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

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Mergers

Summary and Background

91. Part 3 of the Act makes reforms to the UK's regime for the control of mergers. It will replace the merger control provisions of FTA 1973, other than the special arrangements for the control of newspaper mergers, which will remain. Policy for merger reform has been developed through a programme of consultation that started in 1999. *'Mergers: A Consultation Document on Proposals for Reform'* (www2.dti.gov.uk/cp/mergercon/) was published in August 1999. *'Mergers: The Response to the Consultation on Proposals for Reform'* (www2.dti.gov.uk/cp/mergerresp/) was published in October 2000. The main proposals, together with some further refinements, were included in the *'Productivity and Enterprise: A World Class Competition Regime'* White Paper published in July 2001.

92. The main provisions of this Part of the Act provide for:

- final decisions on most mergers to be taken by the OFT and the CC rather than by the Secretary of State;
- mergers to be considered against a new test of whether they result in a substantial lessening of competition rather than the current, broader, public interest test;
- discretion for the competition authorities to clear a merger or allow it to proceed with less stringent competition remedies in circumstances where, notwithstanding an expected substantial lessening of competition, they expect it to result in defined types of customer benefit;
- the Secretary of State to continue to decide mergers which raise defined public interest considerations. National security is defined in the Act as such a consideration and there are powers for further such considerations to be defined by statutory instrument using the affirmative resolution procedure;
- revisions to the special regime for mergers between water enterprises to align it where possible with the general regime whilst preserving the importance currently attached to the ability of the water regulator to make comparisons between different enterprises;
- the retention of the existing two-stage approach to merger control. The OFT will carry out the first stage investigation to decide whether a reference to the CC is required. The CC will carry out the second stage, in-depth investigation where necessary;
- the retention of the UK's system of voluntary rather than compulsory pre-notification of mergers;

- statutory maximum timetables for competition authorities to reach final decisions for both first and second stage investigations;
- the replacement of the current worldwide assets-based criteria for determining whether a merger is subject to merger control procedures with a UK-based turnover test.

93. The path of a merger investigation under the new system is summarised at Annex A.

Chapter 1: Duty to make references

Duty to make references: completed mergers

Section 22: Duty to make references in relation to completed mergers

94. This section provides that the OFT must refer a completed merger to the CC for further investigation if certain circumstances arise. This differs from FTA 1973's arrangements for reference, where the Secretary of State has discretion to refer merger cases. This section will not apply to cases where the European Commission has exclusive jurisdiction to consider the competition aspects of the merger under the ECMR by virtue of the first paragraph of Article 21(2) ECMR.

95. *Subsection (1)* provides that the OFT must make a reference to the CC if it believes there is or may be a 'relevant merger situation' that has or may be expected to result in a substantial lessening of competition. However, *subsection (2)* provides that the OFT can choose not to refer if it thinks either that the market involved is not of sufficient importance to justify a CC investigation, or that any substantial lessening of competition would be outweighed by benefits to customers.

96. The OFT will be required under section 106 to publish advice and information on how these provisions will operate, and how it will apply the substantive tests. The substantial lessening of competition test, and the customer benefits concept are explained in more detail in the notes on sections 35 and 30 respectively.

97. The discretion for the OFT to decide not to refer a merger because the market is of insufficient importance is designed primarily to avoid references being made where the costs involved would be disproportionate to the size of the markets concerned.

98. *Subsection (3)* provides that the OFT is prevented from making a reference in each of the following circumstances:

- the merger involves a newspaper transfer;
- the OFT has accepted (or is considering accepting) undertakings in lieu of a reference in relation to the same transaction;
- the merger was the subject of a 'merger notice' and the deadline for reference has passed;
- the merger was referred to the CC before it was completed;
- the merger raises a public interest consideration(s) and either an intervention notice is in force, or the case has been determined;
- the merger is the subject of a request by the UK under Article 22(3) of the ECMR to the European Commission, and the European Commission is either considering the request, proceeding with a case in pursuance of the request, or has dealt with the matter in response to the request.

99. *Subsection (6)* provides that the definition of UK markets includes both sub-national and supra-national markets.

Section 23: Relevant merger situations

100. This section sets out the criteria for a merger to qualify for investigation by the competition authorities, thereby making it a 'relevant merger situation'. It in substantial part reproduces sections 64 and 68 FTA 1973.

101. It provides that a 'relevant merger situation' is created if: two or more enterprises have ceased to be distinct at a time or in circumstances set out in section 24, and at least one of the following thresholds is met:

- the value of the turnover in the UK of the enterprise being taken over exceeds £70m (the "turnover test"); or
- the merger would result in the creation or enhancement of at least a 25% share of supply of goods or services in the UK, or in a substantial part of the UK (the "share of supply" test). This would cover, for example, both the case of a merger between two enterprises each having a 15% share of supply, and that between two enterprises where one which already has a 25% share of supply mergers with another having a 5% share.

102. The share of supply test is being retained from FTA 1973, but the turnover test is new, replacing an assets test. Section 123 gives the Secretary of State a power to amend the share of supply test.

103. *Subsections (3) to (8)* make further provision as to the share of supply test. *Subsections (3) and (4)* enable the test to be applied to the net share of goods or services supplied by or to the merging enterprises. *Subsection (5)* allows the authorities to apply such criteria (such as value, cost, quantity, etc) as they consider appropriate to determine whether the 25% threshold is satisfied, and *subsections (6) and (7)* allow the authorities to consider whether goods or services subject to different forms of supply should be aggregated for this purpose. *Subsection (8)* gives the competition authorities the discretion to decide whether goods or services are to be treated as goods or services of a separate description for this purpose.

104. *Subsection (9)* has the effect that the question of whether there is a relevant merger situation is to be determined immediately before the time when the reference has been, or is to be made, except in circumstances where the CC has decided to treat the reference of an anticipated merger as that of a completed merger by virtue of section 36(2), when it is to be determined as at such time as the CC may determine.

Section 24: Time-limits and prior notice

105. This section provides for the time period in which completed mergers may be treated as a 'relevant merger situation' and are therefore referable. These re-enact those applying under FTA 1973.

106. A reference to the CC must be made within four months of the completion of a merger, or (if later) material facts about the merger being made public or given to OFT.

107. For this purpose, the section defines the term 'made public' as having the meaning of 'generally known or readily ascertainable'. The intention is that OFT would reasonably be expected to have known or found out about the merger if it has not been notified about it.

Section 25: Extension of time-limits

108. This section allows for the extension of the four-month period in which a merger can be referred in certain circumstances: where the OFT and parties have agreed an extension; where parties have failed to provide information to the OFT as requested; where undertakings are being sought; or where the UK has made a request to the EC under article 22(3) of the ECMR. Where there are multiple extensions, there is provision

for the extensions to run concurrently where it is sensible to count the time period in this way.

Section 26: Enterprises ceasing to be distinct enterprises

109. This section defines a merger situation. It is closely modelled on section 65 FTA 1973, with one omission to take account of the existence of CA 1998.

110. The provision in 65(1)(b) of FTA 1973 that referred to 'arrangements entered into in order to prevent competition between enterprises' has been omitted. Where such arrangements do not fall within the merger regime under the Enterprise Act 2002, it is considered they will be better suited to investigation under CA 1998.

111. *Subsection (1)* defines 'two enterprises ceasing to be distinct' by reference to whether they are brought under common ownership or common control.

112. An 'enterprise' is defined in section 129 as the activities, or part of the activities, of a business; and a 'business' is defined to include a professional practice and to include any other undertaking that is carried on for gain or reward or that is an undertaking in the course of which goods or services are supplied other than free of charge. The definition includes 'part of the activities of a business' as it is sometimes an operating division of a company that is acquired rather than the whole of the company.

113. *Subsections (3) and (4)* (which are modelled on the equivalent FTA 1973 provisions) envisage three levels of control of an enterprise. These are: material influence over policy; control of policy (often called *de facto* control); and a controlling interest in the enterprise (often called *de jure* control). What constitutes material influence or control will be considered on a case-by-case basis by the competition authorities according to the particular circumstances of the case. Under the FTA the authorities have treated the acquisition of the ability to appoint a director or having a 15% shareholding as sufficient to give material influence for these purposes. *De facto* and *de jure* control will arise at higher levels of shareholding, with *de jure* normally requiring more than 50% of the voting rights.

114. Two enterprises cease to be distinct when there is an increase in the level of control - see section 26(3), (4)(a) and (4)(b). It is thus possible for a merger situation to be investigated at any of the three points where there is an increase in the level of control if the different levels of control are acquired at different times.

Sections 27 and 29: Time when enterprises cease to be distinct & Obtaining control by stages

115. Sections 27 and 29 reproduce sections 69 and 66A FTA 1973. These provide for the application of merger control to cases where ownership or control of an enterprise is obtained over a period of time. The key rule is contained in section 27(2), namely that mergers are treated as having been completed at the moment when all the parties to a transaction are contractually bound to do so. It makes clear that no account is to be taken of options that have not been exercised or conditional rights where the conditions have not been satisfied.

116. Section 27(5) to (8) deals with certain cases where ownership or control has been acquired incrementally over a period of time. Where this has been achieved through one or successive transactions or arrangements between the same parties or interests, the competition authorities can treat them as having all occurred on the date of the last relevant event, subject to a two-year cut-off period.

117. Section 29 allows the authorities to treat a series of separate transactions over a period of up to two years, under which a person or group of persons acquire control of an enterprise, to be treated as occurring on the date of the last transaction when considering a reference. Unlike under section 27, there is no need for the transactions to be linked, nor for them to be between the same persons.

Section 28: Turnover test

118. This section provides for how the turnover test, which will replace the current 'assets test' contained in sections 64 and 67 FTA 1973, is to be determined. The test will apply to turnover in the UK, and will be set initially at £70 million, but this figure will be alterable by statutory instrument.

119. The test will be determined by reference to the turnover of the enterprise being taken over (i.e. if the turnover of the target company exceeds £70 million, the merger qualifies for investigation). If it is the case that no enterprise will continue under the same ownership after the merger (for example, formation of a new joint venture), the turnover for the purposes of the test is to be calculated by aggregating that of all the enterprises involved, and taking away the highest. The section also provides that the OFT shall keep the figure under review, and from time to time advise the Secretary of State if it is still an appropriate level.

120. Section 28(2) provides the Secretary of State with a power to make an order with respect to how the turnover in the UK of an enterprise is to be calculated, which may, in particular, make provision for the amounts which are to be taken into account, the dates by reference to which it is to be determined and the connection of that turnover with the UK.

Section 30: Relevant customer benefits

121. This section defines the benefits to customers that the authorities can take into account. They are benefits in the form of lower prices, greater innovation, greater choice or higher quality in a UK market. Customer benefits may be relevant to decisions of the OFT and the CC in two main situations:

- the OFT has a duty to refer mergers that it believes may result in a substantial lessening of competition, with some limited exceptions. One of the circumstances where the OFT may decide not to refer is where it expects customer benefits to outweigh the substantial lessening of competition;
- if a merger is referred, the CC is required to determine whether a merger will result in a substantial lessening of competition. If the CC makes such a determination, it has a duty to apply remedies. At the stage when the CC is deciding on remedies, the Act enables it, in particular, to have regard to customer benefits (see note on section 41). The CC will have scope to apply lesser competition remedies than would otherwise be the case. This scope would extend, at one extreme, to clearing a merger without any conditions if the customer benefits are of sufficient importance and nothing can be done about the competition problems without eliminating the relevant customer benefit that the CC wishes to recognise.

122. Relevant customer benefits are narrowly defined. They are not expected to arise very often. They must be in the form of lower prices, greater innovation, greater choice or higher quality in a UK market. This definition is related to the competition test because the benefits are ones that would normally be expected to arise in a fully competitive market.

123. The definition is further narrowed in the following ways:

- the authority has to have an expectation that the benefits will be realised within a reasonable time-frame as a result of the merger;
- the authority has to consider that the benefits are unlikely to arise without the merger (unless the only other ways of realising the customer benefit would have a similarly detrimental effect on competition);
- relevant customers are limited to the customers of the merged or merging entity. The term also extends to other customers provided they are in a chain of customers

beginning with the immediate customers of the merging entity. In both cases, the term extends to future customers because in some circumstances a merger can lead to the development of new products or services and the creation of new markets.

124. Both the OFT and the CC will be required to produce information and advice respectively about the making and consideration of references. This will include information and advice about their application of the customer benefits concept. Examples of mergers that might – depending on the specific circumstances – generate customer benefits that could be taken into account by the OFT in deciding whether to make a reference, or by the CC in determining remedies, are as follows:

- a merger producing so-called 'network benefits'. A merger might give customers of one enterprise improved access to a wider network operated by the other enterprise, with the wider choice of complementary products that this brings. For example, in mobile telecommunications, the more users who join a particular mobile network, the more valuable the network becomes to those users as they can contact more people, in more locations, at lower cost as the network increases. In the transport sector, network benefits can improve service quality through strengthened hubs, better through-ticketing arrangements or better-connected services;

- mergers leading to large economies of scale where the effect of scale economies on prices is sufficient to outweigh the effect of a substantial lessening of competition. Such circumstances could lead to an overall reduction in prices and be beneficial to both consumers and business, provided that the authorities were satisfied that the economies of scale would be realised in spite of a significant reduction in competition and that prices after the merger would remain lower than they were pre-merger;

- mergers producing more innovation through research and development benefits. Investment in research and development often involves large fixed costs and there may be circumstances where critical mass is needed – in terms of research expertise or capital or both – that can only be secured through a merger.

125. These examples are illustrative only, and should not be regarded as pre-judging what may or may not be included in the advice published by the competition authorities.

Section 31: Information powers in relation to completed mergers

126. This section sets out a new procedure for the OFT to obtain information from the parties of a possible completed merger. It allows the OFT to require information by notice, and provides that the notice must tell the parties what information is required, when it is required and what may happen if the parties do not comply with such a request (i.e. a reference to the CC).

Section 32: Supplementary provision for purposes of sections 25 and 31

127. This section provides the Secretary of State with a power to make regulations about the operation of the extension of the OFT's timetable for reference or the OFT's information-gathering powers in relation to completed mergers. The section also sets out arrangements for certain notices extending the four-month period.

Duty to make references: anticipated mergers

Section 33: Duty to make references in relation to anticipated mergers

128. This section provides that the OFT must refer an anticipated merger (i.e. one that has not yet taken place) to the CC for further investigation in certain circumstances. It broadly mirrors the reference duty in section 22. However, because there may be some uncertainty in these cases about whether a merger will go ahead, the OFT is given

discretion not to refer unless it believes the proposals are sufficiently far advanced or likely to proceed. The OFT will cover this point in its published guidance.

Section 34: Supplementary provision in relation to anticipated mergers

129. This section provides a power for the Secretary of State to make provision about the operation of sections 27 and 29 in relation to anticipated mergers and public interest intervention notices relating to them.

Determination of references

Sections 35–41

130. These sections set out the functions and duties of the CC once a merger has been referred to it. The sections have similarities with existing provisions in FTA 1973, but reflect the removal of Ministers from the decision-making process, the new status of the CC as the determinative body in all cases other than ones raising defined public interest considerations, and the switch from a 'public interest' test to a 'substantial lessening of competition' test for the assessment of mergers.

Section 35: Questions to be decided in relation to completed mergers

131. This section sets out the questions that the CC has to decide as part of a reference. Its first task is to decide whether a relevant merger situation has been created. In doing so, it is confirming (or otherwise) the OFT's initial belief in making a reference under section 22 that a relevant merger situation has been created. If it has, the CC has to decide whether the merger has resulted, or will result, in a substantial lessening of competition. This competition-based test will be the central provision of the new regime. It replaces the public interest test in section 84 FTA 1973. In general, under the new regime, the CC will only have grounds for remedial action if the CC finds that the merger has resulted or may be expected to result in a substantial lessening of competition. (The only exception to this will be in certain public interest cases considered under the procedure set out in Chapter 2.)

132. The term 'substantial lessening of competition' is not defined in the Act. However, it is intended that advice and information on the operation of the competition test will be provided by the CC (and the OFT) under section 106. This requires the competition authorities to publish general advice and information about how they will consider references and how the relevant provisions will operate.

133. The concept of a substantial lessening of competition and its application in the context of a reference inquiry will be for the CC to explain in detail in its guidance. Similar language is used in the legislation controlling mergers in a number of other major jurisdictions, including the US, Canada, Australia and New Zealand. The concept is an economic one, best understood by reference to the question of whether a merger will increase or facilitate the exercise of market power (whether unilateral, or through co-ordinated behaviour), leading to reduced output, higher prices, less innovation or lower quality or choice. A number of matters may be potentially relevant to the assessment of whether a merger will result in a substantial lessening of competition. The matters may include, but are not limited to:

- market shares and concentration;
- extent of effective competition before and after the merger;
- efficiency and financial performance of firms in the market;
- barriers to entry and expansion in the relevant market;
- availability of substitute products and the scope for supply- or demand-side substitution;

- extent of change and innovation in a market;
- whether in the absence of the merger one of the firms would fail and, if so, whether its failure would cause the assets of that firm to exit the market;
- the conduct of customers or of suppliers to those in the market.

134. If the CC decides that there is a substantial lessening of competition, it is also required to decide whether to take action to remedy, mitigate or prevent the substantial lessening of competition or any adverse effects resulting from that loss of competition. Adverse effects in this context are the undesirable consequences that flow from the loss of competition such as higher prices or reduced choice for customers. In deciding what action should be taken, however, *subsection (4)* requires the CC to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and the adverse effects resulting from it. The reference to a 'comprehensive solution' will require the CC to consider remedies that address the substantial lessening of competition itself (e.g. the features arising from the merger that give rise to the creation of market power) because it is generally more effective to tackle the cause of any problems at their source rather than by tackling the symptoms or adverse effects.

135. This section is closely linked with section 41, which sets out the factors that the CC must or may in particular bear in mind in choosing remedies.

136. *Subsections (6) and (7)* allow the OFT 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 created. For example, the reference can be framed in a way that does not require the CC to consider whether the turnover of the enterprise being acquired is over the relevant turnover threshold. In those circumstances, it would consider only whether the share of supply test had been met. Conversely, it can be asked to consider only whether the turnover threshold has been met. The CC can also be required to limit its consideration of whether the share of supply test has been met to a particular part of the UK.

Section 36: Questions to be decided in relation to anticipated mergers

137. This section is the equivalent to section 35. It sets out the questions that the CC has to decide when an anticipated merger (a merger that is in progress or contemplation) has been referred. The questions are similar, but with a future tense used where appropriate to reflect the fact that the merger has not yet been completed.

Section 37: Cancellation and variation of references under section 22 or 33

138. The section allows the OFT to vary a merger reference once it has been made, although this does not carry with it a power to alter the period within which the CC is required to report. It is based on section 71 FTA 1973. The circumstances where this flexibility might be required include situations where the parties have been identified incorrectly, or the grounds for the original reference were wrong.

139. The section introduces a provision giving the CC a new power to change the type of reference made, where the facts justify it. The power might be used, for example, where a merger is referred as an anticipated merger under section 32, but is subsequently completed.

Section 38: Investigations and reports on references under section 22 or 33

140. This section gives the CC an obligation to publish a report on each of its merger references within the statutory time-limit (see below). The section is closely modelled on section 72 FTA 1973 but with differences reflecting the determinative role of the CC both in relation to decisions on the competition test and decisions on what remedies

to apply. The section includes a requirement for the CC to give reasons for its decision and information allowing for a proper understanding of the decisions.

Section 39: Time-limits for investigations and reports

141. Section 70 FTA 1973 currently requires the Secretary of State to set a timetable within which the CC has to report. That timetable cannot exceed 6 months. The period set is extendable for one further period of up to 3 months where the Secretary of State is satisfied that there are special reasons why the report cannot be made within the initial period.

142. Section 39 replaces section 70 FTA 1973. It requires the CC to publish its report on a reference within a statutory maximum period of 24 weeks from the date of reference. A shorter period applies if that is needed to comply with Article 9(6) of the ECMR in circumstances where a merger has been referred back for consideration by the UK domestic competition authorities.

143. The section permits the CC to extend the 24-week period for the report for one further period of no more than 8 weeks where it is satisfied that there are special reasons for a delay. The section does not further define 'special reasons', but it is anticipated that they would include matters such as the illness or incapacity of members of a reporting group that has seriously impeded its work, and an unexpected event such as a merger of competitors.

144. An important difference between the current FTA 1973 timetable and the proposed new timetable is that the CC's report will have to contain not only its decisions on the substantive question of whether there is expected to be a substantial lessening of competition, but also its decisions on remedies. At present, the CC makes the substantive finding against a public interest test, but only makes recommendations to the Secretary of State about the remedies that might be appropriate. The Secretary of State has an unlimited period within which to take final decisions on remedies.

145. *Subsection (4)* gives the CC a discretion that it does not have in the current regime to extend the period within which it has to report where one of the parties to a merger (but not third parties) has failed to comply with a formal notice (see section 109) requiring the provision of information or documents, or the appearance of witnesses. Any such extension continues until the information is provided, or the CC decides to cancel the extension.

Section 40: Section 39: supplementary

146. This section gives the Secretary of State a power by order to shorten the maximum statutory timetable of 24 weeks, and the maximum 8 week period for any extension. They can be lengthened again if necessary, but in no circumstances can the periods be extended beyond 24 weeks and 8 weeks respectively. The section also gives the Secretary of State a power to make regulations covering detailed procedural matters connected with the provision of information and documents, such as the time at which information is to be treated as having been provided.

Section 41: Duty to remedy effects of completed or anticipated mergers

147. There are close links between this section and sections 36 and 37. The latter require the CC to decide whether a merger has or may be expected to result in a substantial lessening of competition, and to identify any action that should be taken to address it. Section 41 requires the CC to take the action that it considers to be reasonable and practicable to remedy, mitigate or prevent the competition problems that it has identified. The steps have to be consistent with the course of action included in the report on the reference, unless there has been a material change of circumstances, or the CC has a special reason for taking different steps.

148. The CC has a choice of preventing, remedying or mitigating the substantial lessening of competition or the adverse effects arising from that loss of competition. However, it has to have particular regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition itself.

149. *Subsection (5)* gives the CC an express discretion, in deciding on what action to take to address the competition problems, to have regard to the effect of any such action on any relevant customer benefits (as defined in section 30). The purpose of this subsection is to ensure that the CC has scope, if it considers that customer benefits are of sufficient importance, to impose a lesser competition remedy or no remedy at all if the only steps that the CC could take to remedy the competition problem are steps that would mean that the customer benefits could not be realised.

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.

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.

Chapter 3: Other special cases

Special public interest cases

190. These sections provide for an exceptional category of mergers that may be referred for investigation on public interest grounds, even though they do not meet the normal qualifying thresholds (the turnover test or the share of supply test). These include mergers involving certain government contractors (or subcontractors) who may hold or receive confidential information or material relating to defence.

191. They will not be scrutinised on competition grounds, but against public interest considerations only.

Section 59: Intervention by Secretary of State in special public interest cases

192. *Subsection (1)* provides that the Secretary of State may intervene on special public interest grounds if she has reasonable grounds for suspecting that: a special merger situation has been created or is in contemplation. *Subsection (2)* provides that the Secretary of State may issue a special intervention notice if she believes that the case raises public interest considerations as specified in section 58.

193. *Subsection (3)* provides that a special merger situation is one where the usual thresholds of share of supply or turnover have not been met and the conditions in *subsection (4)* are satisfied. Those conditions are that one of the enterprises is carried on in the UK, or by or under control of a body corporate incorporated in the UK and a person carrying on one of the enterprises is a relevant government contractor. *Subsections (5) and (6)* provide that for the purposes or determining whether a relevant merger situation has been

created, sections 22-31 shall apply, subject to certain changes listed in *subsection (6)*. These changes clarify that certain references to the OFT shall, for the purposes of the Chapter, be read as the Secretary of State.

194. *Subsection (8)* defines a relevant government contractor as a contractor whose contract includes handling confidential information or documents. They are notified of this by the Secretary of State, or on behalf of the Secretary of State in cases where this notification is passed on from a prime to a subcontractor. This subsection also establishes that a relevant government contractor includes a former contractor whose notification has not been revoked.

195. *Subsection (9)* defines defence as having the same meaning as in section 2 of the Official Secrets Act 1989, and further defines government contractor as having the meaning given in the 1989 Act and including subcontractors.

Section 60: Special intervention notices under section 59

196. This section provides that a special intervention notice shall contain details of the case concerned, and the public interest considerations specified in section 58 which are thought to be relevant. It also provides for the circumstances in which a special intervention notice would finally be determined and the time at which it would be determined.

Section 61: Initial investigation and report by OFT

197. This section establishes the OFT's role in investigating and reporting on these cases. *Subsections (1) and (2)* establish that if the Secretary of State issues a special intervention notice to OFT, they shall produce a report within such time-limit as the Secretary of State may require. There is nothing to prevent the Secretary of State from altering the time-limit if circumstances so require. *Subsection (3)* provides that, in its report, the OFT will consider matters relevant to references under sections 22 and 33 which are also relevant to the criteria specified in section 62. This means that OFT do not need to consider whether the merger may result in a substantial lessening of competition as this is not relevant to the Secretary of State's decision in a special public interest case. This subsection also provides that the OFT's report will include a summary of representations received that are relevant to the Secretary of State's decision.

198. *Subsection (4)* provides that the OFT shall decide whether a special merger situation has been created or is contemplated. This will be a relevant merger situation without the need to meet the qualifying thresholds (share of supply or turnover test). *Subsection (5)* provides that OFT may, at its discretion, provide other advice that may be relevant to the Secretary of State's decision about whether to refer, and *subsection (6)* allows the OFT to carry out their investigations for the report as it considers appropriate.

Section 62: Power of Secretary of State to refer the matter

199. This section provides for the Secretary of State to refer the case to the CC if she believes that a special merger situation has been created, or is contemplated; a consideration specified in section 58 is relevant, and it may operate against the public interest. *Subsection (5)* provides that the Secretary of State will accept the OFT's decision as to whether a special merger situation has been created.

Sections 63 and 64: Questions to be decided on references under section 62 & Cancellation or variation of references under section 62

200. Section 63 provides that the CC will consider whether a special merger situation has been created, or is contemplated; whether – on the basis of the considerations set out in the reference – the merger may be expected to operate against the public interest; and make recommendations as to what action, if any, the Secretary of State or others should take to remedy any adverse effects.

201. Section 64 provides for the circumstances in which the CC or the Secretary of State may cancel or vary a reference.

Section 65: Investigations and reports on references under section 62

202. This section provides that the CC's report and investigation should contain its conclusions on whether a special merger situation has been created; whether it may be expected to operate against the public interest; and what actions should be taken by the Secretary of State or others to remedy these adverse effects.

Section 66: Decision and enforcement action by Secretary of State

203. This section provides that the Secretary of State must decide whether the merger may operate against the public interest within 30 days of receiving the report from the CC and may take whatever remedial steps she considers necessary (from paragraph 9 or 11 of Schedule 7). The Secretary of State must accept the view of the CC as to whether a special merger situation has been created or is contemplated.

European Mergers

Section 67: Intervention to protect legitimate interests

204. This section allows the Secretary of State to intervene in cases where the competition issues (if any) would fall to be determined by the European Commission under the ECMR (i.e. cases other than those where competition issues are referred back for consideration under UK domestic law under Article 9 ECMR, which fall to be considered under Chapters 1 and 2 of Part 3). *Subsection (2)* provides that the Secretary of State may serve a European intervention notice if she believes that one or more than one public interest consideration may be relevant to the case. *Subsection (1)* ensures that the Secretary of State can only serve such a notice if she has a reasonable suspicion that there is or will be a relevant merger situation that is also a concentration qualifying for scrutiny under the ECMR and it is not a case (like a newspaper merger) that is specifically excluded from consideration under Chapter 1 of Part 3 .

Section 68: Scheme for protecting legitimate interests

205. This section provides for the Secretary of State to make regulations to provide for action to be taken to protect legitimate interests as permitted by Article 21(3) of the ECMR. Section 124 provides that regulations made under this power will be subject to the affirmative resolution procedure.

Other

Section 69: Newspaper mergers

206. This section provides that the general merger regime will not apply to mergers covered by the FTA 1973 newspaper merger regime, unless the Secretary of State is prevented from making a reference under that regime.

Section 70 & Schedules 6 and 9: Water mergers

207. Section 70 and Schedule 6 amend the special regime applying to mergers between water enterprises (whether water or sewerage undertakings) in England and Wales, as set out in sections 32 to 35 of the Water Industry Act 1991 (WIA 1991).

208. The current WIA 1991 provisions provide for the mandatory reference by the Secretary of State of qualifying mergers between two or more water enterprises to the CC. A qualifying merger is one where the value of the relevant water assets being taken over and those of the acquirer each exceed a specified figure (currently £30 million). Once a qualifying merger has been referred, the FTA 1973 'public interest' test is applied

in a way that attaches particular weight to the principle that the ability of the Director General of Water Services ('Director') in carrying out his or her functions under the WIA to make comparisons between water enterprises should not be prejudiced. If the CC makes an adverse finding, the Secretary of State is responsible for determining final remedies.

209. The purpose of the special water merger regime is to preserve the Director's ability to make use of 'comparative' or 'yardstick' regulation (i.e. the ability to compare the performance of different water companies for the purposes of setting robust price and customer service standards), except where there are strong wider public interest reasons for not doing so. In the absence of any significant competition in the water sector, yardstick regulation is regarded as a particularly important regulatory tool.

210. The main purpose of the changes being brought about by this section is, while retaining a special regime for mergers between water enterprises, to bring that regime more closely into line with the general merger regime whilst also ensuring that particular weight continues to be attached to the Director's ability to make comparisons between water enterprises.

211. The changes to effect a closer alignment with the general regime include:

- a switch from an assets threshold to a turnover threshold for determining whether a merger between water enterprises qualifies for a mandatory reference;
- transfer of the responsibility for making such references from the Secretary of State to the OFT;
- the transfer of responsibility for final decisions on what remedies should be applied in the event of an adverse finding from the Secretary of State to the CC; and
- in the case of a completed water merger, the time that the OFT will have to make a reference will be reduced from 6 months to 4 months from the date of the merger taking place.

212. New section 32 (duty to refer merger of water or sewerage undertaking) provides that qualifying water enterprise mergers will continue to be subject to mandatory reference to the CC, but with responsibility for making such references transferred from the Secretary of State to the OFT.

213. New section 33 (exclusion of small mergers from duty to make reference) provides that a mandatory reference shall only be made if:

- the relevant turnover of the water enterprise being taken over exceeds £10m; and
- the relevant turnover of one or more of the water enterprises belonging to the acquirer exceeds £10m.

These sums may be altered by regulations made by the Secretary of State.

214. The purpose of this provision is to exclude small mergers from the OFT's duty to make a reference. It replaces a similar provision based on asset values, but is expected to have the same practical effect as the current assets threshold of £30m in terms of the current water enterprises that will be affected. A refinement of the present statute will enable the Secretary of State to prescribe a different turnover threshold for the target and for the acquirer for the purposes of deciding whether there is to be a reference. The regulation-making powers provided in *subsections (4), (5)* and (6) of the revised section include power to make provision for the definition of relevant turnover for these purposes. The turnover will be set independently of the qualifying turnover thresholds set for the general merger regime.

215. Schedule 6 replaces section 34 WIA 1991. The new inserted Schedule 4ZA sets out the task for the CC when a water enterprise merger has been referred to it. Its first job is

to determine whether a merger situation qualifying for investigation has been or will be created. If it has been or will be created, the CC has to decide whether the merger can be expected to prejudice the Director's ability in carrying out his or her functions by virtue of WIA 1991, to make comparisons between different water enterprises. Both such decisions have to be the decisions of at least two-thirds of the members of the relevant CC reporting group to be treated as valid. The Director's functions that are likely to be most relevant here and that could be prejudiced by a merger are his or her functions of setting price controls and service level targets and the related general term of reference in section 2(3)(d) of WIA 1991 to 'promote economy and efficiency on the part of water enterprises'.

216. If there is prejudice, then the CC has to decide whether to take action to remedy, mitigate or prevent the prejudice or any adverse effects that might result, and to decide what action should be taken. In deciding what action to take, the CC may have regard to the effect of any action on relevant customer benefits. The definition of a customer benefit is set out in paragraph 7. This matches the definition of customer benefits as defined for the purposes of the general merger regime.

217. Paragraph 4(1)(a) and (b) of inserted Schedule 4ZA, however, places two constraints on the circumstances in which the CC is able to have regard to customer benefits in deciding on remedies. These constraints are unique to the water regime. They provide that customer benefits can only be considered where the taking account of those benefits would not prevent a solution to the prejudice concerned, or in circumstances where the benefits are expected to be substantially more important than the prejudice concerned. These constraints are intended to ensure that the water regime continues to operate in a way that attaches particular weight to the preservation of comparator enterprises, whilst not excluding the possibility of customer benefits being taken into account if they are important enough, or if they can be obtained in a way that does not prevent action to address the prejudice.

218. Paragraphs 1 and 2 of inserted Schedule 4ZA provide for the general merger provisions in the Act to apply to qualifying water mergers subject to modifications contained in regulations that may be prescribed by the Secretary of State. It is envisaged that this power will be used, for example, to ensure that the general duty to remedy the effects of completed or anticipated mergers in section 41 can be adapted for the special purposes of the water regime. It may also be used to adapt the arrangements for the consideration of water mergers under the special regime to circumstances where the merger also raises a defined public interest issue.

219. Paragraph 5 of inserted Schedule 4ZA ensures that no enforcement action will be taken against a completed merger of water enterprises if a reference was not made within 4 months of the later of: the merger taking place, or material facts about the transaction coming to the attention of the OFT or being made public. The current section provides for a six-month period. The change brings the special water regime into line with the period in the equivalent provision for the general mergers regime.

220. Sections 32(2) and 32(3) of the current WIA 1991 set out transitional arrangements relevant when the original Act was brought into force. They are no longer required, and are therefore repealed.

221. The amendments to sections 32–35 are concerned, as is the original Act, only with water enterprises in England and Wales.

222. The transfer of responsibility for determining and implementing remedies under the normal mergers regime following an adverse finding from the Secretary of State to the CC requires a consequential change to section 17 WIA 1991. This section currently gives the Secretary of State a power, as part of her power to order remedies, to modify the conditions of appointment of a relevant undertaking for the purpose of giving effect to or taking account of the main remedial order. Schedule 9 revises section 17 WIA 1991 to give the power to modify conditions of appointment to the CC.

Chapter 4: Enforcement

223. Sections 71–95 and Schedules 7 and 8 set out the enforcement powers of the OFT, CC and Secretary of State before, during and after a merger reference. As in FTA 1973, enforcement takes two forms: undertakings and orders. Undertakings are given voluntarily by one or more of the parties to a merger. Once accepted by the relevant authority, these become legally binding and enforceable in the courts. Orders are made by the authorities and prohibit the parties specified in the order from doing something or specify that they must take certain action. Before and during a reference, undertakings and orders seek to prevent any action being taken that might prejudice the eventual outcome of the merger inquiry. Following the CC's final report, an undertaking or order may be used to remedy the adverse effects on competition identified by the report. In the case of final orders, what an order can specify is set out in Schedule 8. Under FTA 1973, orders were made by statutory instrument; the OFT and CC will now have the power to make orders on their own authority. There is a different but similar enforcement regime for those cases where the Secretary of State has intervened on public interest grounds. This is set out in Schedule 7.

Powers exercisable before references under section 22 or 33

Section 71: Initial undertakings: completed mergers

224. This section allows the OFT to accept undertakings from parties where it is considering whether to make a merger reference in relation to a completed merger. This is a new power for the OFT. It allows the OFT to act before it has reached a definite conclusion on whether to refer the merger. The OFT can ask parties to undertake not to carry out any action that might prejudice the merger reference or the ability of the CC to act following the outcome of its inquiry. These undertakings are legally-binding.

Section 72: Initial enforcement orders: completed mergers

225. This section permits the OFT to make an order where it is considering whether to make a merger reference. This is a new power for the OFT. The OFT is able to act before it has reached a definite conclusion on whether to refer a completed merger. The OFT can only make initial orders in respect of mergers that have been completed and where it has reason to believe that action is planned that could prejudice any subsequent investigation. This power is modelled on the interim order-making power in section 74 FTA 1973.

Section 73: Undertakings in lieu of references under section 22 or 33

226. This section allows the OFT to seek and accept undertakings from one or more parties to a merger in place of a reference. The purpose of accepting undertakings is to allow the OFT (where it is confident about the problem that needs to be addressed and the appropriate solution) to correct the competition problem the merger presents without recourse to a potentially time-consuming and costly investigation. This provision mirrors the existing power in section 75G FTA 1973 for the Secretary of State to accept undertakings-in-lieu, but with responsibility transferred to the OFT.

Section 74: Effect of undertakings under section 73

227. This section specifies that a reference on the same merger cannot be made if the OFT has accepted undertakings in lieu of a reference.

Section 75: Order-making power where undertakings under section 73 not fulfilled etc.

228. This section allows the OFT to make an order when an undertaking-in-lieu is not being complied with. In such circumstances, the OFT could seek to enforce the original undertaking in the courts or decide to replace it with an order. The content of such an

order is limited to the matters set out in Schedule 8 (see below). This provision transfers the Secretary of State's existing powers in section 75K FTA 1973 to the OFT.

Section 76: Supplementary interim order-making power

229. This section is for use when an undertaking-in-lieu is not being fulfilled and the OFT would like to replace it with an order. It allows the OFT to act quickly to put in place an interim order while it prepares the main remedial order, including carrying out any consultation. The interim order can prevent the parties from taking any action that might prejudice the main order. This interim power is also available to the CC when they are considering replacing final undertakings with a final order.

Interim restrictions and powers

Section 77: Restrictions on certain dealings: completed mergers

230. This section applies an automatic prohibition on the parties to a completed merger, once it has been referred, to prevent them undertaking any further integration without the consent of the CC. This is a new provision, which applies only to completed mergers. It has been introduced because in almost all merger cases the authorities seek to prevent such further integration either by securing undertakings or by making an interim order.

Section 78: Restrictions on certain share dealings: anticipated mergers

231. This section applies an automatic prohibition on the parties to an anticipated merger to prevent them from acquiring any further shares in one another without the consent of the CC. This provision brings in the equivalent prohibition in section 75(4A) FTA 1973.

Section 79: Sections 77 and 78: further interpretation provisions

232. This section provides technical clarification on what constitutes an acquisition of an interest in shares for the purposes of section 78 and sets out certain common definitions for both sections.

Section 80: Interim undertakings

233. This section allows the CC to accept undertakings from one or more parties to a merger that they will not take any action that might prejudice the eventual outcome of the merger reference. This is a new provision. Section 74 FTA 1973 allowed for an interim order (see below) to be made during the course of a reference but made no provision for accepting interim undertakings. In practice, undertakings have been sought and accepted during this period, but on a non-statutory basis. This provision makes such undertakings legally-binding.

Section 81: Interim orders

234. This section allows the CC to make an order to prevent the parties to a merger from taking any action that might prejudice the eventual outcome of the merger reference. This provision is modelled on section 74 FTA 1973. It applies after a merger has been referred. An interim order can be made in respect of both completed and anticipated mergers.

Final powers

Section 82: Final undertakings

235. This section allows the CC to accept final undertakings from the parties to remedy competition problems identified in its final report on a merger. This is based on the provisions on undertakings in section 88 FTA 1973.

Section 83: Order-making power where final undertakings not fulfilled

236. This section allows the CC to replace final undertakings with an order where the parties are not complying with the undertakings. Any order made under this section is limited to the matters set out in Schedule 8.

Section 84: Final orders

237. This section allows the CC to make an order to remedy any competition problem identified in its final report on a merger investigation. This final order may contain any of the matters set out in Schedule 8.

Schedule 8: Provision that may be contained in certain enforcement orders

238. This Schedule contains the list of matters that can be included in final orders for the purpose of remedying the adverse effects specified in the CC's report. This list is based on Schedule 8 of FTA 1973. It has been updated to reflect modern drafting conventions. Certain new remedies have also been added. These are remedies that experience has shown it would be useful to be able to call upon. The new remedies are as follows:

- paragraph 10 – the ability to require goods or services to be supplied to a particular standard or in a particular manner. This has been added to ensure that final orders can require parties to meet a certain quality of service or to continue to produce a certain range of goods. For example, it would allow an order to tell a bus company to maintain a certain frequency of service.
- paragraphs 13(3)(k) and 22 – these allow the OFT to approve the buyer of a divested business and also to approve other conduct or matters.
- paragraph 13(3)(l) – this allows for the appointment of a trustee to oversee the divestment of a business.
- paragraph 18 – the ability to specify how certain information should be published. This has been added to ensure that orders can specify that information should be published on the Internet.
- paragraph 19(c) – this allows the OFT to publish information that it is given.
- paragraph 20 – this allows for provision to be made in the interests of national security.

Public interest and special public interest cases

Section 85: Enforcement regime for public interest and special public interest cases

239. This section brings into effect the separate but similar enforcement regime for those cases when the Secretary of State has decided to intervene on public interest grounds. This regime is set out in detail in Schedule 7.

Schedule 7: Enforcement regime for public interest and special public interest cases

240. This Schedule sets out the enforcement regime that applies for cases involving a public interest consideration. The regime mirrors that of the main regime, giving the Secretary of State equivalent powers to the CC and OFT. It includes provisions for the Secretary of State to make pre-emptive orders or accept pre-emptive undertakings (paragraphs 1 and 2); these are the equivalent of initial and interim orders and undertakings. The Secretary of State may accept undertakings in place of making a reference (paragraphs 3, 4, 5). Schedule 7 includes provision equivalent to the supplementary interim order-making power set out in section 76 (paragraph 6) and the same automatic prohibitions as apply under sections 77 and 78 on further integration for completed mergers and on further share acquisition for anticipated mergers (paragraphs 7 and 8). Finally, the

Schedule includes equivalent powers to accept final undertakings (paragraph 9) or make final orders (paragraph 10 and 11). Orders of the Secretary of State under Schedule 7 are made by way of statutory instrument and subject to the negative resolution procedure in Parliament (section 124(5)).

Undertakings and orders: general provisions

Section 86: Enforcement orders: general provisions

241. This section makes certain general provisions that apply to all orders.

Section 87: Delegated power of directions

242. This section allows the person making an order to give directions to an individual or to an office-holder in any company or association. Failure to comply with such directions may lead to action before the courts.

Section 88: Contents of certain enforcement orders

243. This section sets out the minimum contents of any final order or order to replace undertakings-in-lieu.

Section 89: Subject-matter of undertakings

244. This section makes clear that enforcement undertakings (which are legally enforceable) can make provision for matters that cannot be included in final orders. Thus, final undertakings differ from final orders in that the latter are limited to the matters included in Schedule 8.

Section 90: Procedural requirements for certain undertakings and orders

245. This section gives effect to Schedule 10, which sets out the procedural requirements to be followed in making or revoking an order and in accepting or releasing an undertaking.

Schedule 10: Procedural requirements for certain enforcement undertakings and orders

246. This Schedule sets out the consultation process for making, varying or revoking certain orders or undertakings. Paragraphs 1-5 set out the process to be followed in making an order or accepting undertakings. Paragraphs 6-8 set out the process for revoking an order or releasing a party from an undertaking.

247. In both cases, the authorities will set out clearly what they are proposing to do and the reasons for it. The authorities will have to give notice of their intention to make or vary an order to the parties directly affected by it. There will be a thirty-day consultation period for orders and a fifteen-day period for undertakings, although the authorities can apply an accelerated procedure in merger cases in special circumstances (paragraph 9).

248. These procedural requirements apply to all orders and undertakings except initial and interim orders and undertakings. Initial and interim orders do not have to comply with these procedural requirements because they may need to be introduced at short notice.

Section 91: Register of undertakings and orders

249. This section creates a register to be maintained by the OFT of all orders and undertakings made or accepted by the OFT, CC or Secretary of State and of which it is aware. This register will be available to the public.

Enforcement functions of OFT

Section 92: Duty of OFT to monitor undertakings and orders

250. This section gives the OFT the lead role in monitoring undertakings and orders. The OFT will keep all undertakings and orders under review. Where it decides that an order or undertaking should be amended or revoked, it will advise the CC or Secretary of State accordingly. Where an order or undertaking is not being complied with, the OFT will be able to take the company to court. This is based on the monitoring role the DGFT currently has under section 88 FTA 1973.

Section 93: Further role of OFT in relation to undertakings and orders

251. This section allows the CC and the Secretary of State to ask the OFT to negotiate undertakings with the parties to a merger. The CC or (as the case may be) the Secretary of State retains the final say on whether undertakings should be accepted. The CC and the Secretary of State may also choose to negotiate directly with the parties.

Other

Section 94: Rights to enforce undertakings and orders

252. This section ensures that orders and undertakings can be enforced through the courts. Any person who sustains loss or damage as a result of the contravention of an order or undertaking may bring action before the courts. The OFT may bring civil proceedings to enforce compliance with orders or undertakings. The CC and Secretary of State may also bring civil proceedings in respect of orders or undertakings for which they are responsible.

Section 95: Rights to enforce statutory restrictions

253. This section ensures that compliance with the automatic prohibitions on further integration (section 77) and on further share acquisition (section 78) can be enforced through the courts.

Chapter 5: Supplementary

Merger notices

254. This Chapter updates the merger notice procedure provided for in sections 75A-75H of FTA 1973.

Section 96: Merger notices

255. This section describes the circumstances in which a notice may be given. The section sets out that the notice should be in the form prescribed by the OFT, and that no reference will be made if the period for considering a merger notice has expired.

Sections 97 and 98: Period for considering merger notices & Section 97: supplementary

256. These sections provide for the time-periods in which a reference can be made under a notice. On receipt of a merger notice, the OFT has 20 working days, with a possibility of extending that to 30 workings days, to decide whether to refer. This reduces the FTA 1973 merger notice timetable by 5 days.

257. If an intervention notice has been served, the time-period can be extended to a maximum of 40 working days.

258. There are also circumstances in which a merger notice timetable can be extended further:

- if the parties have failed to provide information that the OFT asked for. In this case, the extension will be the period it took for the parties to provide the information;
- if the OFT is seeking undertakings. In this case the extension will be for the period it takes until undertakings are given; or up to 10 days after the OFT has received a notice saying that undertakings will not be given;
- if the European Commission is considering whether to deal with the case following a request made under article 22(3) of the ECMR;
- if the Secretary of State decides to extend her consideration of a public interest case in relation to the creation of a new public interest gateway.

Section 99: Certain functions of OFT and Secretary of State in relation to merger notices

259. This section sets out the responsibilities of the OFT in relation to merger notices. This includes: taking appropriate steps to ensure that all affected parties are made aware of the case and what the OFT should include in their notice to parties requesting information. It also provides for the circumstances in which the OFT may reject a notice. These include: if the OFT suspects that false or misleading information has been given; if they suspect that the merger will not take place; if information is not given as requested; and if the arrangements would result in a concentration with a Community dimension under the ECMR.

Section 100: Exceptions to protection given by merger notices

260. This section provides for the circumstances in which a case continues to be referable, notwithstanding the fact that the period for considering a merger notice served in that case has expired. Such circumstances include rejection of the notice by the OFT or withdrawal of it by the parties, non-disclosure of material information, and any other merger involving any relevant party.

Sections 101 and 102: Merger notices: regulations & Power to modify sections 97 to 101

261. Sections 101 and 102 provide the Secretary of State with the power to make regulations relating to the merger notice procedures and to modify sections 97 to 101.

General duties in relation to references

Section 103: Duty of expedition in relation to references

262. This section ensures that the relevant authority (either the OFT or the Secretary of State) will make its decision on reference as early as it is sensible to do so.

Section 104: Certain duties of relevant authorities to consult

263. *Subsections (1) and (2)* set out that the OFT, CC or Secretary of State will, where practicable, consult those persons who control any of the merging enterprises who are likely to be adversely affected by certain proposed decisions before those decisions are taken. *Subsection (6)* provides that this duty applies to reference decisions by the OFT and the Secretary of State and the CC's final conclusions on whether there is a substantial lessening of competition or an adverse public interest effect and on remedies. *Subsection (3)* provides that, where practicable, those likely to be affected should be given the reasons for a proposed decision.

Information and publicity requirements

Section 105: General information duties of OFT and Commission

264. This section sets out the general duties of the OFT in relation to merger cases.

265. *Subsections (1) and (2)* ensure that the OFT will act, if practicable, to bring cases that it is investigating to the attention of those that might be affected by the transaction. This duty does not apply to merger notice cases, which carry their own publicity requirements (see note on section 99).

266. *Subsections (3) and (4)* provide that the OFT will give relevant information to the CC.

267. *Subsections (5) and (6)* ensure that the OFT and the CC will give information and assistance to the Secretary of State to enable her to carry out her functions in relation to cases that may raise public interest considerations.

Section 106: Advice and information about references under section 22 and 33

268. This section requires the OFT and the CC to publish advice and information about certain of their key tasks in the merger scrutiny process. The OFT will be required to explain how it will apply its duty to make references. The CC will have to explain how it will consider references. This information and advice will include explanations of how the OFT and CC will apply the substantive tests in the new regime, including, in particular, the application of the substantial lessening of competition test, and the circumstances and manner in which relevant customer benefits will be taken into account when the OFT considers references and when the CC is considering possible remedies. The OFT and the CC will be required to consult each other (and others they consider appropriate) in preparing their respective advice and information. It is intended that the information and advice will increase clarity for business about how the new regime works.

Section 107: Further publicity requirements

269. This section provides that the OFT, CC and the Secretary of State will publish certain decisions, most accompanied by their reasons for those decisions.

270. Where the Secretary of State decides to take enforcement action in a case raising public interest considerations, she will lay details of that decision (including reasons for it) before Parliament, as well as a copy of the relevant report of the CC.

Section 108: Defamation

271. This section protects the Secretary of State, OFT and the CC against actions for defamation as a result of their exercise of functions under the merger provisions of the Act.

Investigation powers

Sections 109–117: Investigation powers

272. Sections 109-117 set out the CC's powers to require persons to give evidence and to provide specified documents and information needed for the purposes of a merger inquiry. These sections replace the powers provided under section 85 FTA 1973. There are many similarities with the earlier investigatory powers. A key change, however, is that the CC's FTA 1973 power to initiate contempt proceedings against persons who fail to comply with notices requiring the production of documents and information and the attendance of witnesses is replaced with a power for the CC itself to impose monetary penalties for non-compliance subject to a right of appeal to the CAT. The new power to impose monetary penalties is also available to the CC when it is carrying out market investigations. In addition, it is available to the CC when it is carrying out references

concerning licence modifications and other matters under various sectoral enactments such as the Airports Act 1986 and the Electricity Act 1989. The necessary amendments to these sectoral enactments are made in Schedule 25 to the Act.

273. Section 109 gives the CC a power to serve notices requiring any person to attend to give evidence to the CC or to provide it with specified documents or information by specified dates. Any notice has to set out the possible consequence of a failure to comply with the notice.

274. Section 110 sets out the enforcement powers that the CC will have. It gives the CC a power to impose monetary penalties where it considers that a person has, without reasonable excuse, failed to comply with a notice. This power replaces the current contempt sanction in section 85(7)–(8) FTA 1973: the existing provision gives the CC the power to apply to a court for a finding that a defaulter has failed without a reasonable excuse to comply with a notice; if the court does make such a finding, it can punish the defaulter as though he or she had been guilty of contempt of court.

275. The section retains a similar criminal offence to that in section 85(6) FTA 1973 for circumstances where a person intentionally alters, suppresses or destroys documents that he or she has been required to produce.

276. *Subsection (9)* provides that the CC should have regard to a statement of policy (see section 116) in deciding how to make use of the available powers.

277. Sections 111–116 set out how the power to impose a monetary penalty will operate. The CC will have discretion about whether to impose a fixed penalty or a daily rate penalty, or both. A daily rate penalty, once set, will accumulate for a period until: the requested information is provided, or the date of publication or handing over of the CC's report on the reference or, where no report is published or handed over, the latest date on which the report could have been published or handed over. The Commission may determine an earlier date at its discretion.

278. The Secretary of State will determine by order the maximum fixed and daily rate penalties that the CC will be able to impose up to the maximum of £30,000 and £15,000 respectively set out in section 111(7). Before setting or altering the maximum penalties, the Secretary of State must consult the CC and such other persons as she considers appropriate. In each case, the actual level of penalty shall be an amount that the CC considers appropriate in all the circumstances of the case. Receipts from the exercise of the power will be paid into the Consolidated Fund.

279. Parties will have a right of appeal to the CAT against decisions to impose monetary penalties allowing for a full reconsideration of the matter. A party may appeal where it is aggrieved by the imposition of the penalty, the amount of the penalty, or the date by which the penalty is required to be paid. The requirement to pay a penalty is suspended until the case is determined. The CAT may cancel or reduce (not increase) the penalty or amend the date or dates by which penalties have to be paid.

280. Section 116 requires the CC to consult on and then to publish a statement of policy in relation to the enforcement of notices under section 109. It will include the considerations that will be relevant to determining the nature and amount of any monetary penalty. These considerations will be for the CC to identify, but it is envisaged that they could include:

- the nature and gravity of the omission;
- the size and financial resources of the defaulter;
- the size of penalty that will encourage the party to co-operate;
- the scale of costs and other disbenefits that will be incurred by the CC if an inquiry has to be extended to take account of information provided late.

281. Section 117 retains the existing section 93B FTA 1973 offence for the circumstances where a person supplies false or misleading information to the CC, the OFT or the Secretary of State. The penalty for this offence is imprisonment or a fine or both.

Reports

Section 118: Excisions from reports

282. This section permits the Secretary of State to exclude information from the versions of the OFT's or CC's reports that she publishes under sections 44, 50, 61 or 65. *Subsection (4)* also provides that the body that has prepared the report will advise the Secretary of State on excisions.

Section 119: Minority reports of Commission

283. This section permits members of CC reporting groups for merger inquiries who disagree with the decisions of the majority to publish their dissenting views as part of the report on a reference.

Miscellaneous

Section 120: Review of decisions under Part 3

284. This section allows decisions taken by the OFT, CC or Secretary of State in connection with a merger reference or possible merger reference to be reviewed by the CAT. The grounds of review are those that would be applied by a court on an application for judicial review. Case law suggests such grounds could include: (i) that an error of law was made; (ii) that there was a material procedural error, such as a material failure of an inquiry panel to comply with the Chairman's procedural rules; (iii) that a material error as to the facts has been made; and (iv) that there was some other material illegality (such as unreasonableness or lack of proportionality). Judicial review evolves over time and the approach in *subsection (6)* has been taken to ensure the grounds of review continue to mirror any such developments.

Section 121: Fees

285. This section provides that the Secretary of State may, by order, require fees to be paid to her, or the OFT for the exercise of their merger regulation functions, and those of the CC. It provides that the order may specify that fees are payable in public interest cases, special public interest cases and mergers of water and newspaper enterprises, as well as cases referred on competition grounds under sections 22 and 33. This section replaces section 152 Companies Act 1989.

Section 122: Primacy of Community law

286. This section ensures that advice or information published by the competition authorities by virtue of section 106 covers the effect of Community law where appropriate. *Subsections (3)-(5)* also ensure that a reference can be made under the domestic regime following a delay arising from the operation of the ECMR.

Section 123: Power to alter the share of supply test

287. This section provides a power for the Secretary of State to amend or replace the share of supply test set out in section 23. In exercising this power, the Secretary of State must have regard to the desirability of ensuring that any amended or new condition continues to operate by reference to the degree of commercial strength which may result from the merger. The Secretary of State must also consult the OFT and the Commission before making an order.

Section 125: Offences by bodies corporate

288. This section provides for the circumstances in which individual officers of companies, partners of Scottish partnerships and members of limited liability partnerships may be held responsible for the conduct of their companies or partnerships in committing offences. Offences may be attributable to consent and connivance, or to neglect.

Section 126: Service of documents

289. This section sets out how any document served on any person (individual, body corporate, partnership or limited liability partnership) under the merger provisions may be served.

Section 127: Associated persons

290. This section explains, in particular for the purpose of deciding whether enterprises have come under common control or ownership, which persons will be considered to be "associated persons" under this model and therefore to be treated as one person. This includes relatives, trustees and business partners. The term "relative" is also defined in this section for further clarification. This section reflects and updates section 77 FTA 1973.

Section 128: Supply of services and market for services etc.

291. This section follows the definition of 'supply of services' in section 137(3) of the FTA 1973, with two modifications. The first modification is the inclusion of new *subsection (4)*, which provides that the supply of services includes making arrangements for a person to receive computer software or data such as information, music or photographs. This is intended to cover electronic supply. Such persons are not receiving anything in physical form and so might not otherwise be receiving 'goods'. This provision ensures that such consumers will be considered to be receiving a service. The second change is the omission from the definition of 'supply of services' of provisions corresponding to sections 137(3)(c), (d), (e) and (g) of the FTA 1973, which relate to the making of arrangements to permit the use of land in certain specified circumstances. The Secretary of State is however given a power by order to extend the definition of the supply of services involving arrangements permitting the use of land as in section 137(3A) of the FTA 1973. It is intended that this order-making power will be used to reinstate those provisions relating to the use of land in section 137(3) that are relevant to this Part before this Part of the Act comes into force.