

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Question: BET 114

Topic: Enterprise Act

Hansard Page: E70 (03/06/2010)

Senator JOYCE asked:

Senator JOYCE—It was in criminal cartels for a short section after mergers and acquisitions, but only for a short period of time. Can you instruct me, through your knowledge of the OECD, how divestiture powers are expressed—for instance, in the Enterprise Act of the UK?

Mr Deitz—I would have to take that on notice.

Answer:

In relation to mergers in the United Kingdom, section 35 of the Enterprise Act 2002 provides that if a Competition Commission (CC) inquiry concludes that a merger has resulted, or will result in an substantial lessening of competition (SLC), then the CC must decide what actions should be taken to remedy, mitigate or prevent the SLC or any adverse effects resulting from it.

In deciding what action should be taken, subsection 35(4) requires the CC to ‘achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects’ resulting from the merger. Section 41 sets out the factors that the CC must or may in particular bear in mind in choosing remedies. These actions can take a variety of forms including prohibition, divestiture or behavioural measures such as rights of access to facilities and price caps.

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Sections 131-184 and Schedules 9 and 12 of the Enterprise Act also provide for a system of market investigation. The purpose of these investigations is to enable the CC to inquire into markets where it appears that competition has been prevented, restricted or distorted by the structure of a market, the conduct of persons who operate within it, or the conduct of such person's customers, but where there has been no obvious breach of the prohibitions on anti-competitive agreements or arrangements or abuse of a dominant position under the Competition Act 1998 (UK).

Schedule 8 of the Enterprise Act sets out the enforcement powers of the Office of Fair Trading (OFT), the CC and Secretary of State during and after a market investigation reference. Enforcement takes two forms: undertakings and orders. Schedule 8 states that an order may provide for the division of any business (whether by the sale of any part of the undertaking or assets or otherwise); or the division of any group of interconnected bodies corporate. There has been an order of divestiture in one investigation, where in 2009 BAA Ltd was required to sell various airports.