



# Enterprise Act 2002 (repealed)

## 2002 CHAPTER 40

### PART 4

#### MARKET INVESTIGATIONS

##### Modifications etc. (not altering text)

- C1** Pt. 4 (ss. 131-184) modified (20.6.2003) by 1988 c. 41, Sch. 7 para. 20(5)-(8) (as substituted by Enterprise Act 2002 (c. 40), ss. 185, 279, **Sch. 11 para. 11(3)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C2** Pt. 4 (ss. 131-184) modified (20.6.2003) by S.I. 1996/275 (N.I. 2), art. 23(2A)(2B) (as substituted by Enterprise Act 2002 (c. 40), ss. 168(9), 279, **Sch. 9 para. 22(2)**); S.I. 2003/1397, **art. 2(1)**, Sch.
- C3** Pt. 4 (ss. 131-184) modified (20.6.2003) by 1993 c. 43, s. 67(2A)(2B) (as substituted by Enterprise Act 2002 (c. 40), ss. 168(9), 279, **Sch. 9 para. 21(2)**); S.I. 2003/1397, **art. 2(1)**, Sch.
- C4** Pt. 4 (ss. 131-184) modified (20.6.2003) by S.I. 1992/231 (N.I. 1), art. 46(2A)(2B) (as substituted by Enterprise Act 2002 (c. 40), ss. 168(9), 279, **Sch. 9 para. 20(2)**); S.I. 2003/1397, **art. 2(1)**, Sch.
- C5** Pt. 4 (ss. 131-184) modified (20.6.2003) by 1991 c. 56, s. 31(4) (as substituted by Enterprise Act 2002 (c. 40), ss. 168(9), 279, **Sch. 9 para. 19(3)**); S.I. 2003/1397, **art. 2(1)**, Sch.
- C6** Pt. 4 (ss. 131-184) modified (20.6.2003) by 1991 c. 56, s. 31(2A) (as substituted by Enterprise Act 2002 (c. 40), ss. 168(9), 279, **Sch. 9 para. 19(2)**); S.I. 2003/1397, **art. 2(1)**, Sch.
- C7** Pt. 4 (ss. 131-184) modified (20.6.2003) by 1984 c. 12, s. 50(2B) (as substituted by Enterprise Act 2002 (c. 40), ss. 168(9), 279, **Sch. 9 para. 16(2)**); S.I. 2003/1397, **art. 2(1)**, Sch.
- C8** Pt. 4 (ss. 131-184) modified (20.6.2003) by 1989 c. 29, s. 43(2B) (as substituted by Enterprise Act 2002 (c. 40), ss. 168(9), 279, **Sch. 9 para. 18(2)**); S.I. 2003/1397, **art. 2(1)**, Sch.
- Pt. 4 (ss. 131-184) modified (25.7.2003 for certain purposes and 29.12.2003 for certain purposes) by Communications Act 2003 (c. 21), **ss. 370(3), 411(2)(3)** (with transitional provisions in Sch. 18); S.I. 2003/1900, arts. 1(2), **2(1)**, 3(1), Sch. 1 (with arts. 3-6 (as amended (8.12.2003) by S.I. 2003/3142, art. 1(3))); S.I. 2003/3142, **art. 3(2)**
- Pt. 4 (ss. 131-184) modified (N.I.) (1.4.2007) by The Water and Sewerage Services (Northern Ireland) Order 2006 (S.I. 2006/3336 (N.I. 21)), arts. 1(2)(3), **29(4)** (with arts. 8(9), 121, 307); S.R. 2007/194, **art. 2(2)**, Sch. 1 Pt. 2 (with Sch. 2)

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*Changes to legislation: There are currently no known outstanding effects for the Enterprise Act 2002 (repealed), Part 4. (See end of Document for details)*

### **Textual Amendments applied to the whole legislation**

- F1** Act: for the words "solicitor of the Supreme Court of Northern Ireland" wherever they occur there is substituted (prosp.) the words "solicitor of the Court of Judicature of Northern Ireland" by virtue of [Constitutional Reform Act 2005 \(c. 4\), ss. 59, 148\(1\), Sch. 11 para. 5](#) [Editorial Note: this amendment will be carried through into the text of the Act at the same time as any other effects on the Act for the year in which the relevant commencement order (or first such order) is made]

## **CHAPTER 1**

### MARKET INVESTIGATION REFERENCES

#### *Making of references*

### **131 Power of OFT to make references**

- (1) The OFT may, subject to subsection (4), make a reference to the Commission if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (2) For the purposes of this Part any reference to a feature of a market in the United Kingdom for goods or services shall be construed as a reference to—
  - (a) the structure of the market concerned or any aspect of that structure;
  - (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
  - (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.
- (3) In subsection (2) “conduct” includes any failure to act (whether or not intentional) and any other unintentional conduct.
- (4) No reference shall be made under this section if—
  - (a) the making of the reference is prevented by section 156(1); or
  - (b) a reference has been made under section 132 in relation to the same matter but has not been finally determined.
- (5) References in this Part to a market investigation reference being finally determined shall be construed in accordance with section 183(3) to (6).
- (6) In this Part—
 

“market in the United Kingdom” includes—

  - (a) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory; and
  - (b) any market which operates only in a part of the United Kingdom;

“market investigation reference” means a reference under this section or section 132;

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and references to a market for goods or services include references to a market for goods and services.

### **132 Ministerial power to make references**

- (1) Subsection (3) applies where, in relation to any goods or services, the appropriate Minister is not satisfied with a decision of the OFT not to make a reference under section 131.
- (2) Subsection (3) also applies where, in relation to any goods or services, the appropriate Minister—
  - (a) has brought to the attention of the OFT information which the appropriate Minister considers to be relevant to the question of whether the OFT should make a reference under section 131; but
  - (b) is not satisfied that the OFT will decide, within such period as the appropriate Minister considers to be reasonable, whether to make such a reference.
- (3) The appropriate Minister may, subject to subsection (4), make a reference to the Commission if he has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (4) No reference shall be made under this section if the making of the reference is prevented by section 156(1).
- (5) In this Part “the appropriate Minister” means—
  - (a) the Secretary of State; or
  - (b) the Secretary of State and one or more than one other Minister of the Crown acting jointly.

### **133 Contents of references**

- (1) A market investigation reference shall, in particular, specify—
  - (a) the enactment under which it is made;
  - (b) the date on which it is made; and
  - (c) the description of goods or services to which the feature or combination of features concerned relates.
- (2) A market investigation reference may be framed so as to require the Commission to confine its investigation into the effects of features of markets in the United Kingdom for goods or services of a description specified in the reference to the effects of features of such of those markets as exist in connection with—
  - (a) a supply, of a description specified in the reference, of the goods or services concerned; or
  - (b) an acquisition, of a description specified in the reference, of the goods or services concerned.
- (3) A description of the kind mentioned in subsection (2)(a) or (b) may, in particular, be by reference to—
  - (a) the place where the goods or services are supplied or acquired; or

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- (b) the persons by or to whom they are supplied or by or from whom they are acquired.

*Determination of references*

**134 Questions to be decided on market investigation references**

- (1) The Commission shall, on a market investigation reference, decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (2) For the purposes of this Part, in relation to a market investigation reference, there is an adverse effect on competition if any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (3) In subsections (1) and (2) “relevant market” means—
  - (a) in the case of subsection (2) so far as it applies in connection with a possible reference, a market in the United Kingdom—
    - (i) for goods or services of a description to be specified in the reference; and
    - (ii) which would not be excluded from investigation by virtue of section 133(2); and
  - (b) in any other case, a market in the United Kingdom—
    - (i) for goods or services of a description specified in the reference concerned; and
    - (ii) which is not excluded from investigation by virtue of section 133(2).
- (4) The Commission shall, if it has decided on a market investigation reference that there is an adverse effect on competition, decide the following additional questions—
  - (a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
  - (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
  - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (5) For the purposes of this Part, in relation to a market investigation reference, there is a detrimental effect on customers if there is a detrimental effect on customers or future customers in the form of—
  - (a) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or
  - (b) less innovation in relation to such goods or services.

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- (6) In deciding the questions mentioned in subsection (4), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as resulting from the adverse effect on competition.
- (7) In deciding the questions mentioned in subsection (4), the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned.
- (8) For the purposes of this Part a benefit is a relevant customer benefit of a feature or features of a market if—
  - (a) it is a benefit to customers or future customers in the form of—
    - (i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or
    - (ii) greater innovation in relation to such goods or services; and
  - (b) the Commission, the Secretary of State or (as the case may be) the OFT believes that—
    - (i) the benefit has accrued as a result (whether wholly or partly) of the feature or features concerned or may be expected to accrue within a reasonable period as a result (whether wholly or partly) of that feature or those features; and
    - (ii) the benefit was, or is, unlikely to accrue without the feature or features concerned.

**Modifications etc. (not altering text)**

- C9** Ss. 35, 36, 47, 63, 134 and 141 extended (20.6.2003) by 1977 c. 37, s. 50A(6) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 8(2)**); S.I. 2003/1397 {art. 2(1)}, Sch. (with art. 8)

**135 Variation of market investigation references**

- (1) The OFT or (as the case may be) the appropriate Minister may at any time vary a market investigation reference made by it or (as the case may be) him.
- (2) The OFT or (as the case may be) the appropriate Minister shall consult the Commission before varying any such reference.
- (3) Subsection (2) shall not apply if the Commission has requested the variation concerned.
- (4) No variation under this section shall be capable of altering the period permitted by section 137 within which the report of the Commission under section 136 is to be prepared and published or (as the case may be) the period permitted by section 144 within which the report of the Commission under section 142 is to be prepared and published or given.

**136 Investigations and reports on market investigation references**

- (1) The Commission shall prepare and publish a report on a market investigation reference within the period permitted by section 137.

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- (2) The report shall, in particular, contain—
- (a) the decisions of the Commission on the questions which it is required to answer by virtue of section 134;
  - (b) its reasons for its decisions; and
  - (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.
- (3) The Commission shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section.
- (4) The Commission shall, at the same time as a report under this section is published—
- (a) in the case of a reference under section 131, give it to the OFT; and
  - (b) in the case of a reference under section 132, give it to the appropriate Minister and give a copy of it to the OFT.
- (5) Where a reference has been made by the OFT under section 131 or by the appropriate Minister under section 132 in circumstances in which a reference could have been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the Commission shall, at the same time as the report under this section is published, give a copy of it to the relevant sectoral regulator concerned.
- (6) Where a reference has been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the Commission shall, at the same time as the report under this section is published, give a copy of it to the OFT.
- (7) In this Part “relevant sectoral enactment” means—
- (a) in relation to the Director General of Telecommunications, section 50 of the Telecommunications Act 1984 (c. 12);
  - (b) in relation to the Gas and Electricity Markets Authority, section 36A of the Gas Act 1986 (c. 44) or (as the case may be) section 43 of the Electricity Act 1989 (c. 29);
  - (c) in relation to the Director General of Water Services, section 31 of the Water Industry Act 1991 (c. 56);
  - (d) in relation to the Director General of Electricity Supply for Northern Ireland, article 46 of the Electricity (Northern Ireland) Order 1992 (S.I. 1992/231 (N.I. 1));
  - (e) in relation to the Rail Regulator, section 67 of the Railways Act 1993 (c. 43);
  - (f) in relation to the Director General of Gas for Northern Ireland, article 23 of the Gas (Northern Ireland) Order 1996 (S.I. 1996/275 (N.I. 2)); and
  - (g) in relation to the Civil Aviation Authority, section 86 of the Transport Act 2000 (c. 38).
- (8) In this Part “relevant sectoral regulator” means the Director General of Telecommunications, the Gas and Electricity Markets Authority, the Director General of Water Services, the Director General of Electricity Supply for Northern Ireland, the Rail Regulator, the Director General of Gas for Northern Ireland or the Civil Aviation Authority.
- (9) The Secretary of State may by order modify subsection (7) or (8).

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### **137 Time-limits for market investigations and reports**

- (1) The Commission shall prepare and publish its report under section 136 within the period of two years beginning with the date of the market investigation reference concerned.
- (2) Subsection (1) is subject to section 151(3) and (5).
- (3) The Secretary of State may by order amend subsection (1) so as to alter the period of two years mentioned in that subsection or any period for the time being mentioned in that subsection in substitution for that period.
- (4) No alteration shall be made by virtue of subsection (3) which results in the period for the time being mentioned in subsection (1) exceeding two years.
- (5) An order under subsection (3) shall not affect any period of time within which the Commission is under a duty to prepare and publish its report under section 136 in relation to a market investigation reference if the Commission is already under that duty in relation to that reference when the order is made.
- (6) Before making an order under subsection (3) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.
- (7) References in this Part to the date of a market investigation reference shall be construed as references to the date specified in the reference as the date on which it is made.

### **138 Duty to remedy adverse effects**

- (1) Subsection (2) applies where a report of the Commission has been prepared and published under section 136 within the period permitted by section 137 and contains the decision that there is one or more than one adverse effect on competition.
- (2) The Commission shall, in relation to each adverse effect on competition, take such action under section 159 or 161 as it considers to be reasonable and practicable—
  - (a) to remedy, mitigate or prevent the adverse effect on competition concerned; and
  - (b) to remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition.
- (3) The decisions of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 134(4) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently.
- (4) In making a decision under subsection (2), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition.
- (5) In making a decision under subsection (2), the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned.

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- (6) The Commission shall take no action under subsection (2) to remedy, mitigate or prevent any detrimental effect on customers so far as it may be expected to result from the adverse effect on competition concerned if—
- (a) no detrimental effect on customers has resulted from the adverse effect on competition; and
  - (b) the adverse effect on competition is not being remedied, mitigated or prevented.

## CHAPTER 2

### PUBLIC INTEREST CASES

#### *Intervention notices*

#### **139 Public interest intervention by Secretary of State**

- (1) The Secretary of State may give a notice to the Commission if—
  - (a) a market investigation reference has been made to the Commission;
  - (b) no more than four months has passed since the date of the reference;
  - (c) the reference is not finally determined; and
  - (d) the Secretary of State believes that it is or may be the case that one or more than one public interest consideration is relevant to the case.
- (2) The Secretary of State may give a notice to the OFT if—
  - (a) the OFT is considering whether to accept—
    - (i) an undertaking under section 154 instead of making a reference under section 131; or
    - (ii) an undertaking varying or superseding any such undertaking;
  - (b) the OFT has published a notice under section 155(1) or (4); and
  - (c) the Secretary of State believes that it is or may be the case that one or more than one public interest consideration is relevant to the case.
- (3) In this Part “intervention notice” means a notice under subsection (1) or (2).
- (4) No more than one intervention notice shall be given under subsection (1) in relation to the same market investigation reference and no more than one intervention notice shall be given under subsection (2) in relation to the same proposed undertaking or in relation to proposed undertakings which do not differ from each other in any material respect.
- (5) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 153 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.
- (6) Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised, he shall, as soon as practicable, take such action as is within his power to ensure that it is finalised.
- (7) For the purposes of this Part a public interest consideration is finalised if—



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- (a) it is specified in section 153 otherwise than by virtue of an order under subsection (3) of that section; or
- (b) it is specified in that section by virtue of an order under subsection (3) of that section and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with subsection (6) of section 181 and within the period mentioned in that subsection.

#### *Intervention notices under section 139(1)*

### **140 Intervention notices under section 139(1)**

- (1) An intervention notice under section 139(1) shall state—
  - (a) the market investigation reference concerned;
  - (b) the date of the market investigation reference concerned;
  - (c) the public interest consideration or considerations which are, or may be, relevant to the case; and
  - (d) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.
- (2) Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to the case, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate.
- (3) The Secretary of State may at any time revoke an intervention notice which has been given under section 139(1) and which is in force.
- (4) An intervention notice under section 139(1) shall come into force when it is given and shall cease to be in force when the matter to which it relates is finally determined under this Chapter.
- (5) For the purposes of subsection (4) a matter to which an intervention notice under section 139(1) relates is finally determined under this Chapter if—
  - (a) the period permitted by section 144 for the preparation of the report of the Commission under section 142 and for action to be taken in relation to it under section 143(1) or (3) has expired and no such report has been so prepared or no such action has been taken;
  - (b) the Commission decides under section 145(1) to terminate its investigation;
  - (c) the report of the Commission has been prepared under section 142 and published under section 143(1) within the period permitted by section 144;
  - (d) the Secretary of State fails to make and publish a decision under subsection (2) of section 146 within the period required by subsection (3) of that section;
  - (e) the Secretary of State decides under section 146(2) that no eligible public interest consideration is relevant;
  - (f) the Secretary of State decides under section 147(2) neither to accept an undertaking under section 159 nor to make an order under section 161;
  - (g) the Secretary of State accepts an undertaking under section 159 or makes an order under section 161; or
  - (h) the Secretary of State decides to revoke the intervention notice concerned.

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- (6) For the purposes of subsections (4) and (5) the time when a matter to which an intervention notice under section 139(1) relates is finally determined under this Chapter is—
- (a) in a case falling within subsection (5)(a) or (d), the expiry of the period concerned;
  - (b) in a case falling within subsection (5)(b), (e), (f) or (h), the making of the decision concerned;
  - (c) in a case falling within subsection (5)(c), the publication of the report concerned; and
  - (d) in a case falling within subsection (5)(g), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.
- (7) In subsection (6)(d) the reference to the acceptance of the undertaking concerned or the making of the order concerned shall, in a case where the enforcement action under section 147(2) involves the acceptance of a group of undertakings, the making of a group of orders or the acceptance and making of a group of undertakings and orders, be treated as a reference to the acceptance or making of the last undertaking or order in the group; but undertakings or orders which vary, supersede or revoke earlier undertakings or orders shall be disregarded for the purposes of subsections (5)(g) and (6)(d).

#### **141 Questions to be decided by Commission**

- (1) This section applies where an intervention notice under section 139(1) is in force in relation to a market investigation reference.
- (2) The Commission shall decide whether any feature, or combination of features, of each relevant market (within the meaning given by section 134(3)) prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (3) The Commission shall, if it has decided that there is an adverse effect on competition, decide the following additional questions—
  - (a) whether action should be taken by the Secretary of State under section 147 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
  - (b) whether the Commission should recommend the taking of other action by the Secretary of State or action by persons other than itself and the Secretary of State for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
  - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (4) The Commission shall, if it has decided that there is an adverse effect on competition, also decide separately the following questions (on the assumption that it is proceeding as mentioned in section 148(1))—
  - (a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition

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- concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
- (b) whether the Commission should recommend the taking of action by other persons for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (5) In deciding the questions mentioned in subsections (3) and (4), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition.
- (6) In deciding the questions mentioned in subsections (3) and (4), the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned.

**Modifications etc. (not altering text)**

**C10** Ss. 35, 36, 47, 63, 134 and 141 extended (20.6.2003) by 1977 c. 37, s. 50A(6) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 8(2)); S.I. 2003/1397 {art. 2(1)}, Sch. (with art. 8)

**142 Investigations and reports by Commission**

- (1) Where an intervention notice under section 139(1) is in force in relation to a market investigation reference, the Commission shall prepare a report on the reference and take action in relation to it under section 143(1) or (3) within the period permitted by section 144.
- (2) The report shall, in particular, contain—
- (a) the decisions of the Commission on the questions which it is required to answer by virtue of section 141;
- (b) its reasons for its decisions; and
- (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.
- (3) The Commission shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section.

**143 Publication etc. of reports of Commission**

- (1) The Commission shall publish a report under section 142 if it contains—
- (a) the decision of the Commission that there is no adverse effect on competition; or
- (b) the decisions of the Commission that there is one or more than one adverse effect on competition but, on the question mentioned in section 141(4)(a) and in relation to each adverse effect on competition, that no action should be taken by it.

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- (2) The Commission shall, at the same time as the report is published under subsection (1) —
- (a) in the case of a reference under section 131, give it to the OFT; and
  - (b) in the case of a reference under section 132, give it to the appropriate Minister and give a copy of it to the OFT.
- (3) Where a report under section 142 contains the decisions of the Commission that there is one or more than one adverse effect on competition and, on the question mentioned in section 141(4)(a) and in relation to at least one such adverse effect, that action should be taken by it, the Commission shall give the report to the Secretary of State.
- (4) The Secretary of State shall publish, no later than publication of his decision under section 146(2) in relation to the case, a report of the Commission given to him under subsection (3) and not required to be published by virtue of section 148(2).
- (5) The Secretary of State shall, at the same time as a report of the Commission given to him under subsection (3) is published under subsection (4), give a copy of it—
- (a) in the case of a reference under section 131, to the OFT; and
  - (b) in the case of a reference under section 132, to any other Minister of the Crown who made the reference and to the OFT.
- (6) Where a reference has been made by the OFT under section 131 or by the appropriate Minister under section 132 in circumstances in which a reference could have been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the relevant authority shall, at the same time as the report under section 142 is published under subsection (1) or (4), give a copy of it to the relevant sectoral regulator concerned.
- (7) Where a reference has been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the relevant authority shall, at the same time as the report under section 142 is published under subsection (1) or (4), give a copy of it to the OFT.
- (8) In subsections (6) and (7) “the relevant authority” means—
- (a) in the case of a report published under subsection (1), the Commission; and
  - (b) in the case of a report published under subsection (4), the Secretary of State.

#### **144 Time-limits for investigations and reports: Part 4**

- (1) The Commission shall, within the period of two years beginning with the date of the reference, prepare its report under section 142 and publish it under subsection (1) of section 143 or (as the case may be) give it to the Secretary of State under subsection (3) of that section.
- (2) The Secretary of State may by order amend subsection (1) so as to alter the period of two years mentioned in that subsection or any period for the time being mentioned in that subsection in substitution for that period.
- (3) No alteration shall be made by virtue of subsection (2) which results in the period for the time being mentioned in subsection (1) exceeding two years.
- (4) An order under subsection (2) shall not affect any period of time within which, in relation to a market investigation reference, the Commission is under a duty to prepare its report under section 142 and take action in relation to it under section 143(1) or

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(3) if the Commission is already under that duty in relation to that reference when the order is made.

(5) Before making an order under subsection (2) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.

#### **145 Restrictions where public interest considerations not finalised: Part 4**

- (1) The Commission shall terminate its investigation under section 142 if—
- (a) the intervention notice concerned mentions a public interest consideration which was not finalised on the giving of that notice or public interest considerations which, at that time, were not finalised;
  - (b) no other public interest consideration is mentioned in the notice;
  - (c) at least 24 weeks has elapsed since the giving of the notice; and
  - (d) the public interest consideration mentioned in the notice has not been finalised within that period of 24 weeks or (as the case may be) none of the public interest considerations mentioned in the notice has been finalised within that period of 24 weeks.
- (2) Where the intervention notice concerned mentions a public interest consideration which is not finalised on the giving of the notice, the Commission shall not give its report under section 142 to the Secretary of State in accordance with section 143(3) unless the period of 24 weeks beginning with the giving of the intervention notice concerned has expired or the public interest consideration concerned has been finalised.
- (3) The Commission shall, in reporting on any of the questions mentioned in section 141(3), disregard any public interest consideration which has not been finalised before the giving of the report.
- (4) The Commission shall, in reporting on any of the questions mentioned in section 141(3), disregard any public interest consideration which was not finalised on the giving of the intervention notice concerned and has not been finalised within the period of 24 weeks beginning with the giving of the notice concerned.
- (5) Subsections (1) to (4) are without prejudice to the power of the Commission to carry out investigations in relation to any public interest consideration to which it might be able to have regard in its report.

#### **146 Decision of Secretary of State**

- (1) Subsection (2) applies where the Secretary of State has received a report of the Commission which—
- (a) has been prepared under section 142;
  - (b) contains the decisions that there is one or more than one adverse effect on competition and, on the question mentioned in section 141(4)(a) and in relation to at least one such adverse effect, that action should be taken by it; and
  - (c) has been given to the Secretary of State as required by section 143(3).
- (2) The Secretary of State shall decide whether—
- (a) any eligible public interest consideration is relevant; or
  - (b) any eligible public interest considerations are relevant;

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to any action which is mentioned in the report by virtue of section 141(4)(a) and (c) and which the Commission should take for the purpose of remedying, mitigating or preventing any adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted or may be expected to result from any adverse effect on competition.

- (3) The Secretary of State shall make and publish his decision under subsection (2) within the period of 90 days beginning with the receipt of the report of the Commission under section 142.
- (4) In this section “eligible public interest consideration” means a public interest consideration which—
  - (a) was mentioned in the intervention notice concerned; and
  - (b) was not disregarded by the Commission for the purposes of its report under section 142.

#### **147 Remedial action by Secretary of State**

- (1) Subsection (2) applies where the Secretary of State—
  - (a) has decided under subsection (2) of section 146 within the period required by subsection (3) of that section that an eligible public interest consideration is relevant as mentioned in subsection (2) of that section or eligible public interest considerations are so relevant; and
  - (b) has published his decision within the period required by subsection (3) of that section.
- (2) The Secretary of State may, in relation to any adverse effect on competition identified in the report concerned, take such action under section 159 or 161 as he considers to be—
  - (a) reasonable and practicable—
    - (i) to remedy, mitigate or prevent the adverse effect on competition concerned; or
    - (ii) to remedy, mitigate or prevent any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
  - (b) appropriate in the light of the eligible public interest consideration concerned or (as the case may be) the eligible public interest considerations concerned.
- (3) In making a decision under subsection (2), the Secretary of State shall, in particular, have regard to—
  - (a) the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition; and
  - (b) the report of the Commission under section 142.
- (4) In having regard by virtue of subsection (3) to the report of the Commission under section 142, the Secretary of State shall not challenge the decision of the Commission contained in the report that there is one or more than one adverse effect on competition.
- (5) In making a decision under subsection (2), the Secretary of State may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned.

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- (6) The Secretary of State shall take no action under subsection (2) to remedy, mitigate or prevent any detrimental effect on customers so far as it may be expected to result from the adverse effect on competition concerned if—
- (a) no detrimental effect on customers has resulted from the adverse effect on competition; and
  - (b) the adverse effect on competition is not being remedied, mitigated or prevented.
- (7) In this section “eligible public interest consideration” has the same meaning as in section 146.

#### **148 Reversion of the matter to the Commission**

- (1) If—
- (a) the Secretary of State fails to make and publish his decision under subsection (2) of section 146 within the period required by subsection (3) of that section; or
  - (b) the Secretary of State decides that no eligible public interest consideration is relevant as mentioned in subsection (2) of that section;
- the Commission shall proceed under section 138 as if the report had been prepared and published under section 136 within the period permitted by section 137.
- (2) The Commission shall publish the report which has been prepared by it under section 142 (if still unpublished) as soon as it becomes able to proceed by virtue of subsection (1).
- (3) The Commission shall, at the same time as its report is published under subsection (2), give a copy of it—
- (a) in the case of a reference under section 131, to the OFT; and
  - (b) in the case of a reference under section 132, to any Minister of the Crown who made the reference (other than the Secretary of State) and to the OFT.
- (4) Where a reference has been made by the OFT under section 131 or by the appropriate Minister under section 132 in circumstances in which a reference could have been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the Commission shall, at the same time as its report is published under subsection (2), give a copy of it to the relevant sectoral regulator concerned.
- (5) Where a reference has been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the Commission shall, at the same time as its report is published under subsection (2), give a copy of it to the OFT.
- (6) In relation to proceedings by virtue of subsection (1), the reference in section 138(3) to decisions of the Commission included in its report by virtue of section 134(4) shall be construed as a reference to decisions which were included in the report of the Commission by virtue of section 141(4).
- (7) Where the Commission, in proceeding by virtue of subsection (1), intends to proceed in a way which is not consistent with its decisions as included in its report by virtue of section 141(4), it shall not so proceed without the consent of the Secretary of State.

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- (8) The Secretary of State shall not withhold his consent under subsection (7) unless he believes that the proposed alternative way of proceeding will operate against the public interest.
- (9) For the purposes of subsection (8) a proposed alternative way of proceeding will operate against the public interest only if any eligible public interest consideration or considerations outweigh the considerations which have led the Commission to propose proceeding in that way.
- (10) In deciding whether to withhold his consent under subsection (7), the Secretary of State shall accept the Commission’s view of what, if the only relevant consideration were how to remedy, mitigate or prevent the adverse effect on competition concerned or any detrimental effect on customers so far as resulting from the adverse effect on competition, would be the most appropriate way to proceed.
- (11) In this section “eligible public interest consideration” has the same meaning as in section 146.

*Intervention notices under section 139(2)*

**149 Intervention notices under section 139(2)**

- (1) An intervention notice under section 139(2) shall state—
  - (a) the proposed undertaking which may be accepted by the OFT;
  - (b) the notice under section 155(1) or (4);
  - (c) the public interest consideration or considerations which are, or may be, relevant to the case; and
  - (d) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.
- (2) Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to the case, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate.
- (3) The Secretary of State may at any time revoke an intervention notice which has been given under section 139(2) and which is in force.
- (4) An intervention notice under section 139(2) shall come into force when it is given and shall cease to be in force on the occurrence of any of the events mentioned in subsection (5).
- (5) The events are—
  - (a) the acceptance by the OFT with the consent of the Secretary of State of an undertaking which is the same as the proposed undertaking mentioned in the intervention notice by virtue of subsection (1)(a) or which does not differ from it in any material respect;
  - (b) the decision of the OFT to proceed neither with the proposed undertaking mentioned in the intervention notice by virtue of subsection (1)(a) nor a proposed undertaking which does not differ from it in any material respect; or
  - (c) the decision of the Secretary of State to revoke the intervention notice concerned.



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## **150 Power of veto of Secretary of State**

- (1) Where an intervention notice under section 139(2) is in force, the OFT shall not, without the consent of the Secretary of State, accept the proposed undertaking concerned or a proposed undertaking which does not differ from it in any material respect.
- (2) The Secretary of State shall withhold his consent if he believes that it is or may be the case that the proposed undertaking will, if accepted, operate against the public interest.
- (3) For the purposes of subsection (2) a proposed undertaking will, if accepted, operate against the public interest only if any public interest consideration which is mentioned in the intervention notice concerned and has been finalised, or any public interest considerations which are so mentioned and have been finalised, outweigh the considerations which have led the OFT to propose accepting the undertaking.
- (4) In making his decision under subsection (2) the Secretary of State shall accept the OFT's view of what undertakings, if the only relevant consideration were how to remedy, mitigate or prevent the adverse effect on competition concerned or any detrimental effect on customers so far as resulting from the adverse effect on competition, would be most appropriate.
- (5) Where a public interest consideration which is mentioned in the intervention notice concerned is not finalised on the giving of the notice, the Secretary of State shall not make his decision as to whether to give his consent under this section before—
  - (a) the end of the period of 24 weeks beginning with the giving of the intervention notice; or
  - (b) if earlier, the date on which the public interest consideration concerned has been finalised.
- (6) Subject to subsections (2) to (5), the Secretary of State shall not withhold his consent under this section.

*Other*

## **151 Further interaction of intervention notices with general procedure**

- (1) Where an intervention notice under section 139(1) comes into force in relation to a market investigation reference, sections 134(1), (4), (6) and (7), 136(1) to (6), 137(1) to (6) and 138 shall cease to apply in relation to that reference.
- (2) Where the Secretary of State revokes an intervention notice which has been given under section 139(1), the Commission shall instead proceed under sections 134 and 136 to 138.
- (3) Where the Commission is proceeding by virtue of subsection (2), the period within which the Commission shall prepare and publish its report under section 136 shall be extended by an additional period of 20 days.
- (4) Where the Commission terminates its investigation under section 145(1), the Commission shall proceed under sections 134 and 136 to 138.
- (5) Where the Commission is proceeding by virtue of subsection (4), the period within which the Commission shall prepare and publish its report under section 136 shall be extended by an additional period of 20 days.

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- (6) In determining the period of 20 days mentioned in subsection (3) or (5) no account shall be taken of—
- (a) Saturday, Sunday, Good Friday and Christmas Day; and
  - (b) any day which is a bank holiday in England and Wales.

## **152 Certain duties of OFT and Commission**

- (1) The OFT shall, in considering whether to make a reference under section 131, bring to the attention of the Secretary of State any case which it believes raises any consideration specified in section 153 unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case.
- (2) The Commission shall, in investigating any reference made to it under section 131 or 132 within the previous four months, bring to the attention of the Secretary of State any case which it believes raises any consideration specified in section 153 unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case.
- (3) The OFT and the Commission shall bring to the attention of the Secretary of State any representations about exercising his power under section 153(3) which have been made to the OFT or (as the case may be) the Commission.

## **153 Specified considerations: Part 4**

- (1) The interests of national security are specified in this section.
- (2) In subsection (1) “national security” includes public security; and in this subsection “public security” has the same meaning as in article 21(3) of Council Regulation (EEC) No. 4064/89 of 21st December 1989 on the control of concentrations between undertakings as amended by Council Regulation (EC) No. 1310/97 of 30th June 1997.
- (3) The Secretary of State may by order modify this section for the purpose of specifying in this section a new consideration or removing or amending any consideration which is for the time being specified in this section.
- (4) An order under this section may apply in relation to cases under consideration by the OFT, by the Secretary of State, by the appropriate Minister (other than the Secretary of State acting alone) or by the Commission before the making of the order as well as cases under consideration on or after the making of the order.

## **CHAPTER 3**

### ENFORCEMENT

#### *Undertakings and orders*

## **154 Undertakings in lieu of market investigation references**

- (1) Subsection (2) applies if the OFT considers that it has the power to make a reference under section 131 and otherwise intends to make such a reference.

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- (2) The OFT may, instead of making such a reference and for the purpose of remedying, mitigating or preventing—
  - (a) any adverse effect on competition concerned; or
  - (b) any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;accept, from such persons as it considers appropriate, undertakings to take such action as it considers appropriate.
- (3) In proceeding under subsection (2), the OFT shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition.
- (4) In proceeding under subsection (2), the OFT may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned.
- (5) The OFT shall take no action under subsection (2) to remedy, mitigate or prevent any detrimental effect on customers so far as it may be expected to result from the adverse effect on competition concerned if—
  - (a) no detrimental effect on customers has resulted from the adverse effect on competition; and
  - (b) the adverse effect on competition is not being remedied, mitigated or prevented.
- (6) An undertaking under this section—
  - (a) shall come into force when accepted;
  - (b) may be varied or superseded by another undertaking; and
  - (c) may be released by the OFT.
- (7) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.
- (8) This section is subject to sections 150 and 155.

## **155 Undertakings in lieu: procedural requirements**

- (1) Before accepting an undertaking under section 154 (other than an undertaking under that section which varies an undertaking under that section but not in any material respect), the OFT shall—
  - (a) publish notice of the proposed undertaking; and
  - (b) consider any representations made in accordance with the notice and not withdrawn.
- (2) A notice under subsection (1) shall state—
  - (a) that the OFT proposes to accept the undertaking;
  - (b) the purpose and effect of the undertaking;
  - (c) the situation that the undertaking is seeking to deal with;
  - (d) any other facts which the OFT considers justify the acceptance of the undertaking;
  - (e) a means of gaining access to an accurate version of the proposed undertaking at all reasonable times; and

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- (f) the period (not less than 15 days starting with the date of publication of the notice) within which representations may be made in relation to the proposed undertaking.
- (3) The matters to be included in a notice under subsection (1) by virtue of subsection (2) shall, in particular, include—
    - (a) the terms of the reference under section 131 which the OFT considers that it has power to make and which it otherwise intends to make; and
    - (b) the adverse effect on competition, and any detrimental effect on customers so far as resulting from the adverse effect on competition, which the OFT has identified.
  - (4) The OFT shall not accept the undertaking with modifications unless it—
    - (a) publishes notice of the proposed modifications; and
    - (b) considers any representations made in accordance with the notice and not withdrawn.
  - (5) A notice under subsection (4) shall state—
    - (a) the proposed modifications;
    - (b) the reasons for them; and
    - (c) the period (not less than 7 days starting with the date of the publication of the notice under subsection (4)) within which representations may be made in relation to the proposed modifications.
  - (6) If, after publishing notice under subsection (1) or (4), the OFT decides—
    - (a) not to accept the undertaking concerned; and
    - (b) not to proceed by virtue of subsection (8) or (9);it shall publish notice of that decision.
  - (7) As soon as practicable after accepting an undertaking to which this section applies, the OFT shall—
    - (a) serve a copy of the undertaking on any person by whom it is given; and
    - (b) publish the undertaking.
  - (8) The requirements of subsection (4) (and those of subsection (1)) shall not apply if the OFT—
    - (a) has already published notice under subsection (1) but not subsection (4) in relation to the proposed undertaking; and
    - (b) considers that the modifications which are now being proposed are not material in any respect.
  - (9) The requirements of subsection (4) (and those of subsection (1)) shall not apply if the OFT—
    - (a) has already published notice under subsections (1) and (4) in relation to the matter concerned; and
    - (b) considers that the further modifications which are now being proposed do not differ in any material respect from the modifications in relation to which notice was last given under subsection (4).
  - (10) Paragraphs 6 to 8 (but not paragraph 9) of Schedule 10 (procedural requirements before terminating undertakings) shall apply in relation to the proposed release of undertakings under section 154 (other than in connection with accepting an undertaking under that section which varies or supersedes an undertaking under that

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section) as they apply in relation to the proposed release of undertakings under section 73.

#### **156 Effect of undertakings under section 154**

- (1) No market investigation reference shall be made by the OFT or the appropriate Minister in relation to any feature, or combination of features, of a market in the United Kingdom for goods or services if—
  - (a) the OFT has accepted an undertaking or group of undertakings under section 154 within the previous 12 months; and
  - (b) the goods or services to which the undertaking or group of undertakings relates are of the same description as the goods or services to which the feature, or combination of features, relates.
- (2) Subsection (1) does not prevent the making of a market investigation reference if—
  - (a) the OFT considers that any undertaking concerned has been breached and has given notice of that fact to the person responsible for giving the undertaking; or
  - (b) the person responsible for giving any undertaking concerned supplied, in connection with the matter, information to the OFT which was false or misleading in a material respect.

#### **157 Interim undertakings: Part 4**

- (1) Subsection (2) applies where—
  - (a) a market investigation reference has been made;
  - (b) a report has been published under section 136 within the period permitted by section 137 or (as the case may be) a report prepared under section 142 and given to the Secretary of State under section 143(3) within the period permitted by section 144 has been published; and
  - (c) the market investigation reference concerned is not finally determined.
- (2) The relevant authority may, for the purpose of preventing pre-emptive action, accept, from such persons as the relevant authority considers appropriate, undertakings to take such action as the relevant authority considers appropriate.
- (3) An undertaking under this section—
  - (a) shall come into force when accepted;
  - (b) may be varied or superseded by another undertaking; and
  - (c) may be released by the relevant authority.
- (4) An undertaking under this section shall, if it has not previously ceased to be in force, cease to be in force when the market investigation reference is finally determined.
- (5) The relevant authority shall, as soon as reasonably practicable, consider any representations received by the relevant authority in relation to varying or releasing an undertaking under this section.
- (6) In this section and section 158—

“pre-emptive action” means action which might impede the taking of any action under section 138(2) or (as the case may be) 147(2) in relation to the market investigation reference concerned; and

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“the relevant authority” means—

- (a) where an intervention notice is in force in relation to the market investigation reference, the Secretary of State;
- (b) in any other case, the Commission.

## **158 Interim orders: Part 4**

- (1) Subsection (2) applies where—
  - (a) a market investigation reference has been made;
  - (b) a report has been published under section 136 within the period permitted by section 137 or (as the case may be) a report prepared under section 142 and given to the Secretary of State under section 143(3) within the period permitted by section 144 has been published; and
  - (c) the market investigation reference concerned is not finally determined.
- (2) The relevant authority may by order, for the purpose of preventing pre-emptive action—
  - (a) prohibit or restrict the doing of things which the relevant authority considers would constitute pre-emptive action;
  - (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
  - (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
  - (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.
- (3) An order under this section—
  - (a) shall come into force at such time as is determined by or under the order; and
  - (b) may be varied or revoked by another order.
- (4) An order under this section shall, if it has not previously ceased to be in force, cease to be in force when the market investigation reference is finally determined.
- (5) The relevant authority shall, as soon as reasonably practicable, consider any representations received by the relevant authority in relation to varying or revoking an order under this section.

## **159 Final undertakings: Part 4**

- (1) The Commission may, in accordance with section 138, accept, from such persons as it considers appropriate, undertakings to take action specified or described in the undertakings.
- (2) The Secretary of State may, in accordance with section 147, accept, from such persons as he considers appropriate, undertakings to take action specified or described in the undertakings.
- (3) An undertaking under this section shall come into force when accepted.
- (4) An undertaking under subsection (1) or (2) may be varied or superseded by another undertaking under that subsection.

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- (5) An undertaking under subsection (1) may be released by the Commission and an undertaking under subsection (2) may be released by the Secretary of State.
- (6) The Commission or (as the case may be) the Secretary of State shall, as soon as reasonably practicable, consider any representations received by it or (as the case may be) him in relation to varying or releasing an undertaking under this section.

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

- (1) Subsection (2) applies where the relevant authority considers that—
  - (a) an undertaking accepted by the relevant authority under section 159 has not been, is not being or will not be fulfilled; or
  - (b) in relation to an undertaking accepted by the relevant authority under that section, information which was false or misleading in a material respect was given to the relevant authority or the OFT by the person giving the undertaking before the relevant authority decided to accept the undertaking.
- (2) The relevant authority may, for any of the purposes mentioned in section 138(2) or (as the case may be) 147(2), make an order under this section.
- (3) Subsections (3) to (6) of section 138 or (as the case may be) 147 shall apply for the purposes of subsection (2) above as they apply for the purposes of that section.
- (4) An order under this section may contain—
  - (a) anything permitted by Schedule 8; and
  - (b) such supplementary, consequential or incidental provision as the relevant authority considers appropriate.
- (5) An order under this section—
  - (a) shall come into force at such time as is determined by or under the order;
  - (b) may contain provision which is different from the provision contained in the undertaking concerned; and
  - (c) may be varied or revoked by another order.
- (6) No order shall be varied or revoked under this section unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances.
- (7) In this section “the relevant authority” means—
  - (a) in the case of an undertaking accepted under section 159 by the Commission, the Commission; and
  - (b) in the case of an undertaking accepted under that section by the Secretary of State, the Secretary of State.

### **Modifications etc. (not altering text)**

- C11** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, s. 144(2) (as substituted by [Enterprise Act 2002 \(c. 40\)](#), ss. 278, 279, [Sch. 25 para. 18\(2\)](#)); [S.I. 2003/1397](#), [art. 2\(1\)](#), Sch. (with [art. 8](#))
- C12** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, s. 238(2) (as substituted by [Enterprise Act 2002 \(c. 40\)](#) ss. 278, 279, {Sch. 25 para. 18(4)}); [S.I. 2003/1397](#), [art. 2\(1\)](#), Sch. (with [art. 8](#))

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*Changes to legislation: There are currently no known outstanding effects for the Enterprise Act 2002 (repealed), Part 4. (See end of Document for details)*

- C13** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, Sch. 2A para. 17(2) (as substituted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 18(5)(a)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C14** Ss. 160(4)(a), 161(3)(a), 164(1) modified (20.6.2003) by 1993 c. 21, s. 33(2A) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 29(3)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C15** Ss. 160(4)(a), 161(3)(a), 164(1) modified (20.6.2003) by 1994 c. 17, s. 33(2A) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 31(3)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)

## 161 Final orders: Part 4

- (1) The Commission may, in accordance with section 138, make an order under this section.
- (2) The Secretary of State may, in accordance with section 147, make an order under this section.
- (3) An order under this section may contain—
  - (a) anything permitted by Schedule 8; and
  - (b) such supplementary, consequential or incidental provision as the person making it considers appropriate.
- (4) An order under this section—
  - (a) shall come into force at such time as is determined by or under the order; and
  - (b) may be varied or revoked by another order.
- (5) No order shall be varied or revoked under this section unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances.

### Modifications etc. (not altering text)

- C16** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, s. 144(2) (as substituted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 18(2)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C17** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, s. 238(2) (as substituted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 18(4)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C18** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, Sch. 2A para. 17(2) (as substituted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 18(5)(a)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C19** Ss. 160(4)(a), 161(3)(a), 164(1) modified (20.6.2003) by 1993 c. 21, s. 33(2A) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 29(3)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C20** Ss. 160(4)(a), 161(3)(a), 164(1) modified (20.6.2003) by 1994 c. 17, s. 33(2A) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 31(3)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)



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*Changes to legislation: There are currently no known outstanding effects for the Enterprise Act 2002 (repealed), Part 4. (See end of Document for details)*

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### *Enforcement functions of OFT*

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

- (1) The OFT shall keep under review the carrying out of any enforcement undertaking or any enforcement order.
- (2) The OFT shall, in particular, from time to time consider—
  - (a) whether an enforcement undertaking or enforcement order has been or is being complied with;
  - (b) whether, by reason of any change of circumstances, an enforcement undertaking is no longer appropriate and—
    - (i) one or more of the parties to it can be released from it; or
    - (ii) it needs to be varied or to be superseded by a new enforcement undertaking; and
  - (c) whether, by reason of any change of circumstances, an enforcement order is no longer appropriate and needs to be varied or revoked.
- (3) The OFT shall give the Commission or (as the case may be) the Secretary of State such advice as it considers appropriate in relation to—
  - (a) any possible variation or release by the Commission or (as the case may be) the Secretary of State of an enforcement undertaking accepted by it or (as the case may be) him;
  - (b) any possible new enforcement undertaking to be accepted by the Commission or (as the case may be) the Secretary of State so as to supersede another enforcement undertaking given to the Commission or (as the case may be) the Secretary of State;
  - (c) any possible variation or revocation by the Commission or (as the case may be) the Secretary of State of an enforcement order made by the Commission or (as the case may be) the Secretary of State;
  - (d) any possible enforcement undertaking to be accepted by the Commission or (as the case may be) the Secretary of State instead of an enforcement order or any possible enforcement order to be made by the Commission or (as the case may be) the Secretary of State instead of an enforcement undertaking; or
  - (e) the enforcement by virtue of section 167(6) to (8) of any enforcement undertaking or enforcement order.
- (4) The OFT shall take such action as it considers appropriate in relation to—
  - (a) any possible variation or release by it of an undertaking accepted by it under section 154;
  - (b) any possible new undertaking to be accepted by it under section 154 so as to supersede another undertaking given to it under that section; or
  - (c) the enforcement by it by virtue of section 167(6) of any enforcement undertaking or enforcement order.
- (5) The OFT shall keep under review the effectiveness of enforcement undertakings accepted under this Part and enforcement orders made under this Part.
- (6) The OFT shall, whenever requested to do so by the Secretary of State and otherwise from time to time, prepare a report of its findings under subsection (5).
- (7) The OFT shall—

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- (a) give any report prepared by it under subsection (6) to the Commission;
  - (b) give a copy of the report to the Secretary of State; and
  - (c) publish the report.
- (8) In this Part—
- “enforcement order” means an order made under section 158, 160 or 161; and
  - “enforcement undertaking” means an undertaking accepted under section 154, 157 or 159.

**Modifications etc. (not altering text)**

- C21** Ss. 91(3), 92(1)(a), 162(1), 166(3) modified (20.6.2003) by 1977 c. 37, s. 50A(7) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 8(2)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C22** Ss. 162(1), 166(3) modified (20.6.2003) by S.I. 1982/1080 (N.I. 12), **art. 23(6)** (as substituted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para. 12(2)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)
- C23** Ss. 162(1), 166(3) modified (20.6.2003) by S.I. 1982/1080 (N.I. 12), **art. 42(5A)** (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, **Sch. 25 para 12(3)(e)**); S.I. 2003/1397, **art. 2(1)**, Sch. (with art. 8)

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

- (1) Subsections (2) and (3) apply where the Commission or the Secretary of State (in this section “the relevant authority”) is considering whether to accept undertakings under section 157 or 159.
- (2) The relevant authority may require the OFT to consult with such persons as the relevant authority considers appropriate with a view to discovering whether they will offer undertakings which the relevant authority would be prepared to accept under section 157 or (as the case may be) 159.
- (3) The relevant authority may require the OFT to report to the relevant authority on the outcome of the OFT’s consultations within such period as the relevant authority may require.
- (4) A report under subsection (3) shall, in particular, contain advice from the OFT as to whether any undertakings offered should be accepted by the relevant authority under section 157 or (as the case may be) 159.
- (5) The powers conferred on the relevant authority by subsections (1) to (4) are without prejudice to the power of the relevant authority to consult the persons concerned itself.
- (6) If asked by the relevant authority for advice in relation to the taking of enforcement action (whether or not by way of undertakings) in a particular case, the OFT shall give such advice as it considers appropriate.

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### Supplementary

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

- (1) The provision which may be contained in an enforcement undertaking is not limited to the provision which is permitted by Schedule 8.
- (2) The following enactments in Part 3 shall apply in relation to enforcement orders under this Part as they apply in relation to enforcement orders under that Part—
  - (a) section 86(1) to (5) (enforcement orders: general provisions); and
  - (b) section 87 (power of directions conferred by enforcement order).
- (3) An enforcement order under section 160 or 161 or any explanatory material accompanying the order shall state—
  - (a) the actions that the persons or description of persons to whom the order is addressed must do or (as the case may be) refrain from doing;
  - (b) the date on which the order comes into force;
  - (c) the possible consequences of not complying with the order; and
  - (d) the section of this Part under which a review can be sought in relation to the order.

#### Modifications etc. (not altering text)

- C24** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, s. 144(2) (as substituted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 18(2)); S.I. 2003/1397, art. 2(1), Sch. (with art. 8)
- C25** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, s. 238(2) (as substituted by Enterprise Act 2002 (c. 40) ss. 278, 279, {Sch. 25 para. 18(4)}); S.I. 2003/1397, art. 2(1), Sch. (with art. 8)
- C26** Ss. 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a), 164(1), Sch. 7 paras. 5, 10, 11 modified (20.6.2003) by 1988 c. 48, Sch. 2A para. 17(2) (as substituted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 18(5)(a)); S.I. 2003/1397, art. 2(1), Sch. (with art. 8)
- C27** Ss. 160(4)(a), 161(3)(a), 164(1) modified (20.6.2003) by 1993 c. 21, s. 33(2A) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 29(3)); S.I. 2003/1397, art. 2(1), Sch. (with art. 8)
- C28** Ss. 160(4)(a), 161(3)(a), 164(1) modified (20.6.2003) by 1994 c. 17, s. 33(2A) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 31(3)); S.I. 2003/1397, art. 2(1), Sch. (with art. 8)

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

Schedule 10 (procedural requirements for certain undertakings and orders), other than paragraph 9 of that Schedule, shall apply in relation to undertakings under section 159 and orders under section 160 or 161 as it applies in relation to undertakings under section 82 and orders under section 83 or 84.

#### 166 Register of undertakings and orders: Part 4

- (1) The OFT shall compile and maintain a register for the purposes of this Part.
- (2) The register shall be kept in such form as the OFT considers appropriate.

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- (3) The OFT shall ensure that the following matters are entered in the register—
- (a) the provisions of any enforcement undertaking accepted by virtue of this Part (whether by the OFT, the Commission, the Secretary of State or a relevant sectoral regulator);
  - (b) the provisions of any enforcement order made by virtue of this Part (whether by the Commission, the Secretary of State or a relevant sectoral regulator); and
  - (c) the details of any variation, release or revocation of such an undertaking or order.
- (4) The duty in subsection (3) does not extend to anything of which the OFT is unaware.
- (5) The Commission, the Secretary of State and any relevant sectoral regulator shall inform the OFT of any matters which are to be included in the register by virtue of subsection (3) and which relate to enforcement undertakings accepted by them or enforcement orders made by them.
- (6) The OFT shall ensure that the contents of the register are available to the public—
- (a) during (as a minimum) such hours as may be specified in an order made by the Secretary of State; and
  - (b) subject to such reasonable fees (if any) as the OFT may determine.
- (7) If requested by any person to do so and subject to such reasonable fees (if any) as the OFT may determine, the OFT shall supply the person concerned with a copy (certified to be true) of the register or of an extract from it.

**Modifications etc. (not altering text)**

- C29** Ss. 91(3), 92(1)(a), 162(1), 166(3) modified (20.6.2003) by 1977 c. 37, s. 50A(7) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 8(2)); S.I. 2003/1397, art. 2(1), Sch. (with art. 8)
- C30** Ss. 162(1), 166(3) modified (20.6.2003) by S.I. 1982/1080 (N.I. 12), art. 23(6) (as substituted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 12(2)); S.I. 2003/1397, art. 2(1), Sch. (with art. 8)
- C31** Ss. 162(1), 166(3) modified (20.6.2003) by S.I. 1982/1080 (N.I. 12), art. 42(5A) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para 12(3)(e)); S.I. 2003/1397, art. 2(1), Sch. (with art. 8)

**167 Rights to enforce undertakings and orders under this Part**

- (1) This section applies to any enforcement undertaking or enforcement order.
- (2) Any person to whom such an undertaking or order relates shall have a duty to comply with it.
- (3) The duty shall be owed to any person who may be affected by a contravention of the undertaking or (as the case may be) order.
- (4) Any breach of the duty which causes such a person to sustain loss or damage shall be actionable by him.
- (5) In any proceedings brought under subsection (4) against a person to whom an enforcement undertaking or enforcement order relates it shall be a defence for that

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person to show that he took all reasonable steps and exercised all due diligence to avoid contravening the undertaking or (as the case may be) order.

- (6) Compliance with an enforcement undertaking or an enforcement order shall also be enforceable by civil proceedings brought by the OFT for an injunction or for interdict or for any other appropriate relief or remedy.
- (7) Compliance with an undertaking accepted under section 157 or 159, or an order under section 158, 160 or 161, shall also be enforceable by civil proceedings brought by the relevant authority for an injunction or for interdict or for any other appropriate relief or remedy.
- (8) In subsection (7) “the relevant authority” means—
  - (a) in the case of an undertaking accepted by the Commission or an order made by the Commission, the Commission; and
  - (b) in the case of an undertaking accepted by the Secretary of State or an order made by the Secretary of State, the Secretary of State.
- (9) Subsections (6) to (8) shall not prejudice any right that a person may have by virtue of subsection (4) to bring civil proceedings for contravention or apprehended contravention of an enforcement undertaking or an enforcement order.

## CHAPTER 4

### SUPPLEMENTARY

#### *Regulated markets*

#### **168 Regulated markets**

- (1) Subsection (2) applies where the Commission or the Secretary of State is considering for the purposes of this Part whether relevant action would be reasonable and practicable for the purpose of remedying, mitigating or preventing an adverse effect on competition or any detrimental effect on customers so far as resulting from such an effect.
- (2) The Commission or (as the case may be) the Secretary of State shall, in deciding whether such action would be reasonable and practicable, have regard to the relevant statutory functions of the sectoral regulator concerned.
- (3) In this section “relevant action” means—
  - (a) modifying the conditions of a licence granted under section 7 of the Telecommunications Act 1984 (c. 12);
  - (b) modifying conditions in force under Part 4 of the Airports Act 1986 (c. 31) other than any conditions imposed or modified in pursuance of section 40(3) or (4) of that Act;
  - (c) modifying the conditions of a licence granted under section 7 or 7A of the Gas Act 1986 (c. 44);
  - (d) modifying the conditions of a licence granted under section 6 of the Electricity Act 1989 (c. 29);
  - (e) modifying networking arrangements (within the meaning given by section 39(1) of the Broadcasting Act 1990 (c. 42));

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- (f) modifying the conditions of a company’s appointment under Chapter 1 of Part 2 of the Water Industry Act 1991 (c. 56);
  - (g) modifying the conditions of a licence granted under article 10 of the Electricity (Northern Ireland) Order 1992 (S.I. 1992/231 (N.I. 1));
  - (h) modifying the conditions of a licence granted under section 8 of the Railways Act 1993 (c. 43);
  - (i) modifying an access agreement (within the meaning given by section 83(1) of the Act of 1993) or a franchise agreement (within the meaning given by section 23(3) of that Act);
  - (j) modifying conditions in force under Part 4 of the Airports (Northern Ireland) Order 1994 (S.I. 1994/426 (N.I. 1)) other than any conditions imposed or modified in pursuance of article 40(3) or (4) of that Order;
  - (k) modifying the conditions of a licence granted under article 8 of the Gas (Northern Ireland) Order 1996 (S.I. 1996/275 (N.I. 2));
  - (l) modifying the conditions of a licence granted under section 11 of the Postal Services Act 2000 (c. 26); or
  - (m) modifying the conditions of a licence granted under section 5 of the Transport Act 2000 (c. 38).
- (4) In this section “relevant statutory functions” means—
- (a) in relation to any licence granted under section 7 of the Telecommunications Act 1984, the duties and obligations of the Director General of Telecommunications imposed on him by or in pursuance of any enactment or other provision mentioned in section 7(5)(a) of that Act;
  - (b) in relation to conditions in force under Part 4 of the Airports Act 1986 (c. 31) other than any conditions imposed or modified in pursuance of section 40(3) or (4) of that Act, the duties of the Civil Aviation Authority under section 39(2) and (3) of that Act;
  - (c) in relation to any licence granted under section 7 or 7A of the Gas Act 1986 (c. 44), the objectives and duties of the Gas and Electricity Markets Authority under section 4AA and 4AB(2) of that Act;
  - (d) in relation to any licence granted under section 6 of the Electricity Act 1989 (c. 29), the objectives and duties of the Gas and Electricity Markets Authority under section 3A and 3B(2) of that Act;
  - (e) in relation to any networking arrangements (within the meaning given by section 39(1) of the Broadcasting Act 1990 (c. 42)), the duties of the Independent Television Commission under section 2(2) of that Act;
  - (f) in relation to a company’s appointment under Chapter 1 of Part 2 of the Water Industry Act 1991 (c. 56), the duties of the Director General of Water Services under section 2 of that Act;
  - (g) in relation to any licence granted under article 10 of the Electricity (Northern Ireland) Order 1992 (S.I. 1992/231 (N.I. 1)), the duty of the Director General of Electricity Supply for Northern Ireland under article 6 of that Order;
  - (h) in relation to any licence granted under section 8 of the Railways Act 1993 (c. 43) where none of the conditions of the licence relate to consumer protection, the duties of the Rail Regulator under section 4 of that Act;
  - (i) in relation to any licence granted under section 8 of the Act of 1993 where one or more than one condition of the licence relates to consumer protection, the duties of the Rail Regulator under section 4 of that Act and the duties of the Strategic Rail Authority under section 207 of the Transport Act 2000 (c. 38);

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- (j) in relation to any access agreement (within the meaning given by section 83(1) of the Act of 1993), the duties of the Rail Regulator under section 4 of the Act of 1993;
  - (k) in relation to any franchise agreement (within the meaning given by section 23(3) of the Act of 1993), the duties of the Strategic Rail Authority under section 207 of the Act of 2000;
  - (l) in relation to conditions in force under Part 4 of the Airports (Northern Ireland) Order 1994 (S.I. 1994/426 (N.I. 1)) other than any conditions imposed or modified in pursuance of article 40(3) or (4) of that Order, the duties of the Civil Aviation Authority under article 30(2) and (3) of that Order;
  - (m) in relation to any licence granted under article 8 of the Gas (Northern Ireland) Order 1996 (S.I. 1996/275 (N.I. 2)), the duties of the Director General of Gas for Northern Ireland under article 5 of that Order;
  - (n) in relation to any licence granted under section 11 of the Postal Services Act 2000 (c. 26), the duties of the Postal Services Commission under sections 3 and 5 of that Act; and
  - (o) in relation to any licence granted under section 5 of the Transport Act 2000, the duties of the Civil Aviation Authority under section 87 of that Act.
- (5) In this section “sectoral regulator” means—
- (a) the Civil Aviation Authority;
  - (b) the Director General of Electricity Supply for Northern Ireland;
  - (c) the Director General of Gas for Northern Ireland;
  - (d) the Director General of Telecommunications;
  - (e) the Director General of Water Services;
  - (f) the Gas and Electricity Markets Authority;
  - (g) the Independent Television Commission;
  - (h) the Postal Services Commission;
  - (i) the Rail Regulator; or
  - (j) the Strategic Rail Authority.
- (6) Subsection (7) applies where the Commission or the Secretary of State is considering for the purposes of this Part whether modifying the conditions of a licence granted under section 7 or 7A of the Gas Act 1986 (c. 44) or section 6 of the Electricity Act 1989 (c. 29) would be reasonable and practicable for the purpose of remedying, mitigating or preventing an adverse effect on competition or any detrimental effect on customers so far as resulting from such an effect.
- (7) The Commission or (as the case may be) the Secretary of State may, in deciding whether modifying the conditions of such a licence would be reasonable and practicable, have regard to those matters to which the Gas and Electricity Markets Authority may have regard by virtue of section 4AA(4) of the Act of 1986 or (as the case may be) section 3A(4) of the Act of 1989.
- (8) The Secretary of State may by order modify subsection (3), (4), (5), (6) or (7).
- (9) Part 2 of Schedule 9 (which makes provision for functions under this Part to be exercisable by various sectoral regulators) shall have effect.

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### *Consultation, information and publicity*

#### **169 Certain duties of relevant authorities to consult: Part 4**

- (1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to have a substantial impact on the interests of any person.
- (2) The relevant authority shall, so far as practicable, consult that person about what is proposed before making that decision.
- (3) In consulting the person concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.
- (4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to—
  - (a) any restrictions imposed by any timetable for making the decision; and
  - (b) any need to keep what is proposed, or the reasons for it, confidential.
- (5) The duty under this section shall not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of this Part for consultation before the making of that decision.
- (6) In this section—
 

“the relevant authority” means the OFT, the appropriate Minister or the Commission; and

“relevant decision” means—

  - (a) in the case of the OFT, any decision by the OFT—
    - (i) as to whether to make a reference under section 131 or accept undertakings under section 154 instead of making such a reference; or
    - (ii) to vary under section 135 such a reference;
  - (b) in the case of the appropriate Minister, any decision by the appropriate Minister—
    - (i) as to whether to make a reference under section 132; or
    - (ii) to vary under section 135 such a reference; and
  - (c) in the case of the Commission, any decision on the questions mentioned in section 134 or 141.

#### **170 General information duties**

- (1) The OFT shall give the Commission—
  - (a) such information in its possession as the Commission may reasonably require to enable the Commission to carry out its functions under this Part; and
  - (b) any other assistance which the Commission may reasonably require for the purpose of assisting it in carrying out its functions under this Part and which it is within the power of the OFT to give.
- (2) The OFT shall give the Commission any information in its possession which has not been requested by the Commission but which, in the opinion of the OFT, would be appropriate to give to the Commission for the purpose of assisting it in carrying out its functions under this Part.



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- (3) The OFT and the Commission shall give the Secretary of State or the appropriate Minister so far as he is not the Secretary of State acting alone—
  - (a) such information in their possession as the Secretary of State or (as the case may be) the appropriate Minister concerned may by direction reasonably require to enable him to carry out his functions under this Part; and
  - (b) any other assistance which the Secretary of State or (as the case may be) the appropriate Minister concerned may by direction reasonably require for the purpose of assisting him in carrying out his functions under this Part and which it is within the power of the OFT or (as the case may be) the Commission to give.
- (4) The OFT shall give the Secretary of State or the appropriate Minister so far as he is not the Secretary of State acting alone any information in its possession which has not been requested by the Secretary of State or (as the case may be) the appropriate Minister concerned but which, in the opinion of the OFT, would be appropriate to give to the Secretary of State or (as the case may be) the appropriate Minister concerned for the purpose of assisting him in carrying out his functions under this Part.
- (5) The Commission shall have regard to any information given to it under subsection (1) or (2); and the Secretary of State or (as the case may be) the appropriate Minister concerned shall have regard to any information given to him under subsection (3) or (4).
- (6) Any direction given under subsection (3)—
  - (a) shall be in writing; and
  - (b) may be varied or revoked by a subsequent direction.

#### **171 Advice and information: Part 4**

- (1) As soon as reasonably practicable after the passing of this Act, the OFT shall prepare and publish general advice and information about the making of references by it under section 131.
- (2) The OFT may at any time publish revised, or new, advice or information.
- (3) As soon as reasonably practicable after the passing of this Act, the Commission shall prepare and publish general advice and information about the consideration by it of market investigation references and the way in which relevant customer benefits may affect the taking of enforcement action in relation to such references.
- (4) The Commission may at any time publish revised, or new, advice or information.
- (5) Advice and information published under this section shall be prepared with a view to—
  - (a) explaining relevant provisions of this Part to persons who are likely to be affected by them; and
  - (b) indicating how the OFT or (as the case may be) the Commission expects such provisions to operate.
- (6) Advice and information published by virtue of subsection (1) or (3) shall include such advice and information about the effect of Community law, and anything done under or in accordance with it, on the provisions of this Part as the OFT or (as the case may be) the Commission considers appropriate.

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*Status: Point in time view as at 20/06/2003.*

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- (7) Advice (or information) published by virtue of subsection (1) or (3) may include advice (or information) about the factors which the OFT or (as the case may be) the Commission may take into account in considering whether, and if so how, to exercise a function conferred by this Part.
- (8) Any advice or information published by the OFT or the Commission under this section shall be published in such manner as the OFT or (as the case may be) the Commission considers appropriate.
- (9) In preparing any advice or information under this section, the OFT shall consult the Commission and such other persons as it considers appropriate.
- (10) In preparing any advice or information under this section, the Commission shall consult the OFT and such other persons as it considers appropriate.
- (11) In this section “Community law” means—
  - (a) all the rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties; and
  - (b) all the remedies and procedures from time to time provided for by or under the Community Treaties.

## **172 Further publicity requirements: Part 4**

- (1) The OFT shall publish—
  - (a) any reference made by it under section 131;
  - (b) any variation made by it under section 135 of a reference under section 131;
  - (c) any decision of a kind mentioned in section 149(5)(b); and
  - (d) such information as it considers appropriate about any decision made by it under section 152(1) to bring a case to the attention of the Secretary of State.
- (2) The Commission shall publish—
  - (a) any decision made by it under section 138(2) neither to accept an undertaking under section 159 nor to make an order under section 161;
  - (b) any decision made by it that there has been a material change of circumstances as mentioned in section 138(3) or there is another special reason as mentioned in that section;
  - (c) any termination under section 145(1) of an investigation by it;
  - (d) such information as it considers appropriate about any decision made by it under section 152(2) to bring a case to the attention of the Secretary of State;
  - (e) any enforcement undertaking accepted by it under section 157;
  - (f) any enforcement order made by it under section 158; and
  - (g) any variation, release or revocation of such an undertaking or order.
- (3) The Secretary of State shall publish—
  - (a) any reference made by him under section 132;
  - (b) any variation made by him under section 135 of a reference under section 132;
  - (c) any intervention notice given by him;
  - (d) any decision made by him to revoke such a notice;
  - (e) any decision made by him under section 147(2) neither to accept an undertaking under section 159 nor to make an order under section 161;
  - (f) any enforcement undertaking accepted by him under section 157;

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- (g) any variation or release of such an undertaking; and
  - (h) any direction given by him under section 170(3) in connection with the exercise by him of his functions under section 132(3).
- (4) The appropriate Minister (other than the Secretary of State acting alone) shall publish—
- (a) any reference made by him under section 132;
  - (b) any variation made by him under section 135 of a reference under section 132; and
  - (c) any direction given by him under section 170(3) in connection with the exercise by him of his functions under section 132(3).
- (5) Where any person is under an obligation by virtue of subsection (1), (2), (3) or (4) to publish the result of any action taken by that person or any decision made by that person, the person concerned shall, subject to subsections (6) and (7), also publish that person's reasons for the action concerned or (as the case may be) the decision concerned.
- (6) Such reasons need not, if it is not reasonably practicable to do so, be published at the same time as the result of the action concerned or (as the case may be) as the decision concerned.
- (7) Subsections (5) and (6) shall not apply in relation to any case falling within subsection (1)(d) or (2)(d).
- (8) The Secretary of State shall publish his reasons for—
- (a) any decision made by him under section 146(2); or
  - (b) any decision to make an order under section 153(3) or vary or revoke such an order.
- (9) Such reasons may be published after—
- (a) in the case of subsection (8)(a), the publication of the decision concerned; and
  - (b) in the case of subsection (8)(b), the making of the order or of the variation or revocation;
- if it is not reasonably practicable to publish them at the same time as the publication of the decision or (as the case may be) the making of the order or variation or revocation.
- (10) Where the Secretary of State has decided under section 147(2) to accept an undertaking under section 159 or to make an order under section 161, he shall (after the acceptance of the undertaking or (as the case may be) the making of the order) lay details of his decision and his reasons for it, and the Commission's report under section 142, before each House of Parliament.

## **173 Defamation: Part 4**

For the purposes of the law relating to defamation, absolute privilege attaches to any advice, guidance, notice or direction given, or decision or report made, by the OFT, by the Secretary of State, by the appropriate Minister (other than the Secretary of State acting alone) or by the Commission in the exercise of any of their functions under this Part.

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*Status: Point in time view as at 20/06/2003.*

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### *Investigation powers*

#### **174 Investigation powers of OFT**

- (1) The OFT may exercise any of the powers in subsections (3) to (5) for the purpose of assisting it in deciding whether to make a reference under section 131 or to accept undertakings under section 154 instead of making such a reference.
- (2) The OFT shall not exercise any of the powers in subsections (3) to (5) for the purpose of assisting it as mentioned in subsection (1) unless it already believes that it has power to make such a reference.
- (3) The OFT may give notice to any person requiring him—
  - (a) to attend at a time and place specified in the notice; and
  - (b) to give evidence to the OFT or a person nominated by the OFT for the purpose.
- (4) The OFT may give notice to any person requiring him—
  - (a) to produce any documents which—
    - (i) are specified or described in the notice, or fall within a category of document which is specified or described in the notice; and
    - (ii) are in that person's custody or under his control; and
  - (b) to produce them at a time and place so specified and to a person so specified.
- (5) The OFT may give notice to any person who carries on any business requiring him—
  - (a) to supply to the OFT such estimates, forecasts, returns or other information as may be specified or described in the notice; and
  - (b) to supply it at a time and place, and in a form and manner, so specified and to a person so specified.
- (6) A notice under this section shall include information about the possible consequences of not complying with the notice.
- (7) The person to whom any document is produced in accordance with a notice under this section may, for the purpose mentioned in subsection (1), copy the document so produced.
- (8) No person shall be required under this section—
  - (a) to give any evidence or produce any documents which he could not be compelled to give or produce in civil proceedings before the court; or
  - (b) to supply any information which he could not be compelled to supply in evidence in such proceedings.
- (9) No person shall be required, in compliance with a notice under this section, to go more than 10 miles from his place of residence unless his necessary travelling expenses are paid or offered to him.
- (10) Any reference in this section 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.
- (11) In this section “the court” means—
  - (a) in relation to England and Wales or Northern Ireland, the High Court; and
  - (b) in relation to Scotland, the Court of Session.

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*Status: Point in time view as at 20/06/2003.*

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## **175 Enforcement of powers under section 174: offences**

- (1) A person commits an offence if he, intentionally and without reasonable excuse, fails to comply with any requirement of a notice under section 174.
- (2) A person commits an offence if he intentionally and without reasonable excuse alters, suppresses or destroys any document which he has been required to produce by a notice under section 174.
- (3) A person who commits an offence under subsection (1) or (2) shall be 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) A person commits an offence if he intentionally obstructs or delays—
  - (a) the OFT in the exercise of its powers under section 174; or
  - (b) any person in the exercise of his powers under subsection (7) of that section.
- (5) A person who commits an offence under subsection (4) shall be liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum;
  - (b) on conviction on indictment, to a fine.

## **176 Investigation powers of the Commission**

- (1) The following sections in Part 3 shall apply, with the modifications mentioned in subsections (2) and (3) below, for the purposes of references under this Part 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 subsection (1) above, 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 subsection (1) above, have effect as if—
  - (a) for the words “section 50 or 65, given” there were substituted “ section 142, published or given under section 143(1) or (3) ”; and
  - (b) for the words “(or given)”, in both places where they appear, there were substituted “ (or published or given) ”.

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### *Reports*

#### **177 Excisions from reports: Part 4**

- (1) Subsection (2) applies where the Secretary of State is under a duty to publish a report of the Commission under section 142.
- (2) The Secretary of State may exclude a matter from the report if he considers that publication of the matter would be inappropriate.
- (3) In deciding what is inappropriate for the purposes of subsection (2) the Secretary of State shall have regard to the considerations mentioned in section 244.
- (4) The Commission shall advise the Secretary of State as to the matters (if any) which it considers should be excluded by him under subsection (2).
- (5) References in sections 136(4) to (6), 143(2) and (5) to (7), 148(3) to (5) and 172(10) to the giving or laying of a report of the Commission shall be construed as references to the giving or laying of the report as published.

#### **178 Minority reports of Commission: Part 4**

- (1) Subsection (2) applies where, on a market investigation reference, a member of a group constituted in connection with the reference in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998 (c. 41), disagrees with any decisions contained in the report of the Commission under this Part as the decisions of the Commission.
- (2) The report shall, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing.

### *Other*

#### **179 Review of decisions under Part 4**

- (1) Any person aggrieved by a decision of the OFT, the appropriate Minister, the Secretary of State or the Commission in connection with a reference or possible reference under this Part may apply to the Competition Appeal Tribunal for a review of that decision.
- (2) For this purpose “decision”—
  - (a) does not include a decision to impose a penalty under section 110(1) or (3) as applied by section 176; but
  - (b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference.
- (3) Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application.
- (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
- (5) The Competition Appeal Tribunal may—
  - (a) dismiss the application or quash the whole or part of the decision to which it relates; and

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- (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal.
- (6) An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal under this section to the appropriate court.
- (7) An appeal under subsection (6) requires the permission of the Tribunal or the appropriate court.
- (8) In this section—
  - “the appropriate court” means the Court of Appeal or, in the case of Tribunal proceedings in Scotland, the Court of Session; and
  - “Tribunal rules” has the meaning given by section 15(1).

## **180 Offences**

- (1) Sections 117 (false or misleading information) and 125 (offences by bodies corporate) shall apply, with the modifications mentioned in subsection (2) below, for the purposes of this Part as they apply for the purposes of Part 3.
- (2) Section 117 shall, in its application by virtue of subsection (1) above, have effect as if references to the Secretary of State included references to the appropriate Minister so far as he is not the Secretary of State acting alone.

## **181 Orders under Part 4**

- (1) Any power of the Secretary of State to make an order under this Part shall be exercisable by statutory instrument.
- (2) Any power of the Secretary of State to make an order under this Part—
  - (a) may be exercised so as to make different provision for different cases or different purposes;
  - (b) includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate.
- (3) The power of the Secretary of State under section 136(9), 137(3), 144(2), 153(3) or 168(8) as extended by subsection (2) above may be exercised by modifying any enactment comprised in or made under this Act, or any other enactment.
- (4) An order made by the Secretary of State under section 137(3), 144(2), 158, 160 or 161, or under section 111(4) or (6) or 114(3)(b) or (4)(b) as applied by section 176, shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (5) No order shall be made by the Secretary of State under section 136(9) or 168(8), or section 128(6) as applied by section 183(2), unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.
- (6) An order made by the Secretary of State under section 153(3) shall be laid before Parliament after being made and shall cease to have effect unless approved, within the period of 28 days beginning with the day on which it is made, by a resolution of each House of Parliament.

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- (7) In calculating the period of 28 days mentioned in subsection (6), no account shall be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.
- (8) If an order made by the Secretary of State ceases to have effect by virtue of subsection (6), any modification made by it of an enactment is repealed (and the previous enactment revived) but without prejudice to the validity of anything done in connection with that modification before the order ceased to have effect and without prejudice to the making of a new order.
- (9) If, apart from this subsection, an order made by the Secretary of State under section 153(3) would be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it shall proceed in that House as if it were not such an instrument.
- (10) References in this section to an order made under this Part include references to an order made under section 111(4) or (6) or 114(3)(b) or (4)(b) as applied by section 176 and an order made under section 128(6) as applied by section 183(2).

#### **182 Service of documents: Part 4**

Section 126 shall apply for the purposes of this Part as it applies for the purposes of Part 3.

#### **183 Interpretation: Part 4**

- (1) In this Part, unless the context otherwise requires—
- “action” includes omission; and references to the taking of action include references to refraining from action;
  - “business” includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge;
  - “change of circumstances” includes any discovery that information has been supplied which is false or misleading in a material respect;
  - “consumer” means any person who is—
    - (a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them; or
    - (b) a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them;

and who does not receive or seek to receive the goods or services in the course of a business carried on by him;
  - “customer” includes a customer who is not a consumer;
  - “enactment” includes an Act of the Scottish Parliament, Northern Ireland legislation and an enactment comprised in subordinate legislation, and includes an enactment whenever passed or made;
  - “goods” includes buildings and other structures, and also includes ships, aircraft and hovercraft;



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“Minister of the Crown” means the holder of an office in Her Majesty’s Government in the United Kingdom and includes the Treasury;

“modify” includes amend or repeal;

“notice” means notice in writing;

“subordinate legislation” has the same meaning as in the Interpretation Act 1978 (c. 30) and also includes an instrument made under an Act of the Scottish Parliament and an instrument made under Northern Ireland legislation; and

“supply”, in relation to the supply of goods, includes supply by way of sale, lease, hire or hire-purchase, and, in relation to buildings or other structures, includes the construction of them by a person for another person.

- (2) Sections 127(1)(b) and (4) to (6) and 128 shall apply for the purposes of this Part as they apply for the purposes of Part 3.
- (3) For the purposes of this Part a market investigation reference is finally determined if—
- (a) where no intervention notice under section 139(1) has been given in relation to it—
    - (i) the period permitted by section 137 for preparing and publishing a report under section 136 has expired and no such report has been prepared and published;
    - (ii) such a report has been prepared and published within the period permitted by section 137 and contains the decision that there is no adverse effect on competition;
    - (iii) the Commission has decided under section 138(2) neither to accept undertakings under section 159 nor to make an order under section 161; or
    - (iv) the Commission has accepted an undertaking under section 159 or made an order under section 161;
  - (b) where an intervention notice under section 139(1) has been given in relation to it—
    - (i) the period permitted by section 144 for the preparation of the report of the Commission under section 142 and for action to be taken in relation to it under section 143(1) or (3) has expired while the intervention notice is still in force and no such report has been so prepared or no such action has been taken;
    - (ii) the Commission has terminated under section 145(1) its investigation and the reference is finally determined under paragraph (a) above (disregarding the fact that the notice was given);
    - (iii) the report of the Commission has been prepared under section 142 and published under section 143(1) within the period permitted by section 144;
    - (iv) the intervention notice was revoked and the reference is finally determined under paragraph (a) above (disregarding the fact that the notice was given);
    - (v) the Secretary of State has failed to make and publish a decision under subsection (2) of section 146 within the period permitted by subsection (3) of that section and the reference is finally determined under paragraph (a) above (disregarding the fact that the notice was given);
    - (vi) the Secretary of State has decided under section 146(2) that no eligible public interest consideration is relevant and the reference is finally

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- determined under paragraph (a) above (disregarding the fact that the notice was given);
- (vii) the Secretary of State has decided under 146(2) that a public interest consideration is relevant but has decided under section 147(2) neither to accept an undertaking under section 159 nor to make an order under section 161; or
- (viii) the Secretary of State has decided under section 146(2) that a public interest consideration is relevant and has accepted an undertaking under section 159 or made an order under section 161.
- (4) For the purposes of this Part the time when a market investigation reference is finally determined is—
- (a) in a case falling within subsection (3)(a)(i) or (b)(i), the expiry of the time concerned;
  - (b) in a case falling within subsection (3)(a)(ii) or (b)(iii), the publication of the report;
  - (c) in a case falling within subsection (3)(a)(iv) or (b)(viii), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned; and
  - (d) in any other case, the making of the decision or last decision concerned or the taking of the action concerned.
- (5) The references in subsection (4) to subsections (3)(a)(i), (ii) and (iv) include those enactments as applied by subsection (3)(b)(ii), (iv), (v) or (vi).
- (6) In subsection (4)(c) the reference to the acceptance of the undertaking concerned or the making of the order concerned shall, in a case where the enforcement action concerned involves the acceptance of a group of undertakings, the making of a group of orders or the acceptance and making of a group of undertakings and orders, be treated as a reference to the acceptance or making of the last undertaking or order in the group; but undertakings or orders which vary, supersede or revoke earlier undertakings or orders shall be disregarded for the purposes of subsections (3)(a)(iv) and (b)(viii) and (4)(c).
- (7) Any duty to publish which is imposed on a person by this Part shall, unless the context otherwise requires, be construed as a duty on that person to publish in such manner as that person considers appropriate for the purpose of bringing the matter concerned to the attention of those likely to be affected by it.

## 184 Index of defined expressions: Part 4

In this Part, the expressions listed in the left-hand column have the meaning given by, or are to be interpreted in accordance with, the provisions listed in the right-hand column.

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<i>Expression</i>	<i>Provision of this Act</i>
Action (and the taking of action)	Section 183(1)
Adverse effect on competition	Section 134(2)
Appropriate Minister	Section 132(5)
Business	Section 183(1)
Change of circumstances	Section 183(1)

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The Commission	Section 273
Consumer	Section 183(1)
Customer	Section 183(1)
Date of market investigation reference	Section 137(7)
Detrimental effect on customers	Section 134(5)
Enactment	Section 183(1)
Enforcement order	Section 162(8)
Enforcement undertaking	Section 162(8)
Feature of a market	Section 131(2)
Final determination of market investigation reference	Section 183(3) to (6)
Goods	Section 183(1)
Intervention notice	Section 139(3)
Market for goods or services	Section 131(6)
Market in the United Kingdom	Section 131(6)
Market investigation reference	Section 131(6)
Minister of the Crown	Section 183(1)
Modify	Section 183(1)
Notice	Section 183(1)
The OFT	Section 273
Public interest consideration	Section 139(5)
Public interest consideration being finalised	Section 139(7)
Publish	Section 183(7)
Relevant customer benefit	Section 134(8)
Relevant sectoral enactment	Section 136(7)
Relevant sectoral regulator	Section 136(8)
Reports of the Commission	Section 177(5)
Subordinate legislation	Section 183(1)
Supply (in relation to the supply of goods)	Section 183(1)
The supply of services (and a market for services etc.)	Section 183(2)

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**Changes to legislation:**

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