



# Enterprise Act 2002

## 2002 CHAPTER 40

### PART 3

#### MERGERS

### CHAPTER 4

#### ENFORCEMENT

##### *Interim restrictions and powers*

#### **77 Restrictions on certain dealings: completed mergers**

- (1) Subsections (2) and (3) apply where—
  - (a) a reference has been made under section 22 but not finally determined; and
  - (b) no undertakings under section 71 or 80 are in force in relation to the relevant merger situation concerned and no orders under section 72 or 81 are in force in relation to that situation.
- (2) No relevant person shall, without the consent of the Commission—
  - (a) complete any outstanding matters in connection with any arrangements which have resulted in the enterprises concerned ceasing to be distinct enterprises;
  - (b) make any further arrangements in consequence of that result (other than arrangements which reverse that result); or
  - (c) transfer the ownership or control of any enterprises to which the reference relates.
- (3) No relevant person shall, without the consent of the Commission, assist in any of the activities mentioned in paragraphs (a) to (c) of subsection (2).
- (4) The prohibitions in subsections (2) and (3) do not apply in relation to anything which the person concerned is required to do by virtue of any enactment.

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- (5) The consent of the Commission under subsection (2) or (3)—
  - (a) may be general or special;
  - (b) may be revoked by the Commission; and
  - (c) shall be published in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of any person entitled to the benefit of it.
- (6) Paragraph (c) of subsection (5) shall not apply if the Commission considers that publication is not necessary for the purpose mentioned in that paragraph.
- (7) Subsections (2) and (3) shall apply to a person’s conduct outside the United Kingdom if (and only if) he is—
  - (a) a United Kingdom national;
  - (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
  - (c) a person carrying on business in the United Kingdom.
- (8) In this section “relevant person” means—
  - (a) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise;
  - (b) any subsidiary of any person falling within paragraph (a); or
  - (c) any person associated with any person falling within paragraph (a) or any subsidiary of any person so associated.

## **78 Restrictions on certain share dealings: anticipated mergers**

- (1) Subsection (2) applies where—
  - (a) a reference has been made under section 33; and
  - (b) no undertakings under section 80 are in force in relation to the relevant merger situation concerned and no orders under section 81 are in force in relation to that situation.
- (2) No relevant person shall, without the consent of the Commission, directly or indirectly acquire during the relevant period an interest in shares in a company if any enterprise to which the reference relates is carried on by or under the control of that company.
- (3) The consent of the Commission under subsection (2)—
  - (a) may be general or special;
  - (b) may be revoked by the Commission; and
  - (c) shall be published in such manner as the Commission considers appropriate for bringing it to the attention of any person entitled to the benefit of it.
- (4) Paragraph (c) of subsection (3) shall not apply if the Commission considers that publication is not necessary for the purpose mentioned in that paragraph.
- (5) Subsection (2) shall apply to a person’s conduct outside the United Kingdom if (and only if) he is—
  - (a) a United Kingdom national;
  - (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
  - (c) a person carrying on business in the United Kingdom.

- (6) In this section and section 79—
- “company” includes any body corporate;
  - “relevant period” means the period beginning with the making of the reference concerned and ending when the reference is finally determined;
  - “relevant person” means—
    - (a) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise;
    - (b) any subsidiary of any person falling within paragraph (a); or
    - (c) any person associated with any person falling within paragraph (a) or any subsidiary of any person so associated; and
  - “share” means share in the capital of a company, and includes stock.

## **79 Sections 77 and 78: further interpretation provisions**

- (1) For the purposes of this Part a reference under section 22 or 33 is finally determined if—
- (a) the reference is cancelled under section 37(1);
  - (b) the time within which the Commission is to prepare and publish a report under section 38 in relation to the reference has expired and no such report has been prepared and published;
  - (c) the report of the Commission under section 38 contains the decision that there is not an anti-competitive outcome;
  - (d) the report of the Commission under section 38 contains the decision that there is an anti-competitive outcome and the Commission has decided under section 41(2) neither to accept an undertaking under section 82 nor to make an order under section 84; or
  - (e) the report of the Commission under section 38 contains the decision that there is an anti-competitive outcome and the Commission has decided under section 41(2) to accept an undertaking under section 82 or to make an order under section 84.
- (2) For the purposes of this Part the time when a reference under section 22 or 33 is finally determined is—
- (a) in a case falling within subsection (1)(a), the making of the decision concerned;
  - (b) in a case falling within subsection (1)(b), the expiry of the time concerned;
  - (c) in a case falling within subsection (1)(c), the publication of the report;
  - (d) in a case falling within subsection (1)(d), the making of the decision under section 41(2); and
  - (e) in a case falling within subsection (1)(e), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.
- (3) For the purposes of section 78 and subject to subsection (4) below, the circumstances in which a person acquires an interest in shares include those where—
- (a) he enters into a contract to acquire the shares (whether or not for cash);
  - (b) he is not the registered holder but acquires the right to exercise, or to control the exercise of, any right conferred by the holding of the shares; or
  - (c) he—

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- (i) acquires a right to call for delivery of the shares to himself or to his order or to acquire an interest in the shares; or
  - (ii) assumes an obligation to acquire such an interest.
- (4) The circumstances in which a person acquires an interest in shares for the purposes of section 78 do not include those where he acquires an interest in pursuance of an obligation assumed before the publication by the OFT of the reference concerned.
- (5) The circumstances in which a person acquires a right mentioned in subsection (3)—
  - (a) include those where he acquires a right, or assumes an obligation, whose exercise or fulfilment would give him that right; but
  - (b) do not include those where he is appointed as proxy to vote at a specified meeting of a company or of any class of its members or at any adjournment of the meeting or he is appointed by a corporation to act as its representative at any meeting of the company or of any class of its members.
- (6) References to rights and obligations in subsections (3) to (5) include conditional rights and conditional obligations.
- (7) References in sections 77 and 78 to a person carrying on or having control of any enterprise includes a group of persons carrying on or having control of an enterprise and any member of such a group.
- (8) Sections 26(2) to (4) and 127(1), (2) and (4) to (6) shall apply for the purposes of sections 77 and 78 to determine whether any person or group of persons has control of any enterprise and whether persons are associated as they apply for the purposes of section 26 to determine whether enterprises are brought under common control.
- (9) Sections 736 and 736A of the Companies Act 1985 (c. 6) shall apply for the purposes of sections 77 and 78 to determine whether a company is a subsidiary of an individual or of a group of persons as they apply to determine whether it is a subsidiary of a company; and references to a subsidiary in subsections (8) and (9) of section 736A as so applied shall be construed accordingly.

## **80 Interim undertakings**

- (1) Subsections (2) and (3) apply where a reference under section 22 or 33 has been made but is not finally determined.
- (2) The Commission may, for the purpose of preventing pre-emptive action, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
- (3) The Commission may, for the purpose of preventing pre-emptive action, adopt an undertaking accepted by the OFT under section 71 if the undertaking is still in force when the Commission adopts it.
- (4) An undertaking adopted under subsection (3)—
  - (a) shall continue in force, in accordance with its terms, when adopted;
  - (b) may be varied or superseded by an undertaking under this section; and
  - (c) may be released by the Commission.
- (5) Any other undertaking under this section—
  - (a) shall come into force when accepted;

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- (b) may be varied or superseded by another undertaking; and
  - (c) may be released by the Commission.
- (6) References in this Part to undertakings under this section shall, unless the context otherwise requires, include references to undertakings adopted under this section; and references to the acceptance or giving of undertakings under this section shall be construed accordingly.
- (7) An undertaking which is in force under this section in relation to a reference under section 22 or 33 shall cease to be in force if an order under section 81 comes into force in relation to that reference.
- (8) An undertaking under this section shall, if it has not previously ceased to be in force, cease to be in force when the reference under section 22 or 33 is finally determined.
- (9) The Commission shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.
- (10) In this section and section 81 “pre-emptive action” means action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the Commission’s decisions on the reference.

## **81 Interim orders**

- (1) Subsections (2) and (3) apply where a reference has been made under section 22 or 33 but is not finally determined.
- (2) The Commission may by order, for the purpose of preventing pre-emptive action—
- (a) prohibit or restrict the doing of things which the Commission considers would constitute pre-emptive action;
  - (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
  - (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
  - (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.
- (3) The Commission may, for the purpose of preventing pre-emptive action, adopt an order made by the OFT under section 72 if the order is still in force when the Commission adopts it.
- (4) An order adopted under subsection (3)—
- (a) shall continue in force, in accordance with its terms, when adopted; and
  - (b) may be varied or revoked by an order under this section.
- (5) Any other order under this section—
- (a) shall come into force at such time as is determined by or under the order; and
  - (b) may be varied or revoked by another order.
- (6) References in this Part to orders under this section shall, unless the context otherwise requires, include references to orders adopted under this section; and references to the making of orders under this section shall be construed accordingly.

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- (7) An order which is in force under this section in relation to a reference under section 22 or 33 shall cease to be in force if an undertaking under section 80 comes into force in relation to that reference.
- (8) An order under this section shall, if it has not previously ceased to be in force, cease to be in force when the reference under section 22 or 33 is finally determined.
- (9) The Commission shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section.