



Neutral citation [2023] CAT 21

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No.: 1576/6/12/23

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

31 March 2023

Before:

SIR MARCUS SMITH  
(President)  
MICHAEL CUTTING  
ANNA WALKER CB

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) APPLE INC  
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED  
(3) APPLE EUROPE LIMITED  
(4) APPLE (UK) LIMITED

Applicants

– and –

**COMPETITION AND MARKETS AUTHORITY**

Respondent

Heard at Salisbury Square House on 10 March 2023

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**JUDGMENT**

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## APPEARANCES

Timothy Otty, KC and Timothy Parker (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Applicants.

Sir James Eadie, KC, David Bailey and Khatija Hafesji appeared on behalf of the Respondent.

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## A. THE PROCEEDINGS

### (1) The decision

1. By a decision dated 22 November 2022 entitled *Mobile browsers and cloud gaming: Decision to make a market investigation reference* (the **Decision**<sup>1</sup>), the Competition and Markets Authority (the **CMA**) decided as follows:

“4.1 In light of the information set out above, we have made an “ordinary” MIR within the meaning of section 131(6) of the Enterprise Act 2002 in respect of the supply of mobile browsers and cloud gaming in the UK.

#### Scope of the market investigation reference

4.2 As set out in the Terms of Reference published alongside this document, the MIR covers the supply of mobile browsers and mobile browser engines, and the distribution of cloud gaming services through app stores on mobile devices (and the supply of related ancillary goods and services) in the United Kingdom.”

2. “MIR” is obviously shorthand for “market investigation reference”. Section 131 of the Enterprise Act 2002 provides for the power of the CMA to make references. It states:

“(1) The CMA may, subject to subsection (4), make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.

(2) For the purposes of this Part any reference to a feature of a market in the United Kingdom for goods or services shall be construed as a reference 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 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 supplies or acquires goods or services.

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<sup>1</sup> Annex 1 hereto lists the terms and abbreviations used in this Judgment, together with the paragraph in which the term/abbreviation is first used.

- (2A) In a case where the feature or each of the features concerned falls within subsection (2)(b) or (c), a reference under subsection (1) may be made in relation to more than one market in the United Kingdom for goods or services.
- (3) In subsection (2) “conduct” includes any failure to act (whether or not intentional) and any other unintentional conduct.
- (4) No reference shall be made under this section if –
  - (a) the making of the reference is prevented by section 156(A1) or (1); or
  - (b) a reference has been made under section 132 or 140(A6) in relation to the same matter but has not been finally determined.
- (5) References in this Part to a market investigation reference being finally determined shall be construed in accordance with section 183(3) to (6).
- (6) In this Part –

“cross-market reference” means a reference under this section which falls within subsection (2A) or a reference under section 132 which falls within subsection (3A) of that section (and see section 140A);

“market in the United Kingdom” includes –

- (a) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory; and
- (b) any market which operates only in a part of the United Kingdom;

“market investigation reference” means a reference under this section or section 132 or 140(A6);

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

and references to a market for goods or services include references to a market for goods and services.”

3. As the Decision makes clear, the MIR in this instance is an “ordinary reference”, which is any reference that is not a “cross-market reference”.<sup>2</sup> The statutory jurisdiction for making either type of reference is section 131(1) of the Enterprise Act 2002, and “reference” in that subsection must be read

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<sup>2</sup> See the definitions in section 131(6) of the Enterprise Act 2002.

accordingly. We will generally use the term **market investigation reference** or **MIR**.

## **(2) The application**

4. By a notice of application (the **Application**) dated 18 January 2023, the Applicants (collectively, **Apple**) applied for a review of the Decision pursuant to section 179 of the Enterprise Act 2002. In conducting such a review, the Tribunal “shall apply the same principles as would be applied by a court on an application for judicial review”.<sup>3</sup>

5. In a nutshell, Apple contend that the Decision was *ultra vires* the CMA and should therefore be quashed. Paragraph 2 of Apple’s Application provides:

“The Decision was *ultra vires* because it was made outside the statutory time-limits stipulated in sections 131B(4), 131B(5) and 131B(6) of the 2002 Act. The CMA had no power to make the MIR against Apple in November 2022. Consequently, the Decision and the ensuing Market Investigation are invalid and of no effect.”

6. Although it unpacks into a number of subsidiary points, *vires* is the only basis upon which Apple seek to review the Decision. There was an application for interim relief, staying the market investigation reference pending the determination of the Application,<sup>4</sup> but a combination of the parties’ good sense and the early listing of the Application for determination has meant that this application for a stay has not been moved by Apple.

## **(3) The structure of this judgment**

7. This judgment considers the following points in the following order. First, the history surrounding the Decision is set out, in particular the circumstances concerning an earlier decision of the CMA (the **Earlier Decision**) not to make the market investigation reference (Section B below). Secondly, the relevant statutory framework is briefly and neutrally described (Section C below). Section D considers the parties’ submissions in relation to the Application, and

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<sup>3</sup> Section 179(4) of the Enterprise Act 2002.

<sup>4</sup> See paragraph 3 of the Application.

our analysis of the issues that arise out of it. Finally, Section E describes how we dispose of the Application.

## **B. THE RELEVANT FACTUAL BACKGROUND**

### **(1) The June 2021 market study notice**

8. On 15 June 2021, the CMA published a market study notice entitled *Mobile ecosystems* (the **June 2021 Market Study Notice**). The June 2021 Market Study Notice was made under section 130A of the Enterprise Act 2002, which describes the circumstances in which the CMA must publish such a notice.

9. The June 2021 Market Study Notice stated:

“The Competition and Markets Authority (referred to in this notice as the “CMA”) publishes this market study notice in accordance with section 130A of the Enterprise Act 2002 (the “Act”).

1. The CMA is proposing to carry out its functions under section 5 of the Act in relation to the supply of mobile ecosystems in the United Kingdom, to consider the extent to which a matter in relation to the supply of those services has or may have effects adverse to the interests of consumers, and to assess the extent to which steps can and should be taken to remedy, mitigate or prevent such adverse effects.
2. In this notice, the supply of “mobile ecosystems” means the supply of smartphones and tablets, and associated software such as operating systems, app stores, browsers and applications. In this notice, “browsers” refers to all web browsers, and associated browser engines, that can be accessed via mobile or desktop devices.
3. Further details of the market study into mobile ecosystems and browsers, including detailed issues on which the CMA would welcome responses, are provided in the Statement of Scope document annexed to this notice.
4. The CMA now invites any persons wishing to make representations on the matter, including on whether the CMA should make a market investigation reference under section 131 of the Act, to do so in writing no later than 26 July 2021.
5. If the CMA proposes to make a market investigation reference or if a representation (as provided for in section 131A of the Act) has been made to the CMA that such a reference should be made but the CMA proposes not to make one, the CMA will publish a notice of that proposal and begin the process of consultation under section 131A(2)(b) of the Act no later than 14 December 2021.

6. Save where paragraph 5 applies, if the CMA decides not to make a market investigation reference under section 131 of the Act the CMA will publish notice of that decision no later than 14 December 2021.
7. The CMA will publish its market study report, setting out its findings in relation to the matter specified in this notice and the action (if any) which the CMA proposes to take in relation to that matter, no later than 14 June 2022.”

**(2) The consultation**

10. The process of consultation referred to in the June 2021 Market Study Notice has a statutory basis in section 131A of the Enterprise Act 2002. Although the CMA may “ignore any representation which it considers to be frivolous or vexatious”,<sup>5</sup> it is otherwise obliged to consult “in such manner as it considers practicable, before deciding whether to make a reference”.<sup>6</sup>

**(3) The decision not to make a reference**

11. On the 14 December 2021, the CMA issued a decision entitled *Mobile Ecosystems: Notice of decision not to make a market reference under section 131 of the Enterprise Act 2002*. We have described this decision as the Earlier Decision.<sup>7</sup>

12. The Earlier Decision provided:

“The Competition and Markets Authority (“CMA”) hereby publishes, for the purposes of section 131B of the Enterprise Act 2002 (the “Act”), notice of its decision not to make a reference under section 131 of the Act in relation to the supply of mobile ecosystems in the United Kingdom.

...

**Notes**

1. On 15 June 2021, the CMA published a market study notice, in accordance with section 130A of the Act, that the CMA proposed to carry out its functions under section 5 of the Act in relation to the supply of mobile ecosystems in the United Kingdom, to consider the extent to which a matter in relation to the study of those ecosystems has or may have effects adverse to the interests of consumers, and to

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<sup>5</sup> Section 131A(3) of the Enterprise Act 2002.

<sup>6</sup> Section 131A(2) of the Enterprise Act 2002.

<sup>7</sup> See paragraph 7 above.

assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.

2. The CMA provided details of the scope of the market study, highlighting issues on which it welcomed responses in writing, in a Statement of Scope published alongside the market study notice.
  3. The market study notice invited any persons wishing to make representations, including on whether the CMA should make a market investigation reference under section 131 of the Act, to do so in writing not later than 26 July 2021.
  4. No representations were made to the CMA, within the specified period, to the effect that a reference under section 131 of the Act should be made in relation to the matters specified in the market study notice.
  5. Where the CMA has published a market study notice, but has received no representations within the period specified in the notice to the effect that a market investigation reference should be made, and has decided not to make a reference, it is required by section 131B(3) of the Act to publish notice of its decision not to make a reference. This notice must be published within six months of the date on which the CMA published its market study notice. Paragraph 6 of the market study notice specified that notice of such a decision would be published no later than 14 December 2021.
  6. The CMA has decided not to make a reference under section 131 of the Act in relation to the supply of mobile ecosystems in the United Kingdom.
  7. For the avoidance of doubt, the CMA is not obliged under section 131B of the Act to consult interested parties before making its decision, and the CMA is not inviting comments on its decision.
  8. The decision not to make a market investigation reference should not in any way be interpreted as the CMA finding no concerns in the sector, only that it considers that any potential concerns would not be best addressed through a market investigation at this time. The CMA has published today alongside this notice its Interim Report, in which it has set out its preliminary views on potential measures that may be required to address certain concerns it has identified. It has invited submissions on those views.”
13. As the Earlier Decision makes clear in its reference to section 131B of the Enterprise Act 2002, the making of decisions to refer, and time limits within which such decisions have to be made, are themselves matters which are the subject of close statutory regulation.

**(4) The interim report**

14. On the same date as the Earlier Decision, the CMA published an interim report entitled *Mobile ecosystems: Market study interim report* (the **Market Study Interim Report**).

**(5) The final report**

15. On 10 June 2022, the CMA published a final report entitled *Mobile ecosystems: Market study final report* (the **Market Study Final Report**). Chapter 9 of the Market Study Final Report is itself entitled *Proposal for a market investigation reference in mobile browsers and cloud gaming*. The chapter explained the CMA’s decision to consult on a market investigation reference into the supply of mobile browsers and mobile browser engines, and the distribution of cloud gaming services through app stores on mobile devices.<sup>8</sup>
16. It is clear that this consultation was a “re-run”<sup>9</sup> of the consultation described in paragraphs 9 and 10 above, which resulted in the Earlier Decision. The Final Report said this about the Earlier Decision:

“9.7 In December 2021, we published our interim report which set out our provisional findings on competition in mobile ecosystems. We noted that based on our initial findings, we believed there were reasonable grounds for suspecting that features of the following markets could be restricting or distorting competition in the UK and therefore that the MIR reference test had been met in relation to:

- mobile operating systems, with a focus on the closed nature of Apple’s ecosystem, and on the nature of Google’s licensing agreements with device manufacturers;
- app stores and app distribution, with a focus on addressing the sources of Apple’s and Google’s market power in native app distribution within their respective ecosystems; and
- browsers and browser engines, with a focus on Apple’s WebKit restriction and other barriers to competition such as pre-installation, default settings and choice architecture.

9.8 We considered many of the potential interventions discussed in the interim report could be implemented through an MIR, and that given

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<sup>8</sup> To quote from paragraph 9.0 of Chapter 9.

<sup>9</sup> We use that term informally to describe the subject-matter of the consultation.

the significance of these markets and the impact of the issues, an MIR appeared to be a proportionate response.

9.9 However, we did not consider that making an MIR was the most appropriate mechanism for assessing the issues and delivering the required outcomes at that point in time. Our assessment was that the new pro-competition regime, once legislated for, would in principle be best placed to tackle the competition concerns we had identified in this market study to date. We provided the following reasons:

- (a) the need, in most cases, for ongoing monitoring and updating of measures which would require continuous oversight;
- (b) the interconnected nature of the different activities; and
- (c) the risk that a market investigation could cut across the work to establish a new regime.

9.10 Nor, at that time, had we received any stakeholder representations for us to carry out a market investigation into mobile ecosystems.

9.11 We therefore decided not to make an MIR and published our Notice of that decision alongside the interim report. However, we committed to keeping this decision under review during the second half of the study, taking into account any relevant market or legislative developments that may arise. We noted that we would continue to review the possible use of all of the CMA's available powers in relation to the issues we identified, including the possibility of an MIR at a later point in time or taking further enforcement action under our competition or consumer powers.

9.12 In particular, we highlighted that we might revisit that decision not to make a reference if the legislation required to bring the proposed new regime into force was not laid before Parliament for some time."

17. It will be necessary to return to this explanation for re-visiting the Earlier Decision. For present purposes, the following should be noted:

- (1) Very little of what is said in these paragraphs appears in the Earlier Decision itself. Looking at the "notes" to the Earlier Decision – which we equate to the reasons for it – Note 6 states that the CMA has decided not to make a reference, and Note 8 states that the decision "should not in any way be interpreted as the CMA finding no concerns in the sector, only that it considers that any potential concerns would not be best addressed through a market investigation at this time. The CMA has published today alongside this notice its Interim Report, in which it has set out its preliminary views on potential measures that may be required

to address certain concerns it has identified. It has invited submissions on those views.”

- (2) The Market Study Interim Report itself does contain substantially what is said in Chapter 9 of the Market Study Final Report. Rather than set out what was said in the Market Study Interim Report, we identify in the table below where the passages in the Market Study Final Report have their equivalents in the Market Study Interim Report:

<b>Reference in Market Study Final Report</b>	<b>Equivalent paragraph in Market Study Interim Report</b>
Paragraph 9.7	See for example paragraphs 5.232, 7.1, 7.11, 8.3, 8.30, 9.10, 10.1 for discussion of the overall competition findings as preliminary / provisional. Paragraph 9.7 for the provisional statement that an MIR would be proportionate. Paragraphs 93 and 9.6 for the finding that there are reasonable grounds to suspect restricting or distorting of competition.
Paragraph 9.8	Paragraph 9.7 (almost exactly the same wording).
Paragraph 9.9	Paragraph 9.11.
Paragraph 9.10	Paragraph 95.
Paragraph 9.11	Paragraphs 97 and 9.12 (almost exactly the same wording).
Paragraph 9.12	Paragraphs 97, 9.12, and footnote 36.

## (6) The Decision

18. The Decision was then taken, as we have described, on 22 November 2022.<sup>10</sup> The Decision triggered a letter before action from Apple and this Application.

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<sup>10</sup> See paragraphs 1 to 3 above.

## **C. THE STATUTORY FRAMEWORK**

### **(1) Approach**

19. Rather than quote extensively from the statutory provisions, we have set them out in Annex 2 to this judgment, and refer to the provisions much more generally in this Section. In this Section, we aim simply to set out the broad framework within which market investigation references find their place, and we seek to do so as neutrally as possible. Where appropriate we identify the battlelines between the parties in relation to these provisions. We will be returning to these provisions in far greater detail when we come to consider and determine the parties' submissions in relation to the Application.
20. The statutory framework for making MIRs appears in the Enterprise Act 2002 and (in this Section C) all references to section numbers are sections in the Enterprise Act 2002.

### **(2) Acquisition of information**

21. Section 5 provides that the CMA has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions.<sup>11</sup> That function is to be carried out with a view to (among other things) ensuring that the CMA has sufficient information to take informed decisions and to carry out its other functions effectively.<sup>12</sup> In carrying out that function the CMA may carry out, commission or support (financially or otherwise) research.<sup>13</sup>

### **(3) Need for information going beyond “research”**

22. Carrying out, commissioning or supporting research pursuant to the power granted under section 5 can be an important source of information, and we would not want the importance of this power of the CMA to be underestimated. But often the CMA will require information going beyond this. Sometimes, the

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<sup>11</sup> Section 5(1).

<sup>12</sup> Section 5(2).

<sup>13</sup> Section 5(3).

CMA will require information concerning its investigation of specific (suspected) infringements of competition law. The CMA has a power to investigate;<sup>14</sup> and a series of specific powers in support of such investigations exist.<sup>15</sup> This information requirement – which, as we have noted is concerned with specific suspected infringements of competition law – needs no further consideration in this Judgment. This Judgment is concerned with powers that support the CMA’s wider need for information in order to fulfil its section 5 function, where information beyond that garnered from research is needed.

**(4) Powers under section 174**

23. As to this need, section 174 provides for certain powers that the CMA may exercise for a “permitted purpose”.<sup>16</sup> These powers permit the CMA to require a person to attend to give evidence;<sup>17</sup> to require a person to produce documents;<sup>18</sup> and/or to require a person carrying on any business to provide estimates, forecasts, returns or other information.<sup>19</sup> These powers are buttressed by certain enforcement provisions in section 174A. A “permitted purpose” includes the following two purposes (the other, third, purpose is not material):

- (1) *Information for purposes of a Market Study.* Assisting the CMA in carrying out its functions under section 5 in relation to a matter in a case where it has published a market study notice.<sup>20</sup>
- (2) *Information for purposes of a Market Reference.* Assisting the CMA in carrying out any functions, including enforcement functions, exercisable by it under or by virtue of this Part in connection with a matter that is or has been the subject of a reference under section 131 or 132 or possible reference under section 131.<sup>21</sup>

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<sup>14</sup> Section 25 of the Competition Act 1998

<sup>15</sup> Sections 26ff of the Competition Act 1998.

<sup>16</sup> Section 174(2).

<sup>17</sup> Section 174(3).

<sup>18</sup> Section 174(4).

<sup>19</sup> Section 174(5).

<sup>20</sup> Section 174(1)(a).

<sup>21</sup> Section 174(1)(b).

24. The two “permitted purposes” set out above concern cases where a market study notice has been published and cases where a market investigation reference has been made or may be made. We consider the provisions regarding these two “permitted purposes” next.

**(5) Where a market study notice has been published.**

25. Pursuant to section 5, the CMA may seek:

- (1) To consider the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the United Kingdom has or may have effects adverse to the interests of consumers;<sup>22</sup> and/or
- (2) To assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.<sup>23</sup>

26. Where the CMA proposes to do so, it must publish a notice referred to as a **market study notice**.<sup>24</sup> The market study notice must specify:

- (1) The matter in relation to which the CMA is proposing to carry out its functions under section 5.<sup>25</sup>
- (2) The period during which representations may be made to the CMA in relation to the matter.<sup>26</sup>
- (3) The dates by which the CMA is required to comply with the requirements imposed on it by sections 131A and 131B.<sup>27</sup>

27. We shall refer to the work done pursuant to a market study notice as a **market study**.

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<sup>22</sup> Section 130A(2)(a).

<sup>23</sup> Section 130A(2)(b).

<sup>24</sup> Section 130A(1).

<sup>25</sup> Section 130A(3)(a).

<sup>26</sup> Section 130A(3)(b).

<sup>27</sup> Section 130A(3)(c).

28. It will be necessary to consider sections 131A and 131B with some care, which we do later on in this Judgment. For the present, we note that:

(1) Where a market study notice has been published, and the CMA is proposing to make a market investigation reference, section 131A imposes a duty to consult on the CMA before deciding whether to make a reference. There is thus a statutory link between a market study and a market investigation reference related to that study. Section 131A(1) is of sufficient significance to be quoted in full:

“This section applies to a case where the CMA has published a market study notice and –

- (a) the CMA is proposing to make a reference under section 131 in relation to the matter specified in the notice; or
- (b) a representation has been made to the CMA within the period specified in the notice under section 130A(3)(b) to the effect that such a reference should be made but the CMA is proposing not to make such a reference.”

Section 131A(1) thus makes explicit a link between a market study and a market investigation reference. Although, as we shall see, it is lawful to make a market investigation reference without a market study being in play, where a market study notice has been made, the power in the CMA to make a market investigation reference is constrained. At the heart of this Application lies the question of these constraints, and it is for this reason that section 131A(1) is significant.

(2) Section 131B sets out certain time limits which apply where a market study notice has been published. In particular, time limits are specified for the beginning of the consultation process under section 131A (but not its completion) and the time by which a decision to make or not make an MIR should be made. It is these time limits that must be published in the market study notice.

**(6) Making a reference**

29. Section 131 provides for a power in the CMA to make market investigation references. We have set out the relevant part of section 131 in paragraph 2 above. It was common ground between the parties that it was possible to make a “freestanding” reference under section 131. By “freestanding reference” we mean a reference made independently of or separately from a reference made in conjunction with a market study.

30. On the face of section 131 it would appear that such a reference can be made without consultation. The CMA, however, accept that a duty to consult would arise under section 169, and this is clearly right. Section 169 provides that where the CMA is proposing to make a “relevant decision” in a way which the CMA considers is likely to have a substantial impact on the interests of any person,<sup>28</sup> the CMA shall, so far as practicable, consult that person about what is proposed before making that decision.<sup>29</sup> A “relevant decision” is a defined term, and includes any decision by the CMA to make a reference under section 131 in a case where the CMA has not published a market study notice under section 130A in relation to the matter concerned.<sup>30</sup>

31. Market investigations are – as this Tribunal has previously observed<sup>31</sup> – intended to be short and intense. By statute, the CMA must prepare and publish its report within the period of 18 months beginning with the date of the market investigation reference.<sup>32</sup>

**D. ANALYSIS**

**(1) Two extremes**

32. Although neither side accepted the label, we were presented with two extreme positions on this Application. Apple contended that the effect of the statutory

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<sup>28</sup> Section 169(1).

<sup>29</sup> Section 169(2).

<sup>30</sup> Section 169(6)(a)(i).

<sup>31</sup> *Airwave Solutions Limited v. Competition and Markets Authority*, [2022] CAT 4 at [40].

<sup>32</sup> Section 137(1) of the Enterprise Act 2002.

provisions that we have set out in Section C, and which we consider further below, rendered the Earlier Decision of the CMA not to make a reference binding on the CMA, such that the Earlier Decision could not be revisited without the CMA making a fresh market study notice. It is important to stress that Apple was only conceding that there was jurisdiction in the CMA to make a fresh market study notice: Apple was most certainly not conceding that - were the CMA to, in effect, conduct a re-run of an exercise already commenced or done - that would be proper. The Decision itself, because it failed to comply with the statutory regime, was *ultra vires* the CMA.

33. The CMA, at the other extreme, contended that the Earlier Decision, whilst properly made, in no way circumscribed the CMA in making a self-standing market reference under section 131, and that this was precisely what the CMA had done by way of its Decision. There was nothing in the statutory provisions that we have set out in Section C above to constrain the CMA in such a course, and the Decision was *intra vires* the CMA.

34. It will readily be appreciated why we have labelled these two positions “extreme” and we do so intending no disrespect to the arguments of either side, which were advanced with cogent force by Mr Timothy Otty, KC, on behalf of Apple and Sir James Eadie, KC, on behalf of the CMA. We did seek to explore whether there was a “middle” ground, precisely because of the extreme position adopted by both sides. The problem, as we saw it, was this:

(1) The consequence of the CMA’s position was that so little weight was attached to the Earlier Decision as to render it an essentially pointless intermediate step that the Enterprise Act 2002 required the CMA to undertake for no particular purpose. The CMA would, of course, do what the statute required of it. But the implication of the CMA’s case (although, of course, the CMA did not put it this way) was that those mandated steps were so close to being legally meaningless in substance as to justify being labelled “pointless”.

(2) By contrast, Apple’s position appeared to permit no ability in the CMA to re-consider an earlier decision (like the Earlier Decision) in the light

of later developments or later understanding of a market on the part of the CMA. The furthest Apple would go, in this regard, was to say that the CMA could, in such circumstances, issue a fresh market study notice; the one thing that the CMA could not do was make a self-standing reference.

35. At the outset of the hearing, we put to both parties some hypothetical cases, so as to gauge the extent to which the Earlier Decision could be re-visited subsequently. Apple's answer was that there was no problem in re-visiting such cases, provided a fresh market study notice was made. The CMA's answer was that the Tribunal's question proceeded on a false premise, namely that the CMA was fettered by its Earlier Decision, when that was not, in fact, the case. The hypothetical cases thus did serve a limited purpose in enabling us to understand the different ends of the spectrum from which each party was proceeding. The hypothetical cases did not assist us in understanding whether there was a third or middle way, lying between the two extremes articulated by Apple and by the CMA.

36. We turn, then, to the questions that arise for our determination.

## **(2) General context**

37. The CMA has a statutory duty to promote competition, both within and outside the United Kingdom, for the benefit of consumers.<sup>33</sup> Section 5 of the Enterprise Act 2002 is a statutory function on the CMA that is entirely consistent with this duty.<sup>34</sup> the CMA obviously requires information in order to do its job, and such information may have to be obtained by compulsion. The Enterprise Act 2002 makes provision for this.<sup>35</sup> In dealing with such demands, undertakings will be faced with significant burdens, which have a not inconsiderable cost, both monetary and otherwise.<sup>36</sup> It is, therefore, scarcely surprising that the CMA's powers are circumscribed by primary legislation.

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<sup>33</sup> See paragraph 8 of the CMA's Defence, referring to the duty on the CMA to seek to promote competition imposed by section 25(3) of the Enterprise and Regulatory Reform Act 2013.

<sup>34</sup> See paragraph 21 above.

<sup>35</sup> See paragraphs 22ff above.

<sup>36</sup> For instance, confidential information can be demanded.

38. As the legislation makes clear, the powers under section 174 of the Enterprise Act 2002 to compulsorily gather information arise in the following three cases:<sup>37</sup>

- (1) Where a market study notice has been published.<sup>38</sup>
- (2) Where a market investigation reference has been made (whether under section 131 or section 132 of the Enterprise Act 2002).<sup>39</sup>
- (3) Where there is a possibility of a market investigation reference under section 131 (but not section 132) of the Enterprise Act 2002.<sup>40</sup>

Self-evidently, the extent to which information can properly be demanded under section 174 will depend upon the nature and scope of the market study or market investigation reference triggering the CMA’s powers under section 174.

**(3) The Decision as a “self-standing” market investigation reference**

**(a) *Constraints that arise in relation to “self-standing” market investigation references***

39. Section 131(1) of the Enterprise Act 2002 is widely drawn. It provides that:<sup>41</sup>

“The CMA may, subject to subsection (4), make a reference to its chair for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 if the CMA has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.”

The words we have emphasised show that the trigger for the jurisdiction is low: the CMA need only have “reasonable grounds for suspecting”.

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<sup>37</sup> Not, we stress, an exhaustive list.

<sup>38</sup> See paragraph 23(1) above.

<sup>39</sup> See paragraph 23(2) above.

<sup>40</sup> See paragraph 23(2) above.

<sup>41</sup> Emphasis added.

40. There is one other constraint in section 131 on the power to make a reference, and that is contained in subsection (4). This subsection identifies two cases where “[n]o reference shall be made under this section” if either of these two cases is met. Neither of these cases is met in the present instance, and there is no need to consider them further.<sup>42</sup>

***(b) Constraints where the market investigation reference is made in connection with a market study notice***

41. Section 131A(1) provides:

“This section applies to a case where the CMA has published a market study notice and –

- (a) the CMA is proposing to make a reference under section 131 in relation to the matter specified in the notice; or
- (b) a representation has been made to the CMA within the period specified in the notice under section 130A(3)(b) to the effect that such a reference should be made but the CMA is proposing not to make such a reference.”

42. We have described the nature of a market study notice in paragraphs 25ff above. In particular, the CMA is obliged, in the notice, to specify certain dates.<sup>43</sup> In the present case, we are concerned with the June 2021 Market Study Notice, which specified:<sup>44</sup>

- (1) 26 July 2021 as the date by which any person wishing to make representations on the matter should do so, including on whether the CMA should make a market investigation reference.<sup>45</sup>
- (2) 14 December 2021 as the date by which the CMA would either publish a notice consulting on the proposal to make a market investigation reference<sup>46</sup> or publish a decision not to make a market investigation reference.<sup>47</sup>

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<sup>42</sup> The subsection is set out in paragraph 2 above.

<sup>43</sup> See paragraph 26 above.

<sup>44</sup> The terms of the notice are set out in paragraph 9 above.

<sup>45</sup> See paragraph 4 of the June 2021 Market Study Notice.

<sup>46</sup> See paragraph 5 of the June 2021 Market Study Notice.

<sup>47</sup> See paragraph 6 of the June 2021 Market Study Notice.

43. It is quite clear that the CMA considered that these provisions applied to the Earlier Decision. The Earlier Decision made explicit reference to the provisions in sections 130A, 131 and 131B of the Enterprise Act 2002. However, we are not presently concerned with the Earlier Decision – although we will be reverting to it. We are here concerned with the application of these provisions to the Decision itself. Section 131A clearly does apply in the case of the Decision:

- (1) The CMA has published a market study notice, namely the June 2021 Market Study Notice.<sup>48</sup>
- (2) The CMA is proposing to make a reference under section 131 of the Enterprise Act 2002. That is clearly the effect of the Market Study Final Report dated 10 June 2022.<sup>49</sup>
- (3) The proposal to make a market investigation reference in the Market Study Final Report is “in relation to the matter specified in the notice”. These words are widely framed, and clearly their application will be fact-specific. In this case, we do not understand the CMA to assert that the Market Study Final Report was not in relation to the June 2021 Market Study Notice. It will be necessary to say a little more about the words “in relation to the matter specified in the notice” in due course.

44. If – as we find to be the case – section 131A(1) applies, certain consequences follow directly from the clear words of the Enterprise Act 2002:

- (1) The CMA is obliged to consult in accordance with the provisions of section 131A of the Enterprise Act 2002. Apple took no point on the question of consultation, and we do not consider section 131A any further in this regard.
- (2) The CMA was obliged to comply with the time limits laid down in section 131B of the Enterprise Act 2002. As to these time limits:

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<sup>48</sup> See paragraph 8 above.

<sup>49</sup> See paragraphs 15 to 17 above.

Obligation on the CMA	Relevant provision under the Enterprise Act 2002	Compliance or otherwise by the CMA
To publish the notice under section 131A(2)(a) within the period of six months of the date of the market study notice.	Section 131B(1)(a)	The June 2021 Market Study Notice was published on 15 June 2021. The six-month period therefore expired on 15 December 2021. A notice of the proposed market investigation reference therefore needed to be published by this date, and it was not. The proposal was published in the Market Study Final Report dated 10 June 2022.
To begin (but not complete) the process of consultation under section 131A(2)(b) within the period of six months of the date of the market study notice.	Section 131B(1)(b)	As we have stated, the June 2021 Market Study Notice was published on 15 June 2021, and the period for the consultation to <u>begin</u> (but not complete) therefore expired on 15 December 2021. The consultation was commenced by the Market Study Final Report dated 10 June 2022.

- (3) The CMA has failed to comply with both of these time limits. It was not suggested by the CMA that if these time limits applied, they could in some way be extended or waived. The CMA accepted that they were hard-edged jurisdictional limits, and we agree.

We should stress that the language of “failure” to comply – whilst inevitable in these sub-paragraphs – is not really fair to the CMA. There can be no question, in this case, of the CMA doing anything other than conscientiously following the processes required by the Enterprise Act 2002. It is simply that the CMA conscientiously followed those processes and reached a decision not to consult about making a market investigation reference. That is the substance of the Earlier Decision, and the Earlier Decision is the explanation for the CMA’s “failures” to comply. The fact of the matter is that the provisions in the Enterprise Act constitute a clear code which involves the CMA making a

decision either (i) not to make a market investigation reference or (ii) to consult upon a proposal to make such a reference or not to make a reference. The CMA chose option (i) and not option (ii).

45. It follows that both the notice under section 131A(2)(a) and the commencement of the consultation process under section 131A(2)(b) were too late, and the CMA had no jurisdiction to take either step as late as it did in the Market Study Final Report. It follows that the Decision lacks the statutory pre-requisites (publication of a timely notice and commencement of a timely consultation) for a valid decision in this regard and that it is a decision *ultra vires* the CMA.
46. For these reasons, therefore, Apple’s Application succeeds.

(c) *A sense check*

47. We consider that the conclusion just stated arises inevitably out of the wording of the Enterprise Act 2002. However, since Sir James Eadie, KC, contended that such an outcome could make no sense and would, irresponsibly, thwart the public functions of the CMA, it is appropriate that we explain why we consider this not to be case.
48. Section 131A deals with the case where there is a link between a market study and a market reference. Where such a link exists – and the link is that specified in section 131A(1)(a), namely that a proposed reference is “in relation to” the matter specified in the market study notice – the Enterprise Act 2002 ensures that the market study and the market investigation reference proceed in lockstep. Thus, the **market study report** – which is the ultimate outcome or “deliverable” of the market study notice – must be published “within the period of 12 months beginning with the date on which” the market study notice was published.<sup>50</sup> Where the market study report contains a decision of the CMA to make a reference under section 131 of the Enterprise Act 2002, “the CMA shall, at the same time as it publishes the report, make the reference”.<sup>51</sup>

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<sup>50</sup> See section 131B(4) of the Enterprise Act 2002.

<sup>51</sup> Section 131B(6) of the Enterprise Act 2002.

49. Tying the reference to the study it arises out of in this way makes perfect sense, for a number of reasons:
- (1) The process of consultation in relation to the making of a market investigation reference is folded into and made part of the market study process of which it is a part.
  - (2) The market is given as much notice as possible of the fact that such a market investigation reference is under consideration. As is well-known, market investigation references involve a great deal of work, not only by the party doing the investigation (the CMA) but also by the undertakings under investigation, in a very short space of time.<sup>52</sup> Responsible undertakings – seeing which way the wind is blowing – will be able to make preparations.
  - (3) The market investigation reference is triggered by the publication of the market study report. That enables the fruits of the market study to be fed into the market investigation, and minimises duplication and overlap. Of course, for the market study to be helpful in this respect, it is necessary for the market investigation to commence the moment the market study is concluded.
50. The constraints that we have described thus make good sense in terms of the efficient use of the CMA’s resources; and in terms of the extent to which a matter under investigation (whether by way of a market study or by way of a market investigation) is considered only once and not time-after-time. Participants in a market – having been the subject of a market study and, if the CMA is so advised, of a market investigation – are entitled to be left alone.
51. This, of course, does not mean that a market cannot be the subject of subsequent market study or market investigation. The key words in this regard are whether a proposed market investigation reference is “in relation to the matter specified” in a market study notice. As we have said, these are wide words that will derive

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<sup>52</sup> See paragraph 31 above.

their significance, if not their meaning, from the factual context. Clearly, where the subject of the reference is a matter entirely different from an anterior market study notice, no constraint will arise at all. But we would go further than this: the effluxion of time, in and of itself, may cause the “matter” of a market study notice (either in terms of its subject matter or the conditions relevant to the CMA’s decision making) to be sufficiently different from the “matter” of a later proposed reference such that the proposed notice and subsequent reference are not “in relation to the matter specified” in a market study notice. Things change over time, and it is the CMA’s continuing duty to keep itself informed under section 5 of the Enterprise Act 2002. We would not want it to be said that simply because the CMA could not point to something that had materially changed, it could not rely on the effluxion of time to justify revisiting a market whether by way of a market study or a self-standing market investigation reference.

**(4) A middle course?**

52. We have determined the Application in Apple’s favour. For the reasons we have given, we consider that the construction of the relevant statutory provisions permits only this outcome.

53. The consequence is not only that the Application succeeds, and that the Decision must be quashed as *ultra vires* the CMA, but that the CMA cannot, on the facts as we understand them, make a further or fresh decision to make a market investigation reference. The consequence of our decision in this Judgment is that the CMA can:

(1) Only make a “stand-alone” reference under section 131 of the Enterprise Act 2002 where it is not in relation to the matter specified in the June 2021 Market Study Notice.

(2) Only make a “linked” reference under section 131, 131A and 131B of the Enterprise Act 2002 where a fresh market study notice is made. Whilst, no doubt, a fresh market study notice can “build on” the findings of an earlier market study notice, the fact is that a series of market studies

on the same or very similar subject matter may be within the *vires* of the CMA, but may well be challengeable on other public law grounds.

54. In circumstances where the CMA obviously considers – for reasons set out in the Market Study Interim Report and in the Market Study Final Report – a market investigation reference to be desirable this is a conclusion that raises an important question of competition enforcement. We consider it to be most undesirable for the CMA to be constrained without good reason from making a market investigation reference. Yet – because of the Earlier Decision – that would appear to be precisely what this Judgment achieves.
55. It is, therefore, important to articulate the way out of this situation. There are two points that we would make in this regard:
  - (1) We did not hear any argument about the precise meaning of the words “in relation to the matter specified” in section 131A(1)(a) of the Enterprise Act 2002. For the reasons we have given above, we do not consider that the CMA can contend that the Decision falls outside the scope of these words, but to be fair to the CMA, that was not the essence of the CMA’s contention. We would not want this Judgment to be read as unduly constraining the CMA in cases of mistake of fact, misrepresentation and/or change of circumstance. These are not matters on which we express any view, as they do not arise on the facts of this case. But we consider it most important to make clear what this Judgment is not deciding.
  - (2) We consider the way out on the rather specific facts of the present case to exist in relation to what we have called the Earlier Decision. We stress that what is said in the next Section is provisional only, and it will be for the CMA to decide how it proceeds in relation to the Earlier Decision; and for Apple to consider how far it resists the course that the CMA determines upon.

**(5) The significance of the Earlier Decision**

56. Although the CMA's contentions treated the Decision as self-standing, it is in reality no such thing. The Decision is not a self-standing decision, and is an express revisiting of a matter considered and decided in the Earlier Decision. The Earlier Decision was unimpeachable in terms of its compliance with the constraints contained in sections 131A and 131B, which obviously applied to the Earlier Decision.
57. The Earlier Decision (which we have set out in paragraph 12 above) was unequivocal in deciding that a market investigation reference should not be made. There was a qualification in note 8 of the Earlier Decision that the decision should not be interpreted as the CMA having found "no concerns in the sector", but we do not consider that this statement amounts to any kind of reservation purporting to entitle the CMA to re-visit matters.
58. The Market Study Interim Report, itself referenced in note 8, is much more explicit. We have summarised its effect in paragraph 17(2) above and we consider that if these paragraphs in the Interim Report were incorporated into the Earlier Decision, a qualification or reservation would be incorporated into what would otherwise be an unequivocal decision. We do not consider that the CMA can lawfully reserve to itself such a power, given the statutory scheme we have described. The CMA must, at the appropriate time laid down by the Enterprise Act 2002, make the decision we have summarized in paragraph 44 above.
59. Taking the position of the Interim Report, one might have expected the CMA to have made a decision at the end of the initial six month period under section 131A(1)(a) to propose to make a market investigation reference unless (and subject to consultation) by the end of the consultation period (and before publication of its Final Market Study Report) it had become clear that the relevant legislation would be forthcoming in good time and/or that there was some other reason for not making the reference proposed. Such a decision would have been unimpeachable and entirely supported by the analysis set out in the Market Study Interim Report (and subsequently by the Market Study Final

Report). It would also have allowed for and been consistent on its face with the impact on decision-making of the uncertainties of Parliamentary action. It would also have created the appropriate expectations for all those affected. Instead the CMA decided not to make a reference, but to set out in the Interim Report an apparent reservation. We consider, clearly and shortly articulated, the Earlier Decision actually to be as follows:<sup>53</sup>

“The Competition and Markets Authority (“CMA”) hereby publishes, for the purposes of section 131B of the Enterprise Act 2002 (the “Act”), notice of its decision not to make a reference under section 131 of the Act in relation to the supply of mobile ecosystems in the United Kingdom. The CMA considers that the test for making a reference under section 131(1) of the Act is met, but it has chosen not to make a reference in anticipation of legislation conferring new powers on the CMA to investigate digital markets. Once those powers have been conferred, the CMA will consider their exercise. The CMA reserves the power to revisit this decision not to make a reference if the legislation required to bring the proposed new regime into force was not laid before Parliament for some time.”

60. As we have described, we do not consider that the CMA can lawfully re-write the Enterprise Act 2002 so as to delay a decision that has an express statutory time-frame. But, disregarding this improper reservation of right, the Earlier Decision is plainly liable to attack on other public law grounds. The essential point is this. The CMA, pursuant to its statutory duties, must consider the proper exercise of its powers, and must exercise those powers accordingly. In concluding that the test for making a market investigation reference under section 131(1) was met, but in declining to make such a reference only in the expectation of receiving further powers or on the basis of a preliminary and (as it transpired) mistaken view of the potential for intervention, it might well be said that the CMA erred in law and/or took into account immaterial considerations, such as future powers that might potentially accrue to it. It might also be said that the CMA failed to consider the importance of a proposed market investigation reference. The fact is that the CMA had a limited number of statutory options to choose from (essentially, and in broad brush terms, propose making a reference; decide not to make a reference). The CMA did not have the option to decide not to make a reference at all with a reservation

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<sup>53</sup> The underlined wording represent our insertion into the wording of the Earlier Decision. That wording has been drawn from the Final Report, quoted in paragraph 16 above, and in particular paragraph 9.12 of the Final Report.

entitling it to re-visit that decision at its discretion at a later date. The choice made by the CMA – to make a final decision not to refer – is, as we have said, questionable on public law grounds.

61. It is, of course, for the CMA to decide its course. We would only say that the course outlined in the foregoing paragraphs is not one that a responsible authority has eschewed in the past.<sup>54</sup>

**E. DISPOSITION**

62. The Application succeeds. For the reasons we have given, the Decision must be quashed.

Sir Marcus Smith  
President

Michael Cutting

Anna Walker, CB

Charles Dhanowa OBE, KC (Hon)  
Registrar

Date: 31 March 2023

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<sup>54</sup> See *CTS Eventim AG v. Competition Commission*, [2010] CAT 7.

## ANNEX 1

### TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(paragraph 1, footnote 1 of this Judgment)

Apple	Paragraph 4
Application	Paragraph 4
CMA	Paragraph 1
Decision	Paragraph 1
Earlier Decision	Paragraph 7
June 2021 Market Study Notice	Paragraph 8
Market investigation reference	Paragraph 2
Market Study Final Report	Paragraph 15
Market Study Interim Report	Paragraph 14
Market study	Paragraph 27
Market study notice	Paragraph 26
Market study report	Paragraph 48
MIR	Paragraph 2

**ANNEX 2**  
**EXTRACTS FROM THE ENTERPRISE ACT 2002**  
(paragraph 19 of this Judgment)

Section 5

**“Acquisition of information etc.**

- (1) The CMA has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions.
- (2) That function is to be carried out with a view to (among other things) ensuring that the CMA has sufficient information to take informed decisions and to carry out its other functions effectively.
- (3) In carrying out that function the CMA may carry out, commission or support (financially or otherwise) research.”

Section 174

**“Attendance of witnesses and production of documents etc.**

- (1) For the purposes of this section, the permitted purposes are the following—
  - (a) assisting the CMA in carrying out its functions under section 5 in relation to a matter in a case where it has published a market study notice;
  - (b) assisting the CMA in carrying out any functions, including enforcement functions, exercisable by it under or by virtue of this Part in connection with a matter that is or has been the subject of a reference under section 131 or 132 or possible reference under section 131;
  - (c) assisting the CMA or the Secretary of State in carrying out any functions, including enforcement functions, of the CMA or (as the case may be) the Secretary of State under or by virtue of this Part in connection with a matter that is or has been the subject of a reference under section 140A(6) or possible reference under section 140A(5) or (6).
- (2) The CMA may exercise any of the powers in subsections (3) to (5) for a permitted purpose.
- (3) The CMA may give notice to any person requiring him—
  - (a) to attend at a time and place specified in the notice; and
  - (b) to give evidence to the CMA or a person nominated by the CMA for the purpose.
- (4) The CMA may give notice to any person requiring him—
  - (a) to produce any documents which—

(i) are specified or described in the notice, or fall within a category of document which is specified or described in the notice; and

(ii) are in that person's custody or under his control; and

(b) to produce them at a time and place so specified and to a person so specified.

(5) The CMA may give notice to any person who carries on any business requiring him—

(a) to supply to the CMA such estimates, forecasts, returns or other information as may be specified or described in the notice; and

(b) to supply it at a time and place, and in a form and manner, so specified and to a person so specified.

(6) A notice under this section shall —

(a) specify the permitted purpose for which the notice is given, including the function or functions in question; and

(b) include information about the possible consequences of not complying with the notice.

(6A) The CMA or any person nominated by it for the purpose may, for a permitted purpose, take evidence on oath and for that purpose may administer oaths.

(7) The person to whom any document is produced in accordance with a notice under this section may, for a permitted purpose, copy the document so produced.

(8) No person shall be required under this section—

(a) to give any evidence or produce any documents which he could not be compelled to give or produce in civil proceedings before the court; or

(b) to supply any information which he could not be compelled to supply in evidence in such proceedings.

(9) No person shall be required, in compliance with a notice under this section, to go more than 10 miles from his place of residence unless his necessary travelling expenses are paid or offered to him.

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

(a) in relation to the CMA—

(i) functions conferred by virtue of section 164(2)(b) on the CMA by enforcement orders;

(ii) functions of the CMA in relation to the variation, supersession or release of enforcement undertakings or the variation or revocation of enforcement orders;

(iii) functions of the CMA under or by virtue of section 160 or 162 in relation to enforcement undertakings or enforcement orders;

(b) in relation to the Secretary of State—

(i) functions conferred by virtue of section 164(2)(b) on the Secretary of State by enforcement orders;

(ii) functions of the Secretary of State in relation to the variation, supersession or release of enforcement undertakings or the variation or revocation of enforcement orders;

(iii) functions of the Secretary of State under or by virtue of section 160 in relation to enforcement undertakings or enforcement orders.

(10) Any reference in this section to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form.

(11) In this section “*the court*” means—

(a) in relation to England and Wales or Northern Ireland, the High Court; and

(b) in relation to Scotland, the Court of Session.”

#### Section 174A

##### **“Enforcement of powers under section 174: general**

(1) Where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice under section 174, it may impose a penalty in accordance with section 174D.

(2) The CMA may proceed (whether at the same time or at different times) under subsection (1) and section 138A(3) in relation to the same failure.

(3) Where the CMA considers that a person has intentionally obstructed or delayed another person in the exercise of its powers under section 174(7), it may impose a penalty in accordance with section 174D.

(4) A person commits an offence if the person intentionally alters, suppresses or destroys any document which the person has been required to produce by a notice under section 174.

(5) But a person does not commit an offence under subsection (4) in relation to any act which constitutes a failure to comply with a notice under section 174 if the CMA has proceeded against the person under subsection (1) in relation to that failure.

- (6) A person who commits an offence under subsection (4) is 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 2 years or to a fine or to both.
- (7) The CMA shall not proceed against a person under subsection (1) in relation to an act which constitutes an offence under subsection (4) if that person has been found guilty of that offence.
- (8) In deciding whether and, if so, how to proceed under subsection (1) or (3) or section 138A(3), the CMA shall have regard to the statement of policy which was most recently published under section 174E at the time the failure or (as the case may be) the obstruction or delay concerned occurred.
- (9) In this section—
- (a) the reference to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form; and
  - (b) the reference to suppressing a document includes a reference to destroying the means of reproducing information recorded otherwise than in legible form.”

### Section 131

#### **“Power of CMA to make references**

- (1) The CMA may, subject to subsection (4), make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
- (2) For the purposes of this Part any reference to a feature of a market in the United Kingdom for goods or services shall be construed as a reference 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 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 supplies or acquires goods or services.

(2A) In a case where the feature or each of the features concerned falls within subsection (2)(b) or (c), a reference under subsection (1) may be made in relation to more than one market in the United Kingdom for goods or services.

(3) In subsection (2) “conduct” includes any failure to act (whether or not intentional) and any other unintentional conduct.

(4) No reference shall be made under this section if—

(a) the making of the reference is prevented by section 156(A1) or (1); or

(b) a reference has been made under section 132 or 140A(6) in relation to the same matter but has not been finally determined.

(5) References in this Part to a market investigation reference being finally determined shall be construed in accordance with section 183(3) to (6).

(6) In this Part—

“cross-market reference” means a reference under this section which falls within subsection (2A) or a reference under section 132 which falls within subsection (3A) of that section (and see section 140A);

“market in the United Kingdom” includes—

(a) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory; and

(b) any market which operates only in a part of the United Kingdom;

“market investigation reference” means a reference under this section or section

132 or 140A(6)[https://uk.westlaw.com/Document/I53E6D960E45211DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=48976c8dacf34bb2a5dcb4320e928782&contextData=\(sc.Search\)&comp=wlu&navId=E46A91055121DDC2324910E91450BCC0](https://uk.westlaw.com/Document/I53E6D960E45211DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=48976c8dacf34bb2a5dcb4320e928782&contextData=(sc.Search)&comp=wlu&navId=E46A91055121DDC2324910E91450BCC0);

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

and references to a market for goods or services include references to a market for goods and services.”

## Section 132

### **“Ministerial power to make references**

(1) Subsection (3) applies where, in relation to any goods or services —

(a) the appropriate Minister is not satisfied with a decision of the CMA not to make a reference under section 131; and

(b) in a case in which the CMA has published a market study notice under section 130A, the period permitted by section 131B for the preparation and publication by the CMA of the market study report has expired.

(2) Subsection (3) also applies where, in relation to any goods or services, the appropriate Minister—

(a) has brought to the attention of the CMA information which the appropriate Minister considers to be relevant to the question of whether the CMA should make a reference under section 131; but

(b) is not satisfied that the CMA will decide, within such period as the appropriate Minister considers to be reasonable, whether to publish a market study notice in relation to the matter concerned.

(3) The appropriate Minister may, subject to subsection (4), make a reference to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if he has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.

(3A) In a case where the feature or each of the features concerned falls within section 131(2)(b) or (c), a reference under subsection (3) may be made in relation to more than one market in the United Kingdom for goods or services.

(4) No reference shall be made under this section if —

(a) the making of the reference is prevented by section 156(A1) or (1); or

(b) a reference has been made under section 140A(6) in relation to the same matter but has not been finally determined.

(5) In this Part “*the appropriate Minister*” means—

(a) the Secretary of State; ...

(b) the Secretary of State and one or more than one other Minister of the Crown acting jointly;

(c) the Scottish Ministers and the Secretary of State acting jointly; or

(d) the Scottish Ministers, the Secretary of State and one or more than one other Minister of the Crown, acting jointly.”

## Section 130A

### **“Duty to publish market study notice**

(1) Where the CMA is proposing to carry out its functions under section 5 in relation to a matter for the purposes mentioned in subsection (2), the CMA must publish a notice under this section (referred to in this Part as a “*market study notice*”).

(2) The purposes are—

(a) to consider the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the United Kingdom has or may have effects adverse to the interests of consumers; and

(b) to assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.

(3) A market study notice shall, in particular, specify—

(a) the matter in relation to which the CMA is proposing to carry out its functions under section 5;

(b) the period during which representations may be made to the CMA in relation to the matter; and

(c) the dates by which the CMA is required to comply with the requirements imposed on it by sections 131A and 131B.”

### Section 131A

#### **“131A Decisions about references under section 131: consultation**

(1) This section applies to a case where the CMA has published a market study notice and—

(a) the CMA is proposing to make a reference under section 131 in relation to the matter specified in the notice; or

(b) a representation has been made to the CMA within the period specified in the notice under section 130A(3)(b) to the effect that such a reference should be made but the CMA is proposing not to make such a reference.

(2) The CMA shall—

(a) publish notice of the proposal concerned; and

(b) consult the relevant persons about the proposal, in such manner as it considers practicable, before deciding whether to make a reference.

(3) The CMA may, for the purposes of subsection (1), ignore any representation which it considers to be frivolous or vexatious.

(4) For the purposes of subsection (2), a person is a “*relevant person*” if the CMA considers that its decision whether to make a reference is likely to have a substantial impact on the person's interests.

- (5) In consulting a person for the purposes of this section, the CMA shall, so far as practicable, give its reasons for the proposal.
- (6) In considering what is practicable for the purposes of this section, the CMA shall, in particular, have regard to—
- (a) the restrictions imposed by the time-table for making the decision (see section 131B); and
  - (b) any need to keep what is proposed, or the reasons for it, confidential.”

### Section 131B

#### **“Market studies and the making of decisions to refer: time-limits**

- (1) Where the CMA has published a market study notice in a case to which section 131A applies, the CMA shall, within the period of 6 months beginning with the date on which it publishes the notice—
- (a) publish the notice under section 131A(2)(a); and
  - (b) begin the process of consultation under section 131A(2)(b) (but the CMA need not complete the process within that period).
- (2) Subsection (3) applies where—
- (a) the CMA has published a market study notice;
  - (b) no representation has been made to the CMA within the period specified in the notice under section 130A(3)(b) to the effect that a reference under section 131 should be made in relation to the matter specified in the notice; and
  - (c) the CMA has decided not to make such a reference.
- (3) The CMA shall, within the period of 6 months beginning with the date on which it publishes the market study notice, publish notice of the decision not to make a reference.
- (4) Where the CMA has published a market study notice it shall, within the period of 12 months beginning with the date on which it publishes the notice, prepare and publish a report (referred to in this Part as a “*market study report*”) which sets out—
- (a) the findings of the CMA in relation to the matter specified in the notice; and
  - (b) the action (if any) which the CMA proposes to take in relation to the matter.
- (5) In a case to which section 131A applies, the market study report shall, in particular, contain—

(a) the decision of the CMA to make a reference under section 131 in relation to the matter specified in the market study notice, the decision to accept an undertaking under section 154 instead of making such a reference or (as the case may be) the decision otherwise not to make such a reference;

(b) the CMA's reasons for the decision; and

(c) such information as the CMA considers appropriate for facilitating a proper understanding of its reasons for the decision.

(6) Where a market study report contains a decision of the CMA to make a reference under section 131 in relation to a matter, the CMA shall, at the same time as it publishes the report, make the reference.

(7) This section is subject to section 140A (duty of Secretary of State to refer in public interest intervention cases).”

#### Section 169

##### **“Certain duties of relevant authorities to consult: Part 4**

(1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to have a substantial impact on the interests of any person.

(2) The relevant authority shall, so far as practicable, consult that person about what is proposed before making that decision.

(3) In consulting the person concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.

(4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to—

(a) any restrictions imposed by any timetable for making the decision; and

(b) any need to keep what is proposed, or the reasons for it, confidential.

(5) The duty under this section shall not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of this Part for consultation before the making of that decision.

(6) In this section—

“*the relevant authority*” means the CMA, the appropriate Minister or the Secretary of State; and

“*relevant decision*” means—

(a) in the case of the CMA, any decision by the CMA —

(i) to make a reference under section 131 in a case where the CMA has not published a market study notice under section 130A in relation to the matter concerned;

(ia) as to whether to accept undertakings under section 154 instead of making any reference under section 131;

(ii) to vary under section 135 such a reference; or—

(iii) on the questions mentioned in section 134, 141 or 141A; and

(b) in the case of the appropriate Minister (other than the Secretary of State acting alone), any decision by the appropriate Minister—

(i) ... to make a reference under section 132; or

(ii) to vary under section 135 such a reference; ...

(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).

### Section 137

#### **“Time-limits for market investigations and reports**

(1) The CMA shall prepare and publish its report under section 136 within the period of 18 months beginning with the date of the market investigation reference concerned.

(2) Subsection (1) is subject to section 151(3) and (5).

(2A) The CMA may extend, by no more than 6 months, the period within which its report under section 136 is to be prepared and published if it considers that there are special reasons for doing so.

(2B) An extension under subsection (2A) shall come into force when published under section 172.

(2C) No more than one extension is possible under subsection (2A).

(3) The Secretary of State may by order amend this section so as to alter one or more of the following periods—

(a) the period of 18 months mentioned in subsection (1) or any period for the time being there mentioned in substitution for that period;

(b) the period of 6 months mentioned in subsection (2A) or any period for the time being there mentioned in substitution for that period.

(4) But no alteration shall be made by virtue of subsection (3) which results in—

(a) the period for the time being mentioned in subsection (1) exceeding 18 months; or

(b) the period for the time being mentioned in subsection (2A) exceeding 6 months.

(5) An order under subsection (3) shall not affect any period of time within which the CMA is under a duty to prepare and publish its report under section 136 in relation to a market investigation reference if the CMA is already under that duty in relation to that reference when the order is made.

(6) Before making an order under subsection (3) the Secretary of State shall consult the CMA and such other persons as he considers appropriate.

(7) References in this Part to the date of a market investigation reference shall be construed as references to the date specified in the reference as the date on which it is made.”