
EXPLANATORY NOTE

(This note is not part of the Regulations)

Part 3 of the Enterprise Act 2002 (“the 2002 Act”) contains the main statutory scheme for the regulation of mergers. Sections 32 to 35 of, and Schedule 4ZA to, the Water Industry Act 1991 (“the 1991 Act”) (as substituted by section 70 of the 2002 Act) provide a separate scheme for the regulation of mergers between water or sewerage undertakers (“water mergers”) in England and Wales. Section 32 of that Act places a duty on the OFT to refer to the Competition Commission any such mergers which exceed certain thresholds that are set pursuant to section 33 of that Act.

Paragraph 1 of Schedule 4ZA provides that Part 3 of the 2002 Act and related provisions in that Act shall apply to water mergers with certain modifications, which must in particular give effect to paragraphs 3 to 6 of that Schedule. These Regulations give effect to those provisions with relevant modifications.

The central modifications are made by regulation 11, which sets out the questions the Competition Commission must decide in relation to completed and anticipated mergers. They must decide whether the merger may be expected to prejudice the ability of the Director General of Water Services or, in future, the Water Services Regulation Authority (the Authority), in carrying out its functions by virtue of the 1991 Act, to make comparisons between different water enterprises. In that event, in deciding what remedial action should be taken, the Commission may have regard to any relevant customer benefits in relation to the merger, provided that a consideration of those benefits would not prevent a solution to the prejudice concerned, and those benefits are substantially more important than the prejudice concerned.

The Regulations expressly disapply certain provisions of Part 3 of the 2002 Act for the purposes of assessing water mergers under the 1991 Act. These include the provisions that allow for public interest considerations specified in section 58 of the 2002 Act to be taken into account.

Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) may also apply to water mergers that are the subject of these Regulations and which fall within the exclusive competence of the European Commission by virtue of its provisions. Regulation 21(4) of the EC Merger Regulation recognises that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by them, and it is considered that securing the ability of the Authority to perform its functions as described above constitutes such a legitimate interest.

A full regulatory impact assessment has not been produced for this instrument as it has no impact on the costs of business.