

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Mergers

Summary and Background

Chapter 5: Supplementary

Merger notices

254. This Chapter updates the merger notice procedure provided for in sections 75A-75H of FTA 1973.

Section 96: Merger notices

255. This section describes the circumstances in which a notice may be given. The section sets out that the notice should be in the form prescribed by the OFT, and that no reference will be made if the period for considering a merger notice has expired.

Sections 97 and 98: Period for considering merger notices & Section 97: supplementary

256. These sections provide for the time-periods in which a reference can be made under a notice. On receipt of a merger notice, the OFT has 20 working days, with a possibility of extending that to 30 working days, to decide whether to refer. This reduces the FTA 1973 merger notice timetable by 5 days.

257. If an intervention notice has been served, the time-period can be extended to a maximum of 40 working days.

258. There are also circumstances in which a merger notice timetable can be extended further:

- if the parties have failed to provide information that the OFT asked for. In this case, the extension will be the period it took for the parties to provide the information;
- if the OFT is seeking undertakings. In this case the extension will be for the period it takes until undertakings are given; or up to 10 days after the OFT has received a notice saying that undertakings will not be given;
- if the European Commission is considering whether to deal with the case following a request made under article 22(3) of the ECMR;
- if the Secretary of State decides to extend her consideration of a public interest case in relation to the creation of a new public interest gateway.

Section 99: Certain functions of OFT and Secretary of State in relation to merger notices

259. This section sets out the responsibilities of the OFT in relation to merger notices. This includes: taking appropriate steps to ensure that all affected parties are made aware of the case and what the OFT should include in their notice to parties requesting information. It also provides for the circumstances in which the OFT may reject a notice. These include: if the OFT suspects that false or misleading information has been given; if they suspect that the merger will not take place; if information is not given as requested; and if the arrangements would result in a concentration with a Community dimension under the ECMR.

Section 100: Exceptions to protection given by merger notices

260. This section provides for the circumstances in which a case continues to be referable, notwithstanding the fact that the period for considering a merger notice served in that case has expired. Such circumstances include rejection of the notice by the OFT or withdrawal of it by the parties, non-disclosure of material information, and any other merger involving any relevant party.

Sections 101 and 102: Merger notices: regulations & Power to modify sections 97 to 101

261. Sections 101 and 102 provide the Secretary of State with the power to make regulations relating to the merger notice procedures and to modify sections 97 to 101.

General duties in relation to references

Section 103: Duty of expedition in relation to references

262. This section ensures that the relevant authority (either the OFT or the Secretary of State) will make its decision on reference as early as it is sensible to do so.

Section 104: Certain duties of relevant authorities to consult

263. Subsections (1) and (2) set out that the OFT, CC or Secretary of State will, where practicable, consult those persons who control any of the merging enterprises who are likely to be adversely affected by certain proposed decisions before those decisions are taken. Subsection (6) provides that this duty applies to reference decisions by the OFT and the Secretary of State and the CC's final conclusions on whether there is a substantial lessening of competition or an adverse public interest effect and on remedies. Subsection (3) provides that, where practicable, those likely to be affected should be given the reasons for a proposed decision.

Information and publicity requirements

Section 105: General information duties of OFT and Commission

264. This section sets out the general duties of the OFT in relation to merger cases.
265. Subsections (1) and (2) ensure that the OFT will act, if practicable, to bring cases that it is investigating to the attention of those that might be affected by the transaction. This duty does not apply to merger notice cases, which carry their own publicity requirements (see note on section 99).
266. Subsections (3) and (4) provide that the OFT will give relevant information to the CC.
267. Subsections (5) and (6) ensure that the OFT and the CC will give information and assistance to the Secretary of State to enable her to carry out her functions in relation to cases that may raise public interest considerations.

Section 106: Advice and information about references under section 22 and 33

268. This section requires the OFT and the CC to publish advice and information about certain of their key tasks in the merger scrutiny process. The OFT will be required to explain how it will apply its duty to make references. The CC will have to explain how it will consider references. This information and advice will include explanations of how the OFT and CC will apply the substantive tests in the new regime, including, in particular, the application of the substantial lessening of competition test, and the circumstances and manner in which relevant customer benefits will be taken into account when the OFT considers references and when the CC is considering possible remedies. The OFT and the CC will be required to consult each other (and others they consider appropriate) in preparing their respective advice and information. It is intended that the information and advice will increase clarity for business about how the new regime works.

Section 107: Further publicity requirements

269. This section provides that the OFT, CC and the Secretary of State will publish certain decisions, most accompanied by their reasons for those decisions.
270. Where the Secretary of State decides to take enforcement action in a case raising public interest considerations, she will lay details of that decision (including reasons for it) before Parliament, as well as a copy of the relevant report of the CC.

Section 108: Defamation

271. This section protects the Secretary of State, OFT and the CC against actions for defamation as a result of their exercise of functions under the merger provisions of the Act.

Investigation powers

Sections 109–117: Investigation powers

272. **Sections 109-117** set out the CC's powers to require persons to give evidence and to provide specified documents and information needed for the purposes of a merger inquiry. These sections replace the powers provided under section 85 FTA 1973. There are many similarities with the earlier investigatory powers. A key change, however, is that the CC's FTA 1973 power to initiate contempt proceedings against persons who fail to comply with notices requiring the production of documents and information and the attendance of witnesses is replaced with a power for the CC itself to impose monetary penalties for non-compliance subject to a right of appeal to the CAT. The new power to impose monetary penalties is also available to the CC when it is carrying out market investigations. In addition, it is available to the CC when it is carrying out references concerning licence modifications and other matters under various sectoral enactments such as the Airports Act 1986 and the Electricity Act 1989. The necessary amendments to these sectoral enactments are made in Schedule 25 to the Act.
273. **Section 109** gives the CC a power to serve notices requiring any person to attend to give evidence to the CC or to provide it with specified documents or information by specified dates. Any notice has to set out the possible consequence of a failure to comply with the notice.
274. **Section 110** sets out the enforcement powers that the CC will have. It gives the CC a power to impose monetary penalties where it considers that a person has, without reasonable excuse, failed to comply with a notice. This power replaces the current contempt sanction in section 85(7)–(8) FTA 1973: the existing provision gives the CC the power to apply to a court for a finding that a defaulter has failed without a reasonable excuse to comply with a notice; if the court does make such a finding, it can punish the defaulter as though he or she had been guilty of contempt of court.

275. The section retains a similar criminal offence to that in section 85(6) FTA 1973 for circumstances where a person intentionally alters, suppresses or destroys documents that he or she has been required to produce.
276. *Subsection (9)* provides that the CC should have regard to a statement of policy (see section 116) in deciding how to make use of the available powers.
277. **Sections 111–116** set out how the power to impose a monetary penalty will operate. The CC will have discretion about whether to impose a fixed penalty or a daily rate penalty, or both. A daily rate penalty, once set, will accumulate for a period until: the requested information is provided, or the date of publication or handing over of the CC's report on the reference or, where no report is published or handed over, the latest date on which the report could have been published or handed over. The Commission may determine an earlier date at its discretion.
278. The Secretary of State will determine by order the maximum fixed and daily rate penalties that the CC will be able to impose up to the maximum of £30,000 and £15,000 respectively set out in section 111(7). Before setting or altering the maximum penalties, the Secretary of State must consult the CC and such other persons as she considers appropriate. In each case, the actual level of penalty shall be an amount that the CC considers appropriate in all the circumstances of the case. Receipts from the exercise of the power will be paid into the Consolidated Fund.
279. Parties will have a right of appeal to the CAT against decisions to impose monetary penalties allowing for a full reconsideration of the matter. A party may appeal where it is aggrieved by the imposition of the penalty, the amount of the penalty, or the date by which the penalty is required to be paid. The requirement to pay a penalty is suspended until the case is determined. The CAT may cancel or reduce (not increase) the penalty or amend the date or dates by which penalties have to be paid.
280. **Section 116** requires the CC to consult on and then to publish a statement of policy in relation to the enforcement of notices under section 109. It will include the considerations that will be relevant to determining the nature and amount of any monetary penalty. These considerations will be for the CC to identify, but it is envisaged that they could include:
- the nature and gravity of the omission;
 - the size and financial resources of the defaulter;
 - the size of penalty that will encourage the party to co-operate;
 - the scale of costs and other disbenefits that will be incurred by the CC if an inquiry has to be extended to take account of information provided late.
281. **Section 117** retains the existing section 93B FTA 1973 offence for the circumstances where a person supplies false or misleading information to the CC, the OFT or the Secretary of State. The penalty for this offence is imprisonment or a fine or both.

Reports

Section 118: Excisions from reports

282. This section permits the Secretary of State to exclude information from the versions of the OFT's or CC's reports that she publishes under sections 44, 50, 61 or 65. *Subsection (4)* also provides that the body that has prepared the report will advise the Secretary of State on excisions.

Section 119: Minority reports of Commission

283. This section permits members of CC reporting groups for merger inquiries who disagree with the decisions of the majority to publish their dissenting views as part of the report on a reference.

Miscellaneous

Section 120: Review of decisions under Part 3

284. This section allows decisions taken by the OFT, CC or Secretary of State in connection with a merger reference or possible merger reference to be reviewed by the CAT. The grounds of review are those that would be applied by a court on an application for judicial review. Case law suggests such grounds could include: (i) that an error of law was made; (ii) that there was a material procedural error, such as a material failure of an inquiry panel to comply with the Chairman's procedural rules; (iii) that a material error as to the facts has been made; and (iv) that there was some other material illegality (such as unreasonableness or lack of proportionality). Judicial review evolves over time and the approach in *subsection (6)* has been taken to ensure the grounds of review continue to mirror any such developments.

Section 121: Fees

285. This section provides that the Secretary of State may, by order, require fees to be paid to her, or the OFT for the exercise of their merger regulation functions, and those of the CC. It provides that the order may specify that fees are payable in public interest cases, special public interest cases and mergers of water and newspaper enterprises, as well as cases referred on competition grounds under sections 22 and 33. This section replaces section 152 Companies Act 1989.

Section 122: Primacy of Community law

286. This section ensures that advice or information published by the competition authorities by virtue of section 106 covers the effect of Community law where appropriate. *Subsections (3)-(5)* also ensure that a reference can be made under the domestic regime following a delay arising from the operation of the ECMR.

Section 123: Power to alter the share of supply test

287. This section provides a power for the Secretary of State to amend or replace the share of supply test set out in section 23. In exercising this power, the Secretary of State must 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 may result from the merger. The Secretary of State must also consult the OFT and the Commission before making an order.

Section 125: Offences by bodies corporate

288. This section provides for the circumstances in which individual officers of companies, partners of Scottish partnerships and members of limited liability partnerships may be held responsible for the conduct of their companies or partnerships in committing offences. Offences may be attributable to consent and connivance, or to neglect.

Section 126: Service of documents

289. This section sets out how any document served on any person (individual, body corporate, partnership or limited liability partnership) under the merger provisions may be served.

Section 127: Associated persons

290. This section explains, in particular for the purpose of deciding whether enterprises have come under common control or ownership, which persons will be considered to be “associated persons” under this model and therefore to be treated as one person. This includes relatives, trustees and business partners. The term “relative” is also defined in this section for further clarification. This section reflects and updates section 77 FTA 1973.

Section 128: Supply of services and market for services etc.

291. This section follows the definition of ‘supply of services’ in section 137(3) of the FTA 1973, with two modifications. The first modification is the inclusion of new *subsection (4)*, which provides that the supply of services includes making arrangements for a person to receive computer software or data such as information, music or photographs. This is intended to cover electronic supply. Such persons are not receiving anything in physical form and so might not otherwise be receiving ‘goods’. This provision ensures that such consumers will be considered to be receiving a service. The second change is the omission from the definition of ‘supply of services’ of provisions corresponding to sections 137(3)(c), (d), (e) and (g) of the FTA 1973, which relate to the making of arrangements to permit the use of land in certain specified circumstances. The Secretary of State is however given a power by order to extend the definition of the supply of services involving arrangements permitting the use of land as in section 137(3A) of the FTA 1973. It is intended that this order-making power will be used to reinstate those provisions relating to the use of land in section 137(3) that are relevant to this Part before this Part of the Act comes into force.