

Terms of reference and conduct of inquiry

Terms of reference

1. On 5 July 2004 the OFT sent to the CC the following reference:

The OFT, in exercise of its powers under section 131 of the Enterprise Act 2002, hereby makes a reference to the Competition Commission for an investigation into the supply of domestic bulk LPG (the reference goods and services) in the United Kingdom.

The OFT has reasonable grounds for suspecting that a feature or a combination of features of the market in which the reference goods and services are supplied prevent, restrict or distort competition in connection with the supply of the reference goods and services in the United Kingdom.

For the purposes of this reference:

- “LPG” means liquefied petroleum gas.
- “domestic” means supplied for use by households as well as for use by businesses whose consumption of LPG by volume is similar to that of households.
- “bulk” means supplied by tanker to fixed storage tanks, as opposed to supplied in cylinders.

Dated: 5 July 2004
Signed: John Vickers

2. On the 20 October the terms of reference (ToRs) were modified as follows:

The Supply of Bulk Liquefied Petroleum Gas for Domestic Use Variation of Market Investigation Reference

On 5 July 2004 the OFT made a market investigation reference to the Competition Commission (the CC) for an investigation into the supply of domestic bulk LPG (the reference). The terms of reference defined 'LPG', 'domestic', and 'bulk'.

After the reference was made the OFT received a number of representations from undertakings present in the market which is the subject of the reference ('the representations'). The representations took issue with the OFT's definition in the reference of 'domestic' as meaning 'supplied for use by households as well as for use by businesses whose consumption of LPG by volume is similar to that of households', on the basis that this definition of 'domestic' was broader than that set out in the OFT's earlier document consulting on a possible reference.

Having considered the representations, and having consulted the CC and the undertakings present in the market which is the subject of the reference, the OFT is satisfied that it is appropriate to vary the reference. The OFT therefore, in exercise of its powers under section 135 of the Enterprise Act 2002, hereby varies the reference as follows:

- In paragraph 1 of the reference the words 'domestic bulk LPG' are replaced by 'bulk LPG for domestic use'.
- In paragraph 3 of the reference the second bullet point, defining 'domestic', is omitted.

John Vickers
Chairman
20 October 2004

3. Section 134 of the Act sets out the following question to be decided on market investigation references:

134 Questions to be decided on market investigation references

- (1) The Commission shall, on a market investigation reference, decide whether any feature, or combination of features, of each relevant market 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, in relation to a market investigation reference, there is an adverse effect on competition if any feature, or combination of features, of a relevant market 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.
- (3) In subsections (1) and (2) “relevant market” means—
 - (a) in the case of subsection (2) so far as it applies in connection with a possible reference, a market in the United Kingdom—
 - (i) for goods or services of a description to be specified in the reference; and
 - (ii) which would not be excluded from investigation by virtue of section 133(2); and
 - (b) in any other case, a market in the United Kingdom—
 - (i) for goods or services of a description specified in the reference concerned; and
 - (ii) which is not excluded from investigation by virtue of section 133(2).
- (4) The Commission shall, if it has decided on a market investigation reference that there is an adverse effect on competition, decide the following additional questions—
 - (a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
 - (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
 - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (5) For the purposes of this Part, in relation to a market investigation reference, there is a detrimental effect on customers if there is a detrimental effect on customers or future customers in the form of—
 - (a) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or

- (b) less innovation in relation to such goods or services.
- (6) In deciding the questions mentioned in subsection (4), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as resulting from the adverse effect on competition.
- (7) In deciding the questions mentioned in subsection (4), the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned.
- (8) For the purposes of this Part a benefit is a relevant customer benefit of a feature or features of a market if—
 - (a) it is a benefit to customers or future customers in the form of—
 - (i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or
 - (ii) greater innovation in relation to such goods or services; and
 - (b) the Commission, the Secretary of State or (as the case may be) the OFT believes that—
 - (i) the benefit has accrued as a result (whether wholly or partly) of the feature or features concerned or may be expected to accrue within a reasonable period as a result (whether wholly or partly) of that feature or those features; and
 - (ii) the benefit was, or is, unlikely to accrue without the feature or features concerned.

Relevance of metered estates to the investigation

- 4. As noted in the main text, we received complaints from residents of metered estates, which required us to consider whether supply to such estates can be regarded as within the terms of reference. Supply of LPG metered estates can be divided into two main categories as follows:
 - (a) supply by LPG suppliers direct to domestic customers; and
 - (b) supply by LPG suppliers to a third party (for example, estate owner), who then supply those customers.
- 5. Each of the above two categories can then be further subdivided into:
 - (a) supply to housing estates;

- (b) supply to mobile homes, used as permanent residences (known as ‘park homes’); and
- (c) supply to leisure sites, open only part of the year.

6. The possible combinations are consequently as follows:

	<i>Housing estates</i>	<i>Park homes</i>	<i>Leisure sites</i>
Direct from supplier to resident	(a)(i)	(a)(ii)	(a)(iii)
Supplied via a third party intermediary	(b)(i)	(b)(ii)	(b)(iii)

Applicability of the ToRs to metered estates

- 7. It should be noted that the reference market is not necessarily the same as the economic market.
- 8. In relation to the category (a) scenarios, the LPG supplier is delivering LPG to fixed storage tanks (hence bulk LPG) for use by domestic customers. The three scenarios would appear to fall squarely within the ToRs, as set out above. (It should be noted that scenario (a)(iii) is unlikely to arise in practice, since the park owner will normally be responsible for charging holiday-makers for utilities.)
- 9. The position is not so clear in relation to the category (b) scenarios. In these situations, the LPG suppliers deliver LPG to fixed storage tanks, thereby qualifying as bulk LPG. However, LPG is not supplied directly to domestic customers, but indirectly via a third party intermediary such as an estate owner, developer and—in some circumstances—a residents association.

10. In relation to third party intermediaries, there would seem to be a good argument that they are not supplying bulk LPG, since they do not deliver LPG to fixed storage tanks but only supply from the tank to domestic premises. There is a counter-argument that the definition of 'bulk' contained in the ToRs is intended only to distinguish between supply to fixed storage tanks and cylinders, and cannot be relied on to exempt intermediaries in this way. However, on balance, the better view would appear to be that third party intermediaries supplying gas to domestic customers do not fall within the CC's ToRs.
11. As regards LPG suppliers themselves, there is an argument that where they are supplying gas to a commercial intermediary, they are not involved in the supply of bulk LPG for domestic use. In practical terms, the parties do seem to classify supply to an intermediary for on-sale to domestic customers as 'commercial' supply, so such an interpretation may reflect the reality of the arrangements. However, such an approach requires the CC to adopt a purposive interpretation and to read the word 'directly' into the ToRs.
12. On balance, there appears to be a reasonable argument that LPG suppliers delivering gas to fixed storage tanks for distribution by an intermediary fall within the ToRs where the gas is intended ultimately, whether directly or indirectly, for domestic use.
13. In relation to the supply of bulk LPG to leisure sites (scenario (b)(iii)), there may be an argument that the gas is not intended for domestic use, but instead is part of the commercial arrangements underpinning a holiday letting. The ToRs contain no definition of 'domestic' and the dictionary definition, 'of or relating to the family or household', is of little assistance in clarifying the point.

14. We have examined whether there is any analogous definition of 'domestic use' under the statutory regime governing the supply of natural gas. We understand that within the standard Gas Suppliers Licence (for natural gas), the phrase 'domestic customer' is defined as 'a customer supplied or requiring to be supplied with gas at domestic premises (but excluding such customer in so far as he is supplied or requires to be supplied at premises other than domestic premises)'. In the same licence 'domestic premises' are defined as 'premises at which a supply is taken wholly or mainly for domestic purposes'. The definitions are rather circular, and do not provide much assistance. However, we understand that, as a matter of practice, Ofgem has decided to include holiday lettings in its definition of 'domestic use', since—in its view—these are extensions of the domestic environment.
15. On balance, we consider that the supply by an LPG supplier to an intermediary park-owner of a leisure site probably does fall within the ToRs.

Conduct of inquiry

16. Notices inviting interested parties to submit evidence to the CC were placed in *Countryside Voice, Daily Telegraph, Farm Life, LP Gas and Utility Week*.
17. During the course of our inquiry Members and staff visited BP's Avonmouth terminal, Calor's Stoney Stanton filling plant, Flogas's offices in Syston and Shell's depot at Coolham.
18. We held hearings with BP, Calor, Flogas and Shell. A non-sensitive version of their initial submissions can be found on the CC web site.
19. We also sought evidence from a number of other parties including other LPG suppliers, consumer and public bodies, government departments and trade

associations. Non-sensitive submissions received from third parties can be found on the CC web site, together with a summary of other third party arguments and views. Written evidence was received from many of these parties and hearings were held with eight of them.

20. In the course of the inquiry, we sent to LPG suppliers copies of our Statement of Issues (published on 21 December 2004), results of our quantitative survey and qualitative survey carried out for us by ORC International, Mott Macdonald's survey report, the CC's safety working paper and annexes, the CC's Emerging Thinking document (published on 1 April 2005), the CC's Provisional Findings (published on 23 August 2005), and the CC's Remedies Working Paper (published on 3 March 2006). These can all be found on our web site along with any non-sensitive comments we received from BP, Calor, Flogas and Shell.

21. We should like to thank all those who have helped us in our inquiry so far, particularly BP, Calor, Flogas and Shell.