



Fair Trading Act 1973

1973 CHAPTER 41

PART V

MERGERS

Other merger references

63 Merger references to which ss.64 to 75 apply

- (1) Sections 64 to 75 of this Act shall have effect in relation to merger references other than newspaper merger references ; and accordingly in those sections " merger reference " shall be construed—
- (a) as not including a reference made under section 59 of this Act, but
 - (b) as including any merger reference relating to a transfer of a newspaper or of newspaper assets, if the reference is made under section 64 or section 75 of this Act in a case falling within section 59(2) of this Act.
- (2) In the following provisions of this Part of this Act " enterprise " means the activities, or part of the activities, of a business.

64 Merger situation qualifying for investigation

- (1) A merger reference may be made to the Commission by the Secretary of State where it appears to him that it is or may be the fact that two or more enterprises (in this section referred to as " the relevant enterprises "), of which one at least was carried on in the United Kingdom or by or under the control of a body corporate incorporated in the United Kingdom, have, at a time or in circumstances falling within subsection (4) of this section, ceased to be distinct enterprises, and that either—
- (a) as a result, the condition specified in subsection (2) or in subsection (3) of this section prevails, or does so to a greater extent, with respect to the supply of goods or services of any description, or
 - (b) the value of the assets taken over exceeds £5 million.

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- (2) The condition referred to in subsection (1)(a) of this section, in relation to the supply of goods of any description, is that at least one-quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom, either—
 - (a) are supplied by one and the same person or are supplied to one and the same person, or
 - (b) are supplied by the persons by whom the relevant enterprises (so far as they continue to be carried on) are carried on, or are supplied to those persons.
- (3) The condition referred to in subsection (1)(a) of this section, in relation to the supply of services of any description, is that the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is, to the extent of at least one-quarter, either—
 - (a) supply by one and the same person, or supply for one and the same person, or
 - (b) supply by the persons by whom the relevant enterprises (so far as they continue to be carried on) are carried on, or supply for those persons.
- (4) For the purposes of subsection (1) of this section enterprises shall be taken to have ceased to be distinct enterprises at a time or in circumstances falling within this subsection if either—
 - (a) they did so not earlier than six months before the date on which the merger reference relating to them is to be made, or
 - (b) they did so under or in consequence of arrangements or transactions which were entered into without prior notice being given to the Secretary of State or to the Director of material facts about the proposed arrangements or transactions and in circumstances in which those facts had not been made public, and notice of those facts was not given to the Secretary of State or to the Director or made public more than six months before the date mentioned in the preceding paragraph.
- (5) In determining whether to make a merger reference to the Commission the Secretary of State shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a determination as soon as is reasonably practicable.
- (6) On making a merger reference, the Secretary of State shall arrange for it to be published in such manner as he thinks most suitable for bringing it to the attention of persons who in his opinion would be affected by it.
- (7) The Secretary of State may by order made by statutory instrument provide, subject to any transitional provisions contained in the order, that for the sum specified in subsection (1)(b) of this section (whether as originally enacted or as previously varied by an order under this subsection) there shall be substituted such other sum (not being less than £5 million) as is specified in the order.
- (8) The fact that two or more enterprises have ceased to be distinct enterprises in the circumstances described in subsection (1) of this section (including in those circumstances the result specified in paragraph (a), or fulfilment of the condition specified in paragraph (b), of that subsection) shall, for the purposes of this Act, be regarded as creating a merger situation qualifying for investigation ; and in this Act " merger situation qualifying for investigation " and any reference to the creation of such a situation shall be construed accordingly.

- (9) In this section "made public" means so publicised as to be generally known or readily ascertainable.

65 Enterprises ceasing to be distinct enterprises

- (1) For the purposes of this Part of this Act any two enterprises shall be regarded as ceasing to be distinct enterprises if either—
- (a) they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control), or
 - (b) either of the enterprises ceases to be carried on at all and does so in consequence of any arrangements or transaction entered into to prevent competition between the enterprises.
- (2) For the purposes of the preceding subsection enterprises shall (without prejudice to the generality of the words "common control" in that subsection) be regarded as being under common control if they are—
- (a) enterprises of interconnected bodies corporate, or
 - (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control, or
 - (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.
- (3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise, but without having a controlling interest in that body corporate or in that enterprise, may for the purposes of subsections (1) and (2) of this section be treated as having control of it.
- (4) For the purposes of subsection (1)(a) of this section, in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if—
- (a) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate, or
 - (b) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy.

66 Time when enterprises cease to be distinct

- (1) Where under or in consequence of the same arrangements or transaction, or under or in consequence of successive arrangements or transactions between the same parties or interests, successive events to which this subsection applies occur within a period of two years, then for the purposes of a merger reference those events may, if the Secretary of State thinks fit, be treated as having occurred simultaneously on the date on which the latest of them occurred.
- (2) The preceding subsection applies to any event whereby, under or in consequence of the arrangements or the transaction or transactions in question, any enterprises cease as between themselves to be distinct enterprises.

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- (3) For the purposes of subsection (1) of this section any arrangements or transactions may be treated by the Secretary of State as arrangements or transactions between the same interests if it appears to him to be appropriate that they should be so treated, having regard to the persons who are substantially concerned in them.
- (4) Subject to the preceding provisions of this section, the time at which any two enterprises cease to be distinct enterprises, where they do so under or in consequence of any arrangements or transaction not having immediate effect, or having immediate effect in part only, shall be taken to be the time when the parties to the arrangements or transaction become bound to such extent as will result, on effect being given to their obligations, in the enterprises ceasing to be distinct enterprises.
- (5) In accordance with subsection (4) of this section (but without prejudice to the generality of that subsection) for the purpose of determining the time at which any two enterprises cease to be distinct enterprises no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied

67 Valuation of assets taken over

- (1) The provisions of this section shall have effect for the purposes of section 64(1)(b) of this Act.
- (2) Subject to subsection (4) of this section, the value of the assets taken over—
 - (a) shall be determined by taking the total value of the assets employed in, or appropriated to, the enterprises which cease to be distinct enterprises, except any enterprise which remains under the same ownership and control, or if none of the enterprises remains under the same ownership and control, then that one of the enterprises having the assets with the highest value, and
 - (b) shall be so determined by reference to the values at which, on the enterprises ceasing to be distinct enterprises or (if they have not then done so) on the making of the merger reference to the Commission, the assets stand in the books of the relevant business, less any relevant provisions for depreciation, renewals or diminution in value.
- (3) For the purposes of subsection (2) of this section any assets of a body corporate which, on a change in the control of the body corporate or of any enterprise of it, are dealt with in the same way as assets appropriated to any such enterprise shall be treated as appropriated to that enterprise.
- (4) Where in accordance with subsection (1) of section 66 of this Act events to which that subsection applies are treated as having occurred simultaneously, subsection (2) of this section shall apply with such adjustments as appear to the Secretary of State or to the Commission to be appropriate.

68 Supplementary provisions as to merger situations qualifying for investigation

- (1) In relation to goods or services of any description which are the subject of different forms of supply—
 - (a) references in subsection (2) of section 64 of this Act to the supply of goods, or
 - (b) references in subsection (3) of that section to the supply of services,shall be construed in whichever of the following ways appears to the Secretary of State or the Commission, as the case may be, to be appropriate in all the circumstances, that

is to say, as references to any of those forms of supply taken separately, to all those forms of supply taken together, or to any of those forms of supply taken in groups.

- (2) For the purposes of the preceding subsection the Secretary of State or the Commission may treat goods or services as being the subject of different forms of supply whenever the transactions in question differ as to their nature, their parties, their terms or their surrounding circumstances, and the difference is one which, in the opinion of the Secretary of State or of the Commission, as the case may be, ought for the purposes of that subsection to be treated as a material difference.
- (3) For the purpose of determining whether the proportion of one-quarter mentioned in subsection (2) or subsection (3) of section 64 of this Act is fulfilled with respect to goods or services of any description, the Secretary of State or the Commission, as the case may be, shall apply such criterion (whether it be value or cost or price or quantity or capacity or number of workers employed or some other criterion, of whatever nature) or such combination of criteria as may appear to the Secretary of State or the Commission to be most suitable in all the circumstances.
- (4) The criteria for determining when goods or services can be treated, for the purposes of section 64 of this Act, as goods or services of a separate description shall be such as in any particular case the Secretary of State thinks most suitable in the circumstances of that case.

69 Different kinds of merger references

- (1) Subject to the following provisions of this Part of this Act, on a merger reference the Commission shall investigate and report on the questions—
 - (a) whether a merger situation qualifying for investigation has been created, and
 - (b) if so, whether the creation of that situation operates, or may be expected to operate, against the public interest.
- (2) A merger reference may be so framed as to require the Commission, in relation to the question whether a merger situation qualifying for investigation has been created, to exclude from consideration paragraph (a) of subsection (1) of section 64 of this Act, or to exclude from consideration paragraph (b) of that subsection, or to exclude one of those paragraphs if the Commission find the other satisfied.
- (3) In relation to the question whether any such result as is mentioned in section 64(1)(a) of this Act has arisen, a merger reference may be so framed as to require the Commission to confine their investigation to the supply of goods or services in a specified part of the United Kingdom.
- (4) A merger reference may require the Commission, if they find that a merger situation qualifying for investigation has been created, to limit their consideration thereafter to such elements in, or possible consequences of, the creation of that situation as may be specified in the reference, and to consider whether, in respect only of those elements or possible consequences, the situation operates, or may be expected to operate, against the public interest.

70 Time-limit for report on merger reference

- (1) Every merger reference shall specify a period (not being longer than six months beginning with the date of the reference) within which a report on the reference is to be made ; and a report of the Commission on a merger reference shall not have effect,

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and no action shall be taken in relation to it under this Act, unless the report is made before the end of that period or of such further period (if any) as may be allowed by the Secretary of State in accordance with the next following subsection.

- (2) The Secretary of State shall not allow any further period for a report on a merger reference except on representations made by the Commission and on being satisfied that there are special reasons why the report cannot be made within the period specified in the reference ; and the Secretary of State shall allow only one such further period on any one reference, and no such further period shall be longer than three months.

71 Variation of certain merger references

- (1) Subject to the following provisions of this section, the Secretary of State may at any time vary a merger reference made under section 69(4) of this Act.
- (2) A merger reference made under section 69(4) of this Act shall not be so varied that it ceases to be a reference limited in accordance with that subsection.
- (3) Without prejudice to the powers of the Secretary of State under section 70 of this Act, a merger reference shall not be varied so as to specify a period within which a report on the reference is to be made which is different from the period specified in the reference in accordance with that section.

72 Report of Commission on merger reference

- (1) In making their report on a merger reference, the Commission shall include in it definite conclusions on the questions comprised in the reference, together with—
 - (a) such an account of their reasons for those conclusions, and
 - (b) such a survey of the general position with respect to the subject-matter of the reference, and of the developments which have led to that position,as in their opinion are expedient for facilitating a proper understanding of those questions and of their conclusions.
- (2) Where on a merger reference the Commission find that a merger situation qualifying for investigation has been created and that the creation of that situation operates or may be expected to operate against the public interest (or, in a case falling within subsection (4) of section 69 of this Act, find that one or more elements in or consequences of that situation which were specified in the reference in accordance with that subsection so operate or may be expected so to operate) the Commission shall specify in their report the particular effects, adverse to the public interest, which in their opinion the creation of that situation (or, as the case may be, those elements in or consequences of it) have or may be expected to have; and the Commission—
 - (a) shall, as part of their investigations, consider what action (if any) should be taken for the purpose of remedying or preventing those adverse effects, and
 - (b) may, if they think fit, include in their report recommendations as to such action.
- (3) In paragraph (a) of subsection (2) of this section the reference to action to be taken for the purpose mentioned in that paragraph is a reference to action to be taken for that purpose either—
 - (a) by one or more Ministers (including Ministers or departments of the Government of Northern Ireland) or other public authorities, or

- (b) by one or more persons specified in the report as being persons carrying on, owning or controlling any of the enterprises which, in accordance with the conclusions of the Commission, have ceased to be distinct enterprises.

73 Order of Secretary of State on report on merger reference

- (1) The provisions of this section shall have effect where a report of the Commission on a merger reference has been laid before Parliament in accordance with the provisions of Part VII of this Act, and the conclusions of the Commission set out in the report, as so laid,—
 - (a) include conclusions to the effect that a merger situation qualifying for investigation has been created and that its creation, or particular elements in or consequences of it specified in the report, operate or may be expected to operate against the public interest, and
 - (b) specify particular effects, adverse to the public interest, which in the opinion of the Commission the creation of that situation, or (as the case may be) those elements in or consequences of it, have or may be expected to have.
- (2) In the circumstances mentioned in the preceding subsection the Secretary of State may by order made by statutory instrument exercise such one or more of the powers specified in Parts I and II of Schedule 8 to this Act as he may consider it requisite to exercise for the purpose of remedying or preventing the adverse effects specified in the report as mentioned in the preceding subsection ; and those powers may be so exercised to such extent and in such manner as the Secretary of State considers requisite for that purpose.
- (3) In determining whether, or to what extent or in what manner, to exercise any of those powers, the Secretary of State shall take into account any recommendations included in the report of the Commission in pursuance of section 72(2)(b) of this Act and any advice given by the Director under section 88 of this Act.

74 Interim order in respect of merger reference

- (1) Where a merger reference has been made to the Commission, and does not impose on the Commission a limitation under section 69(4) of this Act, then, with a view to preventing action to which this subsection applies, the Secretary of State, subject to subsection (3) of this section, may by order made by statutory instrument—
 - (a) prohibit or restrict the doing of things which in his opinion would constitute action to which this subsection applies, or
 - (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets, or
 - (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner, or
 - (d) exercise any of the powers which, by virtue of paragraph 12 of Schedule 8 to this Act, are exercisable by an order under section 73 of this Act.
- (2) In relation to a merger reference the preceding subsection applies to any action which might prejudice the reference or impede the taking of any action under this Act which may be warranted by the Commission's report on the reference.

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- (3) No order shall be made under this section in respect of a merger reference after whichever of the following events first occurs, that is to say—
- (a) the time (including any further period) allowed to the Commission for making a report on the reference expires without their having made such a report;
 - (b) the period of forty days beginning with the day on which a report of the Commission on the reference is laid before Parliament expires.
- (4) An order under this section made in respect of a merger reference (if it has not previously ceased to have effect) shall cease to have effect on the occurrence of whichever of those events first occurs, but without prejudice to anything previously done under the order.
- (5) Subsection (4) of this section shall have effect without prejudice—
- (a) to the operation, in relation to any such order, of section 134(1) of this Act, or
 - (b) to the operation of any order made under section 73 of this Act which exercises the same or similar powers to those exercised by the order under this section.

75 Reference in anticipation of merger

- (1) A merger reference may be made to the Commission by the Secretary of State where it appears to him that it is or may be the fact that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a merger situation qualifying for investigation.
- (2) Subject to the following provisions of this section, on a merger reference under this section the Commission shall proceed in relation to the prospective and (if events so require) the actual results of the arrangements proposed or made as, in accordance with the preceding provisions of this Part of this Act, they could proceed if the arrangements in question had actually been made, and the results in question had followed immediately before the date of the reference under this section.
- (3) A merger reference under this section may require the Commission, if they find that a merger situation qualifying for investigation has been created, or will be created if the arrangements in question are carried into effect, to limit their consideration thereafter to such elements in, or possible consequences of, the creation of that situation as may be specified in the reference, and to consider whether, in respect only of those elements or possible consequences, the situation might be expected to operate against the public interest.
- (4) In relation to a merger reference under this section, sections 66, 67, 69, 71, 72, 73 and 74 of this Act shall apply subject to the following modifications, that is to say—
- (a) section 66 shall apply with the necessary adaptations in relation to enterprises which will or may cease to be distinct enterprises under or in consequence of arrangements not yet carried into effect or not yet fully carried into effect;
 - (b) in section 67(4) the reference to subsection (1) of section 66 shall be construed as a reference to that subsection as modified in accordance with the preceding paragraph;
 - (c) in section 69, subsection (1) shall be construed as modified by subsection (2) of this section; in subsections (2) and (3) any reference to the question whether a merger situation qualifying for investigation has been created, or whether a result mentioned in section 64(1)(a) of this Act has arisen, shall be construed as including a reference to the question whether such a situation will be created

- or such a result will arise if the arrangements in question are carried into effect; and subsection (4) of that section shall not apply;
- (d) in section 71, in section 72(2) and in section 74(1), the references to section 69(4) of this Act shall be construed as references to subsection (3) of this section ; and
 - (e) in section 73(1), the reference to conclusions to the effect that a merger situation qualifying for investigation has been created shall be construed as including a reference to conclusions to the effect that such a situation will be created if the arrangements in question are carried into effect.
- (5) If, in the course of their investigations on a merger reference under this section, it appears to the Commission that the proposal to make arrangements such as are mentioned in the reference has been abandoned, the Commission—
- (a) shall, if the Secretary of State consents, lay the reference aside, but
 - (b) shall in that case furnish to the Secretary of State such information as he may require as to the results until then of the investigations.