

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Market Investigations

Introduction

Chapter 2: Public interest cases

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

Intervention notices

Section 139: Public interest intervention by Secretary of State

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

Intervention notices under *section 139(1)*

*Section 140: Intervention notices under *section 139(1)**

326. This section sets out the content requirements of an intervention notice under section 139(1) and provides when any such intervention notice will be deemed to be in force.
327. *Subsection (1)* provides that intervention notices must include certain details, including which case they relate to, and which public interest considerations may be relevant. *Subsection (2)* gives the Secretary of State discretion to mention such public interest consideration(s) in the intervention notice as she considers appropriate where there may be more than one relevant public interest consideration.

328. Subsection (4) provides that an intervention notice will come into force as soon as it is given. Subsections (4) and (5) provide that an intervention notice will cease to be in force once the role of the Secretary of State in relation to that case is complete (either because she has acted, including by revoking the intervention notice, or is prevented from acting in a number of circumstances set out in subsection (5)).

Section 141: Questions to be decided by Commission

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

Section 142: Investigations and reports by Commission

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

Section 143: Publication etc. of reports of Commission

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

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

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

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

337. This section provides that the CC’s conclusions as set out in its report must not rely on any new public interest consideration cited in the intervention notice, unless that consideration has been approved by Parliament within a given period. This ensures that the Secretary of State is prevented from determining the outcome of a case on grounds that Parliament has not recognised.

338. The CC will be able to consider a public interest consideration cited in a relevant intervention notice only if Parliament has approved an order seeking to create such a public interest consideration, or for a period of up to 24 weeks from the date of the intervention notice. Where Parliament has not yet decided upon such an order, the CC will be prevented from giving its report to the Secretary of State for a period of 24 weeks from the date of the reference.

Section 146: Decision of Secretary of State

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

Section 147: Remedial action by Secretary of State

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

Section 148: Reversion of the matter to the Commission

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

Intervention notices under *section 139(2)*

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

345. This section sets out the content requirements of an intervention notice given to the OFT under *section 139(2)* in relation to undertakings in lieu, and provides for when any such intervention notice will be deemed to be in force.
346. *Subsection (1)* provides that such intervention notices must include certain details, including which case it relates to, and which public interest considerations may be relevant. *Subsection (2)* provides the Secretary of State with the discretion to

mention such public interest consideration(s) in the intervention notice as she considers appropriate where there may be more than one relevant public interest consideration.

347. *Subsection (4)* ensures that an intervention notice will come into force as soon as it is given. *Subsections (4) and (5)* provide that an intervention notice will cease to be in force once the role of the Secretary of State in relation to that case is complete (either because she has acted, including by revoking the intervention notice, or is prevented from acting in a number of circumstances set out in subsection (5)).

Section 150: Power of veto of Secretary of State

348. This section provides that, if an intervention notice on undertakings in lieu is in force, the Secretary of State must agree to any undertakings before the OFT accepts them. The Secretary of State can only withhold her agreement if she believes that an undertaking could adversely affect the public interest. She may have regard only to the competition concerns identified by the OFT and any relevant public interest considerations.
349. *Subsection (5)* provides that, where new public interest consideration(s) specified in the intervention notice have not yet been approved by Parliament, the Secretary of State is prevented from giving her agreement on undertakings in lieu until either the Parliamentary procedure has run its course or 24 weeks have passed from the date of the intervention notice (whichever is the shorter).

Other

Section 151: Further interaction of intervention notices with general procedure

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

Section 152: Certain duties of OFT and Commission

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

Section 153: Specified considerations: Part 4

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