



Enterprise Act 2002

2002 CHAPTER 40

PART 3

MERGERS

CHAPTER 2

PUBLIC INTEREST CASES

Power to make references

42 Intervention by Secretary of State in certain public interest cases

- (1) Subsection (2) applies where—
- (a) the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (b) no reference under section 22 or 33 has been made in relation to the relevant merger situation concerned;
 - (c) no decision has been made not to make such a reference (other than a decision made by virtue of subsection (2)(b) of section 33 or a decision to accept undertakings under section 73 instead of making such a reference); and
 - (d) no reference is prevented from being made under section 22 or 33 by virtue of—
 - (i) section 22(3)(a) or (e) or (as the case may be) 33(3)(a) or (e); or
 - (ii) Community law or anything done under or in accordance with it.
- (2) The Secretary of State may give a notice to the OFT (in this Part “an intervention notice”) if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.

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- (3) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 58 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.
- (4) No more than one intervention notice shall be given under subsection (2) in relation to the same relevant merger situation.
- (5) For the purposes of deciding whether a relevant merger situation has been created or whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, sections 23 to 32 (read together with section 34) shall apply for the purposes of this Chapter as they do for the purposes of Chapter 1 but subject to subsection (6).
- (6) In their application by virtue of subsection (5) sections 23 to 32 shall have effect as if—
- (a) for paragraph (a) of section 23(9) there were substituted—
 - “(a) in relation to the giving of an intervention notice, the time when the notice is given;
 - (aa) in relation to the making of a report by the OFT under section 44, the time of the making of the report;
 - (ab) in the case of a reference which is treated as having been made under section 45(2) or (3) by virtue of section 49(1), such time as the Commission may determine; and”;
 - (b) the references to the OFT in sections 25(1) to (3), (6) and (8) and 31 included references to the Secretary of State;
 - (c) the references to the OFT in section 25(4) and (5) were references to the Secretary of State;
 - (d) the reference in section 25(4) to section 73 were a reference to paragraph 3 of Schedule 7;
 - (e) after section 25(5) there were inserted—
 - “(5A) The Secretary of State 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, by virtue of section 46(5) or paragraph 3(6) of Schedule 7, he decides to delay a decision as to whether to make a reference under section 45.
 - (5B) An extension under subsection (5A) shall be for the period of the delay.”;
 - (f) in section 25(10)(b) after the word “(4)” there were inserted “, (5A)”;
 - (g) the reference in section 25(12) to one extension were a reference to one extension by the OFT and one extension by the Secretary of State;
 - (h) the powers to extend time-limits under section 25 as applied by subsection (5) above, and the power to request information under section 31(1) as so applied, were not exercisable by the OFT or the Secretary of State before the giving of an intervention notice but the existing time-limits in relation to possible references under section 22 or 33 were applicable for the purposes of the giving of that notice;
 - (i) the existing time-limits in relation to possible references under section 22 or 33 (except for extensions under section 25(4)) remained applicable on and after the giving of an intervention notice as if any extensions were made under

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- section 25 as applied by subsection (5) above but subject to further alteration by the OFT or the Secretary of State under section 25 as so applied;
- (j) in subsection (1) of section 31 for the words “section 22” there were substituted “section 45(2) or (3)” and, in the application of that subsection to the OFT, for the word “deciding” there were substituted “enabling the Secretary of State to decide”;
 - (k) in the case of the giving of intervention notices, the references in sections 23 to 32 to the making of a reference or a reference were, so far as necessary, references to the giving of an intervention notice or an intervention notice; and
 - (l) the references to the OFT in section 32(2)(a) to (c) and (3) were construed in accordance with the above modifications.
- (7) Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised, he shall, as soon as practicable, take such action as is within his power to ensure that it is finalised.
- (8) For the purposes of this Part a public interest consideration is finalised if—
- (a) it is specified in section 58 otherwise than by virtue of an order under subsection (3) of that section; or
 - (b) it is specified in that section by virtue of an order under subsection (3) of that section and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with subsection (7) of section 124 and within the period mentioned in that subsection.

43 Intervention notices under section 42

- (1) An intervention notice shall state—
- (a) the relevant merger situation concerned;
 - (b) the public interest consideration or considerations which are, or may be, relevant to a consideration of the relevant merger situation concerned; and
 - (c) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.
- (2) Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to a consideration of the relevant merger situation concerned, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate.
- (3) An intervention notice shall come into force when it is given and shall cease to be in force when the matter to which it relates is finally determined under this Chapter.
- (4) For the purposes of this Part, a matter to which an intervention notice relates is finally determined under this Chapter if—
- (a) the time within which the OFT is to report to the Secretary of State under section 44 has expired and no such report has been made;
 - (b) the Secretary of State decides to accept an undertaking or group of undertakings under paragraph 3 of Schedule 7 instead of making a reference under section 45;
 - (c) the Secretary of State otherwise decides not to make a reference under that section;
 - (d) the Commission cancels such a reference under section 48(1) or 53(1);

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- (e) the time within which the Commission is to prepare a report under section 50 and give it to the Secretary of State has expired and no such report has been prepared and given to the Secretary of State;
 - (f) the time within which the Secretary of State is to make and publish a decision under section 54(2) has expired and no such decision has been made and published;
 - (g) the Secretary of State decides under section 54(2) to make no finding at all in the matter;
 - (h) the Secretary of State otherwise decides under section 54(2) not to make an adverse public interest finding;
 - (i) the Secretary of State decides under section 54(2) to make an adverse public interest finding but decides neither to accept an undertaking under paragraph 9 of Schedule 7 nor to make an order under paragraph 11 of that Schedule; or
 - (j) the Secretary of State decides under section 54(2) to make an adverse public interest finding and accepts an undertaking under paragraph 9 of Schedule 7 or makes an order under paragraph 11 of that Schedule.
- (5) For the purposes of this Part the time when a matter to which an intervention notice relates is finally determined under this Chapter is—
- (a) in a case falling within subsection (4)(a), (e) or (f), the expiry of the time concerned;
 - (b) in a case falling within subsection (4)(b), the acceptance of the undertaking or group of undertakings concerned;
 - (c) in a case falling within subsection (4)(c), (d), (g) or (h), the making of the decision concerned;
 - (d) in a case falling within subsection (4)(i), the making of the decision neither to accept an undertaking under paragraph 9 of Schedule 7 nor to make an order under paragraph 11 of that Schedule; and
 - (e) in a case falling within subsection (4)(j), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.

44 Investigation and report by OFT

- (1) Subsection (2) applies where the Secretary of State has given an intervention notice in relation to a relevant merger situation.
- (2) The OFT shall, within such period as the Secretary of State may require, give a report to the Secretary of State in relation to the case.
- (3) The report shall contain—
 - (a) advice from the OFT on the considerations relevant to the making of a reference under section 22 or 33 which are also relevant to the Secretary of State's decision as to whether to make a reference under section 45; and
 - (b) a summary of any representations about the case which have been received by the OFT and which relate to any public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under section 45.
- (4) The report shall, in particular, include decisions as to whether the OFT believes that it is, or may be, the case that—

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- (a) a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (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;
 - (c) the market or markets concerned would not be of sufficient importance to justify the making of a reference to the Commission under section 22 or 33;
 - (d) in the case of arrangements which are in progress or in contemplation, the arrangements are not sufficiently far advanced, or not sufficiently likely to proceed, to justify the making of such a reference;
 - (e) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition and any adverse effects of the substantial lessening of competition; or
 - (f) it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings under paragraph 3 of Schedule 7.
- (5) If the OFT believes that it is or may be the case that it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings under paragraph 3 of Schedule 7, the report shall contain descriptions of the undertakings which the OFT believes are, or may be, appropriate.
- (6) The report may, in particular, include advice and recommendations on any public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under section 45.
- (7) The OFT shall carry out such investigations as it considers appropriate for the purposes of producing a report under this section.

45 Power of Secretary of State to refer matter to Commission

- (1) Subsections (2) to (5) apply where the Secretary of State—
- (a) has given an intervention notice in relation to a relevant merger situation; and
 - (b) has received a report of the OFT under section 44 in relation to the matter.
- (2) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
- (a) a relevant merger situation has been created;
 - (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;
 - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
 - (d) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.

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- (3) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
- (a) a relevant merger situation has been created;
 - (b) the creation of that situation has not resulted, and may be expected not to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
 - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
 - (d) taking account only of the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.
- (4) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
- (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
 - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
 - (d) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest.
- (5) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
- (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (b) the creation of that situation may be expected not to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
 - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
 - (d) taking account only of the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest.
- (6) For the purposes of this Chapter any anti-competitive outcome shall be treated as being adverse to the public interest unless it is justified by one or more than one public interest consideration which is relevant.
- (7) This section is subject to section 46.

46 References under section 45: supplementary

- (1) No reference shall be made under section 45 if—

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- (a) the making of the reference is prevented by section 69(1), 74(1) or 96(3) or paragraph 4 of Schedule 7; or
 - (b) 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.
- (2) The Secretary of State, in deciding whether to make a reference under section 45, shall accept the decisions of the OFT included in its report by virtue of subsection (4) of section 44 and any descriptions of undertakings as mentioned in subsection (5) of that section.
- (3) Where the decision to make a reference under section 45 is made at any time on or after the end of the period of 24 weeks beginning with the giving of the intervention notice concerned, the Secretary of State shall, in deciding whether to make such a reference, disregard any public interest consideration which is mentioned in the intervention notice but which has not been finalised before the end of that period.
- (4) Subject to subsection (5), where the decision to make a reference under section 45(2) or (4) is made at any time before the end of the period of 24 weeks beginning with the giving of the intervention notice concerned, the Secretary of State shall, in deciding whether to make such a reference, disregard any public interest consideration which is mentioned in the intervention notice but which has not been finalised if its effect would be to prevent, or to help to prevent, an anti-competitive outcome from being adverse to the public interest.
- (5) The Secretary of State may, if he believes that there is a realistic prospect of the public interest consideration mentioned in subsection (4) being finalised within the period of 24 weeks beginning with the giving of the intervention notice concerned, delay deciding whether to make the reference concerned until the public interest consideration is finalised or, if earlier, the period expires.
- (6) A reference under section 45 shall, in particular, specify—
 - (a) the subsection of that section under which it is made;
 - (b) the date on which it is made; and
 - (c) the public interest consideration or considerations mentioned in the intervention notice concerned which the Secretary of State is not under a duty to disregard by virtue of subsection (3) above and which he believes are or may be relevant to a consideration of the relevant merger situation concerned.