



# Enterprise Act 2002

## 2002 CHAPTER 40

### PART 4

#### MARKET INVESTIGATIONS

### 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.
- (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.

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- (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  - (b) may be varied or superseded by another undertaking; and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
  - (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 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—

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- (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
  - “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.
- (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

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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.

#### **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.

### *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.

### **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.

### *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.

#### **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.
- (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.

#### **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.

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- (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 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.