

COMMUNICATIONS ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Competition in Communications Markets

Chapter 1: Functions of OFCOM under Competition Legislation

Section 370: OFCOM's functions under Part 4 of the Enterprise Act 2002

778. This section gives OFCOM current jurisdiction with the OFT to apply and enforce the provisions of Part 4 of the Enterprise Act 2002 (market investigations), with certain limited exceptions, in relation to commercial activities connected with communications matters.

**Under subsection (4), the expression activities connected with communications matters includes the supply and export of apparatus used for providing or making available electronic communications networks or services and the production or acquisition of any such apparatus for supply or export.*

779. Part 4 of the Enterprise Act 2002 will replace the monopoly provisions of the Fair Trading Act 1973 with a new regime of "market investigations". These are designed to complement the Competition Act 1998 by providing a means of addressing problems in markets where competition does not appear to be working well, but where there is no apparent breach of existing competition law. An example of the sort of circumstances in which a market investigation might take place would be a situation where a few large firms supplied almost the whole of the market and, without there being any agreement between them, they all tended to follow parallel courses of conduct, while new competitors faced significant barriers to entry into the market, and there was little or no evidence of vigorous competition between the existing players (i.e. a non-collusive, uncompetitive oligopoly). The OFT is able to make a reference to the Competition Commission where it has reasonable grounds to suspect that the structure of a market in or including the UK, or the conduct of persons supplying or acquiring goods, or of their customers, prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK. Where the Competition Commission finds that such an adverse effect on competition exists, it is under a duty to take such remedial action within its powers as it considers reasonable and practicable. A number of sectoral regulators have concurrent powers with the OFT to make market investigation references in respect of markets which fall within their areas of responsibility. The Communications Act will give concurrent powers to OFCOM to exercise the OFT's functions under Part 4 of the Enterprise Act 2002 in relation to commercial activities connected with communications, except that, unlike the OFT, OFCOM will neither be obliged to keep a register of undertakings accepted and orders made under Part 4 (under section 166 of the Enterprise Act 2002) nor will they be obliged to issue guidance on the making of market references (under section 177 of that Act).

780. *Subsections (5) and (6) are designed to prevent the simultaneous exercise by both OFCOM and the OFT of their powers under Part 4 of the Enterprise Act 2002 in*

*These notes refer to the Communications Act 2003
(c.21) which received Royal Assent on 17 July 2003*

relation to the same matter. These subsections place those bodies under a duty to consult with each other before exercising any of the concurrent powers under this section and prohibit them from exercising these powers in a case where the other has already done so.

781. *Subsection (7)* places OFCOM under a duty, where they have referred a matter to the Competition Commission under the provisions of Part 4 of the Enterprise Act 2002, to provide the Competition Commission with any relevant information relevant to the investigation in their possession and with any other assistance that is within their power to give.
782. *Subsection (8)* gives the Secretary of State the power to conclusively determine any question that arises as to whether OFCOM may carry out any particular function under this section. However, *subsection (9)* also makes clear that no action taken by OFCOM under Part 4 of the Enterprise Act 2002 is open to challenge on the grounds that such action should have been taken by the OFT.
783. *Subsection (10)* applies section 117 of the Enterprise Act 2002 to the carrying out by OFCOM of functions under this section. Section 117 makes it an offence for a person knowingly or recklessly to supply materially false or misleading information to the Secretary of State, the OFT, the Competition Commission or to another person who he knows will use the information for the purpose of providing information to the Secretary of State, the OFT or the Competition Commission.