

SCHEDULES

SCHEDULE 6

Section 70

SCHEDULE TO BE INSERTED IN THE WATER INDUSTRY ACT 1991

“SCHEDULE 4ZA

Section 34

APPLICATION OF PROVISIONS OF ENTERPRISE ACT 2002 TO MERGERS OF WATER ENTERPRISES

- 1 Part 3 of the 2002 Act (and any other provisions of that Act so far as relating to that Part) shall apply, with such prescribed modifications as the Secretary of State considers to be necessary or expedient, in relation to water mergers and merger references under section 32 of this Act as it applies in relation to relevant merger situations and references under Part 3 of that Act.
- 2 The modifications made by virtue of paragraph 1 above shall include modifications to give effect to paragraphs 3 to 6 below.
- 3 (1) The first questions to be decided by the Competition Commission on a merger reference under section 32(a) of this Act shall be—
 - (a) whether arrangements are in progress which, if carried into effect, will result in a water merger; and
 - (b) if so, whether that merger may be expected to prejudice the ability of the Director, in carrying out his functions by virtue of this Act, to make comparisons between different water enterprises.
- (2) The first questions to be decided by the Competition Commission on a merger reference under section 32(b) of this Act shall be—
 - (a) whether a water merger has taken place; and
 - (b) if so, whether that merger has prejudiced, or may be expected to prejudice, the ability of the Director, in carrying out his functions by virtue of this Act, to make comparisons between different water enterprises.
- (3) Any decision of the Competition Commission on a merger reference under section 32(a) of this Act that arrangements are in progress which, if carried into effect, will result in a water merger shall be treated as a decision that no arrangements are in progress which, if carried into effect, will result in a water merger if the decision is not that of at least two-thirds of the members of the group constituted in connection with the reference in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998 (c. 41).
- (4) Any decision of the Competition Commission on a merger reference under section 32(a) of this Act that a water merger may be expected to prejudice the ability of the Director, in carrying out his functions by virtue of this Act, to make comparisons between different water enterprises shall be treated as a decision that the water merger may be expected not to prejudice that ability of the Director if the decision is not that of at least two-thirds of the members of the group constituted

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in connection with the reference in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998.

- (5) Any decision of the Competition Commission on a merger reference under section 32(b) of this Act that a water merger has taken place shall be treated as a decision that no water merger has taken place if the decision is not that of at least two-thirds of the members of the group constituted in connection with the reference in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998.
- (6) Any decision of the Competition Commission on a merger reference under section 32(b) of this Act that a water merger has prejudiced, or may be expected to prejudice, the ability of the Director, in carrying out his functions by virtue of this Act, to make comparisons between different water enterprises shall be treated as a decision that the water merger has not prejudiced, or may be expected not to prejudice, that ability of the Director if the decision is not that of at least two-thirds of the members of the group constituted in connection with the reference in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998.
- 4 (1) In deciding, on a merger reference under section 32(a) of this Act whether to take action for the purpose of remedying, mitigating or preventing the prejudice to the Director or any adverse effect which may be expected to result from the prejudice to the Director and, if so, what action should be taken, the Competition Commission may, in particular, have regard to the effect of any such action on any relevant customer benefits in relation to the merger concerned provided that—
- (a) a consideration of those benefits would not prevent a solution to the prejudice concerned; or
 - (b) the benefits which may be expected to accrue are substantially more important than the prejudice concerned.
- (2) In deciding, on a merger reference under section 32(b) of this Act whether to take action for the purpose of remedying, mitigating or preventing the prejudice to the Director or any adverse effect which has resulted from, or may be expected to result from, the prejudice to the Director and, if so, what action should be taken, the Competition Commission may, in particular, have regard to the effect of any such action on any relevant customer benefits in relation to the merger concerned provided that—
- (a) a consideration of those benefits would not prevent a solution to the prejudice concerned; or
 - (b) the benefits which have accrued, or may be expected to accrue, are substantially more important than the prejudice concerned.
- (3) This paragraph is without prejudice to the power of the Secretary of State to provide in regulations made under paragraph 1 above for other matters to which the Competition Commission may or must have regard in deciding the questions as mentioned in sub-paragraph (1) or (2) above (including matters which are to take priority over the effect of action on relevant customer benefits).
- 5 (1) No enforcement action shall be taken on a merger reference under section 32(b) of this Act in respect of an actual merger unless the reference was made within the period of four months beginning with whichever is the later of—
- (a) the day on which the merger took place; and
 - (b) the day on which the material facts about the transactions which resulted in the merger first came to the attention of the OFT or were made public (within the meaning given by section 24(3) of the 2002 Act).

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- (2) This paragraph is without prejudice to the power of the Secretary of State to provide in regulations made under paragraph 1 above for extensions of the four month period; and, if any such provision is made in such regulations, the provision which is to be made in regulations under paragraph 1 above by virtue of sub-paragraph (1) above or paragraph 6 below may be adjusted accordingly.
- 6 If, on a merger reference under section 32(b) of this Act, the Competition Commission are satisfied that the reference was not made within the period of four months mentioned in paragraph 5 above, its report on the reference shall state that fact.
- 7 (1) For the purposes of this Schedule 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; or
 - (ii) greater innovation in relation to such goods or services; and
 - (b) the Competition Commission believes—
 - (i) in the case of a merger reference under section 32(a) of this Act, as mentioned in sub-paragraph (2) below; and
 - (ii) in the case of a merger reference under section 32(b) of this Act, as mentioned in sub-paragraph (3) below.
- (2) The belief, in the case of a merger reference under section 32(a) of this Act, is that—
- (a) the benefit may be expected to accrue within a reasonable period as a result of the merger concerned; and
 - (b) the benefit is unlikely to accrue without the merger concerned or a similar prejudice to the Director.
- (3) The belief, in the case of a merger reference under section 32(b) of this Act is that—
- (a) the benefit has accrued as a result of the merger concerned or may be expected to accrue within a reasonable period as a result of the merger concerned; and
 - (b) the benefit was, or is, unlikely to accrue without the merger concerned or a similar prejudice to the Director.
- (4) In sub-paragraph (1) above “relevant customers” means—
- (a) customers of any person carrying on an enterprise which, in the merger 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 sub-paragraph “customers” includes future customers.
- 8 In this Schedule—
- “customers”, “goods”, “market in the United Kingdom”, “services” and “relevant merger situation” have the same meanings as in Part 3 of the 2002 Act; and
 - “water merger” means a merger of any two or more water enterprises.”