



# 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*Status: Point in time view as at 26/05/2011.*

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### 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 [F<sup>1</sup>EU] 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 [F<sup>1</sup>EU] 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.

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- (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

[F2(1) Where section 80A applies, OFCOM must comply with the applicable requirements of that section and section 80B before—

- (a) identifying a market for the purposes of making a market power determination, or
- (b) making a market power determination.

(1A) Where section 80A does not apply because of subsection (2) of that section—

- (a) any identification of a market or market power determination must be temporary; and
- (b) the notification published under section 79(4) containing the identification or determination must state the period for which the identification or determination is to have effect.

(1B) Where OFCOM propose to extend or make permanent any such temporary identification or determination—

- (a) sections 80A and 80B(1) do not apply in relation to the proposal; and
- (b) subsections (2) to (8) of section 80B apply in relation to the proposal as if the words from the beginning of subsection (2) to “appropriate” were omitted.]

(7) The power of OFCOM to [F3: identify a market or make a market power determination is subject to section 83] .

#### Textual Amendments

- F2** S. 80(1)(1A)(1B) substituted for s. 80(1)-(6) (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), [Sch. 1 para. 42\(a\)](#) (with [Sch. 3 paras. 2, 11](#))
- F3** Words in s. 80(7) substituted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), [Sch. 1 para. 42\(b\)](#) (with [Sch. 3 paras. 2, 11](#))

#### 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))

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**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**)

**[<sup>F4</sup>80A. Domestic consultation for market identifications and market power determinations**

- (1) This section applies where—
  - (a) OFCOM propose—
    - (i) to identify a market for the purposes of making a market power determination; or
    - (ii) to make a market power determination; and
  - (b) (in the case of a services market) the proposed identification or determination is in OFCOM's opinion likely to result in the setting, modification or revocation of SMP services conditions that will have a significant impact on the market.
- (2) But this section does not apply where the proposal is of EU significance and in OFCOM's opinion—
  - (a) there are exceptional circumstances; and
  - (b) there is an urgent need to act in order to safeguard competition and to protect the interests of consumers.
- (3) OFCOM must publish a notification of what they are proposing to do.
- (4) Notifications for the purposes of subsection (3)—
  - (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 power determination in relation to that market; or
  - (c) may be contained in a single notification under section 48A(3) 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.
- (5) 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.
- (6) That period must be a period of not less than one month after the day of the publication of the notification.
- (7) But where OFCOM are satisfied that there are exceptional circumstances justifying the use of a shorter period, the period specified as the period for making representations may be whatever shorter period OFCOM considers reasonable in those circumstances.

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- (8) 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.
- (9) OFCOM must—
  - (a) consider every representation about the proposal made to them during the period specified in the notification; and
  - (b) have 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.
- (10) Where the proposal is not of EU significance, OFCOM may then give effect to it, with any modifications that appear to OFCOM to be appropriate.

#### Textual Amendments

- F4** Ss. 80A, 80B inserted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 43** (with Sch. 3 paras. 2, 11)

### **80B. EU consultation for market identifications and market power determinations**

- (1) This section applies where, after complying with section 80A(9) in relation to a proposal of EU significance, OFCOM wish to proceed with the proposal.
- (2) After making any modifications of the proposal that appear to OFCOM to be appropriate, OFCOM must send a copy of the proposal, and of a statement setting out the reasons for it, to—
  - (a) the European Commission;
  - (b) BEREC; and
  - (c) the regulatory authorities in every other member State.
- (3) If at the end of the period of one month referred to in paragraph (3) of Article 7 of the Framework Directive no indication has been given to OFCOM by the Commission under paragraph (4) of that Article, OFCOM may give effect to the proposal, with any modifications that appear to them to be appropriate.
- (4) Before giving effect to the proposal under subsection (3), OFCOM must consider any comments made by—
  - (a) the Commission;
  - (b) BEREC; and
  - (c) any regulatory authority in any other member State.
- (5) Subsections (6) to (8) apply where such an indication is given by the Commission to OFCOM during that period.
- (6) If under Article 7(5)(a) of the Framework Directive the Commission requires OFCOM to withdraw the proposal, OFCOM must amend or withdraw the proposal within 6 months of the date of the Commission's decision.
- (7) Where the proposal is amended under subsection (6), section 80 applies in relation to the amended proposal as if it were a new proposal.

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- (8) OFCOM may give effect to the proposal, with any modifications that appear to them to be appropriate—
- (a) if the Commission takes a decision to lift its reservations in accordance with paragraph (5)(b) of Article 7 of the Framework Directive; or
  - (b) if at the end of the period of 2 months referred to in paragraph (4) of that Article the Commission has neither required OFCOM to withdraw the proposal under paragraph (5)(a) nor lifted its reservations under paragraph (5)(b).]

#### Textual Amendments

- F4** Ss. 80A, 80B inserted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 43** (with Sch. 3 paras. 2, 11)

#### [<sup>F5</sup>81 Delivery of copies of notifications under sections 79 and 80A

- (1) OFCOM must send to the Secretary of State a copy of every notification published under section 79(4) or 80A(3).
- (2) OFCOM must send to the European Commission a copy of every notification published under section 79(4) in relation to a services market.
- (3) OFCOM must send to BEREC a copy of every notification published under section 79(4) where the proposal to identify the market or make a market power determination was a proposal of EU significance.
- (4) Where a notification published under section 79(4) relates to a proposal to which section 80A did not apply because of subsection (2) of that section, OFCOM must send a copy of a statement setting out the reasons for the proposal and for the urgent need to act to—
  - (a) the Commission;
  - (b) BEREC; and
  - (c) the regulatory authorities in every other member State.]

#### Textual Amendments

- F5** S. 81 substituted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 44** (with Sch. 3 paras. 2, 11)

#### 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)

#### [<sup>F6</sup>82 European Commission's powers in respect of proposals

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#### Textual Amendments

- F6** S. 82 omitted (26.5.2011) by virtue of [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), [Sch. 1 para. 45](#) (with [Sch. 3 paras. 2, 11](#))

#### 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.
- (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.

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#### 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 [<sup>F7</sup>may (and, when required to do so by section 84A, must)] 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.
- <sup>F8</sup>(3) .....
- (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.

#### Textual Amendments

- F7** Words in [s. 84\(2\)](#) substituted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 46(a)** (with [Sch. 3 paras. 2, 12](#))
- F8** [S. 84\(3\)](#) omitted (26.5.2011) by virtue of [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 46(b)** (with [Sch. 3 paras. 2, 12](#))



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#### 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)

#### [<sup>F9</sup>84A. Timing of services market identifications and determinations

- (1) This section makes provision about the exercise by OFCOM of their powers—
  - (a) to identify and analyse services markets;
  - (b) to make and review market power determinations in respect of such markets; and
  - (c) to set, modify and revoke SMP services conditions by reference to such determinations.
- (2) Where under Article 15(1) of the Framework Directive the European Commission has adopted a revised recommendation identifying a services market not previously notified to the Commission, OFCOM must ensure that within the specified period they have—
  - (a) carried out any identification and analysis of markets that is necessary in consequence of the recommendation; and
  - (b) sent the Commission copies of any resulting proposals with respect to market identification, market power determinations and SMP services conditions.
- (3) Where, following the identification and analysis of a services market, OFCOM have made a market power determination in relation to it, they must ensure that within the specified period they have—
  - (a) carried out a further analysis of the market and reviewed the identification and determination made on the basis of the earlier analysis; and
  - (b) sent the Commission copies of any resulting proposals with respect to market identification, market power determinations and SMP services conditions.
- (4) Subsection (3) applies only where the market power determination was made after 25 May 2011.
- (5) Where it appears to OFCOM that they are unlikely to be able to comply with the requirements of subsection (2) or (3) within the specified period, they may request assistance from BEREC under Article 16(7) of the Framework Directive.
- (6) Where OFCOM request such assistance—
  - (a) they must inform the Commission of the request;
  - (b) subsection (2) or (as the case may be) (3) applies in the case in question as if the words “within the specified period” were omitted; and
  - (c) within 6 months of the assistance being provided they must send copies of any resulting proposals to the Commission.
- (7) In this section “the specified period” means—
  - (a) in the case of subsection (2), the period of 2 years from the adoption of the recommendation; and
  - (b) in the case of subsection (3), the period of 3 years from the publication under section 79(4) of the notification of the market power determination made on the basis of the earlier analysis, subject to any extension of that period under Article 16(6)(a) of the Framework Directive.]

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#### Textual Amendments

- F9** S. 84A inserted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 47** (with Sch. 3 para. 2)

### 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.
- (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, [<sup>F10</sup>80, 80A 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.

#### Textual Amendments

- F10** Words in s. 85(7) substituted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 48** (with Sch. 3 paras. 2, 11)

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#### 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—
- 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
  - 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—
- carried out a further analysis under section 84 of the market in question; and
  - 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—
- in the case of an unmodified condition, since the condition was set, or
  - in any other case, since the condition was last modified,
- 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—
- carried out a further analysis under section 85 of the market in question; and
  - 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—
- the setting of the condition in question; or
  - 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)

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Point in time view as at 26/05/2011.

**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 21 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.