



Enterprise Act 2002

2002 CHAPTER 40

PART 3

MERGERS

CHAPTER 4

ENFORCEMENT

Powers exercisable before references under section 22 or 33

71 Initial undertakings: completed mergers

- (1) Subsection (2) applies where the OFT is considering whether to make a reference under section 22.
- (2) The OFT 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) No undertaking shall be accepted under subsection (2) unless the OFT has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created.
- (4) An undertaking under this section—
 - (a) shall come into force when accepted;
 - (b) may be varied or superseded by another undertaking; and
 - (c) may be released by the OFT.
- (5) An undertaking which—
 - (a) is in force under this section in relation to a possible reference or reference under section 22; and
 - (b) has not been adopted under section 80 or paragraph 1 of Schedule 7;

Status: This is the original version (as it was originally enacted).

shall cease to be in force if an order under section 72 or 81 comes into force in relation to that reference or an order under paragraph 2 of that Schedule comes into force in relation to the matter.

- (6) An undertaking under this section shall, if it has not previously ceased to be in force and if it has not been adopted under section 80 or paragraph 1 of Schedule 7, cease to be in force—
- (a) where the OFT has decided to make the reference concerned under section 22, at the end of the period of 7 days beginning with the making of the reference;
 - (b) where the OFT has decided to accept an undertaking under section 73 instead of making that reference, on the acceptance of that undertaking;
 - (c) where an intervention notice is in force, at the end of the period of 7 days beginning with the giving of that notice; and
 - (d) where the OFT has otherwise decided not to make the reference concerned under section 22, on the making of that decision.
- (7) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.
- (8) In this section and section 72 “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.

72 Initial enforcement orders: completed mergers

- (1) Subsection (2) applies where the OFT is considering whether to make a reference under section 22.
- (2) The OFT may by order, for the purpose of preventing pre-emptive action—
- (a) prohibit or restrict the doing of things which the OFT 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) No order shall be made under subsection (2) unless the OFT has reasonable grounds for suspecting that it is or may be the case that—
- (a) a relevant merger situation has been created; and
 - (b) pre-emptive action is in progress or in contemplation.
- (4) An 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.
- (5) An order which—
- (a) is in force under this section in relation to a possible reference or a reference under section 22; and
 - (b) has not been adopted under section 81 or paragraph 2 of Schedule 7;

shall cease to be in force if an undertaking under section 71 or 80 comes into force in relation to that reference or an undertaking under paragraph 1 of that Schedule comes into force in relation to the matter.

- (6) An order under this section shall, if it has not previously ceased to be in force and if it is not adopted under section 81 or paragraph 2 of Schedule 7, cease to be in force—
- (a) where the OFT has decided to make the reference concerned under section 22, at the end of the period of 7 days beginning with the making of the reference;
 - (b) where the OFT has decided to accept an undertaking under section 73 instead of making that reference, on the acceptance of that undertaking;
 - (c) where an intervention notice is in force, at the end of the period of 7 days beginning with the giving of that notice; and
 - (d) where the OFT has otherwise decided not to make the reference concerned under section 22, on the making of that decision.
- (7) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section.

73 Undertakings in lieu of references under section 22 or 33

- (1) Subsection (2) applies if the OFT considers that it is under a duty to make a reference under section 22 or 33 (disregarding the operation of section 22(3)(b) or (as the case may be) 33(3)(b) but taking account of the power of the OFT under section 22(2) or (as the case may be) 33(2) to decide not to make such a reference).
- (2) The OFT may, instead of making such a reference and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
- (3) In proceeding under subsection (2), the OFT shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
- (4) In proceeding under subsection (2), the OFT may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
- (5) An undertaking under this section—
- (a) shall come into force when accepted;
 - (b) may be varied or superseded by another undertaking; and
 - (c) may be released by the OFT.
- (6) An undertaking under this section which is in force in relation to a relevant merger situation shall cease to be in force if an order comes into force under section 75 or 76 in relation to that undertaking.
- (7) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.

74 Effect of undertakings under section 73

- (1) The relevant authority shall not make a reference under section 22, 33 or 45 in relation to the creation of a relevant merger situation if—
 - (a) the OFT has accepted an undertaking or group of undertakings under section 73; and
 - (b) the relevant merger situation is the situation by reference to which the undertaking or group of undertakings was accepted.
- (2) Subsection (1) does not prevent the making of a reference if material facts about relevant arrangements or transactions, or relevant proposed arrangements or transactions, were not notified (whether in writing or otherwise) to the OFT or made public before any undertaking concerned was accepted.
- (3) For the purposes of subsection (2) arrangements or transactions, or proposed arrangements or transactions, are relevant if they are the ones in consequence of which the enterprises concerned ceased or may have ceased, or may cease, to be distinct enterprises.
- (4) In subsection (2) “made public” means so publicised as to be generally known or readily ascertainable.
- (5) In this section “relevant authority” means—
 - (a) in relation to a possible reference under section 22 or 33, the OFT; and
 - (b) in relation to a possible reference under section 45, the Secretary of State.

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

- (1) Subsection (2) applies where the OFT considers that—
 - (a) an undertaking accepted by it under section 73 has not been, is not being or will not be fulfilled; or
 - (b) in relation to an undertaking accepted by it under that section, information which was false or misleading in a material respect was given to the OFT by the person giving the undertaking before the OFT decided to accept the undertaking.
- (2) The OFT may, for any of the purposes mentioned in section 73(2), make an order under this section.
- (3) Subsections (3) and (4) of section 73 shall apply for the purposes of subsection (2) above as they apply for the purposes of subsection (2) of that section.
- (4) An order under this section may contain—
 - (a) anything permitted by Schedule 8; and
 - (b) such supplementary, consequential or incidental provision as the OFT considers appropriate.
- (5) An order under this section—
 - (a) shall come into force at such time as is determined by or under the order;
 - (b) may contain provision which is different from the provision contained in the undertaking concerned; and
 - (c) may be varied or revoked by another order.

- (6) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section.

76 Supplementary interim order-making power

- (1) Subsection (2) applies where—
- (a) the OFT has the power to make an order under section 75 in relation to a particular undertaking and intends to make such an order; or
 - (b) the Commission has the power to make an order under section 83 in relation to a particular undertaking and intends to make such an order.
- (2) The OFT or (as the case may be) the Commission may, for the purpose of preventing any action which might prejudice the making of that order, make an order under this section.
- (3) No order shall be made under subsection (2) unless the OFT or (as the case may be) the Commission has reasonable grounds for suspecting that it is or may be the case that action which might prejudice the making of the order under section 75 or (as the case may be) 83 is in progress or in contemplation.
- (4) An order under subsection (2) may—
- (a) prohibit or restrict the doing of things which the OFT or (as the case may be) the Commission considers would prejudice the making of the order under section 75 or (as the case may be) 83;
 - (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.
- (5) An 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) An order under this section shall, if it has not previously ceased to be in force, cease to be in force on—
- (a) the coming into force of an order under section 75 or (as the case may be) 83 in relation to the undertaking concerned; or
 - (b) the making of the decision not to proceed with such an order.
- (7) The OFT or (as the case may be) 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.