



## Competition Commission Market Investigations

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## Market Investigations



“Market investigations have a broad scope in terms of subject matter. They enable the CC to look in the round at markets and where it may be thought that competition is not working well. It is clear from the White Paper that preceded the Enterprise Act and the discussions around its implementation that market investigations were seen as an important addition and alternative to the prohibition system established by the Competition Act and later extended to include Articles 81 and 82. This is in part because the AEC test is cast in terms that, whilst recognizable in general competition law, are broader than the normal prohibition concepts of agreement, concerted practice, dominant position and abuse. The AEC encompasses all these matters, but goes much wider, extending, for example, to vertical effects, structural issues, tacit coordination or non-collusive oligopolies. And the emphasis is very much on diagnosis and cure rather than prohibition, punishment and deterrence.”

Peter Freeman, Chairman May 2008



## CC Market Investigations

Store card credit services (2006)  
Domestic bulk liquefied petroleum gas (2006)  
Home credit (2006)  
Classified directory advertising services (2006)  
Northern Irish personal banking (2007)  
Groceries market (2009)  
Payment protection insurance (PPI) (2009)  
BAA Airports (2009)  
Rolling stock leasing (2009)  
Local Bus Services (Referred 2010)  
Movies on Pay TV (Referred 2010)

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## Power to make references

*The OFT\* may make a reference ... if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.*

Section 131 Enterprise act 2002

\*certain utility regulators also have the ability to make references

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# Questions the Competition Commission must answer



- *Whether any feature or combination of features of each relevant market prevents, restricts or distorts competition (an adverse effect on competition (AEC) in connection with the supply or acquisition of any goods or services in the UK (or a part of the UK)*

If there is an AEC :-

- *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*
- *Whether it should recommend the taking of action by others*
- *In either case, if action should be taken, what action should be taken and what is to be remedies, mitigated or prevented*

Section 134 EA 2002

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# Features



A feature shall be construed as a reference to:-

- *Structure of the market concerned or any aspect of that structure*
- *Any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or*
- *Any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services*

Section 131 (2) EA 2002

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## Features (contd)

- **Market structure** might include
  - Concentration
  - Entry barriers
  - Information asymmetries
  - Regulation etc
- **Conduct** includes any act or failure to act (whether or not intentional).

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## Establishing an AEC

- Identify Theories of Harm
- Assessment of competition in the reference market
- Standards used to make assessment
  - Not perfect competition (economic concept; all markets would fail)
  - Well functioning market/how a market would function in the absence of the features
- Identify features that result in an AEC

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## Remedies selection

In the case of an AEC, the CC has to determine remedies

- It can either take action itself (through undertakings and orders) or make recommendations to others
- It needs to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition
- Taking account of effectiveness, costs, proportionality, and relevant customer benefits (lower prices, higher quality, greater choice or greater innovation arising as a result of the market feature)

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## Types of remedy

- Structural remedies, eg:
  - divestment
  - reducing barriers to entry
  - reducing switching costs
  - require firms to discontinue certain behaviours
- Behavioural remedies, eg:
  - a price cap
  - monitoring remedies – eg provision of price and profit information

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## Types of remedy (contd)

- Recommendations, eg:
  - on legislation, regulations, procurement practices
- White Paper, *Productivity and Enterprise: a world class competition regime*, DTI 2001: The Government has given a commitment to respond to recommendations within 90 days of publication of the report

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## Monitoring and enforcement of remedies

- Duty of OFT to monitor undertakings and orders
- Duty of OFT to keep register of undertakings and orders (and variations, revocations)
- Any breach of the duty to comply with an undertaking or order is actionable by person to whom the duty is owed and who has sustained loss or damage as a result
- Compliance with the undertaking is also enforceable by the OFT (and in some cases CC, SoS)
- Variation/revocation by the CC on advice from OFT

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## Characteristics of Market Investigation

- Subject to statutory timetable
- Investigation led by decision makers
- Information gathering powers
- Requirement to consult on proposed decisions - the AEC decision and the proposed remedies
- Significant transparency and disclosure during the investigation
- CC is required to publish guidance on the analytical approach and procedures

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## Challenges

*“Our challenge is to reconcile the three potentially conflicting requirements of fairness, thoroughness and timeliness. In other words, our decisions have to be based on proper analysis of all the relevant evidence, arrived at using a fair procedure and reached within reasonable time limits. To this should be added a fourth requirement, although probably already inherent in the other three, that our remedies must be effective and proportionate”*

Peter Freeman, ‘The Quest for the Holy Grail’ 14 January 2010

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## Timetable of investigation

### Overall timescale

- Period limited to 2 years maximum *Section 144 EA 2002*
- CC aims to complete investigations within 18 months
- Time period covers receipt of reference until publication of Final Report
- Implementation of remedies follows publication of Final Report

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## Decision makers and staff

- Group: Chair and Part-time commissioners
- Supported by Staff team:
  - Inquiry Director and administrative support
  - Economists
  - Statistician
  - Business adviser
  - Financial Analysts
  - Lawyers

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## Transparency during investigation

- Administrative timetable
- Publication/disclosure of key working papers, surveys, submissions and summaries of hearings
- Publication of Issues statement, Provisional Findings, Notice of Possible Remedies
- CC has duty to consult persons affected about key decisions (Provisional Findings and Proposed Decision on Remedy) when it considers that the decision is likely to have adverse effects (section 104 EA)

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## Market investigations Publications

- Rules of Procedure (CC1)
- Guidance on the Analytical Approach (CC4) *n.b. under review*
- Guidance on Disclosure of Information in Merger and Market Investigations (CC7)

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# Stages of investigation

- Reference (with reasons) published by referring body
- Appointment of Inquiry members and staff team (handling of conflicts)
- First Day letter, request for information and submissions
- Initial staff meetings with Parties
- Questionnaires, site visits, commissioning surveys
- Issues statement based on Theories of Harm
- Hearings (held by decision makers and staff)
- Publication of surveys, working papers, key submissions
- Provisional findings (and notice of possible remedies if needed)
- Hearings
- Provisional decision on remedies (if required)
- Final Report

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# Thank you!

## Useful web addresses

Competition Commission:

<http://www.competition-commission.org.uk/>

Investigations:

<http://www.competition-commission.org.uk/inquiries/>

Publications:

[http://www.competition-commission.org.uk/rep\\_pub/index.htm](http://www.competition-commission.org.uk/rep_pub/index.htm)

Guidance:

[http://www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/index.htm](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/index.htm)

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