



Enterprise Act 2002

2002 CHAPTER 40

PART 4

MARKET INVESTIGATIONS

CHAPTER 2

PUBLIC INTEREST CASES

Intervention notices

139 Public interest intervention by Secretary of State

- (1) The Secretary of State may give a notice to the Commission if—
 - (a) a market investigation reference has been made to the Commission;
 - (b) no more than four months has passed since the date of the reference;
 - (c) the reference is not finally determined; and
 - (d) the Secretary of State believes that it is or may be the case that one or more than one public interest consideration is relevant to the case.
- (2) The Secretary of State may give a notice to the OFT if—
 - (a) the OFT is considering whether to accept—
 - (i) an undertaking under section 154 instead of making a reference under section 131; or
 - (ii) an undertaking varying or superseding any such undertaking;
 - (b) the OFT has published a notice under section 155(1) or (4); and
 - (c) the Secretary of State believes that it is or may be the case that one or more than one public interest consideration is relevant to the case.
- (3) In this Part “intervention notice” means a notice under subsection (1) or (2).

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- (4) No more than one intervention notice shall be given under subsection (1) in relation to the same market investigation reference and no more than one intervention notice shall be given under subsection (2) in relation to the same proposed undertaking or in relation to proposed undertakings which do not differ from each other in any material respect.
- (5) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 153 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.
- (6) Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised, he shall, as soon as practicable, take such action as is within his power to ensure that it is finalised.
- (7) For the purposes of this Part a public interest consideration is finalised if—
 - (a) it is specified in section 153 otherwise than by virtue of an order under subsection (3) of that section; or
 - (b) it is specified in that section by virtue of an order under subsection (3) of that section and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with subsection (6) of section 181 and within the period mentioned in that subsection.

Intervention notices under section 139(1)

140 Intervention notices under section 139(1)

- (1) An intervention notice under section 139(1) shall state—
 - (a) the market investigation reference concerned;
 - (b) the date of the market investigation reference concerned;
 - (c) the public interest consideration or considerations which are, or may be, relevant to the case; and
 - (d) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.
- (2) Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to the case, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate.
- (3) The Secretary of State may at any time revoke an intervention notice which has been given under section 139(1) and which is in force.
- (4) An intervention notice under section 139(1) shall come into force when it is given and shall cease to be in force when the matter to which it relates is finally determined under this Chapter.
- (5) For the purposes of subsection (4) a matter to which an intervention notice under section 139(1) relates is finally determined under this Chapter if—
 - (a) the period permitted by section 144 for the preparation of the report of the Commission under section 142 and for action to be taken in relation to it under section 143(1) or (3) has expired and no such report has been so prepared or no such action has been taken;

- (b) the Commission decides under section 145(1) to terminate its investigation;
 - (c) the report of the Commission has been prepared under section 142 and published under section 143(1) within the period permitted by section 144;
 - (d) the Secretary of State fails to make and publish a decision under subsection (2) of section 146 within the period required by subsection (3) of that section;
 - (e) the Secretary of State decides under section 146(2) that no eligible public interest consideration is relevant;
 - (f) the Secretary of State decides under section 147(2) neither to accept an undertaking under section 159 nor to make an order under section 161;
 - (g) the Secretary of State accepts an undertaking under section 159 or makes an order under section 161; or
 - (h) the Secretary of State decides to revoke the intervention notice concerned.
- (6) For the purposes of subsections (4) and (5) the time when a matter to which an intervention notice under section 139(1) relates is finally determined under this Chapter is—
- (a) in a case falling within subsection (5)(a) or (d), the expiry of the period concerned;
 - (b) in a case falling within subsection (5)(b), (e), (f) or (h), the making of the decision concerned;
 - (c) in a case falling within subsection (5)(c), the publication of the report concerned; and
 - (d) in a case falling within subsection (5)(g), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.
- (7) In subsection (6)(d) the reference to the acceptance of the undertaking concerned or the making of the order concerned shall, in a case where the enforcement action under section 147(2) involves the acceptance of a group of undertakings, the making of a group of orders or the acceptance and making of a group of undertakings and orders, be treated as a reference to the acceptance or making of the last undertaking or order in the group; but undertakings or orders which vary, supersede or revoke earlier undertakings or orders shall be disregarded for the purposes of subsections (5)(g) and (6)(d).

141 Questions to be decided by Commission

- (1) This section applies where an intervention notice under section 139(1) is in force in relation to a market investigation reference.
- (2) The Commission shall decide whether any feature, or combination of features, of each relevant market (within the meaning given by section 134(3)) prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (3) The Commission shall, if it has decided that there is an adverse effect on competition, decide the following additional questions—
 - (a) whether action should be taken by the Secretary of State under section 147 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
 - (b) whether the Commission should recommend the taking of other action by the Secretary of State or action by persons other than itself and the Secretary of

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State for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and

- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (4) The Commission shall, if it has decided that there is an adverse effect on competition, also decide separately the following questions (on the assumption that it is proceeding as mentioned in section 148(1))—
- (a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
 - (b) whether the Commission should recommend the taking of action by other persons for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
 - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (5) In deciding the questions mentioned in subsections (3) and (4), the Commission 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.
- (6) In deciding the questions mentioned in subsections (3) and (4), the Commission 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.

142 Investigations and reports by Commission

- (1) Where an intervention notice under section 139(1) is in force in relation to a market investigation reference, the Commission shall prepare a report on the reference and take action in relation to it under section 143(1) or (3) within the period permitted by section 144.
- (2) The report shall, in particular, contain—
 - (a) the decisions of the Commission on the questions which it is required to answer by virtue of section 141;
 - (b) its reasons for its decisions; and
 - (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.
- (3) The Commission shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section.

143 Publication etc. of reports of Commission

- (1) The Commission shall publish a report under section 142 if it contains—

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- (a) the decision of the Commission that there is no adverse effect on competition; or
 - (b) the decisions of the Commission that there is one or more than one adverse effect on competition but, on the question mentioned in section 141(4)(a) and in relation to each adverse effect on competition, that no action should be taken by it.
- (2) The Commission shall, at the same time as the report is published under subsection (1) —
- (a) in the case of a reference under section 131, give it to the OFT; and
 - (b) in the case of a reference under section 132, give it to the appropriate Minister and give a copy of it to the OFT.
- (3) Where a report under section 142 contains the decisions of the Commission that there is one or more than one adverse effect on competition and, on the question mentioned in section 141(4)(a) and in relation to at least one such adverse effect, that action should be taken by it, the Commission shall give the report to the Secretary of State.
- (4) The Secretary of State shall publish, no later than publication of his decision under section 146(2) in relation to the case, a report of the Commission given to him under subsection (3) and not required to be published by virtue of section 148(2).
- (5) The Secretary of State shall, at the same time as a report of the Commission given to him under subsection (3) is published under subsection (4), give a copy of it—
- (a) in the case of a reference under section 131, to the OFT; and
 - (b) in the case of a reference under section 132, to any other Minister of the Crown who made the reference and to the OFT.
- (6) Where a reference has been made by the OFT under section 131 or by the appropriate Minister under section 132 in circumstances in which a reference could have been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the relevant authority shall, at the same time as the report under section 142 is published under subsection (1) or (4), give a copy of it to the relevant sectoral regulator concerned.
- (7) Where a reference has been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the relevant authority shall, at the same time as the report under section 142 is published under subsection (1) or (4), give a copy of it to the OFT.
- (8) In subsections (6) and (7) “the relevant authority” means—
- (a) in the case of a report published under subsection (1), the Commission; and
 - (b) in the case of a report published under subsection (4), the Secretary of State.

144 Time-limits for investigations and reports: Part 4

- (1) The Commission shall, within the period of two years beginning with the date of the reference, prepare its report under section 142 and publish it under subsection (1) of section 143 or (as the case may be) give it to the Secretary of State under subsection (3) of that section.
- (2) The Secretary of State may by order amend subsection (1) so as to alter the period of two years mentioned in that subsection or any period for the time being mentioned in that subsection in substitution for that period.

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- (3) No alteration shall be made by virtue of subsection (2) which results in the period for the time being mentioned in subsection (1) exceeding two years.
- (4) An order under subsection (2) shall not affect any period of time within which, in relation to a market investigation reference, the Commission is under a duty to prepare its report under section 142 and take action in relation to it under section 143(1) or (3) if the Commission is already under that duty in relation to that reference when the order is made.
- (5) Before making an order under subsection (2) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.

145 Restrictions where public interest considerations not finalised: Part 4

- (1) The Commission shall terminate its investigation under section 142 if—
 - (a) the intervention notice concerned mentions a public interest consideration which was not finalised on the giving of that notice or public interest considerations which, at that time, were not finalised;
 - (b) no other public interest consideration is mentioned in the notice;
 - (c) at least 24 weeks has elapsed since the giving of the notice; and
 - (d) the public interest consideration mentioned in the notice has not been finalised within that period of 24 weeks or (as the case may be) none of the public interest considerations mentioned in the notice has been finalised within that period of 24 weeks.
- (2) Where the intervention notice concerned mentions a public interest consideration which is not finalised on the giving of the notice, the Commission shall not give its report under section 142 to the Secretary of State in accordance with section 143(3) unless the period of 24 weeks beginning with the giving of the intervention notice concerned has expired or the public interest consideration concerned has been finalised.
- (3) The Commission shall, in reporting on any of the questions mentioned in section 141(3), disregard any public interest consideration which has not been finalised before the giving of the report.
- (4) The Commission shall, in reporting on any of the questions mentioned in section 141(3), disregard any public interest consideration which was not finalised on the giving of the intervention notice concerned and has not been finalised within the period of 24 weeks beginning with the giving of the notice concerned.
- (5) Subsections (1) to (4) are without prejudice to the power of the Commission to carry out investigations in relation to any public interest consideration to which it might be able to have regard in its report.

146 Decision of Secretary of State

- (1) Subsection (2) applies where the Secretary of State has received a report of the Commission which—
 - (a) has been prepared under section 142;
 - (b) contains the decisions that there is one or more than one adverse effect on competition and, on the question mentioned in section 141(4)(a) and in

- relation to at least one such adverse effect, that action should be taken by it;
and
- (c) has been given to the Secretary of State as required by section 143(3).
- (2) The Secretary of State shall decide whether—
- (a) any eligible public interest consideration is relevant; or
- (b) any eligible public interest considerations are relevant;
- to any action which is mentioned in the report by virtue of section 141(4)(a) and (c) and which the Commission should take for the purpose of remedying, mitigating or preventing any adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted or may be expected to result from any adverse effect on competition.
- (3) The Secretary of State shall make and publish his decision under subsection (2) within the period of 90 days beginning with the receipt of the report of the Commission under section 142.
- (4) In this section “eligible public interest consideration” means a public interest consideration which—
- (a) was mentioned in the intervention notice concerned; and
- (b) was not disregarded by the Commission for the purposes of its report under section 142.

147 Remedial action by Secretary of State

- (1) Subsection (2) applies where the Secretary of State—
- (a) has decided under subsection (2) of section 146 within the period required by subsection (3) of that section that an eligible public interest consideration is relevant as mentioned in subsection (2) of that section or eligible public interest considerations are so relevant; and
- (b) has published his decision within the period required by subsection (3) of that section.
- (2) The Secretary of State may, in relation to any adverse effect on competition identified in the report concerned, take such action under section 159 or 161 as he considers to be—
- (a) reasonable and practicable—
- (i) to remedy, mitigate or prevent the adverse effect on competition concerned; or
- (ii) to remedy, mitigate or prevent any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
- (b) appropriate in the light of the eligible public interest consideration concerned or (as the case may be) the eligible public interest considerations concerned.
- (3) In making a decision under subsection (2), the Secretary of State shall, in particular, have regard to—
- (a) 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; and
- (b) the report of the Commission under section 142.

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- (4) In having regard by virtue of subsection (3) to the report of the Commission under section 142, the Secretary of State shall not challenge the decision of the Commission contained in the report that there is one or more than one adverse effect on competition.
- (5) In making a decision under subsection (2), the Secretary of State 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.
- (6) The Secretary of State 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.
- (7) In this section “eligible public interest consideration” has the same meaning as in section 146.

148 Reversion of the matter to the Commission

- (1) If—
 - (a) the Secretary of State fails to make and publish his decision under subsection (2) of section 146 within the period required by subsection (3) of that section; or
 - (b) the Secretary of State decides that no eligible public interest consideration is relevant as mentioned in subsection (2) of that section;
 the Commission shall proceed under section 138 as if the report had been prepared and published under section 136 within the period permitted by section 137.
- (2) The Commission shall publish the report which has been prepared by it under section 142 (if still unpublished) as soon as it becomes able to proceed by virtue of subsection (1).
- (3) The Commission shall, at the same time as its report is published under subsection (2), give a copy of it—
 - (a) in the case of a reference under section 131, to the OFT; and
 - (b) in the case of a reference under section 132, to any Minister of the Crown who made the reference (other than the Secretary of State) and to the OFT.
- (4) Where a reference has been made by the OFT under section 131 or by the appropriate Minister under section 132 in circumstances in which a reference could have been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the Commission shall, at the same time as its report is published under subsection (2), give a copy of it to the relevant sectoral regulator concerned.
- (5) Where a reference has been made by a relevant sectoral regulator under section 131 as it has effect by virtue of a relevant sectoral enactment, the Commission shall, at the same time as its report is published under subsection (2), give a copy of it to the OFT.
- (6) In relation to proceedings by virtue of subsection (1), the reference in section 138(3) to decisions of the Commission included in its report by virtue of section 134(4) shall

be construed as a reference to decisions which were included in the report of the Commission by virtue of section 141(4).

- (7) Where the Commission, in proceeding by virtue of subsection (1), intends to proceed in a way which is not consistent with its decisions as included in its report by virtue of section 141(4), it shall not so proceed without the consent of the Secretary of State.
- (8) The Secretary of State shall not withhold his consent under subsection (7) unless he believes that the proposed alternative way of proceeding will operate against the public interest.
- (9) For the purposes of subsection (8) a proposed alternative way of proceeding will operate against the public interest only if any eligible public interest consideration or considerations outweigh the considerations which have led the Commission to propose proceeding in that way.
- (10) In deciding whether to withhold his consent under subsection (7), the Secretary of State shall accept the Commission's view of what, if the only relevant consideration were how to remedy, mitigate or prevent the adverse effect on competition concerned or any detrimental effect on customers so far as resulting from the adverse effect on competition, would be the most appropriate way to proceed.
- (11) In this section "eligible public interest consideration" has the same meaning as in section 146.

Intervention notices under section 139(2)

149 Intervention notices under section 139(2)

- (1) An intervention notice under section 139(2) shall state—
 - (a) the proposed undertaking which may be accepted by the OFT;
 - (b) the notice under section 155(1) or (4);
 - (c) the public interest consideration or considerations which are, or may be, relevant to the case; and
 - (d) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.
- (2) Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to the case, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate.
- (3) The Secretary of State may at any time revoke an intervention notice which has been given under section 139(2) and which is in force.
- (4) An intervention notice under section 139(2) shall come into force when it is given and shall cease to be in force on the occurrence of any of the events mentioned in subsection (5).
- (5) The events are—
 - (a) the acceptance by the OFT with the consent of the Secretary of State of an undertaking which is the same as the proposed undertaking mentioned in the intervention notice by virtue of subsection (1)(a) or which does not differ from it in any material respect;

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- (b) the decision of the OFT to proceed neither with the proposed undertaking mentioned in the intervention notice by virtue of subsection (1)(a) nor a proposed undertaking which does not differ from it in any material respect; or
- (c) the decision of the Secretary of State to revoke the intervention notice concerned.

150 Power of veto of Secretary of State

- (1) Where an intervention notice under section 139(2) is in force, the OFT shall not, without the consent of the Secretary of State, accept the proposed undertaking concerned or a proposed undertaking which does not differ from it in any material respect.
- (2) The Secretary of State shall withhold his consent if he believes that it is or may be the case that the proposed undertaking will, if accepted, operate against the public interest.
- (3) For the purposes of subsection (2) a proposed undertaking will, if accepted, operate against the public interest only if any public interest consideration which is mentioned in the intervention notice concerned and has been finalised, or any public interest considerations which are so mentioned and have been finalised, outweigh the considerations which have led the OFT to propose accepting the undertaking.
- (4) In making his decision under subsection (2) the Secretary of State shall accept the OFT's view of what undertakings, if the only relevant consideration were how to remedy, mitigate or prevent the adverse effect on competition concerned or any detrimental effect on customers so far as resulting from the adverse effect on competition, would be most appropriate.
- (5) Where a public interest consideration which is mentioned in the intervention notice concerned is not finalised on the giving of the notice, the Secretary of State shall not make his decision as to whether to give his consent under this section before—
 - (a) the end of the period of 24 weeks beginning with the giving of the intervention notice; or
 - (b) if earlier, the date on which the public interest consideration concerned has been finalised.
- (6) Subject to subsections (2) to (5), the Secretary of State shall not withhold his consent under this section.

Other

151 Further interaction of intervention notices with general procedure

- (1) Where an intervention notice under section 139(1) comes into force in relation to a market investigation reference, sections 134(1), (4), (6) and (7), 136(1) to (6), 137(1) to (6) and 138 shall cease to apply in relation to that reference.
- (2) Where the Secretary of State revokes an intervention notice which has been given under section 139(1), the Commission shall instead proceed under sections 134 and 136 to 138.
- (3) Where the Commission is proceeding by virtue of subsection (2), the period within which the Commission shall prepare and publish its report under section 136 shall be extended by an additional period of 20 days.

- (4) Where the Commission terminates its investigation under section 145(1), the Commission shall proceed under sections 134 and 136 to 138.
- (5) Where the Commission is proceeding by virtue of subsection (4), the period within which the Commission shall prepare and publish its report under section 136 shall be extended by an additional period of 20 days.
- (6) In determining the period of 20 days mentioned in subsection (3) or (5) no account shall be taken of—
 - (a) Saturday, Sunday, Good Friday and Christmas Day; and
 - (b) any day which is a bank holiday in England and Wales.

152 Certain duties of OFT and Commission

- (1) The OFT shall, in considering whether to make a reference under section 131, bring to the attention of the Secretary of State any case which it believes raises any consideration specified in section 153 unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case.
- (2) The Commission shall, in investigating any reference made to it under section 131 or 132 within the previous four months, bring to the attention of the Secretary of State any case which it believes raises any consideration specified in section 153 unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case.
- (3) The OFT and the Commission shall bring to the attention of the Secretary of State any representations about exercising his power under section 153(3) which have been made to the OFT or (as the case may be) the Commission.

153 Specified considerations: Part 4

- (1) The interests of national security are specified in this section.
- (2) In subsection (1) “national security” includes public security; and in this subsection “public security” has the same meaning as in article 21(3) of Council Regulation (EEC) No. 4064/89 of 21st December 1989 on the control of concentrations between undertakings as amended by Council Regulation (EC) No. 1310/97 of 30th June 1997.
- (3) The Secretary of State may by order modify this section for the purpose of specifying in this section a new consideration or removing or amending any consideration which is for the time being specified in this section.
- (4) An order under this section may apply in relation to cases under consideration by the OFT, by the Secretary of State, by the appropriate Minister (other than the Secretary of State acting alone) or by the Commission before the making of the order as well as cases under consideration on or after the making of the order.