



Enterprise Act 2002

2002 CHAPTER 40

PART 3

MERGERS

CHAPTER 1

DUTY TO MAKE REFERENCES

Duty to make references: completed mergers

22 Duty to make references in relation to completed mergers

- (1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that—
 - (a) a relevant merger situation has been created; and
 - (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
- (2) The OFT may decide not to make a reference under this section if it believes that—
 - (a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission; or
 - (b) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned.
- (3) No reference shall be made under this section if—
 - (a) the making of the reference is prevented by section 69(1), 74(1) or 96(3) or paragraph 4 of Schedule 7;

Status: This is the original version (as it was originally enacted).

- (b) the OFT is considering whether to accept undertakings under section 73 instead of making such a reference;
 - (c) the relevant merger situation concerned is being, or has been, dealt with in connection with a reference made under section 33;
 - (d) a notice under section 42(2) is in force in relation to the matter or the matter to which such a notice relates has been finally determined under Chapter 2 otherwise than in circumstances in which a notice is then given to the OFT under section 56(1); or
 - (e) the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others) under article 22(3) of the European Merger Regulations, is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request.
- (4) A reference under this section shall, in particular, specify—
- (a) the enactment under which it is made; and
 - (b) the date on which it is made.
- (5) The references in this section to the creation of a relevant merger situation shall be construed in accordance with section 23, the reference in subsection (2) of this section to relevant customer benefits shall be construed in accordance with section 30 and the reference in subsection (3) of this section to a matter to which a notice under section 42(2) relates being finally determined under Chapter 2 shall be construed in accordance with section 43(4) and (5).
- (6) In this Part “market in the United Kingdom” includes—
- (a) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory; and
 - (b) any market which operates only in a part of the United Kingdom;
- and references to a market for goods or services include references to a market for goods and services.
- (7) In this Part “the decision-making authority” means—
- (a) in the case of a reference or possible reference under this section or section 33, the OFT or (as the case may be) the Commission; and
 - (b) in the case of a notice or possible notice under section 42(2) or 59(2) or a reference or possible reference under section 45 or 62, the OFT, the Commission or (as the case may be) the Secretary of State.

23 Relevant merger situations

- (1) For the purposes of this Part, a relevant merger situation has been created if—
- (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and
 - (b) the value of the turnover in the United Kingdom of the enterprise being taken over exceeds £70 million.
- (2) For the purposes of this Part, a relevant merger situation has also been created if—
- (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and

Status: This is the original version (as it was originally enacted).

- (b) as a result, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent.
- (3) The condition mentioned in this subsection is that, in relation to the supply of goods of any description, at least one-quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom—
 - (a) are supplied by one and the same person or are supplied to one and the same person; or
 - (b) are supplied by the persons by whom the enterprises concerned are carried on, or are supplied to those persons.
- (4) The condition mentioned in this subsection is that, in relation to the supply of services of any description, the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is to the extent of at least one-quarter—
 - (a) supply by one and the same person, or supply for one and the same person; or
 - (b) supply by the persons by whom the enterprises concerned are carried on, or supply for those persons.
- (5) For the purpose of deciding whether the proportion of one-quarter mentioned in subsection (3) or (4) is fulfilled with respect to goods or (as the case may be) services of any description, the decision-making authority shall apply such criterion (whether value, cost, price, quantity, capacity, number of workers employed or some other criterion, of whatever nature), or such combination of criteria, as the decision-making authority considers appropriate.
- (6) References in subsections (3) and (4) to the supply of goods or (as the case may be) services shall, in relation to goods or services of any description which are the subject of different forms of supply, be construed in whichever of the following ways the decision-making authority considers appropriate—
 - (a) as references to any of those forms of supply taken separately;
 - (b) as references to all those forms of supply taken together; or
 - (c) as references to any of those forms of supply taken in groups.
- (7) For the purposes of subsection (6) the decision-making authority may treat goods or services as being the subject of different forms of supply whenever—
 - (a) the transactions concerned differ as to their nature, their parties, their terms or their surrounding circumstances; and
 - (b) the difference is one which, in the opinion of the decision-making authority, ought for the purposes of that subsection to be treated as a material difference.
- (8) The criteria for deciding when goods or services can be treated, for the purposes of this section, as goods or services of a separate description shall be such as in any particular case the decision-making authority considers appropriate in the circumstances of that case.
- (9) For the purposes of this Chapter, the question whether a relevant merger situation has been created shall be determined as at—
 - (a) in the case of a reference which is treated as having been made under section 22 by virtue of section 37(2), such time as the Commission may determine; and
 - (b) in any other case, immediately before the time when the reference has been, or is to be, made.

24 Time-limits and prior notice

- (1) For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if—
 - (a) the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is to be made and did so not more than four months before that day; or
 - (b) notice of material facts about the arrangements or transactions under or in consequence of which the enterprises have ceased to be distinct enterprises has not been given in accordance with subsection (2).
- (2) Notice of material facts is given in accordance with this subsection if—
 - (a) it is given to the OFT prior to the entering into of the arrangements or transactions concerned or the facts are made public prior to the entering into of those arrangements or transactions; or
 - (b) it is given to the OFT, or the facts are made public, more than four months before the day on which the reference is to be made.
- (3) In this section—
 - “made public” means so publicised as to be generally known or readily ascertainable; and
 - “notice” includes notice which is not in writing.

25 Extension of time-limits

- (1) The OFT and the persons carrying on the enterprises which have or may have ceased to be distinct enterprises may agree to extend by no more than 20 days the four month period mentioned in section 24(1)(a) or (2)(b).
- (2) The OFT may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2)(b) if it considers that any of those persons has failed to provide, within the period stated in a notice under section 31 and in the manner authorised or required, information requested of him in that notice.
- (3) An extension under subsection (2) shall be for the period beginning with the end of the period within which the information is to be provided and which is stated in the notice under section 31 and ending with—
 - (a) the provision of the information to the satisfaction of the OFT; or
 - (b) if earlier, the cancellation by the OFT of the extension.
- (4) The OFT may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2)(b) if it is seeking undertakings from any of those persons under section 73.
- (5) An extension under subsection (4) shall be for the period beginning with the receipt of the notice under that subsection and ending with the earliest of the following events—
 - (a) the giving of the undertakings concerned;
 - (b) the expiry of the period of 10 days beginning with the first day after the receipt by the OFT of a notice from the person who has been given a notice under subsection (4) and from whom the undertakings are being sought stating that he does not intend to give the undertakings; or

- (c) the cancellation by the OFT of the extension.
- (6) The OFT may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2)(b) if the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others) under article 22(3) of the European Merger Regulations (but is not yet proceeding with the matter in pursuance of such a request).
- (7) An extension under subsection (6) shall be for the period beginning with the receipt of the notice under that subsection and ending with the receipt of a notice under subsection (8).
- (8) The OFT shall, in connection with any notice given by it under subsection (6), by notice inform the persons carrying on the enterprises which have or may have ceased to be distinct enterprises of the completion by the European Commission of its consideration of the request of the United Kingdom.
- (9) Subject to subsections (10) and (11), where the four month period mentioned in section 24(1)(a) or (2)(b) is extended or further extended by virtue of this section in relation to a particular case, any reference to that period in section 24 or the preceding provisions of this section shall have effect in relation to that case as if it were a reference to a period equivalent to the aggregate of the period being extended and the period of the extension (whether or not those periods overlap in time).
- (10) Subsection (11) applies where—
 - (a) the four month period mentioned in section 24(1)(a) or (2)(b) is further extended;
 - (b) the further extension and at least one previous extension is made under one or more of subsections (2), (4) and (6); and
 - (c) the same days or fractions of days are included in or comprise the further extension and are included in or comprise at least one such previous extension.
- (11) In calculating the period of the further extension, any days or fractions of days of the kind mentioned in subsection (10)(c) shall be disregarded.
- (12) No more than one extension is possible under subsection (1).

26 Enterprises ceasing to be distinct enterprises

- (1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control).
- (2) Enterprises shall, in particular, be treated as being under common control if they are—
 - (a) enterprises of interconnected bodies corporate;
 - (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
 - (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.
- (3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on

Status: This is the original version (as it was originally enacted).

an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2), be treated as having control of it.

- (4) For the purposes of subsection (1), in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if—
- (a) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate; or
 - (b) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy.

27 Time when enterprises cease to be distinct

- (1) Subsection (2) applies in relation to any arrangements or transaction—
- (a) not having immediate effect or having immediate effect only in part; but
 - (b) under or in consequence of which any two enterprises cease to be distinct enterprises.
- (2) The time when the parties to any such arrangements or transaction become bound to such extent as will result, on effect being given to their obligations, in the enterprises ceasing to be distinct enterprises shall be taken to be the time at which the two enterprises cease to be distinct enterprises.
- (3) In accordance with subsections (1) and (2) (but without prejudice to the generality of those subsections) for the purpose of determining the time at which any two enterprises cease to be distinct enterprises no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied.
- (4) Subsections (1) to (3) are subject to subsections (5) to (8) and section 29.
- (5) The decision-making authority may, for the purposes of a reference, treat successive events to which this subsection applies as having occurred simultaneously on the date on which the latest of them occurred.
- (6) Subsection (5) applies to successive events—
- (a) which occur within a period of two years under or in consequence of the same arrangements or transaction, or successive arrangements or transactions between the same parties or interests; and
 - (b) by virtue of each of which, under or in consequence of the arrangements or the transaction or transactions concerned, any enterprises cease as between themselves to be distinct enterprises.
- (7) The decision-making authority may, for the purposes of subsections (5) and (6), treat such arrangements or transactions as the decision-making authority considers appropriate as arrangements or transactions between the same interests.
- (8) In deciding whether it is appropriate to treat arrangements or transactions as arrangements or transactions between the same interests the decision-making authority shall, in particular, have regard to the persons substantially concerned in the arrangements or transactions concerned.

28 Turnover test

- (1) For the purposes of section 23 the value of the turnover in the United Kingdom of the enterprise being taken over shall be determined by taking the total value of the turnover in the United Kingdom of the enterprises which cease to be distinct enterprises and deducting—
 - (a) the turnover in the United Kingdom of any enterprise which continues to be carried on under the same ownership and control; or
 - (b) if no enterprise continues to be carried on under the same ownership and control, the turnover in the United Kingdom which, of all the turnovers concerned, is the turnover of the highest value.
- (2) For the purposes of this Part (other than section 121(4)(c)(ii)) the turnover in the United Kingdom of an enterprise shall be determined in accordance with such provisions as may be specified in an order made by the Secretary of State.
- (3) An order under subsection (2) may, in particular, make provision as to—
 - (a) the amounts which are, or which are not, to be treated as comprising an enterprise's turnover;
 - (b) the date or dates by reference to which an enterprise's turnover is to be determined;
 - (c) the connection with the United Kingdom by virtue of which an enterprise's turnover is turnover in the United Kingdom.
- (4) An order under subsection (2) may, in particular, make provision enabling the decision-making authority to determine matters of a description specified in the order (including any of the matters mentioned in paragraphs (a) to (c) of subsection (3)).
- (5) The OFT shall—
 - (a) keep under review the sum for the time being mentioned in section 23(1)(b); and
 - (b) from time to time advise the Secretary of State as to whether the sum is still appropriate.
- (6) The Secretary of State may by order amend section 23(1)(b) so as to alter the sum for the time being mentioned there.

29 Obtaining control by stages

- (1) Where an enterprise is brought under the control of a person or group of persons in the course of two or more transactions (in this section a “series of transactions”) to which subsection (2) applies, those transactions may, if the decision-making authority considers it appropriate, be treated for the purposes of a reference as having occurred simultaneously on the date on which the latest of them occurred.
- (2) This subsection applies to—
 - (a) any transaction which—
 - (i) enables that person or group of persons directly or indirectly to control or materially to influence the policy of any person carrying on the enterprise;
 - (ii) enables that person or group of persons to do so to a greater degree; or
 - (iii) is a step (whether direct or indirect) towards enabling that person or group of persons to do so; and

Status: This is the original version (as it was originally enacted).

- (b) any transaction by virtue of which that person or group of persons acquires a controlling interest in the enterprise or, where the enterprise is carried on by a body corporate, in that body corporate.
- (3) Where a series of transactions includes a transaction falling within subsection (2)(b), any transaction occurring after the occurrence of that transaction is to be disregarded for the purposes of subsection (1).
- (4) Where the period within which a series of transactions occurs exceeds two years, the transactions that may be treated as mentioned in subsection (1) are any of those transactions that occur within a period of two years.
- (5) Sections 26(2) to (4) and 127(1), (2) and (4) to (6) shall apply for the purposes of this section to determine—
 - (a) whether an enterprise is brought under the control of a person or group of persons; and
 - (b) whether a transaction is one to which subsection (2) applies;
 as they apply for the purposes of section 26 to determine whether enterprises are brought under common control.
- (6) In determining for the purposes of this section the time at which any transaction occurs, no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied.

30 Relevant customer benefits

- (1) For the purposes of this Part a benefit is a relevant customer benefit if—
 - (a) it is a benefit to relevant customers in the form of—
 - (i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market or markets in which the substantial lessening of competition concerned has, or may have, occurred or (as the case may be) may occur); or
 - (ii) greater innovation in relation to such goods or services; and
 - (b) the decision-making authority believes—
 - (i) in the case of a reference or possible reference under section 22 or 45(2), as mentioned in subsection (2); and
 - (ii) in the case of a reference or possible reference under section 33 or 45(4), as mentioned in subsection (3).
- (2) The belief, in the case of a reference or possible reference under section 22 or section 45(2), is that—
 - (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and
 - (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
- (3) The belief, in the case of a reference or possible reference under section 33 or 45(4), is that—
 - (a) the benefit may be expected to accrue within a reasonable period as a result of the creation of the relevant merger situation concerned; and

- (b) the benefit is unlikely to accrue without the creation of that situation or a similar lessening of competition.
- (4) In subsection (1) “relevant customers” means—
- (a) customers of any person carrying on an enterprise which, in the creation of the relevant merger situation concerned, has ceased to be, or (as the case may be) will cease to be, a distinct enterprise;
 - (b) customers of such customers; and
 - (c) any other customers in a chain of customers beginning with the customers mentioned in paragraph (a);
- and in this subsection “customers” includes future customers.

31 Information powers in relation to completed mergers

- (1) The OFT may by notice to any of the persons carrying on the enterprises which have or may have ceased to be distinct enterprises request him to provide the OFT with such information as the OFT may require for the purpose of deciding whether to make a reference under section 22.
- (2) The notice shall state—
- (a) the information required;
 - (b) the period within which the information is to be provided; and
 - (c) the possible consequences of not providing the information within the stated period and in the authorised or required manner.

32 Supplementary provision for purposes of sections 25 and 31

- (1) The Secretary of State may make regulations for the purposes of sections 25 and 31.
- (2) The regulations may, in particular—
- (a) provide for the manner in which any information requested by the OFT under section 31 is authorised or required to be provided, and the time at which such information is to be treated as provided (including the time at which it is to be treated as provided to the satisfaction of the OFT for the purposes of section 25(3));
 - (b) provide for the persons carrying on the enterprises which have or may have ceased to be distinct enterprises to be informed, in circumstances in which section 25(3) applies—
 - (i) of the fact that the OFT is satisfied as to the provision of the information requested by it or (as the case may be) of the OFT’s decision to cancel the extension; and
 - (ii) of the time at which the OFT is to be treated as so satisfied or (as the case may be) of the time at which the cancellation is to be treated as having effect;
 - (c) provide for the persons carrying on the enterprises which have or may have ceased to be distinct enterprises to be informed, in circumstances in which section 25(5) applies—
 - (i) of the OFT’s decision to cancel the extension; and
 - (ii) of the time at which the cancellation is to be treated as having effect;
 - (d) provide for the time at which any notice under section 25(4), (5)(b), (6) or (8) is to be treated as received;

Status: This is the original version (as it was originally enacted).

- (e) provide that a person is, or is not, to be treated, in such circumstances as may be specified in the regulations, as acting on behalf of a person carrying on an enterprise which has or may have ceased to be a distinct enterprise.
- (3) A notice under section 25(2)—
- (a) shall be given within 5 days of the end of the period within which the information is to be provided and which is stated in the notice under section 31; and
 - (b) shall inform the person to whom it is addressed of—
 - (i) the OFT's opinion as mentioned in section 25(2); and
 - (ii) the OFT's intention to extend the period for considering whether to make a reference.
- (4) In determining for the purposes of section 25(1) or (5)(b) or subsection (3)(a) above any period which is expressed in the enactment concerned as a period of days or number of days no account shall be taken of—
- (a) Saturday, Sunday, Good Friday and Christmas Day; and
 - (b) any day which is a bank holiday in England and Wales.