's remedies to the adverse effect on competition would affect any eligible public interest considerations. *Subsections (3) and (4)* ensure that the Secretary of State must make and publish this decision within 90 days of receipt of the CC's report; otherwise, the report reverts to the CC allowing it to implement its preferred remedies.

Section 147: Remedial action by Secretary of State

341. This section sets out that, where the Secretary of State has decided that the CC's preferred approach would affect any eligible public interest considerations, she may take action to address the adverse effects on competition identified in the report concerned, with regard to what is appropriate in light of the relevant public interest considerations.
342. *Subsection (6)* provides that, where the CC has found that a detrimental effect on customers may be expected to result from a particular adverse effect on competition, but that no detrimental effect on customers has yet resulted from that adverse effect, then the Secretary of State may only take action to remedy, mitigate or prevent the detrimental effect that may be expected to arise if she remedies, mitigates or prevents the adverse effect on competition.

Section 148: Reversion of the matter to the Commission

343. This section sets out that the CC should act where the Secretary of State either fails to make a decision on whether public interest considerations are affected, or decides that no public interest considerations are relevant. The CC will publish its report (and give a copy to relevant bodies) and will be under a duty to implement its preferred remedies as set out in that report.
344. Where the case has reverted to the CC to implement its preferred remedies under this section, *subsections (7)–(10)* provide that the CC must obtain the Secretary of State's agreement if it proposes to depart materially from the course of action set out in its report. However, the Secretary of State can only withhold her agreement if she believes that the CC's new proposed course of action would adversely affect the public interest. She may have regard only to the competition concerns identified by the CC and any relevant public interest considerations.

Intervention notices under [section 139\(2\)](#)

Section 149: Intervention notices under [section 139\(2\)](#)

345. This section sets out the content requirements of an intervention notice given to the OFT under [section 139\(2\)](#) in relation to undertakings in lieu, and provides for when any such intervention notice will be deemed to be in force.
346. *Subsection (1)* provides that such intervention notices must include certain details, including which case it relates to, and which public interest considerations may be relevant. *Subsection (2)* provides the Secretary of State with the discretion to mention such public interest consideration(s) in the intervention notice as she considers appropriate where there may be more than one relevant public interest consideration.
347. *Subsection (4)* ensures that an intervention notice will come into force as soon as it is given. *Subsections (4) and (5)* provide that an intervention notice will cease to be in force once the role of the Secretary of State in relation to that case is complete (either because she has acted, including by revoking the intervention notice, or is prevented from acting in a number of circumstances set out in *subsection (5)*).

Section 150: Power of veto of Secretary of State

348. This section provides that, if an intervention notice on undertakings in lieu is in force, the Secretary of State must agree to any undertakings before the OFT accepts them. The Secretary of State can only withhold her agreement if she believes that an undertaking could adversely affect the public interest. She may have regard only to the competition concerns identified by the OFT and any relevant public interest considerations.
349. *Subsection (5)* provides that, where new public interest consideration(s) specified in the intervention notice have not yet been approved by Parliament, the Secretary of

State is prevented from giving her agreement on undertakings in lieu until either the Parliamentary procedure has run its course or 24 weeks have passed from the date of the intervention notice (whichever is the shorter).

Other

Section 151: Further interaction of intervention notices with general procedure

350. This section ensures that, at any one time, any case is dealt with either on the 'competition-only' track or the 'public interest' track. Where a case which was subject to an intervention notice, has reverted to the 'competition-only' track because the Secretary of State has revoked the intervention notice, the statutory maximum timetable for the CC to publish its report is extended by 20 days.

Section 152: Certain duties of OFT and Commission

351. This section ensures that the OFT and the CC pass any relevant information to the Secretary of State.
352. *Subsection (1)* provides that the OFT will inform the Secretary of State if it believes that any case it is considering raises any issue specified in section 153 that the Secretary of State would not consider immaterial. *Subsection (2)* provides that, in the four months following a market reference, the CC will inform the Secretary of State if it believes that an investigation raises issues specified in section 153 which the Secretary of State would not consider immaterial. These provisions are intended to alert the Secretary of State to cases where she might wish to intervene on public interest grounds.
353. *Subsection (3)* provides that the OFT and the CC must pass on to the Secretary of State any representations that they receive about the need for the Secretary of State to specify a new public interest consideration. This provision ensures that the Secretary of State is made aware of any calls for new public interest considerations to be specified in legislation.

Section 153: Specified considerations: Part 4

354. This section lists the relevant public interest issues that may be specified by the Secretary of State in an intervention notice. *Subsection (1)* provides that 'national security' is the only consideration specified. *Subsection (3)* allows the Secretary of State, by order, to add to, remove from, or amend the considerations in this list.

Chapter 3: Enforcement

355. **Chapter 3** (sections 154-169) and Schedule 8 set out the enforcement powers of the OFT, CC and Secretary of State during and after a market investigation reference. As for the merger regime, enforcement takes two forms: undertakings and orders. Undertakings are agreements voluntarily entered into by the parties to a merger. Once agreed, these become legally-binding and enforceable in the courts. Orders are made by the authorities and prohibit the parties specified in the order from doing something or specify that they must take certain action. Under FTA 1973, orders were made by statutory instrument; the CC will now have the power to make orders on its own authority.

Undertakings and orders

Section 154: Undertakings in lieu of market investigation references

356. This section allows the OFT to seek and accept undertakings from one or more persons in place of making a market investigation reference. This provision enables the OFT to avoid making a reference to the CC in certain cases. The OFT has to be confident it has identified an adverse effect on competition in a market in relation to which it would

otherwise have made a reference. It also needs to persuade the relevant parties to agree to a course of remedial action to address the competition problem it has identified. It can then accept undertakings in lieu of making a market investigation reference. This provision mirrors the existing power in section 56A FTA 1973 for the Secretary of State to accept undertakings-in-lieu, but with responsibility transferred to the OFT.

Section 155: Undertakings in lieu: procedural requirements

357. This section sets out the consultation process for accepting or varying an undertaking in lieu of a market reference. Undertakings-in-lieu require their own procedures because the OFT is required to set out, prior to accepting the undertaking, the terms of the market investigation reference that it would otherwise have made.

Section 156: Effect of undertakings under section 154

358. This section specifies that where the OFT has accepted an undertaking or group of undertakings in lieu of a reference, no market investigation reference in relation to the matters in respect of which the OFT would have made a reference had it not accepted any such undertaking or group of undertakings can be made for a period of twelve months.

Section 157: Interim undertakings: Part 4

359. This section applies following the publication of the CC's report and up to the point at which the reference is finally determined. During this period the CC can accept undertakings from the parties that they will not take any action that might prejudice the eventual introduction of the final remedy following the CC's report. The Secretary of State may exercise this power in cases where there is a public interest notice in force.
360. [Section 89](#) FTA 1973 allowed an interim order (see below) to be made during this period. No express provision was made for accepting interim undertakings. In practice, the authorities could seek and accept undertakings but these had no statutory basis.

Section 158: Interim orders: Part 4

361. This section also applies from publication of the CC's report to the point at which the final remedy is put in place. During this period, the CC can by order prevent the parties affected by a market investigation from taking any action that might prejudice the eventual introduction of the final remedy. This provision is based on section 89 FTA 1973. The Secretary of State may exercise this power in cases where a public interest notice is in force.

Section 159: Final undertakings: Part 4

362. This section allows the CC to accept final undertakings from the parties to remedy competition problems identified in its final report on a market investigation reference. This is based on the provisions on undertakings in section 88 FTA 1973. The Secretary of State may exercise this power in cases where there is a public interest notice in force.

Section 160: Order-making power where final undertakings not fulfilled: Part 4

363. This section allows the CC to replace final undertakings with an order where the parties are not complying with the undertakings. Any order made under this section is limited to the remedies set out in Schedule 8 or any closely-related remedy. (See note on Schedule 8 under Part 3 for more detail.) The Secretary of State may exercise this power in cases raising a public interest consideration.

Section 161: Final orders: Part 4

364. This section allows the CC to make an order to remedy competition problems identified in its final report on a market investigation. This final order may contain any of the remedies permitted by Schedule 8 or any closely-related remedy. The Secretary of State may exercise this power in cases where there is a public interest notice in force.

Enforcement functions of OFT

Section 162: Duty of OFT to monitor undertakings and orders: Part 4

365. This section gives the OFT the lead role in monitoring undertakings and orders. OFT will keep all undertakings and orders under review. Where it decides that an order or undertaking should be amended or revoked, it will advise the CC or Secretary of State accordingly. Where an order or undertaking is not being complied with, OFT will be able to take the company to court. This is based on the monitoring role given to the DGFT by section 88 FTA 1973.

Section 163: Further role of OFT in relation to undertakings and orders: Part 4

366. This section allows the CC (or the Secretary of State) to ask the OFT to negotiate final undertakings on its behalf following a market investigation. The CC retains the final say on whether undertakings should be accepted. The CC may also choose to negotiate directly with the parties.

Supplementary

Section 164: Enforcement undertakings and orders under this Part: general provisions

367. This section applies certain provisions from the mergers regime (Part 3) in the context of market investigations. It also specifies the minimum contents of any order.
368. [Section 86](#) makes certain general provisions applicable to all orders.
369. [Section 87](#) allows the person making an order to give directions to an individual or to an office-holder in any company or association.

Section 165: Procedural requirements for certain undertakings and orders: Part 4

370. This section brings into effect procedural requirements for making, varying or revoking orders and undertakings set out in Schedule 10.
371. These procedural requirements apply to final orders and undertakings. Interim orders do not have to comply with these procedural requirements because they may need to be introduced at short notice. However, unlike in mergers, paragraph 9 of the Schedule has been excluded to ensure that undertakings and orders are published in draft in every case.

Section 166: Register of undertakings and orders: Part 4

372. This section creates a register to be maintained by the OFT of all orders and undertakings made or accepted by the OFT, relevant sectoral regulators, CC or Secretary of State. This register will be available to the public. The sectoral regulators are not required to compile and maintain such a register.

Section 167: Rights to enforce undertakings and orders under this Part

373. This section makes provision for the enforcement of undertakings and orders through the courts along the same lines as section 94 in Part 3.

Chapter 4: Supplementary

Regulated markets

Section 168: Regulated markets

374. In regulated markets, regulators have a statutory set of objectives that go beyond preventing adverse effects on competition. These objectives are also reflected in the terms and conditions of, for example, the licences under which firms operate in such markets. Whilst the regulators have a duty to promote competition, they have other duties that go further than competition. These duties may have higher priority than the duty to promote competition (e.g. The Postal Services Commission (POSTCOMM) has an overriding duty to ensure a universal postal service). Therefore, when the CC propose remedies that involve changes to licence conditions, networking arrangements, conditions attached to permissions of airports, rail franchise agreements or access agreements or conditions of appointment in the water sector (i.e. 'relevant action'), the CC should have regard to the regulators' duties.
375. The scheme for remedying a competition problem in a regulated market is outlined in Annex D.

Schedule 9: Certain amendments of sectoral enactments

376. This Schedule sets out amendments to sectoral regulatory legislation. Under the FTA 1973 monopolies regime, the Secretary of State can make enforcement orders that amend licence conditions. Part 1 of the Schedule makes amendments to the sectoral enactments to extend this power to the OFT and the CC. Part 2 sets out the consequential amendments to the sectoral regulatory legislation that will be required to be made in order to give sectoral regulators the same concurrent powers in relation to the market investigations regime as they have under the FTA 1973 monopolies regime.

Consultation, information and publicity

Section 169: Certain duties of relevant authorities to consult: Part 4

377. This section is provided to ensure that as far as is practicable the relevant authorities (the CC, the OFT and the appropriate Minister), consult with, and where practicable give reasons to, any person on whose interests they consider that a decision that they are about to make would have a substantial impact. An example of such a decision would be the OFT's decision to make a market investigation reference. This will ensure that the affected party is made aware of the authority's proposed decision and has the opportunity to make representations to the authority about this proposed decision before it is taken.
378. *Subsection (4)* lists some of the things that the relevant authority should consider when it decides whether it is practicable to consult the party about its proposed decision and give reasons for this proposed decision. These are any restrictions that are imposed on the authority for taking action within a specific timetable, and the need to keep either the proposed decision or the reasons for this proposed decision confidential.

Section 170: General information duties

379. The purpose of this section is to ensure that in relation to market investigations, the OFT, CC and Secretary of State are able to obtain such information and assistance as they need from each other.

Section 171: Advice and information: Part 4

380. This section ensures the publication of guidance on the main aspects of the new markets investigations regime. The purpose of the guidance is to explain the relevant provisions

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

and indicate how either the OFT or the CC expects these provisions to work, and to highlight the effect of Community law as appropriate. It is intended that guidance will increase clarity for business about how the new regime works. The duties conferred on the OFT by this section do not extend to the sectoral regulators.

381. The OFT is given a duty to prepare and publish guidance on how it will make market investigation references. This guidance can be updated or re-published at any time. The OFT is required to consult the CC and others whom it considers appropriate, for example the sectoral regulators, when publishing this guidance.
382. The CC is given a duty to prepare and publish guidance on how it will consider market investigation references. This shall include guidance on how the CC will consider customer benefits. Like the OFT's guidance, this guidance can be updated or re-published at any time, and the CC are required to consult the OFT and others whom it considers appropriate when publishing this guidance.

Section 172: Further publicity requirements: Part 4

383. *Subsections (1) to (4)* require the OFT, the CC, the Secretary of State or appropriate Minister to publish certain decisions taken under Part 4. The relevant authorities are also required to publish reasons for their decisions, although these reasons do not have to be published at the same time as the decision if this is not reasonably practicable.
384. The only exceptions to this duty to publish reasons are decisions by the OFT or the CC to inform the Secretary of State about a case raising a public interest consideration (see section 152(1) or section 152(2)).
385. *Subsection (8)* requires that the Secretary of State publish her reasons for deciding whether any public interest consideration is relevant to remedial action in a case, and for making, varying or revoking an order relating to the list of public interest considerations that allow the Secretary of State to take decisions in a case rather than the CC, although these reasons do not have to be published at the same time as the decision.
386. *Subsection (10)* provides that in a case that raises a public interest consideration, where the Secretary of State has decided to accept undertakings or make an order, or has decided to do neither of these things, the Secretary of State should lay details of the decision, the reasons for the decision and a copy of the CC's report, before each House of Parliament.

Section 173: Defamation: Part 4

387. This section protects the Secretary of State, other Ministers of the Crown, OFT and the CC against actions for defamation as a result of their exercise of their functions under the market investigation provisions of the Act.

Investigation powers

Section 174: Investigation powers of OFT

388. This section provides that the OFT should have investigative powers while it is considering whether to make a market investigation reference. These powers correspond more closely to those available to the CC in market investigations, than to the powers available to the OFT before it makes a monopoly reference under section 44 FTA 1973.

Section 175: Enforcement of powers under section 174: offences

389. This section sets out the enforcement powers that the OFT will have in relation to their general investigative powers under section 174. It provides that a person commits an offence where he or she intentionally fails to comply with a notice or he or she intentionally alters, suppresses or destroys documents that he or she has been

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required to produce. The punishment for either of these offences may be a fine and/or imprisonment. The section also sets out that it is an offence for a person to intentionally obstruct or delay the OFT or any person in carrying out their investigative functions under section 174 – this offence is punishable by fine only.

Section 176: Investigation powers of the Commission

390. The investigation powers for the markets regime are described in more detail in the explanatory notes on the merger regime (see notes on merger sections 109-117). These sections set out the powers the CC will have to require persons to give evidence, and to provide specified documents and information needed for the purposes of a markets inquiry. There are close similarities with the investigatory powers currently provided under section 85 FTA 1973, but with one significant change. The CC's FTA 1973 power to initiate contempt proceedings against persons who fail to comply with notices requiring the production of documents and information, and the attendance of witnesses, is replaced with a power for the CC to impose monetary penalties for non-compliance (see notes on sections 111-116).

Reports

Section 177: Excisions from reports: Part 4

391. This section permits the Secretary of State to exclude information from the version of the CC's report that she is under a duty to publish under section 142. *Subsection (4)* also provides that the CC will advise the Secretary of State on excisions.

Section 178: Minority reports of Commission: Part 4

392. This section permits members of CC reporting groups for market investigation references who disagree with the decisions of the majority to publish their dissenting views as part of the group's report on the reference.

Other

Section 179: Review of decisions under Part 4

393. This section makes comparable provision in relation to the review of decisions taken by public authorities under the market investigation provisions to that provided by section 120 in relation to decisions under the merger provisions.

Section 180: Offences

394. This section provides that the sections in Part 3 that deal with the provision of false or misleading information and the commission of offences by bodies corporate also apply to the market investigations regime. In the markets investigations regime, where there are references in section 117 (false or misleading information) to the Secretary of State, these also include references to the appropriate Minister as far as he or she is not the Secretary of State acting alone.

Section 182: Service of documents: Part 4

395. This section makes the same provision for the service of documents in relation to market investigation references as section 126 does in relation to merger references.