



# Enterprise Act 2002

## 2002 CHAPTER 40

### PART 3

#### MERGERS

#### CHAPTER 1

##### DUTY TO MAKE REFERENCES

##### *Determination of references*

### **35 Questions to be decided in relation to completed mergers**

- (1) Subject to subsections (6) and (7) and section 127(3), the Commission shall, on a reference under section 22, decide the following questions—
  - (a) whether a relevant merger situation has been created; and
  - (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
- (2) For the purposes of this Part there is an anti-competitive outcome if—
  - (a) a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; or
  - (b) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
- (3) The Commission shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), decide the following additional questions—

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- (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
  - (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
  - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (4) In deciding the questions mentioned in subsection (3) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
- (5) In deciding the questions mentioned in subsection (3) the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
- (6) In relation to the question whether a relevant merger situation has been created, a reference under section 22 may be framed so as to require the Commission to exclude from consideration—
- (a) subsection (1) of section 23;
  - (b) subsection (2) of that section; or
  - (c) one of those subsections if the Commission finds that the other is satisfied.
- (7) In relation to the question whether any such result as is mentioned in section 23(2)(b) has arisen, a reference under section 22 may be framed so as to require the Commission to confine its investigation to the supply of goods or services in a part of the United Kingdom specified in the reference.

### **36 Questions to be decided in relation to anticipated mergers**

- (1) Subject to subsections (5) and (6) and section 127(3), the Commission shall, on a reference under section 33, decide the following questions—
- (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
  - (b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
- (2) The Commission shall, if it has decided on a reference under section 33 that there is an anti-competitive outcome (within the meaning given by section 35(2)(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 substantial lessening of competition concerned or any adverse effect which may be expected to result from the substantial lessening of competition;
  - (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may be expected to result from the substantial lessening of competition; and

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- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (3) In deciding the questions mentioned in subsection (2) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
- (4) In deciding the questions mentioned in subsection (2) the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
- (5) In relation to the question whether a relevant merger situation will be created, a reference under section 33 may be framed so as to require the Commission to exclude from consideration—
  - (a) subsection (1) of section 23;
  - (b) subsection (2) of that section; or
  - (c) one of those subsections if the Commission finds that the other is satisfied.
- (6) In relation to the question whether any such result as is mentioned in section 23(2)(b) will arise, a reference under section 33 may be framed so as to require the Commission to confine its investigation to the supply of goods or services in a part of the United Kingdom specified in the reference.

### **37 Cancellation and variation of references under section 22 or 33**

- (1) The Commission shall cancel a reference under section 33 if it considers that the proposal to make arrangements of the kind mentioned in the reference has been abandoned.
- (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 section 22 or 33 as if it had been made under section 33 or (as the case may be) 22; and, in such cases, references in this Part to references under those sections shall, so far as may be necessary, be construed accordingly.
- (3) Where, by virtue of subsection (2), the Commission treats a reference made under section 22 or 33 as if it had been made under section 33 or (as the case may be) 22, sections 77 to 81 shall, in particular, apply as if the reference had been made under section 33 or (as the case may be) 22 instead of under section 22 or 33.
- (4) Subsection (5) applies in relation to any undertaking accepted under section 80, or any order made under section 81, which is in force immediately before the Commission, by virtue of subsection (2), treats a reference made under section 22 or 33 as if it had been made under section 33 or (as the case may be) 22.
- (5) The undertaking or order shall, so far as applicable, continue in force as if—
  - (a) in the case of an undertaking or order which relates to a reference made under section 22, accepted or made in relation to a reference made under section 33; and
  - (b) in the case of an undertaking or order which relates to a reference made under section 33, accepted or made in relation to a reference made under section 22;and the undertaking or order concerned may be varied, superseded, released or revoked accordingly.

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- (6) The OFT may at any time vary a reference under section 22 or 33.
- (7) The OFT shall consult the Commission before varying any such reference.
- (8) Subsection (7) shall not apply if the Commission has requested the variation concerned.
- (9) No variation by the OFT under this section shall be capable of altering the period permitted by section 39 within which the report of the Commission under section 38 is to be prepared and published.

### **38 Investigations and reports on references under section 22 or 33**

- (1) The Commission shall prepare and publish a report on a reference under section 22 or 33 within the period permitted by section 39.
- (2) The report shall, in particular, contain—
  - (a) the decisions of the Commission on the questions which it is required to answer by virtue of section 35 or (as the case may be) 36;
  - (b) its reasons for its decisions; and
  - (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.
- (3) The Commission shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section.
- (4) The Commission shall, at the same time as a report prepared under this section is published, give it to the OFT.

### **39 Time-limits for investigations and reports**

- (1) The Commission shall prepare and publish its report under section 38 within the period of 24 weeks beginning with the date of the reference concerned.
- (2) Where article 9(6) of the European Merger Regulations applies in relation to the reference under section 22 or 33, the Commission shall prepare and publish its report under section 38—
  - (a) within the period of 24 weeks beginning with the date of the reference; or
  - (b) if it is a shorter period, within such period as is necessary to ensure compliance with that article.
- (3) The Commission may extend, by no more than 8 weeks, the period within which a report under section 38 is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within that period.
- (4) The Commission may extend the period within which a report under section 38 is to be prepared and published if it considers that a relevant person has failed (whether with or without a reasonable excuse) to comply with any requirement of a notice under section 109.
- (5) In subsection (4) “relevant person” means—
  - (a) any person carrying on any of the enterprises concerned;
  - (b) any person who (whether alone or as a member of a group) owns or has control of any such person; or

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- (c) any officer, employee or agent of any person mentioned in paragraph (a) or (b).
- (6) For the purposes of subsection (5) a person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body of persons corporate or unincorporate, but without having a controlling interest in that body of persons, may be treated as having control of it.
- (7) An extension under subsection (3) or (4) shall come into force when published under section 107.
- (8) An extension under subsection (4) shall continue in force until—
  - (a) the person concerned provides the information or documents to the satisfaction of the Commission or (as the case may be) appears as a witness in accordance with the requirements of the Commission; or
  - (b) the Commission publishes its decision to cancel the extension.
- (9) References in this Part to the date of a reference shall be construed as references to the date specified in the reference as the date on which it is made.
- (10) This section is subject to section 40.

#### **40 Section 39: supplementary**

- (1) No extension is possible under subsection (3) or (4) of section 39 where the period within which the report is to be prepared and published is determined by virtue of subsection (2)(b) of that section.
- (2) Where the period within which the report is to be prepared and published is determined by virtue of subsection (2)(a) of section 39, no extension is possible under subsection (3) or (4) of that section which extends that period beyond such period as is necessary to ensure compliance with article 9(6) of the European Merger Regulations.
- (3) A period extended under subsection (3) of section 39 may also be extended under subsection (4) of that section and a period extended under subsection (4) of that section may also be extended under subsection (3) of that section.
- (4) No more than one extension is possible under section 39(3).
- (5) Where a period within which a report under section 38 is to be prepared and published is extended or further extended under section 39(3) or (4), the period as extended or (as the case may be) further extended shall, subject to subsections (6) and (7), be calculated by taking the period being extended and adding to it the period of the extension (whether or not those periods overlap in time).
- (6) Subsection (7) applies where—
  - (a) the period within which the report under section 38 is to be prepared and published is further extended;
  - (b) the further extension and at least one previous extension is made under section 39(4); and
  - (c) the same days or fractions of days are included in or comprise the further extension and are included in or comprise at least one such previous extension.
- (7) In calculating the period of the further extension, any days or fractions of days of the kind mentioned in subsection (6)(c) shall be disregarded.

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- (8) The Secretary of State may by order amend section 39 so as to alter any one or more of the following periods—
- (a) the period of 24 weeks mentioned in subsection (1) of that section or any period for the time being mentioned in that subsection in substitution for that period;
  - (b) the period of 24 weeks mentioned in subsection (2)(a) of that section or any period for the time being mentioned in that subsection in substitution for that period;
  - (c) the period of 8 weeks mentioned in subsection (3) of that section or any period for the time being mentioned in that subsection in substitution for that period.
- (9) No alteration shall be made by virtue of subsection (8) which results in the period for the time being mentioned in subsection (1) or (2)(a) of section 39 exceeding 24 weeks or the period for the time being mentioned in subsection (3) of that section exceeding 8 weeks.
- (10) An order under subsection (8) shall not affect any period of time within which the Commission is under a duty to prepare and publish its report under section 38 in relation to a reference under section 22 or 33 if the Commission is already under that duty in relation to that reference when the order is made.
- (11) Before making an order under subsection (8) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.
- (12) The Secretary of State may make regulations for the purposes of section 39(8).
- (13) The regulations may, in particular—
- (a) provide for the time at which information or documents are to be treated as provided (including the time at which they are to be treated as provided to the satisfaction of the Commission for the purposes of section 39(8));
  - (b) provide for the time at which a person is to be treated as appearing as a witness (including the time at which he is to be treated as appearing as a witness in accordance with the requirements of the Commission for the purposes of section 39(8));
  - (c) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which section 39(8) applies, of the fact that—
    - (i) the Commission is satisfied as to the provision of the information or documents required by it; or
    - (ii) the person concerned has appeared as a witness in accordance with the requirements of the Commission;
  - (d) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which section 39(8) applies, of the time at which the Commission is to be treated as satisfied as mentioned in paragraph (c)(i) above or the person concerned is to be treated as having appeared as mentioned in paragraph (c)(ii) above.

#### **41 Duty to remedy effects of completed or anticipated mergers**

- (1) Subsection (2) applies where a report of the Commission has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.
- (2) The Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
  - (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
  - (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
- (3) The decision of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) or (as the case may be) 36(2) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently.
- (4) In making a decision under subsection (2), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
- (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 creation of the relevant merger situation concerned.