

SCHEDULES

SCHEDULE 10

Section 35(10)

MARKETS: PUBLIC INTEREST INTERVENTIONS

- 1 Part 4 of the 2002 Act (market investigations) is amended as follows.
- 2 (1) Section 131 (power to make market investigation references) is amended as follows.
- (2) In subsection (4)(b), after “132” insert “or 140A(6)”.
- (3) In subsection (6), in the definition of “market investigation reference”, after “132” insert “or 140A(6)”.
- 3 In section 132 (ministerial power to make references), in subsection (4)—
- (a) after “if” insert “—
- (a)”,
- and
- (b) at the end insert “; or
- (b) a reference has been made under section 140A(6) in relation to the same matter but has not been finally determined.”
- 4 In section 135 (variation of references), in subsection (1), for “by it or (as the case may be) by him” substitute “by it under section 131 or (as the case may be) by the appropriate Minister under section 132”.
- 5 (1) Section 140 (supplementary provision about intervention notices under section 139(1)) is amended as follows.
- (2) In subsection (1)—
- (a) for paragraphs (a) and (b) substitute—
- “(a) the matter to which the market study notice or (as the case may be) the consultation under section 169 concerned relates;
- (b) the date of publication of that notice or (as the case may be) on which the process of consultation began;”, and”
- (b) in paragraph (c), for “case” substitute “matter”.
- (3) In subsection (2), for “case” (in the second place where it occurs) substitute “matter”.
- (4) After subsection (4) insert—
- “(4A) An intervention notice under section 139(1) shall also cease to be in force if—
- (a) it mentions a public interest consideration which was not finalised on the giving of the notice or public interest considerations which, at that time, were not finalised;
- (b) no other public interest consideration is mentioned in the notice;

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- (c) at least 24 weeks has elapsed since the giving of the notice;
- (d) the public interest consideration mentioned in the notice has not been finalised within that period of 24 weeks or (as the case may be) none of the public interest considerations mentioned in the notice has been finalised within that period of 24 weeks; and
- (e) the Secretary of State has not, by the end of that period of 24 weeks, made a reference under section 140A in relation to the matter.

(4B) Subsection (4D) applies in a case where—

- (a) an intervention notice ceases to be in force in accordance with subsection (4A);
- (b) the CMA has, before the time at which the notice ceases to be in force, prepared a market study report in relation to the matter within the period permitted by section 131B(4) and given it to the Secretary of State in accordance with section 140A(3)(b); and
- (c) the report contains the decision of the CMA that it should make a reference in relation to the matter concerned under section 131.

(4C) Subsection (4D) also applies in a case where—

- (a) an intervention notice ceases to be in force in accordance with subsection (4A); and
- (b) the CMA has, before the time at which the notice ceases to be in force—
 - (i) decided that it should make an ordinary reference or a cross-market reference under section 131 in relation to the matter concerned; and
 - (ii) given a document containing its decision, the reasons for it and such information as the CMA considers appropriate for facilitating a proper understanding of the reasons for its decision to the Secretary of State in accordance with section 140A(3)(c).

(4D) In a case to which this subsection applies—

- (a) the CMA shall, as soon as reasonably practicable, make a reference in relation to the matter under section 131; and
- (b) the reference is to be treated for the purposes of this Part as having been made in accordance with the requirements imposed by this Part.”

(5) In subsection (5)—

- (a) before paragraph (a) insert—
 - “(za) the CMA accepts an undertaking under section 154 instead of making a reference under section 131 in relation to the matter;
 - (zb) the CMA publishes notice that it has otherwise decided not to make a reference under section 131 in relation to the matter;
 - (zc) the period permitted for the preparation by the CMA of the market study report in relation to the matter and for the report to be published under section 131B(4) or (as the case may be) given to the Secretary of State under

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- section 140A(3) has expired and no such report has been so prepared or no such action has been taken;
- (zd) the Secretary of State makes a reference under section 140A(5) in relation to the matter;”,
- (b) in paragraph (a), after “143(1) or (3)” insert “or (as the case may be) 143A(2) or (3)”,
- (c) in paragraph (c), after “143(1)” insert “or (as the case may be) 143A(2)”,
- (d) in paragraph (d), at the end insert “or (as the case may be) fails to make and publish a decision under subsection (2) of section 146A within the period required by subsection (6) of that section”,
- (e) in paragraph (e), at the end insert “or (as the case may be) decides under section 146A(2) to make no finding at all in relation to the matter”, and
- (f) in paragraph (f), after “147(2)” insert “or (as the case may be) 147A(2)”.
- (6) In subsection (6)—
- (a) before paragraph (a) insert—
- “(za) in a case falling within subsection (5)(za), the acceptance of the undertaking concerned;
- (zb) in a case falling within subsection (5)(zb), the publication of the notice concerned;”,
- (b) in paragraph (a), after “(5)” insert “(zc),”, and
- (c) after paragraph (a) insert—
- “(aa) in a case falling within subsection (5)(zd), the making of the reference concerned;”.
- (7) After subsection (6) insert—
- “(6A) In subsection (6)(za) the reference to the acceptance of the undertaking concerned shall, in a case where the CMA has accepted a group of undertakings under section 154, be treated as a reference to the acceptance of the last undertaking in the group; but undertakings which vary, supersede or revoke earlier undertakings shall be disregarded for the purposes of subsections (5)(za) and (6)(za).”
- (8) In subsection (7), after “147(2)” insert “or (as the case may be) 147A(2)”.
- 6 After section 140A (inserted by section 35) insert—
- “140B Variation of restricted PI references and full PI references**
- (1) The Secretary of State may at any time vary a restricted PI reference or a full PI reference.
- (2) The Secretary of State shall consult the CMA before varying any such reference.
- (3) But subsection (2) does not apply if the CMA requested the variation concerned.
- (4) No variation under this section is capable of altering the public interest consideration or considerations specified in the reference.”
- 7 (1) Section 141 (questions to be decided where section 139(1) intervention notice is in force) is amended as follows.

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- (2) For subsection (1) substitute—
- “(1) This section applies where the Secretary of State makes a restricted PI reference.”
- (3) For the heading, substitute “Restricted PI references: questions to be decided by CMA”.
- 8 (1) Section 142 (investigations and reports) is amended as follows.
- (2) In subsection (1)—
- (a) for the words from the beginning to “the Commission” substitute “Where the Secretary of State makes a restricted PI reference or a full PI reference, the CMA”, and
- (b) after “section 143(1) or (3)” insert “or (as the case may be) 143A(2) or (3)”.
- (3) In subsection (2)—
- (a) in paragraph (a), at the end insert “or (as the case may be) 141A”,
- (b) omit the “and” after paragraph (b), and
- (c) after paragraph (c) insert “; and
- (d) in the case of a report in relation to a full PI reference in respect of which the Secretary of State appointed a public interest expert, a summary of the views of the expert.”
- (4) After subsection (2) insert—
- “(2A) A summary of the views of a public interest expert in a report under this section shall be approved by the expert before action is taken in relation to the report under section 143A(2) or (3).”
- 9 (1) Section 143 (publication etc of reports) is amended as follows.
- (2) Before subsection (1) insert—
- “(A1) This section applies in relation to a report prepared under section 142 in respect of a restricted PI reference.”
- (3) In subsection (1), in the words before paragraph (a), for “a report under section 142” substitute “the report”.
- (4) Omit subsection (2).
- (5) In subsection (3), for “a report under section 142” substitute “the report”.
- (6) Omit subsections (5) to (8).
- (7) For the heading substitute “Restricted PI references: publication etc of reports of CMA”.
- 10 After section 143 insert—
- “143A Full PI references: publication etc of reports of CMA**
- (1) This section applies in relation to a report prepared under section 142 in respect of a full PI reference.
- (2) The CMA shall publish the report if it contains—

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- (a) the decision of the CMA that there is no adverse effect on competition;
 - (b) the decision of the CMA that there is an adverse effect on competition but that the feature or combination of features which gave rise to it does not operate and may not be expected to operate against the public interest; or
 - (c) the decisions of the CMA that there is one or more than one adverse effect on competition and that one or more than one of the features or combinations of features which gave rise to an adverse effect on competition operates or may be expected to operate against the public interest but, on the question mentioned in section 141A(5)(a), and in relation to each effect adverse to the public interest concerned, that no action should be taken by the Secretary of State.
 - (3) The CMA shall give the report to the Secretary of State if it contains the decisions of the CMA—
 - (a) that there is one or more than one adverse effect on competition and that one or more than one of the features or combinations of features which gave rise to an adverse effect on competition operates or may be expected to operate against the public interest; and
 - (b) in relation to at least one effect adverse to the public interest concerned, that action should be taken by the Secretary of State.
 - (4) The Secretary of State shall publish, no later than publication of the Secretary of State’s decision under section 146A(2) in relation to the case, a report of the CMA given to the Secretary of State under subsection (3) and not required to be published by virtue of section 148A(3).”
- 11 (1) Section 144 (time-limits for investigations and reports in public interest cases) is amended as follows.
 - (2) In subsection (1)—
 - (a) for “the date of the reference” substitute “the relevant date”, and
 - (b) for the words from “publish it” to the end substitute “publish it under section 143(1) or 143A(2) or (as the case may be) give it to the Secretary of State in accordance with section 143(3) or 143A(3).”
 - (3) After subsection (1) insert—
 - “(1A) For the purposes of subsection (1), the “relevant date” is—
 - (a) in the case of a report in relation to a restricted PI reference or to a full PI reference which specifies that the Secretary of State does not propose to appoint a public interest expert, the date of the reference;
 - (b) in the case of a report in relation to a full PI reference which specifies that the Secretary of State proposes to appoint a public interest expert, the earliest of the following—
 - (i) the date of the appointment of the expert;
 - (ii) the date on which the Secretary of State gives notice to the CMA that the Secretary of State no longer intends to appoint such an expert;
 - (iii) the end of the period of 2 months beginning with the date of the reference.”

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- (4) In subsection (4), after “143(1) or (3)” insert “or (as the case may be) 143A(2) or (3)”.
- 12 (1) Section 145 (restrictions where public interest considerations not finalised: Part 4) is amended as follows.
- (2) In subsection (2), after “143(3)” insert “or (as the case may be) 143A(3)”.
- (3) In subsection (3), after “141(3)” insert “or (as the case may be) 141A(4) and (5).”
- (4) In subsection (4), after “141(3)” insert “or (as the case may be) 141A(4) and (5).”
- 13 (1) Section 146 (decision of Secretary of State) is amended as follows.
- (2) In subsection (1), in the words before paragraph (a), for “report of the Commission” substitute “report of the CMA in relation to a restricted PI reference”.
- (3) In the heading, at the beginning, insert “Restricted PI references:”.
- 14 After section 146 insert—

“146A Full PI references: decision of Secretary of State

- (1) Subsection (2) applies where the Secretary of State has received a report of the CMA in relation to a full PI reference which—
- (a) has been prepared under section 142;
 - (b) contains the decisions of the CMA that there is one or more than one adverse effect on competition and that one or more than one of the features or combinations of features that gave rise to an adverse effect on competition operates or may be expected to operate against the public interest and that, in relation to at least one effect adverse to the public interest concerned, action should be taken by the Secretary of State; and
 - (c) has been given to the Secretary of State as required by section 143A(3).
- (2) The Secretary of State shall decide whether to make an adverse public interest finding in relation to the matter and whether to make no finding at all in the matter.
- (3) For the purposes of this Part, the Secretary of State makes an adverse public interest finding in relation to a matter if, in relation to that matter, the Secretary of State decides—
- (a) that there is an adverse effect on competition;
 - (b) that there is one or more than one admissible public interest consideration which is relevant to the matter; and
 - (c) taking account only of any adverse effect on competition and any relevant admissible public interest consideration or considerations, that any feature or combination of features which gave rise to an adverse effect on competition operates or may be expected to operate against the public interest.
- (4) The Secretary of State may make no finding at all in a matter only if the Secretary of State decides that there is no admissible public interest consideration which is relevant to a consideration of the matter concerned.

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- (5) In deciding whether to make an adverse public interest finding under subsection (2), the Secretary of State shall accept the decision of the CMA as to whether there is an adverse effect on competition in relation to the matter.
- (6) The Secretary of State shall make and publish the decision under subsection (2) within the period of 90 days beginning with the receipt of the report of the CMA under section 142.
- (7) In this section “admissible public interest consideration” means a public interest consideration which—
 - (a) was mentioned in the intervention notice concerned; and
 - (b) was not disregarded by the CMA for the purposes of its report under section 142.”

15 In section 147 (remedial action by Secretary of State), in the heading, at the beginning, insert “Restricted PI references:”.

16 After section 147 insert—

“147A Full PI references: remedial action by Secretary of State

- (1) Subsection (2) applies where the Secretary of State has decided under subsection (2) of section 146A within the period required by subsection (6) of that section to make an adverse public interest finding in relation to a matter and has published the decision within the period so required.
- (2) The Secretary of State may take such action under section 159 or 161 as the Secretary of State considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the features or combinations of features in question.
- (3) In making a decision under subsection (2), the Secretary of State shall, in particular, have regard to the report of the CMA under section 142.
- (4) In making a decision under subsection (2), the Secretary of State may, in particular, have regard to—
 - (a) the need to achieve as comprehensive a solution as is reasonable and practicable to the effects adverse to the public interest concerned; and
 - (b) any detrimental effects on customers so far as resulting from those effects.”

17 (1) Section 148 (reversion of the matter) is amended as follows.

(2) Omit subsections (3) to (5).

(3) For the heading substitute “Restricted PI references: reversion of the matter to CMA”.

18 After section 148 insert—

“148A Full PI references: reversion of the matter to CMA

- (1) This section applies if—

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- (a) the Secretary of State decides under section 146A(2) to make no finding at all in the matter; or
 - (b) the Secretary of State fails to make and publish the decision under subsection (2) of section 146A within the period required by subsection (6) of that section.
- (2) The CMA shall proceed under section 138 as if—
- (a) a reference under section 131 had been made (in accordance with the requirements imposed by this Part) instead of a full PI reference; and
 - (b) its report had been prepared and published under section 136 within the period permitted by section 137.
- (3) The CMA shall publish the report which has been prepared by it under section 142 (if still unpublished) as soon as it becomes able to proceed by virtue of subsection (2).
- (4) In relation to proceedings by virtue of subsection (2), the reference in section 138(3) to decisions of the CMA included in its report by virtue of section 134(4) is to be construed as a reference to decisions which were included in the report of the CMA by virtue of section 141A(6).
- (5) Where the CMA becomes under a duty to proceed as mentioned in subsection (2), references in this Part to a reference under section 131, so far as necessary, are to be construed accordingly.
- (6) Where the CMA, in proceeding by virtue of subsection (2), intends to proceed in a way which is not consistent with its decisions as included in its report by virtue of section 141A(6), it shall not so proceed without the consent of the Secretary of State.
- (7) The Secretary of State shall not withhold consent under subsection (6) unless the Secretary of State believes that the proposed alternative way of proceeding will operate against the public interest.
- (8) For the purposes of subsection (7) a proposed alternative way of proceeding will operate against the public interest only if any admissible public interest consideration or considerations outweigh the considerations which have led the CMA to propose proceeding in that way.
- (9) In deciding whether to withhold consent under subsection (6), the Secretary of State shall accept the CMA’s view of what, if the only relevant consideration were how to remedy, mitigate or prevent the adverse effect on competition concerned or any detrimental effect on customers so far as resulting from the adverse effect on competition, would be the most appropriate way to proceed.
- (10) In this section “admissible public interest consideration” has the same meaning as in section 146A.”
- 19 (1) Section 149 (intervention notices under section 139(2)) is amended as follows.
- (2) In subsection (1)(c), for “case” substitute “proposal to accept the undertaking”.
 - (3) In subsection (2), for “case” (in the second place where it occurs) substitute “proposal to accept the undertaking”.

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- 20 In section 150 (power of veto of Secretary of State: undertakings in lieu), before subsection (1) insert—
- “(A1) Where an intervention notice under subsection 139(1) is in force, the CMA shall not, without the consent of the Secretary of State, accept any proposed undertaking under section 154 in relation to the matter concerned.”
- 21 (1) Section 151 (further interaction of intervention notices with general procedure) is amended as follows.
- (2) For subsection (1) substitute—
- “(1) Sections 134(1), (1A), (4), (6) and (7), 136(1) to (6), 137(1) to (6), 138 and 138A do not apply in relation to a restricted PI reference or a full PI reference.”
- (3) In subsection (2), for the words from “, the Commission” to the end substitute “at a time after the Secretary of State has made a restricted PI reference or a full PI reference, the CMA shall proceed as if the reference concerned had instead been made under section 131 (in accordance with the requirements imposed by this Part).”
- (4) In subsection (4), for the words from “, the Commission shall” to the end substitute “, the CMA shall proceed as if the restricted PI reference or (as the case may be) the full PI reference concerned had instead been made by the CMA under section 131 (in accordance with the requirements imposed by this Part).”
- (5) For the heading, substitute “Public interest intervention cases: interaction with general procedure”.
- 22 In section 152 (certain duties in relation to providing information), omit subsection (2).
- 23 In section 155 (undertakings in lieu: procedural requirements), in subsection (3)(a), at the end insert “or (but for the effect of section 140A(3)) it would have had power to make and which it would otherwise have intended to make”.
- 24 (1) Section 157 (interim undertakings: Part 4) is amended as follows.
- (2) In subsection (1)(b), after “143(3)” insert “or (as the case may be) 143A(3)”.
- (3) In subsection (6)—
- (a) in the definition of “pre-emptive action”, for “or (as the case may be) 147(2)” substitute “, 147(2) or (as the case may be) 147A(2)”, and
- (b) for the definition of “relevant authority” substitute—
- ““the relevant authority” means—
- (a) in the case of a restricted PI reference or a full PI reference, the Secretary of State;
- (b) in any other case, the CMA.”
- 25 In section 158 (interim orders: Part 4), in subsection (1)(b), after “143(3)” insert “or (as the case may be) 143A(3)”.
- 26 In section 159 (final undertakings: Part 4), in subsection (2), after “147” insert “or (as the case may be) 147A”.
- 27 (1) Section 160 (order-making power where final undertakings not fulfilled: Part 4) is amended as follows.

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- (2) In subsection (2), for “or (as the case may be) 147(2)” substitute “, 147(2) or (as the case may be) 147A(2)”.
- (3) In subsection (3), for “or (as the case may be) 147” substitute “or 147 or (as the case may be) subsections (3) and (4) of section 147A”.
- 28 In section 161 (final orders: Part 4), in subsection (2), after “147” insert “or (as the case may be) 147A”.
- 29 In section 169 (certain duties of relevant authorities to consult: Part 4), in subsection (6)—
- (a) in the definition of “relevant authority”, at the end insert “or the Secretary of State”,
 - (b) in the definition of “relevant decision”, in paragraph (b), after “appropriate Minister” (in the first place where it occurs) insert “(other than the Secretary of State acting alone)”, and
 - (c) also in that definition, after paragraph (b) insert—
 - “(ba) in the case of the Secretary of State, any decision by the Secretary of State—
 - (i) to make a reference under section 132;
 - (ii) to vary under section 135 such a reference;
 - (iii) in a case where the Secretary of State is required to make a reference under section 140A, whether to make a reference under subsection (5) or (6) of that section; or
 - (iv) to vary under section 140B a reference made under section 140A(6).”
- 30 (1) Section 172 (further publicity requirements: Part 4) is amended as follows.
- (2) In subsection (1), in paragraph (a), after “section 131” insert “, other than a reference treated as so made by virtue of section 140A(5)(b)”.
 - (3) In subsection (2), omit paragraph (d).
 - (4) In subsection (3)—
 - (a) after paragraph (d) insert—
 - “(da) any reference made by him under section 140A(5) or (6);
 - (db) any variation made by him under section 140B of a reference under section 140A(6);”, and
 - (b) in paragraph (e), after “147(2)” insert “or (as the case may be) 147A(2)”.
 - (5) In subsection (7), omit “or (2)(d)”.
 - (6) In subsection (7A) (inserted by Schedule 12), at the end insert “or (3)(da)”.
 - (7) In subsection (8), in paragraph (a), after “146(2)” insert “or 146A(2)”.
 - (8) In subsection (10), after “147(2)” insert “or 147A(2)”.
- 31 In section 177 (excisions from reports: Part 4), in subsection (5), omit “, 143(2) and (5) to (7), 148(3) to (5)”.
- 32 (1) Section 183 (interpretation: Part 4) is amended as follows.

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- (2) In subsection (3), in paragraph (a), for the words before sub-paragraph (i) substitute “where the reference is made under section 131 or 132—”.
- (3) In that subsection, in paragraph (b)—
- (a) for the words before sub-paragraph (i) substitute “where the reference is a restricted PI reference or a full PI reference—”,
 - (b) in sub-paragraph (i), after “143(1) or (3)” insert “or (as the case may be) 143A(2) or (3)”,
 - (c) in sub-paragraph (ii), omit “(disregarding the fact that the notice was given)”,
 - (d) in sub-paragraph (iii), after “143(1)” insert “or (as the case may be) 143A(2)”,
 - (e) in sub-paragraph (iv), omit “(disregarding the fact that the notice was given)”,
 - (f) for sub-paragraph (v) substitute—
 - “(v) the Secretary of State has failed to make and publish a decision under subsection (2) of section 146 within the period permitted by subsection (3) of that section or (as the case may be) under subsection (2) of section 146A within the period permitted by subsection (6) of that section and the reference is finally determined under paragraph (a) above;”,
 - (g) in sub-paragraph (vi), omit “(disregarding the fact that the notice was given)”,
 - (h) after sub-paragraph (vi) insert—
 - “(via) the Secretary of State has made no finding at all under section 146A(2) and the reference is finally determined under paragraph (a) above;”,
 - (i) omit the “or” after sub-paragraph (vii),
 - (j) after sub-paragraph (vii) insert—
 - “(viiia) the Secretary of State has made an adverse public interest finding under section 146A(2) but has decided under section 147A(2) neither to accept an undertaking under section 159 nor to make an order under section 161;”, and
 - (k) after sub-paragraph (viii) insert “; or
 - (ix) the Secretary of State has made an adverse public interest finding under section 146A(2) and has accepted an undertaking under section 159 or made an order under section 161.”
- (4) In subsection (4)(c), after “(b)(viii)” insert “or (ix)”.
- (5) In subsection (5), for “or (vi)” substitute “, (vi) or (via)”.
- (6) In subsection (6), after “(b)(viii)” insert “and (ix)”.
- 33 (1) Section 184 (index of defined expressions in Part 4) is amended as follows.
- (2) After the entry in the table for “Adverse effect on competition” insert—
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| “Adverse public interest finding | Section 146A(3)”. |
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(3) After the entry in the table for “Final determination of market investigation reference” insert—

“Full PI reference | Section 140A(12)”.

(4) After the entry in the table for “Public interest consideration being finalised” insert—

“Public interest expert | Section 141B(4)”.

(5) Before the entry in the table for “subordinate legislation” insert—

“Restricted PI reference | Section 140A(12)”.