

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Market Investigations

Introduction

Chapter 3: Enforcement

355. **Chapter 3** (sections 154-169) and Schedule 8 set out the enforcement powers of the OFT, CC and Secretary of State during and after a market investigation reference. As for the merger regime, enforcement takes two forms: undertakings and orders. Undertakings are agreements voluntarily entered into by the parties to a merger. Once agreed, these become legally-binding and enforceable in the courts. Orders are made by the authorities and prohibit the parties specified in the order from doing something or specify that they must take certain action. Under FTA 1973, orders were made by statutory instrument; the CC will now have the power to make orders on its own authority.

Undertakings and orders

Section 154: Undertakings in lieu of market investigation references

356. This section allows the OFT to seek and accept undertakings from one or more persons in place of making a market investigation reference. This provision enables the OFT to avoid making a reference to the CC in certain cases. The OFT has to be confident it has identified an adverse effect on competition in a market in relation to which it would otherwise have made a reference. It also needs to persuade the relevant parties to agree to a course of remedial action to address the competition problem it has identified. It can then accept undertakings in lieu of making a market investigation reference. This provision mirrors the existing power in section 56A FTA 1973 for the Secretary of State to accept undertakings-in-lieu, but with responsibility transferred to the OFT.

Section 155: Undertakings in lieu: procedural requirements

357. This section sets out the consultation process for accepting or varying an undertaking in lieu of a market reference. Undertakings-in-lieu require their own procedures because the OFT is required to set out, prior to accepting the undertaking, the terms of the market investigation reference that it would otherwise have made.

Section 156: Effect of undertakings under section 154

358. This section specifies that where the OFT has accepted an undertaking or group of undertakings in lieu of a reference, no market investigation reference in relation to the matters in respect of which the OFT would have made a reference had it not accepted any such undertaking or group of undertakings can be made for a period of twelve months.

Section 157: Interim undertakings: Part 4

359. This section applies following the publication of the CC's report and up to the point at which the reference is finally determined. During this period the CC can accept undertakings from the parties that they will not take any action that might prejudice the eventual introduction of the final remedy following the CC's report. The Secretary of State may exercise this power in cases where there is a public interest notice in force.
360. **Section 89 FTA 1973** allowed an interim order (see below) to be made during this period. No express provision was made for accepting interim undertakings. In practice, the authorities could seek and accept undertakings but these had no statutory basis.

Section 158: Interim orders: Part 4

361. This section also applies from publication of the CC's report to the point at which the final remedy is put in place. During this period, the CC can by order prevent the parties affected by a market investigation from taking any action that might prejudice the eventual introduction of the final remedy. This provision is based on section 89 FTA 1973. The Secretary of State may exercise this power in cases where a public interest notice is in force.

Section 159: Final undertakings: Part 4

362. This section allows the CC to accept final undertakings from the parties to remedy competition problems identified in its final report on a market investigation reference. This is based on the provisions on undertakings in section 88 FTA 1973. The Secretary of State may exercise this power in cases where there is a public interest notice in force.

Section 160: Order-making power where final undertakings not fulfilled: Part 4

363. This section allows the CC to replace final undertakings with an order where the parties are not complying with the undertakings. Any order made under this section is limited to the remedies set out in Schedule 8 or any closely-related remedy. (See note on Schedule 8 under Part 3 for more detail.) The Secretary of State may exercise this power in cases raising a public interest consideration.

Section 161: Final orders: Part 4

364. This section allows the CC to make an order to remedy competition problems identified in its final report on a market investigation. This final order may contain any of the remedies permitted by Schedule 8 or any closely-related remedy. The Secretary of State may exercise this power in cases where there is a public interest notice in force.

Enforcement functions of OFT

Section 162: Duty of OFT to monitor undertakings and orders: Part 4

365. This section gives the OFT the lead role in monitoring undertakings and orders. OFT will keep all undertakings and orders under review. Where it decides that an order or undertaking should be amended or revoked, it will advise the CC or Secretary of State accordingly. Where an order or undertaking is not being complied with, OFT will be able to take the company to court. This is based on the monitoring role given to the DGFT by section 88 FTA 1973.

Section 163: Further role of OFT in relation to undertakings and orders: Part 4

366. This section allows the CC (or the Secretary of State) to ask the OFT to negotiate final undertakings on its behalf following a market investigation. The CC retains the final say on whether undertakings should be accepted. The CC may also choose to negotiate directly with the parties.

Supplementary

Section 164: Enforcement undertakings and orders under this Part: general provisions

- 367. This section applies certain provisions from the mergers regime (Part 3) in the context of market investigations. It also specifies the minimum contents of any order.
- 368. [Section 86](#) makes certain general provisions applicable to all orders.
- 369. [Section 87](#) allows the person making an order to give directions to an individual or to an office-holder in any company or association.

Section 165: Procedural requirements for certain undertakings and orders: Part 4

- 370. This section brings into effect procedural requirements for making, varying or revoking orders and undertakings set out in Schedule 10.
- 371. These procedural requirements apply to final orders and undertakings. Interim orders do not have to comply with these procedural requirements because they may need to be introduced at short notice. However, unlike in mergers, paragraph 9 of the Schedule has been excluded to ensure that undertakings and orders are published in draft in every case.

Section 166: Register of undertakings and orders: Part 4

- 372. This section creates a register to be maintained by the OFT of all orders and undertakings made or accepted by the OFT, relevant sectoral regulators, CC or Secretary of State. This register will be available to the public. The sectoral regulators are not required to compile and maintain such a register.

Section 167: Rights to enforce undertakings and orders under this Part

- 373. This section makes provision for the enforcement of undertakings and orders through the courts along the same lines as section 94 in Part 3.