



# **General Advice and Information Guidance**

Consultation Document

This is part of a series of guidance documents which the  
Competition Commission is required to publish under  
the Enterprise Bill

September 2002

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## Part 1: Purpose of guidance

### 1.1 This guidance:

- gives an overview of the role and functions of the Commission and its relationship with other competition authorities;
- briefly explains its role in merger and market investigations and other references; and
- sets out the procedures that it will normally follow in the consideration of those references and implementing remedies.

1.2 It is issued to meet the statutory obligations<sup>1</sup> of the Competition Commission (the Commission) under the Enterprise Act 2002 (the Act) to prepare and publish general advice and information about its consideration of merger references<sup>2</sup> and market investigation references.<sup>3</sup> It explains the provisions of the legislation concerning matters referred to the Commission and indicates how the Commission expects the provisions to operate in practice. It complements the Commission's separate guidance documents *Merger References: Competition Commission Guidelines* (the merger guidelines) and *Market Investigation References: Competition Commission Guidelines* (the market guidelines) published under the same statutory provisions. They describe the Commission's approach to each category of reference and the factors that the Commission will normally take into account in considering its decisions.

1.3 Other publications relevant to the Commission's investigation of references are the *Commission Rules of Procedure* and the Commission's *Statement of Policy on Penalties*, that is on its power to impose penalties on individuals who fail to provide information as required by the Act. All these documents may be revised from time to time and others may be published.

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<sup>1</sup>Clauses 103 and 166 of the Enterprise Bill 2002, HL 112: henceforward all references to clause numbers refer to this print of the Enterprise Bill, unless otherwise specified.

<sup>2</sup>Clauses 21 and 32.

<sup>3</sup>Clause 126.

- 1.4 This guidance is intended to explain in broad terms the application of the Act and the Commission's procedures, and is not to be taken as a full or comprehensive account of the relevant law. It should be read in conjunction with the relevant law. Anyone believing him or herself affected by the legislation should consider seeking legal advice.
- 1.5 A list of other publications by the Commission and other bodies containing information relevant to the provisions of the Enterprise Act can be found at [\*\*\*\*]

## **Part 2: Role of the Competition Commission**

### **Inquiries**

2.1 The Commission is one of several bodies with regulatory responsibilities under UK competition law. It is an independent public body established by the Competition Act 1998 (CA 98), and replaced the Monopolies and Mergers Commission on 1 April 1999.

2.2 The Commission conducts in-depth inquiries into:

- mergers (both anticipated and completed);
- markets (the successor to complex monopoly inquiries under the Fair Trading Act 1973);
- and the economic regulation, including price regulation, of the major regulated industries (regulatory inquiries).

2.3 Every inquiry the Commission undertakes is in response to a reference made to it by another authority: usually by the Office of Fair Trading (OFT), but in certain circumstances by the Secretary of State, or by the regulators under sector-specific legislative provisions relating to regulated industries and some public sector bodies.<sup>4</sup> The Commission has no power to conduct inquiries on its own initiative.

2.4 The Enterprise Act 2002, which is expected to come into force on [1 May 2003], enhances the role of the Commission in merger and market investigation inquiries so that the Commission becomes responsible for making decisions on competition questions and for making decisions on the remedies

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<sup>4</sup>The sectors concerned are airports, air traffic services, electricity, gas, postal services, railways, telecommunications, water.

- in mergers, decisions on remedies concern any substantial lessening of competition or adverse effects resulting from it, and
- in markets, decisions on remedies concern any adverse effect on competition or any detrimental effect on customers resulting from it.

This differs from the Fair Trading Act regime where the Commission could only make recommendations on remedies to the Secretary of State.

For regulatory inquiries its decisions answer those questions specified in the reference and those required by the relevant legislation; the Act makes no substantive change to the way these references are considered. (There are some minor procedural changes affecting licence modifications).

2.5 The Commission publishes a report on each of its inquiries.<sup>5</sup> The report contains the Commission's decisions on the competition questions and remedies, the reasons for its decisions and such information as it considers appropriate for facilitating a proper understanding of the questions and the reasons for its decisions.

2.6 Table 1 (page 45) illustrates the types of inquiry which the Commission undertakes, their statutory basis, and the body which refers them. The OFT will not make a merger reference to the Commission if the case has a European Community dimension and falls to be dealt with under the European Commission Merger Regulation (Council Regulation (EEC) No. 4064/89) (see Part 9).

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<sup>5</sup>Clauses 37 and 131.

## **The Commission**

- 2.7 The Commission is a non-departmental public body. The Commission consists of members, who are supported by staff. The Chairman of the Commission, himself a member, appoints members to inquiry groups; and also chairs the Council (its board) which includes the Deputy Chairmen and the Chief Executive.
- 2.8 The decisions in each inquiry are made by a group of members of the Commission. The members are appointed by the Secretary of State for Trade and Industry for an eight-year term<sup>6</sup> following an open competition. Members are appointed for their individual experience, ability, and diversity of background, not as representatives of particular organisations, interests or political parties. There are usually around fifty Commission members, and except for the Chairman, they work part-time. A list of members and their biographies can be found in the Commission's latest [\*Annual review and accounts\*](#), which can be found on the Commission's website.
- 2.9 The staff of the Commission is headed by the Chief Executive (who is also the Secretary and Accounting Officer). Staff fall into two broad categories: those assisting groups on references and support staff. The first group consists of professional staff (economists, accountants, business advisers and lawyers) and administrators. The second group of support staff are employed in, for example, finance, information technology, information services, and personnel. A list of key staff can be found in the Commission's *Annual review and accounts*.
- 2.10 The Council's statutory duties are: to publish general advice and information about the Commission's approach to merger and market investigation references and about its procedures,<sup>7</sup> and to publish a statement of policy on penalties for non-provision of information.<sup>8</sup> As a board, it has a strategic role on behalf of the Commission.

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<sup>6</sup>Schedule 11 paragraph 5.

<sup>7</sup>Clauses 103 and 166

<sup>8</sup>Clause 113

## **Accountability, fairness and transparency**

- 2.11 The Commission aims to keep parties to references well informed and for its procedures to be as transparent as possible. Information and arguments which it may rely on in reaching its conclusions are put to the relevant parties for comment. The Commission also ensures that parties check the factual accuracy of information it may rely on in reaching its decisions. Parties will also be consulted on decisions that might affect them and the Commission's provisional findings will be published during the course of inquiries under the Enterprise Act (see part 6).
- 2.12 Parties to an inquiry who are aggrieved by a decision of the Commission in relation to a merger or market investigation reference may apply to the Competition Appeal Tribunal for a review of that decision (see part 8). For decisions in regulatory inquiries applications for review lie to the High Court.
- 2.13 The Commission's *Annual review and accounts* reports fully on the Commission's work in the previous financial year. The Chairman and Chief Executive (who is also the Accounting Officer) are answerable to Parliament for the work of the Commission and the Commission's use of resources and therefore may be called to appear before Parliamentary Select Committees.

## Part 3: Mergers overview

### Mergers

3.1 Most merger references are referred to the Commission by the Office of Fair Trading (OFT). The mergers may be either complete (that is, have taken place already), or anticipated. The OFT must normally make a reference to the Commission if it believes<sup>9</sup> that there is or may be a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition. [Add cross-reference to OFT merger guidance]

### Reference Questions

3.2 The group of Commission members appointed to decide on a reference (from now on in this part called the Commission) is required to consider a set of up to five questions for completed mergers and anticipated mergers. The Commission's approach to these questions is set out in the merger guidelines. The questions are:

#### ***For completed mergers:***<sup>10</sup>

- (a) *whether a relevant merger situation has been created; and*
- (b) *if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services.*

#### ***For anticipated mergers:***<sup>11</sup>

- (a) *whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and*

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<sup>9</sup>Clauses 21 and 32.

<sup>10</sup>Clause 34 (1) and (2).

<sup>11</sup>Clause 35 (1) and (2).

(b) *if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services.*

3.3. The decision to refer a merger to the Commission for investigation usually depends on the UK turnover of the enterprise acquired (or to be acquired) and the share of the market held (or to be held) by the merged enterprise.

3.4. If at least two-thirds of the group decide both questions in the affirmative,<sup>12</sup> there is an anti-competitive outcome from the merger and the Commission must go on to consider remedies. The remedies questions are:

***For both completed and anticipated mergers:***<sup>13</sup>

(c) *whether action should be taken by it ..... for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;*

(d) *whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and*

(e) *in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.*

3.5. If the Commission finds that there is or will be no anti-competitive outcome from the merger, the Commission can take the matter no further and prepares and publishes its report to that effect (see part 6); no question of considering remedies arises. If the Commission finds that there is or will be an anti-competitive outcome it must go on to consider remedies.

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<sup>12</sup>Schedule 11, para 11.

<sup>13</sup>Clauses 34 (3) and 35(2).

- 3.6. The Commission must so far as practicable consult the relevant parties<sup>14</sup> about any decision it proposes to make which is likely to have an adverse effect on their interests.<sup>15</sup> It consults the parties on the competition questions through provisional findings. Consultation on decisions on remedies may take place at that stage or subsequently.
- 3.7. When making its decisions on remedial action, the Commission may have regard to the effect of any such action on any relevant customer benefits arising from the merger.<sup>16</sup> If the benefits are significant the Commission may decide to take lesser action, or even no action, so as not to jeopardise them. Customer benefits<sup>17</sup> may take the form of lower prices, higher quality or greater choice of goods or services, or greater innovation. More detail about the consideration and selection of remedies and the circumstances in which consumer benefits may be balanced against remedies appears in the merger guidelines.
- 3.8. Once the Commission has reached its conclusions, it prepares and publishes<sup>18</sup> its report.

### **Mergers public interest cases**

- 3.9. So far this text has described ‘normal’ merger cases. The Act also provides for the Secretary of State to intervene in the consideration of a merger that she thinks might raise one or more public interest considerations.<sup>19</sup> Such considerations must be statutorily specified and the only one so far specified is ‘national security’.<sup>20</sup>
- 3.10. The Secretary of State intervenes by serving an intervention notice on OFT.<sup>21</sup> The OFT then makes a report to the Secretary of State giving its advice on the competition issues, including customer benefits and the importance of the market, its view on whether a relevant merger situation has been created and a summary of the representations it has

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<sup>14</sup>Clause 101

<sup>15</sup>ie decisions under clause 34(1), 35(1) and (2), 46 or 62

<sup>16</sup>Clause 34 (5) and 35(4).

<sup>17</sup>Clause 29.

<sup>18</sup>Clause 37.

<sup>19</sup>Clause 41.

<sup>20</sup>Clause 57.

<sup>21</sup>Clause 41.

received about the public interest consideration in the intervention notice. It is for the Secretary of State to decide whether or not the merger should then be referred to the Commission because it may be adverse to the public interest. A reference may be made on grounds of substantial lessening of competition and grounds of public interest consideration, or on grounds of the public interest consideration alone. If the Secretary of State decides not to refer a merger on public interest grounds consideration of further action falls to the OFT.

3.11. The Commission's consideration then follows broadly the same pattern as for mergers (paragraph 3.2). The two significant variations are that the Commission must consider:

(a) (depending on the terms of the reference – ie whether or not the substantial lessening of competition question is relevant), either

- the substantial lessening of competition test and the public interest test (ie whether the merger operates against the public interest, taking account of the public interest consideration and any substantial lessening of competition); or
- only the public interest test (ie whether the merger operates against the public interest, taking account of any public interest consideration);

(b) if there is an adverse finding on either or both of the public interest test or the substantial lessening of competition test, what action should be taken by the Secretary of State (and others, including the Commission itself) to remedy the identified adverse effects.<sup>22</sup>

3.12. It is for the Secretary of State to decide whether to make an adverse public interest finding; on this aspect the Commission's findings are only advisory but she must accept

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<sup>22</sup> Clauses 46 and 49.

the Commission's findings on the substantial lessening of competition test.<sup>23</sup> Once she has published an adverse finding on the public interest test, she may take such action as she thinks appropriate to remedy any adverse effects arising from the merger taking account of the Commission's report. However, the public interest test is only relevant to those cases where a public interest consideration arises. If, following a full investigation by the Commission, the Secretary of State decides that no public interest consideration arises, the Commission assumes its normal role of implementing and enforcing remedies in relation to the adverse effects resulting from the substantial lessening of competition as set out in its report.<sup>24</sup>

### **Mergers special public interest cases**

3.13. The Act provides for an exceptional category of mergers which can be referred on public interest consideration grounds only. These are mergers involving government contractors who hold confidential material related to defence—so triggering the consideration of national security—but who do not meet the normal qualifying thresholds relating to turnover or the share of supply. Where this type of merger (called a special merger situation) is referred, the question of whether the merger will result in a substantial lessening of competition is not an issue that can be considered. Similar procedures to those in public interest cases apply.<sup>25</sup> The Secretary of State must issue an intervention notice; the OFT makes a report as to whether a special merger situation has arisen, and including any other relevant advice;<sup>26</sup> and the Secretary of State may refer the case to the Commission if she believes that a special merger situation has been created or is contemplated, that a public interest consideration is relevant and that the merger may operate against the public interest.<sup>27</sup>

3.14. The Commission considers these points and, if it considers that the merger operates or will operate against the public interest, makes recommendations as to the action the

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<sup>23</sup>Clause 53.

<sup>24</sup>Clause 55.

<sup>25</sup>Clause 58.

<sup>26</sup>Clause 60.

<sup>27</sup>Clause 61.

Secretary of State or others should take to remedy any adverse effects.<sup>28</sup> It reports on those matters to the Secretary of State. The Secretary of State will make the final decision and take whatever remedial steps she considers necessary.<sup>29</sup>

### **Newspaper mergers**

3.15. The Act does not change<sup>30</sup> the newspaper merger regime laid down in Part V of the Fair Trading Act 1973.<sup>31</sup> The present provisions are broadly that the Secretary of State is to receive applications for any transfer of a newspaper or newspaper assets to an existing newspaper proprietor and (subject to a de minimis rule) must refer the matter to the Commission for investigation and report. The Commission must report on whether the transfer in question might be expected to operate against the public interest, taking account of all relevant matters and in particular, the need for accurate presentation of news and free expression of opinion; and must consider, whether any, and if so what, conditions might be attached to any consent to transfer. Decisions on consent to transfer and conditions fall to the Secretary of State.

### **Water Mergers**

3.16. The Act amends the special regime applying to mergers between water enterprises in England and Wales.<sup>32</sup> It aligns these mergers more closely with the general merger regime.

3.17. Qualifying water enterprise mergers will be subject to a mandatory reference from OFT to the Commission.<sup>33</sup>

3.18. The questions to be decided by the Commission are:

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<sup>28</sup>Clauses 62 and 63.

<sup>29</sup>Clause 65.

<sup>30</sup>The Communications Bill may change this, if it is enacted.

<sup>31</sup>FTA sections 58 to 62.

<sup>32</sup>Clause 67 and schedules 6 and 9.

<sup>33</sup>Sections 32 and 33 of the Water Industry Act 1991.

- (a) whether a merger situation qualifying for investigation has been created;
- (b) if so, whether the merger has prejudiced or can be expected to prejudice the ability of the Director General of Water Services, in carrying out his functions by virtue of the Water Industry Act 1991, to make comparisons between water enterprises. (The Director's functions that are likely to be most relevant here and which could be prejudiced by a merger are his functions of setting price controls and service level targets and the related task of promoting economy and efficiency on the part of water enterprises); and
- (c) if there will be prejudice, whether to take action to remedy, mitigate or prevent the prejudice and if so what action should be taken.

Questions (a) and (b) require at least a two-thirds majority if remedies are to be considered.

3.19. In deciding such action, the Commission may have regard to customer benefits, but only where taking account of those benefits would not prevent a solution to the prejudice concerned or where the benefits are expected to be substantially more important than the prejudice.

3.20. These changes apart, the Act provides<sup>34</sup> that the normal merger regime set out in Part 3 including determining and implementing remedies will apply to water enterprises and be the responsibility of the Commission.

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<sup>34</sup> Schedule 6, schedule 4ZA, para 1

## Part 4: Market investigation references

### References

- 4.1 The Commission may receive references from the OFT, from sector regulators having concurrent powers<sup>35</sup> or, rarely, from the Secretary of State, if they have

*reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods and services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods and services in the United Kingdom or a part of the United Kingdom.*<sup>36</sup>

- 4.2 A feature<sup>37</sup> of a market is to be taken as referring to
- (a) *the structure of the market concerned or any aspect of that structure;*
  - (b) *any conduct (whether or not in the market concerned) of one or more than one person who, in the course of business, supplies or acquires goods or services in the market concerned; or*
  - (c) *any conduct relating to the market concerned of customers of any person who, in the course of business, supplies or acquires goods or services.*

### Reference questions

- 4.3 The group of Commission members (the Commission) appointed to decide on a market investigation reference is required to answer up to four questions. The Commission's approach to these questions is set out in the market guidelines. The first question is

(a) *...whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or*

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<sup>35</sup>Director General of Water Services, Director General of Gas Supply, Director General of Electricity Supply, Rail Regulator, Director General of Telecommunications, Civil Aviation Authority, Postal Services Commission, and their Northern Irish counterparts.

<sup>36</sup>Clause 126.

<sup>37</sup>Clause 126.

*acquisition of any goods and services in the United Kingdom or a part of the United Kingdom.*<sup>38</sup>

4.4 If the answer is yes, it follows that one or more adverse effects on competition exist. The Commission also considers at this stage whether there is a detrimental effect on customers resulting from the adverse effect on competition. (A detrimental effect on customers<sup>39</sup> may take the form of higher prices, lower quality or less choice of goods and services or less innovation in relation to them). If at least two thirds of the Group have decided that there is an adverse effect on competition,<sup>40</sup> the Commission must go on to decide:<sup>41</sup>

- (b) whether action should be taken by it... 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;*
- (c) whether the Commission should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers which has resulted, or may be expected to result, from the adverse effect on competition; and*
- (d) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.*

4.5 If the Commission finds that there is no adverse effect on competition, it can take the matter no further and prepares and publishes its final report to that effect (see part 6); no question of considering remedies arises. If it finds there is an adverse effect on competition, it must go on to consider remedies.

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<sup>38</sup>Clause 129.

<sup>39</sup>Clause 129.

<sup>40</sup>Schedule 11, para 11.

<sup>41</sup>Clause 129.

- 4.6 The Commission must consult persons<sup>42</sup> about any decision it proposes to make which it considers is likely to have a substantial impact on their interests.<sup>43</sup> It will consult persons on the competition questions through provisional findings. Consultation on decisions on remedies may take place either at the same time as on the decisions on the competition questions or subsequently.
- 4.7 When making its decisions on remedial action, the Commission may have regard to the effect of any such action on any relevant customer benefits arising from the merger. If they are significant, the Commission may decide to take lesser action, or even no action, so as not to jeopardise them. Customer benefits<sup>44</sup> may take the form of lower prices, higher quality or greater choice of goods or services, or greater innovation. More detail about the consideration and selection of remedies and the circumstances in which customer benefits may be balanced against remedies appears in the market guidelines.
- 4.8 Once the Commission has reached its conclusions, it prepares and publishes<sup>45</sup> its report.

#### **Markets public interest cases**

- 4.9 The Act also provides for the Secretary of State to intervene in the consideration of a market that she thinks might raise one or more public interest considerations.<sup>46</sup> Such considerations must be statutorily specified, and the only consideration so far specified is national security.<sup>47</sup> The Secretary of State intervenes by serving an intervention notice on the Commission<sup>48</sup> within four months of the date of the reference.
- 4.10 The Commission's consideration then follows broadly the same pattern as for normal market references. It must consider the questions as before, including the remedies

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<sup>42</sup>Clause 164.

<sup>43</sup>See decisions under clauses 129(1) and (4) and 136 (2) and (3).

<sup>44</sup>Clause 129.

<sup>45</sup>Clause 132.

<sup>46</sup>Clause 136.

<sup>47</sup>Clause 148.

<sup>48</sup>Clause 134.

questions if appropriate. The significant variation is that the Commission must also consider what action should be taken by the Secretary of State in the light of any eligible public interest considerations<sup>49</sup> and report to the Secretary of State accordingly.

- 4.11 It is for the Secretary of State to decide whether the Commission's remedies for the adverse effects on competition would affect any eligible public interest considerations.<sup>50</sup> If so, she may take action to address the adverse effects on competition identified in the Commission's report having regard to what is appropriate in the light of the relevant public interest considerations. If she decides that no public interest consideration arises, the Commission will assume its normal role of publishing its report and imposing and enforcing remedies as set out in its report.<sup>51</sup>

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<sup>49</sup>Clause 136.

<sup>50</sup>Clause 141.

<sup>51</sup>Clause 143.

## **Part 5: Regulatory references**

### **General**

5.1 The Commission investigates references relating to issues in some regulated industries<sup>52</sup> under the relevant privatisation statutes. There are broadly five types:

- Licence modification references
- Water and other price determination references
- Water merger references (see paragraphs 3.16 to 3.20 above)
- Airport references
- References under the Financial Services and Markets Act 2000

### **Licence modification references**

5.2 Each company regulated under the telecommunications, gas, water, electricity or railways legislation has a formal instrument setting out the terms of its operation, normally described as a licence. An industry regulator may modify the conditions of a company's licence if the company agrees to the changes. If the company does not agree to a proposed modification and the regulator nevertheless wishes to proceed, he must refer the question to the Commission. That question is, generally, whether the absence of a licence modification may be expected to operate against the public interest. The public interest criteria are specific to the relevant industry. These references can involve the price control applied to the company, since price controls are provided for in the licences.

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<sup>52</sup>The sectors concerned are airports, air traffic services, electricity, gas, postal services, railways, telecommunications, and water.

- 5.3 The report must answer the questions in the reference giving the Commission's reasons for its conclusions together with supporting evidence. If the Commission makes an adverse public interest finding, it must report on whether the adverse effects could be remedied or prevented by modifications to a licence and, if so, specify what those should be. Its report is to the relevant regulator.
- 5.4 If the Commission finds that the absence of the licence modification does not operate against the public interest, its decision is final. If the Commission finds that the absence of a licence modification operates against the public interest, the regulator must make any changes to the licence which he considers necessary to remedy or prevent the adverse effects identified by the Commission. In doing so, he must bear in mind, but is not bound by, the modifications specified in the Commission's report. Under the Utilities Act 2000 the Commission is required, following a regulatory report under the gas, electricity, railways or postal services legislation, to decide whether the regulator's proposals are adequate to remedy the adverse effects, and if not to make the modification itself.

#### **Water and other price determination references**

- 5.5 Price control can be an important feature of licence modifications. Alterations to charges for water and sewerage are controlled by reference to inflation measured by movements in the retail price index (RPI) and an adjustment factor known as the "K factor". The formula is known as RPI + K. The water regulator, the Director General of Water Services, determines the K factor for each company at periodic intervals. He also determines the "standard amount" (an amount relevant to charges for new connections). If the company disputes the Director General's determination of the K factor or the standard amount, the Director General must refer the matter to the Commission, thus requiring the Commission to set the size of the K factor or the standard amount.
- 5.6 Similar issues arise relating to price controls in other regulated industries. In these cases, the formula is RPI-X, X being determined by the relevant regulator at each

periodic review. Again, disputed determinations of the X factor must be referred to the Commission for decision.

5.7 The process for reporting is the same as for other licence modifications except that the Commission's determination is binding on the regulator and the company.

### **Airport References**

5.8 There are two types of inquiry under the Airports Act 1986: quinquennial reviews and inquiries under section 41(6).

#### ***Quinquennial reviews***

5.9 The Civil Aviation Authority (CAA) refers designated airports (currently Heathrow, Gatwick, Stansted and Manchester) to the Commission every five years.

5.10 A quinquennial review reference has two parts:

(a) It requires the Commission to investigate and report on the maximum airport charges that the airport operator can levy for the next five-year period in the form of recommendations to the CAA, which are not binding.

(b) The Commission is required to determine whether the airport operator has, at any time during the five-year period since the previous reference, pursued a course of conduct which relates to airport charges, the operation of the airport, or the subcontracting or licensing of operations on the airport, which was against the public interest.

5.11 If the Commission finds that a course of conduct is against the public interest, the CAA must impose appropriate conditions to remedy or prevent the adverse effects the Commission has identified.

#### ***Section 41(6)***

5.12 This applies to non-designated airports. The CAA may wish to modify the terms of an operator's licence to remedy or prevent the adverse effects of anti-competitive conduct

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on the part of the airport operator in relation to its business. If the airport operator does not agree to the proposed modification, the CAA may refer the matter to the Commission.

5.13 The Commission must decide if the airport operator has pursued a course of conduct which is anti-competitive or unfairly exploitative, whether the course of conduct may be expected to operate against the public interest and, if so, whether the adverse effects could be remedied or prevented by imposing or modifying conditions in the licence.

5.14 Where the Commission makes an adverse public interest finding, the CAA must impose or modify conditions to remedy or prevent the adverse effects identified by the Commission. In doing so it must bear in mind, but is not bound by, the modifications specified in the Commission's report.

#### **The Financial Services and Markets Act 2000**

5.15 The OFT may report to the Commission provisions and practices adopted by the Financial Services Authority having a significant adverse effect on competition. Where the Commission's further investigation and report are adverse, the Treasury may, but is not bound to, give directions.

## **Part 6: Procedures**

6.1 The Commission's procedures are governed by the provisions of the Enterprise Act, Schedule 7 of the Competition Act 1998, relevant regulatory legislation and the Commission Rules, which are binding on groups (see the [Commission Rules of Procedure](#)—published in hard copy and on the website). Groups should also have regard to the [Chairman's Guidance](#), which gives advice to groups on the conduct of inquiries.

### **Appointment of groups**

6.2 When a reference is made to the Commission, the Chairman selects members to serve on the group that will conduct that inquiry. A group comprises a minimum of three members, one of whom acts as the group Chairman. Groups of four or five members have been normal practice to date. The Commission has a stringent procedure to ensure that conflicts of interest do not occur. The Chairman has the power to appoint a replacement for a group member if during the course of an investigation that member ceases to be a member of the Commission, or will be unable to perform his duties for a substantial period, or a particular interest means it would be inappropriate for him to continue.

6.3 There are three types of groups:

- merger reference groups;
- market reference groups;
- special reference groups.

6.4 The Commission has special panels of members for special reference groups, that is for water references, utilities references and newspaper merger references, from which one or more member of each special reference group must be chosen.

- 6.5 Subject to any particular provisions in the Act and to the Commission's Rules of Procedure, groups determine their own procedures. As a result there may be some variation in procedures according to the particular inquiry.
- 6.6 The Chairman of a group has the casting vote. Groups can consult other Commission members with the group Chairman's permission, and the Commission Chairman can give advice to groups.

### **Timetable**

- 6.7 The Commission must reach its decisions and publish its report within the following statutory time limits:
- *Mergers*: 24 weeks,<sup>53</sup> with an extension of up to eight weeks, if the Commission 'considers that there are special reasons why the report cannot be prepared and published within that period'.<sup>54</sup> In this case it must publish a notice of the extension.<sup>55</sup> Furthermore, if a relevant person does not appear as a witness or provide information or documents ordered by the Commission, the Commission can extend the inquiry until such time as the order is obeyed or it publishes its decision to cancel the extension. In most cases the Commission expects to complete its work in a shorter time than the maximum allowed.
  - *Merger cases referred back by the European Commission for consideration under a domestic regime*: four months from the date of reference back, as the European regime works to shorter timescales than the UK regime.
  - *Markets*: two years maximum<sup>56</sup> (though it is expected that most markets inquiries will be completed in a shorter time, probably 12-15 months).
  - *Regulatory references*: six months but one extension of up to six months (three months for airports) is permitted.

The Secretary of State has the power to alter these time limits by order, but not to extend them.<sup>57</sup>

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<sup>53</sup> clause 38.

<sup>54</sup> clause 38 (3).

<sup>55</sup> clause 38.

<sup>56</sup> clause 132.

6.8 Following consultation with the parties, each group will draw up an administrative timetable for the stages of its inquiry, which it has the power to revise,<sup>58</sup> and publish it on the website.

### **Major stages of investigation**

6.9 An inquiry begins when a reference to the Commission is made by the OFT, a sector regulator, or the Secretary of State. (The Commission has the power to cancel a merger reference, should it find that there were no grounds for a reference and in this case must publish a notice of the cancellation). The OFT also has the power to vary a reference, following consultation with the Commission. The Commission is under a duty to publish a notice if there is a material change in circumstances affecting a reference.

6.10 The main stages of an investigation (which often overlap and are not necessarily pursued in this order) are:

- (a) gathering information, including the issue of questionnaires,
- (b) hearing witnesses,
- (c) verifying information,
- (d) preparing a statement of issues,
- (e) considering responses to the statement of issues,
- (f) notifying parties of and publishing provisional findings,
- (g) considering possible remedies, and
- (h) considering exclusions from disclosure, and publishing reports.

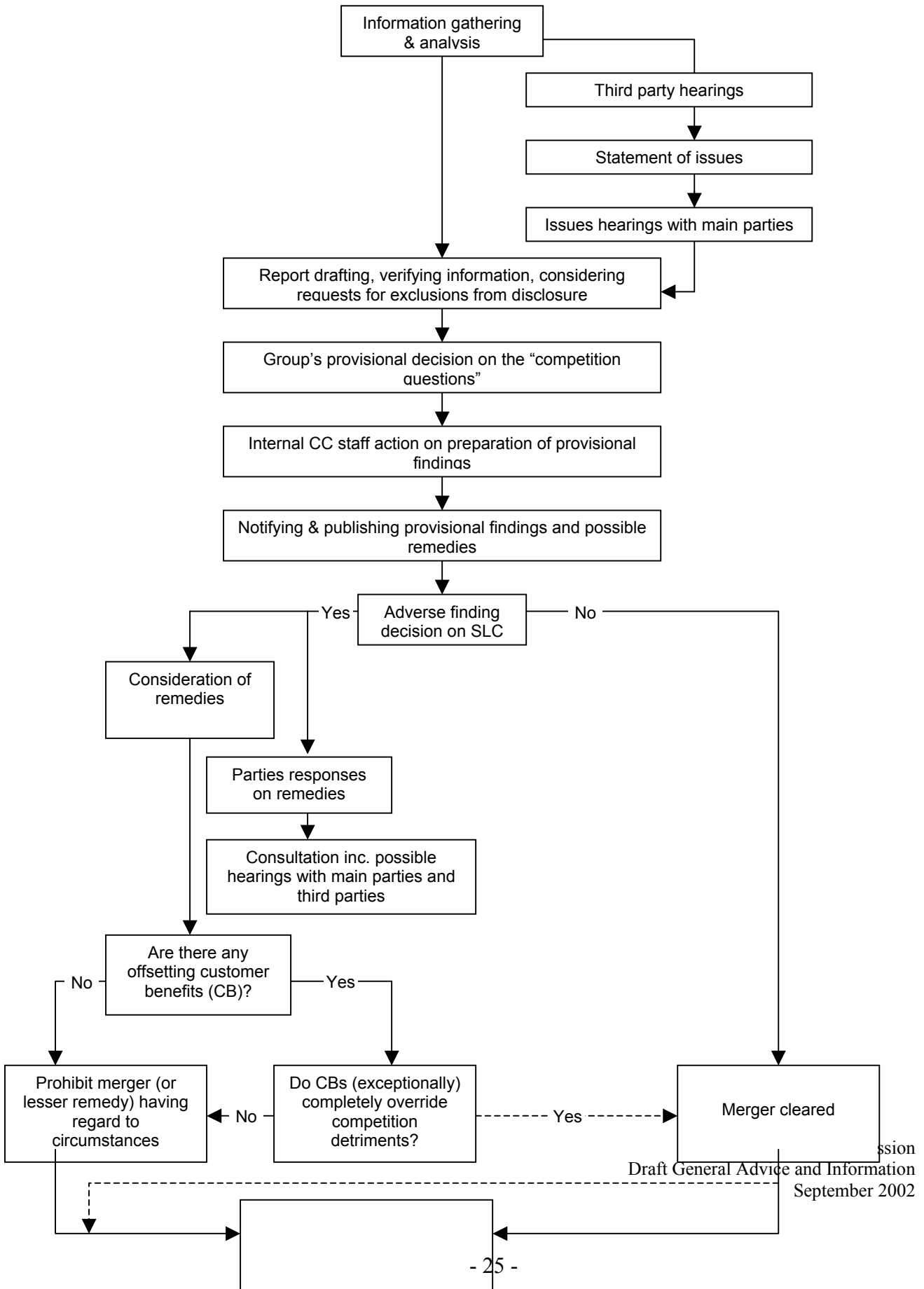
6.11 The flowcharts below indicate the stages of a typical merger inquiry and a market inquiry. These timetables can alter depending on the reference: for market inquiries, in particular, the length of the inquiry will depend on its complexity.

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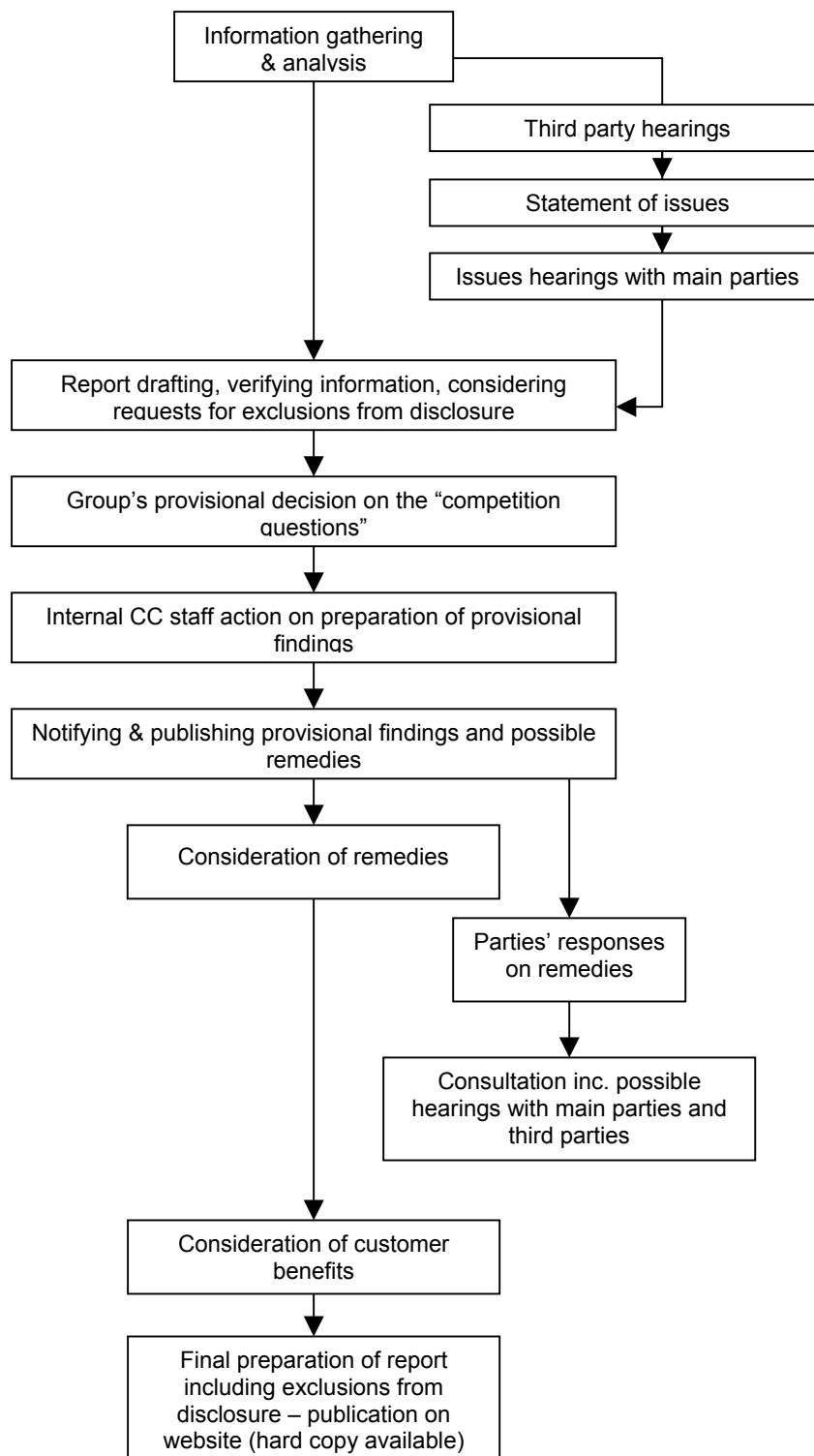
<sup>57</sup>clause 39 (8).

<sup>58</sup>Commission's Rules paragraphs 5.2, 5.5 and 5.7.

**Typical Shape of a Merger Inquiry**



## Typical Shape of a Market Investigation



## Information gathering and handling

6.12 It is vital that the Commission has access to detailed information regarding the companies and markets in question, so that it can make soundly based decisions on the competition and remedies questions. Those affected, or potentially affected, by decisions made by the Commission should also have the opportunity to put their views to the Commission and for those views to be considered. The Commission invites evidence from all parties likely to have an interest in the inquiry. They include:

- the main parties to inquiries (the merging companies in merger inquiries, or companies that form a part of the market under investigation in market inquiries),
- third parties that might be affected (for example, competitors, customers, suppliers, and trade or consumer organisations), and
- other interested bodies such as Government departments and expert bodies.

The provision of evidence to the Commission can be very time-consuming for the parties concerned and the Commission aims to restrict its requests to the minimum consistent with carrying out its duties. The Commission maintains regular contact with representatives of the main parties, to obtain and check information, and to inform them of progress.

6.13 At the outset of a reference, the Commission has available to it the information already gathered by the OFT, to which it must have regard.<sup>59</sup> The Commission then collects further information in a variety of ways:

- (a) *Letters and questionnaires.* When the reference is made, the Commission writes to the main parties to the inquiry, inviting submissions from them. It also contacts other interested parties to request their views. Questionnaires drafted by

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<sup>59</sup>Clauses 102 and 165.

Commission staff are sent to the main parties to an inquiry and sometimes to third parties.

- (b) *Press notices, advertisements and website.* The Commission publishes press notices seeking information and places advertisements in relevant publications; a notice is also included on the Commission website.
- (c) *Publicly available sources of information.* Often, useful information regarding the companies or market in question is available in publications, on websites, or in analysts' or consultants' reports.
- (d) *Surveys.* In some inquiries, surveys (for example, of consumers) are commissioned to provide evidence about a particular market.
- (e) *Visits to the main parties.* These help the Group and staff to gain a first hand understanding of the workings of the company and industry in question. They provide the opportunity for the parties to make presentations and for the members to ask questions in an informal setting.
- (f) *Commissioning of expert advice.*
- (g) *Hearings with the parties* (see separate section below).

6.14 The Commission has long had powers to issue notices requiring a person to attend at a certain time or place, to give evidence, to produce documents, or to supply other estimates, forecasts, returns, or other specified information.<sup>60</sup> However, the Act introduces a new sanction for non-compliance with such notices. In place of the Fair Trading Act power to institute contempt proceedings, the Commission can now impose a fixed monetary penalty of a maximum of £30,000, or a penalty of £15,000 per day, or a combination of the two. See the Commission's [Policy Statement on Penalties](#) for further details. Intentional provision of false information, or intentional alteration, suppression or destruction of any documents a person is required to produce constitutes

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<sup>60</sup>Clauses 106 and 177.

an offence.<sup>61</sup> The Commission is also free to ignore any information that it receives after the date reasonably specified for its receipt.<sup>62</sup>

6.15 Commission staff review the information collected. Some documents received are considered in their entirety by the group; others form the basis of papers written by Commission staff, which summarise, analyse, or draw out the implications of the information. The members of the group meet regularly with Commission staff to discuss and analyse the evidence and findings presented in these papers. In this way, the group is able to gain an understanding of the market and companies in question, and therefore to make informed decisions on the competition and remedies questions.

6.16 Some of the evidence gathered will normally be included in an issues letter sent to the main parties setting out the main lines of inquiry the group intends to pursue as a basis for the hearings with the main parties.

### **Hearings**

6.17 The Commission conducts hearings with the main parties to an inquiry on the basis of its issues letter.

6.18 Usually hearings are held with one party to the inquiry at a time. However, it is also possible to hold hearings that are open to the public, and joint hearings with more than one party. It is up to each inquiry group to decide on the most appropriate type of hearing for the inquiry in question. Normally hearings are held at the Commission.

6.19 Companies' representatives are expected to be able to answer the Commission's questions (which are put by the members) about the issues raised in the issues letter. A hearing can last anything from a couple of hours to a day. A transcript is taken, and is

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<sup>61</sup>Clause 107, clause 114.

<sup>62</sup>Commission's Rules 8.3.

forwarded to the party for checking. Should the party wish to clarify or add to any point made in the hearing, they can write to the Commission afterwards.

6.20 Hearings provide the members with an opportunity to explore in depth the key issues in an inquiry, and to raise questions arising from the party's written submission and answers to the questionnaire. They are not conducted in an adversarial fashion, but rather in the spirit of gaining a sound understanding of the questions raised in the inquiry.

### **Provisional findings**

6.21 The Enterprise Act imposes a duty on the Commission to consult on its decisions. In the case of mergers, it must do so where it considers that decision is likely to be adverse to the interests of a relevant party,<sup>63</sup> and in the case of market investigations, it must do so where it considers the decision is likely to have a substantial effect on the interests of any person.<sup>64</sup> The Commission will publish provisional findings on a reference (see paragraphs 9.1 to 9.9 of the Commission Rules), to which parties are invited to respond within 21 days. These provisional findings may also contain proposals for remedies: if they do not do so, then remedies will be consulted on separately. (For more detail on remedies see part 7.)

6.22 Following the publication of and consultation on the provisional findings, the group will meet to discuss responses to them, and consider whether or not, in the light of responses received, the provisional findings should be altered. This might necessitate a further hearing with one or more of the parties.

### **Remedies**

6.23 Groups must reach decisions that there is an anti-competitive effect by a two-thirds majority if they are to go on to consider remedial action.<sup>65</sup> In the event of an adverse

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<sup>63</sup> clause 101.

<sup>64</sup> clause 164.

<sup>65</sup> Schedule 11, 11 (3).

finding - that is, that a merger does lead to a substantial lessening of competition, or that there is an adverse effect arising from the features of a market – the Commission must propose remedies to counter the adverse effects. In practice, this means that groups consider possible remedies from an early stage of the inquiry, and consult interested parties on their proposals. Groups often hold hearings with the main parties to explore possible remedies and their likely effectiveness. In all cases with an anti-competitive finding, decisions on remedies must be published in the final report.

### **Final decisions and reports**

6.24 The Commission's final decisions on the competition questions and remedies are published in its final report, together with the reasons for those decisions and such information as is necessary to facilitate a proper understanding of the decisions and the reasons.<sup>66</sup> A report may contain a statement of dissent by any group member who disagrees with any decisions contained in the report.<sup>67</sup> Reports are published on the website; hard copies are also available from the Commission.

### **Special Reference Groups**

6.25 Special Reference Groups are constituted in relation to utilities statutes (for a full list see Commission Rules, 15.1). The procedures they follow are similar to the procedures for merger and market references, but they are not obliged to publish provisional findings. Moreover, the final report relating to such inquiries is sent to the relevant sector regulator.

### **Disclosure and confidentiality of information**

6.26 In the course of its work, the Commission publishes some of the information provided to it: either in the final report as evidence on which the decisions are based, or occasionally as background information on the Commission's website. Parties who have provided information to the Commission which is used as evidence for the decisions in a final report are always invited to check its accuracy and for their

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<sup>66</sup>clause 37 and clause 131.

<sup>67</sup>clause 116.

comments on possible disclosure. The Enterprise Act provides that the Commission should exclude from disclosure as far as possible:

- any information whose disclosure the Commission thinks is against the public interest,
- commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the business concerned,
- information relating to the private affairs of an individual whose disclosure the Commission thinks may substantially harm the individual's interests.

However, the Act requires that the Commission's reports should contain the information necessary to understand its decisions and the reasons for those decisions.<sup>68</sup> Ultimately the Commission decides what information should be disclosed in a report in order to fulfil that duty.

6.27 For the purposes of the law of defamation absolute privilege attaches to any report made by the Commission.<sup>69</sup>

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<sup>68</sup>clauses 37 and 131.

<sup>69</sup>clause 168.

## Part 7: Enforcement powers and procedures

### Overview

#### *Introduction*

7.1 This section describes the Commission's enforcement powers during and after the inquiry and sets out the procedures when implementing remedies.

7.2 After publishing its report on a reference, the Commission will go on to implement its decisions on remedies.<sup>70</sup> Its actions must continue to be such as it considers are reasonable and practicable to remedy, mitigate or prevent

- the substantial lessening of competition and its resulting adverse effects (mergers) or
- the adverse effect on competition and its resulting detrimental effects on customers (markets).

These actions must be consistent with the Commission's report unless there has been a material change of circumstances since the preparation of the report or other special reason. In taking such further action, the Commission must continue to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable; and to the effect of any proposed remedies on any customer benefits.

7.3 Enforcement takes two forms: undertakings and orders. Undertakings are given voluntarily by one or more of the parties to a merger or market investigation and once accepted by the Commission (or other competition authority) they are legally binding. Orders are made by the Commission (or other competition authority) and prohibit the parties specified in the order from taking certain action or require them to take certain action. Undertakings are unlimited in scope subject to the parties' willingness to give them. During a merger inquiry, interim undertakings may be accepted, and/or orders made, to seek to prevent the parties taking any action that might prejudice the outcome of the inquiry. At the end of an inquiry a final undertaking or final order is the means used by the Commission:

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<sup>70</sup>Clauses 40 and 129.

- to remedy the substantial lessening of competition or its adverse effects in the case of a merger; and
- to remedy the adverse effect on competition and any detrimental effects on customers so far as resulting from it in the case of a market investigation.

7.4 Schedule 8 of the Enterprise Act specifies the categories of remedy that a final order may include. In making an order the Commission may give directions to an individual or office-holder in any company or association.

7.5 Undertakings, once accepted by the Commission, orders and directions are enforceable in the courts by civil proceedings<sup>71</sup> brought by the Commission. The OFT may also take compliance proceedings before the courts.<sup>72</sup> Any person who has sustained loss or damage through a company's contravention of the undertaking, order or direction may bring an action before the courts.

### ***Functions of the OFT***

7.6 The OFT is required to keep a register open to inspection by the public which must include, among other things, the provisions of any final undertakings and final orders, any variation, release or revocation of them, and any consent given by the Commission to continue steps towards integration or acquire shares (paragraph 7.10 below). The Commission has a duty to supply that information to the OFT.

7.7 It is the duty of OFT to monitor the implementation of final undertakings and orders and to advise the Commission about further action such as variation, release, negotiation of a new undertaking, revocation of an order, or enforcement of a final order or undertaking in the courts.

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<sup>71</sup>Clause 91.

<sup>72</sup>Clause 89.

7.8 The Act<sup>73</sup> allows the Commission to require the OFT to negotiate undertakings with the parties to a merger but with the Commission retaining the final say on whether the undertakings should be accepted.

### **Commission's enforcement powers: mergers**

#### ***During an inquiry***

7.9 The Commission has the power to prevent pre-emptive action during the course of an inquiry, which might prejudice the outcome of a merger reference or impede the Commission from taking action later which may be justified by its decisions on the reference.

7.10 To this end the Commission may accept from the parties concerned interim undertakings<sup>74</sup> to refrain from doing things which would constitute pre-emptive action or to do things to maintain activities and safeguard assets. In the absence of receiving suitable undertakings<sup>75</sup> it may also impose interim orders to achieve the result it seeks. These provisions for interim undertakings and orders apply after the merger has been referred and may continue after the report is made until final remedies are implemented. Interim undertakings and orders have no notice requirements but the Commission is bound to consider representations about variation or revocation as soon as it can.

7.11 During the course of an inquiry into a completed merger the Commission can<sup>76</sup> prohibit the parties to a completed merger from taking further steps to integration without the Commission's consent. During the course of an inquiry into an anticipated merger the Commission can<sup>77</sup> prevent parties from acquiring any further shares in each other without the Commission's consent.

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<sup>73</sup>Clause 72

<sup>74</sup>Clause 77.

<sup>75</sup>Clause 78.

<sup>76</sup>Clause 74.

<sup>77</sup>Clause 75.

### *After an inquiry*

7.12 The Commission's decisions on remedies will be in the final report. The merger guidelines and the markets guidelines describe the categories of remedies available and the Commission's powers to negotiate undertakings or to make orders to implement appropriate remedies or to impose a remedy from among those described in Schedule 8 of the Act by means of orders.

7.13 The Commission has powers to vary or release undertakings on its own authority<sup>78</sup> and to vary or revoke orders<sup>79</sup> when advised by the OFT that such a variation or revocation is appropriate.

7.14 If parties do not comply with an undertaking, it may be replaced by a final order. Orders are limited to the categories of remedy specified in Schedule 8.<sup>80</sup>

7.15 The Commission may make a supplementary interim order<sup>81</sup> to prevent any action in relation to a particular undertaking which might prevent the Commission making a final order. Such an order has no notice requirements, but the Commission is bound to consider representations about variation or revocation as soon as it can.

### **Commission's enforcement powers: market investigations**

#### *During an inquiry*

7.16 The Commission has no power to prevent pre-emptive action during the course of an inquiry.

#### *After an inquiry*

7.17 The Commission has the power to prevent pre-emptive action that might impede it from taking action justified by its decisions on a reference and after it has reported the Commission may accept from the parties concerned interim undertakings<sup>82</sup> to prohibit

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<sup>78</sup>Clause 79.

<sup>79</sup>Clauses 80 and 81.

<sup>80</sup>Clause 80.

<sup>81</sup>Clause 73.

<sup>82</sup>Clause 152.

the doing of things which would constitute pre-emptive action or to undertake to do things to maintain activities and safeguard assets. In the absence of receiving suitable undertakings<sup>83</sup> the Commission may also impose interim orders to achieve the result it seeks. Such undertakings and orders have no notice requirements but the Commission is bound to consider representations about variation or revocation as soon as it can.

7.18 The Commission's decisions on remedies are in the final report. The market guidelines describe the categories of remedies available and the Commission's powers to negotiate undertakings or to make orders to implement appropriate remedies or to impose a remedy from among those described in Schedule 8 of the Act by means of orders.

7.19 The Commission has powers to vary or release undertakings on its own authority<sup>84</sup> and to vary or revoke orders<sup>85</sup> when advised by the OFT that such a variation or revocation is appropriate.

7.20 Orders may also be used to replace final undertakings where undertakings given by the parties are not being complied with. They are limited to the categories of remedy specified in Schedule 8.<sup>86</sup>

7.21 The Commission has no powers to make a supplementary interim order in market cases.

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<sup>83</sup>Clause 153.

<sup>84</sup>Clause 154.

<sup>85</sup>Clauses 155 and 156.

<sup>86</sup>Clause 155.

## **Enforcement procedure after report for mergers and market investigations**

7.22 Schedule 10 of the Act provides the binding legal framework for procedures applying to accepting undertakings and making orders. Paragraph 9 allows the Commission, for mergers only, to dispense in special circumstances with the checks and balances normally followed. The Commission will only accelerate the procedure with good reason and will explain its reasons to the parties and the public. The procedures are set out here.

### ***Requirement to give notice***

1. Before accepting an undertaking or making an order the Commission must give notice of the proposed undertaking or order.

### ***Content of notice***

2. The notice must state:
  - (a) that the Commission proposes to accept the undertaking or make the order;
  - (b) the purpose and effect of the undertaking or order;
  - (c) the situation that the undertaking is seeking to remedy;
  - (d) any other facts which justify the acceptance of the undertaking or the making of the order;
  - (e) a means of access to an accurate version of the proposed undertaking or order at all reasonable times; and
  - (f) the period (not less than 15 days starting with the date of publication of the notice for an undertaking and not less than 30 days for an order) within which representations may be made about it.

### ***Service of notice***

3. Such notice must be given by serving a copy of the proposed order on any person identified in the order as a person on whom a copy of the order should be served, and by, in every case, publishing the order.

### ***Representations***

4. Before accepting an undertaking or making an order the Commission must consider any representations made in accordance with the notice and not withdrawn.

### ***Modifications***

5. The Commission may not accept the undertaking, or make the order, with modifications unless it has given notice of the proposed modifications and considered any representations made in accordance with the notice and not withdrawn.
6. A notice relating to proposed modifications must state:
  - (a) the proposed modifications and the reasons for them; and
  - (b) the period (not less than 7 days starting with the date of publication of the notice relating to proposed modifications) within which representations may be made about it.
7. As to serving a notice relating to modifications of a proposed order, paragraph 3 applies.

### ***Deciding not to proceed***

8. If the Commission, after giving notice of a proposed undertaking or order or of a subsequent modification, decides not to accept the undertaking or make the order, it must give notice of that decision.
9. As to serving a notice that an order is not to be proceeded with, paragraph 3 applies.

### ***Deciding to proceed***

10. If the Commission decides to proceed it must, as soon as practicable after accepting an undertaking or making an order, serve a copy of the undertaking on any person by whom it is given or serve a copy of the order on any person identified in it as a person on whom a copy of the order should be served. It must also publish the undertaking or order.

***Content of certain enforcement orders***

11. Any final order or order to replace undertakings not fulfilled<sup>87</sup> must contain:
- (a) the actions that the person or description of the person to whom the order is addressed must do, or refrain from doing;
  - (b) the date on which the order comes into force;
  - (c) the possible consequences of non-compliance; and
  - (d) the provisions for review of the order.

***Releasing an undertaking or revoking an order***

12. Before releasing an undertaking or revoking an order the Commission must give notice of the proposed release or revocation.

***Content of notice***

13. The notice must state:
- (a) that a release or revocation is proposed;
  - (b) the reasons for it; and
  - (c) the period (not less than 15 days starting with the date of publication of the notice for an undertaking and not less than 30 days for an order) within which representations may be made about it.

***Decision to release or revoke***

14. The Commission must, as soon as practicable after releasing the undertaking or making the revoking order, serve a copy of the release of the undertaking on the person who gave the undertaking or serve a copy of the order on any person identified in the order being revoked as a person on whom a copy of the order should be served. It must also publish the release or the revoking order.

***Decision not to release or revoke***

15. If the Commission, after giving notice of a proposed release or revocation, decides not to proceed, it must give notice of that decision.

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<sup>87</sup>Clause 85.

16. Such notice is given by serving notice that the release or revocation is not to be proceeded with on the person who gave the undertaking being released or the person identified in the order being revoked as a person on whom a copy of the order should be served, and by publishing the notice.

***Enforcement in public interest cases***

17. The Secretary of State has similar powers to implement and enforce her decisions in mergers public interest and special public interest cases and markets public interest cases.

## Part 8: Appeals

### 8.1 The Competition Appeal Tribunal:

- reviews, on application, the decisions of the Competition Commission and other competition authorities in merger and market investigations;<sup>88</sup> and
- hears appeals against decisions to impose penalties for the failure of a witness to attend a hearing or to produce documents.<sup>89</sup>

8.2 The Act requires that the Competition Appeal Tribunal should, in determining review applications, follow the same principles as a court would follow on an application for judicial review. That means that the Tribunal will consider such matters as whether the Commission considered the case fully, followed its own procedures, observed the relevant law, acted fairly and proportionately and without bias, and came to a reasonable decision on the basis of the evidence.

8.3 Appeals against the imposition of penalties will have a rehearing on the merits of the case.

8.4 The procedures that the Competition Appeal Tribunal will follow are set out in the Competition Appeal Tribunal Rules.

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<sup>88</sup>Clauses 117 and 174.

<sup>89</sup>Clause 111.

## **Part 9: EC and UK competition authorities and their responsibilities**

- 9.1 The Competition Commission is one of a number of competition authorities which make decisions and recommendations on competition matters affecting UK businesses.
- 9.2 The Secretary of State has the power to make market references to the Commission and retains the power to initiate public interest cases and take final decisions on remedies in all public interest cases.
- 9.3 The OFT has a significant role in competition policy. It is responsible for making merger references and market investigation references to the Commission. It has responsibility for monitoring undertakings and orders made under the merger and market provisions of the Act and keeping the register. It makes decisions itself on the Chapter I and Chapter II prohibitions of the Competition Act 1998, which follow the Article 81 and 82 prohibitions (see below). The Chapter I prohibition is the prohibition of agreements and concerted practices which may affect trade in the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. The Chapter II prohibition is the prohibition of abuse of a dominant position in a market if it may affect trade within the UK and that power operates alongside the Commission's power to undertake market investigations referred to it
- 9.4 The European Commission's Competition Directorate-General (DG) takes decisions on competition rules applicable to undertakings where the common market is concerned. These rules are contained in Articles 81 and 82 of the Treaty of Rome and the EC Merger Regulation Council Regulation (EEC) No 4064/89 (the ECMR).
- 9.5 Article 81 prohibits all agreements and concerted practices which may affect trade between member states which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 82 prohibits any undertaking from abusing a dominant position which it holds in so far as it may affect trade between member states.

- 9.6 The ECMR regulates mergers with a European Community dimension. The Competition DG controls a significant number of large mergers but some may be referred back to the national authority (in the case of the UK, to the OFT) by the EC, or at the request of a member state. Some of these will be referred to the Commission.
- 9.7 Competition decisions of the EC are subject to judicial review by the EC courts.
- 9.8 Through the developing EC Competition Network, the OFT has a close administrative link with the Competition DG and other EC member states.

TABLE 1		
<i>Type of inquiry</i>	<i>Statute</i>	<i>Referring organisation</i>
Anticipated merger	Enterprise Act 2002	Office of Fair Trading
Completed merger	Enterprise Act 2002	Office of Fair Trading
Merger (repatriated from European Commission)	Article 9 ECMR	Office of Fair Trading
Merger raising defined public interest issues (ie cases with national security implications)	Enterprise Act 2002	Secretary of State
Newspaper merger	Fair Trading Act 1973	Secretary of State
Market	Enterprise Act 2002	Office of Fair Trading, sectoral regulators (OFTEL etc) or Secretary of State
Water merger	Water Industry Act 1991 s32	Office of Fair Trading
Water licence modification or price determination	Water Industry Act 1991 s12 or s14	Director General of Water Services
Airports price regulation (quinquennial reviews)	Airports Act 1986 s43 or Airports (Northern Ireland) Order 1994 art 34	Civil Aviation Authority
Gas licence modification	Gas Act 1986 s24 or 41E, or Gas (Northern Ireland) Order 1996 art 15	GEMA [Director General of Gas Supply] (or counterpart in Northern Ireland)
Electricity licence modification	Electricity Act 1989 s12 or 56c, or Electricity (Northern Ireland) Order 1992 art 15	GEMA [Director General of Electricity Supply] (or counterpart for Northern Ireland)
Railways licence modification	Railways Act 1993, s13 or Schedule 4A	Office of the Rail Regulator
National Air Traffic System	Transport Act 2000 s12	Civil Aviation Authority
Telecommunications licence modification	Telecommunications Act 1984 s13	Director General of Telecommunications
Postal Services licence modification	Postal Services Act 2000 s15	Postal Services Commission
Broadcasting licences – networking arrangements	Broadcasting Act 1990 schedule 4	ITC and holders of regional Channel 3 licences
Regulatory provisions or practices	Financial Services and Markets Act 2000 s162 or s306	Office of Fair Trading
Public bodies-efficiency and costs	Competition Act 1980 s11	Secretary of State