

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Mergers

Summary and Background

Chapter 2: Public interest cases

150. Sections 42-58 set out the regime for the investigation of mergers that raise matters of public interest in addition to, or instead of, competition and customer benefit concerns. In future, such matters may only be investigated and taken into account if the Secretary of State intervenes in a case. The flowchart at Annex B illustrates the handling of these cases.

Power to make references

Section 42: Intervention by Secretary of State in certain public interest cases

151. This section allows the Secretary of State to intervene in the consideration of a case by serving an intervention notice where she believes it raises a public interest consideration that needs to be taken into account.
152. *Subsection (2)* allows the Secretary of State to serve an intervention notice in a case that she thinks might raise one or more public interest considerations, and *subsection (4)* provides that only one intervention notice may be served in any case. *Subsection (3)* limits the considerations that she may raise in this way to those specified in section 58 or those that the Secretary of State thinks should be so specified. *Subsection (7)* has the effect that, in the latter case, the Secretary of State must bring forward an order specifying the consideration in legislation and seeking Parliament's approval of it ('finalise' the consideration) as early as practicable.
153. *Subsection (1)* sets out the conditions to be met before an intervention notice can be served. A key condition is that the notice cannot be served if a reference decision has already been taken by OFT.

Section 43: Intervention notices under section 42

154. This section sets out that the intervention notice must include certain details, including which case it relates to, and which public interest considerations may be relevant. It provides that, where the Secretary of State believes that more than one public interest consideration may be relevant, she has discretion not to mention such of them in the intervention notice as she considers appropriate. The section also provides that an intervention notice will come into force as soon as it is given, and that it will cease to be in force once the role of the Secretary of State in relation to that case is complete (either because she has acted or is prevented from acting by the legislation).

Section 44: Investigation and report by OFT

155. This section sets out the duties of the OFT to report to the Secretary of State in a case where an intervention notice has been served.
156. *Subsection (2)* provides that the OFT will report to the Secretary of State within a deadline set by the Secretary of State. There is nothing to prevent the Secretary of State from altering the deadline if circumstances so require.
157. *Subsections (3)–(7)* ensure that the Secretary of State will receive information on at least two areas:
- the OFT’s advice on any competition issues (including customer benefits, the importance of the market and the scope for undertakings-in-lieu if relevant), as well as its view on whether a relevant merger situation has or would be created; and
 - the OFT’s summary of the representations that it has received in relation to the public interest considerations mentioned in the intervention notice.

Section 45: Power of Secretary of State to refer matter to Commission

158. This section allows the Secretary of State to make the decision on whether a merger raising public interest considerations should be referred to the CC.
159. *Subsection (1)* ensures that the Secretary of State only has the power to refer a case if there is an intervention order in force relating to that case and the OFT has produced a report on that case for the Secretary of State.
160. *Subsections (2)–(7)* provide that the Secretary of State may make a reference if she believes that there could be a ‘relevant merger situation’ that might be adverse to the public interest. In deciding whether to make a reference, she will be bound to accept the views of OFT on any competition-related issues, but may also have regard to the public interest considerations cited in the intervention notice.
161. Thus *subsection (6)* ensures that the Secretary of State will view a competition problem identified by the OFT as being adverse to the public interest unless she considers this to be outweighed in the overall assessment.

Section 46: References under section 45: supplementary

162. This section further qualifies the Secretary of State’s power to refer under section 45. As with the OFT’s duties to refer under sections 22 and 33, no reference is permitted if the merger involves a newspaper transfer, or was the subject of either accepted undertakings in lieu of a reference or a merger notice if the deadline for reference has passed. In addition, this section prevents the Secretary of State from clearing a merger where the OFT identified competition concerns if the public interest consideration(s) that she wishes to base that decision on had not been approved by Parliament. The Secretary of State may delay taking the decision on reference for up to 24 weeks from the date of the intervention notice so that she might be able to take a newly-approved consideration into account.

Reports on references

Section 47: Questions to be decided on references under section 45

163. This section sets out the matters that the CC must decide in the case of a reference by the Secretary of State.
164. *Subsections (1) and (4)* provide that, as in all cases, the CC must first decide whether a ‘relevant merger situation’ has been created, or is in the process of being created. If so, *subsections (2), (3), (5) and (6)* provide for it to reach a view on whether it considers the merger would be adverse overall to the public interest and, if relevant to

the reference, would result in a substantial lessening of competition. *Subsections (7)-(10)* ensure that the CC will consider how any of those problems might be remedied, mitigated or prevented.

Section 48: Cases where references or certain questions need not be decided

165. This section provides that, in certain circumstances, the CC need not decide certain questions in relation to a case that raises public interest considerations.
166. *Subsection (1)* provides for the CC to cancel a reference in relation to an anticipated merger where it believes that the arrangements for that merger transaction have been abandoned. *Subsections (2) and (3)* allow the Secretary of State to frame references in a way that requires the CC to limit the questions that it has to consider in deciding whether a relevant merger situation has been or will be created.

Section 49: Variation of references under section 45

167. This section ensures that a qualifying merger situation referred as an anticipated merger may be handled by the CC as a completed merger, and vice versa. The section also provides for the Secretary of State to vary a reference, but any variation must not alter the time available to the CC to make its report or the public interest consideration specified in the reference.

Section 50: Investigations and reports on references under section 45

168. This section provides that the CC will prepare a report for the Secretary of State on any reference made to it under section 45.
169. *Subsection (1)* provides that the CC will have the same deadline for producing a report for the Secretary of State on a case raising a public interest concern as it would have to produce and publish its report on a competition-only case (i.e. within 24 weeks).
170. *Subsections (2) and (3)* provide for the CC to give a general report on the subject of the merger and to report on whether there was either a completed or anticipated merger. If so, the CC would report on whether the transaction could be expected to operate against the public interest, and (where the reference has been made on competition and public interest grounds) whether the transaction could be expected to result in a substantial lessening of competition. If either or both of these findings were adverse, the report should also contain advice on how to remedy, prevent or mitigate identified adverse effects. The CC will have to give reasons for its conclusions.

Section 51: Time-limits for investigations and reports by Commission

171. This section (*subsection (1)*) provides for an upper time-limit of 24 weeks for the CC to send its report to the Secretary of State in a case raising public interest concerns. FTA 1973 currently sets a time-limit of six months. *Subsection (2)* ensures that, where the merger has been referred back to the UK from the European Commission, the CC will report within a shorter time-limit if necessary.
172. *Subsections (3)-(8)* provide for extensions to the 24-week timetable. The CC may extend the timetable once by up to 8 weeks where it has special reasons to do so. FTA 1973 currently allows an extension of up to 3 months. The CC will also be able to extend the timetable where a party to the merger fails to deliver required information – the extension in those cases would be for the period between the deadline for receipt of the information and the actual receipt of that information, or until the CC cancelled the extension.

Section 52: Section 51: supplementary

173. This section limits the ability of the CC to extend its timetable in a case that has been referred back to the UK, where that would conflict with the timetable set by the ECMR.

It also provides that the extensions provided for special circumstances and delays in obtaining information can be cumulative, but that multiple extensions for failure to provide information can run concurrently where they overlap. The section also allows the Secretary of State to alter the standard timetable and extension time-periods (but provides that the periods must not be set above 24 weeks and 8 weeks respectively).

Section 53: Restrictions on action where public interest considerations not finalised

174. This section provides that the CC will only continue to consider a public interest consideration cited in a relevant intervention notice where it has previously been approved by Parliament (either in the Act, or subsequently), or is so approved within 24 weeks of the serving of the intervention notice in the case.
175. In a case raising a new public interest consideration, the CC will not report to the Secretary of State, unless either Parliament has approved the creation of a new public interest consideration, or a period of 24 weeks has passed since the serving of the intervention notice, or the case is subject to the ECMR timetable. In any case, the CC will disregard any public interest consideration that is not finalised at the time it gives its report to the Secretary of State.

Decisions of the Secretary of State

Section 54: Decision of Secretary of State in public interest cases

176. This section sets out how the Secretary of State will proceed on receipt of a report from the CC in a case raising any public interest consideration(s).
177. *Subsection (3)* provides for the circumstances in which the Secretary of State can make an adverse public interest finding. *Subsection (4)* provides that the Secretary of State may decide not to make any finding on the adverse public interest test if she thinks that no public interest consideration is relevant to the case. *Subsection (5)* ensures that the Secretary of State must make her decision within 30 days from receipt of the CC's report.
178. *Subsection (6)* ensures that the Secretary of State will take account only of any public interest considerations that were specified in the reference and were not disregarded by the CC for its report. *Subsection (7)* provides that the Secretary of State cannot diverge from the relevant competition authority's conclusion on competition.

Section 55: Enforcement action by Secretary of State

179. This section provides that the Secretary of State may accept undertakings from or impose orders on the parties to address any of the adverse effects she has identified where she has made an adverse public interest finding. *Subsection (2)* provides that she may only take steps provided for in paragraphs 9 and 11 of Schedule 7. *Subsections (3) and (4)* provide that, in making her decisions on enforcement, the Secretary of State shall have regard to the views of the CC presented in its report and may take account of any customer benefits where there has been a substantial lessening of competition.

Other

Section 56: Competition cases where intervention on public interest grounds ceases

180. This section provides for a case to revert to the competition authorities for a decision where an intervention notice ceases to have effect, either because of the Secretary of State deciding that the public interest consideration is not relevant to the case, or, in a case where parliamentary approval of the consideration is required, that approval is not given within the 24-week period mentioned above.

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

181. *Subsections (1) and (2)* provide for the Secretary of State to hand a case back to the OFT for a decision on reference where she decides the public interest consideration(s) cited in the intervention notice are irrelevant to the case.
182. *Subsections (3)-(5)* provide for the CC to revert to a competition-only investigation where the relevant intervention notice has ceased to be in force. The CC is to have the same timetable for producing and publishing its report as it had been granted for producing a report for the Secretary of State, plus an additional 20 working days.
183. *Subsection (6)* provides for the CC to proceed as though it had conducted and published a report on a competition-only investigation where the Secretary of State decides that no public interest consideration is relevant to the case.

Section 57: Duties of OFT and Commission to inform Secretary of State

184. This section ensures that the OFT and the Commission pass relevant information to the Secretary of State.
185. *Subsection (1)* provides that the OFT will inform the Secretary of State if it believes that any case it is considering raises any public interest consideration already specified in legislation that the Secretary of State would not consider immaterial.
186. *Subsection (2)* provides that the OFT and the CC must pass on to the Secretary of State any representations that they receive about the need for the Secretary of State to specify a new public interest consideration.

Section 58: Specified considerations

187. This section sets out the considerations that may need to be looked at alongside competition matters in merger cases. It also provides a mechanism for varying the specified considerations.
188. *Subsection (1)* provides that 'national security' is the only consideration specified.
189. *Subsections (3) and (4)* provide that the public interest considerations specified may be added to, removed or amended and that the revised considerations may be used in any case, regardless of the progress of the order amending the considerations.