



Communications Act 2003

2003 CHAPTER 21

PART 2

NETWORKS, SERVICES AND THE RADIO SPECTRUM

CHAPTER 1

ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES

SMP conditions: procedure

78 Circumstances required for the setting of SMP conditions

- (1) For the purposes of this Chapter a person shall be taken to have significant market power in relation to a market if he enjoys a position which amounts to or is equivalent to dominance of the market.
- (2) References in this section to dominance of a market must be construed in accordance with any applicable provisions of Article 14 of the Framework Directive.
- (3) A person is to be taken to enjoy a position of dominance of a market if he is one of a number of persons who enjoy such a position in combination with each other.
- (4) A person or combination of persons may also be taken to enjoy a position of dominance of a market by reason wholly or partly of his or their position in a closely related market if the links between the two markets allow the market power held in the closely related market to be used in a way that influences the other market so as to strengthen the position in the other market of that person or combination of persons.
- (5) The matters that must be taken into account in determining whether a combination of persons enjoys a position of dominance of a services market include, in particular, the matters set out in Annex II to the Framework Directive.

Status: Point in time view as at 22/04/2011.

Changes to legislation: Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

Commencement Information

- I1** S. 78 in force at 25.7.2003 for specified purposes by S.I. 2003/1900, arts. 1(2), 2(1), Sch. 1 (with art. 3) (as amended by S.I. 2003/3142, art. 1(3))
- I2** S. 78 in force at 29.12.2003 in so far as not already in force by S.I. 2003/3142, art. 3(2) (with art. 11)

79 Market power determinations

- (1) Before making a market power determination, OFCOM must—
 - (a) identify (by reference, in particular, to area and locality) the markets which in their opinion are the ones which in the circumstances of the United Kingdom are the markets in relation to which it is appropriate to consider whether to make the determination; and
 - (b) carry out an analysis of the identified markets.
- (2) In identifying or analysing any services market for the purposes of this Chapter, OFCOM must take due account of all applicable guidelines and recommendations which—
 - (a) have been issued or made by the European Commission in pursuance of the provisions of a [F¹EU] instrument; and
 - (b) relate to market identification and analysis.
- (3) In considering whether to make or revise a market power determination in relation to a services market, OFCOM must take due account of all applicable guidelines and recommendations which—
 - (a) have been issued or made by the European Commission in pursuance of the provisions of a [F¹EU] instrument; and
 - (b) relate to market analysis or the determination of what constitutes significant market power.
- (4) The way in which—
 - (a) a market is to be identified for the purposes of this section, or
 - (b) a market power determination is to be made,
 is by the publication of a notification containing the identification or determination.
- (5) Notifications for the purposes of subsection (4)—
 - (a) may be given separately;
 - (b) may be contained in a single notification relating to both the identification of a market and the making of a market determination in relation to that market; or
 - (c) may be contained in a single notification under section 48(1) with respect to the setting or modification of an SMP condition and either—
 - (i) the making of the market power determination by reference to which OFCOM set or modify that condition; or
 - (ii) the making of that market power determination and the identification of the market in relation to which they make that determination.
- (6) The publication of a notification under this section must be in such manner as appears to OFCOM to be appropriate for bringing the contents of the notification to the attention of the persons who, in OFCOM's opinion, are likely to be affected by the matters notified.

Status: Point in time view as at 22/04/2011.

Changes to legislation: Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

- (7) References in this section to guidelines and recommendations issued by the European Commission and to a [F1EU] instrument include references, respectively, to guidelines and recommendations issued after the commencement of this section and to a [F1EU] instrument made after the commencement of this section.

Textual Amendments

- F1** Words in Act substituted (22.4.2011) by [The Treaty of Lisbon \(Changes in Terminology\) Order 2011 \(S.I. 2011/1043\)](#), arts. 2, 3, 6 (with art. 3(2)(3), 4(2), 6(4)(5))

Commencement Information

- I3** S. 79 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), arts. 1(2), 2(1), [Sch. 1](#) (with art. 3) (as amended by [S.I. 2003/3142](#), art. 1(3))
- I4** S. 79 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), [art. 3\(2\)](#) (with art. 11)

80 Proposals for identifying markets and for market power determinations

- (1) Before OFCOM—
- (a) identify a market for the purposes of making a market power determination, or
 - (b) make a market power determination,
- they must publish a notification of what they are proposing to do.
- (2) Notifications for the purposes of subsection (1)—
- (a) may be given separately;
 - (b) may be contained in a single notification relating to both the identification of a market and the making of a market determination in relation to that market; or
 - (c) may be contained in a single notification under section 48(2) with respect to the setting or modification of an SMP condition and either—
 - (i) the making of the market power determination by reference to which OFCOM are proposing to set or modify that condition; or
 - (ii) the making of that market power determination and the identification of the market in relation to which they are proposing to make that determination.
- (3) A notification under this section relating to a proposal to identify a market or to make a market power determination must—
- (a) state that OFCOM are proposing to identify that market or to make that market power determination;
 - (b) set out the effect of the proposal;
 - (c) give their reasons for making the proposal; and
 - (d) specify the period within which representations may be made to OFCOM about their proposal.
- (4) That period must be a period of not less than one month after the day of the publication of the notification.
- (5) The publication of a notification under this section must be in such manner as appears to OFCOM to be appropriate for bringing the contents of the notification to the attention of the persons who, in OFCOM's opinion, are likely to be affected by the matters notified.

Status: Point in time view as at 22/04/2011.

Changes to legislation: Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

- (6) OFCOM may give effect, with or without modifications, to a proposal with respect to which they have given a notification under this section only if—
- (a) they have considered every representation about the proposal that is made to them within the period specified in the notification; and
 - (b) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for the purposes of this paragraph by the Secretary of State.
- (7) The power of OFCOM to give effect to such a proposal is subject to sections 82 and 83.

Commencement Information

- I5** S. 80 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), arts. 1(2), 2(1), [Sch. 1](#) (with art. 3) (as amended by [S.I. 2003/3142](#), art. 1(3))
- I6** S. 80 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), [art. 3\(2\)](#) (with art. 11)

81 Delivery of copies of notifications under ss. 79 and 80

- (1) OFCOM must send a copy of every notification published under section 79(4) or 80 to the Secretary of State.
- (2) OFCOM must send to the European Commission a copy of every notification published under section 79(4) with respect to a market power determination in relation to a services market.
- (3) OFCOM must send a copy of every notification published under section 80 which—
- (a) relates to a proposal to identify a services market or to make a market power determination in relation to such a market; and
 - (b) in OFCOM’s opinion would affect trade between member States,
- to the European Commission and to the regulatory authorities of every other member State.
- (4) OFCOM must, in every other case in which it appears to them appropriate to do so, send—
- (a) to the European Commission, and
 - (b) to such of the regulatory authorities of the other member States as OFCOM think fit,
- a copy of a notification published under section 80 which relates to a proposal to identify a services market or to make a market power determination in relation to such a market.

Commencement Information

- I7** S. 81 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), arts. 1(2), 2(1), [Sch. 1](#) (with art. 3) (as amended by [S.I. 2003/3142](#), art. 1(3))
- I8** S. 81 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), [art. 3\(2\)](#) (with art. 11)

Status: Point in time view as at 22/04/2011.

Changes to legislation: Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

82 European Commission’s powers in respect of proposals

- (1) This section applies, in the case of a notification under section 80 with respect to a proposal—
 - (a) to identify a particular market; or
 - (b) to make a market power determination.
- (2) If, within the representations period, OFCOM are notified by the European Commission for the purposes of Article 7(4) of the Framework Directive (market identifications that do not conform to Commission recommendations and determinations that affect trade between member States)—
 - (a) that the Commission considers that giving effect to the proposal would create a barrier in relation to the single European market, or
 - (b) that the Commission has serious doubts as to whether giving effect to the proposal would be compatible with the requirements of any [F1EU] obligations,

OFCOM are not to give effect to the proposal before the end of a further two months beginning with the end of the representations period.
- (3) Where, before the end of that two month period, the European Commission makes a decision in accordance with Article 7(4) of the Framework Directive that the proposal should be withdrawn, OFCOM—
 - (a) must withdraw it; and
 - (b) shall not be entitled to give effect to it.
- (4) In this section “the representations period”, in relation to a notification under section 80, means the period specified in that notification for the making of representations about the proposals contained in it.

Textual Amendments

- F1** Words in Act substituted (22.4.2011) by [The Treaty of Lisbon \(Changes in Terminology\) Order 2011 \(S.I. 2011/1043\)](#), arts. 2, 3, 6 (with art. 3(2)(3), 4(2), 6(4)(5))

Commencement Information

- I9** S. 82 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), arts. 1(2), 2(1), [Sch. 1](#) (with art. 3) (as amended by [S.I. 2003/3142](#), art. 1(3))
- I10** S. 82 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), [art. 3\(2\)](#) (with art. 11)

83 Special rules for transnational markets

- (1) This section applies where a services market is for the time being identified by a decision of the European Commission under Article 15(4) of the Framework Directive as a transnational market.
- (2) Where the market area includes the whole or a part of the United Kingdom, OFCOM must enter into and maintain arrangements with the other relevant regulatory authorities about—
 - (a) the extent to which the agreement of all the relevant regulatory authorities is required for the doing of any of the things mentioned in subsection (3); and
 - (b) the procedures to be followed for securing that agreement where it is required.

Status: Point in time view as at 22/04/2011.

Changes to legislation: Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

- (3) Those things are—
- (a) the identification of the whole or a part of the market as a market in relation to which it is appropriate to determine whether a person has significant market power;
 - (b) the making of such a determination in relation to the whole or a part of the market;
 - (c) the setting of a condition the setting of which requires such a determination to have been made;
 - (d) the modification or revocation of such a condition.
- (4) OFCOM must not do any of the things mentioned in subsection (3) except in accordance with arrangements maintained under that subsection.
- (5) Those arrangements may include arrangements requiring OFCOM, when doing any of those things, to comply with—
- (a) a decision made, by one or more other regulatory authorities; or
 - (b) a decision made by a person appointed under the arrangements to act on behalf of some or all of the relevant regulatory authorities.
- (6) In this section—
- “market area”, in relation to a services market identified by the European Commission as a transnational market, means the area identified by that Commission as the area for which the market operates; and
- “relevant regulatory authorities”, in relation to such a market, means the regulatory authorities for each member State the whole or a part of which is comprised in the market area.

Commencement Information

- I11** S. 83 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), arts. 1(2), 2(1), [Sch. 1](#) (with art. 3) (as amended by [S.I. 2003/3142](#), art. 1(3))
- I12** S. 83 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), [art. 3\(2\)](#) (with art. 11)

84 Review of services market identifications and determinations

- (1) This section applies where OFCOM have identified and analysed a services market for the purposes of making a market power determination.
- (2) OFCOM must, at such intervals as they consider appropriate, carry out further analyses of the identified market for one or both of the following purposes—
- (a) reviewing market power determinations made on the basis of an earlier analysis;
 - (b) deciding whether to make proposals for the modification of SMP conditions set by reference to a market power determination made on such a basis.
- (3) It shall be the duty of OFCOM to carry out such a further analysis of a services market as soon as reasonably practicable after recommendations are made by the European Commission that affect the matters that were taken into account, or could have been taken into account, in the case of the last analysis by OFCOM of that market.

Status: Point in time view as at 22/04/2011.

Changes to legislation: Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

- (4) Where on, or in consequence of, a further analysis under this section, OFCOM determine that a person to whom any SMP conditions apply is no longer a person with significant market power in that market, they must revoke every SMP services condition applied to that person by reference to the market power determination made on the basis of the earlier analysis.
- (5) Before carrying out a further analysis under subsection (2), OFCOM may review any decision of theirs identifying the markets which it was appropriate to consider for the purpose of carrying out an earlier analysis.
- (6) Where, on such a review, OFCOM conclude that the appropriate markets have changed—
 - (a) they must identify the markets they now consider to be the appropriate ones; and
 - (b) those markets shall be the identified markets for the purposes of the further analysis.
- (7) Sections 79 to 83 apply—
 - (a) in relation to the identification of a services market for the purposes of reviewing a market power determination under this section, as they apply in relation to the identification of such a market for the purpose of making a market determination; and
 - (b) in relation to the review of such a determination, as they apply in relation to the making of such a determination.

Commencement Information

- I13** S. 84 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), arts. 1(2), 2(1), [Sch. 1](#) (with art. 3) (as amended by [S.I. 2003/3142](#), art. 1(3))
- I14** S. 84 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), [art. 3\(2\)](#) (with art. 11)

85 Review of apparatus market identifications and determinations

- (1) This section applies where OFCOM have identified and analysed an apparatus market for the purposes of making a market power determination.
- (2) OFCOM must, at such intervals as they consider appropriate, carry out further analyses of the identified market for one or both of the following purposes—
 - (a) reviewing market power determinations made on the basis of an earlier analysis;
 - (b) deciding whether to make proposals for the modification of SMP conditions set by reference to any such market power determination.
- (3) Where on, or in consequence of, a further analysis under this section, OFCOM determine that a person to whom any SMP conditions apply is no longer a person with significant market power in that market, they shall revoke every SMP apparatus condition applied to that person by reference to the market power determination made on the basis of the earlier analysis.
- (4) Before carrying out any further analysis under subsection (2), OFCOM may review any decision of theirs identifying the markets which it was appropriate to consider for the purpose of carrying out any earlier analysis.

Status: Point in time view as at 22/04/2011.

Changes to legislation: Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

- (5) Where on such a review OFCOM conclude that the appropriate markets have changed—
 - (a) they shall identify the markets they now consider to be the appropriate ones; and
 - (b) those markets shall be the identified markets for the purposes of the further analysis.
- (6) Where on such a review OFCOM conclude that there is no person at all with significant market power in relation to the identified market—
 - (a) they must so inform the Secretary of State; and
 - (b) the Secretary of State may by order remove or restrict OFCOM’s power under this Chapter to set SMP apparatus conditions by reference to that market.
- (7) Sections 79, 80 and 81(1) apply—
 - (a) in relation to the identification of a apparatus market for the purposes of reviewing a market power determination under this section, as they apply in relation to the identification of such a market for the purpose of making a market determination; and
 - (b) in relation to the review of such a determination, as they apply in relation to the making of such a determination.

Commencement Information

- I15** S. 85 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), arts. 1(2), 2(1), [Sch. 1](#) (with [art. 3](#)) (as amended by [S.I. 2003/3142](#), art. 1(3))
- I16** S. 85 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), [art. 3\(2\)](#) (with [art. 11](#))

86 Cases where review required

- (1) OFCOM must not set an SMP services condition by a notification which does not also make the market power determination by reference to which the condition is set unless—
 - (a) the condition is set by reference to a market power determination which has been reviewed under section 84 and, in consequence of that review, is confirmed in the notification setting the condition; or
 - (b) the condition is set by reference to a market power determination made in relation to a market in which OFCOM are satisfied there has been no material change since the determination was made.
- (2) OFCOM must not modify or revoke SMP services conditions applying to a person except in a case falling within subsection (3) or (4).
- (3) The first case is where, for the purpose of determining whether to make the modification or revocation, OFCOM have—
 - (a) carried out a further analysis under section 84 of the market in question; and
 - (b) reviewed the market power determination for the time being in force in that person’s case.
- (4) The second case is where OFCOM are satisfied that there has not—
 - (a) in the case of an unmodified condition, since the condition was set, or
 - (b) in any other case, since the condition was last modified,

Status: Point in time view as at 22/04/2011.

Changes to legislation: Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

been a material change in the market identified or otherwise used for the purposes of the market power determination by reference to which the condition was set or last modified.

- (5) OFCOM must not modify SMP apparatus conditions applying to a person except where, for the purpose of determining whether to make the modification or revocation, they have—
- (a) carried out a further analysis under section 85 of the market in question; and
 - (b) reviewed the market power determination for the time being in force in that person's case.
- (6) A change is a material change for the purposes of subsection (1) or (4) if it is one that is material to—
- (a) the setting of the condition in question; or
 - (b) the modification or revocation in question.

Commencement Information

- I17** S. 86 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), [arts. 1\(2\)](#), [2\(1\)](#), [Sch. 1](#) (with [art. 3](#)) (as amended by [S.I. 2003/3142](#), [art. 1\(3\)](#))
- I18** S. 86 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), [art. 3\(2\)](#) (with [art. 11](#))

Status:

Point in time view as at 22/04/2011.

Changes to legislation:

Communications Act 2003, Cross Heading: SMP conditions: procedure is up to date with all changes known to be in force on or before 17 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.