

COMMUNICATIONS ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Competition in Communications Markets

Chapter 1: Functions of OFCOM under Competition Legislation

775. Chapter 1 of Part 5 of the Act allows OFCOM to exercise concurrent powers with the Office of Fair Trading (OFT) under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002. Currently, the Director General of Telecommunications has concurrent jurisdiction with the OFT to exercise functions under these Acts in so far as they relate to “commercial activities connected with telecommunications” (see section 50 of the Telecommunications Act 1984, as amended by Part 2 of Schedule 9 to the Enterprise Act 2002). Chapter 1 of Part 5 will give OFCOM concurrent powers in relation to a wider range of activities including broadcasting and related matters.

Section 369: Matters in relation to which OFCOM have competition functions

776. This section explains the expression “communications matters” as it is used throughout this Chapter. “Communications matters” include any one or more of the following:

- the provision of electronic communications networks;
- the provision of electronic communications services;
- the making available of services or facilities in association with an electronic communications network or service or for facilitating the use of a network or service;
- apparatus used for any of the above; and
- broadcasting and related matters.

777. *Subsection (2)* gives the Secretary of State a power by order to amend this definition. No such order is, however, to be made unless a draft of it has been laid before Parliament and approved by a resolution of each House.

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 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.

Section 371: OFCOM's functions under the Competition Act 1998

784. This section is analogous to the existing provisions of the Competition Act 1998 giving concurrent jurisdiction to other sectoral regulators such as the Director General of Telecommunications. This section gives OFCOM concurrent jurisdiction with the OFT to apply and enforce Part 1 of the Competition Act 1998, with the exception of section 38 (1) to (6) and section 51. This means that OFCOM will be able to exercise

almost all of the functions of the OFT under Part 1 of the 1998 Act in so far as they relate to activities connected with communications matters. *Subsection (8)* gives OFCOM concurrent jurisdiction with the OFT with respect to certain transitional provisions of the 1998 Act.

*Section 38 of the Competition Act 1998 requires the OFT to prepare and publish guidance as to the appropriate amount of any penalty under Part 1 of the Act. Section 51 allows the OFT to make rules (currently in the form of the Competition Act 1998 (Director's Rules) Order 2000, [SI 2000 No. 293](#)) setting out the procedures to be followed by the OFT, the sectoral regulators and third parties under Part 1 of the Act.

*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.

785. The 1998 Act is based on Articles 81 and 82 of the EC Treaty. It contains two prohibitions: first, of agreements which prevent, restrict or distort competition and which may affect trade within the United Kingdom ('the Chapter I prohibition'); secondly, of conduct which amounts to an abuse of a dominant position in a market which may affect trade within the United Kingdom ('the Chapter II prohibition'). The 1998 Act is generally applied and enforced by the OFT. However, in a number of regulated industries such as telecommunications, gas, electricity, water and sewerage and railway services, functions under the Act are carried out by the sectoral regulator concurrently with the OFT. Examples of the functions in respect of which OFCOM will have concurrent jurisdiction include:

- to investigate possible infringements of the Chapter I or Chapter II prohibitions, either on their own initiative or in response to complaints;
- to impose financial penalties and/or to give directions to bring an infringement of either of the prohibitions to an end; and
- to issue general advice and information on how the Act applies to the communications sector.

786. OFCOM and the OFT will consult with each other before a decision is made as to who will deal with a case in respect of which there is concurrent jurisdiction. Formal arrangements for consultation are set out in regulations made under the Competition Act 1998. In general, anti-competitive agreements or abusive conduct that relate to activities connected with communications matters will be dealt with by OFCOM (unless the OFT is better placed to do so). Where it is unclear which regulator has jurisdiction, the matter will be referred to, and determined by, the Secretary of State. However, no objection may be made against anything done by OFCOM on the grounds that it should have been done by the OFT.

*Further provision for the co-ordination of the performance by the OFT and sectoral regulators of concurrent functions is contained in the Competition Act 1998 (Concurrency) Regulations 2000 ([SI 2000 No. 260](#)). The OFT and each regulator are also represented on the Concurrency Working Party which was formed in 1997 to ensure full co-ordination between regulators and the OFT and to ensure consistency of approach to casework.

787. Section 44 of the Competition Act 1998 makes it an offence, directly or indirectly, to provide false or misleading information to the OFT. As *subsection (3)* of this section provides that references to the OFT in Chapter 1 of the Competition Act 1998 are generally to be read as including OFCOM, section 44 of the Competition Act 1998 will also apply in relation to information provided to OFCOM in connection with their exercise of concurrent jurisdiction under that Act.

Section 372: Application of the Competition Act 1998 to news provision

788. This section amends section 194A of the Broadcasting Act 1990. Under that section, the Secretary of State may declare that any provisions in agreements between regional Channel 3 licence holders for the appointment of the Channel 3 news provider are either not anti-competitive or, if anti-competitive, are proportionate to the objectives being achieved. The effect of such a declaration is that the Chapter I prohibition in the Competition Act 1998 (referred to above) does not apply to those provisions and the OFT cannot use its powers under Chapter 3 of Part 1 of that Act to investigate the agreement. The Secretary of State is obliged to consult the OFT before making such declarations and to notify the OFT after making such declarations.
789. This section amends the references in section 194A of the Broadcasting Act 1990 to the OFT to refer to both the OFT and to OFCOM. This reflects the concurrent jurisdiction of the OFT and OFCOM under Part 1 of the Competition Act 1998 in relation to communications matters.
790. [Paragraphs 56](#) and [57](#) of Schedule 18 (transitional provisions) provide that from the date on which sections 370 and 371 come into force, anything done by the Director General of Telecommunications under the Enterprise Act 2002 or the Competition Act 1998 which OFCOM would, under those provisions, have the power to do in the future, will be taken to have been done by OFCOM. Anything else will, from the date of entry into force, be taken to have been done by the OFT.