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## SCHEDULES

### SCHEDULE 4

Section 39.

#### REFERENCES WITH RESPECT TO NETWORKING ARRANGEMENTS

##### *Report by Director on reference under s. 39*

- 1 (1) Where any reference is made to the Director General of Fair Trading (“the Director”) under section 39(12)(a), it shall be the duty of the Director—
  - (a) to publish a notice of the reference, together with a description of the arrangements to which it relates, in such manner as he considers most suitable for bringing it to the attention of persons who, in his opinion, would be affected by or be likely to have an interest in it;
  - (b) to consider whether those arrangements satisfy the competition test in accordance with paragraph 2; and
  - (c) to make a report on those arrangements within the period of six months beginning with the date of publication of the notice referred to in paragraph (a).
- (2) If, while the Director is proceeding with any such reference, he is informed in accordance with section 39(12)(b) of this Act of any modification to the arrangements in question, he may, if he thinks fit, treat the reference as varied so far as is necessary to take account of the modification; and, if he does so, references to those arrangements in sub-paragraph (1)(b) and (c) shall accordingly be construed as references to those arrangements as modified.
- (3) The Director’s report on any arrangements shall contain his conclusions on the question whether the arrangements satisfy the competition test and may contain such an account of his reasons for those conclusions as is, in his opinion, expedient for facilitating a proper understanding of those conclusions.
- (4) If those conclusions are to the effect that the arrangements do not satisfy the competition test, the report shall specify the modifications which the Director considers would, if incorporated in the arrangements, result in them satisfying that test.
- (5) Subsections (6) and (7) of section 186 of this Act shall have effect in relation to any report made by the Director under this paragraph as they have effect in relation to any report made by him under that section.
- (6) The Director shall send a copy of any report made by him under this paragraph to the Commission and to every holder of a regional Channel 3 licence.

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### *The competition test*

- 2 (1) For the purposes of this Schedule arrangements satisfy the competition test if—
- (a) they do not have, and are not intended or likely to have, the effect of restricting, distorting or preventing competition in connection with any business activity in the United Kingdom; or
  - (b) they do have, or are intended or likely to have, such an effect but they would satisfy the criteria set out in paragraph 3 of Article 85 of the E.E.C. Treaty (agreements contributing to improving the production or distribution of goods or to promoting technical or economic progress) if that paragraph were to be construed as relating only to the effects within the United Kingdom of agreements between undertakings.
- (2) For the purposes of sub-paragraph (1)(b) any arrangements made by the Commission shall be treated as if they constituted an agreement between undertakings within the meaning of Article 85(3).
- (3) In determining whether any arrangements would satisfy the criteria referred to in that provision, the Director or, as the case may be, the Monopolies and Mergers Commission (“the MMC”) shall have regard to any principles laid down by or decision of the European Court, or any court attached thereto, so far as relevant to the construction of Article 85(3).

### *Duty to modify arrangements in consequence of Director’s report*

- 3 (1) Where the Director’s report on any arrangements specifies any modifications in pursuance of paragraph 1(4), then (subject to sub-paragraph (2))—
- (a) if the arrangements were made by the holders of regional Channel 3 licences, the Commission shall notify all the holders of such licences of the period within which the modifications are to be incorporated in the arrangements, being such period as may be determined by the Director after consulting the Commission; and
  - (b) if the arrangements were made by the Commission, the Commission shall—
    - (i) incorporate those modifications in the arrangements with effect from such date as may be so determined, and
    - (ii) notify all the holders of such licences of the arrangements as modified.
- (2) If a reference relating to the Director’s report is made to the MMC under paragraph 4 and they have begun to proceed with it in accordance with that paragraph, the modifications referred to in sub-paragraph (1) above shall not be required to be incorporated in the arrangements by virtue of that sub-paragraph—
- (a) if the reference is in respect of the arrangements as a whole, or
  - (b) (in any other case) to the extent that the modifications fall to be considered by the MMC on the reference.
- (3) Each regional Channel 3 licence shall include such conditions as appear to the Commission to be appropriate in consequence of this paragraph.

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### *References to MMC*

- 4 (1) Where the Director's report on any arrangements contains any such conclusions as are mentioned in paragraph 1(4), the Commission or the holder of any regional Channel 3 licence may, within the relevant period, make to the MMC a reference which is so framed as to require the MMC to investigate and report on either or both of the following questions, namely—
- (a) whether the arrangements, or any particular provisions of the arrangements, satisfy the competition test;
  - (b) whether the modifications specified in the report, or any particular modification so specified, ought to be incorporated in the arrangements for the purpose of enabling them to satisfy that test.
- (2) In sub-paragraph (1) “the relevant period” means the period of four weeks beginning with the date of publication of the Director's report.
- (3) Where a reference is made to the MMC under this paragraph, the MMC shall (subject to sub-paragraphs (4) and (5))—
- (a) publish a notice of the reference in such manner as they consider most suitable for bringing it to the attention of persons who, in the opinion of the MMC, would be affected by or be likely to have an interest in it; and
  - (b) make a report on the reference within the period of three months beginning with the date of publication of the notice referred to in paragraph (a).
- (4) The period referred to in sub-paragraph (3)(b) may be extended by the MMC by a further period of three months if they consider it necessary to do so.
- (5) The MMC shall not be required to proceed with any reference under this paragraph which appears to them to be frivolous or vexatious; but, where they decide not to proceed with any such reference, they shall publish a notice of their decision in such manner as they consider appropriate.
- (6) If—
- (a) while the MMC are proceeding with any reference under this paragraph, the Director is informed in accordance with section 39(12)(b) of this Act of any modification to the arrangements in respect of which the reference has been made, and
  - (b) it appears to him that the modification is material to any issue falling to be considered by the MMC on the reference,
- he shall refer the modification to the MMC, who may, if they think fit, treat the reference as varied so far as is necessary to take account of the modification; and, if they do so, references to those arrangements in paragraphs 5 and 6 shall accordingly be construed as references to those arrangements as modified.
- (7) The following provisions, namely—
- (a) sections 81 (procedure in carrying out investigations) and 85 (attendance of witnesses and production of documents) of the <sup>M1</sup>Fair Trading Act 1973,
  - (b) Part II of Schedule 3 to that Act (performance of functions of MMC), and
  - (c) section 24 of the <sup>M2</sup>Competition Act 1980 (modification of provisions about performance of such functions),
- shall apply in relation to references under this paragraph as if—

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- (i) the functions of the MMC in relation to such references were functions under the Fair Trading Act 1973,
  - (ii) the expression “merger reference” included a reference under this paragraph,
  - (iii) in the said section 81, subsections (3) and (4) were omitted, and
  - (iv) in the said Schedule 3, paragraphs 11 and 16(2) were omitted.

#### Marginal Citations

M1 1973 c. 41

M2 1980 c. 21

VALID FROM 29/12/2003

#### *Further provision about references under paragraph 4*

- [<sup>F1</sup>4A (1) The following sections of Part 3 of the Enterprise Act 2002 shall apply, with the modifications mentioned in sub-paragraphs (2) and (3), for the purposes of references under paragraph 4 as they apply for the purposes of references under that Part—
- (a) section 109 (attendance of witnesses and production of documents etc.);
  - (b) section 110 (enforcement of powers under section 109: general);
  - (c) section 111 (penalties);
  - (d) section 112 (penalties: main procedural requirements);
  - (e) section 113 (payments and interest by instalments);
  - (f) section 114 (appeals in relation to penalties);
  - (g) section 115 (recovery of penalties); and
  - (h) section 116 (statement of policy).
- (2) Section 110 shall, in its application by virtue of sub-paragraph (1), have effect as if—
- (a) subsection (2) were omitted; and
  - (b) in subsection (9) the words from “or section” to “section 65(3)” were omitted.
- (3) Section 111(5)(b)(ii) shall, in its application by virtue of sub-paragraph (1), have effect as if—
- (a) for the words “published (or, in the case of a report under section 50 or 65, given)” there were substituted “made”;
  - (b) for the words “published (or given)”, in both places where they appear, there were substituted “made”; and
  - (c) the words “by this Part” were omitted.
- (4) Provisions of Part 3 of the Enterprise Act 2002 which have effect for the purposes of sections 109 to 116 of that Act (including, in particular, provisions relating to offences and the making of orders) shall, for the purposes of the application of those sections by virtue of sub-paragraph (1), have effect in relation to those sections as applied by virtue of that sub-paragraph.

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(5) Accordingly, corresponding provisions of this Act shall not have effect in relation to those sections as applied by virtue of that sub-paragraph.]

#### Textual Amendments

**F1** Sch. 4 para. 4A inserted (*prosp.*) by 2002 c. 40, ss. 278(1), 279, **Sch. 25 para. 24(9)(e)**

#### Report by MMC on reference under paragraph 4

- 5 (1) The MMC's report on a reference under paragraph 4 shall contain their conclusions on the question or questions comprised in the reference, together with such an account of their reasons for those conclusions as is, in their opinion, expedient for facilitating a proper understanding of those conclusions.
- (2) If the MMC's conclusions on any such question as is mentioned in paragraph 4(1)(a) are to the effect that the arrangements, or any particular provisions of the arrangements, do not satisfy the competition test, the report shall specify the modifications which the MMC consider would, if incorporated in the arrangements, result in the arrangements or (as the case may be) the provisions in question satisfying that test (and those modifications may to any extent differ from those specified by the Director in pursuance of paragraph 1(4)).
- (3) If the MMC's conclusions on any such question as is mentioned in paragraph 4(1)(b) are to the effect that any modification so specified by the Director ought to be incorporated for the purpose mentioned in that provision, the MMC shall (unless the report specifies a like modification in pursuance of sub-paragraph (2) above) affirm that modification in the report; but, if their conclusions on any such question are to the effect that any such modification ought not to be so incorporated, the report shall specify such other modification (if any) as appears to them to be appropriate for that purpose.
- (4) The MMC shall—
- (a) publish any report made by them under this paragraph in such manner as they consider appropriate; and
  - (b) send a copy of it to the Director, to the Commission and to every holder of a regional Channel 3 licence.
- (5) Section 82 of the <sup>M3</sup>Fair Trading Act 1973 (general provisions as to reports) shall apply in relation to reports of the MMC on references under paragraph 4 as it applies in relation to reports of the MMC under that Act.

#### Marginal Citations

**M3** 1973 c. 41

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*Duty to modify arrangements in consequence of MMC's report*

- 6 (1) Where the MMC's report on any reference under paragraph 4 specifies any modifications or modification in pursuance of paragraph 5(2) or (3), or any modification specified by the Director is affirmed in such a report, then—
- (a) if the arrangements to which the report relates were made by the holders of regional Channel 3 licences, the Commission shall notify all the holders of such licences of the period within which any such modifications or modification are or is to be incorporated in the arrangements, being such period as may be determined by the Director after consulting the Commission; and
  - (b) if those arrangements were made by the Commission, the Commission shall—
    - (i) incorporate any such modifications or modification in the arrangements with effect from such date as may be so determined, and
    - (ii) notify all the holders of such licences of the arrangements as modified.
- (2) Paragraph 3(3) shall have effect in relation to this paragraph as it has effect in relation to paragraph 3.

*Power of Director to review previous decision with respect to arrangements*

- 7 (1) The Director may at any time after making a report under paragraph 1 with respect to any arrangements—
- (a) consider afresh whether the arrangements (as for the time being in force) satisfy the competition test; and
  - (b) make a further report on those arrangements in accordance with sub-paragraphs (3) to (5) of paragraph 1.
- (2) If, while any arrangements are under consideration by the Director under this paragraph, he is informed in accordance with section 39(12)(b) of this Act of any modification of those arrangements, he may, if he thinks fit, decide to vary the matters under consideration so far as is necessary to take account of the modification; and, if he does so, references to those arrangements in sub-paragraph (1)(a) and (b) above shall accordingly be construed as references to those arrangements as modified.
- (3) The Director shall send a copy of any report made by him under this paragraph to the Commission and to every holder of a regional Channel 3 licence.
- (4) Paragraphs 2 to 6 shall have effect in relation to any such report as they have effect in relation to a report made by the Director under paragraph 1.

*Power to obtain information*

- 8 (1) The Director may serve on any person a notice requiring him, at a time and a place specified in the notice—

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- (a) to produce to the Director such documents specified or described in the notice (being documents in the custody or under the control of that person), or
- (b) to furnish him, in a form specified in the notice, with such estimates, returns or other information specified or described in it,
- as he may require for the purpose of making any report under this Schedule.
- (2) A person shall not by virtue of sub-paragraph (1) be compelled—
- (a) to produce any document which he could not be compelled to produce in civil proceedings before the High Court or (in Scotland) the Court of Session, or
- (b) in complying with any requirement for the furnishing of evidence, to give any information which he could not be compelled to give in evidence in such proceedings.
- (3) In section 85 of the <sup>M4</sup>Fair Trading Act 1973, as amended by the <sup>M5</sup>Companies Act 1989, subsections (6) to (8) (enforcement of notices requiring production of documents) shall apply in relation to a notice under sub-paragraph (1) above as they apply in relation to a notice under subsection (1) of that section, but as if, in subsection (7) of that section, there were substituted “the Director” for the words from “any one” to “the Commission”.
- (4) In that Act, as so amended, section 93B (false or misleading information) shall apply in relation to the furnishing of information to the Director or the MMC in connection with his or their functions under this Schedule as it applies in relation to the furnishing of information as mentioned in subsection (1)(a) or (b) of that section.

#### Marginal Citations

**M4** 1973 c. 41

**M5** 1989 c. 40.

VALID FROM 29/12/2003

#### Enforcement

- <sup>F28A</sup> (1) The court may, on an application by the OFT, enquire into whether any person (“the defaulter”) has refused or otherwise failed, without reasonable excuse, to comply with a notice under paragraph 8(1).
- (2) An application under sub-paragraph (1) shall include details of the possible failure which the OFT considers has occurred.
- (3) In enquiring into a case under sub-paragraph (1), the court shall hear any witness who may be produced against or on behalf of the defaulter and any statement which may be offered in defence.
- (4) Sub-paragraphs (5) and (6) apply where the court is satisfied, after hearing any witnesses and statements as mentioned in sub-paragraph (3), that the defaulter has refused or otherwise failed, without reasonable excuse, to comply with the notice under paragraph 8(1).

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- (5) The court may punish the defaulter as it would have been able to punish him had he been guilty of contempt of court.
- (6) Where the defaulter is a body corporate, the court may punish any director or officer of the defaulter as it would have been able to punish that director or officer had the director or officer been guilty of contempt of court.
- [ Where the defaulter is a partnership constituted under the law of Scotland, the court<sup>F3</sup>(6A) may punish any partner of the defaulter as it would have been able to punish him had he been guilty of contempt of court.]
- (7) In this section “the court”—
- (a) in relation to England and Wales or Northern Ireland, means the High Court, and
  - (b) in relation to Scotland, means the Court of Session.]

#### Textual Amendments

- F2** Sch. 4 paras. 8A-8C inserted (*prosp.*) by 2002 c. 40, ss. 278(1), 279, **Sch. 25 para. 24(9)(j)**
- F3** Sch. 4 para. 8A(6A) inserted (20.6.2003) by The Enterprise Act 2002 (Consequential and Supplemental Provisions) Order 2003 (S.I. 2003/1398), art. 1, **Sch. para. 14(3)**

VALID FROM 29/12/2003

- <sup>F4</sup>[8B (1) A person commits an offence if he intentionally alters, suppresses or destroys a document which he has been required to produce by a notice under paragraph 8(1).
- (2) A person who commits an offence under sub-paragraph (1) shall be liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.]

#### Textual Amendments

- F4** Sch. 4 paras. 8A-8C inserted (*prosp.*) by 2002 c. 40, ss. 278(1), 279, **Sch. 25 para. 24(9)(j)**

VALID FROM 29/12/2003

#### *False or misleading information*

- <sup>F5</sup>8C (1) A person commits an offence if—
- (a) he supplies any information to the OFT or the Competition Commission in connection with any of their functions under this Schedule;
  - (b) the information is false or misleading in a material respect; and
  - (c) he knows that it is false or misleading in a material respect or is reckless as to whether it is false or misleading in a material respect.
- (2) A person commits an offence if he—



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- (a) supplies any information to another person which he knows to be false or misleading in a material respect; or
- (b) recklessly supplies any information to another person which is false or misleading in a material respect;

knowing that the information is to be used for the purpose of supplying information to the OFT or the Competition Commission in connection with any of their functions under this Schedule.

- (3) A person who commits an offence under sub-paragraph (1) or (2) shall be liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.
- (4) This paragraph shall not have effect in relation to the supplying of information to the Competition Commission in connection with its functions under any provision of the Enterprise Act 2002 as applied by virtue of paragraph 4A.]

#### Textual Amendments

**F5** Sch. 4 paras. 8A-8C inserted (*prosp.*) by 2002 c. 40, ss. 278(1), 279, **Sch. 25 para. 24(9)(j)**

#### *Duty of Director to assist MMC*

- 9 (1) It shall be the duty of the Director, for the purpose of assisting the MMC in carrying out an investigation on a reference made to them under paragraph 4, to give to the MMC—
  - (a) any information which is in his possession and which relates to matters falling within the scope of the investigation, and which is either—
    - (i) requested by the MMC for that purpose, or
    - (ii) information which in his opinion it would be appropriate for that purpose to give to the MMC without any such request, and
  - (b) any other assistance which the MMC may require, and which it is within his power to give, in relation to any such matters;and the MMC shall, for the purpose of carrying out any such investigation, take account of any information given to them for that purpose under this sub-paragraph.
- (2) Sub-paragraph (1) shall not affect the operation of paragraph 4(6).

#### *Interpretation*

- 10 In this Schedule—
  - “the Director” means the Director General of Fair Trading; and
  - “the MMC” means the Monopolies and Mergers Commission.

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