

2004 No. 3202

WATER INDUSTRY, ENGLAND AND WALES

**The Water Mergers (Modification of Enactments) Regulations
2004**

<i>Made</i> - - - -	<i>2nd December 2004</i>
<i>Laid before Parliament</i>	<i>7th December 2004</i>
<i>Coming into force</i> - -	<i>29th December 2004</i>

The Secretary of State, in exercise of her powers under paragraphs 1 and 2 of Schedule 4ZA to, and section 213(2)(f) of, the Water Industry Act 1991(a), hereby makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Water Mergers (Modification of Enactments) Regulations 2004 and shall come into force on 29th December 2004.

(2) In these Regulations—

“the 1991 Act” means the Water Industry Act 1991; and

“the 2002 Act” means the Enterprise Act 2002(b).

Modification of Part 3 of the 2002 Act

2. In its application in relation to water mergers and merger references under section 32 of the 1991 Act, Part 3 of the 2002 Act has effect with the modifications prescribed in these Regulations.

Omitted provisions

3.—(1) Part 3 of the 2002 Act has effect as if the following provisions were omitted—

- (a) section 28 (turnover test);
- (b) sections 34A and 34B (cases referred by the European Commission);
- (c) Chapter 2, section 85 and Schedule 7 (public interest cases);
- (d) sections 59 to 68 (other special cases);
- (e) sections 73 to 75 (undertakings in lieu of references, etc);
- (f) sections 96 to 102 (merger notices); and
- (g) section 123 (power to alter share of supply test).

(2) Accordingly, any reference in Part 3 of the 2002 Act to those provisions (and any provisions of that Part so far as applying to them) shall be disregarded.

(a) 1991 c.56.
(b) 2002 c.40.

Sections 22 to 24: References in relation to completed mergers

4. Part 3 of the 2002 Act has effect as if, for sections 22 to 24, there were substituted—

“22 References in relation to completed water mergers

(1) A reference under section 32(b) of the 1991 Act shall specify—

- (a) the enactment under which it is made; and
- (b) the date on which it is made.

(2) In this Part “the decision-making authority” means the OFT or (as the case may be) the Commission.

23 Water mergers

(1) For the purposes of this Chapter and Chapter 3 of Part 2 of the 1991 Act, the question whether a water merger has taken place shall be determined as at—

- (a) in the case of a reference which is treated as having been made under section 32(b) of the 1991 Act by virtue of section 37(2), such time as the Commission may determine; and
- (b) in any other case, immediately before the time when the reference has been, or is to be, made.

(2) In this Part—

- (a) “water merger” means a merger of any two or more water enterprises;
- (b) “water enterprise” means an enterprise carried on by a water undertaker or sewerage undertaker; and
- (c) a reference to a merger of any two or more water enterprises is a reference to those enterprises ceasing to be distinct enterprises.

24 Time-limits for enforcement action

(1) No enforcement action shall be taken on a merger reference under section 32(b) of the 1991 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.

(2) In this section “made public” means so publicised as to be generally known or readily ascertainable.”.

Section 25: Extension of time-limits

5. Section 25 (extension of time-limits) has effect as if—

- (a) in subsections (1), (2) and (9), for “section 24(1)(a) or (2)(b)” there were substituted “section 24(1)”;
- (b) subsections (4) to (8), (10) and (11) were omitted; and
- (c) in subsection (9), the words “Subject to subsections (10) and (11),” were omitted.

Section 30: Relevant customer benefits

6. Part 3 of the 2002 Act has effect as if, for section 30 (relevant customer benefits), there were substituted—

“30 Relevant customer benefits in relation to water mergers

- (1) For the purposes of this Part 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 (whether or not the market or markets in relation to which the prejudice to the Authority has, or may have, occurred or (as the case may be) may occur); or
 - (ii) greater innovation in relation to such goods or services; and
 - (b) the Commission believes—
 - (i) in the case of a merger reference under section 32(a) of the 1991 Act, as mentioned in subsection (2); and
 - (ii) in the case of a merger reference under section 32(b) of the 1991 Act, as mentioned in subsection (3).
- (2) The belief, in the case of a merger reference under section 32(a) of the 1991 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 Authority.
- (3) The belief, in the case of a merger reference under section 32(b) of the 1991 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 Authority.
- (4) In subsection (1) “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 subsection “customers” includes future customers.
- (5) For the purposes of subsection (1) “market in the United Kingdom” includes—
- (a) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory; and
 - (b) any market which operates only in a part of the United Kingdom;
- and references to a market for goods or services include references to a market for goods and services.”.

Section 31: Information powers in relation to completed mergers

7. Section 31 (information powers in relation to completed mergers) has effect as if, in subsection (1), for “to make a reference under section 22” there were substituted “it has a duty to make a reference under section 32(b) of the 1991 Act”.

Section 32: Supplementary provision for purposes of sections 25 and 31

8. Section 32 (supplementary provision for purposes of sections 25 and 31) has effect as if—
- (a) in subsection (2), paragraphs (c) and (d) were omitted; and

(b) in subsection (4), the words “or (5)(b)” were omitted.

Section 33: Duty to make references in relation to anticipated mergers

9. Part 3 of the 2002 Act has effect as if, for section 33 (duty to make references in relation to anticipated mergers), there were substituted—

“33 References in relation to anticipated water mergers

A reference under section 32(a) of the 1991 Act shall specify—

- (a) the enactment under which it is made; and
- (b) the date on which it is made.”.

Section 34: Supplementary provision in relation to anticipated mergers

10.—(1) Section 34 (supplementary provision in relation to anticipated mergers) has effect as if, in subsection (1)(a), for the words from “this Part” to “contemplation” there were substituted “section 32(a) of the 1991 Act”.

(2) The Enterprise Act 2002 (Anticipated Mergers) Order 2003(a) shall have effect, for the purposes of references under section 32(a) of the 1991 Act, as if it had been made under section 34 of the 2002 Act as modified by paragraph (1) and as if—

- (a) in article 2, for the definition of “reference” there were substituted—
““reference” means a reference under section 32(a) of the Water Industry Act 1991;”;
and
- (b) in article 4, for “36(2)(a) and (b)” there were substituted “36(4)(a) and (b)”.

Sections 35 to 36: Questions to be decided in relation to mergers

11. Part 3 of the 2002 Act has effect as if, for sections 35 and 36, there were substituted—

“35 Questions to be decided in relation to completed water mergers

(1) Subject to section 127(3), the first questions to be decided by the Commission on a merger reference under section 32(b) of the 1991 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 Authority, in carrying out its functions by virtue of the 1991 Act, to make comparisons between different water enterprises.

(2) Any decision of the Commission on a merger reference under section 32(b) of the 1991 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 1998 Act.

(3) Any decision of the Commission on a merger reference under section 32(b) of the 1991 Act that a water merger has prejudiced, or may be expected to prejudice, the ability of the Authority, in carrying out its functions by virtue of the 1991 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 Authority 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 1998 Act.

(4) For the purposes of this Part there is a prejudicial outcome if—

(a) S.I. 2003/1595.

- (a) a water merger has taken place and that merger has prejudiced, or may be expected to prejudice, the ability of the Authority, in carrying out its functions by virtue of the 1991 Act, to make comparisons between different water enterprises; or
 - (b) arrangements are in progress which, if carried into effect, will result in a water merger and that merger may be expected to prejudice the ability of the Authority, in carrying out its functions by virtue of the 1991 Act, to make comparisons between different water enterprises.
- (5) The Commission shall, if it has decided on a reference under section 32(b) of the 1991 Act that there is a prejudicial outcome (within the meaning given by subsection (4)(a)), decide the following additional questions—
- (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the prejudice to the Authority or any adverse effect which has resulted from, or may be expected to result from, the prejudice to the Authority;
 - (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the prejudice to the Authority or any adverse effect which has resulted from, or may be expected to result from, the prejudice to the Authority; and
 - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (6) In deciding the questions mentioned in subsection (5) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the prejudice to the Authority and any adverse effects resulting from it.
- (7) In deciding, on a merger reference under section 32(b) of the 1991 Act, whether to take action for the purpose of remedying, mitigating or preventing the prejudice to the Authority or any adverse effect which has resulted from, or may be expected to result from, the prejudice to the Authority and, if so, what action should be taken, the 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.

36 Questions to be decided in relation to anticipated water mergers

(1) Subject to section 127(3), the first questions to be decided by the Commission on a merger reference under section 32(a) of the 1991 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 Authority, in carrying out its functions by virtue of the 1991 Act, to make comparisons between different water enterprises.

(2) Any decision of the Commission on a merger reference under section 32(a) of the 1991 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 1998 Act.

(3) Any decision of the Commission on a merger reference under section 32(a) of the 1991 Act that a water merger may be expected to prejudice the ability of the Authority, in carrying out its functions by virtue of the 1991 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 Authority 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 1998 Act.

(4) The Commission shall, if it has decided on a reference under section 32(a) of the 1991 Act that there is a prejudicial outcome within the meaning given by section 35(4)(b), decide the following additional questions—

- (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the prejudice to the Authority or any adverse effect which may be expected to result from the prejudice to the Authority;
- (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the prejudice to the Authority or any adverse effect which may be expected to result from the prejudice to the Authority; and
- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

(5) In deciding the questions mentioned in subsection (4) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the prejudice to the Authority and any adverse effects resulting from it.

(6) In deciding, on a merger reference under section 32(a) of the 1991 Act, whether to take action for the purpose of remedying, mitigating or preventing the prejudice to the Authority or any adverse effect which may be expected to result from the prejudice to the Authority and, if so, what action should be taken, the 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.”.

Section 37: Cancellation and variation of references

12. Section 37 (cancellation and variation of references) has effect as if—

- (a) in subsection (1), for “section 33” there were substituted “section 32(a) of the 1991 Act”; and
- (b) for subsections (2) and (3) there were substituted—

“(2) The Commission may, if it considers that doing so is justified by the facts (including events occurring on or after the making of the reference concerned), treat a reference made under paragraph (a) or paragraph (b) of section 32 of the 1991 Act as if it had been made under paragraph (b) or (as the case may be) paragraph (a) of that section; and, in such cases, references in this Part to references under those paragraphs shall, so far as may be necessary, be construed accordingly.

(3) Where, by virtue of subsection (2), the Commission treats a reference made under paragraph (a) or paragraph (b) of section 32 of the 1991 Act as if it had been made under paragraph (b) or (as the case may be) paragraph (a) of that section, sections 77 to 81 shall, in particular, apply as if the reference had been made under paragraph (b) or (as the case may be) paragraph (a) of section 32 of that Act instead of under paragraph (a) or paragraph (b) of that section.”;

- (c) in subsection (4), for “section 22 or 33 as if it had been made under section 33 or (as the case may be) 22” there were substituted “paragraph (a) or paragraph (b) of section 32 of the 1991 Act as if it had been made under paragraph (b) or (as the case may be) paragraph (a) of that section”;
- (d) in subsection (5)(a)—
 - (i) for “section 22” there were substituted “section 32(a) of the 1991 Act”; and

- (ii) for “section 33” there were substituted “section 32(b) of that Act”;
- (e) in subsection (5)(b)—
 - (i) for “section 33” there were substituted “section 32(b) of the 1991 Act”; and
 - (ii) for “section 22” there were substituted “section 32(a) of that Act”; and
- (f) in subsection (6), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”.

Section 38: Investigations and reports on references

13. Section 38 (investigations and reports on references) has effect as if—

- (a) in subsection (1), for “section 22 or 33” there were substituted “section 32 of the 1991 Act”; and
- (b) in subsection (2)—
 - (i) in paragraph (b), the word “and” were omitted; and
 - (ii) after paragraph (c), there were inserted—
 - “; and
 - (d) if the merger reference is under section 32(b) of the 1991 Act and the Commission is satisfied that the reference was not made within the period of four months mentioned in section 24, a statement of that fact.”.

Section 40: Section 39: supplementary

14. Section 40 (section 39: supplementary) has effect as if, in subsection (10), for “section 22 or 33” there were substituted “section 32 of the 1991 Act”.

Section 41: Duty to remedy effects of completed or anticipated mergers

15. Section 41 (duty to remedy effects of completed or anticipated mergers) has effect as if—

- (a) in subsection (1), for “an anti-competitive” there were substituted “a prejudicial”;
- (b) in paragraphs (a) and (b) of subsection (2), and in subsection (4), for “substantial lessening of competition” there were substituted “prejudice to the Authority”;
- (c) in subsection (3)—
 - (i) for “35(3)” there were substituted “35(5)”; and
 - (ii) for “36(2)” there were substituted “36(4)”; and
- (d) for subsection (5) there were substituted—
 - “(5) In making a decision under subsection (2), the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the merger concerned in accordance with section 35(7) or (as the case may be) section 36(6)”.

Section 71: Initial undertakings: completed mergers

16. Section 71 of the 2002 Act (initial undertakings: completed mergers) has effect as if—

- (a) in subsection (1), for “to make a reference under section 22” there were substituted “it has a duty to make a reference under section 32(b) of the 1991 Act”;
- (b) in subsection (3), for “relevant merger situation has been created” there were substituted “relevant water merger has taken place”;
- (c) in paragraph (a) of subsection (5), for “section 22” there were substituted “section 32(b) of the 1991 Act”;
- (d) in subsection (6)—

- (i) in paragraph (a), for “to make the reference concerned under section 22” there were substituted “it has a duty to make the reference concerned under section 32(b) of the 1991 Act”; and
- (ii) in paragraph (d), for “otherwise decided not to make the reference concerned under section 22” there were substituted “decided it does not have a duty to make the reference concerned under section 32(b) of the 1991 Act”; and
- (e) after subsection (8) there were inserted—
 - “(9) In this section and section 72 “relevant water merger” means a merger of any two or more water enterprises which is subject to the duty to make a reference under section 32(b) of the 1991 Act”.

Section 72: Initial enforcement orders: completed mergers

17. Section 72 (initial enforcement orders: completed mergers) has effect as if—

- (a) in subsection (1), for “to make a reference under section 22” there were substituted “it has a duty to make a reference under section 32(b) of the 1991 Act”;
- (b) in paragraph (a) of subsection (3), for “relevant merger situation has been created” there were substituted “relevant water merger has taken place”;
- (c) in paragraph (a) of subsection (5), for “section 22” there were substituted “section 32(b) of the 1991 Act”; and
- (d) in subsection (6)—
 - (i) in paragraph (a), for “to make the reference concerned under section 22” there were substituted “it has a duty to make the reference concerned under section 32(b) of the 1991 Act”; and
 - (ii) in paragraph (d), for “otherwise decided not to make the reference concerned under section 22” there were substituted “decided it does not have a duty to make the reference concerned under section 32(b) of the 1991 Act”.

Section 77: Restrictions on certain dealings: completed mergers

18. Section 77 (restrictions on certain dealings: completed mergers) has effect as if—

- (a) in paragraph (a) of subsection (1), for “section 22” there were substituted “section 32(b) of the 1991 Act”; and
- (b) in paragraph (b) of subsection (1)—
 - (i) for “relevant merger situation” there were substituted “water merger”; and
 - (ii) for “that situation” there were substituted “that merger”.

Section 78: Restrictions on certain share dealings: anticipated mergers

19. Section 78 (restrictions on certain share dealings: anticipated mergers) has effect as if—

- (a) in paragraph (a) of subsection (1), for “section 33” there were substituted “section 32(a) of the 1991 Act”; and
- (b) in paragraph (b) of subsection (1)—
 - (i) for “relevant merger situation” there were substituted “proposed water merger”; and
 - (ii) for “that situation” there were substituted “that merger”.

Section 79: Sections 77 and 78: further interpretation provisions

20. Section 79 (sections 77 and 78: further interpretation provisions) has effect as if—

- (a) in subsections (1) and (2), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”; and

- (b) in paragraphs (c), (d) and (e) of subsection (1), for “an anti-competitive” there were substituted “a prejudicial”.

Section 80: Interim undertakings

21. Section 80 (interim undertakings) has effect as if, in subsections (1), (7) and (8), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”.

Section 81: Interim orders

22. Section 81 (interim orders) has effect as if, in subsections (1), (7) and (8), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”.

Section 82: Final undertakings

23. Section 82 (final undertakings) has effect as if, in subsections (3) and (4), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”.

Section 84: Final orders

24. Section 84 (final orders) has effect as if, in subsection (5), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”.

Section 103: Duty of expedition in relation to references

25. Section 103 (duty of expedition in relation to references) has effect as if, in subsection (1), for “to make a reference under section 22 or 33” there were substituted “it has a duty to make a reference under section 32(a) or (b) of the 1991 Act”.

Section 104: Certain duties of relevant authorities to consult

26. Section 104 (certain duties of relevant authorities to consult) has effect as if, in subsection (6), in the definition of “relevant decision”—

- (a) for sub-paragraph (i) of paragraph (a), there were substituted—
 - “(i) as to whether it has a duty to make a reference under section 32(a) or (b) of the 1991 Act”; and
- (b) in paragraph (b), for “(3), 36(1) or (2)” there were substituted “(5), 36(1) or (4)”.

Section 105: General information duties of OFT and Commission

27. Section 105 (general information duties of OFT and Commission) has effect as if, in subsection (1)—

- (a) for “to make a reference under section 22 or 33” there were substituted “it has a duty to make a reference under section 32(a) or (b) of the 1991 Act”; and
- (b) for “creation of the relevant merger situation” there were substituted “water merger”.

Section 106: Advice and information about references

28. Section 106 (advice and information about references) has effect as if, in subsections (1) and (3), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”.

Section 107: Further publicity requirements

29. Section 107 (further publicity requirements) has effect as if—

- (a) in subsection (1)—

- (i) in paragraphs (a) and (b), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”; and
 - (ii) in paragraph (a), the words “(other than a decision made by virtue of subsection (2)(b) of section 33)” were omitted; and
- (b) in subsection (2)—
- (i) in paragraph (a), for “section 33” there were substituted “section 32(a) of the 1991 Act”; and
 - (ii) in paragraph (b), for “section 22 or 33 as if it had been made under section 33 or (as the case may be) 22” there were substituted “paragraph (a) or paragraph (b) of section 32 of the 1991 Act as if it had been made under paragraph (b) or (as the case may be) paragraph (a) of that section”.

Section 109: Attendance of witnesses and production of documents etc.

30. Section 109 (attendance of witnesses and production of documents etc) has effect as if, in subsections (1), (2), (3), (5) and (6) for “this Part” there were substituted “section 32(a) or (b) of the 1991 Act”.

Section 117: False or misleading information

31. Section 117 (false or misleading information) has effect as if, in subsections (1) and (2), after the word “Part” there were inserted “or section 32 of the 1991 Act”.

Section 120: Review of decisions under Part 3

32. Section 120 (review of decisions under Part 3) has effect as if—

- (a) for subsection (1), there were substituted —
 - “(1) Any person aggrieved by a decision of the OFT or the Commission under this Part or section 32 of the 1991 Act in connection with a reference or possible reference in relation to a water merger may apply to the Competition Appeal Tribunal for a review of that decision.”; and
- (b) in subsection (2)(b), after the words “this Part” there were inserted “or section 32 of the 1991 Act”.

Section 122: Primacy of Community law

33. Section 122 (primacy of Community law) has effect as if—

- (a) in subsection (1), after the word “Part” there were inserted “or sections 32 to 35 of the 1991 Act”; and
- (b) subsections (2) to (5) were omitted.

Section 127: Associated persons

34. Section 127 (associated persons) has effect as if, in subsection (3), for “section 22, 33, 45 or 62” there were substituted “section 32(a) or (b) of the 1991 Act”.

Section 129: Other interpretation provisions

35. Section 129 (other interpretation provisions) has effect as if, in subsection (1), the following definitions were inserted—

- (a) before the definition of “action”—
 - ““the 1991 Act” means the Water Industry Act 1991;”;
- (b) before the definition of “business”—

““the Authority” means the Water Services Regulation Authority or, until the coming into force of section 36 of the Water Act 2003, the Director General of Water Services;”.

2nd December 2004

Gerry Sutcliffe,
Parliamentary Under Secretary of State for Employment
Relations, Postal Services and Consumers,
Department of Trade and Industry

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.

£3.00

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