



Enterprise Act 2002

2002 CHAPTER 40

PART 4

MARKET INVESTIGATIONS

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

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- (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;
- 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
 - (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

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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; 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.
- (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.

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.
- (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

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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).

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.

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- (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.
- (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.