



Enterprise and Regulatory Reform Act 2013

2013 CHAPTER 24

PART 4

COMPETITION REFORM

CHAPTER 2

MARKETS

Cross-market investigations

33 Power of CMA to make cross-market references

- (1) Section 131 of the 2002 Act (power to make market investigation references) is amended as follows.
- (2) After subsection (2) insert—
 - “(2A) In a case where the feature or each of the features concerned falls within subsection (2)(b) or (c), a reference under subsection (1) may be made in relation to more than one market in the United Kingdom for goods or services.”
- (3) In subsection (4)(a), for “section 156(1)” substitute “section 156(A1) or (1)”.
- (4) In subsection (6)—
 - (a) before the definition of “market in the United Kingdom” insert—

““cross-market reference” means a reference under this section which falls within subsection (2A) or a reference under section 132 which falls within subsection (3A) of that section (and see section 140A);”, and
 - (b) after the definition of “market investigation reference” insert—

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““ordinary reference” means a reference under this section or section 132 which is not a cross-market reference (and see section 140A);”.

34 Ministerial power to make cross-market references

- (1) Section 132 of the 2002 Act (ministerial power to make market investigation references) is amended as follows.
- (2) After subsection (3) insert—
 - “(3A) In a case where the feature or each of the features concerned falls within section 131(2)(b) or (c), a reference under subsection (3) may be made in relation to more than one market in the United Kingdom for goods or services.”
- (3) In subsection (4), for “section 156(1)” substitute “section 156(A1) or (1)”.
- (4) Schedule 9 (which contains amendments of Part 4 of the 2002 Act which are consequential on section 33 and this section) has effect.

Public interest interventions

35 Public interest interventions in markets investigations

- (1) Part 4 of the 2002 Act (market investigations) is amended as follows.
- (2) Section 139 (power of Secretary of State to give public interest intervention notices) is amended as follows.
- (3) For subsection (1) substitute—
 - “(A1) This section applies where—
 - (a) the CMA has published a market study notice in relation to a matter; or
 - (b) the CMA has begun the process of consultation under section 169 in respect of a decision of the kind mentioned in subsection (6)(a)(i) of that section.
 - (1) The Secretary of State may, within the permitted period, give a notice to the CMA if 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 matter.
 - (1A) For the purposes of subsection (1), the permitted period, in a case to which this section applies by virtue of paragraph (a) of subsection (A1), is the period beginning with the publication of the market study notice and ending with—
 - (a) the acceptance by the CMA of an undertaking under section 154 instead of the making of a reference under section 131 in relation to the matter;
 - (b) the publication of notice of the fact that the CMA has otherwise decided not to make such a reference in relation to the matter;
 - (c) the making of such a reference in relation to the matter; or
 - (d) in a case where the period permitted by section 131B for the preparation and publication by the CMA of the market study report in

relation to the matter has expired and no such report has been prepared or published, the end of that period.

(1B) For the purposes of subsection (1), the permitted period, in a case to which this section applies by virtue of paragraph (b) of subsection (A1), is the period beginning with the date on which the CMA begins the process of consultation concerned and ending with—

- (a) the acceptance by the CMA of an undertaking under section 154 instead of the making of a reference under section 131 in relation to the matter concerned;
- (b) the publication of notice of the fact that the CMA has otherwise decided not to make such a reference in relation to the matter; or
- (c) the making of such a reference in relation to the matter.”

(4) In subsection (2)—

- (a) in the words before paragraph (a), after “may” insert “, within the permitted period,”;
- (b) in paragraph (a)(i), after “131” insert “in relation to the matter”, and
- (c) in paragraph (c), for “case” (in the second place where it occurs) substitute “proposal to accept the undertaking”.

(5) After subsection (2) insert—

“(2A) For the purposes of subsection (2), the permitted period is—

- (a) where the CMA publishes a notice under section 155(1), the period within which representations may be made in relation to the proposed undertaking (as to which, see section 155(2)(f));
- (b) where the CMA publishes a notice under section 155(4), the period within which representations may be made in relation to the proposed modifications to the proposed undertaking (as to which, see section 155(5)(c)).”

(6) For subsection (4) substitute—

“(4) No more than one intervention notice shall be given under subsection (1) in relation to the same matter.

(4A) An intervention notice shall not be given under subsection (2) in relation to a proposal to accept an undertaking if the proposal relates to a matter in respect of which an intervention notice under subsection (1) has already been given.

(4B) 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.”

(7) After subsection (4B) insert—

“(4C) In this section, a reference to the acceptance of an undertaking shall, in a case where the CMA has accepted a group of undertakings under section 154, be treated as a reference to the acceptance of the last undertaking in the group; but undertakings which vary, supersede or revoke earlier undertakings shall be disregarded for the purposes of this section.”

(8) After section 140 insert—

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“140A Section 139(1) intervention notices: Secretary of State’s duty to refer

- (1) This section applies where—
 - (a) the CMA has prepared a market study report in relation to a matter within the period permitted by section 131B(4);
 - (b) an intervention notice under section 139(1) is in force in relation to the matter at the time when the CMA would (but for this section) be required to publish the report; and
 - (c) the report contains the decision of the CMA that it should make an ordinary reference or a cross-market reference in relation to the matter under section 131.
- (2) This section also applies where—
 - (a) the CMA has conducted a consultation under section 169 in respect of a decision of the kind mentioned in subsection (6)(a)(i) of that section;
 - (b) the CMA has decided that it should make an ordinary reference or a cross-market reference in relation to the matter concerned under section 131; and
 - (c) an intervention notice under section 139(1) is in force in relation to the matter at the time when the CMA makes that decision.
- (3) The CMA—
 - (a) shall not exercise the power under section 131 to refer the matter;
 - (b) in a case falling within subsection (1), shall not publish the market study report under section 131B(4) and shall instead, within the period mentioned in section 131B(4), give the report to the Secretary of State; and
 - (c) in a case falling within subsection (2), shall give to the Secretary of State a document containing—
 - (i) its decision and the reasons for its decision; and
 - (ii) such information as the CMA considers appropriate for facilitating a proper understanding of the reasons for its decision.
- (4) The Secretary of State shall decide whether any public interest consideration which was mentioned in the intervention notice is relevant to the matter in question.
- (5) Where the Secretary of State decides that there is no relevant public interest consideration—
 - (a) the Secretary of State shall (in accordance with the CMA’s decision) make a reference in relation to the matter to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013; and
 - (b) the reference is to be treated for the purposes of this Part as an ordinary reference or (as the case may be) a cross-market reference made under section 131 in accordance with the requirements imposed by this Part.
- (6) Where the Secretary of State decides that there is one or more than one relevant public interest consideration, the Secretary of State shall (in

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accordance with the CMA's decision) make a reference in relation to the matter to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013.

- (7) The Secretary of State shall specify in a reference made under subsection (6)—
- (a) the relevant public interest consideration or considerations; and
 - (b) whether the reference is a restricted PI reference or a full PI reference (as to which, see sections 141 and 141A respectively).
- (8) Where the Secretary of State makes a full PI reference under subsection (6), the reference shall also specify whether the Secretary of State proposes to appoint a public interest expert under section 141B.
- (9) For the purposes of this Part, a reference under subsection (6) is to be treated—
- (a) in a case where the decision of the CMA was that it should make an ordinary reference, as an ordinary reference;
 - (b) in a case where the decision of the CMA was that it should make a cross-market reference, as a cross-market reference.
- (10) In a case falling within subsection (1), the Secretary of State shall publish the market study report concerned at the same time as the Secretary of State makes a reference under this section.
- (11) In a case falling within subsection (2), the Secretary of State shall publish the document given to the Secretary of State by the CMA under subsection (3)(c), at the same time as the Secretary of State makes a reference under this section.
- (12) In this Part—
- “full PI reference” means a reference made by the Secretary of State under subsection (6) which specifies that it is a full PI reference;
- “restricted PI reference” means a reference made by the Secretary of State under subsection (6) which specifies that it is a restricted PI reference.”

- (9) After section 141 insert—

“141A Full PI references: questions to be decided by CMA

- (1) This section applies where the Secretary of State makes a full PI reference.
- (2) The CMA shall, on an ordinary reference, 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 CMA shall, on a cross-market reference, decide in relation to each feature and each combination of the features specified in the reference, whether the feature or combination of features, as it relates to goods or services of one or more than one of the descriptions so specified, 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.

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- (4) The CMA shall, if it has decided that there is an adverse effect on competition, decide whether, taking account only of any adverse effect on competition and the admissible public interest consideration or considerations concerned, any feature or combination of features which gave rise to an adverse effect on competition operates or may be expected to operate against the public interest.
- (5) The CMA shall, if it has decided that any such feature or combination of features operates or may be expected to operate against the public interest, also decide separately the following additional questions—
 - (a) whether action should be taken by the Secretary of State under section 147A for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest concerned;
 - (b) whether the CMA should recommend the taking of other action by the Secretary of State, or action by persons other than itself and the Secretary of State, for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest concerned; and
 - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (6) The CMA 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 148A(2))—
 - (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 CMA 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.
- (7) In a case where the Secretary of State has appointed a public interest expert under section 141B in relation to a full PI reference, the CMA shall, in deciding the questions mentioned in subsections (4) and (5), have regard, in particular, to the views of the expert.
- (8) In deciding the questions mentioned in subsection (5), the CMA shall, in particular, have regard to—
 - (a) the need to achieve as comprehensive a solution as is reasonable and practicable to the effects adverse to the public interest concerned; and
 - (b) any detrimental effects on customers so far as resulting from those effects.
- (9) In deciding the questions mentioned in subsection (6), the CMA 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

- (b) any detrimental effects on customers so far as resulting from it.
- (10) In deciding the questions mentioned in subsections (5) and (6), the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market or markets concerned.
- (11) In this section, “admissible public interest consideration” means any public interest consideration specified in the reference concerned and which the CMA is not under a duty to disregard.

141B Full PI references: power of Secretary of State to appoint expert

- (1) This section applies where the Secretary of State makes a full PI reference.
- (2) The Secretary of State may appoint one or more than one person to advise the CMA on the questions mentioned in subsections (4) and (5) of section 141A in relation to the reference.
- (3) A person so appointed shall be a person who appears to the Secretary of State to have particular knowledge of, or expertise in, matters relating to a public interest consideration specified in the reference.
- (4) Each person so appointed is referred to in this Part as a “public interest expert”.
- (5) The terms and conditions of appointment of a public interest expert (including, in particular, as to remuneration) are to be determined by the Secretary of State.
- (6) Any appointment of a public interest expert under this section shall be made within the period of 2 months beginning with the date of the reference concerned.
- (7) Before appointing a public interest expert the Secretary of State shall consult the chair of the CMA.”
- (10) Schedule 10 (which contains amendments of Part 4 of the 2002 Act which are consequential on or otherwise related to this section) has effect.

Investigation powers

36 Investigation powers: markets

- (1) Section 174 of the 2002 Act (investigation powers) is amended as follows.
- (2) For subsections (1) and (2) substitute—
- “(1) For the purposes of this section, the permitted purposes are the following—
- (a) assisting the CMA in carrying out its functions under section 5 in relation to a matter in a case where it has published a market study notice;
- (b) assisting the CMA in carrying out any functions, including enforcement functions, exercisable by it under or by virtue of this Part in connection with a matter that is or has been the subject of a reference under section 131 or 132 or possible reference under section 131;

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- (c) assisting the CMA or the Secretary of State in carrying out any functions, including enforcement functions, of the CMA or (as the case may be) the Secretary of State under or by virtue of this Part in connection with a matter that is or has been the subject of a reference under section 140A(6) or possible reference under section 140A(5) or (6).
- (2) The CMA may exercise any of the powers in subsections (3) to (5) for a permitted purpose.”
- (3) In subsection (6), after “shall” insert “—
 - (a) specify the permitted purpose for which the notice is given, including the function or functions in question; and
 - (b)”.
- (4) After subsection (6) insert—

“(6A) The CMA or any person nominated by it for the purpose may, for a permitted purpose, take evidence on oath and for that purpose may administer oaths.”
- (5) In subsection (7), for “the purpose mentioned in subsection (1)” substitute “a permitted purpose”.
- (6) After subsection (9) insert—

“(9A) In subsection (1), “enforcement functions” means—

 - (a) in relation to the CMA—
 - (i) functions conferred by virtue of section 164(2)(b) on the CMA by enforcement orders;
 - (ii) functions of the CMA in relation to the variation, supersession or release of enforcement undertakings or the variation or revocation of enforcement orders;
 - (iii) functions of the CMA under or by virtue of section 160 or 162 in relation to enforcement undertakings or enforcement orders;
 - (b) in relation to the Secretary of State—
 - (i) functions conferred by virtue of section 164(2)(b) on the Secretary of State by enforcement orders;
 - (ii) functions of the Secretary of State in relation to the variation, supersession or release of enforcement undertakings or the variation or revocation of enforcement orders;
 - (iii) functions of the Secretary of State under or by virtue of section 160 in relation to enforcement undertakings or enforcement orders.”
- (7) For the heading substitute “Attendance of witnesses and production of documents etc.”.
- (8) Schedule 11 (which makes provision about the enforcement of the powers under section 174 of the 2002 Act, as amended by this section, and which makes consequential amendments of that Act) has effect.

Interim measures

37 Interim measures: pre-emptive action: markets

- (1) Part 4 of the 2002 Act (market investigations) is amended as follows.
- (2) In section 157 (interim undertakings: Part 4), after subsection (2) insert—
 - “(2A) Subsection (2B) applies where—
 - (a) subsection (1)(a) to (c) applies; and
 - (b) the relevant authority has reasonable grounds for suspecting that pre-emptive action has or may have been taken.
 - (2B) The relevant authority may, for the purpose of restoring the position to what it would have been had the pre-emptive action not been taken or otherwise for the purpose of mitigating its effects, accept, from such persons as the relevant authority considers appropriate, undertakings to take such action as the relevant authority considers appropriate.”
- (3) After subsection (2B) of that section insert—
 - “(2C) A person may, with the consent of the relevant authority, take action of a particular description where the action would otherwise constitute a contravention of an undertaking accepted under this section.”
- (4) In section 158 (interim orders: Part 4), after subsection (2) insert—
 - “(2A) Subsection (2B) applies where—
 - (a) subsection (1)(a) to (c) applies; and
 - (b) the relevant authority has reasonable grounds for suspecting that pre-emptive action has or may have been taken.
 - (2B) The relevant authority may by order, for the purpose of restoring the position to what it would have been had the pre-emptive action not been taken or otherwise for the purpose of mitigating its effects—
 - (a) do anything mentioned in subsection (2)(b) to (d);
 - (b) impose such other obligations, prohibitions or restrictions as it considers appropriate for that purpose.”
- (5) After subsection (2B) of that section insert—
 - “(2C) A person may, with the consent of the relevant authority, take action of a particular description where the action would otherwise constitute a contravention of an order under this section.”

Time-limits and procedure

38 Market studies and market investigations: consultation and time-limits

Schedule 12 (which makes provision about consultation in relation to decisions whether to make a market investigation reference and about time-limits in relation to the conduct of market studies and the markets investigation reference regime under Part 4 of the 2002 Act) has effect.