

Terms of reference and conduct of inquiry

Terms of reference

1. On 5 July 2004, the OFT sent to the CC the following reference, as set out below:

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

Variation of the terms of reference

2. On 20 October 2004, the terms of reference (ToRs) were modified as set out below:

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 to metered estates can be divided into two main categories as follows:

(a) supply by suppliers direct to domestic customers; and

(b) supply by suppliers to a third party (for example, estate owner), who then supplies 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 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 suppliers deliver LPG to fixed storage tanks, thereby supplying '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, we conclude that the better view is that third-party intermediaries supplying gas to domestic customers do not fall within the CC's ToRs.

11. As regards 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. However, it is clear in such situations that the gas is ultimately intended for domestic customers. The ToRs do not specify supply 'to domestic customers' but rather cover supply 'for domestic use'. To exclude supply by bulk LPG suppliers to commercial intermediaries would require the CC to read the word 'directly' into the ToRs.
12. On balance, we consider that 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. One of the major suppliers [redacted] noted that the Approved Code of Practice for the GSIUR 1998 provides in relation to the definition of a 'supplier' in relation to who fills a storage container that '[w]here the gas is to be provided on by a landlord for the use of tenant(s) in a building or part of a building (eg flat), the LPG company is responsible ... However, where the gas is provided for use by consumers in premises other than buildings, such as caravans, the landlord (eg caravan part operator) is the supplier'.¹ While we acknowledge that, in the HSE's view, this renders caravan park owners responsible for dealing with matters such as gas escapes, we do not consider that this provides sufficient justification for distinguishing between supply to buildings (scenario (b)(i)) and supply to residential caravan parks (scenario (b)(ii)) under the ToRs.
14. In relation to the supply of bulk LPG to leisure sites (scenario (b)(iii)), there is 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.
15. 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.
16. On balance, given the nature of holiday lets we consider that the supply by an LPG supplier to an intermediary park-owner of a leisure site does not fall within the ToRs.

Conduct of inquiry

17. Notices inviting interested parties to submit evidence to the CC were placed in *Countryside Voice*, *Daily Telegraph*, *Farm Life*, *LP Gas* and *Utility Week*.

¹*Safety in the installation and use of gas systems and appliances. Gas Safety (Installation and Use) Regulations 1998, Approved Code of Practice (1998), paragraph 20(b)(i).* According to the HSE, this interpretation of the GSIUR rests on a complicated exemption in the regulations [redacted], and has not been confirmed by court decision.

18. 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.
19. We held hearings with BP, Calor, Flogas and Shell. A non-sensitive version of their initial submissions can be found on the CC website.
20. 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 website, 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.
21. In the course of the inquiry, we sent to 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 23 August 2005), and the CC's Proposed Final Report (published 30 March 2006). In the context of remedies, we consulted upon a Notice of Possible Remedies (published 23 August 2005) and a Remedies Working Paper (published 3 March 2006). These can all be found on our website, along with any non-sensitive comments we received from BP, Calor, Flogas and Shell. Of these major suppliers, two [redacted] made little, if any, comment on the consultation on the Proposed Final Report, one supplier [redacted] made two points of principle, whereas one supplier [redacted] made a large number of comments, which we have considered very carefully and, where appropriate, have amended the Report accordingly.
22. We should like to thank all those who have helped us in our inquiry so far, particularly BP, Calor, Flogas and Shell.