



Enterprise Act 2002

2002 CHAPTER 40

PART 3

MERGERS

CHAPTER 5

SUPPLEMENTARY

Miscellaneous

120 Review of decisions under Part 3

- (1) Any person aggrieved by a decision of the OFT, the Secretary of State or the Commission under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.
- (2) For this purpose “decision”—
 - (a) does not include a decision to impose a penalty under section 110(1) or (3); but
 - (b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference.
- (3) Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application.
- (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
- (5) The Competition Appeal Tribunal may—
 - (a) dismiss the application or quash the whole or part of the decision to which it relates; and

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- (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal.
- (6) An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal under this section to the appropriate court.
- (7) An appeal under subsection (6) requires the permission of the Tribunal or the appropriate court.
- (8) In this section—
 - “the appropriate court” means the Court of Appeal or, in the case of Tribunal proceedings in Scotland, the Court of Session; and
 - “Tribunal rules” has the meaning given by section 15(1).

121 Fees

- (1) The Secretary of State may by order require the payment to him or the OFT of such fees as may be prescribed by the order in connection with the exercise by the Secretary of State, the OFT and the Commission of their functions under or by virtue of this Part, Part V of the Fair Trading Act 1973 (c. 41) and sections 32 to 34 of, and Schedule 4ZA to, the Water Industry Act 1991 (c. 56).
- (2) An order under this section may, in particular, provide for fees to be payable—
 - (a) in respect of a merger notice;
 - (b) in respect of an application for the consent of the Secretary of State under section 58(1) of the Act of 1973 to the transfer of a newspaper or of newspaper assets; or
 - (c) on the occurrence of any event specified in the order.
- (3) The events that may be specified in an order under this section by virtue of subsection (2)(c) include, in particular—
 - (a) the decision by the OFT in relation to a possible reference under section 22 or 33 that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (b) the decision by the Secretary of State in relation to a possible reference under section 45 that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (c) the decision by the Secretary of State in relation to a possible reference under section 62 that—
 - (i) it is or may be the case that a special merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation; and
 - (ii) one or more than one consideration mentioned in the special intervention notice is relevant to a consideration of the special merger situation concerned; and

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- (d) the decision by the OFT in relation to a possible reference under section 32 of the Act of 1991 that it is or may be the case that arrangements are in progress which, if carried into effect, will result in a merger of any two or more water enterprises or that such a merger has taken place otherwise than as a result of the carrying into effect of arrangements that have been the subject of a reference by virtue of paragraph (a) of that section.
- (4) An order under this section may, in particular, contain provision—
- (a) for ascertaining the persons by whom fees are payable;
 - (b) specifying whether any fee is payable to the Secretary of State or the OFT;
 - (c) for the amount of any fee to be calculated by reference to matters which may include—
 - (i) in a case involving functions of the Secretary of State under sections 57 to 61 of the Act of 1973, the number of newspapers concerned, the number of separate editions (determined in accordance with the order) of each newspaper and the average circulation per day of publication (within the meaning of Part V of that Act) of each newspaper; and
 - (ii) in any other case, the value of the turnover of the enterprises concerned;
 - (d) as to the time when any fee is to be paid; and
 - (e) for the repayment by the Secretary of State or the OFT of the whole or part of any fee in specified circumstances.
- (5) For the purposes of subsection (4)(c)(ii) the turnover of an enterprise shall be determined in accordance with such provisions as may be specified in an order under this section.
- (6) Provision made by virtue of subsection (5) may, in particular, include provision—
- (a) as to the amounts which are, or which are not, to be treated as comprising an enterprise's turnover;
 - (b) as to the date or dates by reference to which an enterprise's turnover is to be determined;
 - (c) restricting the turnover to be taken into consideration to turnover which has a connection of a particular description with the United Kingdom.
- (7) An order under this section may, in particular, in connection with provisions of the kind mentioned in subsection (5) make provision enabling the Secretary of State or the OFT to determine matters of a description specified in the order (including any of the matters mentioned in paragraphs (a) to (c) of subsection (6)).
- (8) In determining the amount of any fees to be prescribed by an order under this section, the Secretary of State may take into account all costs incurred by him and by the OFT in respect of the exercise by him, the OFT and the Commission of their respective functions under or by virtue of this Part, Part V of the Act of 1973 and sections 32 to 34 of, and Schedule 4ZA to, the Act of 1991.
- (9) Fees paid to the Secretary of State or the OFT under this section shall be paid into the Consolidated Fund.
- (10) In this section “newspaper” has the same meaning as in Part V of the Act of 1973.

122 Primacy of Community law

- (1) Advice and information published by virtue of section 106(1) or (3) shall include such advice and information about the effect of Community law, and anything done under or in accordance with it, on the provisions of this Part as the OFT or (as the case may be) the Commission considers appropriate.
- (2) Advice and information published by the OFT by virtue of section 106(1) shall, in particular, include advice and information about the circumstances in which the duties of the OFT under sections 22 and 33 do not apply as a result of the European Merger Regulations or anything done under or in accordance with them.
- (3) The duty or power to make a reference under section 22 or 45(2) or (3), and the power to give an intervention notice under section 42, shall apply in a case in which the relevant enterprises ceased to be distinct enterprises at a time or in circumstances not falling within section 24 if the condition mentioned in subsection (4) is satisfied.
- (4) The condition mentioned in this subsection is that, because of the European Merger Regulations or anything done under or in accordance with them, the reference, or (as the case may be) the reference under section 22 to which the intervention notice relates, could not have been made earlier than 4 months before the date on which it is to be made.
- (5) Where the duty or power to make a reference under section 22 or 45(2) or (3), or the power to give an intervention notice under section 42, applies as mentioned in subsection (3), references in this Part to the creation of a relevant merger situation shall be construed accordingly.

123 Power to alter share of supply test

- (1) The Secretary of State may by order amend or replace the conditions which determine for the purposes of this Part whether a relevant merger situation has been created.
- (2) The Secretary of State shall not exercise his power under subsection (1)—
 - (a) to amend or replace the conditions mentioned in paragraphs (a) and (b) of subsection (1) of section 23;
 - (b) to amend or replace the condition mentioned in paragraph (a) of subsection (2) of that section.
- (3) In exercising his power under subsection (1) to amend or replace the condition mentioned in paragraph (b) of subsection (2) of section 23 or any condition which for the time being applies instead of it, the Secretary of State shall, in particular, 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 results from the enterprises concerned having ceased to be distinct.
- (4) Before making an order under this section the Secretary of State shall consult the OFT and the Commission.
- (5) An order under this section may provide for the delegation of functions to the decision-making authority.